

Direction as to certain procedures to be followed in IC reviews

information from any person and to make any inquiries that the Information Commissioner considers appropriate.

- 2.4 In general, IC reviews will be conducted on the papers unless there are unusual circumstances to warrant a hearing.³ Therefore, complete and timely production of documents at issue, submissions and any other information that has been requested is important.
- 2.5 Under s 55DA of the FOI Act, agencies and ministers must use their best endeavours to assist the Information Commissioner in the conduct of IC reviews. Under s 55D(1) of the FOI Act, agencies and ministers have the onus of establishing that a decision refusing access is justified or that the Information Commissioner should give a decision that is adverse to the IC review applicant in an IC review of an access refusal decision. The Information Commissioner will make a decision in an IC review on the basis of the evidence before them. Failure to properly satisfy the onus in s 55D(1) by providing the Information Commissioner with complete and appropriate evidence for an access refusal decision will increase the likelihood of a decision being made that is adverse to an agency or minister.
- 2.6 Section 55Z of the FOI Act provides immunity to a person from civil proceedings and penalties if the person gives information, produces a document or answers a question in good faith for the purposes of an IC review.

3. General procedure in relation to IC review of deemed refusal decisions

Preliminary inquiries

- 3.1 Where an application for IC review is made in relation to an FOI request that is deemed to have been refused under ss 15AC(3), 51DA(2) or 54D(2) of the FOI Act, the Information Commissioner will undertake preliminary inquiries under s 54V of the FOI Act. In undertaking preliminary inquiries, the Information Commissioner will require the agency or minister to confirm that the relevant FOI request is deemed to have been refused.
- 3.2 Agencies and ministers will have one week to respond to the Information Commissioner's preliminary inquiries.

Commencement of review

- 3.3 If the agency or minister confirms that the relevant FOI request is deemed to have been refused, or fails to respond to the Information Commissioner's preliminary inquiries, a notice under s 54Z will be issued notifying of the commencement of an IC review. This notice will be accompanied by a direction under s 55(2)(e) of the FOI Act, requiring the agency or minister to either:
 - a. make a revised decision under s 55G if the decision the agency or minister intends to make will result in the giving of access to the requested documents in full and to

³ See *FOI Guidelines* at [10.20] and [10.63].

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provide the relevant decision to the applicant and to the Information Commissioner or

- b. make a revised decision under s 55G if the decision the agency or minister intends to make will result in the giving of access to some of the requested documents, and to provide the relevant decision and non-exempt documents to the applicant, and to provide all relevant processing documents and the documents remaining at issue to the Information Commissioner or
- c. make submissions in support of the access refusal if the agency or minister intends refusing access to the requested documents and to send those submissions to both the Information Commissioner and the applicant. The agency or minister must also provide all relevant processing documents and exempt documents to the Information Commissioner under s 55T of the FOI Act.

3.4 Agencies and ministers will have 3 weeks to respond to the Information Commissioner's written direction.

4. General procedure in relation to review of other access refusal and access grant decisions

Commencement of review

4.1 The Information Commissioner will issue a notice under s 54Z of the FOI Act to advise the respondent agency or minister of the commencement of the IC review (s 54Z notice).

Requirement to engage with the applicant

4.2 The s 54Z notice will also require the agency or minister to engage, or make reasonable attempts to engage with, the IC review applicant during the IC review, for the purpose of genuinely attempting to resolve or narrow the issues in dispute in the IC review.

4.3 Engagement with IC review applicants will comprise a telephone or video conference between the applicant and the agency or minister. The agency or minister will be responsible for contacting the applicant and making the necessary arrangements for the engagement process. The OAIC will not be involved in making such arrangements or in attending the telephone or video conference.

Response to s 54Z notice

4.4 The agency or minister will generally have 8 weeks to respond to the Information Commissioner's s 54Z notice. The 8 week timeframe takes into account the time needed to contact and make arrangements with the applicant for the engagement process, and to reach agreement, where relevant. It is not expected that agencies or ministers will require any additional time. The Information Commissioner will consider any request for an extension of time on a case-by-case basis. However it is expected that it will only be in extenuating circumstances that any further extension to time will be granted.

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- 4.5 Respondent agencies and ministers must provide the Information Commissioner with evidence of the action they have taken to address the issues identified in the IC review application, or actions taken to contact the applicant.⁴
- 4.6 The evidence to be provided to the Information Commissioner will include:
- evidence that the agency or minister has taken genuine and reasonable steps to contact the IC review applicant, including any written correspondence issued to the applicant and any file notes of telephone calls made to the applicant
 - evidence of communications and any correspondence with the IC review applicant that demonstrates the attempts made by the parties to resolve the issues in dispute, including any proposals made by the agency or minister to resolve the IC review informally, and any response from the applicant
 - evidence of the outcome of the engagement between the agency or minister and the IC review applicant, including any evidence the applicant has notified the agency or minister in writing that their IC review application is withdrawn as a result of the agency or minister's contact with the applicant.⁵
- 4.7 In the event that not all issues in dispute in the IC review are resolved through the engagement process with the IC review applicant, respondent agencies and ministers should consider whether to make a revised decision under s 55G of the FOI Act.
- 4.8 If the respondent agency or minister decides not to make a revised decision under s 55G giving full access in accordance with the applicant's FOI request, agencies and ministers are required to provide the Information Commissioner with the FOI request processing documents and marked up copies of the exempt documents at issue in the IC review (if applicable) (see [5.2] below).

5. General procedure for production and inspection of documents

Production of documents

- 5.1 The Information Commissioner has various powers to require the production of information and documents under the FOI Act. These powers are outlined in Annexure 1 to this Direction. In addition to the Information Commissioner's information gathering powers under Division 8 of the FOI Act, the Information Commissioner is able to obtain any information from any person, and to make any inquiries, that are considered to be appropriate under s 55(2)(d) of the FOI Act. Therefore, when the Information Commissioner commences an IC review by issuing a notice of IC review, the Information Commissioner will also request relevant information and documents to progress the IC review.

⁴ An agency may not be required to engage in the conciliation process if it is able to provide evidence of having engaged in a similar process at an earlier stage. However, participation in formal statutory processes (for example, the request consultation process outlined in s 24AB of the FOI Act in relation to practical refusals) will not be a basis for not consulting the applicant in relation to the IC review.

⁵ At Annexure 2 to this Direction is an evidence checklist designed to assist agencies and ministers provide relevant evidence relating to the agency or minister's engagement with the applicant during the IC review.

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- 5.2 Document production requirements may vary from case to case depending on the issues being considered (application of exemptions, searches, charges or practical refusal).⁶ In relation to IC reviews involving the application of exemptions under the FOI Act, the Information Commissioner will require the agency or minister to provide a marked up and unredacted copy of the documents at issue in electronic format and the documents setting out any relevant consultations (for example, under ss 26A, 27 or 27A of the FOI Act).⁷
- 5.3 In providing the Information Commissioner with a marked up copy of relevant documents, agencies and ministers must ensure that all redactions pursuant to an exemption, or deletions on the basis of relevance pursuant to s 22(1)(a)(ii) of the FOI Act, are clearly marked with reference to the relevant provision of the FOI Act that the redactions or deletions are made under. A schedule of marked up documents must also be included.
- 5.4 In IC reviews where an agency or minister claims that documents cannot be found or do not exist, the Information Commissioner will require the agency or minister to provide evidence of the searches that have been undertaken to find relevant documents.⁸
- 5.5 In IC reviews involving a charge or a practical refusal reason, the Information Commissioner may require the agency or minister to provide a sufficiently representative sample of documents considered to be within the scope of the request.⁹
- 5.6 Agencies and ministers must provide their response within the timeframe set out in the notice, unless an extension of time has been sought and granted. However as noted at [4.4], the Information Commissioner considers that it will only be in extenuating circumstances that any further extension to time will be granted. If an agency or minister requires an extension of time to respond to a notice of IC review, the agency or minister must make a request in writing to the Information Commissioner with supporting evidence of the need for the extension prior to the due date.
- 5.7 Where an agency or minister fails to provide information and documents within the initial or extended timeframe, or requests another extension, the Information Commissioner may proceed to require the provision of information and the production of documents pursuant to s 55R of the FOI Act (discussed at Annexure 1 to this Direction).

Inspection of documents

- 5.8 Inspection of the documents at issue by the Information Commissioner in response to a request for production will only be considered in very limited situations where the

⁶ See *FOI Guidelines* at [10.98].

⁷ See *FOI Guidelines* at [10.100].

⁸ See *FOI Guidelines* at [10.98].

⁹ See *FOI Guidelines* at [3.121] and the IC review decisions in *Adrian Wright and Department of Human Services (Freedom of information)* [2017] AICmr 127 and *Cash World Gold Buyers Pty Ltd and Australian Taxation Office (Freedom of information)* [2017] AICmr 20.

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agency or minister can demonstrate that the circumstances warrant inspection rather than the direct production of copies of the marked up documents.

- 5.9 What constitutes these very limited circumstances is not prescriptive and will be determined on a case-by-case basis. The onus is on the requesting agency or minister to justify that circumstances exist that warrant inspection.
- 5.10 If an agency or minister is of the view that there are circumstances that justify inspection, the Information Commissioner will require the agency or minister to provide a written request for inspection together with supporting reasons prior to the due date in the s 54Z notice of IC review.
- 5.11 The Information Commissioner considers that inspection will not be warranted where the documents at issue are subject to conditional exemptions. The Information Commissioner considers that inspection may be appropriate in some circumstances where the documents at issue are subject to a national security, Cabinet or Parliamentary Budget Office exemption claim (ss 33, 34 and 45A of the FOI Act). However, the requesting agency or minister must satisfy the Information Commissioner that the circumstances warrant inspection.¹⁰
- 5.12 If the Information Commissioner agrees to an agency's or minister's request for inspection, the agency or minister will be required to undertake all necessary arrangements to facilitate the inspection. Unless otherwise agreed, this will occur at the Information Commissioner's office.

6. General procedure in relation to submissions made during an IC review

General principles

- 6.1 All parties to an IC review will be given a reasonable opportunity to present their case through written submissions.
- 6.2 Written submissions will be sought from parties following the completion of the initial triage and early resolution process and once the matter has been assigned to a review adviser for substantive review/case management.
- 6.3 In seeking submissions from agencies and ministers in support of the IC reviewable decision, the OAIC will require the agency or minister to send their submissions to the applicant at the same time as they are sent to the Information Commissioner. The applicant will then have the opportunity to make submissions in response. The applicant will be required to send their submissions to the agency or minister at the same time as they are sent to the Information Commissioner.
- 6.4 Subject to [6.6], the Information Commissioner will not accept any further submissions from either party to the IC review.
- 6.5 The Information Commissioner will generally provide each of the parties with 4 weeks to make their submissions.

Commented [F1]: Qualification regarding provision of submissions required. Addition inserted which takes account of paragraph 6.6.

¹⁰ The OAIC is able to receive secure electronic transmission of documents. For more information contact the OAIC.

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- 6.6 The Information Commissioner will contact the parties after receipt of submissions if procedural fairness requirements are identified or where a preliminary view can be provided to an agency that may result in an agency or minister making a revised decision under s 55G of the FOI Act.

Request to make submissions in confidence

- 6.7 If an agency or minister wishes to make a submission in confidence, a request for the submission to be treated in confidence must be made before providing the submission. Any request for confidentiality must be accompanied by reasons to support such a claim, including whether the submission would reveal the contents of the documents at issue.
- 6.8 Where the Information Commissioner accepts a submission in confidence, agencies and ministers must provide a version of the submission that can be shared with the applicant.¹¹
- 6.9 If the Information Commissioner forms the view that the submission does not disclose exempt matter, or is otherwise not inherently confidential, the Information Commissioner will advise the agency or minister of this view and invite the agency or minister to withdraw the claim for confidentiality with respect to the submission. If the agency or minister does not wish to withdraw the claim for confidentiality they may elect to withdraw the submission because it will not be considered by the Information Commissioner to make a decision under s 55K of the FOI Act on the issues in the IC review.

Consideration of submissions

- 6.10 The Information Commissioner will generally proceed with the IC review on the basis of the evidence provided in response to the s 54Z notice, and submissions.
- 6.11 Where the Information Commissioner makes a decision on IC review pursuant to s 55K of the FOI Act, the Information Commissioner will quote or summarise an agency's or minister's non-confidential submissions in the published decision. If a confidential submission is relied on by the Information Commissioner in making a decision on the IC review, this will be noted in the decision without revealing the confidential material.
- 6.12 In providing submissions, agencies and ministers should be mindful of their obligation to assist the Information Commissioner pursuant to s 55DA of the FOI Act and their onus under s 55D of the FOI Act. As it may be appropriate for an IC review to proceed to a decision under s 55K of the FOI Act on the basis of a response to a notice of IC review, it is in agency's and ministers' interests to put forward all relevant contentions and supporting reasons in response to the notice of review.¹²

¹¹ See *FOI Guidelines* at [10.103].

¹² See *FOI Guidelines* at [10.74].

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6.13 Agencies and ministers should be aware that if they do not make submissions when an opportunity to do so has been provided, the review may proceed to a decision under s 55K of the FOI Act without any further opportunity to make submissions.

7. Non-compliance with this Direction

7.1 Because the model litigant obligation under the *Legal Services Directions 2017* extends to Commonwealth entities involved in merits review proceedings, failure to adhere to the requirements of this Direction may amount to non-compliance with the model litigant obligation.¹³

7.2 The Information Commissioner may report non-compliance with this Direction in the Office of the Australian Information Commissioner's Annual Report.

7.3 The Information Commissioner may also report non-compliance with this Direction to the Office of Legal Services Coordination in the Attorney-General's Department.

7.4 The Information Commissioner may also consider investigating the non-compliance under Part VIIB of the FOI Act.

Angelene Falk
Australian Information Commissioner

DATE

Commented [F2]: Deletion: I consider the general statement is sufficient to encompass the (unqualified) example if those facts and circumstances arise.

Commented [A3R2]: Response: I agree that this could be removed as this sentence was inserted as a response to several agencies seeking to 'reserve their right to make submissions' - usually in response to a s 54Z notice.

Commented [F4R2]: Thank you

Commented [F5]: Rocelle: Could you please provide me with brief points on the reasoning for this conclusion noting the Legal Service Direction Appendix B; note to item 4 refers to merits review before a Tribunal. Previous advice has concluded the OAIIC is a Tribunal for the purposes of the Parliamentary Privileges Act.

Commented [A6R5]: - Paragraph 3 of Appendix B - The Commonwealth's obligation to act as a model litigant obligation: *The obligation to act as a model litigant extends to Commonwealth agencies involved in merits review proceedings.*

- Paragraph 4.2 of Schedule 1 provides that *Claims are to be handled and litigation is to be conducted by the entity in accordance with the Directions on The Commonwealth's Obligation to Act as a Model Litigant, at Appendix B, noting that the entity is not to start legal proceedings unless it is satisfied that litigation is the most suitable method of dispute resolution.*

'Litigation' is defined in paragraph 15 of Schedule 1 as proceedings before courts, tribunals, inquiries and in arbitration and other alternative dispute resolution processes, and the preparation for such proceedings.

Commented [A7R5]: Please see Leo's comments:

The FOI Act confers on the IC/FOIC functions and powers generally conferred on a 'tribunal' - that is, the IC/FOIC has, in relation to the IC review function, the features ordinarily associated with an administrative 'tribunal' - a merits review function, compulsive powers, hearing powers, procedural fairness obligations, etc. Additionally, the definition of 'litigation' is very broad, extending to 'inquiries', 'arbitration', any kind of 'alternative dispute resolution process'. It would be a strange outcome if 'tribunal' in that definition was somehow read down to not include the IC/FOIC in the conduct of IC reviews. That would seem to deny the clear intention expressed in para 3 of App B and, I think, introduce into the interpretation of 'tribunal' essentially arbitrary limits given that the features of the IC/FOIC IC review function are those commonly associated with a 'tribunal'.

I note that the PP Act has a specific definition of 'tribunal' (see s 3(1)), but that has no bearing on what a tribunal is according to its ordinary or technical meaning, which is the meaning relevant to interpretation of the LSDs so far as I can see. As I've said above, it's difficult to see why the IC/FOIC in performing their IC review function is not a 'tribunal' in that sense.

Commented [A8R5]: See <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AICmr/2022/66.html> which discussed the PP Act.

Commented [F9R5]: Thank you

¹³ See paragraph 3 of Appendix B to the *Legal Services Directions 2017*.

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Annexure 1: Information gathering and document production powers

1. Notice to Produce

- 1.1 Pursuant to s 55R(3) of the FOI Act, the Information Commissioner may issue a written Notice to Produce to require an agency or minister to give information or produce documents of a kind specified in the Notice. A Notice to Produce may also be issued in conjunction with either ss 55T or 55U of the FOI Act (discussed below).
- 1.2 The Information Commissioner will allow at least 2 weeks for agencies and ministers to respond to a Notice to Produce. It is an offence to fail to comply with a Notice to Produce issued by the Information Commissioner.

2. Production of exempt documents generally

- 2.1 Section 55T of the FOI Act concerns the production of exempt documents generally. This section applies when an agency or a minister claims that a document is an exempt document and the document is not covered by s 55U of the FOI Act (discussed below).
- 2.2 Section 55T(2) of the FOI Act provides that, for the purposes of deciding that a document is an exempt document, the Information Commissioner may require the document to be produced. In addition, s 55T(4) of the FOI Act provides that the Information Commissioner may require the production of an exempt document for the purpose of determining whether it is practicable for an agency or a minister to give access to an edited copy of the document.

3. Production of particular exempt documents

- 3.1 Section 55U of the FOI Act concerns the production of documents subject to a national security, Cabinet or Parliamentary Budget Office exemption claim (ss 33, 34 or 45A the FOI Act).
- 3.2 Section 55U(3) of the FOI Act provides that, if the Information Commissioner is not satisfied by evidence on affidavit or otherwise that a document is an exempt document under ss 33, 34 or 45A of the FOI Act, the Information Commissioner may require the document to be produced for examination.
- 3.3 If, after examining the documents, the Information Commissioner is still not satisfied that the documents are exempt under s 33 of the FOI Act, pursuant to s 55ZB of the FOI Act, the Information Commissioner will request the Inspector-General of Intelligence and Security to appear and give evidence on the damage that would or could reasonably be expected to result from the release of the documents.¹⁴

¹⁴ The Information Commissioner has a Memorandum of Understanding with the Inspector-General of Intelligence and Security to facilitate the Information Commissioner's information gathering powers.

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Annexure 2: Evidence checklist – IC review compulsory conference

The '*Direction as to certain procedures to be followed in IC review*' issued under s 55(2)(e)(i) of the *Freedom of Information Act 1982* by the Australian Information Commissioner requires agencies and ministers to engage, or make reasonable attempts to engage, with IC review applicants during the IC review.

Agencies and ministers must provide the Information Commissioner with evidence of the action they have taken to address the issues identified in the IC review application, or actions taken to contact the applicant. This checklist has been developed to assist agencies provide relevant evidence and can be used as a cover when providing relevant evidence to the OAIC.

1. Contact with IC review applicant

Evidence of earlier engagement in similar process*	<input type="checkbox"/> Attached <input type="checkbox"/> Not applicable
Copy of letter sent to IC review applicant to arrange contact	<input type="checkbox"/> Attached <input type="checkbox"/> Not applicable
Date of Letter	[insert date]
File note of telephone call to IC review applicant	<input type="checkbox"/> Attached <input type="checkbox"/> Not applicable
Copies of written correspondence from IC review applicant	<input type="checkbox"/> Attached <input type="checkbox"/> Not applicable

2. Attempts to resolve issues in dispute

File note of engagement with applicant	<input type="checkbox"/> Attached <input type="checkbox"/> Not applicable
Suggestions made by agency/minister to resolve IC review	<input type="checkbox"/> Attached <input type="checkbox"/> Not applicable
Response provided by applicant, and any suggestions made by applicant to resolve IC review	<input type="checkbox"/> Attached <input type="checkbox"/> Not applicable

3. Outcome of engagement

Outcome of engagement	<input type="checkbox"/> Attached <input type="checkbox"/> Not applicable
Written notification that IC review applicant wishes to withdraw their application for IC review	<input type="checkbox"/> Attached <input type="checkbox"/> Not applicable

* An agency may not be required to engage in the engagement process if it is able to provide evidence of having engaged in a similar process at an earlier stage. However, participation in formal statutory processes (for example, the request consultation process outlined in s 24AB of the FOI Act in relation to practical refusals) will not be a basis for not consulting the applicant in relation to the IC review.

Commented [F10]: typo

Commented [A11R10]: Thank you

Commented [F12]: For consistency with Direction language.

Commented [A13R12]: Thank you



Australian Government
Office of the Australian Information Commissioner

Direction as to certain procedures to be followed by applicants in Information Commissioner reviews



Angelene Falk
Australian Information Commissioner
1 July 2023

OAIC

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Part 1: About this direction

- 1.1 This direction is given by the Australian Information Commissioner under s 55(2)(e)(i) of the *Freedom of Information Act 1982* (FOI Act) in relation to Information Commissioner reviews (IC reviews).
- 1.2 This written direction sets out the procedure to be followed by applicants for IC reviews undertaken by the Information Commissioner under the FOI Act.
- 1.3 The Information Commissioner may decide not to undertake an IC review, or not to continue to undertake an IC review, if the IC review applicant fails to comply with a direction of the Information Commissioner (s 54W(c)).
- 1.4 The Information Commissioner may also give written directions as to the procedure to be followed in relation to a particular IC review (s 55(2)(e)(ii)).
- 1.5 This direction does not apply to the extent it is inconsistent with a provision of the FOI Act, another enactment or a specific direction made in a particular IC review under s 55(2)(e)(ii) of the FOI Act.
- 1.6 Further information relating to the IC review process is published on the Office of the Australian Information Commissioner's (OAIC) [website](#). In particular, [Part 10](#) (Reviews by the Australian Information Commissioner) of the Guidelines issued by the Information Commissioner under s 93A of the FOI Act (FOI Guidelines) describes the principles that inform the OAIC's approach to IC reviews.
- 1.7 In addition to this direction, the OAIC service charter, available on our [website](#), sets out the standard of service applicants can expect from the OAIC, explains how applicants can assist the OAIC and provides an opportunity for applicants to provide feedback.
- 1.8 This direction has effect from 1 July 2023.

Part 2: The IC review process

- 1.9 IC review procedures are found in Part VII of the FOI Act. The IC review process is intended to be an informal, non-adversarial and timely means of external merits review of FOI decisions made by agencies and ministers. Part 10 of the FOI Guidelines, to which agencies and ministers must have regard when performing a function or exercising a power under the FOI Act, sets out in detail the process and underlying principles of IC review.

Making an application for IC review

- 1.10 An application for IC review must be made in writing and should be made online using the Information Commissioner Review Application form available on the [OAIC website](#).
- 1.11 Where it is not possible for an application to be made online, applications may be sent to the OAIC by:
 - email to foidr@oaic.gov.au

- mail to FOI Regulatory Group, GPO Box 5218, Sydney NSW 2001.
- 1.12 An IC review application must, at a minimum, include the following contact details:
- a. the applicant's name or, where the applicant is an organisation or company, the name of contact person for the IC review and the name of the organisation or company
 - b. a contact telephone number
 - c. an email address that will be used to receive correspondence in connection with the IC review (a postal address may be provided if no email address is available).
- 1.13 The OAIC will contact applicants using their preferred contact method nominated in the application for IC review. Where an applicant has listed a preferred contact method as well as other contact information, the OAIC will consider any notices as received when sent to an applicant's preferred contact.
- 1.14 An application for IC review must also include the following information (if relevant):
- a. The name and contact details of any person the applicant would like to represent them, as well as evidence that the person has authority to act on the applicant's behalf, where appropriate
 - b. If the applicant requires an interpreter, the language or dialect required
 - c. If the applicant requires any other assistance, the type of assistance required
 - d. If the applicant has contacted the OAIC previously about the current application or another matter, the reference number previously provided by the OAIC to the applicant.
- 1.15 An application for IC review may be made by, or on behalf of, the person who made the FOI request to which decision relates (s 54L(3)). The OAIC may require information about the applicant's identity to establish that they are the person who made the original FOI request or evidence that a third party is authorised to seek review of the decision by that person.
- 1.16 An application for IC review must be accompanied by a copy of the agency's or Minister's decision (called a s 26 notice) for which review is sought or, if no decision has been made (for example, when the agency or Minister is taken to have refused the FOI request because they have not made a decision within the statutory time period), a copy of the FOI request.
- 1.17 The applicant must provide the OAIC with information about the FOI decision, in particular:
- a. Whether the decision about which IC review is sought is an original decision or an internal review decision.
 - If an applicant has the choice between applying for internal review or IC review, the Information Commissioner is of the view that it is usually better to seek internal review first as this is generally quicker and allows the agency to take a fresh look at its original decision. However, in circumstances where the original decision was made by the Minister or personally by the principal officer of an agency, or in the case of a deemed access refusal, applicants must apply directly for IC review.

- If an applicant has applied for internal review, they should wait for the agency to make a decision before applying for IC review.
- b. The date of the FOI decision.
- In most cases, an application for IC review must be made within 60 days of the applicant being notified of the agency's or Minister's decision to refuse access to some or all of the documents requested, or within 30 days of a decision granting access to documents to another person.
 - If an application for IC review is not made within the timeframes in the FOI Act, applicants may apply to the Information Commissioner under s 54T of the FOI Act for an extension of time to apply for IC review. Where an extension of time is sought, the applicant must provide reasons which explain why it would be reasonable in all the circumstances to extend the time to apply for IC review. In considering what is reasonable in all the circumstances, the Information Commissioner may take the following factors into account:
 - i. the length of the delay in applying for IC review
 - ii. the reason for the delay
 - iii. any action taken by the applicant regarding the decision after the agency or Minister made their decision
 - iv. any prejudice to the agency or the Minister and the general public due to the delay and
 - v. the merits of the substantive IC review application.

1.18 An application for IC review should also:

- a. identify the aspect(s) of the agency's or Minister's decision about which the IC review is sought
- b. state why the applicant disagrees with the agency's or Minister's decision
- c. identify which documents the applicant considers have been wrongly refused or which exemptions have been incorrectly applied
- d. if the FOI request has been refused on the ground that it would substantially or unreasonably divert an agency's resources or interfere with the performance of a minister's functions (ss 24 and 24AA) – specify the reasons why the applicant believes the FOI request would not have this impact.

1.19 The OAIC must provide 'appropriate assistance' to a person who wishes to apply for IC review and requires assistance to prepare the IC review application (s 54N(3)).

1.20 Section 54N of the FOI Act sets out the requirements for the contents and delivery of an application for IC review. These requirements include giving the OAIC contact details to which notices can be sent and providing a copy of the FOI decision the applicant wants the Information Commissioner to review. An application that does not comply with these requirements may be considered to be invalid.

During the IC review

Changes to contact details

- 1.21 An applicant or nominated representative must advise the OAIC if there are any changes to their contact details as soon as it is possible to do so. The Information Commissioner may decide not to undertake an IC review, or not continue to undertake an IC review, if the applicant or their nominated representative cannot be contacted after making reasonable attempts (s 54W(a)(iii)).

Participation in the IC review

- 1.22 Applicants must respond to inquiries from the OAIC within the time provided unless there are circumstances warranting a longer period to respond. If more time is needed, a request for an extension of time must be made to the OAIC at the earliest opportunity within the period provided for response, and no later than 2 days before that period is due to expire. Requests for more time must explain why additional time is needed and propose a new date for response. Approval of an extension request is at the discretion of the OAIC.
- 1.23 The OAIC requires agencies and Ministers to engage with the IC review applicant at the commencement of an IC review. The purpose of this engagement is to attempt to resolve the issues identified in the IC review application in an informal and timely way. Agencies are required to contact applicants for IC review shortly after the IC review application is lodged to arrange a suitable time for the engagement process. Failure by an applicant to participate in the engagement process without reasonable excuse may in some cases result in the Information Commissioner not continuing to undertake the IC review on the ground that the IC review applicant has failed to cooperate in progressing the IC review application or IC review without reasonable excuse (see s 54W(a)(ii)).
- 1.24 The Information Commissioner may use any technique the Information Commissioner considers appropriate to facilitate an agreed resolution of the matters at issue in the IC review (such as alternative dispute resolution processes - s 55(2)(b)). Where appropriate, and following the compulsory engagement process described above, the OAIC may invite applicants to attend a teleconference to discuss the issues in dispute in the IC review with the agency's or Minister's office and to explore options for resolution, with a view to reaching agreement on some or all of the matters at issue in the IC review.
- 1.25 The Information Commissioner may decide not to undertake an IC review, or not continue to undertake an IC review, if an IC review applicant has failed to cooperate in progressing the IC review application or the IC review without reasonable excuse (s 54W(a)(ii)).

Commented [F1]: Typo

Commented [A2R1]: Corrected, thank you.

Submissions

- 1.26 During an IC review, applicants will be given a reasonable opportunity to present their case. This generally includes having the opportunity to comment on relevant, adverse information provided to the OAIC by other parties.
- 1.27 Applicants will be invited to make written submissions after the initial triage and early resolution process is complete, and once the application has been assigned to a review adviser

for substantive review/case management. First, the agency or Minister will be asked to make submissions in support of the IC reviewable decision. The agency or Minister will send the applicant a copy of their submissions at the same time as they are sent to the OIAC. The applicant will then have the opportunity to make submissions addressing any issues raised by the agency or the Minister. The applicant is required to send their submissions to the agency or Minister at the same time as they are sent to the OIAC.

- 1.28 The Information Commissioner will generally give the parties (both the applicant and the agency or Minister) 4 weeks to make their submissions.
- 1.29 The Information Commissioner will not accept any further submissions from either party to the IC review unless the Information Commissioner has requested them.
- 1.30 The Information Commissioner will contact the parties after receipt of submissions if procedural fairness requirements have been identified. For information on procedural fairness see [3.15] – [3.31] of Part 3 of the FOI Guidelines.
- 1.31 The OIAC may provide a preliminary view at any time during the IC review. This will outline the case officer's preliminary thinking on the issues in dispute in the IC review. The applicant may be invited in some cases to withdraw the IC review application, depending on the views expressed in the preliminary view
- 1.32 The IC review application and any attachments will be shared with the agency or Minister, as well as any other parties to the review, unless there is a reason not to do so. Any other information and submissions provided to the OIAC by the applicant will be made available to the other parties to the IC review.
- 1.33 Applicants can apply to the OIAC to make a submission in confidence. The applicant must give reasons why they want to make a confidential submission and the OIAC will consider those reasons and decide whether to accept the submission on a confidential basis. If the OIAC agrees to treat a submission confidentially, the applicant may be required to provide a second version of the submission which can be shared.
- 1.34 Generally, submissions should be made in writing and sent by email or pre-paid post. In limited circumstances, if an applicant is unable to provide written submissions, the OIAC may agree to accept verbal submissions by telephone.

Information Commissioner decisions

- 1.35 The Information Commissioner must give written reasons for the decision to all the parties to the IC review (ss 55K(1) and (6)) and must publish the decision in a manner that makes it publicly available (s 55K(8)). This means that when the Information Commissioner makes a decision under s 55K of the FOI Act, the outcome of the IC review will be published online.
- 1.36 When the Information Commissioner makes a decision on IC review under s 55K of the FOI Act, the Information Commissioner will quote or summarise the submissions in the published decision. If a confidential submission is relied on by the Information Commissioner in making a decision on the IC review, this will be noted in the decision without revealing the confidential material.

- 1.37 To protect against the unreasonable disclosure of personal information, the Information Commissioner will consider whether identifying information should be included in published decisions. Natural persons may opt not to be named by providing notice in writing during the IC review. Other applicants, such as organisations or companies, must provide reasons for wishing not to be named, which will be considered on a case-by-case basis.

Part 3: Procedure for IC review of specific types of decisions

Deemed access refusal decisions

- 1.38 A 'deemed access refusal' occurs when the statutory time for making a decision on an FOI request for access to a document has expired and notice of the decision has not been given. In these circumstances the agency or Minister is 'deemed' to have refused the FOI request. Where the applicant applies for IC review of a deemed access refusal decision, the OAIC will make inquiries with the agency or Minister.
- 1.39 If, during the IC review, the agency or Minister sends the applicant a written decision on the applicant's FOI request the OAIC will check whether the applicant is satisfied with the decision. Applicants who are satisfied with the decision and do not wish to proceed with the IC review must advise the OAIC in writing that they withdraw their application for IC review. Applicants who are not satisfied with the agency's or Minister's decision must explain why they disagree with the decision and the basis on which they wish to proceed with the IC review. If the applicant does not respond to the OAIC's correspondence, the Information Commissioner may decide not to undertake an IC review on the basis that the applicant has failed to cooperate in progressing the IC review application without reasonable excuse (s 54W(a)(ii)).

Access refusal decisions

- 1.40 An 'access refusal decision' means (s 53A):
- 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 all the 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 (s 21) (see Part 3 of the Guidelines)
 - e. a decision relating to the imposition or amount of a charge (s 29)
 - f. a decision to give access to a document to a 'qualified person' (where disclosing the information to the applicant might be detrimental to the applicant's physical or mental health or well-being) (s 47F(5))

- g. a decision refusing to amend a record of personal information in accordance with an application (s 48)
- h. a decision refusing to annotate a record of personal information in accordance with an application (s 48).

- 1.41 In an IC review of an access refusal decision, the agency or Minister bears the onus of establishing that the decision is justified or that the Information Commissioner should give a decision adverse to the IC review applicant (s 55D(1)).
- 1.42 Given that the agency or Minister bears this onus, it will generally be necessary to undertake inquiries or seek information from the agency or Minister before inviting comment from applicants.

Access grant decisions

- 1.43 An 'access grant decision' means a decision to grant access to a document where there is a requirement to consult a third party (s 53B). Such decisions involve granting the FOI applicant access to information or documents following consultation.
- 1.44 In an IC review of an access grant decision, it is the IC review applicant who bears the onus of establishing that a decision refusing the FOI request is justified, or that the Information Commissioner should give a decision adverse to the FOI applicant (s 55D(2)).
- 1.45 IC review applicants will generally be invited to provide information or submissions which explain why the agency's or Minister's decision is wrong before comment is invited from the agency or Minister.

Part 4: Non-compliance with this direction

- 1.46 If an applicant fails to comply with this direction, the Information Commissioner may in some cases decide not to undertake an IC review or make a decision at their discretion, not to review as outlined in s 54W(c). This means that, in these cases, the review will be finalised.
- 1.47 Applicants will be provided with the opportunity to explain why the Information Commissioner should not finalise the IC review under s 54W(c) of the FOI Act before a decision is made.

PART 12 — VEXATIOUS APPLICANT DECLARATIONS

Version 1.1, October 2011

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PART 12 – VEXATIOUS APPLICANT DECLARATIONS

12.1 The Information Commissioner may declare a person to be a vexatious applicant, either on the Commissioner’s own motion or if an agency or minister applies (s 89K). The power is additional to the Commissioner’s discretion not to undertake or continue an IC review application on the basis that it is frivolous, vexatious or not made in good faith (s 54W(a)) (see Part 10 of these Guidelines). A vexatious applicant declaration is not an action that the Commissioner will undertake lightly, but its use may be appropriate at times.

Grounds for declaration

12.2 Before declaring a person to be a vexatious applicant the Information Commissioner must be satisfied that:

- (a) the person has repeatedly engaged in access actions that involve an abuse of process
- (b) the person is engaging in a particular access action that would involve an abuse of process, or
- (c) a particular access action by the person would be manifestly unreasonable (s 89L(1)).

12.3 An ‘access action’ is defined under s 89L(2) as:

- making an access request under s 15
- making an application for amendment or annotation under s 48
- applying for internal review (s 54B), or
- applying for Information Commissioner review (s 54N).

12.4 ‘Abuse of process’ includes harassing or intimidating an individual or an agency employee; unreasonably interfering with an agency’s operations; and seeking to use the Act to circumvent access restrictions imposed by a court (s 89L(4)). In a similar context, the Federal Court of Australia in *Ford v Child Support Registrar*¹ noted that a series of FOI applications of a repetitive nature and apparently made with the intention of annoying or harassing agency staff could be classified as vexatious. Also relevant in considering an abuse of process is whether an applicant has made repeated requests for documents which have been provided earlier or to which access has been refused.

12.5 A decision by the Information Commissioner to make a vexatious applicant declaration will be based on the facts of each case, after considering any submission from the person concerned. This power is new to the FOI Act. Over time, the Commissioner may develop further guidance based on the Commissioner’s decisions in individual cases either to make or not make a declaration.

12.6 Because this power is a new one, the Information Commissioner will not consider making a vexatious applicant declaration based only on a person’s FOI access actions prior to 1 November 2010. A declaration must relate to a person’s access actions under the law

¹ [2009] FCA 328.

that applies from 1 November. A prior access action may, however, be relevant, particularly if it was pursued through all stages of the review process and relates to the same documents or issues arising in a fresh access application.

Procedure

12.7 An agency or minister who applies for a vexatious applicant declaration bears the onus of showing that the declaration should be made (s 89K(3)). A clear and convincing case must be established. A declaration has the practical effect of preventing a person from exercising an important legal right conferred by the FOI Act, and will not lightly be made. The Commissioner will also take into account that other provisions of the FOI Act can be used in appropriate circumstances to resolve requests that pose a practical difficulty (such as ss 24 and 24AA which allow a request to be refused where a 'practical refusal reason' exists).

12.8 Before making a declaration, the Information Commissioner must give the person concerned an opportunity to make written or oral submissions (s 89L(3)).

12.9 A vexatious applicant declaration may be made subject to terms and conditions (s 89M). For example, the declaration may provide that an agency or minister may refuse to deal with an access request, an application for amendment of personal information or an application for internal review unless the Information Commissioner gives permission (s 89M(2)(a)). The declaration may also provide that the Information Commissioner may refuse to consider an IC review application by the person (s 89M(2)(b)).

12.10 A vexatious applicant declaration must be made in writing and be notified as soon as practicable to the person concerned, by the agency, minister or the Information Commissioner (as the case requires) (ss 89K(4), 89M(3)). A vexatious applicant declaration may be revoked or varied (s 33 *Acts Interpretation Act 1901*).

Review

12.11 A decision by the Information Commissioner to declare a person to be a vexatious applicant is a decision that can be reviewed by the AAT (s 89N).

Part 10 —

Review by the Information Commissioner

Version 1.10, February 2022

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- 10.1 Part 10 of the Guidelines covers the broad principles and procedures in the Information Commissioner review process as set out under Part VII of the FOI Act. This Part also provides guidance to agencies in relation to the practice of the Information Commissioner with respect to the steps in an IC review, the decision and the relevant appeal rights.¹

What decisions can the Information Commissioner review?

- 10.2 A person² who disagrees with an agency's or minister's decision following a request for access to a document or for amendment or annotation of personal records may apply to the Information Commissioner for review under Part VII (IC review). It is not necessary to go through the agency's internal review process before applying for an IC review. However, the Information Commissioner is of the view that it is usually better for a person to seek internal review of an agency decision before applying for an IC review. An agency's internal review process gives the agency an opportunity to reconsider the initial decision, usually at a more senior level, and the result may well meet the applicant's needs in a shorter timeframe than is available in the IC review process. Internal review is not available if the decision was made by a minister or personally by the principal officer of an agency.³
- 10.3 The Information Commissioner can review the following decisions by an agency or minister:
- an 'access refusal decision' (s 54L(2)(a), discussed below at [10.6])
 - an 'access grant decision' (s 54M(2)(a), discussed below at [10.7])
 - 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)).

Deemed decisions

- 10.4 The Information Commissioner may also review decisions that are deemed to have been made by an agency or minister where the statutory timeframe was not met. This may happen:
- at first instance (following a request for access to information (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).
- 10.5 Where a decision is deemed and the Information Commissioner has allowed the agency or minister further time to make an actual decision, and the agency or minister complies with

¹ The Office of the Information Commissioner has issued a Freedom of Information Regulatory Action Policy which provides guidance on the approach of the Australian Information Commissioner to the exercise of FOI regulatory powers, including in undertaking IC reviews, investigation of FOI complaints and conducting FOI own motion investigations. The Policy is available on the OAIC website, www.oaic.gov.au

² The reference to 'person' includes a body politic or corporate as well as an individual (see s 2C of the *Acts Interpretation Act 1901* (Cth)).

³ For detailed advice about internal review, see Part 9 of these Guidelines.

the extension, the actual decision is substituted for the deemed decision for the purposes of the IC review (s 54Y(2)).

Access refusal decisions

- 10.6 An ‘access refusal decision’ encompasses more than a simple refusal to grant access to a document. It 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 all the 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 or 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) (where disclosing the information to the applicant might be detrimental to the 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.

Access grant decisions

- 10.7 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).
- 10.8 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’⁴ or a decision that a document is open to public access as part of a public register where access is subject to a fee⁵) may be reviewed by the Information Commissioner (see [10.104]).

⁴ For example see *Philip Morris Ltd and Treasurer* [2013] AICmr 88.

⁵ See for example *Mentink and Australian Federal Police* [2014] AICmr 64.

Who can seek review?

10.9 Depending on the type of decision, the following table explains who can apply for an IC review.

- where the agency's or minister's decision was an access refusal decision (including a decision on 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 was to grant access – a third party who was consulted under s 26A(2) (s 54M(3)(a))
- where the decision was to grant access – a third party who was invited to make a submission in support of an exemption contention under ss 27 or 27A and did so (s54M(3)(a))
- where the decision was made after internal review of the original access refusal decision – the person who made the request for internal review (that is, the original FOI applicant) (s 54L(3))
- where the agency's decision on internal review was 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 was an access grant decision – a third party who was invited to make a submission in support of an exemption contention and did so (s 54M(3)(b))
- where the decision was to refuse to extend the period for applying for internal review of an access refusal decision (under s 54B) – the person who was seeking internal review (that is, the original FOI applicant).

10.10 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 Information Commissioner must be satisfied that the other person has authority to act on behalf of the FOI applicant or third party.

10.11 For instance, in circumstances where the representative is not a legal practitioner the Information Commissioner may request the provision of a 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.

10.12 In some circumstances other legislative requirements in relation to whether information can be disclosed to the representative may apply (for instance see subdivision 355-B of Schedule 1 to the *Taxation Administration Act 1953*).

Onus

10.13 In an IC review in relation to an FOI request (s 15) or an application to have personal records amended (s 48), the agency or minister has the onus of establishing that the decision is justified or that the Information Commissioner should give a decision adverse to the IC review applicant (s 55D(1)). The agency or minister must also bear in mind their

obligation to use their best endeavours to assist the Commissioner to make the correct or preferable decision (see [10.21]).⁶

- 10.14 In an IC review of an access grant decision, the affected third party has the onus of establishing that a decision refusing the request is justified or that the Information Commissioner should give a decision adverse to the person who made the request (s 55D(2)).

Principles of the Information Commissioner review process

- 10.15 Review by the Information Commissioner of decisions about access to government documents is designed around several key principles:
- it is a merit review process where the Information Commissioner makes the correct or preferable decision at the time of decision of the Information Commissioner
 - it is intended to be as informal as possible
 - it is intended to be non-adversarial, and
 - it is intended to be timely.

Merit review

- 10.16 Review by the Information Commissioner is a merit review process. The Commissioner does not simply review the reasons given by the agency or minister, but determines the correct or preferable decision in the circumstances. The Commissioner can access all relevant material, including material that the agency or minister claims is exempt. The Commissioner can also consider additional material or submissions not considered by the original decision maker, including relevant new material that has arisen since the decision was made. For example, for the purpose of deciding whether a document requested by an applicant is conditionally exempt, the Commissioner can take account of contemporary developments that shed light on whether disclosure would be contrary to the public interest. However, the Commissioner 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.⁷
- 10.17 If the Information Commissioner finds that the original decision was not correct in law or not the preferable decision, the decision can be varied or set aside and a new decision substituted. For example, the Commissioner may decide that a document is not an exempt document under the FOI Act or that an access charge was not correctly applied.

An informal process

- 10.18 IC reviews are intended to be a simple, practical and cost effective method of external merit review. This is consistent with the objects of the FOI Act, which provides that functions and powers are to be performed and exercised, as far as possible, to facilitate

⁶ 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 2005*.

⁷ *Lobo and Department of Immigration and Citizenship* [2010] AATA 583.

and promote public access to information, promptly and at the lowest reasonable cost (s 3(4)).

- 10.19 Consistent with the object of promoting public access to information, the Information Commissioner will provide appropriate assistance to IC review applicants to make their applications (s 54N(3)), which include explaining, for example, what particulars they must give in their application for review and seeking confirmation about which aspects of the decision they disagree with.
- 10.20 Consistent with the object of prompt and cost-effective access to information, most matters will be reviewed on the papers rather than through formal hearings. Although the Information Commissioner has more formal information gathering powers (see Division 8 of Part VII), documents are usually requested informally from agencies (see [10.100] below). The more formal powers may be used to compel agencies that do not respond to informal requests by the OIAC.

Non-adversarial

- 10.21 Agencies and ministers must use their best endeavours to assist the Information Commissioner to make the correct or preferable decision in relation to access to information held by the Government (s 55DA). This duty is consistent with the obligation on the 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. The Information Commissioner also encourages parties to reach agreement as to the terms of a decision on an IC review. The Information Commissioner may then make a decision in accordance with those terms without completing the IC review (s 55F).
- 10.22 All parties are also encouraged to minimise their use of legal representation in IC reviews, to reduce formality and costs. The Information Commissioner expects to receive responses from the relevant agency rather than a legal representative, even where the agency chooses to seek legal advice on particular issues.

Timely

- 10.23 The IC review process is intended to be efficient and lead to resolution as quickly as possible. To maintain efficiency, the OIAC relies on:
- timely responses to requests for documents at issue and submissions from the parties
 - preliminary views, which may be provided by a case officer to the parties after review of the documents at issue and the submissions where appropriate, and
 - conferences between the parties where appropriate to facilitate early resolution.
- 10.24 The Information Commissioner may decide to expedite the conduct of an IC review application in response to a request from the IC review applicant or as a result of identifying individual applications that involve factors that are outlined below. When considering whether to expedite an IC review application, the Information Commissioner may have regard to any of the following factors:
- whether expedition would best facilitate and promote prompt public access to information. For example, this factor may be relevant where the application for IC review 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 would best facilitate public access to information at the lowest reasonable cost. For example it is relevant to consider whether:
 - an IC review decision in the matter would address a novel issue
 - an IC review decision would resolve issues raised in a number of other related IC review applications which may result in the resolution of 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 applications that raise similar issues together
- the objects of the FOI Act
- any other factors the Information Commissioner considers relevant in the circumstances.

10.25 Where the conduct of an IC review is expedited, this may be reflected by changes in the process. For example, it may be appropriate for the Information Commissioner to provide the parties with shorter timeframes for responses and require the provision of submissions that can be shared with the other party to eliminate delays incurred when parties initially seek to only provide submissions on a confidential basis.⁸

Procedures in an Information Commissioner review

Parties to an IC review

10.26 The parties to an IC review (as specified in s 55A) are:

- a) the IC review applicant (see [10.9] 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 [10.45]-[10.46])
- d) a person who is joined by the Information Commissioner to the review proceedings as a person whose interests are affected (discussed below at [10.48]-[10.51]).

10.27 Where a minister is party to an IC review and there is a change of minister in the course of the review, the new minister is the respondent. If the requested document is not in the possession of the new minister, the FOI Act will not apply and the IC review cannot continue as the document is no longer an 'official document of a minister'.⁹

⁸ See Australian Information Commissioner, *Direction as to the production of documents in IC reviews Section 55(2)(e)(i) Freedom of Information Act 1982* in relation to submissions made during an IC review.

⁹ *Philip Morris Ltd and Treasurer* [2013] AICmr 88; *Thomas and Prime Minister* [2014] AICmr 18.

Application for IC review

Making an application

- 10.28 An application for IC review must be in writing (s 54N), which includes email. It must:
- give details of how notices may be sent to the applicant (for example, by providing an email address)
 - include a copy of the notice of the decision given by the agency or minister under s 26.
- 10.29 Including a copy of the s 26 notice enables the Information Commissioner to readily identify the agency or minister and the matters in dispute.
- 10.30 The application may also contain particulars of the basis on which the applicant disputes the reviewable decision (s 54N(2)). It will assist prompt handling of the matter if the applicant sets out the following matters in the application:
- any grounds on which the applicant disputes the reasons given for a claim that a document is exempt or conditionally exempt
 - any grounds on which the applicant considers that the public interest in giving access overrides the reasons given for not granting access
 - if an FOI request has been refused on the ground that it would unreasonably impact on an agency's resources or a minister's functions (ss 24 and 24AA) — any reasons why the applicant believes the FOI request would not have that impact.
- 10.31 The OAIC must provide 'appropriate assistance' where an applicant needs help to prepare the IC review application (s 54N(3)). This may arise, for example, where the applicant has language or literacy difficulties or other factors that affect their capacity to prepare an application.
- 10.32 The IC review application must be delivered to the OAIC or sent by prepaid postage or by electronic communication (fax or email) (s 54N(4)). The online form is located at: https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICR_10. The contact details for the OAIC are:

Postal address	GPO Box 5218 Sydney NSW 2001
Email address	FOIDR@oaic.gov.au
Fax	+61 2 9284 9666

Access grant decision

- 10.33 An IC review applicant who is a third party seeking review of an access grant decision may also not have received a copy of the s 26 statement of reasons given to the FOI applicant. The third party should, however, have been given a written notice of the access grant decision (see Part 3 of these Guidelines), and should provide a copy of that notice with their application.
- 10.34 The IC review application may also contain particulars of the basis on which the applicant disputes the reviewable decision (s 54N(2)). It will assist prompt handling of the matter if the affected third party applicant sets out the following matters:

- any grounds on which the applicant disputes the reasons given for a claim that a document is not exempt under s 47 or conditionally exempt under ss 47B, 47F or 47G, and
- any grounds on which the applicant considers that the public interest in giving access does not override the reasons given for not granting access.

Deemed decisions

- 10.35 A person will not have received a copy of the decision when notice of a decision is deemed to have been given. In that case, the application should include details of the agency or minister to whom the FOI request was made and state whether the FOI request was an application for an initial decision or for internal review of an agency decision. If the decision under IC review is a deemed decision on internal review, it will be useful for the OAI if the agency provided the statement of reasons for the initial decision.
- 10.36 If, after an applicant applies for IC review of a deemed decision where the Information Commissioner allowed the agency or minister further time to make an actual decision and the agency or minister did so, the actual decision is substituted for the deemed decision for the purposes of the IC review (s 54Y(2)). At any time during an IC review, an agency or minister may substitute a deemed or an actual access refusal decision with a decision that is in the applicant's favour (see [10.67]–[10.74]).

Withdrawing an application

- 10.37 An applicant may withdraw an application for IC review at any time before the Information Commissioner makes a decision (s 54R(1)). A withdrawn application is taken never to have been made (s 54R(2)). If an application is withdrawn, the Commissioner will notify the agency or minister.

Time for applying

- 10.38 An application for IC review must be made within 60 days of notice being given of an access refusal decision (s 54S(1)) or 30 days of notice being given of an access grant decision (s 54S(2)). Further details are below.
- 10.39 An FOI applicant may apply for IC review of an access refusal decision within 60 days after the day notice of the decision was given under s 26 (s 54S(1)). This time limit also applies to deemed refusals, as notice is deemed to have been given under s 26 of the FOI Act on the last day of the initial decision period (s 15AC(3) — see Part 3 of these Guidelines). Where the FOI applicant sought internal review and the agency did not make a decision within 30 days and no extension was granted, the original decision to refuse access is taken to have been affirmed on the last day of the decision period which is 30 days after the date that the FOI request was made (s 54D — see Part 9 of these Guidelines).
- 10.40 An affected third party may apply for IC review of an access grant decision within 30 days after the day they were given notice under ss 26A(3), 27(6) or 27A(5). An affected third party may also apply for review of an agency decision under s 54C to grant access on internal review. If the affected third party does not apply for IC review within 30 days of the notification of the decision, the agency or minister can provide access to the document, unless the Information Commissioner has granted an extension to the affected third party (ss 26A(4), 27(7) and 27A(6)). The Information Commissioner will notify an agency or minister if an affected third party has applied for an extension of time. The Information

Commissioner will provide a further notice after making a decision on that application. To minimise the possibility of dispute about the propriety or timing of a decision to release information when a third party objects, agencies and ministers should contact the OAIC after the appeal period has expired to confirm whether any IC review proceedings are in progress.

Extension of time for applying

- 10.41 An FOI applicant or an affected third party may ask the Information Commissioner for an extension of time to apply for IC review (s 54T(1)). The Information Commissioner may extend the time if satisfied that it is reasonable in all the circumstances to do so, even if the application period has expired (ss 54T(2) and (3)). The applicant should set out the reasons for the delay as part of their application. As a practical matter, an affected third party will not be able to apply for an extension of time if the agency or minister has already given the FOI applicant access to the documents after the time for applying for internal review or IC review has expired (see previous paragraph).
- 10.42 There may be a delay between when an FOI applicant receives notice of an access grant decision and when they receive access to documents. The Information Commissioner can consider granting an extension to apply for IC review if the applicant does not receive access to documents before the 30-day limit in s 54S(2) runs out. (The applicant can also apply for internal review within 15 days of receiving access — for more information, see Part 9 of these Guidelines.)
- 10.43 Before granting an extension, the Information Commissioner may require the applicant to give notice of the application to any person the Information Commissioner considers is affected (s 54T(4)). For example, the Information Commissioner may require the applicant to notify the agency or an affected third party. That person may in turn notify the Information Commissioner in writing that the agency or affected third party opposes the application, and must do so within the time the Commissioner specifies (s 54T(5)). Unless there are special reasons to the contrary, the Commissioner will allow 14 days for a response.
- 10.44 The Information Commissioner must give the applicant for the extension and any person opposing the extension a reasonable opportunity to present their cases before determining the extension application (s 54T(6)).

Agency or minister must notify third parties

- 10.45 The agency or minister must notify an affected third party where an FOI applicant has applied for IC review of a decision to refuse access to a document to which a consultation requirement applies (s 54P). This obligation applies whether the affected third party made a submission or was invited to make a submission but did not under s 26A (documents affecting Commonwealth-State relations), s 27 (business documents) or s 27A (personal privacy) (s 54P(1) — see Part 6 of these Guidelines). The third party has a right to be a party in the IC review. The third party would be seeking to support the agency's or minister's contention that access should be refused to a document that affects them.
- 10.46 The agency or minister is required as soon as practicable to take all reasonable steps to provide this notice (s 54P(2)). They must also give a copy of the notice to the Information Commissioner as soon as practicable (s 54P(3)). The s 54P notice is generally requested by the IC review officer (see table at [10.100]).

- 10.47 Section 54Q provides that the Information Commissioner may, on the agency's or minister's application, order that this notice requirement does not apply to business documents (s 27) or documents affecting personal privacy (s 27A). This may be done if the Commissioner is satisfied that notification of the IC review would not be appropriate as it could reasonably be expected to:
- a) prejudice the conduct of an investigation of a breach of the law or a failure to comply with a law relating to taxation (for example, if the person who would otherwise be notified is under investigation)
 - b) prejudice the enforcement or proper administration of the law in a particular instance
 - c) disclose or allow someone to ascertain the existence, identity or non-existence of a confidential source of information, in relation to the enforcement or administration of the law
 - d) endanger anyone's life or physical safety
 - e) damage the security, defence or international relations of the Commonwealth (s 54Q(3)).

Joining other parties to the review

- 10.48 The Information Commissioner may join a person whose interests are affected as a party to an IC review application (s 55A(3)) if that person applies in writing (s 55A(2)).
- 10.49 This could arise, for example, in a case where the IC review applicant is an affected third party who disagrees with an agency's or minister's decision to grant access to a document. In that case, the Information Commissioner may join the original FOI applicant to the review.
- 10.50 Another example is where an affected third party is not given notice of an IC review application because one of the reasons in s 54Q applies (see [10.47]). If the Information Commissioner, on considering the review application, is not satisfied that the information concerning that person is exempt, the Commissioner may decide to join the person to the review under s 55A(1)(d).
- 10.51 In some cases, the FOI decision may have included documents that involve more than one agency. An agency has the option of transferring an FOI request to another agency under s 16 where appropriate if the other agency agrees. If the agency decides not to transfer the FOI request, the agency is responsible for consulting relevant agencies, both before making a decision and throughout the IC review process. In exceptional circumstances where an agency other than the decision maker applies to be joined as a party to an IC review, the Information Commissioner may decide to grant the application.

General procedure

- 10.52 IC reviews are intended to provide a simple, practical and cost effective system for external merit review. To achieve this aim, the Information Commissioner may conduct an IC review in whatever way the Information Commissioner considers appropriate (s 55(2)(a)), and must use as little formality and technicality as possible (s 55(4)(a)). It is intended that most applications will be determined on the basis of the documents and submissions (see [10.63]).

Using alternative dispute resolution methods

10.53 To help resolve applications promptly, the Information Commissioner may use alternative dispute resolution methods or any other appropriate technique (s 55(2)(b)). Alternative dispute resolution methods and early appraisal can clarify at an early stage the issues to be resolved or the information to be provided by either party in support of their claims or submissions. For instance, the OAIC's IC review officer with carriage of the matter may review the material submitted by both parties and provide a preliminary view as to the merits of the case to the relevant party. The party then has the opportunity to make further submissions or take other action as may be appropriate (withdrawal of the IC review application or issuance of a s 55G revised decision). The IC review officer can also facilitate a teleconference between the parties if this would aid in resolving the matter.

Participation by various means

10.54 The Information Commissioner may allow a person to participate by any means of communication (s 55(2)(c)). For example, a person may be allowed to participate in a hearing by telephone or video conference, or to provide a written submission. Appropriate arrangements may also be made to assist a person with a disability.

Obtaining information

10.55 The Information Commissioner may obtain any information from any person and make any inquiries that the Information Commissioner considers appropriate (s 55(2)(d)). For example, the Commissioner may request information about the agency's decision early in the IC review process. Those inquiries may help the Commissioner to form a preliminary view about the issues to be addressed or the merit of a decision. The Information Commissioner also has a specific power to make preliminary inquiries to determine whether to undertake an IC review (discussed below at [10.82]) and the power to compel agencies to participate in a number of information gathering processes (discussed at [10.91]–[10.99]). The Information Commissioner can also seek expert assistance from agency staff or another party where documents involve complex or technical issues.

Written directions

10.56 The Information Commissioner may give written directions about the conduct of the IC review, both generally and in particular IC reviews (s 55(2)(e)).

10.57 The Information Commissioner has issued the following general procedure directions:

- a direction setting out the general procedure to be followed by agencies and ministers for the production of documents and submissions in IC reviews¹⁰
- a direction as to certain procedures to be followed by applicants in IC reviews.¹¹

10.58 In relation to directions in particular IC reviews, the Commissioner can, for example, direct that the publication of certain evidence in a particular review be prohibited or restricted if satisfied the evidence should be kept confidential.

¹⁰ See Australian Information Commissioner, *Direction as to certain procedures to be followed in IC reviews*.

¹¹ See Australian Information Commissioner, *Direction as to certain procedures to be followed by applicants in Information Commissioner reviews*.

- 10.59 Where an agency or minister fails to comply with a direction of the Information Commissioner, the Information Commissioner may proceed to make a decision (s 55K) on the basis that the agency or minister has failed to discharge their onus (s 55D(1)).¹²
- 10.60 The Information Commissioner may decide not to undertake an IC review or not to continue to undertake an IC review if the IC review applicant fails to comply with a direction of the Information Commissioner (s 54W(c)).

When the reasons for a decision are inadequate

- 10.61 The Information Commissioner can require an agency or minister to give reasons for their decision if the Commissioner believes the reasons given were inadequate or if no reasons were provided (s 55E). This includes where a decision is deemed to be made and no s 26 statement was prepared.¹³
- 10.62 The Information Commissioner can specify when an agency or minister must provide reasons. If no time period is specified, the agency or minister must provide reasons within 28 days (s 55E(3)). For guidance on preparing good reasons for decisions, see Part 3 of these Guidelines.

Hearings

- 10.63 Hearings are not intended to be a common part of Information Commissioner reviews, because they can increase contestability, introduce more formality to the process and prolong the matter. In general, IC reviews will be conducted on the papers. (see [10.52] above and s 55(1)).¹⁴
- 10.64 However, a party may apply to the Information Commissioner for a hearing at any time before a decision is made (s 55B(1)). The Information Commissioner notify the other review parties of the application and give all review parties a reasonable opportunity to make submissions on the application.¹⁵
- 10.65 The Information Commissioner must conduct hearings in public unless satisfied there are reasons to hold a hearing (in whole or part) in private (s 55(5)(a)). This means that part of a hearing may be held in the absence of one or more of the review parties and their representatives if the Commissioner considers it necessary to prevent the disclosure of confidential matters.
- 10.66 A party may be represented by another person at a hearing (s 55C), including a legal representative. For example, a party may wish to be represented by an advocate, friend or family member.

¹² See Australian Information Commissioner, *Direction as to certain procedures to be followed in IC reviews*, at [6.1].

¹³ See Australian Information Commissioner, *Direction as to certain procedures to be followed in IC reviews*, at [4.1]-[4.4].

¹⁴ Section 55(1) provides that review can be carried out on the documents or other available material if: the Information Commissioner considers the matter can be adequately determined in the absence of the review parties, the Information Commissioner is satisfied that there are no unusual circumstances that warrant a hearing, or none of the parties has applied for a hearing.

¹⁵ See *McKinnon and Department of Immigration and Citizenship* [2012] AICmr 34.

Revising the decision in the course of an IC review

- 10.67 After an application is made to the Information Commissioner for IC review, an agency or minister may (at any time during the IC review) revoke or vary an access refusal decision¹⁶ to favour the applicant by:
- giving access to a document in accordance with the request (s 55G(1)(a))
 - relieving the IC review applicant from liability to pay a charge (s 55G(1)(b)), or
 - requiring record of personal information to be amended or annotated in accordance with the application (s 55G(1)(c)).
- 10.68 During an IC review, where an agency or minister no longer contends that material is exempt or has identified further material within the scope of the FOI request, a revised decision under s 55G facilitates the prompt release of further material to the applicant.
- 10.69 The agency or minister must notify the Information Commissioner in writing of the new decision (s 55G(2)(a)).
- 10.70 A revised decision does not automatically conclude the IC review. The revised decision will be the decision under review (s 55G(2)(b)). The OAIC will generally consult the applicant as to whether they wish to continue the IC review on the basis of the revised decision.
- 10.71 If the decision under review is a decision refusing to give access to a document in accordance with a request under s 53A(a), the revised decision must have the effect of releasing more material to the applicant.¹⁷ That will include releasing part of a document because ‘document’ under s 4(1) of the FOI Act is defined to also include any part of a document.¹⁸ A revised decision may still be an access refusal decision in relation to other material within the scope of a request, provided that the variation is made ‘in a manner that favours the applicant’.¹⁹
- 10.72 The power under s 55G to make a revised decision during the IC review should be understood bearing in mind the purpose and context of the section. The provision only applies to decisions ‘that essentially benefit the applicant’,²⁰ does not require agreement between the parties²¹ and is a prescribed procedure within the IC review process (see Division 6 of Part VII of the FOI Act).
- 10.73 Accordingly, it is not in the spirit of a revised decision to include further exemption claims in relation to the remaining material to which access is refused which would have the effect of disadvantaging an applicant.
- 10.74 Any new contentions by an agency or minister that further or different exemptions apply to documents at issue should be put forward as part of the IC review, not as a revised decision under s 55G. Any new contentions that are put forward as part of the IC review must be justified by new circumstances or information that was not available at the time of the

¹⁶ A minister or agency cannot vary an access grant decision once the matter is under IC review (that is, there is no equivalent to s 55G, which applies only to access refusal decisions).

¹⁷ *Thomson and Australian Federal Police* [2013] AICmr 83 [12].

¹⁸ See [2.26] – [2.28].

¹⁹ *Australian Associated Press Pty Ltd and Department of Immigration and Border Protection* [2016] AICmr 25 [18], [22] and [24].

²⁰ See Explanatory Memorandum to the Freedom of Information Amendment (Reform) Bill 2009 33.

²¹ As distinct from s 55F of the FOI Act.

earlier decision and supported by detailed submissions.²² Agencies should bear in mind the lowest reasonable cost objective of the FOI Act under s 3(4) in ensuring that any such contentions are justified at a later stage of an IC review and should provide detailed reasons to the Information Commissioner.

Protections when information is supplied

- 10.75 A claim for legal professional privilege can still apply to a document or information produced for the purpose of an IC review. The act of producing the document does not of itself constitute a waiver of the privilege (s 55Y).
- 10.76 A person is immune from civil proceedings and any criminal or civil penalty if the person gives information, produces a document or answers a question in good faith for an IC review (s 55Z). The immunity applies whether the information was supplied voluntarily or supplied because the Information Commissioner had compelled production of the information (for example, under s 55(2)(d) — see [10.91]-[10.99]).

Evidence by the Inspector-General of Intelligence and Security

- 10.77 Before deciding that a document an agency or minister claims falls under the national security exemption (s 33) is not exempt, the Information Commissioner must ask the Inspector-General of Intelligence and Security (Inspector-General) to give evidence on the likely damage if access was granted (ss 55ZA–55ZD — for guidance about s 33, see Part 5 of these Guidelines).²³ There are similar provisions in relation to AAT proceedings (s 60A). The Inspector-General must comply with the Information Commissioner’s request unless the Inspector-General believes they are not appropriately qualified to give evidence on those matters (s 55ZC).
- 10.78 This requirement is to assist the Information Commissioner make a decision through the provision of expert advice. Because the Inspector-General is an independent statutory office holder, the evidence given is not evidence by the agency or minister who made the FOI decision. The Information Commissioner and the Inspector-General have entered into a memorandum of understanding establishing agreed procedures for the exercise of this discretion.²⁴
- 10.79 Before receiving evidence from the Inspector-General personally, the Information Commissioner must receive any evidence or submissions from the agency or minister (s 55ZB(3)). The Commissioner is not bound by the Inspector-General’s opinion (s 55ZB(4)).
- 10.80 The requirement does not apply if the Information Commissioner considers there is sufficient material to affirm the agency’s or minister’s decision to exempt the document.

²² See Australian Information Commissioner, *Direction as to certain procedures to be followed in IC reviews*, at [5.6]-[5.7].

²³ See *Penny Wong and Department of the Prime Minister and Cabinet* [2016] AICmr 6 [16] and *Wake and Australian Broadcasting Corporation* [2013] AICmr 45 [9].

²⁴ The memorandum of understanding is available at www.oaic.gov.au.

The Information Commissioner's options

10.81 After receiving an application for IC review, the Information Commissioner has two options:

- to review the decision if satisfied it is a decision that is reviewable, or
- not to review the decision if satisfied on certain grounds (discussed at [10.85] below).

Preliminary inquiries

10.82 The Information Commissioner may make preliminary inquiries of the parties to help determine whether to undertake an IC review (s 54V). Such inquiries might be made to clarify whether the review decision falls within the Information Commissioner's jurisdiction, or to clarify whether an internal review is currently on foot. Where an application for IC review is made in relation to an FOI request that is deemed to have been refused under ss 15AC(3), 51DA(2) or 54D(2) of the FOI Act, the Commissioner will undertake preliminary inquiries.²⁵

Who conducts the review?

10.83 An IC review officer from the OAIC will manage the IC application for review, including undertaking the preliminary assessment (see [10.108]–[10.113]). However, only the Information Commissioner, FOI Commissioner or Privacy Commissioner can make the final decision on a review (AIC Act ss 10, 11, 12 and 25(e)).

Timeframe for a review

10.84 The Act does not specify a time for completion of an IC review.²⁶ The time taken will depend on a number of factors, including:

- the type and range of issues involved in the IC review
- the number and type of documents involved
- whether there is a need to refine the scope of the issues the applicant has raised
- whether the agency or minister needs to undertake further searches for documents
- whether parties other than the agency and the applicant need to be consulted or joined to the IC review
- any new issues the parties have introduced during the IC review
- the time parties take to respond to requests for information or other issues raised by the IC review officer, and
- the extent to which the parties are willing to engage in informal resolution processes (where appropriate).

²⁵ See Australian Information Commissioner, *Direction as to certain procedures to be followed in IC reviews* at [4.1]–[4.4].

²⁶ The OAIC seeks to ensure that 80% of IC review matters are finalised within 12 months of receipt. See OAIC, *Corporate Plan 2017-18*, 31 August 2017, at www.oaic.gov.au.

When the Information Commissioner will not review a matter

- 10.85 The Information Commissioner has the discretion not to undertake a review, or not to continue a review, if:
- a) the applicant fails to comply with a direction by the Information Commissioner (s 54W(c))²⁷, or
 - b) if the Information Commissioner is satisfied:
 - i) the review application is frivolous, vexatious, misconceived, lacking in substance or not made in good faith
 - ii) the review applicant has failed to cooperate in progressing the IC review application or the IC review without reasonable excuse
 - iii) the Information Commissioner cannot contact the applicant after making reasonable attempts (s 54W(a))
 - c) if the Information Commissioner is satisfied the IC reviewable decision should be considered by the AAT (s 54W(b) — see [10.88] below).
- 10.86 An IC review application for review of an agency or minister’s preliminary costs assessment will be considered to lack substance if the agency or minister waives the charges.²⁸ The circumstances in which an IC review application can be described as ‘frivolous or vexatious’ have been examined in various cases.²⁹ The circumstances include where it is open to conclude that a series of FOI requests were made to annoy or harass agency staff and none of the requests is capable of conferring a practical benefit on the applicant.³⁰ See Part 12 of these Guidelines for information about vexatious applicant declarations. Where an applicant expresses their wish for a decision not to be published because they are concerned about privacy, this does not constitute failure to cooperate (but if the review proceeds the decision is nevertheless required to be published (s 555K(8)).³¹

Reviewing part of a matter

- 10.87 The Information Commissioner may decide to review only part of an IC reviewable decision (see s 54U).

AAT review as an alternative to IC review

- 10.88 The Information Commissioner may decline to undertake a review if satisfied ‘that the interests of the administration of the [FOI] Act make it desirable’ that the AAT consider the IC reviewable decision (s 54W(b)). It is intended that the Information Commissioner will resolve most applications. Circumstances in which the Information Commissioner may

²⁷ See Australian Information Commissioner, *Direction as to certain procedures to be followed by applicants in Information Commissioner reviews* at 1.40-1.41

²⁸ *Knowles v Australian Information Commissioner* [2018] FCA 1212.

²⁹ For an example of abuse of process generally see *Bringolf and Secretary, Department of Human Services (Freedom of information)* [2018] AATA 2004.

³⁰ *Ford v Child Support Registrar* [2009] FCA 328, applying *Attorney-General (Vic) v Wentworth* (1998) 14 NSWLR 481.

³¹ *Giddings v Australian Information Commissioner* [2017] FCA 677.

decide that it is desirable for the AAT to consider the IC reviewable decision instead of the Commissioner continuing with the IC review include:³²

- where the IC review is linked to ongoing proceedings before the AAT or a court
- where there is an apparent inconsistency between earlier IC review decisions and AAT decisions
- where, should the application progress to an IC review decision, the IC review decision is likely to be taken on appeal to the AAT on a disputed issue of fact
- where the FOI request under review is of a level of complexity that would be more appropriately handled through the procedures of the AAT
- where there may be a perceived or actual conflict of interest in the Commissioner undertaking review, including where:
 - the FOI request under review was made to, or decided by, the Information Commissioner or their delegate
 - the FOI request or material at issue relate to specific functions exercised by the Information Commissioner under the Privacy Act
 - the applicant has active matters in other forums, including the AAT or Federal Court and the Information Commissioner is the respondent
- where consideration by the AAT would further the objects of the FOI Act, particularly in relation to the performance and exercise of functions and powers given by the FOI Act to facilitate and promote public access to information, promptly and at the lowest reasonable cost (s 3(4)).

10.89 The OAIC will consult the parties to an IC review before concluding an IC review pursuant to s 54W(b).

Parties to be notified of decision not to undertake a review

10.90 If the Information Commissioner decides not to undertake an IC review, the Commissioner must give the parties written notice of the decision (s 54X(2)). Where the Information Commissioner has decided it would be desirable for the AAT to undertake the review, the notice must state that the applicant may apply to the AAT for review (s 54X(3)(b)).

The Information Commissioner's powers to gather information

10.91 The Information Commissioner has a range of powers to compel agencies to participate in procedures to gather information needed to properly review the merits of a decision. In addition to the power to require an agency or minister to give adequate reasons for a decision (discussed at [10.61]), the Commissioner has the power to:

- require a person to produce information and documents

³² See also *McKinnon and Department of Immigration and Citizenship* [2012] AICmr 34.

- require a minister or the principal officer of an agency to produce a document claimed to be exempt (with some qualification where the claimed exemption relates to national security, Cabinet or Parliamentary Budget Office matters)
- order an agency or minister to undertake further searches for documents
- require a person to attend to answer questions and to take an oath or affirmation that the answers given will be true.

10.92 Each of these is discussed below. The Information Commissioner’s information gathering powers are similar to those of the AAT, as discussed below. Further information is also available in the Annexure to the Information Commissioner’s direction as to the production of documents and submissions.³³

Producing information and documents

10.93 The Information Commissioner can issue a notice requiring a person to produce information and documents if the Commissioner reasonably believes it is relevant to an IC review (s 55R(3)). Failure to comply with a notice to produce is an offence punishable by six months imprisonment (s 55R(5)). There is a similar offence for failing to comply with a summons to produce issued by the AAT (*Administrative Appeals Tribunal Act 1975* (AAT Act) ss 40 and 61). The Commissioner may take, copy and take extracts from those documents and hold them as long as necessary for the purposes of the IC review (s 55S(1)).

Producing documents claimed to be exempt: general

10.94 The Information Commissioner may require the principal officer of an agency or a minister to produce a document claimed to be exempt, other than a document claimed to be exempt under the national security, Cabinet or Parliamentary Budget Office documents exemptions (s 55T(1)). As a general rule, the Commissioner will require an agency to provide a copy of all documents that are claimed to be exempt to enable the Commissioner to undertake merit review of the decision to refuse access (see [10.94]). If satisfied the document is exempt, the Commissioner must return the document to the agency or minister (s 55T(3)).

10.95 No person other than the Information Commissioner, the FOI Commissioner, the Privacy Commissioner or a member of the Information Commissioner’s staff may have access to a document that is claimed to be exempt (s 55T(5)). (The Information Commissioner must take all reasonable steps to ensure relevant OAIC staff are given appropriate security clearances (s 89P)). The AAT has a similar production power for its proceedings (s 64).

Producing documents claimed to be exempt: national security, Cabinet and Parliamentary Budget Office matters

10.96 The Information Commissioner may only require the principal officer of an agency or a minister to produce a document they claim is exempt under the national security exemption (s 33), Cabinet documents exemption (s 34) or Parliamentary Budget Office documents exemption (s 45A) if the Commissioner is not satisfied by evidence on affidavit

³³ See Australian Information Commissioner, *Direction as to certain procedures to be followed in IC reviews*.

or other evidence that the document is exempt (s 55U(3)). There is a similar provision in s 58E(2) relating to AAT review proceedings.

Further searches for documents

10.97 The Information Commissioner may order an agency or minister to undertake further searches for documents, including where access to a document has been granted but not actually given (s 55V(2)). This replicates the powers given to the AAT under s 58A(2).

Attending to answer questions

10.98 The Information Commissioner may require a person to attend to answer questions for the purposes of an IC review (s 55W(1)). The Information Commissioner must give the person a written notice that specifies the time and place when the person must attend, with the time to be not less than 14 days after the person is given the notice (s 55W(2)). Failure to comply with the notice is an offence punishable by six months imprisonment (s 55W(3)). There is a similar offence for failing to comply with a summons to appear to give evidence in AAT proceedings (AAT Act ss 40 and 61).

10.99 The Information Commissioner may also require a person who appears before the Commissioner pursuant to a notice to take an oath or affirmation that the answers the person will give will be true (s 55X). Breaching that requirement (for example, if the person refuses to take the oath or affirmation, or knowingly gives false answers) is an offence punishable by six months imprisonment (s 55X(3)).

Steps in the Information Commissioner review process

On receiving a review application

10.100 When an IC review application is received, the IC review officer will check that it is a valid application (see [10.28] – [10.32]). Before undertaking an IC review, the IC review officer will inform the person, the agency or minister who made the decision, or if the IC review application is by an affected third party in relation to an access grant decision, the FOI applicant (s 54Z). The IC review officer will contact the relevant agency or minister advising them of the review and seeking relevant information (as set out in the table below). The IC review officer will give the agency a copy of the application for IC review. The IC review officer may also enquire whether the agency is currently undertaking an internal review under Part VI of the Act. Where the agency advises that an internal review is under way, the IC review officer will ordinarily await the outcome before taking further steps in the IC review. The agency must make a fresh decision within 30 days after the day on which the application was received by the agency (s 54C(3)).³⁴

³⁴ For internal review processes and timeframes, see Part 9 of these Guidelines.

Scope of IC review	Information to be provided by Respondent
Access refusal - Exemptions (Part IV Divisions 2 and 3, except ss 33, 34, 45A)	<ul style="list-style-type: none"> • The original FOI request and any correspondence with the FOI applicant that modifies the scope of the FOI request • Copies of correspondence including file notes of relevant telephone conversations between the agency or minister and anyone consulted • A marked up and unredacted copy of the documents at issue where material claimed to be exempt is highlighted with reference made to the exemptions applied • Any submissions in support of the agency or minister’s decision, including the application of s 11B of the FOI Act in relation to conditional exemption claims • If any third parties are notified of the IC review, a copy of the written notifications under s 54P
Access refusal – Exemptions (Part IV Division 2, ss 33, 34, 45A)	<ul style="list-style-type: none"> • The original FOI request and any correspondence with the FOI applicant that modifies the scope of the FOI request • Copies of correspondence including file notes of relevant telephone conversations between the agency or minister and anyone consulted • Evidence, on affidavit or otherwise, including by way of submissions, that documents are exempt under ss 33, 34, or 45A • If any third parties are notified of the IC review, a copy of the written notifications under s 54P
Access refusal –FOI request does not fall within FOI Act: Part I and ss 4, 5,6, 6A, 7, 12, 20 and Schedules to the FOI Act	<ul style="list-style-type: none"> • The original FOI request and any correspondence with the FOI applicant that modifies the scope of the FOI request • Information about the nature of the document in question • The agency or minister’s response to the applicant • Any submissions in support of the agency or minister’s decision
Access grant (Part IV Divisions 2 and 3 ss 47, 47F and 47G)	<ul style="list-style-type: none"> • The original FOI request and any correspondence with the FOI applicant that modifies the scope of the FOI request • Copies of correspondence with the third party • The documents in dispute • The reasons for the decision to release the documents despite the third party’s objections • Any submissions in support of the agency or minister’s decision
Access refusal – Charges (Part III, s 29)	<ul style="list-style-type: none"> • The original FOI request and any correspondence with the FOI applicant that modifies the scope of the FOI request • A copy of the charges notice sent to the FOI applicant • A copy of the preliminary estimates notice sent to the FOI applicant and the applicant’s response • Any further explanation the agency or minister wishes to provide as to why the charge was imposed or how it was calculated, including any documentary evidence which supports the agency or minister’s calculation of charges • Any submissions in support of the agency or minister’s decision to impose a charge or in the alternative, a revised decision under s 55G of the FOI Act waiving the charge in full •

Scope of IC review	Information to be provided by Respondent
Access refusal – Refusal to amend or annotate a record of personal information (Part IV)	<ul style="list-style-type: none"> • A copy of the documents that were given to the FOI applicant • The reasons why the agency or minister considers that no amendment should be made under s 50, or the reasons why the requested annotation of records was not made under s 51 • Any submissions in support of the agency or minister’s decision
Access refusal – Failure to provide all documents / Adequacy of searches (Part III, s 24A)	<ul style="list-style-type: none"> • The FOI request, and any correspondence that modifies its scope • A copy of any document that records searches conducted, including if applicable: <ul style="list-style-type: none"> ○ Notes kept by individuals conducting searches ○ Correspondence between the FOI decision maker and individuals who conducted searches ○ Any other records of searches or recorded consideration of where to search • Any other relevant information that the agency or minister wishes to provide in support of its decision
Access refusal – Practical refusal (Part III, s 24A)	<ul style="list-style-type: none"> • The original FOI request and any correspondence with the FOI applicant that modifies the scope of the FOI request • Copies of any correspondence including file notes of telephone conversations relating to the agency of minister’s request consultation process, including a copy of the letter sent to the applicant, and the applicant’s response (if any). • Records that demonstrate the number of documents and/or pages encompassed by the request, including but not limited to notes of any searches conducted, and consultations with relevant staff members • An estimation of the number of hours processing time involved, and a breakdown of this time to demonstrate what this is based on • Evidence of document sampling, if undertaken • The names and contact details of anyone who was consulted by agency or minister, formally under ss 15(7), 26A 27A, or informally (including consultations with other government agencies) • Any submissions in support of the agency or minister’s decision
Access refusal – Deemed refusal or deemed affirmation of original decision	<ul style="list-style-type: none"> • The written reasons for the decision (see [10.106]) • The original decision • Other documents as listed above depending on the nature of the decision

10.101 The request for documents may initially be informal. However, if an agency does not comply with this informal request, the documents may be requested under a provision of the FOI Act that compels production by the relevant agency or minister within a specified timeframe. If necessary, the Information Commissioner may rely on the powers to:

- require the agency or minister to provide documents for which an exemption claim has been made, if these have not been provided to the IC review officer earlier (ss 55T and 55U – see [10.94]–[10.100])
- issue a notice requiring any person to provide information or documents that are relevant to an IC review (s 55R – see [10.93])

- require the agency or minister to conduct a further search for documents (s 55V – see [10.97])
- by written notice requiring a person to appear to answer questions (s 55W – see [10.98]), and to provide answers on oath or affirmation (s 55X – see [10.99])
- hold a hearing at which the parties will have an opportunity to present further evidence or submissions (see [10.63]–[10.66]).

Submissions and material received by the OAIC

- 10.102 In the case of documents from which information has been redacted, the agency should supply to the IC review officer copies of both the original document with the redacted material and the relevant exemption marked and the edited copy that was released. The OAIC will not release documents to the FOI applicant or any other party.
- 10.103 As a general rule, submissions made by the agency will be made available to the IC review applicant, and to other parties as considered appropriate. If submissions are made on a confidential basis, the agency or minister should indicate this to the OAIC before providing the submission and provide adequate reasons to support such a claim. The OAIC will consider those reasons and decide whether to accept the submission on a confidential basis. Where the Information Commissioner accepts a submission in confidence, the agency must provide a version of the submission that can be shared with the applicant.³⁵
- 10.104 A modified review process will be followed if the threshold question to be resolved is whether the applicant’s FOI request falls within the scope of the FOI Act. In a straightforward case, the Information Commissioner may be able to decide, without contacting an agency or minister, that the FOI request was made to an agency or for a document to which the FOI Act does not apply. On the other hand, it may be necessary for an IC review officer to contact an agency or minister to seek information about the nature of a document or the agency’s or minister’s response to the applicant. This may be necessary, for example, if the FOI applicant disagrees with a minister’s decision that the document requested is not an official document of the minister, or is a ‘defence intelligence document’.

Deemed refusal or deemed affirmation of original decision

- 10.105 A person may apply for IC review when there is a deemed refusal of an FOI access request. This will occur when the agency or minister has not made a decision within 30 days of receiving the FOI request or within the relevant period if it has been extended (s 15AC). After a deemed access refusal, the agency or minister should consider applying in writing to the Information Commissioner for further time to consider the matter (s 15AC(4)). This avenue is only available once. The Commissioner may then grant an appropriate extension, subject to any conditions considered appropriate (ss 15AC(5)–(6)).
- 10.106 The agency or minister retains an obligation to provide the applicant with written reasons in relation to the decision (s 26). If these reasons are not forthcoming the Information Commissioner may also issue a notice requiring the agency or minister to provide reasons (s 55E).³⁶ This decision made by the agency or minister after the IC review application has been made becomes the reviewable decision for the IC review (s 54Y). The provision of the

³⁵ See Australian Information Commissioner, *Direction as to certain procedures to be followed in IC reviews*, at [5.4].

³⁶ See Australian Information Commissioner, *Direction as to certain procedures to be followed in IC reviews*, at [4.3]–[4.4].

decision does not finalise the IC review process. The applicant has to withdraw the application for IC review (s 54R).

- 10.107 When there has been a deemed affirmation of an agency's decision following the expiration of time to complete an internal review, the agency should consider whether to seek an extension of time from the Information Commissioner to complete the internal review (s 54D(3)). Where the agency does not do so, or the Information Commissioner declines to grant an extension, the processes outlined in [10.101]–[10.104] above will apply.

Preliminary assessment and view

- 10.108 The IC review officer will consider the IC review application and the material supplied by the agency or minister. The IC review officer may ask the agency or minister or the FOI applicant to provide additional information or submissions at this stage.
- 10.109 After preliminary assessment of all the material by the IC review officer, the IC review officer may decide to form a preliminary view of the matter and advise the agency or minister or the FOI applicant as relevant.
- 10.110 If the preliminary view is against the agency or minister the preliminary view will be provided to the agency or minister. The Information Commissioner or the IC review officer will then invite the agency or minister to issue a revised decision in line with the preliminary view or make submissions in response to the preliminary view.
- 10.111 If the preliminary view is against the applicant the preliminary view will be provided to the FOI applicant. The IC review officer will then invite the applicant to withdraw the IC review application or make submissions in response to the preliminary view.
- 10.112 It should also be noted that in exceptional cases where the Information Commissioner has personally inspected the documents and formed the view that the documents should be released in part or in full, the Information Commissioner may provide the agency or minister with their preliminary view. The agency or minister will be given the opportunity to make a revised decision or make further submissions prior to proceeding to a decision. Any submissions provided by the agency or minister in response to this preliminary view will be provided to the applicant for comment unless the agency or minister requests the submissions be treated in confidence and adequate reasons by way of submissions are provided to support the claim. Where the Information Commissioner accepts the submission in confidence, agencies and ministers must provide a version of the submissions that can be shared with the applicant.³⁷
- 10.113 In relation to preliminary assessments, any submissions received during this process will generally be shared between the parties.

Methods of providing documents to the Information Commissioner

- 10.114 Ordinarily, the Information Commissioner will require agencies to provide copies of documents in hard copy or in scanned form as PDF documents. Where the Information Commissioner requests a copy of the documents at issue, the agency or minister is asked to provide a marked up and unredacted copy of the documents where material claimed to

³⁷ See Australian Information Commissioner, *Direction as to certain procedures to be followed in IC reviews*, at [5.4].

be exempt is highlighted with reference made to the exemptions applied. Information may be provided to the Information Commissioner's office by, for example email, USB or safe hand delivery.

10.115 The inspection of documents by the Information Commissioner will only be permitted where the agency or minister satisfies the Information Commissioner that there are extenuating circumstances to warrant production by this method. The onus is on the requesting agency or minister to justify that extenuating circumstances exist to warrant inspection.³⁸ If the Information Commissioner agrees to an agency or minister's request for inspection, the agency or minister will be required to undertake all necessary arrangements to facilitate the inspection. Unless otherwise agreed this will occur at the Information Commissioner's office. Inspection of documents at the premises of the agency are organised only in exceptional circumstances.³⁹

The Information Commissioner's decision

Where the review parties reach agreement

10.116 At any stage during an IC review, the Information Commissioner may resolve an application in whole or in part by giving effect to an agreement between the parties (s 55F). Before making the decision, the Commissioner must be satisfied that the terms of the written agreement would be within the powers of the Commissioner and that all parties have agreed to the terms.

Where the review parties do not reach agreement

10.117 If the parties do not reach an agreement, and unless the IC review applicant withdraws their application under s 54R, the Information Commissioner must make a decision after a merit review of the application. The Commissioner has three options:

- to affirm the decision of the agency or minister (s 55K(1)(a))
- to vary the decision of the agency or minister (s 55K(1)(b))
- to set aside the decision of the agency or minister and make a fresh decision (s 55K(1)(c)).

Written reasons to be given

10.118 The Information Commissioner must give written reasons for the decision to all the parties to the IC review (ss 55K(1) and (6)) and must publish the decision in a manner that makes it publicly available (s 55K(8)). The statements of reasons for Information Commissioner decisions are published on AustLII in the Australian Information Commissioner database.⁴⁰ The Information Commissioner's published decisions will not include any exempt material or information about the existence or non-existence of a document that would be exempt under ss 33, 37 or 45A (ss 55K(5)(a) and 25(1)) or any other matter that would cause the

³⁸ See Australian Information Commissioner, *Direction as to certain procedures to be followed in IC reviews*, at [3.9]-[3.13].

³⁹ See for instance *T' and Australian Securities and Investments Commission* [2013] AICmr 33 where two OAIC officers attended ASIC premises and inspected 3 files that fell within the applicant's FOI request.

⁴⁰ See www.austlii.edu.au/au/cases/cth/AICmr/

reasons to be an exempt document (s 55K(5)(b)). In addition, where appropriate to protect against the unreasonable disclosure of personal information about an applicant or third party, including details of their identity, the Commissioner will not include such personal information in the decision published on the website.

Exempt documents

10.119 If the Information Commissioner finds a document to be exempt, the Information Commissioner cannot order that access be given to the exempt material (s 55L). This includes a document which:

- has been found to be exempt because a specific exemption under Part IV Division 2 of the Act applies
- is conditionally exempt (under Part IV Division 3) and access to the document would be contrary to the public interest, or
- is a document of a person, body or agency exempt under the FOI Act (s 7 — see Part 2 of these Guidelines).

10.120 A similar restriction is placed on the AAT under s 58(2).

Requiring records to be amended

10.121 Part V of the FOI Act enables a person to apply for amendment or annotation of personal information that an agency uses for administrative purposes (see Part 7 of these Guidelines).

10.122 The Information Commissioner's decision can require amendment to be made to a record of personal information (subject to two limitations):

- a) *Opinions* — The Information Commissioner may only require amendment of a record that relates to an opinion if satisfied:
 - i) the opinion was based on a mistake of fact, and/or
 - ii) the author of the opinion was biased, unqualified to form the opinion or acted improperly in conducting the factual inquiries that led to the formation of the opinion (s 55M(1)).
- b) *Court or tribunal decision* — The Information Commissioner cannot require that a record of a decision under an enactment by a court, tribunal, authority or person be amended (s 55M(2)(a)). Nor can the Commissioner require that a record be amended if that would involve determining an issue that a person either is, or could be, entitled to have decided in another process — by an agency (on internal review), the Information Commissioner, a court or tribunal (s 55M(2)(b)). This means that the Information Commissioner does not have the power to require amendments that rely on the Commissioner making another decision first that could be made by an agency (such as where an agency must first determine a person's eligibility for a benefit), the Information Commissioner (such as deciding a request for access to the relevant documents) or a court (such as deciding whether a person is bankrupt) or tribunal (such as deciding whether a person is eligible for a visa).

10.123 The AAT is similarly limited in its power to recommend or require amendments of personal records (s 58AA).

Practical refusal, searches and charges

10.124 Other decisions that the Information Commissioner can set aside or affirm include:

- access refusal decisions based on the existence of a practical refusal reason with respect to an FOI request following a request consultation process (s 24)
- access refusal decisions based on the contention that all reasonable steps have been taken to find the document and the document cannot be found or does not exist (s 24A). The FOI Act provides individuals with a right of access to documents that exist. There is no right of access to documents that do not exist or cannot be found. The Commissioner cannot consider whether records have been destroyed or removed⁴¹ or matters where the applicant disputes the nature of the documents produced,⁴² and
- the Commissioner cannot consider matters on the basis that the applicant suspects records have been destroyed or removed and cannot be located by the agency,⁴³ or where the applicant disputes the nature of the document produced,⁴⁴ and
- decisions with respect to charges (s 29).

Compliance with the Information Commissioner’s decision

10.125 Parties to an IC review are notified of the Information Commissioner’s written reasons for decision at the conclusion of the IC review and are provided with a copy of these reasons.

10.126 At the time of notifying the parties of the written reasons for decision, the Information Commissioner will request information from the respondent about compliance with the decision. This information is to be provided to the Information Commissioner within four weeks of notification of the decision.

Enforcement of the Information Commissioner’s decision

10.127 An agency or minister must comply with an IC review decision (s 55N). If an agency or minister fails to comply, the Information Commissioner or the review applicant may apply to the Federal Court for an order directing them to comply (s 55P(1)). The application can only be made after the period an agency or minister has to apply to the AAT for review of the Information Commissioner’s decision has expired, that is, 28 days (AAT Act s 29(2)). There is a similar scheme for enforcing determinations of the Privacy Commissioner (Privacy Act ss 55A and 62).

10.128 In exercising the power to enforce an IC review decision, the Information Commissioner may consider the following factors:

- whether exercising the power to enforce an IC review decision would best facilitate and promote public access to information (for example, it is relevant to consider whether enforcement of an IC review decision would result in the agency releasing documents to the IC review applicant and, more generally, increase compliance of that agency with IC review decisions)

⁴¹ *Josh Taylor and Prime Minister of Australia (Freedom of information)* [2018] AICmr 42.

⁴² See for example *‘WV’ and Department of Veterans’ Affairs (Freedom of information)* [2021] AICmr 10.

⁴³ *Josh Taylor and Prime Minister of Australia (Freedom of information)* [2018] AICmr 42.

⁴⁴ See for example *‘WV’ and Department of Veterans’ Affairs (Freedom of information)* [2021] AICmr 10.

- whether exercising the power to enforce an IC review decision would best increase the promptness of public access to information (for example, it is relevant to consider whether this would impact the speed with which the agency in question complies with IC review decisions)
- whether exercising the power to enforce an IC review decision would best facilitate public access to information at the lowest reasonable cost (for example, it is relevant to consider whether enforcement by the Federal Court of Australia is the cost effective way to increase compliance with the FOI Act)
- whether exercising the power to enforce an IC review decision would promote the objects of the FOI Act to give the Australian community access to information held by the Government of the Commonwealth by requiring agencies to publish information and enforcing a right of access to documents, and
- any other factors which the Information Commissioner considers relevant in the circumstances.

Correcting errors in the Information Commissioner’s decision

10.129 The Information Commissioner has a discretionary power to correct obvious errors in his or her decision, either on his or her own initiative or on application by a review party (s 55Q).

Federal Court proceedings

10.130 The Federal Court may determine matters in two situations:

- deciding questions of law referred by the Information Commissioner (s 55H)
- on appeal by an IC review party on a question of law, from the Information Commissioner’s decision (s 56).

10.131 The Federal Court may also direct an agency or minister to comply with the Information Commissioner’s decision.

Referring questions of law

10.132 The Information Commissioner may refer a question of law to the Federal Court at any time during the review (s 55H), and must act consistently with the Federal Court’s decision (s 55H(5)). This power is intended to ensure that the Information Commissioner makes decisions that are correct in law and that his or her decisions can finally resolve a matter. The AAT has a similar power under s 45 of the AAT Act.

10.133 If a reference is made to the Federal Court, the Information Commissioner must send all relevant documents and information in his or her possession to the Court (s 55J).

10.134 In exercising the power to refer a question of law to the Federal Court of Australia, the Information Commissioner may consider the following factors:

- whether referring a question of law to the Federal Court would best facilitate and promote public access to information (for example if there is uncertainty with respect to the interpretation of the FOI Act)

- whether referring a question of law to the Federal Court would best increase the promptness of public access to information (for example if resolving a particular question of law would result in a positive impact on processing of FOI requests and IC reviews)
- whether referring a question of law to the Federal Court would best facilitate public access to information at the lowest reasonable cost (for example if the Federal Court's response to the question of law binds future decision makers and results in more efficient and therefore cost effective processing of FOI requests)
- whether referring a question of law to the Federal Court would promote the objects of the FOI Act to give the Australian community access to information held by the Government of the Commonwealth by requiring agencies to publish information and enforcing a right of access to documents, and
- any other factors which the Information Commissioner considers relevant in the circumstances.

Appeal to the Federal Court

- 10.135 A review party has the right to appeal to the Federal Court on a question of law from a decision of the Information Commissioner (s 56). A party to an AAT proceeding has a similar right (AAT Act s 44).
- 10.136 A party may choose to apply to the Federal Court rather than seek merit review in the AAT if, for example, the party believes the Information Commissioner wrongly interpreted and applied the FOI Act. If the Federal Court remits a decision to the Information Commissioner for reconsideration, a party could later apply to the AAT for review of the Commissioner's subsequent decision.
- 10.137 Section 56A(1)(b) provides that in determining the matter, the Federal Court may make findings of fact if its findings of fact are not inconsistent with findings of fact made by the Information Commissioner (other than findings resulting from an error of law), and it appears to the Court to be convenient. In determining whether it is convenient, the Court must have regard to all the following factors:
- i) the extent to which it is necessary for facts to be found
 - ii) the means of establishing those facts
 - iii) the expeditious and efficient resolution of the whole of the matter to which the IC review relates
 - iv) the relative expense to the parties if the Court, rather than the Information Commissioner, makes the findings of fact
 - v) the relative delay to the parties if the Court, rather than the Information Commissioner, makes the findings of fact
 - vi) whether any of the parties considers that it is appropriate for the Court, rather than the Information Commissioner, to make the findings of fact
 - vii) such other matters (if any) as the Court considers relevant.
- 10.138 There are similar provisions where Federal Court proceedings arise from an appeal from an AAT decision (AAT Act s 44(7)).

Review by the AAT

When can a person apply to the AAT?

10.139 A person can apply to the AAT for review of:

- the Information Commissioner’s decision to affirm, vary or set aside a decision after the Information Commissioner has undertaken a review (ss 55K and 57A(1)(a))
- the agency’s or minister’s decision where the Information Commissioner has decided not to undertake a review on the basis that it is desirable that the AAT undertakes the review (ss 54W(b) and 57A(1)(b))
- the Information Commissioner’s declaration of the person as a vexatious applicant (ss 89K and 89N).

10.140 A person cannot apply to the AAT directly for review of an agency or a minister’s decision – the person must apply for Information Commissioner review first.⁴⁵ However, when applying for IC review an applicant may make submissions as to why the Information Commissioner should decline the review under s 54W(b), thus enabling the person to apply to the AAT.

10.141 A person cannot apply to the AAT for review of the Information Commissioner’s decision not to undertake or continue a review. A person can however seek judicial review by the Federal Court of Australia or the Federal Circuit Court of Australia of the decision not to undertake or continue a review under the *Administrative Decisions (Judicial Review) Act 1977*.

Time limit

10.142 A person must apply to the AAT within 28 days after the day they receive the Information Commissioner’s decision (AAT Act s 29(2)). The same time limit applies where the Information Commissioner declines to consider the matter on the grounds that it would be better dealt with by the AAT (s 57A(2)).

Parties to the AAT proceedings

10.143 The parties to an AAT review application are:

- the person who applies to the AAT for review (s 60(3)(a))
- the original FOI applicant, that is, the person who made the request for access to documents or for amendment or annotation of a personal record (s 60(3)(b))
- the principal officer of the agency or the minister to whom the request was made (s 60(3)(c))
- any other person who is made a party to the proceeding by the AAT (s 60(3)(d)).

10.144 The AAT has a discretionary power under s 30(1A) of the AAT Act to join a person whose interests are affected by the decision.

⁴⁵ *Scholes and Decision Maker (Freedom of information)* [2018] AATA 4091.

- 10.145 The Information Commissioner is not a party to the proceedings in the AAT, except in relation to review under s 89N of a declaration that a person is a vexatious applicant. Consequently, the Commissioner does not play any role in the proceedings in defending his or her decision. In deciding the correct or preferable decision, the AAT will be guided by the submissions of the parties, who will ordinarily be the FOI applicant and the agency or minister who made the IC reviewable decision. As noted below in [10.153], s 61A of the FOI Act modifies relevant provisions of the AAT Act to spell out the role in the proceedings of the agency or minister who made the IC reviewable decision. Further, s 58(1) of the FOI Act provides that the AAT may decide any matter in relation to the FOI request that could be decided by the agency or minister.
- 10.146 In relation to review of a declaration that a person is a vexatious applicant (see Part 12 of these Guidelines), note 3 to s 89N expressly refers to s 30 of the AAT Act, which sets out the parties to AAT proceedings. Section 30 states that the decision maker (in this case, the Information Commissioner) will be a party to the proceedings. The Commissioner's role would be to assist the AAT and not to be a protagonist in the proceedings.⁴⁶ An agency or minister could also apply to the AAT to be made a party to those proceedings (AAT Act s 30(1A)).

Notifying third parties

- 10.147 An agency or minister must notify affected third parties if an FOI applicant seeks AAT review of a decision to refuse access to third party information (s 60AA). This is the same as the notice requirement where an application is made for an IC review. An affected third party may apply to become a party to the AAT proceedings under s 30(1A) of the AAT Act (s 30(3)(d)).
- 10.148 The AAT may order that an agency or minister does not need to give notice to an affected third party of an AAT review application if it would not be appropriate to do so in the circumstances (s 60AB). An agency or minister must apply to the AAT for an order to be excused from the requirement to give notice (s 60AB(2)).
- 10.149 Section 60AB(3) provides the circumstances to which the AAT must have regard when determining if the requirement to give notice is not appropriate. Those circumstances are whether notifying the affected third party would or could reasonably be expected to:
- a) prejudice the conduct of an investigation of a breach of the law, or a failure to comply with a law relating to taxation (for example, if a document includes information about a person under criminal investigation)
 - b) prejudice the enforcement or proper administration of the law in a particular instance
 - c) disclose, or enable a person to ascertain, 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
 - d) endanger the life or physical safety of any person
 - e) cause damage to the security, defence or international relations of the Commonwealth.

⁴⁶ In line with the view expressed in *R v Australian Broadcasting Tribunal; ex parte Hardiman* [1980] HCA 13; (1980) 144 CLR 13 at [54]. See also AAT Act s 33(1AA).

Onus

10.150 In AAT proceedings to review an FOI decision, the agency or minister who made a decision on the FOI request or the application for amendment of personal records has the onus of establishing that a decision adverse to the FOI applicant should be given. The agency or minister has that onus when:

- the agency or minister seeks review of the Information Commissioner’s decision (for example that access should be given to a document because an exemption does not apply) – in this case the AAT will review a decision of the Commissioner (s 61(1)(a))
- the FOI applicant seeks review of a decision made by the Information Commissioner (for example, affirming that an exemption applies to a document and that access may be refused) – in this case the AAT will review the Information Commissioner’s decision (s 61(1)(b))
- the FOI applicant applies for IC review of a decision and the Information Commissioner declines on the ground that it is desirable that the AAT undertake review – in this case the AAT will review the decision of the agency or minister (s 61(1)(b)).

10.151 The FOI applicant does not bear an onus in either IC review or AAT review.

10.152 If an affected third party is a party to the proceeding, the third party has the onus of establishing that a decision refusing to give access to the document is justified, or the AAT should give a decision adverse to the person who made the request (s 61(2)).

Who bears the onus?	Nature of request for AAT review	Section of the FOI Act
Agency or minister who received the access request or the application for amendment of personal records	Review of the Information Commissioner’s decision sought by the agency or minister	s 61(1)(a)
	Review of the Information Commissioner’s decision sought by the applicant requesting documents or amendment of personal records	s 61(1)(b)
	Review of an agency’s or minister’s decision that the Information Commissioner has declined to review under s 54W on the ground that it is desirable that the AAT undertake review	s 61(1)(b)
Affected third party that is a party to the AAT proceeding	Review of an access grant decision to which a consultation requirement applies under ss 26A, 27 or 27A	s 61(2)

Modifications to references in the AAT Act

10.153 Because agency and minister’s FOI decisions are now reviewed by the Information Commissioner and generally the AAT’s role is to review decisions made by the Information Commissioner, various provisions of the AAT Act that previously referred to ‘the person who made the decision’ are now taken to mean either the agency, minister or the person who made the IC reviewable decision, or each of the review parties, as the context requires. These modifications are listed in s 61A.

PART 9 — INTERNAL AGENCY REVIEW OF DECISIONS

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PART 9 — INTERNAL AGENCY REVIEW OF DECISIONS

Availability of internal review

9.1 Part VI of the FOI Act provides for internal review of agency decisions in two circumstances:

- an FOI applicant who is denied access in accordance with a request under the FOI Act may request the agency to review its original decision and make a fresh decision; the internal review can extend to a decision to deny access either wholly or in part, or to a decision on FOI charges
- a third party who is affected by a decision to grant access to a document in accordance with an applicant's request may request the agency to review its decision to grant access.

9.2 Internal review enables an agency to reconsider in full both the FOI request and the existing agency decision on that request.

9.3 The scheme for internal review was not changed by the 2010 amendments to the Act, except in three respects:

- a person applying for internal review is no longer required to pay an application fee or charge
- a person is not required to apply for internal review before applying for external review of an agency decision
- there were consequential drafting changes arising from the creation of the new option of IC review.

Choice between internal review or IC review

9.4 A person who is dissatisfied with an agency's access refusal or access grant decision can apply either for internal review or IC review of that decision. A person is not required to apply for internal review before applying for IC review. If dissatisfied with an internal review decision, the person can then apply for IC review of that decision. There is no fee or charge applying to either internal or IC review.

9.5 The Information Commissioner is of the view that it is usually better for a person to seek internal review of an agency 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.

9.6 Internal review is not available if the decision was made by a minister or personally by the principal officer of an agency (see paragraph 9.11 below). In both situations, a person can apply directly for IC review.

Decisions subject to internal review

9.7 Two categories of decision are amenable to internal review under the FOI Act:

- an ‘access refusal decision’ (s 53A, discussed below at paragraph 9.9) — the FOI applicant may apply for internal review of an access refusal decision (s 54)
- an ‘access grant decision’ (s 53B, discussed below at paragraph 9.10) — an affected third party may apply for internal review of an access grant decision (s 54A).

9.8 These terms are also used in connection with IC review and AAT review, and are discussed in Part 10 of these Guidelines.¹

Access refusal decisions

9.9 An access refusal decision is defined in s 53A to comprise all of the following:

- (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, in accordance with a request, access to all documents to which the request relates, but not actually giving that access
- (d) a decision to defer the provision of access to a document (except a document that a minister thinks should first be provided to the Parliament in accordance with s 21(1)(d))
- (e) a decision under s 29 relating to imposition of a charge or the amount of a charge
- (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.

Access grant decisions

9.10 An access grant decision is a decision to grant access to a document where there is a requirement to consult with a State under s 26A, Norfolk Island under s 26AA, a business entity under s 27, or an individual or legal personal representative of a deceased person under s 27A. This is spelt out in the table on the following page taken from s 53B of the Act.

¹ An overview of key internal review principles for agency decision makers is available in *FOI Agency Resource 10: Internal review*, available at www.oaic.gov.au.

Access grant decisions		
Item	If, in relation to a request for access to a document ...	the access grant decision is ...
1	consultation with a State under s 26A (documents affecting Commonwealth-State relations) is required	a decision of an agency or minister to give the applicant access to the document (or an edited copy of the document) because: (a) the document is not conditionally exempt under s 47B (Commonwealth-State relations); or (b) access to the document would not, on balance, be contrary to the public interest for the purposes of s 11A(5).
1A	consultation with the Commonwealth or State under s 26AA (documents affecting Norfolk Island intergovernmental relations) is required	a decision of an agency or minister to give the applicant access to the document (or an edited copy of the document) because: (a) the document is not conditionally exempt under s 47B (Commonwealth-State relations); or (b) access to the document would not, on balance, be contrary to the public interest for the purposes of s 11A(5).
2	s 27 (business documents) applies in relation to business information in the document	a decision of an agency or minister to give access to the document (or an edited copy of the document) because: (a) the document is neither exempt under s 47 (trade secrets), nor conditionally exempt under s 47G (business documents); or (b) if the document is conditionally exempt under s 47G — access to the document would not, on balance, be contrary to the public interest for the purposes of s 11A(5).
3	s 27A (documents affecting personal privacy) applies in relation to personal information in the document about a living person	a decision of an agency or minister to give the applicant access to the document (or an edited copy of the document) because: (a) the document is not conditionally exempt under s 47F (personal privacy); or (b) access to the document would not, on balance, be contrary to the public interest for the purposes of s 11A(5).
4	s 27A (documents affecting personal privacy) applies in relation to personal information in the document about a deceased person	a decision of an agency or Minister to give the applicant access to the document (or an edited copy of the document) because: (a) the document is not conditionally exempt under s 47F (personal privacy); or (b) access to the document would not, on balance, be contrary to the public interest for the purposes of s 11A(5).

When internal review is not available

9.11 Internal review is not available if an access refusal decision or access grant decision:

- was made by a minister (ss 54(1) and 54A(1))
- was made personally by the principal officer of an agency (ss 54(1) and 54A(1))
- is a deemed decision of an agency to refuse access to a document (s 15AC) or to refuse to amend or annotate a personal record (s 51DA), because the statutory timeframe was not met (s 54E(b)).

9.12 A person cannot seek internal review of an earlier internal review decision (s 54E(a)). Internal review is also not available to a third party if an agency has decided not to consult the third party under ss 26A, 26AA, 27 or 27A. However, the third party may make a complaint that an agency failed to consult with them before deciding to release a document. For further information about FOI complaints see Part 11 of these Guidelines.

Who may apply for internal review?

9.13 The FOI applicant may apply for internal review of an access refusal decision (s 54(2)). An affected third party may apply for internal review of an access grant decision (s 54A(2)). Section 53C contains a table that defines ‘affected third party’, as follows:

Who is an affected third party?		
Item	If, in relation to a request for access to a document ...	the affected third party for the document is ...
1	consultation with a State under s 26A (documents affecting Commonwealth-State relations) is required	the State.
1A	consultation with the Commonwealth or State under s 26AA (documents affecting Norfolk Island intergovernmental relations) is required	the Commonwealth or the State, as the case may be
2	s 27 (business documents) applies in relation to business information in the document	the person or organisation concerned (within the meaning of s 27).
3	s 27A (documents affecting personal privacy) applies in relation to personal information in the document about a living person	the person.
4	s 27A (documents affecting personal privacy) applies in relation to personal information in the document about a deceased person	the legal personal representative of the deceased person.

9.14 The effect of that provision, coupled with the notification provisions in ss 27(8) and 27A(7), is that internal review of an access grant decision may be sought by:

- a State that was consulted by an agency under s 26A(2), the Commonwealth or a State that was consulted under s 26AA(2), and

- a business entity or person who was invited by an agency to make a submission under ss 27 or 27A and made such a submission in support of an exemption contention.

9.15 A business entity or person who was invited to make a submission under ss 27 or 27A but did not do so is neither required to be notified of an access grant decision nor entitled to apply for internal review of IC review of that decision. A third party who was not invited to make a submission but believes they should have been invited under ss 27 or 27A may complain to the Information Commissioner.

Procedures in an internal review

Making an application for internal review

9.16 Two requirements are specified in s 54B(1) for a person to apply for internal review:

- the application must be in writing (which includes an email or any other form of electronic communication permitted by the *Electronic Transactions Act 1999*), and
- the application must be made within the specified time limit (s 54B(1)).

Time for applying

9.17 An applicant generally 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)). A longer period can apply to internal review of the following access refusal decisions:

- a decision giving access to documents in accordance with a request but not giving access to all the documents covered by the request
- a decision purporting to give access to documents in accordance with a request but not in fact doing so
- a decision giving access to a document to a qualified person, rather than the FOI applicant, where disclosure of personal information direct to the applicant may be detrimental to his or her physical or mental health or well-being (s 47F(5)).

9.18 In those three instances, the time limit for applying for internal review is either 30 calendar days after notification of the agency decision or 15 calendar days after access to documents was given or purported to be given, whichever period is longer (s 54B(1)(b)).

Extension of time for applying

9.19 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)).

9.20 The FOI Act does not specify any criteria that an agency must consider. The Information Commissioner recommends that agencies adopt a liberal approach and grant an extension unless there is a special reason not to do so. It may, for example, be appropriate to refuse an extension if a long time has elapsed since the agency decision was made, the agency would encounter administrative difficulty or prejudice in undertaking a review after that delay, and the applicant has not satisfactorily explained the reason for the delay. There

may be no benefit in extending the time for applying for review of an access grant decision, for example, if the documents in question have already been released.

9.21 In granting an extension, it is reasonable for an agency to require an applicant to apply for internal review within a short and specified time limit, for example, 20 days.

9.22 An agency decision to refuse an extension of time to seek 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). The FOI Act does not provide for IC review of an agency's refusal to extend the time to seek internal review of an access grant decision.

9.23 An applicant who is refused an extension of time by an agency or the Information Commissioner may make a fresh request under s 15 for access to the documents that were the subject of the earlier FOI request and agency decision.

The internal review decision maker

9.24 An agency, upon receiving an application for internal review, must as soon as practicable arrange for a person other than the original FOI decision maker to make the review decision (s 54C(2)). The person must be an officer of the agency who is appointed as an authorised officer under arrangements approved by the Minister or the principal officer of the agency under s 23.

9.25 If possible, it is preferable that a more senior officer who was not involved in the earlier decision be appointed to conduct the internal review. If no suitable person can be appointed, the agency should consider discussing with the applicant the option of applying for IC review instead.

Time for deciding

9.26 The agency must notify a decision to the internal review applicant within 30 calendar days of receiving the internal review application (ss 54C(3), 54D). The notice of decision must contain the particulars specified in s 26 (s 54C(4) — see paragraph 9.36 below).

9.27 If the internal review applicant does not receive notice of the internal review decision within 30 days, the principal officer of the agency is deemed to have made and notified a decision on the 30th day affirming the original FOI decision (s 54D(2)). The applicant may then apply to the Information Commissioner to review the agency decision (see Part 10 of these Guidelines). However, until that occurs, the internal review officer should proceed to make a decision as soon as practicable.

9.28 There is no mechanism in the FOI Act for an agency and an applicant to agree to extend the time for deciding an internal review application (by contrast, s 15AA enables an agency and an applicant to agree to extend the time for processing an FOI request). It is nevertheless open to an agency to request an applicant not to apply for IC review of a deemed internal review decision pending the agency's decision. However, this should not be done lightly and the applicant should be fully advised of the reason for the delay, the expected date of decision and the applicant's right to seek IC review.

9.29 There is also no provision for an extension for the decision maker to consult a third party during internal review. The decision maker may propose to allow access to documents for which an exemption was claimed in the original decision. If an affected third party was not consulted before the original decision was made, the decision maker on internal review may be required to consult them under ss 26A, 26AA, 27 or 27A (see Part 6 of these Guidelines). This is because the internal reviewer's task is to make a fresh decision, which implicitly imports all the statutory requirements the original decision maker had to meet (s 54C(3), and see paragraphs 9.31–9.35 below). The extension of time available for consultation under s 15(6) only applies to the original decision-making period.

Extension of time for deciding

9.30 If the internal review period has expired without a decision being made, an agency may apply to the Information Commissioner for an extension of time to decide an application for internal review (s 54D(3)).

9.31 The FOI Act does not specify any criteria the Information Commissioner must consider. 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 request and any views expressed by the internal review applicant.

9.32 In granting an extension, the Information Commissioner can allow further time considered appropriate for the agency to make an internal review decision (s 54D(4)) and impose any condition on the agency (s 54D(5)). During the period of any extension, the agency will not be deemed to have affirmed the original FOI decision (s 54D(6)). However, if the agency fails to make an internal review decision during the period of extension or fails to comply with a condition imposed by the Information Commissioner, the principal officer of the agency is deemed to have affirmed the original FOI decision on the last day of the period of extension (s 54D(7)). The Information Commissioner cannot thereafter grant any further extension to the agency (s 54D(8)).

The internal review decision

9.33 The FOI Act does not prescribe any procedure or criteria for the internal review decision. An agency should be guided by the principles put forward by the Administrative Review Council in a Best Practice Guide on internal review, *Internal Review of Agency Decision Making*, Report No 44 (2000), Chapter 8. Those principles can be adapted to the FOI context as follows:

- The role of the internal review officer is to bring a fresh, independent and impartial mind to the review. To the extent possible, the officer should not have been involved in or consulted in the making of the decision under review. (As noted at paragraph 9.25 above, it is preferable that the review officer is senior to the officer who made the decision under review.)
- Internal review is a merit review process (see Part 10 of these Guidelines). The internal review officer can decide all issues raised by an applicant's FOI request, and exercise all the powers available to the original decision maker. For example, the review officer can decide (contrary to the decision reached by the original decision

maker) that a document is not an exempt document under the FOI Act, that an exempt document should be provided to the applicant in accordance with s 3A, or that an FOI charge should be reduced or waived.

- The internal review officer may rely on record searches or third party consultation undertaken by the original decision maker, or may cause the same work to be undertaken again. For example, the review officer may rely upon an earlier agency search that located all requested documents the agency held, and may accept the record of consultation the agency undertook with a State, a foreign organisation, a business entity or a person. On the other hand, if there is a doubt as to the adequacy of those earlier record searches or consultation, the review officer may repeat those tasks, partially or in full, to reach a correct and preferable decision on the FOI request.
- All the material available to the original decision maker should be available to the internal review officer. In reviewing an exemption claim, the internal review officer should examine each document claimed to be exempt.
- The internal review officer must consider all issues raised by the person applying for internal review. The review officer may contact that person to seek further information or to discuss the issues raised by the request, including the option of redefining or narrowing the scope of the request.
- The internal review officer may consult other agency staff when undertaking the review, including the original FOI decision maker. However, it is important that the review officer brings an independent mind to the task and does not act at the direction or behest of any other officer.
- The internal review officer may consider additional material or submissions not considered by the original FOI decision maker. In particular, the review officer may decide that a change in circumstances occurring since the earlier decision has the result, for example, that disclosure would not be contrary to the public interest, or that a charge should be waived on public interest grounds.

9.34 As explained above, there is no obligation to undertake further consultation with an affected third party at the internal review stage. Nor does the FOI Act authorise an agency to extend the time for deciding an internal review in order to undertake consultation. An internal review officer should nevertheless consider the need for consultation if none has been undertaken or if an earlier consultation did not address issues that arise in the internal review.

9.35 If the internal review officer decides to release documents that contain the personal or business information of an affected third party or information affecting Commonwealth-State relations, ss 26A(4), 26AA(4), 27(7) and 27A(6) require that access not be given until an affected third party's review or appeal opportunities have run out (see Parts 8 and 10 of these Guidelines).²

² Only a business entity or person who made a submission in support of an exemption contention under ss 27 or 27A can seek internal review of an access grant decision.

Notifying the applicant of an internal review decision

9.36 An agency must provide written notice of an internal review decision to the internal review applicant (s 54C(4)). The notice of decision must comply with s 26, which also applies to original decisions (see Part 8 of these Guidelines). The notice should state the findings and reasons underlying the internal review decision, and not merely refer to or restate the decision of the original FOI decision maker.

9.37 The notice should also advise the applicant of the right to complain to the Information Commissioner and to seek IC review of the internal review decision, and the procedure for exercising those rights. This should be done even if the internal review decision is to provide access to all documents requested. The internal review applicant may, for example, wish to complain about how the internal review was handled, or seek IC review on the basis that not all documents covered by an FOI request were located by the agency.

PART 7 — AMENDMENT AND ANNOTATION OF PERSONAL RECORDS

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PART 7 – AMENDMENT AND ANNOTATION OF PERSONAL RECORDS

7.1 There are two Acts that allow individuals to seek access to their personal information and to have the information corrected or annotated — the FOI Act and the Privacy Act. 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 APPs in the Privacy Act give individuals the right to request an agency to correct 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 operate alongside 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 applying under the APPs. Those differences are considered below at [7.6]-[7.9].

7.3 Neither the FOI Act nor the Privacy Act prevents an agency from correcting personal information under an informal administrative arrangement, provided the arrangement satisfies the minimum requirements of the Privacy Act.¹ 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 the Privacy Act

7.4 A fundamental principle of information privacy is that individuals are entitled to have access to their own personal information, except where the law provides otherwise (APP 12, s 14 of 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, s 14 of 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 an enforceable right to access to documents (under Part III) and to initiate a correction or update (Part V) to their personal information held in agency records or in the official documents of a minister. Part V enables records that are incomplete, incorrect, out of date or misleading to be amended on the application of the affected person. An applicant may also ask for the record to be annotated to include a statement explaining their objection and the reasons for their objection (s 51).

¹ For more information about APP 13 minimum procedural requirements, see Chapter 13 of the Information Commissioner's APP Guidelines at www.oaic.gov.au.

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 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 this list 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 complaint options available to the individual under the FOI Act and APP 13 also differ. Under the FOI Act, an individual may apply for IC review of an agency’s or minister’s failure to amend or annotate a record in accordance with the person’s request. The Information Commissioner may exercise the agency’s or minister’s discretion to amend or annotate a record. Under the Privacy Act, an individual may complain to the Information Commissioner about an APP entity’s failure to take reasonable steps to correct personal information. After investigation, the Information 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 Information Commissioner may make a determination to that effect, and require, for example, the entity 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 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. More detailed information could be provided by an agency in other ways — such as a separate document that sets out the procedure for requesting correction of personal information, through an ‘Access to information’ icon on the agency’s website,² or on a case-by-case basis as the need arises. An agency could draw attention to the more flexible procedure for correcting their personal information. As explained in Part 3 of these Guidelines, agencies should consider establishing administrative access arrangements that operate alongside 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).

² See the OAIC’s *Guidance for agency websites: ‘Access to information’ web page* at www.oaic.gov.au.

7.10 The remainder of this Part deals with the amendment and annotation provisions in the FOI Act. For more information about the operation of APP 13, see the Information Commissioner's APP Guidelines, Chapter 13.

Records that may be amended or annotated

7.11 Section 48 of the FOI Act requires a request for amendment or annotation of a record of personal information in a document to meet the following criteria:

- 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 already has lawful 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

7.12 The right to request amendment or annotation only extends to documents that contain the applicant's personal information. For example, a person cannot apply for correction or annotation of a policy document that contains no personal information.

7.13 An application for correction or annotation differs from the usual scheme of the FOI Act in that it is concerned with records of information contained in documents, rather than documents as such. A request for amendment or annotation extends to any record of the information 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 information corrected extends to all active records the agency has kept for administrative purposes where there is a reference to the applicant's date of birth.

7.14 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)).

7.15 Part V applies broadly to information that has been used, is being used, or is available for use for an administrative purpose. This includes where the information was only used once. It is irrelevant where or why the information is kept.

Information incomplete, incorrect, out of date or misleading

7.16 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. 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

7.19 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

7.20 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

7.21 Personal information is out of date if it contains facts, opinions or other pieces of information that are no longer current. 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.

7.22 Personal information about a past event may have been accurate at the time it was recorded, but have been overtaken by a later development. Whether that information is out of date will depend on the purpose for which it is held. If information from a past point in time 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

7.23 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 acted improperly, or if another similar reason applies. The applicant's disagreement with the opinion is not a sufficient reason to amend the record. 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

7.24 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 make a complaint under the Privacy Act (APP 13).

How to apply for amendment or annotation

7.25 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 [7.30]–[7.32])
- 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.

7.26 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

7.27 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(c)).³

³ This reflects the policy decision not to update Part V of the FOI Act as part of the 2010 reforms (apart from by adding IC review provisions).

7.28 The FOI Act requirements for amendment and annotation applications must be read alongside the *Electronic Transactions Act 1999*. Section 8 of that Act provides that a transaction under a law of the Commonwealth is not invalid because it takes place wholly or partly by means of electronic communication. Section 9(1) provides that a requirement under a law of the Commonwealth for a written application to be made to a Commonwealth entity may be validly satisfied by electronic communication; and that a person may consent to receiving information from a Commonwealth entity by electronic communication.

7.29 The Information Commissioner's view is that agencies and ministers should apply the same electronic communication procedures that apply to access requests under Part III to applications under ss 48 and 49 for amendment and annotation of personal information. 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

7.30 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.

7.31 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.

7.32 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 using the telephone or email to contact applicants, can help to resolve problems and minimise delay in making a decision.

Making decisions on a request for amendment

7.33 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.

7.34 Where a person has requested amendment of their own personal information, 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

7.35 As noted at [7.30]–[7.31], an applicant must give particulars of the amendments being requested and the reasons for their request (ss 49 and 51A).

7.36 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.

7.37 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 satisfies 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.

7.38 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.

7.39 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

7.40 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.⁴ Generally, the more

⁴ See 'K' and *Department of Immigration and Citizenship* [2012] AICmr 20.

significant the effect of the amendment sought, the greater the weight of evidence that would be required to justify the amendment.⁵

7.41 In assessing what weight to give to evidentiary documents, the decision maker should consider the circumstances in which the information was first provided. 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. 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.

7.42 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.⁶ 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.⁷

7.43 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.⁸ 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 certifier⁹
- whether a document is based on information reported by the applicant (self-reported information)¹⁰
- the reliability of other documents issued by the same agency, organisation or individual¹¹
- the quality of a translation of an original document and whether the translator is known or reputable¹²
- damage to the document and/or an indication of tampering with the document¹³
- previous statutory declarations that agree with or contradict a later statutory declaration by the same individual.¹⁴

⁵ See *'M' and Department of Immigration and Citizenship* [2012] AICmr 23.

⁶ See *'K' and Department of Immigration and Citizenship* [2012] AICmr 20 [41].

⁷ See *'N' and Department of Immigration and Citizenship* [2012] AICmr 26 [21].

⁸ See *'O' and Department of Immigration and Citizenship* [2012] AICmr 27.

⁹ See *'T' and Department of Immigration and Citizenship* [2012] AICmr 35 [13].

¹⁰ See *'AU' and Department of Immigration and Border Protection* [2013] AICmr 90 [14],[22].

¹¹ See *'U' and Department of Immigration and Citizenship* [2012] AICmr 36 [12].

¹² See *'A' and Department of Immigration and Citizenship* [2013] AICmr 7 [22].

¹³ See *'AU' and Department of Immigration and Border Protection* [2013] AICmr 90 [16].

7.44 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.

7.45 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. 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.¹⁵ 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 50.¹⁶ If the agency makes a finding that the information 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.¹⁷

7.46 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. 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 of multiple government agencies.¹⁸

Consequences of amendment

7.47 Sometimes an amendment to a record could have flow-on legal effects. 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

¹⁴ See 'P' and Department of Immigration and Citizenship [2012] AICmr 29 [11].

¹⁵ See 'K' and Department of Immigration and Citizenship [2012] AICmr 20 [39].

¹⁶ See 'K' and Department of Immigration and Citizenship [2012] AICmr 20 [39].

¹⁷ See 'K' and Department of Immigration and Citizenship [2012] AICmr 20 [39].

¹⁸ See 'AM' and Department of Immigration and Border Protection [2013] AICmr 73 [21]

obliged to represent the applicant's interests. The object is to ensure as far as possible that an applicant can make an informed decision.

7.48 The fact that an amendment of a record may benefit an applicant, and provide an incentive to make an amendment application, is not a matter that can ordinarily be given much weight. It is not generally evidence for or against the correctness of the personal information in a record.¹⁹

Recording and notifying an amendment decision

7.49 An agency or minister who agrees with an applicant's request may decide to change the record as requested (see [7.54]–[7.66] 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

7.50 Where an agency or minister decides not to amend the record, they must give the applicant written notice of the decision. The notification should set out what evidence (for and against the request) the decision maker examined, the weighting given to the evidence and the reasons for refusal. The notification must also include information about the applicant's review rights and right to complain to the Information Commissioner about how the request was handled (s 26 as applied by s 51D(3)). For further guidance on writing notifications, see Part 8 of these Guidelines.

7.51 The agency or minister has the onus of justifying the decision if it is reviewed by the Information Commissioner (s 55D(1)). The agency or minister need not prove the information was correct, but must establish that the Information Commissioner should affirm the decision or give a decision that is adverse to the applicant.

Implementing a decision to amend the record

7.52 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.

7.53 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 existed. Removing or destroying part of a record would prejudice the record's integrity as an account of the information originally supplied, a record which may still be needed to explain an action taken on the basis of the original information. If this is not possible, a decision maker should keep a

¹⁹ See 'A' and Department of Immigration and Border Protection [2013] AICmr 7 [26].

careful account of any changes made, cross-referencing to the file or database that contains the record of the amendment decision.

Amending paper records

7.54 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.

7.55 The Information Commissioner suggests that information on a paper document be corrected by ruling through the incorrect information and writing the correct information next to it, above or below it. Include explanatory words such as: 'Amended on (insert date) under s 50 of the FOI Act', and cross-reference it to the amendment by adding the words 'see folio (x) of file (x)'. If there are a large number of amendments, it would be useful to pre-print stickers with the appropriate wording.

7.56 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).

7.57 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 [7.36]).

7.58 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

7.59 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.

7.60 Although information should be amended in a way that does not obliterate the original text of the record (see [7.53]), 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.

7.61 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)).

7.62 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(c) (discussed at [7.31]) sets out the matters that an applicant needs to include in their submission.

7.63 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)).

7.64 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.

7.65 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.

7.66 The Information Commissioner encourages agencies to ensure that the existence of an annotation is clearly displayed on the cover of the applicant's active paper files and flagged on electronic files such as 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

7.67 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).

7.68 The receiving agency or minister must agree to accept the transfer. The Information Commissioner expects agencies and ministers will agree, unless there are exceptional circumstances. For further information on transfers see Part 3 of these Guidelines.

Mandatory transfer of documents from exempt agencies

7.69 Certain agencies or persons are wholly exempt from the FOI Act or partly exempt in respect of particular types of documents, as set out in Schedule 2. Documents which originate from one of those agencies or persons and which are more closely connected with their functions, must be transferred to:

- the responsible portfolio department where the body or person is a wholly exempt agency listed in Part I of Schedule 2 (s 51C(2))
- the agency where the agency is exempt in respect of particular types of documents, as specified in Part II of Schedule 2 (s 51C(3)).

7.70 Part I of Schedule 2 lists agencies and those parts of the Department of Defence that are exempt from the operation of the FOI Act in respect of all documents in their possession. These agencies are principally intelligence agencies and agencies which compete on the open market with their private sector counterparts. Part II of Schedule 2 lists agencies that are exempt from the operation of the FOI Act in respect of specified types of documents, but are subject to the FOI Act in respect of all other documents.

7.71 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.

Notification of transfer

7.72 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 received by the first agency or minister (s 51C(6)(b)).

7.73 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 any relevant documents they hold in the same way (s 51C(8)).

Time limits

7.74 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).

7.75 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 Information Commissioner (see Part 10 of these Guidelines). However, the applicant's prior agreement is a factor that the Information Commissioner would take into account in deciding whether to give the agency an extension of time under s 51DA(3).

7.76 The Information Commissioner considers that 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 Information Commissioner may grant a period of extension that the Commissioner considers appropriate (s 51DA(4)). The Information 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)).

7.77 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.

Mode of delivery	Time of receipt
Post	The time at which the letter would be delivered in the ordinary course of post ²⁰
Over the counter at agency's or minister's office	Date of receipt stamped on request
Email or similar electronic communication	Date the communication is capable of being retrieved by the agency at the designated electronic address for amendment or annotation requests.

7.78 Section 14A of the *Electronic Transactions Act 1999* provides that an email or similar electronic communication is received at the time it is capable of being retrieved by the addressee, which is assumed to be the time it reaches the addressee's designated electronic address. This rule may be varied by agreement between the sender (the applicant) and the addressee (the agency or minister). The Information Commissioner considers that this requirement would only be satisfied by a conscious agreement following negotiation between the parties. A unilateral statement on the agency's or minister's website or an automated email response that the applicant cannot refuse would not constitute an agreement for the purposes of s 14A. Consequently, it is possible that the 30-day processing period may start on a weekend or public holiday.

7.79 As noted above at [7.75]–[7.76], 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 Information Commissioner will take into account any non-working days falling within the original period.

7.80 Processing a request for amendment can take a long 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 advise the applicant of the expected delay and their intention to apply to the Information Commissioner for an extension of time.

Acknowledging receipt

7.81 The FOI Act does not require agencies and ministers to acknowledge receipt of a request for amendment or annotation of personal information. The Information Commissioner nonetheless considers it good administrative practice for agencies and

²⁰ Acts Interpretation Act, s 29.

ministers to acknowledge receipt of an amendment or annotation request within 14 days, as required with FOI access requests.

Authorised decision making

7.82 Like access decisions 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 8 of these Guidelines).

7.83 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. The Information Commissioner suggests that 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

7.84 There are no charges for processing applications for amendment or annotation of records because they concern the applicant's own personal information (reg 5 Charges Regulations). For further guidance on charges see Part 4 of these Guidelines.

Comments on annotations

7.85 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.

7.86 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

7.87 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 [7.50]). Review rights include internal review and IC review. A complaint can also be made to the Information Commissioner about the handling of a request.

7.88 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.

7.89 A person may also complain to the Information Commissioner under the Privacy Act.

PART 6 — CONDITIONAL EXEMPTIONS

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PART 6 — CONDITIONAL EXEMPTIONS

6.1 Certain types of documents are conditionally exempt under Division 3 of Part IV of the FOI Act. This means that access must be given to the document unless in the circumstances access at that time would on balance be contrary to the public interest (s 11A(5)). Conditional exemptions relate to the following categories:

- Commonwealth-State relations (s 47B)
- deliberative processes (s 47C)
- financial or property interests of the Commonwealth or Norfolk Island (s 47D)
- certain operations of agencies (s 47E)
- personal privacy (s 47F)
- business (other than documents to which s 47 applies) (s 47G)
- research (s 47H)
- the economy (s 47J).

6.2 Each of these categories of exemption is discussed below, following discussion of the public interest test.

The public interest test

6.3 The 2010 reforms included three important changes:

- a single public interest test was introduced to apply to each of the conditional exemptions
- the new public interest test is defined to include certain factors that must be taken into account where relevant, and some factors which must not be taken into account
- the public interest test applies to a greater range of exemptions.

Another relevant reform that commenced in 2009 was the abolition of conclusive certificates.¹ Previously, a conclusive certificate issued by a minister or senior official would establish conclusively that disclosure of an internal working document would be contrary to the public interest.

6.4 The public interest in disclosure, reflected in the objects of the FOI Act (see Part 1 of these Guidelines), remains at the forefront of decision making about giving access. Agencies and ministers must have regard to the Information Commissioner's guidelines when determining whether giving access would be contrary to the public interest (s 11B(5)). These guidelines include references to court and tribunal decisions which may assist in applying the conditional exemptions. However, agencies should note that some of those decisions related to statutory provisions that have since been repealed or amended, and caution is therefore required in adopting some decisions as a precedent in interpreting the FOI Act.

¹ *Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act 2009.*

6.5 Prior to the 2010 reforms, various FOI exemptions contained a range of different public interest tests. The following table lists the former exemptions that incorporated a concept of public interest and the conditional exemptions that have replaced them. Of note is the fact that the public interest test now applies to documents where issues of personal privacy, business and research are raised. None of these categories previously included a public interest test.

Table 1: Exemptions subject to a public interest test

Exemptions prior to 2010 reforms	Conditional exemptions following 2010 reforms
Commonwealth-State relations (s 33A)	Commonwealth-State relations (s 47B)
internal working documents (s 36)	deliberative processes (s 47C)
documents affecting financial or property interests of the Commonwealth (s 39)	financial and property interests of the Commonwealth or Norfolk Island (s 47D)
documents concerning certain operations of agencies (s 40)	documents concerning certain operations of agencies (s 47E)
documents affecting the national economy (s 44)	the economy (s 47J)
-	personal privacy (s 47F)
-	business (s 47G)
-	research (s 47H)

What does the term ‘public interest’ mean?

6.6 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.²

6.7 The concept of public interest has also been described as something that is of serious concern or benefit to the public, not merely of individual interest.³ It has been held that public interest does not mean of interest to the public, but in the interest of the public.⁴

6.8 The term ‘public interest’ was not defined in the FOI Act when it was enacted.⁵ This approach encouraged decision makers to analyse what constitutes the public interest in a particular matter, rather than relying on set criteria. Following the 2010 reforms, the term

² Senate Standing Committee on Constitutional and Legal Affairs, *Report on the Cth Freedom of Information Bill 1978, 1979*, paragraph 5.25.

³ *British Steel Corporation v Granada Television Ltd* (1980) 3 WLR 780.

⁴ *Johansen v City Mutual Life Assurance Society Ltd* (1904) 2 CLR 186.

⁵ Senate Standing Committee on Constitutional and Legal Affairs, *Report on the Cth Freedom of Information Bill 1978, 1979*, paragraph 5.28.

remains largely undefined, although there are some factors which must *not* be taken into account (see paragraph 6.31). The term ‘public interest’ is necessarily broad and non-specific because what constitutes the public interest depends on the particular facts of the matter and the context in which it is being considered. The concept can be applied to a multitude of situations and circumstances. Public interest considerations (such as the administration of justice) may also be simultaneously evoked in favour and against disclosure of a document in a particular case.

6.9 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 of the matter at the time the decision is made.

6.10 It is not necessary for a matter to be in the interest of the public as a whole. It may be sufficient that the matter is in the interest of a section of the public bounded by geography or another characteristic that depends on the particular situation. The public interest relates to matters of common concern or relevance to all members of the public, or a substantial section of the public. A matter of particular interest or benefit to an individual or small group of people may nevertheless be a matter of general public interest. This is recognised in s 11B(3)(c) of the Act, which states that there can be a public interest in allowing a person to access his or her personal information.

Applying the public interest test

6.11 The FOI Act requires that:

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

6.12 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 8 of these Guidelines).

6.13 A document may be conditionally exempt if it falls under one of the eight categories outlined in paragraph 6.1. Before considering where the public interest lies in relation to disclosing a document, the decision maker must first determine whether the document is conditionally exempt.

6.14 A decision maker cannot withhold access to a document simply because it falls under one of the eight conditional exemption categories. Disclosure of conditionally exempt documents is required unless in the particular circumstances, and at the time of the decision, there is on balance countervailing harm which offsets the inherent public interest of giving access. The FOI Act acknowledges in the framing of the conditional exemptions

that there are certain harms that could occur if a document is disclosed. The basis of disclosure of those documents is that on balance more good than harm will result.

6.15 The six steps in determining if a document is conditionally exempt and applying the public interest test are set out below.

Step 1: Determine if the document is conditionally exempt

6.16 For each of the conditional exemptions, the harm threshold that must be reached is specified in the provision. The various harm thresholds vary in both the extent of the harm that disclosure would cause and the extent to which the decision maker must be satisfied that the harm would result. The only exception is the deliberative processes exemption (s 47C), which does not include any requirement of harm: the threshold requirement is that the document includes deliberative matter. Specific guidance on the criteria to be met in each of the eight conditional exemptions is provided later in this Part.

6.17 A decision maker's initial consideration of the harm that may arise is concerned with whether the document meets the criteria for being a conditionally exempt document. It is not a determination of where on balance the public interest lies, taking into account all relevant considerations.

6.18 For example, s 47D concerns conditional exemptions where documents relate to the financial or property interests of the Commonwealth, Norfolk Island, or an agency. In order to find that s 47D applies, a decision maker would need to be satisfied that if the document were disclosed there would be:

- a substantial adverse effect
- on the financial or property interests of the Commonwealth, Norfolk Island, or an agency.

6.19 These criteria require more than simply asserting that the Commonwealth's, or Norfolk Island's, or an agency's financial interests would be affected. The effect would need to be sufficiently serious or significant to cause a reasonable person to be concerned. The decision maker would need to be able to describe clearly the expected effect on the Commonwealth, Norfolk Island or the agency. At this stage, no other general public interest considerations (such as the likely effect on public debate, scrutiny of government administration or revealing misconduct by an agency officer) are taken into account.

Step 2: Identify the specific harm threshold

6.20 Because each exemption is different, there is necessarily a high degree of specificity in the considerations relevant to each decision about granting access. This directly affects how the factors favouring disclosure and those favouring non-disclosure are determined. These factors must be directly relevant to both the particular harm threshold of the conditional exemption and to the particular document, the particular circumstances and the particular time.

6.21 Using the previous example of s 47D, the specific harm that must be shown is a 'substantial adverse effect' on the financial or property interests of the Commonwealth, Norfolk Island or an agency.

6.22 While both Steps 1 and 2 involve consideration of harm, there is a distinction in the nature and purpose of this consideration. In Step 1, the consideration relates to whether or not the harm threshold has been met in order to determine whether the document is conditionally exempt. Step 2 relates to quantifying the harm as a preparatory step to weighing the factors in favour and against disclosure.

Step 3: Identify the factors favouring disclosure

6.23 The FOI Act sets out four factors favouring access, which must be considered if relevant. They are that disclosure would:

- (a) promote the objects of the Act
- (b) inform debate on a matter of public importance
- (c) promote effective oversight of public expenditure
- (d) allow a person to access his or her personal information (s 11B(3)).

6.24 For example, disclosure of a document that is conditionally exempt under s 47D might in the particular circumstances enhance the scrutiny of government decision making, or inform the community of the Australian Government's policies and practices in dealing with the public, or promote effective oversight by revealing the misconduct of an agency officer. These would be factors in favour of disclosure in the public interest.

6.25 The four 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. A non-exhaustive list of factors is below.

Public interest factors favouring disclosure

- (a) FOI Act promotes disclosure
 - 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. allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official⁶
 - iii. reveal or substantiate that an agency or official has engaged in misconduct or negligent, improper or unlawful conduct
 - iv. reveal the reason for a government decision and any background or contextual information that informed the decision
 - v. enhance the scrutiny of government decision making
- (b) inform debate on a matter of public importance
- (c) promote effective oversight of public expenditure
- (d) allow a person to access his or her personal information, or

⁶ See also *Carver and Fair Work Ombudsman* [2011] AICmr 5.

- 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 generally 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 fairness⁷
 - (g) contribute to the enforcement of the criminal law
 - (h) contribute to the administration of justice for a person
 - (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.

Step 4: Identify the factors against disclosure

6.26 The FOI Act does not list any factors weighing against disclosure. 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 harm may result from the disclosure of some types of documents in certain circumstances; for example, where disclosure could prejudice an investigation, unreasonably affect a person's privacy or reveal commercially sensitive information. Such policy considerations are reflected in the list of public interest factors that may be relevant in a particular case.

6.27 Citing the specific harm defined in the applicable conditional exemption is not itself sufficient to conclude that disclosure would be contrary to the public interest. However, the harm is an important consideration that the decision maker must weigh when seeking to determine where the balance lies.

6.28 For example, a factor against disclosure of a document that is conditionally exempt under s 47D would be the expected substantial adverse effect on the Commonwealth's financial interests. This factor would have been explored when the decision maker considered whether the conditional exemption applied. Other factors against disclosure might be a reasonable expectation that disclosure could be reasonably expected to prejudice the Commonwealth's ability to obtain similar information from third parties in the

⁷ 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].

future, or that disclosure would harm the interests of an individual or group of individuals who would be affected.

6.29 A non-exhaustive list of factors against disclosure is provided below.

Public interest factors against disclosure

- (a) could reasonably be expected to prejudice the protection of an individual's right to privacy, 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 generally 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.
- (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
- (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
- (g) could reasonably be expected to impede the flow of information to the police or another law enforcement or regulatory agency
- (h) could reasonably be expected to prejudice an agency's ability to obtain confidential information
- (i) could reasonably be expected to prejudice an agency's ability to obtain similar information in the future
- (j) could reasonably be expected to prejudice the competitive commercial activities of an agency
- (k) could reasonably be expected to harm the interests of an individual or group of individuals
- (l) could reasonably be expected to prejudice the conduct of investigations, audits or reviews by the Ombudsman or Auditor-General⁸

⁸ See *Australian Broadcasting Corporation and Commonwealth Ombudsman* [2012] AICmr 11.

- (m) could reasonably be expected to prejudice the management function of an agency
- (n) could reasonably be expected to prejudice the effectiveness of testing or auditing procedures

Step 5: Ensure that no irrelevant factor will be considered

6.30 The decision maker must take care not to consider factors that are not relevant in the particular circumstances. The FOI Act also nominates certain factors which must not be taken into account, as explained in paragraph 6.77 below. Some of these factors were commonly applied prior to the 2010 amendments to the Act.

6.31 The irrelevant factors are:

- 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 which the request for access to the document was made
- access to the document could result in confusion or unnecessary debate (s 11B(4)).

Step 6: Weigh the relevant factors to determine where the public interest lies

6.32 The decision maker must determine whether 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 disclosure. The timing is important: it is possible that certain factors may be relevant when the decision is made, but would not be relevant if the request were to be reconsidered some time later. In such circumstances a new and different decision could be made.⁹

6.33 In weighing the factors for and against release of a document, it is not sufficient simply to list the factors. The decision maker must explain the relevance of the factors and the relative weights given to those factors in their statement of reasons under s 26(1) (see Part 8 of these Guidelines).

Commonwealth-State relations

- 6.34 Section 47B creates a conditional exemption where disclosure of a document either:
- would, or could reasonably be expected to, cause damage to relations between the Commonwealth and a State (s 47B(a)), 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 the Commonwealth, to an authority of the Commonwealth or to a person receiving the communication on behalf of the Commonwealth (s 47B(b)), or

⁹ See *Washington and Australian Prudential Regulation Authority* [2011] AICmr 11.

- would, or could reasonably be expected to, cause damage to relations between the Commonwealth and Norfolk Island (s 47B(c), or
- would divulge information or matter communicated in confidence by or on behalf of the Government of Norfolk Island or 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, or could reasonably be expected to, cause damage to relations between Norfolk Island and a State (s 47B(e)), 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 the Government of Norfolk Island, to an authority of Norfolk Island or to a person receiving the communication on behalf of Norfolk Island or of an authority of Norfolk Island (s 47B(f)).

6.35 For the purposes of this exemption, a State includes the Australian Capital Territory and the Northern Territory (s 4(1)) (see Part 1 of these Guidelines). One or more of the provisions may apply to a document requested by the FOI applicant.

6.36 The 2010 reforms did not substantially change this exemption (formerly in s 33A), apart from redrafting to insert terminology that is consistent with the new public interest test in s 11A(5). Another change removed an agency's option to respond to a request for access to documents affecting Commonwealth-State relations by neither confirming nor denying the existence or non-existence of such a document under s 25.¹⁰

Author of the document irrelevant

6.37 The relevant documents do not have to have been supplied or written by the Commonwealth, a State agency or a State authority to fall within this exemption. The content of the document (and potentially the reason or circumstances why the document was created) is the deciding factor, rather than the originator's identity. 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

6.38 A decision maker may consider that disclosure would, or could reasonably be expected to damage the working relations of the Commonwealth and one or more States (s 47B(a)). 'Working relations' encompass all interactions of the Commonwealth and the States,¹¹ from formal Commonwealth-State consultation processes such as the Council of Australian Governments through to any working arrangements between agencies undertaken as part of their day to day functions.

6.39 Disclosure of the document may cause damage by, for example:

¹⁰ As recommended in Australian Law Reform Commission and Administrative Review Council, *Open government: A review of the federal Freedom of Information Act 1982*, Report No 77, 1995.

¹¹ See *Arnold (on behalf of Australians for Animals) v Queensland* (1987) 73 ALR 607.

- interrupting or creating difficulty in negotiations or discussions that are underway, including in the development of joint or parallel policy¹²
- adversely affecting the administration of a continuing Commonwealth-State project
- substantially impairing (but not merely modifying) Commonwealth-State programs¹³
- adversely affecting the continued level of trust or co-operation in existing inter-office relationships¹⁴
- impairing or prejudicing the flow of information to and from the Commonwealth.¹⁵

6.40 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.

6.41 The potential damage need not be quantified,¹⁶ but the effect on relations arising from the disclosure must be adverse. A potentially positive effect on Commonwealth-State relations would not fall within the conditional exemption.

Damage to be reasonably expected

6.42 The term ‘could be reasonably expected’ is explained in greater detail in Part 5 of these Guidelines. There must be real and substantial grounds for expecting the damage to occur which can be supported by evidence or reasoning.¹⁷ There cannot be merely an assumption or allegation that damage may occur if the document were released. For example, when consulting a State agency or authority as required under s 26A, the agency should ask the agency or authority for its reasons for expecting damage, as an unsubstantiated concern would not satisfy the s 47B(a) threshold.

Information communicated in confidence

6.43 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.¹⁸

6.44 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

¹² See *Arnold (on behalf of Australians for Animals) v Queensland* (1987) 73 ALR 607.

¹³ See *Re Cosco Holdings Pty Limited and Department of Treasury* [1998] AATA 124.

¹⁴ See *Arnold (on behalf of Australians for Animals) v Queensland* (1987) 73 ALR 607.

¹⁵ See *Re Shopping Centre Council and Australian Competition and Consumer Commission* [2004] AATA 119.

¹⁶ See *Re Jeffrey Samuel Angel and the Department of Arts, Heritage and Environment; HC Sleigh Resources Ltd and Tasmania* [1985] AATA 314.

¹⁷ See *Attorney-General's Department and Australian Iron and Steel Pty Ltd v Cockcroft* (1986) 10 FCR 180.

¹⁸ See *Re Mann and Australian Tax Office* [1985] AATA 144.

communication. The circumstances of the communication may also need to be considered, such as:

- whether the communication was ad hoc, routine or required¹⁹
- whether there were any existing, implied or assumed arrangements or understandings between the Commonwealth and State concerning the exchange or supply of information²⁰
- how the information was subsequently handled, disclosed or otherwise published.²¹

6.45 See also the discussion on s 33(b) (international relations) in Part 5 as that provision uses the same term.

6.46 This exemption should not be claimed where the documents relate to routine or administrative matters or documents that are already in the public domain.

A State and an authority of a State

6.47 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.²² Where there is doubt as to whether an entity is an ‘authority of a State’, the agency should consult the entity. The entity can confirm whether it is a State authority, or a business, contractor or private organisation (in which case an agency may need to consider whether an exemption under s 47G (business affairs) applies). The view of the State Government or the entity as to its status would be an influential but not decisive factor.

Consultation with a State or State authority, and Norfolk Island consultation with the Commonwealth or a State

6.48 Agencies and ministers are required under s 26A to consult a State, and Norfolk Island authorities and ministers are required under s 26AA to consult the Commonwealth or a State (where arrangements to do so are in place), before deciding to release a document where the State or the Commonwealth may reasonably contend that the document is conditionally exempt and that disclosure of the document would be contrary to the public interest.

6.49 Part 8 of these Guidelines provides further details on consultation with a State or an authority of a State, or the Commonwealth or a State in terms of Norfolk Island, including advising the State, the State authority or the Commonwealth of the decision and the available review rights and the applicable timeframes. The State, or the Commonwealth or the State in terms of Norfolk Island, may apply for internal review or IC review when it disagrees with the agency’s access grant decision (ss 54A, 54M).

¹⁹ See *Re Maher and Attorney-General’s Department* [1986] AATA 16.

²⁰ See *Re Maher and Attorney-General’s Department* [1986] AATA 16 for agreements and *Re Queensland and Australian National Parks and Wildlife Service (Australians for Animals, party joined)* [1986] AATA 224 for assumed arrangements.

²¹ See *James Edward McGarvin and Australian Prudential Regulation Authority* [1998] AATA 585.

²² See *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125, *Committee of Direction of Fruit Marketing v Delegate of the Australian Postal Commission* (1980) 144 CLR 577.

6.50 Formal consultation under ss 26A and 26AA grants agencies an additional 30 days in which to provide an access decision (s 15(6)). The Information Commissioner recommends that consultation be undertaken at an early stage in processing a request, that is, when the agency is gathering the information that would show whether or not the documents were conditionally exempt under one or both elements of s 47B.

Consultation comments to be considered when assessing conditional exemption

6.51 The decision maker must take into account any concerns raised by the consulted State or State authority. The consulted authority does not, however, have the right to veto access and agencies should take care that the authority is not under such a misapprehension. All other relevant considerations should be taken into account to ensure a sound decision is made.

6.52 The information provided during the consultation process can assist the decision maker in assessing whether or not the document does contain material that concern Commonwealth-State relations, and to assess what damage, if any, could occur from disclosure.

Consultation comments to be considered when assessing the public interest test

6.53 Where it has been found that disclosure may, or be reasonably expected to, damage Commonwealth-State relations, those findings could also be relevant public interest factors against disclosure.

6.54 Conversely, where the disclosure of the 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.

Applying the public interest test

6.55 The fact that disclosure would damage Commonwealth-State relations is not determinative of whether it would be contrary to the public interest to allow access, although it would be a relevant factor to consider. Other public interest factors may also be relevant (such as the desirability of allowing scrutiny of government activities).

Deliberative processes

6.56 A document may be conditionally exempt if it includes deliberative matter. 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
- a consultation or deliberation that has taken place
- in the course of, or for the purposes of, a deliberative process of the agency or minister (s 47C(1)).

6.57 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.²³

6.58 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 paragraph 6.74 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)).

6.59 The deliberative processes exemption differs from other conditional exemptions in that no type of harm is required to result from disclosure. The only consideration is whether the document includes content of a specific type, namely deliberative matter. If a document does not contain deliberative matter, it cannot be conditionally exempt under this provision, regardless of any harm that may result from disclosure.

6.60 While identifiable harm resulting from disclosure is not a specific factor in determining whether a document may be categorised as 'deliberative', it may be relevant subsequently when deciding where the balance of the public interest lies. If, in a particular case, a deliberative document may be released without appreciable harm resulting, this would tend to indicate that it would not be contrary to the public interest to disclose the document and therefore it must be released to the applicant.

6.61 This conditional exemption has a potentially broad reach. The Information Commissioner expects, however, that agencies will claim this conditional exemption only in clearly applicable circumstances. 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. A decision maker should ensure that the content of a document strictly conforms with the criteria for identifying 'deliberative matter' before claiming this conditional exemption (see paragraph 6.56 above and paragraphs 6.66–6.69 below).

Deliberative process

6.62 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

²³ Note that s 8A came into effect on 1 May 2011.

example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.²⁴

6.63 The deliberative process must relate to the functions of an agency, minister or the government of the Commonwealth. 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.²⁵

6.64 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 considered²⁶
- interim decisions or deliberations.

6.65 An opinion or recommendation does not need to be prepared for the sole purpose of a deliberative process.

Assessing deliberative matter

6.66 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.²⁷

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

6.68 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

²⁴ See *Re JE Waterford and Department of Treasury (No 2)* [1984] AATA 67. See *British American Tobacco Australia Ltd and Australian Competition and Consumer Commission* [2012] AICmr 19, [15]–[22]. See also *Carver and Fair Work Ombudsman* [2011] AICmr 5 in relation to code of conduct investigations.

²⁵ 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.

²⁶ See *Chapman and Minister for Aboriginal and Torres Strait Islander Affairs* [1996] AATA 210.

²⁷ See *Secretary, Department of Employment, Workplace Relations and Small Business and Staff Development Centre* (2001) 114 FCR 301.

- incidental administrative content²⁸
- procedural or day to day content²⁹
- the decision or conclusion reached at the end of the deliberative process³⁰
- matter that was not obtained, prepared or recorded in the course of, or for the purposes of, a deliberative process.

6.69 Where material was gathered as a basis for intended deliberations, it may be deliberative matter.³¹ 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.³²

Consultation

6.70 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.³³

6.71 The agency should create the consultation document with the intention of initiating a two way exchange between at least two parties. If the other person does not respond or participate, the consultation document will still be deliberative matter.

Purely factual material

6.72 The exclusion of purely factual material under s 47C(2)(b) is intended to allow disclosure of material used by the person who made the conclusion or decision following the deliberative process. A conclusion involving opinion or judgement is not purely factual material. For example, an assertion by the author of a document that something is a fact may be an opinion and not conclusive that the thing is a fact.

6.73 Where a decision maker finds it difficult to separate the purely factual material from the deliberative matter, both the elements may be exempt.³⁴ If the two elements can be

²⁸ See *Re VXF and Human Rights and Equal Opportunity Commission* [1989] AATA 107.

²⁹ See *Subramanian and Refugee Review Tribunal* [1997] AATA 31.

³⁰ See *Thomas Lincoln Chapman and Wendy Jennifer Chapman and Minister of Aboriginal and Torres Strait Islander Affairs* [1996] AATA 210; *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.

³¹ See *Secretary, Department of Employment, Workplace Relations and Small Business and Staff Development Centre* (2001) 114 FCR 301.

³² See *Re Susic and Australian Institute of Marine Science* No Q89/580 AAT [6189], *Re Booker and Department of Social Security* No Q89/193 AAT NO 6189.

³³ *James Edward McGarvin and Australian Prudential Regulation Authority* [1998] AATA 585.

³⁴ See *Eccleston and Department of Family Services and Aboriginal and Islander Affairs*, unreported decision of the Queensland Information Commissioner, Decision No 93002, 30 June 1993; *Chapman and Minister of Aboriginal and Torres Strait Islander Affairs* [1996] AATA 210.

separated, the decision maker should consider giving the applicant a copy with deletions under s 22 to provide access to the purely factual material.³⁵

Reports on scientific or technical matters

6.74 As noted in paragraph 6.58 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)).

6.75 The sciences include the natural sciences of physics, chemistry, astronomy, biology (such as botany, zoology and medicine³⁶) and the earth sciences (which include geology, geophysics, hydrology, meteorology, physical geography, oceanography, and soil science). Technical matters involve the application of science, and include engineering.³⁷

6.76 The social sciences, or the study of an aspect of human society, are not scientific for the purposes of this exception (for example, anthropology, archaeology, economics,³⁸ geography, history, linguistics, political science, sociology and psychology).

Applying the public interest test

6.77 There is considerable case law on the former exemption provision (formerly s 36) as to whether disclosure of an internal working document would be contrary to the public interest, and whether reasonable grounds exist for a conclusive certificate claim to that effect. Agencies should be cautious in applying those precedents in light of the changes to the FOI Act in 2009 and 2010. Many earlier decisions applied or referred to the AAT's decision in *Re Howard and the Treasurer*,³⁹ which listed five factors that could support a claim that disclosure would be contrary to the public interest. Three of those factors are now declared to be irrelevant considerations by s 11B(4) of the Act (the high seniority of the author of the document in the agency to which the request for access to the document was made, misinterpretation or misunderstanding of a document, and confusion or unnecessary debate following disclosure). The other two Howard factors (disclosure of policy development, and inhibition of frankness and candour) are not, in those terms, consistent with the new objects clause of the FOI Act (s 3) and the list of public interest factors favouring access in s 11B(3). It is important that agencies now have regard to the more extensive range of public interest factors that may favour or be against disclosure (see paragraphs 6.23–6.29 above).

³⁵ See *Re Jennifer May McDonald Harris v Australian Broadcasting Corporation and Keith Cameron Mackriell and Michael H Cosby* (1983) 78 FLR 236.

³⁶ See *Re Eleanor S Wertheim and the Department of Health* [1984] AATA 537.

³⁷ See *Re Jennifer May McDonald Harris v Australian Broadcasting Corporation and Keith Cameron Mackriell and Michael H Cosby* (1983) 78 FLR 236 per Beaumont J.

³⁸ See *Re John Edward O'Brien Waterford and the Treasurer of the Commonwealth of Australia* [1985] AATA 114.

³⁹ *Re Howard and the Treasurer* [1985] AATA 100.

Documents affecting financial or property interests of the Commonwealth

6.78 Section 47D conditionally exempts a document where disclosure would have a substantial adverse effect on the financial or property interests of the Commonwealth, Norfolk Island or an agency.⁴⁰

6.79 The 2010 reforms have not substantially changed this exemption, other than by making the exemption conditional.

Financial or property interests

6.80 The financial or property interests of the Commonwealth, Norfolk Island or an agency relate to both expenditure and revenue-generating activities. An agency's property interests may be broader than merely buildings and land, such as intellectual property or the Crown's interest in natural resources.⁴¹

6.81 The financial interests of the Commonwealth may encompass indirect effect. 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 best value for money through a competitive tendering process may be compromised.⁴²

Substantial adverse effect

6.82 For the conditional exemption to apply, the potential effect that would be expected to occur following disclosure must be both substantial⁴³ and adverse. This standard is discussed further in Part 5 of these Guidelines.

6.83 An agency cannot merely assert that its financial or property interests would be adversely affected following disclosure. The agency should consider and provide reasons supporting its conclusion for both elements of the conditional exemption. A comprehensive description would also indicate whether the effect could reasonably be expected to occur and why.

6.84 A detailed description of the predicted effect would enable a comprehensive, evidence-based comparison of the predicted effect against the status quo. The comparison would indicate whether the effect would be adverse, substantial or both. It would be best practice for the comparison, where it would not include exempt material, to be included in the statement of reasons (s 26) if the exemption is relied upon (see Part 8 of these Guidelines for guidance on preparing statements of reasons).

6.85 The effect must bear on the actual financial or property interest of the Commonwealth, Norfolk Island or agency. If the effect were, say, to reduce the amount of

⁴⁰ For an example of the application of this exemption see *Briggs and the Department of the Treasury (No. 3)* [2012] AICmr 22

⁴¹ See *Re Connolly and Department of Finance* [1994] AATA 167, in which the Commonwealth property was the uranium stockpile.

⁴² See *The Staff Development & Training Centre Pty Ltd and Secretary, Department of Employment, Workplace Relations and Small Business* (2001) 114 FCR 301.

⁴³ See *Harris v Australian Broadcasting Corporation* (1983) 78 FLR 236.

revenue that may be generated, the test would not be satisfied, particularly where the process for the collection is not affected, or required under legislation.⁴⁴

Certain operations of agencies

6.86 Section 47E conditionally exempts documents where disclosure would, or could reasonably be expected to, prejudice or have a substantial adverse effect on certain listed agency operations.

6.87 There are four 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 this Act would, or could reasonably be expected to, do any of the following:

- (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, by Norfolk Island or by an agency or
- (d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency (s 47E).

6.88 The 2010 reforms repealed the provision relating to an agency's ability to conduct industrial relations (former s 40(1)(e)), implementing a recommendation of the *Open government* report.⁴⁵ Where an agency is considering documents relating to its industrial relations activities, conditional exemptions such as s 47E(c) (management of personnel), s 47E(d) (effective operations of the agency) or s 47F (personal privacy) may be relevant.

6.89 Various terms in the conditional exemption are explained below.

Prejudice

6.90 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 in Part 5.

6.91 In the context of this exemption, a prejudicial effect could be regarded as one which 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.⁴⁶

⁴⁴ See *Re Hart and Deputy Commissioner of Taxation* [2002] AATA 1190.

⁴⁵ Australian Law Reform Commission and Administrative Review Council, *Open government: A review of the federal Freedom of Information Act 1982*, Report No 77, 1995.

⁴⁶ See *James and Australian National University* [1984] AATA 18.

Reasonably be expected

6.92 For the grounds in s 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 in Part 5 of these Guidelines. There must be more than merely an assumption or allegation that damage may occur if the document were to be released.

6.93 Where the documents relate more closely to investigations relating to compliance with a taxation law or the enforcement or proper administration of the law, either due to the involvement of a police service or the Director of Public Prosecutions, or by the agency’s internal investigators, the agency may need to consider the law enforcement exemption (s 37, see Part 5 of these Guidelines).

Reasons behind predicted effect

6.94 An agency cannot merely assert that an effect would occur following disclosure. The particulars of the predicted effect and the reasons behind the identification of those particulars should be articulated during the decision making process. Those particulars should also indicate whether the effect could reasonably be expected to occur. Where the conditional exemption is relied upon, the relevant particulars and reasons should form part of the decision maker’s statement of reasons, if they can be included without disclosing exempt material (see Part 8 of these Guidelines).

Prejudice the effectiveness of testing, examining or auditing methods

6.95 Where the 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.

6.96 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 (s 26).

6.97 The decision maker should explain how the expected effect would prejudice the effectiveness of the agency’s testing methods. A detailed description of the predicted effect would enable a comprehensive comparison of the predicted effect against the usual effectiveness of existing testing methods. The comparison would indicate whether or not the effect would be prejudicial.

6.98 Examples of testing methods considered by the AAT include:

- safety audits and testing regimes⁴⁷

⁴⁷ See *Vasta and McKinnon and Civil Aviation Safety Authority* [2010] AATA 499.

- licensing board examinations
- risk assessment matrices⁴⁸
- compliance audit indicators and any comparative weighting of the indicators
- accident investigation techniques⁴⁹
- tests or examinations leading to qualifications⁵⁰
- potential fraud case assessment and analysis tools.⁵¹

6.99 Circumstances considered by the AAT where disclosure of the testing method may prejudice the method include:

- providing forewarning of the usual manner of audits
- 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 audited⁵²
- permitting pre-prepared responses which would compromise the integrity of the testing process.⁵³

Prejudice the attainment of testing, examination and/or auditing objectives

6.100 Where the document relates to the integrity of the attainment of the objectives of the tests, examinations or audits by an agency, the decision maker must address both elements of the conditional exemption in s 47E(b), that is, that:

- (a) an effect would reasonably be expected following disclosure, and
- (b) the expected effect would be prejudicial to the attainment of the objects of the audit, test or examination being conducted.

6.101 The agency would be undertaking the testing or examination to meet particular requirements, and have a particular need for the results (the test objectives). The underlying operational requirements for the test objectives is the context for assessing the document against the conditional exemption and should be included in the statement of reasons (s 26) if the exemption is relied upon.

6.102 Some examples of test objectives include:

- ensuring only properly qualified people are flying aircraft
- ensuring the selection of the most competent and best candidates for promotion⁵⁴

⁴⁸ See *Lobo and Secretary, Department of Education, Science and Training* [2007] AATA 1891.

⁴⁹ See *Vasta and McKinnon and Civil Aviation Safety Authority* [2010] AATA 499.

⁵⁰ See *James and Australian National University* [1984] AATA 18.

⁵¹ See *Splann and Centrelink* [2009] AATA 320.

⁵² See *Ascic and Australian Federal Police* [1986] AATA 108.

⁵³ See *Re Crawley and Centrelink* [2006] AATA 572.

⁵⁴ See *Ascic and Australian Federal Police* [1986] AATA 108.

- ensuring that an agency's expenditure is being lawfully spent through proper acquittal.

6.103 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 system⁵⁵
- allow for examiners to be inhibited in future marking by the threat of challenge to their marking⁵⁶
- 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 psychometric testing to ascertain an applicant's eligibility for a certain pension⁵⁷ or patent examiner examinations.⁵⁸

Substantial adverse effect on management or assessment of personnel

6.104 Where the document relates to the agency's policies and practices relating to the assessment and 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.

6.105 For this exemption to apply, the documents must relate to either:

- the management of personnel – including the broader human resources policies and activities, recruitment,⁵⁹ promotion, compensation, discipline, harassment and occupational 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.

6.106 The terms 'would reasonably be expected' and 'substantial adverse' have the same meanings as explained in Part 5 of these Guidelines. If the predicted effect would be substantial but not adverse or maybe even beneficial, the conditional exemption does not apply.⁶⁰ It would be unlikely for the potential embarrassment of an employee to be considered to be an effect on an agency.⁶¹

⁵⁵ See *Asic and Australian Federal Police* [1986] AATA 108.

⁵⁶ See *Asic and Australian Federal Police* [1986] AATA 108.

⁵⁷ See *Re Crawley and Centrelink* [2006] AATA 572.

⁵⁸ See *Re Watermark and Australian Industrial Property Organisation* (1995) 70 FOIR 61.

⁵⁹ See *Re Dyrenfurth and Department of Social Security* [1987] AATA 140.

⁶⁰ See *Albanese and CEO Australian Customs Service* [2006] AATA 900.

⁶¹ See *Wilson and Australian Postal Corporation* [1994] AATA 189.

6.107 The predicted effect must arise from the disclosure of the documents that are being assessed.⁶² 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 that are required to investigate a workplace complaint,⁶³ or referee reports to assess job applicants.⁶⁴

6.108 Where the 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 (s 15A) in the first instance.

Substantial adverse effect on an agency's proper and efficient conduct of operations

6.109 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.⁶⁵

6.110 Examples of circumstances where the AAT has upheld the exemption include where it was established that:

- disclosure of the Australian Electoral Commission 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 investigators⁶⁶
- disclosure of information provided by industry participants could prejudice the Australian Competition and Consumer Commission's ability to investigate anti-competitive behaviour and its ability to perform its statutory functions⁶⁷
- disclosure of the Universal Resource Locators (URLs) and Internet Protocols (IPs) 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.⁶⁸

6.111 The exemption may also apply to documents that relate to a complaint made to an investigative body. The disclosure of this type of information could reasonably affect the willingness of people to make complaints to the investigative body, which would have a

⁶² See *Re Dyrenfurth and Department of Social Security* [1987] AATA 140.

⁶³ See *Albanese and CEO Australian Customs Service* [2006] AATA 900, *Wilson and Australian Postal Corporation* [1994] AATA 189.

⁶⁴ See *Re Department of Social Security v Eric Bernard Dyrenfurth* (1988) 8 AAR 544.

⁶⁵ 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.

⁶⁶ *Re Murphy and Australian Electoral Commission* [1994] AATA 149.

⁶⁷ *Re Telstra Australia Limited and Australian Competition and Consumer Commission* [2000] AATA 71.

⁶⁸ *Re Electronic Frontiers Australia and the Australian Broadcasting Authority* [2002] AATA 449.

substantial adverse effect on the proper and efficient conduct of the investigative body's operations.⁶⁹

6.112 The predicted effect must bear on the agency's 'proper and efficient' operations, that is, the agency is undertaking its expected activities 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 public interest factors of accountability and transparency are further weighted towards disclosure.

Personal privacy

6.113 Section 47F protects personal privacy by providing that a document is conditionally exempt if its disclosure under FOI would involve the unreasonable disclosure of personal information of any person (including a deceased person).

6.114 This exemption does not apply if the personal information is only about the applicant (s 47F(3)). Where the information is joint personal information, however, the exemption may apply. For more information about joint personal information see paragraph 6.136 below.

6.115 In some cases, providing indirect access to certain personal information via a qualified person may be appropriate (s 47F(5) – see paragraph 6.153 below).

Personal information

6.116 Personal information means information or an opinion (including information forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion (s 4(1)). In other words, personal information:

- identifies, or could identify, a person
- says something about a person
- may be opinion
- may form part of a database
- may be true or untrue
- relates to a natural person.⁷⁰

6.117 Personal information can include a person's name, address, telephone number,⁷¹ date of birth, medical records, bank account details, taxation information⁷² and signature.⁷³

⁶⁹ 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.

⁷⁰ See s 4 of the *Freedom of Information Act 1982* and s 6 of the *Privacy Act 1988*.

⁷¹ See *Re Green and Australian and Overseas Telecommunications Corporation* [1992] AATA 252.

⁷² See *Re Murtagh and Commissioner of Taxation* [1984] AATA 249 and *Re Jones and Commissioner of Taxation* [2008] AATA 834.

⁷³ See *Re Corkin and Department of Immigration & Ethnic Affairs* [1984] AATA 448.

For more information about personal information, see privacy material on the OAIC website at www.oaic.gov.au.

A person's identity is apparent or reasonably ascertainable

6.118 For information or opinion to be personal information, the individual's identity needs to be apparent, or reasonably ascertainable. The question of whether the individual's identity needs to be ascertainable by the applicant or the world at large has not been settled.

6.119 The issue has been considered by State jurisdictions, including the Victorian Court of Appeal in *Victoria Police v Marke*.⁷⁴ The Court of Appeal considered whether disclosure under FOI was disclosure to the world at large. The majority in that case held that disclosure under FOI was not necessarily disclosure to all the world. Weinberg JA held the Tribunal was 'entitled to assume that once a document is made available, it has the potential to be disseminated widely' and that this assumption would be true in most cases.⁷⁵ To require consideration of the likely extent of dissemination would be 'a burdensome, and indeed pointless, exercise, which in the vast majority of cases will be of no relevance.'⁷⁶ However, where a person seeking access to information puts the issue of dissemination 'squarely in issue', the Tribunal is bound to consider the matter.⁷⁷

6.120 In *Re West Australian Newspapers Limited and Department of the Premier and Cabinet* the Western Australian Information Commissioner took the broader view and stated that:

... if any person, even if only a person having some additional knowledge, could reasonably ascertain the identity of a particular individual from particular information about that individual, that information will be personal information for the purposes of the FOI Act.⁷⁸

6.121 In the Commonwealth FOI jurisdiction, the Information Commissioner suggests that, generally, the individual's identity needs to be reasonably ascertainable by the applicant. The ability of an applicant to reasonably ascertain an individual's identity will depend on the context and circumstances.⁷⁹

6.122 In other words, it depends on whether it is practically possible for an applicant to link pieces of information to identify an individual. If the agency or minister is aware of relevant information that the applicant has (or could easily obtain) to ascertain the individual's identity, this is to be taken into consideration. An agency or minister must not, however, seek information from the applicant about what other information they have or could obtain.

⁷⁴ *Victoria Police v Marke* [2008] VSCA 218.

⁷⁵ *Victoria Police v Marke* [2008] VSCA 218 at 68.

⁷⁶ *Victoria Police v Marke* [2008] VSCA 218 at 69.

⁷⁷ *Victoria Police v Marke* [2008] VSCA 218 at 85. See also *XYZ v Victoria Police* [2010] VCAT 255 at 181.

⁷⁸ *Re West Australian Newspapers Limited and Department of the Premier and Cabinet* [2006] WAICmr 23.

⁷⁹ See Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108, 2008, paragraph 6.54. See also *Autism Aspergers Advocacy Australia and Department of Families, Housing, Community Services and Indigenous Affairs* [2012] AICmr 28.

6.123 The Information Commissioner suggests that, where an agency or minister is unaware of the other information the applicant may have, the question to be asked is what other information a reasonable member of the public would be able to access.

6.124 In certain circumstances, however, it may be appropriate to consider whether the individual's identity may be ascertainable by the world at large. This may be appropriate where the applicant is a journalist or interest group, for example. This issue is discussed further in relation to 'unreasonableness' in paragraph 6.127 below.

Says something about a person

6.125 The information needs to convey or say something about a person, rather than just identify them. The mere mention of a person's name or signature may, however, reveal personal information about them depending on the context.⁸⁰ For example, a person's name may appear in a list of benefit recipients, and given that context, the information would be personal information.

Natural person

6.126 An individual is a natural person and does not include a corporation, trust, body politic or incorporated association.⁸¹ The FOI Act provides for the extension of the term 'individual' to include a deceased person. This differs from the Privacy Act definition, which does not include such an extension.

Unreasonable disclosure

6.127 The personal privacy exemption is designed to prevent the unreasonable invasion of third parties' privacy.⁸² 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.

6.128 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 sources⁸³

⁸⁰ See *Re Veale and Town of Bassendean* [1994] WAICmr 4.

⁸¹ See s 22 of the *Acts Interpretation Act 1901*.

⁸² See *Re Chandra and Minister for Immigration and Ethnic Affairs* [1984] AATA 437; *Parnell and Department of the Prime Minister and Cabinet* [2012] AICmr 31; *'R' and Department of Immigration and Citizenship* [2012] AICmr 32.

⁸³ See *Re Jones and Federal Commissioner of Taxation* [2008] AATA 413; *'Q' and Department of Human Services* [2012] AICmr 30.

- (d) any other matters that the agency or minister considers relevant (s 47F(2)).⁸⁴

6.129 These are the same matters that must be taken into account for the purposes of consulting an affected third party under s 27A(2).

6.130 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 protection the personal privacy of a third party ...⁸⁵

6.131 The Federal Court affirmed the approach provided in *Re Chandra* and stated that there are four factors for determining whether disclosure is unreasonable in all the circumstances. The four factors are whether:

- (a) the author of the document is identifiable⁸⁶
- (b) the documents contain third party personal information
- (c) release of the documents would cause stress on the third party
- (d) no public purpose would be achieved through release.⁸⁷

6.132 Other factors considered to be relevant include:

- the nature of the information, that is, whether it is common or disclosure would result in serious consequences⁸⁸
- how the information was obtained, that is, covertly, in confidence or using information gathering powers⁸⁹
- the current relevance or age of the information⁹⁰

⁸⁴ 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.

⁸⁵ See *Re Chandra and Minister for Immigration and Ethnic Affairs* [1984] AATA 437 at 259.

⁸⁶ 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 paragraph 6.31).

⁸⁷ *Re McCallin and Department of Immigration* [2008] AATA 477.

⁸⁸ See *Re Timmins and National Media Liaison Service* [1986] AATA 23, *Re Z and Australian Taxation Office* [1984] AATA 458.

⁸⁹ See *Re Timmins and National Media Liaison Service* [1986] AATA 23, *Re Lianos and Department of Social Security* [1985] AATA 38.

- whether it would shed light on the workings of government.⁹¹

6.133 For example, in *Colakovski v Australian Telecommunications Corp*, Heerey J considered that ‘... if the information disclosure were of no demonstrable relevance to the affairs of government and was likely to do no more than excite or satisfy the curiosity of people about the person whose personal affairs were disclosed ... disclosure would be unreasonable’.⁹²

6.134 Whether the motives and identity of the applicant are relevant when considering unreasonableness is not settled.⁹³ The FOI Act provides that a person’s right of access is not affected by any reasons they give for seeking access, or what beliefs the agency or minister have about the person’s reasons (s 11(2)). This leads to the position that an objective test of balancing public interests should be taken.

6.135 In the Victorian case of *Re Lapidos and Office of Corrections*, however, Fricke DP said that given the exemption turns on unreasonableness:

... one is driven to consider the purpose of the application. Disclosure to one applicant ... might not be unreasonable, but it might be unreasonable vis-à-vis another applicant. The very words ‘unreasonable disclosure’ compel one to engage in a balancing exercise, weighing on the one hand, the strength of the applicant’s claim to access, and, on the other hand, the interests of other persons ...⁹⁴

Joint personal information

6.136 Documents often contain personal information about more than one individual. Where possible, personal information should be dealt with separately under the 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, or information about a relationship provided to Centrelink or the Child Support Agency.

6.137 Intertwined personal information should be separated where possible, without diminishing or impairing the quality or completeness of the applicant’s personal information.⁹⁵ Where it is not possible to separate an applicant’s personal information from a third party’s personal information, the exemption may be claimed if it is unreasonable to release the information.

6.138 Whether it is unreasonable to release the information will depend on the relationship between the individuals. Decisions about the release of joint personal information should only be made after consultation with the third party where such

⁹⁰ See *Re Wiseman and Defence Service Homes Corp* [1987] AATA 895, *Haneef and Australian Federal Police and Commonwealth Director of Public Prosecutions* [2010] AATA 514.

⁹¹ See *Colakovski v Australian Telecommunications Corporation* (1991) 29 FCR 429.

⁹² *Colakovski v Australian Telecommunications Corporation* (1991) 29 FCR 429.

⁹³ See *Re Carter and Department of Health (ACT)* [1995] AAT 101, *Re Williams and Registrar of Federal Court of Australia* [1985] AATA 226.

⁹⁴ *Re Lapidos and Office of Corrections (Vic) [No 3]* (1990) 4 VAR 150 at 154.

⁹⁵ *Re Anderson and Australian Federal Police* [1986] AATA 79 and *Re McKinnon and Department of Immigration and Ethnic Affairs* [1995] AATA 364.

consultation is reasonably practical. For more information about consultation see paragraph 6.143 below.

Information about agency employees

6.139 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.

6.140 Where public servants' personal information is included in a document because of their usual duties or responsibilities, it would not be unreasonable to disclose unless special circumstances existed. This is because the information would reveal only that the public servant was performing their public duties.⁹⁶ Such information may often also be publicly available, such as on an agency website.

6.141 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)). In addition, where an individual has a propensity to pursue matters obsessively and there is no need for them to contact a particular public servant in the future, disclosure of the public servant's name may be unreasonable.⁹⁷

6.142 There needs to be careful consideration of the exemption where the personal information does not relate to the public servant's usual duties and responsibilities. For example, if a document included information about an individual's disposition or private characteristics, disclosure is likely to be unreasonable.⁹⁸ This would generally include the reasons a public servant has applied for personal leave, information about their performance management or whether they were unsuccessful during a recruitment process.

Consultation

6.143 Where a document includes personal information relating to a person who is not the applicant, an agency or minister should give that individual (the third party) a reasonable opportunity to make a submission that the document should be 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.

6.144 Such consultation should occur where:

- (a) it is reasonably practicable. This will depend on all the circumstances including the time limits for processing the request (s 27A(4)). For example, it may not be reasonably practicable if the agency cannot locate the third party in a timely and effective way.

⁹⁶ See *Commissioner of Police v District Court of NSW* (1993) 31 NSWLR 606.

⁹⁷ *Re Bartucciutto and Commonwealth Ombudsman* [2005] AATA 1109.

⁹⁸ *Re Toomer & Department of Primary Industries and Energy* [1990] AATA 85 and *Re Dyki & Commissioner of Taxation* (1990) 12 AAR 554.

- (b) it appears to the agency or minister that the third party might reasonably wish to make a submission that the document should be 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)).

6.145 Agencies and ministers should generally start from the position that a third party might 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.

6.146 If there is a need to consult third parties under s 27A, the timeframe for making a decision is extended by 30 days (s 15(6)). Agencies should identify as soon as possible within the initial 30 day decision making period whether there is a need for consultation.

Submissions

6.147 Where consultation occurs, a third party should be asked if 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.

They should be asked to provide reasons and evidence for their submission.

6.148 To assist the third party to make a submission it may be necessary to give them a copy of the information. This could 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 should also take care not to breach any of its obligations under the Privacy Act during consultation, for example, by identifying the applicant without consent. For more information about an agency's obligations regarding the disclosure of personal information, see the guidelines to Information Privacy Principle 11 at www.oaic.gov.au.

6.149 The letter to the third party may also include information about the obligation of agencies and ministers to provide the public with access to information that has been released in documents provided to an applicant (s 11C).

6.150 An agency or minister must have regard for any submissions made before deciding whether to give access to the document (ss 27A(3) and 27A(4)). The third party does not, however, have the right to veto access and agencies should take care that the third party is not under such a misapprehension.

6.151 Where an agency or minister decides to give the applicant access to documents, after a third party has provided a submission, they must give the third party written notice (s 27A(5)). Access to a document must not be given to the applicant until the third party's opportunities for review have run out, or if review did occur, the decision still stands (s 27A(6)).

General information about consultation

6.152 General information about consultation is provided in Part 3. That Part provides guidance about extended timeframes, notice of decision, review rights and when access to documents may be provided.

Access to qualified person (indirect access)

6.153 An agency or minister may provide a qualified person with access to a document that would otherwise be provided to an 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 applicant might be detrimental to their physical or mental health or well-being (s 47F(4)(b)).

6.154 A broad approach should be taken in considering an applicant's physical or mental health or well-being. The possibility of detriment must appear to be real or tangible.⁹⁹

6.155 Where indirect access is to be provided, the 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)). 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, mental health or well-being, including:

- a medical practitioner
- a psychiatrist
- a psychologist
- a counsellor¹⁰⁰
- a social worker (s 47F(7)).

6.156 Where access is provided to a qualified person, it is left to their discretion as to how they facilitate the applicant's access to the document.

Business information

6.157 A document is conditionally exempt if it discloses information (business 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, 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

⁹⁹ *Re K and Director-General of Social Security* [1984] AATA 252.

¹⁰⁰ The *Freedom of Information (Amendment) Reform Act 2010* replaced the previous reference to 'marriage guidance counsellor' with a reference to 'counsellor'.

- could reasonably be expected to prejudice the future supply of information to the Commonwealth, Norfolk Island 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)).

6.158 If a decision maker finds that the document is conditionally exempt, the decision maker must then apply the public interest test before concluding that the document is exempt from disclosure (see paragraphs 6.3–6.33 above).

6.159 If the business information concerns a person, organisation or undertaking other than the applicant, the decision maker may be required to consult that third party (see paragraphs 6.178–6.187 below).

Exemption does not apply in certain circumstances

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

6.161 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 seek an exemption under s 47 for documents containing such information if the circumstances call for it. This is a limited exception to the normal rule that more than one exemption can apply to the same information (see s 32).

Elements of the exemption

6.162 The operation of the business information 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)). For the purposes of this conditional exemption, an undertaking includes an undertaking carried on by, or by an authority of, a 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.¹⁰¹ In other words, it is intended to protect the interests of third parties dealing with the government. The exemption has not materially changed since the Federal Court considered it in 1983. Therefore, 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.¹⁰² As an alternative, one of the specific

¹⁰¹ *Harris v Australian Broadcasting Corporation* (1983) 78 FLR 236.

¹⁰² In *Secretary, Department of Employment, Workplace Relations and Small Business v The Staff Development and Training Centre* (2001) 114 FCR 301 the Full Federal Court seemed to accept (without referring to the *Harris* case) that a government agency could claim this conditional exemption, although it did not decide the case on this point. The question therefore remains uncertain.

exemptions for agencies in respect of particular documents in Part II of Schedule 2 may be available.

6.163 To be conditionally exempt, the disclosure of business information in a document must reasonably be expected to have either of the following outcomes:

- an unreasonable and adverse effect on the business or professional affairs of a person or on the business, commercial or financial affairs or an organisation or undertaking, or
- prejudice the future supply of information to the Commonwealth or an agency for the purpose of the administration of a law of the Commonwealth or of a Territory or the administration of matters administered by an agency.

Could reasonably be expected

6.164 This term is explained in Part 5 of these Guidelines. As in other applications, it refers to an expectation that is based on reason. Mere assertion or speculative possibility is not enough.¹⁰³

Unreasonable adverse effect of disclosure

6.165 The presence of ‘unreasonably’ in s 47G(1) implies a need to balance public and private interests, but this does not amount to the public interest test of 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 balance. This is inherent in the structure of the business information exemption.

6.166 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’s activities pose a threat to public safety may have a substantial adverse effect on that business but it may be reasonable in the circumstances to disclose it. Similarly, it would not be unreasonable to disclose information about a business that revealed serious criminality.¹⁰⁴ These considerations necessitate a weighing of a public interest (public safety) against a private interest (preserving the profitability of a business) but at this stage it bears only on the threshold question of whether the disclosure would be unreasonable.¹⁰⁵

6.167 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 the administration or that form part of a flow of correspondence and other documents between the administration and business. The AAT concluded that such documents inclined more to arguments favouring scrutiny of government activities when considering whether disclosure would be unreasonable.¹⁰⁶ By

¹⁰³ *Re Actors’ Equity Association (Aust) and Australian Broadcasting Tribunal (No 2)* [1985] AATA 69.

¹⁰⁴ *Searle Australia Pty Ltd v Public Interest Advocacy Centre and Department of Community Services and Health* (1992) 108 ALR 163.

¹⁰⁵ In relation to the test of reasonableness, see ‘E’ and *National Offshore Petroleum Safety and Environmental Management Authority* [2012] AICmr 3.

¹⁰⁶ *Re Actors’ Equity Association (Aust) and Australian Broadcasting Tribunal (No 2)* [1985] AATA 69.

implication, the exemption is more likely to protect documents obtained from third party businesses.

6.168 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.¹⁰⁷

Business or professional affairs

6.169 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’.¹⁰⁸

6.170 In the absence of a definition in the FOI Act, ‘professional’ bears its usual meaning. The Shorter Oxford Dictionary defines ‘professional’ as relating to a vocation in which a professed knowledge of some department of learning is used in its application to the affairs of others, especially one of the three learned professions of divinity, law and medicine. 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.¹⁰⁹ 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.

6.171 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 community acceptance that the audit activities of officers of the Australian Taxation Office constituted ‘professional affairs’ led the AAT to refuse to extend the ordinary meaning of the expression in that case.¹¹⁰

Organisation or undertaking

6.172 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 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

6.173 A document that discloses the kind of information described in paragraph 6.157 above will be conditionally exempt if the disclosure could reasonably be expected to

¹⁰⁷ *Re Daws and Department of Agriculture Fisheries and Forestry* [2008] AATA 1075.

¹⁰⁸ *Re Mangan and The Treasury* [2005] AATA 898.

¹⁰⁹ *Re Fogarty and Chief Executive Officer, Cultural Facilities Corporation* [2005] ACTAAT 14.

¹¹⁰ *Re Dyki and Commissioner of Taxation* (1990) 12 AAR 554.

prejudice the future supply of information to the Commonwealth, Norfolk Island 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)).

6.174 This limb of the conditional exemption comprises two 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.¹¹¹

6.175 There must be a reasonable likelihood that disclosure would result in a reduction in both the quantity and quality of business information flowing to the government.¹¹² In some cases, disclosing the identity of the person providing the business information may be sufficient to prejudice the future supply of information.¹¹³ 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.

6.176 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 in issue is routine or administrative (that is, generated as a matter of practice).¹¹⁴

6.177 Unlike the other limb of this conditional exemption, s 47G(1)(b) does not require that the prejudice to the future supply of business information be unreasonable. The unreasonableness of the prejudice may be considered in applying the public interest test under s 11A(5).

Consultation

6.178 Where a document includes business information relating to a person, organisation or undertaking other than the applicant, an agency or minister should give that individual or organisation (the third party) a reasonable opportunity to make a submission that the document should be 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).

6.179 For the purposes of consulting a third party, business information means:

- (a) information about an individuals' business or professional affairs
- (b) information about the business, commercial or financial affairs of an organisation or undertaking(s 47G(2)).

¹¹¹ *Re Angel and the Department of the Arts, Heritage and the Environment* [1985] AATA 314.

¹¹² *Re Maher and the Attorney-General's Department* [1986] AATA 16, *Re Telstra and Australian Competition and Consumer Commission* [2000] AATA 71.

¹¹³ *Re Caruth and Department of Health, Housing, Local Government and Community Services* (1993) 53 FOIR 65.

¹¹⁴ *Re Kobelke and Minister for Planning* [1994] WAICmr 5.

6.180 Because the requirement to consult covers a third party who may wish to contend that a document is exempt under s 47 as well as 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.

6.181 Consultation should occur where:

- (a) it is reasonably practicable. This will depend on all the circumstances including the time limits for processing the request (s 27(5)). For example, it may not be reasonably practicable if the agency cannot locate the third party in a timely and effective way.
- (b) it appears to the agency or minister that the third party might reasonably wish to make a submission that the document should be 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)).

6.182 Agencies and ministers should generally start from the position that a third party might 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 otherwise have been apparent.

6.183 From a practical perspective, a decision maker should identify early any need to undertake consultation to benefit from the 30-day extension to the timeframe for making a decision (s 15(6)). This is because the extension only applies when consultation starts within the initial decision making period (that is, in the first 30 days).

Submissions

6.184 Where consultation occurs, a third party should be asked if they object to disclosure and invited to make submissions about:

- whether the conditional exemption should apply
- whether, on balance, access would be contrary to the public interest.

They should be asked to provide reasons and evidence for their submission. An affected third party who is consulted under s 27 cannot contend that exemptions other than ss 47 or 47G should apply.¹¹⁵

6.185 To assist the third party to make a submission it may be necessary to provide a copy of the information. This could 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

¹¹⁵ See 'E' and National Offshore Petroleum Safety and Environmental Management Authority [2012] AICmr 3.

should also take care not to breach any obligation under the Privacy Act during consultation, for example, by identifying the 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 be stated that the copy has been provided for the purpose of consultation.

6.186 An agency or minister must have regard for 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 should take care that the third party is not under such a misapprehension.

Where an agency or minister decides to give the applicant access to documents, after a third party has provided a submission, they must give the third party written notice (s 27(6)). Access to a document must not be given to the applicant until the third party's opportunities for review have run out, or if review did occur, the decision still stands (s 27(7)).

General information about consultation

6.187 General information about consultation is provided in Part 3. That Part provides guidance about extended timeframes, notice of decision, review rights and when access to documents may be provided.

Research

6.188 A document is conditionally exempt under s 47H if it meets two criteria:

- (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 (CSIRO) and the Australian National University) and
- (b) disclosure of the information before the completion of the research would be likely unreasonably to expose the agency or officer to disadvantage.

6.189 This provision is similar to the previous s 43A. There are no AAT or court decisions on the provision.

The Australian economy

6.190 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.

6.191 The economy 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. Section 47J differs significantly from its predecessor (the former s 44 of the FOI Act) by:

- (a) requiring a decision maker to focus on the consequences of disclosure, namely the expected adverse effect on Australia's economy
- (b) being subject to the public interest test.

6.192 Section 47J(2) makes it clear that '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.

6.193 In this exemption, a 'person' includes a body corporate and a body politic (for example, the government of a State or Territory) (*Acts Interpretation Act 1901*, s 22).

6.194 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, Norfolk Island, a State or an authority of the Commonwealth, Norfolk Island or of a State (s 47J(3)).

6.195 The terms 'substantial adverse effect' and 'reasonably be expected' are explained in greater detail in Part 5. There must be more than an assumption, allegation or possibility that the adverse effect would occur if the document were released.

6.196 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
- 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.¹¹⁶

¹¹⁶ See Explanatory Memorandum, pp. 21–22. For an example of the application of this exemption see *Washington and Australian Prudential Regulation Authority* [2011] AICmr 11.

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PART 5 — EXEMPTIONS

Introduction

5.1 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)).

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

5.3 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 material and provide the balance to the applicant. If it is practicable to delete the exempt material and prepare a meaningful non-exempt edited copy to provide to the applicant, an agency or minister must do so (s 22).

5.4 In cases where the applicant seeks access only to that part of a document that does not contain exempt material, and the exempt material can be easily separated from the remainder of the document, it is practicable to treat the exempt material as outside the scope of the request.

5.5 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).

5.6 Agencies and ministers have a discretion to provide access to a document where the law permits, even if the document is exempt (s 3A). Agencies and ministers should consider in each case whether an exempt document can be released without causing significant harm and allow access to documents wherever possible.

Documents exempt under Part IV

5.7 Exempt documents under Part IV of the FOI Act fall into two 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)).

5.8 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).

5.9 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.

5.10 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).

5.11 Documents which are conditionally exempt under Division 3 relate to the following categories:

- Commonwealth-State relations (s 47B)
- deliberative processes (s 47C)
- financial or property interests of the Commonwealth (s 47D)
- certain operations of agencies (s 47E)
- personal privacy (s 47F)
- business (other than documents to which s 47 applies) (s 47G)
- research (s 47H)
- the economy (s 47J).

5.12 Where a document is assessed as conditionally exempt, the agency or minister must give access to it unless in the circumstances access would, on balance, be contrary to the public interest (s 11A(5)). The public interest test is weighted in favour of giving access to documents so that the public interest in disclosure remains at the forefront of decision making. The statement of reasons for the decision must include the public interest factors taken into account (s 26(1)(aa)). Further guidance on conditional exemptions and the public interest test is in Part 6.

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), 11A(6), and 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 an agency (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.¹

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.²

5.18 The mere risk, possibility or chance of prejudice does not qualify as a reasonable expectation.³ There must, based on reasonable grounds, be at least a real, significant or material possibility of prejudice.⁴

Substantial adverse effect

5.19 Several conditional exemptions⁵ 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’.

5.20 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’.⁶ The word ‘substantial’, taken in the context of substantial loss or damage, has been interpreted as ‘loss or damage that is, in the circumstances, real or of substance and not insubstantial or nominal’.⁷

5.21 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 in order to show their deliberations in determining the extent of the expected effect. Of course, it may sometimes be necessary to use general terms to avoid making the Statement of Reasons itself an ‘exempt document’ (s 26(2)).

Prejudice

5.22 Some exemptions and conditional exemptions⁸ 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:

¹ The test ‘would or could reasonably be expected’ has been discussed in various decisions. See, as a recent AAT example, *Bell and Secretary, Department of Health (Freedom of information)* [2015] AATA 494 at [37].

² *Re Maksimovic and Australian Customs Service* [2009] AATA 28.

³ *Re News Corporation Limited v National Companies and Securities Commission* (1984) 5 FCR 88.

⁴ *Chemical Trustee Limited and Ors and Commissioner of Taxation and Chief Executive Officer, AUSTRAC (Joined Party)* [2013] AATA 623 [78].

⁵ Sections 47D, 47E(c), 47E(d), 47J.

⁶ See *Re Thies and Department of Aviation* [1986] AATA 141 [24].

⁷ See *Tillmanns Butcheries Pty Ltd v Australasian Meat Employees Union & Ors* (1979) 27 ALR 367 383.

⁸ Sections 37(1)(a), 37(2)(a), 37(2)(c), 47E(a), 47E(b), 47G(1)(b).

- (a) disadvantage resulting from some judgement or action of another
- (b) resulting injury or detriment.

5.23 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’.⁹

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

5.24 Section 33 exempts documents that affect Australia’s national security, defence or international relations. The exemption comprises two 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
- (b) disclosure would divulge information communicated in confidence to the Commonwealth by a foreign government, an agency of a foreign government or an international organisation.

5.25 In claiming the exemption, decision makers must examine the content of each document that is relevant to a 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. 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 [5.39] – [5.40] below for more detail on the mosaic theory.

5.26 The classification markings on a document (such as ‘secret’ or ‘confidential’) are not of themselves conclusive of whether the exemption applies (see also [5.41] – [5.47] below in relation to information communicated in confidence).

Reasonably expected

5.27 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.¹⁰ A mere allegation or possibility of damage is insufficient to meet the ‘reasonable expectation’ test.¹¹

Damage

5.28 ‘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 government, or the future flow of confidential information from a foreign government or agency.¹² In determining whether damage is likely to result from disclosure of the document(s) in

⁹ See *Re James and Ors and Australian National University* (1984) 6 ALD 687.

¹⁰ *Attorney-General’s Department and Australian Iron and Steel Pty Ltd v Cockcroft* (1986) 10 FCR 180.

¹¹ See *Re O’Donovan and Attorney-General’s Department* [1985] AATA 330; *Re Maher and Attorney-General’s Department* [1985] AATA 180.

¹² See *The Sun-Herald Newspaper and the Australian Federal Police* [2014] AICmr 52.

question, a decision maker could have regard to the relationships between individuals representing respective governments.¹³ 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.¹⁴

Security of the Commonwealth

5.29 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)).

5.30 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.

5.31 The meaning of ‘damage’ has three aspects:

- i. that of safety, protection or defence from something that is regarded as a danger. The 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.¹⁵

5.32 The claim has been upheld in the following situations:

- (a) If the release of a document would prevent a security organisation from obtaining information on those engaged in espionage, it could reasonably be expected to cause damage to national security.¹⁶
- (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.¹⁷
- (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.¹⁸

¹³ 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.

¹⁴ See *Arnold v Queensland* (1987) 73 ALR 607.

¹⁵ As per Forgie DP in *Prinn and Department of Defence (Freedom of Information)* [2016] AATA 445 [65].

¹⁶ *Re Slater and Cox (Director-General of Australian Archives)* [1988] AATA 110.

¹⁷ *Re Hocking and Department of Defence* [1987] AATA 602.

¹⁸ *Re Throssell and Australian Archives* [1987] AATA 453.

5.33 It is well accepted that securing classified government information forms part of the security of the Commonwealth.¹⁹ The assessment that s 33(a)(i) requires must be made at the time the decision is made and in the environment that exists at the time.²⁰ Where a request is received for classified government information, the documents must be considered both individually and collectively. The Information Commissioner believes that it might be safer for the FOI decision maker to err on the side of non-disclosure provided the interests of other citizens are able to be protected.²¹ Where there is doubt, this should be in favour of non-disclosure.²²

Defence of the Commonwealth

5.34 The FOI Act does not define ‘defence of the Commonwealth’. Previous Administrative Appeals Tribunal (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.²³

5.35 Damage to the defence of the Commonwealth is not necessarily confined to monetary damage (see [5.28] above). However, in all cases, there must be evidence that the release of the information in question will be likely to cause the damage claimed.

International relations

5.36 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.²⁴ 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.²⁵

5.37 The mere fact that a government has expressed concern about a 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.²⁶ The expectation of damage to international relations must be

¹⁹ *Aldred and Department of Foreign Affairs and Trade* [1990] AATA 833.

²⁰ *Prinn and Department of Defence (Freedom of Information)* [2016] AATA 445 [66].

²¹ See *Prinn and Department of Defence* [2014] AICmr 84 [23]-[24].

²² *Australian Securities and Investments Commission v P Dawson Nominees Pty Ltd* [2008] FCAFC 123; (2008) 169 FCR 227; 247 ALR 646 [40]; 236; 654 per Heerey, Moore and Tracey JJ, as discussed by Forgie DP in *Prinn and Department of Defence (Freedom of Information)* [2016] AATA 445 [79].

²³ See for example, *Re Dunn and the Department of Defence* [2004] AATA 1040.

²⁴ *Re McKnight and Australian Archives* [1992] AATA 225.

²⁵ *Re Haneef and Australian Federal Police* [2009] AATA 51.

²⁶ *Re Maher and Attorney-General’s Department* [1985] AATA 180 as applied in *Maksimovic and Attorney-General’s Department* [2008] AATA 1089. See also *James O’Neill and the Australian Federal Police* [2015] AICmr 50 [9].

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.²⁷ There must also be real and substantial grounds for the exemption that are supported by evidence.²⁸ These grounds are not fixed in advance, but vary according to the circumstances of each case.

5.38 For example, the 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.²⁹ 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.³⁰

The mosaic theory

5.39 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, can generate a composite — a mosaic — that can damage Australia's national security, defence or international relations.³¹ Therefore, decision makers may need to consider other sources of information when considering this exemption.

5.40 The mosaic theory does not relieve decision makers from evaluating whether there are real and substantial grounds for the expectation that the claimed effects will result from disclosure.³²

Information communicated in confidence

5.41 Section 33(b) exempts information communicated in confidence to the Australian Government or agency by another government or one of its authorities, or by an international organisation.³³ One example is the confidential exchange of police information or information received in confidence from a foreign defence force agency.³⁴

5.42 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

²⁷ *Re Slater and Cox (Director-General of Australian Archives)* [1988] AATA 110.

²⁸ *Secretary, Department of Foreign Affairs v Whittaker* (2005) 143 FCR 15.

²⁹ *Re Maksimovic and Attorney-General's Department* [2008] AATA 1089. See also *O'Sullivan and Department of Foreign Affairs and Trade* [2013] AICmr 36 and '*AA*' and *Bureau of Meteorology* [2013] AICmr 46.

³⁰ *Re Public Interest Advocacy Centre and Department of Community Services and Health and Searle Australia Pty Ltd (No 2)* [1991] AATA 723.

³¹ *Re McKnight and Australian Archives* [1992] AATA 225.

³² 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.

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

³⁴ See for example '*W*' and *the Australian Federal Police* [2013] AICmr 39.

matter of determining whether the information is of itself confidential in nature.³⁵ 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.³⁶ Whether the information is, in fact, confidential in character and whether it was communicated in circumstances importing an obligation of confidence are relevant considerations.³⁷ They may assist the decision maker to determine whether, on the balance of probabilities, information was communicated in confidence.³⁸

5.43 The relevant time for the test of confidentiality is the time of communication of the information, not the time of the request for access. It is irrelevant for the purposes of the exemption that the foreign government or agency may have since reviewed the status of the document and it is no longer confidential. The document will still be an exempt document under the FOI Act,³⁹ noting however that agencies and ministers have a discretion to provide access to an exempt document where the law permits (see [5.6] above).

5.44 An agreement to treat documents as confidential does not need to be 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.⁴⁰

5.45 To avoid doubt, s 4(10) 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.

5.46 Information communicated by an Australian Government agency to a foreign government can also fall under s 33(b) if it restates information the foreign government previously communicated to the agency in confidence.⁴¹

Classification markings

5.47 Classification markings on a document (such as secret or confidential) are not in themselves conclusive of 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

³⁵ *Secretary, Department of the Prime Minister and Cabinet v Haneef* (2010) 52 AAR 360.

³⁶ *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.

³⁷ For examples of the application of these considerations, see *O'Sullivan and Department of Foreign Affairs and Trade* [2013] AICmr 36; *Wake and Australian Broadcasting Corporation* [2013] AICmr 45 and '*AA*' and *Bureau of Meteorology* [2013] AICmr 46.

³⁸ *Re Environment Centre NT Inc and Department of the Environment, Sport and Territories* [1994] AATA 301.

³⁹ *Secretary, Department of Foreign Affairs v Whittaker* (2005) 143 FCR 15.

⁴⁰ *Re Maher and Attorney-General's Department* [1986] AATA 16.

⁴¹ *Mentink and Australian Federal Police* [2014] AICmr 64 [33]–[34].

to make an independent assessment that the information was communicated in confidence.⁴²

Extended processing period for consultation

5.48 The standard statutory timeframe for making a decision on an FOI request is 30 days (see Part 3). Where 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 a foreign government or authority or an international organisation to assist them in deciding whether the document is exempt (ss 15(7)-(8)). This decision must be in writing and must be notified to the applicant as soon as practicable (ss 15(7)-(8)(b)). Although the decision maker should take any views expressed during consultation into account, the final decision on whether to grant access to the document lies with the decision maker.

5.49 The form of consultation with a foreign government, authority or organisation will depend on the nature of the relationship between the Australian agency 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. A decision maker should seek information relevant to establishing whether the grounds for exemption are met. This information may be used to support and explain a claim for exemption in a statement of reasons to the applicant. In all cases, the person consulted should have authority to speak for the foreign entity.

Refusal to confirm or deny existence of a document

5.50 In some instances, the act of confirming or denying whether 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.

5.51 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 [5.79] – [5.117] below for further guidance on the application of s 37(1), and see [5.173] – [5.180] for guidance on s 45A.) The agency may instead give the 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.

5.52 As use of this section has the effect of refusing a request for access to a document without providing reasons, use of s 25 should be reserved strictly for cases where the content of the material requires it.

5.53 Section 26(2) also provides that there is no requirement to include information

⁴² *Re Anderson and Department of Special Minister of State* [1984] AATA 478.

in a notice that, were it contained in a document, would make that document exempt (see Part 3).⁴³

Evidence from Inspector-General of Intelligence and Security

5.54 Where the Information Commissioner is conducting a review of a decision refusing access to a document on the grounds of exemption 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). This provision is 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 the national security exemption, or whether giving access would divulge information communicated in confidence. For more information on Information Commissioner reviews, see Part 10.

Cabinet documents (s 34)

5.55 The Cabinet exemption in s 34 of the FOI Act is designed to protect the confidentiality of the Cabinet process 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.

5.56 ‘Cabinet’ for s 34 purposes means the Cabinet and Cabinet committees (see the definition of Cabinet in s 4(1)). It does not include informal meetings of ministers outside the Cabinet. In any case of doubt as to whether a body is a Cabinet committee, agencies should consult the Department of the Prime Minister and Cabinet (DPMC).

5.57 Agencies should refer to the *Cabinet Handbook* issued by DPMC for guidance about Cabinet processes and the underlying principles of the Cabinet system.⁴⁴ DPMC asks that agencies consult the DPMC FOI Coordinator on any Cabinet-related material identified as being within the scope of an FOI request.

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

Documents included in exemption

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

- (a) Cabinet submissions that:
 - (i) have been submitted to Cabinet; or
 - (ii) are proposed for submission to Cabinet; or
 - (iii) were proposed to be submitted but were in fact never submitted and were

⁴³ See also *Secretary Department of Health and Ageing v iNova Pharmaceuticals (Australia) Pty Limited* [2010] FCA 1442 for discussion of ss 25 and 26 in relation to decisions that do not provide information as to the existence of documents.

⁴⁴ Available at www.dpmc.gov.au.

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)).

5.60 The exemption also applies to full or partial copies of the categories of documents listed at [5.59] above as well as a document that contains an extract from those categories (s 34(2)).

5.61 Any document containing information which, if disclosed, would reveal Cabinet deliberations or a decision is exempt unless the deliberation or decision has 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.⁴⁵

5.62 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 still exempt.⁴⁶ 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.⁴⁷

Documents excluded from exemption

5.63 There are three 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

⁴⁵ As 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. Disclosure of its existence, however, does not require disclosure of the substance (per *Sanderson* at [77]). A media release can constitute an official disclosure of the existence of Cabinet’s deliberations where the media release discloses the ‘existence’ of Cabinet deliberation (per *Sanderson* at [80]).

⁴⁶ *Philip Morris Ltd and Department of Finance* [2014] AICmr 27 [34].

⁴⁷ *Philip Morris Ltd and Department of Finance* [2014] AICmr 27 [36].

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 decision has not been officially disclosed (s 34(6)).

Documents created for the dominant purpose of submission to Cabinet

5.64 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 must have actually been submitted or have been proposed by a sponsoring minister to be submitted. Documents in this class may be Cabinet submissions or attachments to Cabinet submissions.

5.65 For example, if, at the time a report is brought into existence there was no purpose 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 submission to the Cabinet. It may, however, still be exempt under s 34(3) if its disclosure would reveal a Cabinet deliberation or decision.

5.66 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 inform Cabinet, the contents of which are intended merely to be noted by Cabinet.⁴⁸

5.67 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.⁴⁹

Official record of the Cabinet

5.68 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.⁵⁰ DPMC asks that agencies consult the DPMC FOI Coordinator when deciding whether a document is an official record of the Cabinet (see [5.57] above).

Cabinet briefings

5.69 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.

Draft Cabinet documents

5.70 Section 34(1)(d) provides that a draft of a Cabinet submission, an official

⁴⁸ 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.

⁴⁹ *Re Fisse and Secretary, Department of the Treasury* [2008] AATA 288; *Nick Xenophon and Department of Defence* [2016] AICmr 14.

⁵⁰ *Re Toomer and Department of Agriculture, Fisheries and Forestry and Ors* [2003] AATA 1301.

record of the Cabinet or a Cabinet briefing is exempt.

Copies and extracts

5.71 A document is exempt from disclosure to the extent that it contains a copy or part of or 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, part of, or an extract from a Cabinet submission, a Cabinet briefing or an official record of the Cabinet. 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.

5.72 A document that refers to a Cabinet meeting date or Cabinet document reference number contains an extract from a Cabinet document for the purposes for s 34(2). It may therefore 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 that the decision maker 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).⁵¹

5.73 It is important to note that coordination comments merit special attention. 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 s34(2) on the basis that it was an extract from the minister's Cabinet submission.⁵²

Documents disclosing a deliberation or decision of Cabinet

5.74 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 [5.78]).

5.75 'Deliberation' in this context has been interpreted as active debate in Cabinet, or its 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:

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

⁵¹ See *Philip Morris Ltd and Department of Finance* [2014] AICmr 27 [54]–[57]; and *Philip Morris Ltd and IP Australia* [2014] AICmr 28 [22].

⁵² *Re McKinnon and Department of Prime Minister and Cabinet* [2007] AATA 1969.

conclusions as to the manner in which a matter is to proceed.⁵³

Purely factual material

5.76 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 any deliberation or decision of the Cabinet, and
- (b) the fact of that deliberation or decision has not been officially disclosed.

5.77 Purely factual material includes material such as statistical data, surveys and factual studies. A conclusion involving opinion or judgement is not purely factual material. For example, a projection or prediction of a future event would not usually be considered purely factual.⁵⁴

‘Officially disclosed’

5.78 The Cabinet exemption twice refers to a deliberation or decision of the Cabinet being ‘officially disclosed’: ss 34(3) and 34(6)(b). This can refer to disclosure by an oral as well as a written statement — for example, an oral announcement by a minister about a Cabinet decision.⁵⁵ The disclosure may be a general public disclosure (for example, a statement in a consultation paper published on a Departmental website)⁵⁶ or a disclosure to a limited audience on the understanding that it is not a confidential communication.⁵⁷ 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)

5.79 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
- prejudice the conduct of an investigation of a failure, or possible failure, to comply with a taxation law
- prejudice the enforcement, or the proper administration, of the law in a particular instance
- 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

⁵³ *Re Toomer and Department of Agriculture, Fisheries and Forestry and Ors* [2003] AATA 1301 [88].

⁵⁴ ‘Purely factual matter’ and ‘deliberative matter’ are also referred to in s 47C (see Part 6).

⁵⁵ 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 [101].

⁵⁶ *Philip Morris Ltd and Department of Finance* [2014] AICmr 27 [30].

⁵⁷ *Re Toomer and Department of Agriculture, Fisheries and Forestry* [2003] AATA 1301 [101].

- endanger the life or physical safety of any person
- prejudice the fair trial of a person, or the impartial adjudication of a particular case
- 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
- prejudice the maintenance or enforcement of lawful methods for the protection of public safety (see ss 37(1)-(2)).

5.80 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.

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

5.82 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.⁵⁸ 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 [5.79].

5.83 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 result in any of the specified consequences.

Withholding information about the existence of documents

5.84 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 [5.50] – [5.53] above).

Reasonable expectation

5.85 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

⁵⁸ *Re Gold and Australian Federal Police and National Crime Authority* [1994] AATA 382, citing Young CJ in *Accident Compensation Commission v Croom* (1991) 2 VR 322 324.

refers to activities that might reasonably be expected to have occurred, be presently occurring, or could occur in the future (see [5.16] – [5.19] above).⁵⁹

Investigation of a breach of law

5.86 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.⁶⁰ In other words, the exemption does not apply if the prejudice is about investigations in general.

5.87 The exemption is concerned with the conduct of an investigation. For example, it would apply where disclosure would forewarn the applicant about the direction of the investigation, as well as the evidence and resources available to the investigating body — putting the investigation in jeopardy.⁶¹ The section will not apply if the investigation is closed or if it is being conducted by an overseas agency.⁶²

5.88 Where the investigation is merely suspended or dormant rather than permanently closed, or where new information may revive an investigation, the Information Commissioner considers the exemption should apply. However, the expectation that an investigation may revive should be more than speculative or theoretical and be supported by evidence.⁶³

5.89 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.

5.90 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

5.91 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. 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).

5.92 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 his or her identity to be known only to those who need to know it for the purpose of enforcing or administering the law⁶⁴

⁵⁹ *Re Maksimovic and Australian Customs Service* [2009] AATA 28.

⁶⁰ *Re Murtagh and Federal Commissioner of Taxation* [1984] AATA 249.

⁶¹ *News Corporation v National Companies and Securities Commission* [1984] 5 FCR 88.

⁶² *Re Rees and Australian Federal Police* (1999) ALD 686.

⁶³ *Re Doulman and CEO of Customs* [2003] AATA 883 and *Noonan and Australian Securities and Investments Commission* [2000] AATA 495.

⁶⁴ *Department of Health v Jephcott* (1985) 8 FCR 85.

- the information was supplied on the understanding, express or implied, that the source's identity would remain confidential.

5.93 Where a document contains information known only to a limited number of people and they are known to the confidential source, and/or where the document has identifying features such as handwriting, disclosure is more likely to identify the confidential source.⁶⁵

5.94 Section 37(1)(b) can also apply to protect information which would allow the applicant to ascertain the existence or non-existence (rather than the identity) of a confidential source of information.⁶⁶

5.95 The 'mosaic theory' might apply in some cases (see [5.39] – [5.40] above).⁶⁷ That is, the disclosure of the information in question will lead to its being linked to already available information and thus disclose the identity of the confidential source.⁶⁸

5.96 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.⁶⁹

Scope of confidentiality

5.97 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.

5.98 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 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 applicant was considered to be included in the relationship of confidence between the broker and the agency. The AAT stated that if the applicant was not privy to the confidence, he was entitled to be.⁷⁰

5.99 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.⁷¹ For example, the source may have supplied the information under the reasonable expectation that his or her identity would be kept confidential. In some cases, confidentiality can be inferred from the practice of the agency to receive similar types of information in confidence. Two examples are a telephone hotline set up to receive certain types of information from

⁶⁵ See *'HR' and Department of Immigration and Border Protection* [2015] AICmr 80 [13].

⁶⁶ *Re Jephcott and Department of Community Services* [1986] AATA 248; *The Sun-Herald Newspaper and the Australian Federal Police* [2014] AICmr 52 [24]

⁶⁷ For an example, see *Besser and Attorney-General's Department* [2013] AICmr 12.

⁶⁸ *Re Petroulias and Others v Commissioner of Taxation* [2006] AATA 333.

⁶⁹ See Explanatory Memorandum to the *Law and Justice Legislation Amendment Bill 1994* at 163.

⁷⁰ *Re Lander and Australian Taxation Office* [1985] AATA 296.

⁷¹ *Department of Health v Jephcott* (1985) 8 FCR 85.

members of the public and expressly promoted as confidential; or information received from a person who could reasonably expect that their identity will not be made known to anyone other than those involved in administering and enforcing the law.⁷²

Nevertheless, the understanding or representation that information will be received confidentially must not be vague or devoid of context.

5.100 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.⁷³

Enforcement or administration of the law

5.101 The phrase ‘the enforcement or the proper administration of the law’ 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.⁷⁴

Disclosure of identity

5.102 There must be a reasonable expectation that the contents of the documents in question will disclose the identity of the confidential source.⁷⁵ Where a person’s identity is not apparent and the information is so general that it is unlikely to lead to the identification of the source, or it could have come from any one of several sources, this element of the exemption is not satisfied.

5.103 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 is already lost.⁷⁶ On the other hand, the inadvertent or unauthorised leaking of a document does not diminish the quality of confidence attaching to it.⁷⁷

5.104 The identity of a person can sometimes be ascertained from sources other than express mention in the document in question. For example, distinctive handwriting in a handwritten letter, the letterhead or the nature of the information which may only be known to a limited number of people.⁷⁸

Endanger the life or physical safety of any person

5.105 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.⁷⁹ This

⁷² *X’ and Australian Federal Police* [2013] AICmr 40.

⁷³ *Besser and Attorney-General’s Department* [2013] AICmr 12.

⁷⁴ *Re Gold and Australian Federal Police and National Crime Authority* [1994] AATA 382, citing *Young CJ in Accident Compensation Commission v Croom* (1991) 2 VR 322, 324.

⁷⁵ *Re Rees and Australian Federal Police* [1999] AATA 252.

⁷⁶ *Re Chandra and Minister for Immigration and Ethnic Affairs* [1984] AATA 437.

⁷⁷ *Re Cullen and Australian Federal Police* [1991] AATA 671.

⁷⁸ See *X’ and Australian Federal Police* [2013] AICmr 40 [22]; *HR’ and Department of Immigration and Border Protection* [2015] AICmr 80.

⁷⁹ *I’ and Australian National University* [2012] AICmr 12.

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 about threats made by the applicant will not be sufficient.⁸⁰ 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.⁸¹

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

- A reasonable apprehension was shown in *Re Ford and Child Support Registrar*.⁸² In this case, a third party gave extensive evidence about her fear 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 he was still in jail. She said he had written threatening letters to her and her friends and she was scared of him. The AAT found that 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*,⁸³ found that a threat of litigation against a person is not harassment which endangers a person's life or physical safety.⁸⁴
- 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.⁸⁵

Prejudice to a fair or impartial trial

5.107 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.⁸⁶ 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 in question to the applicant could have actually facilitated the adjudication of the matter.⁸⁷

⁸⁰ *Re Ervin Lajos Boehm and Department of Industry Technology and Commerce* [1985] AATA 60.

⁸¹ *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).

⁸² *Re Ford and Child Support Registrar* [2006] AATA 283.

⁸³ Now replaced by the *Right to Information Act 2009*.

⁸⁴ *Re Murphy and Queensland Treasury* [1995] QICmr 23.

⁸⁵ *Re Binnie and Department of Agriculture and Rural Affairs* (1987) VAR 361.

⁸⁶ See Federal Court of Australia, *Glossary of Legal Terms* <http://www.fedcourt.gov.au/attending-court/glossary-of-legal-terms>.

⁸⁷ *Re O'Grady v Australian Federal Police* [1983] AATA 390.

The fact that documents are relevant to a case is not of itself sufficient to justify exemption. Some causal link between the disclosure and the prejudice must be demonstrated.

Prejudice to law enforcement methods and procedures

5.108 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.

5.109 ‘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.

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

5.111 This exemption requires satisfaction of two 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.⁸⁸ 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.⁸⁹

5.112 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 priorities to matters, with the observation that disclosing such a method is on par with disclosing that the respondent uses pens, pencils, desks, chairs and filing cabinets in the investigation of possible breaches of the Corporations Law.⁹⁰ 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.⁹¹ 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.⁹²

5.113 The exemption may apply to methods and procedures that are neither obvious

⁸⁸ *Re Anderson and Australian Federal Police* [1986] AATA 79.

⁸⁹ See *Hunt and Australian Federal Police* [2013] AICmr 66.

⁹⁰ *Re Russo v Australian Securities Commission* [1992] AATA 228.

⁹¹ *Re Edelsten and Australian Federal Police* [1985] AATA 350, citing *Re Mickelberg and Australian Federal Police* (1984) 6 ALN N176.

⁹² *Stephen Waller and Department of Environment* [2014] AICmr 133 [17]-[18].

nor a matter of public notoriety, even if evidence of a particular method or procedure has been given in a proceeding before the courts.⁹³ 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.⁹⁴ The exemption is more likely to apply where disclosure of a document would disclose covert, as opposed to overt or routine methods or procedures.⁹⁵

Protection of public safety

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

5.115 The terms 'lawful' and 'prejudice' apply to s 37(2)(c) in the same manner as described for s 37(2)(b) at [5.108] – [5.113] above.

5.116 The words 'public safety' do not extend beyond safety from violations of the law and breaches of the peace.⁹⁶ 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.⁹⁷

5.117 *Re Hocking and Department of Defence* provides an example of the operation of s 37(2)(c).⁹⁸ The 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 were made public, there would be a significant risk to the security of the Commonwealth.⁹⁹

Documents to which secrecy provisions apply (s 38)

5.118 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)).

5.119 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

⁹³ *Re T and Queensland Health* (1994) 1 QAR 386.

⁹⁴ *Re Murphy and Australian Electoral Commission* [1994] AATA 149.

⁹⁵ *Re Anderson and Australian Federal Police* [1986] AATA 79.

⁹⁶ *Re Thies and Department of Aviation* [1986] AATA 141.

⁹⁷ *Re Parisi and Australian Federal Police (Qld)* [1987] AATA 395.

⁹⁸ *Re Hocking and Department of Defence* [1987] AATA 602.

⁹⁹ *Re Hocking and Department of Defence* [1987] AATA 602.

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.

5.120 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.¹⁰⁰ Contrary to normal 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.¹⁰¹

5.121 Section 38 does not apply to documents in so far as they contain personal information about the applicant (s 38(2)). The exception applies only to personal information about the applicant and not to 'mixed personal information', that is, personal information about the applicant which, if disclosed, would also reveal personal information about another individual. If the FOI applicant's information can be separated from any third party personal information, the FOI applicant's 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).

5.122 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 of which the disclosure is prohibited under s 503A of the *Migration Act 1958*, as affected by s 503D of that Act.

5.123 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 disclosures that may be linked to those duties or functions¹⁰² but would generally not encompass the release of information under the FOI Act.

5.124 For example, in *Walker and Secretary, Department of Health (Freedom of information)* [2015] AATA 606 the AAT considered the application of s 38 to information relating to the status of medical General Practitioners. Subject to certain exceptions, subsection 130(1) of the *Health Insurance Act 1973* prohibits disclosure of information acquired in the performance or exercise of powers or functions under the Act. Subsection 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'.¹⁰³

5.125 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

¹⁰⁰ *NAAO v Secretary, Department of Immigration and Multicultural Affairs* (2002) 117 FCR 401.

¹⁰¹ *Re Young and Commissioner of Taxation* [2008] AATA 155; see also '*A*' and *Department of Health and Ageing* [2011] AICmr 4, 13–16.

¹⁰² *Canadian Pacific Tobacco Co Ltd v Stapleton* (1952) 86 CLR 1.

¹⁰³ *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 is exempt information.

information’ is information relating to and identifying an entity acquired for a taxation law purpose. The effect of this tax provision on a request for documents is to make a document containing the protected information of a person or entity other than the person making the request, an exempt document under s 38.

Documents subject to legal professional privilege (s 42)

5.126 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 (LPP).

5.127 The FOI Act does not define LPP for the purposes of the exemption. To determine the application of this exemption, the decision maker needs to turn to common law concepts of LPP. The statutory test of client legal privilege under the *Evidence Act 1995* is not applicable and should not be taken into account.¹⁰⁴ It is important that each aspect of the privilege, as discussed below, be addressed in the decision maker’s statement of reasons.

Whether a document attracts legal professional privilege

5.128 LPP applies to some but not all communications between legal advisers and clients. The underlying policy basis for LPP is to promote the 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.¹⁰⁵ 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.

5.129 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 purpose of giving or receiving legal advice, or use in connection with actual or anticipated litigation
- whether the advice given is independent
- whether the advice given is confidential.¹⁰⁶

Legal adviser-client relationship, independence and in house lawyers

5.130 A legal adviser-client relationship exists where a client retains the services of a lawyer for the purposes of obtaining professional advice. The existence of the relationship is usually straightforward to establish where advice is received from an independent external legal adviser. 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).

¹⁰⁴ *Commonwealth of Australia v Dutton* (2000) 102 FCR 168.

¹⁰⁵ *Mann v Carnell* as restated in *Comcare v Foster* (2006) 42 AAR 434.

¹⁰⁶ *Grant v Downs* (1976) 135 CLR 674; *Waterford v Commonwealth of Australia* (1987) 163 CLR 54. For examples of the application of these considerations see *Hamden and Department of Human Services* [2013] AICmr 41; *'AF' and Department of Immigration and Citizenship* [2013] AICmr 54 and *Rudd and Civil Aviation Safety Authority* [2013] AICmr 56.

5.131 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 adviser-client relationship exists will be a question of fact to be determined on the circumstances applying to the particular advice that 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 his/her capacity as a professional legal adviser
- the giving of the advice must be attended by the necessary degree of independence¹⁰⁷
- the dominant purpose test must be satisfied
- the advice must be confidential
- the fact that the advice arose out of a statutory duty does not preclude the privilege from applying¹⁰⁸
- whether the lawyer is subject to professional standards can be relevant.¹⁰⁹

5.132 An in-house lawyer has the necessary degree of independence so long as their personal loyalties, duties or interests do not influence the professional legal advice they give.¹¹⁰

5.133 Having legal qualifications will 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 a decisive factor.¹¹¹ Alternatively, a right to practise may be conferred by an Act (for example, ss 55B and 55E of the *Judiciary Act 1903*).

5.134 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 [5.131] 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 that 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 that the

¹⁰⁷ Generally, LPP 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].

¹⁰⁸ *Waterford v Commonwealth of Australia* (1987) 163 CLR 54.

¹⁰⁹ *Re Proudfoot and Human Rights and Equal Opportunity Commission* [1992] AATA 317 which restates the principles of *Waterford v Commonwealth of Australia* (1987) 163 CLR 54.

¹¹⁰ *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].

¹¹¹ *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, referring to *Australian Hospital Care Pty Ltd v Duggan* [1999] VSC 134. 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.

employee is acting independently in giving the advice.’¹¹²

5.135 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.¹¹³ 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

5.136 Whether LPP 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.¹¹⁴ The communication may have been brought into existence for more than one purpose but will be privileged if the main purpose of its creation was for giving or receiving legal advice or for use in actual or anticipated litigation.

Legal advice privilege

5.137 The AAT has observed that a broad approach is to be taken as to what is included in the scope of the privilege; and 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.¹¹⁵

5.138 The concept of legal advice, while broad, does not extend to advice that is purely commercial or of a public relations character.¹¹⁶

Litigation privilege

5.139 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’.¹¹⁷

5.140 The question of whether litigation privilege extends beyond the Courts to include Tribunals is unsettled.¹¹⁸

¹¹² *Ransley and Commissioner of Taxation (Freedom of information)* [2015] AATA 728 [13].

¹¹³ *AWB Limited v Cole* (2006) 235 ALR 307.

¹¹⁴ *Eso Australia Resources Ltd v Commissioner for Taxation* (1999) 201 CLR 49.

¹¹⁵ As per Tamberlin DP QC in *Ransley and Commissioner of Taxation (Freedom of information)* [2015] AATA 728 [14].

¹¹⁶ *College of Law Limited v Australian National University* [2013] FCA 492 [23], summarising principles set out by various authorities including: *Mann v Carnell* [1999] HCA 66; (1999) 201 CLR 1; *Bennett v Chief Executive Officer, Australian Customs Service* [2004] FCAFC 237; (2004) 140 FCR 101; *AWB Limited v Cole (No 5)* [2006] FCA 1234; (2006) 155 FCR 30; *Osland v Secretary, Department of Justice* [2008] HCA 37; (2008) 234 CLR 275; *British American Tobacco Australia Ltd v Secretary, Department of Health and Ageing* [2011] FCAFC 107; (2011) 195 FCR 123 and *Cooper v Hobbs* [2013] NSWCA 70.

¹¹⁷ *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) 161 FCR 122 [30].

¹¹⁸ In *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd* [2006] NSWSC 530, Bergin J held that litigation privilege did not apply in the AAT because AAT proceedings are not adversarial. In ‘GF’

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

5.141 In light of recent AAT authority, the Information Commissioner recommends that agencies and ministers consider whether or not the entire contents of a document meets the dominant purpose test, and where not, and reasonably practicable to do so consider giving the applicant access to non-substantive material that is not of itself privileged while remaining mindful of the consequence of unintended waiver of privilege (see below at [5.144] – [5.149]).¹¹⁹ 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 would not disclose exempt material, the decision maker should consider whether editing would 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 exempted in full (see Part 3).

Confidentiality

5.142 LPP does not apply to a communication that is not confidential — that is, known only to the client or to a select class of persons with a common interest in the matter.

5.143 LPP 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.¹²⁰

Waiver of privilege

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

5.145 LPP is the client's privilege to assert or to waive, and the legal adviser cannot waive it except with the authority of the client.¹²¹ In the context of an FOI request, the agency receiving the advice will usually be the 'client' agency that will need to decide whether to assert or waive LPP. If the privilege is asserted, that 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.

5.146 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.

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.

¹¹⁹ 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.

¹²⁰ *Comcare v Foster* (2006) 150 FCR 301.

¹²¹ *Re Haneef and the Australian Federal Police* [2009] AATA 51, citing *Mann v Carnell* (1999) 201 CLR 1.

5.147 The High Court has held that waiver of LPP will occur where the earlier disclosure is inconsistent with the confidentiality protected by the privilege.¹²² This inconsistency test has been more recently affirmed by the High Court as the appropriate test for determining whether privilege has been waived.¹²³ It is immaterial that the client did not intend to waive privilege.

5.148 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. Modern organisations often work in teams and several people may need to know about privileged communications, both in the requesting client organisation and in the firm of legal advisers. Similarly, a limited disclosure of the existence and the effect of legal advice could be consistent with maintaining confidentiality in the actual terms of the advice. Whether the disclosure is inconsistent with maintaining confidentiality will depend on the circumstances of the case.¹²⁴ The *Legal Services Directions 2005* 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.¹²⁵ The Legal Services Directions are available at www.ag.gov.au.

5.149 The Information Commissioner suggests that agencies should take special care in dealing with documents for which they may wish to claim LPP to avoid unintentionally waiving that privilege.

The ‘real harm’ test

5.150 Agencies are advised not to claim exemption for a document under s 42 unless it is considered that ‘real harm’ would result from releasing the document. A ‘real harm’ criterion is not an element of the common law doctrine of LPP, but has been acknowledged within government as a relevant discretionary test to apply in FOI administration.¹²⁶ The phrase ‘real harm’ distinguishes between substantial prejudice to the agency’s affairs and mere irritation, embarrassment or inconvenience to the agency.

5.151 An agency’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.¹²⁷

Copies or summary records

5.152 Records made by officers of an agency summarising communications which are themselves privileged also attract the privilege. Privilege may also attach to a copy of an unprivileged document if the copy was made for the dominant purpose of

¹²² *Mann v Carnell* (1999) 201 CLR 1.

¹²³ *Osland v Secretary to the Department of Justice* [2008] HCA 37.

¹²⁴ *Osland v Secretary to the Department of Justice* [2008] HCA 37; *Doney and Department of Finance and Deregulation* [2012] AICmr 25.

¹²⁵ *Judiciary Act 1903* s 55ZH(4).

¹²⁶ 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.

¹²⁷ Section 55L(2) of the FOI Act.

obtaining legal advice or for use in legal proceedings.¹²⁸

Exception for operational information

5.153 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)).

5.154 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.¹²⁹ For further information about the definition of ‘operational information’ see Part 13.

Documents containing material obtained in confidence (s 45)

5.155 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 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.¹³⁰

5.156 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.

5.157 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).¹³¹

Breach of confidence

5.158 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.¹³² The FOI Act expressly preserves confidentiality where

¹²⁸ *Re Haneef and Australian Federal Police and Commonwealth Director of Public Prosecutions* [2010] AATA 514.

¹²⁹ See *'AL' and Department of Defence* [2013] AICmr 72 [33]–[36] and *Hamden and Department of Human Services* [2013] AICmr 41 [19]–[21].

¹³⁰ See the Explanatory Memorandum, *Freedom of Information Bill 1992; Re Kamminga and Australian National University* [1992] AATA 84; dissenting judgment of Gummow J in *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434 [443].

¹³¹ See the Explanatory Memorandum, *Freedom of Information Bill 1981*.

¹³² *Coco v AN Clark (Engineers) Ltd* (1969) 86 RPC 41.

that confidentiality would be actionable at common law or in equity.¹³³

5.159 To found an action for breach of confidence (which means s 45 would apply), the following five 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
- it must have been disclosed or threatened to be disclosed, without authority
- unauthorised disclosure of the information has or will cause detriment.¹³⁴

5.160 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.¹³⁵

Specifically identified

5.161 The alleged confidential information must be identified specifically. It is not sufficient for the information to be identified in global terms.¹³⁶

Quality of confidentiality

5.162 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.¹³⁷ For example, information that is provided to an agency and copied to other organisations on a non-confidential or open basis may not be considered confidential.

5.163 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. The obligation of confidence may also only relate to a limited time period.

Mutual understanding of confidence

5.164 The information must have been communicated and received on the basis of a mutual understanding of confidence. In other words, the agency needs to have understood and accepted an obligation of confidence.¹³⁸ The mutual understanding

¹³³ *Re Petroulias and Others and Commissioner of Taxation* [2006] AATA 333.

¹³⁴ *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434 [443] referring to *Commonwealth v John Fairfax & Sons Ltd* (1980) 32 ALR 485. For examples of the application of these criteria see *Australian Broadcasting Corporation and Commonwealth Ombudsman* [2012] AICmr 11; *'B' and Department of Immigration and Citizenship* [2013] AICmr 9; *ACP Magazines Limited and IP Australia* [2013] AICmr 20; *Upper Dumaresq Action Group and Australian Competition and Consumer Commission* [2013] AICmr 47; and *'AF' and Department of Immigration and Citizenship* [2013] AICmr 54.

¹³⁵ *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434.

¹³⁶ *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434.

¹³⁷ *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434.

¹³⁸ *Re Harts Pty Ltd and Tax Agents' Board (Qld)* [1994] AATA 349.

must have existed at the time of the communication. The most obvious example is a contractual obligation of confidence. Confidence may arise in other circumstances. For example, when a person gives information to an agency they may ask that it be kept confidential and the agency could accept the information on that basis.

5.165 A mutual understanding of confidence can exist even if a person is legally obliged to provide the information to the agency.¹³⁹ On the other hand, if an agency has a statutory obligation to publish or release specified information, that obligation will outweigh any undertaking by the agency to treat the information confidentially, and therefore any mutual understanding of confidence.¹⁴⁰

5.166 It may be clear from an agency's actions whether the agency accepted an obligation of confidence and is maintaining that obligation.¹⁴¹ For example, an agency 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.

5.167 An obligation of confidentiality may be express or implied.¹⁴² An express mutual understanding may occur where the person providing the information asks the agency to keep the information confidential and the agency 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 information to that agency it will be on the basis of confidentiality.¹⁴³

Unauthorised disclosure or threatened disclosure

5.168 The information must have been 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.

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

5.170 Compliance with a statutory requirement for disclosure of confidential information will not amount to an unauthorised use and will not breach confidentiality.¹⁴⁴

¹³⁹ *National Australia Bank Ltd and Australian Competition and Consumer Commission* [2013] AICmr 84 [23].

¹⁴⁰ *Maritime Union of Australia and Department of Infrastructure and Regional Development* [2014] AICmr 35 [28]–[40].

¹⁴¹ *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434.

¹⁴² See *Re Bunting and Minister Immigration and Multicultural and Indigenous Affairs* [2006] AATA 145.

¹⁴³ See *Re Bunting and Minister Immigration and Multicultural and Indigenous Affairs* [2006] AATA 145; *Re Minter Ellison and Australian Customs Service* [1989] AATA 66.

¹⁴⁴ *Re Drabsch and Collector of Customs and Anor* [1990] AATA 265.

Detriment

5.171 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.¹⁴⁵ Detriment takes many forms, such as threat to health or safety, financial loss, embarrassment, exposure to ridicule or public criticism. The last three are applicable only to private persons and entities, but not to government.

5.172 The AAT has applied this element in numerous cases, but whether it must be established is uncertain.¹⁴⁶ 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.¹⁴⁷ Despite the uncertainty, it would be prudent to assume that establishing detriment is necessary.¹⁴⁸

Parliamentary Budget Office documents (s 45A)

5.173 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* (PS Act)), documents related to PBO requests may be held by other agencies. The PBO exemption in s 45A is designed to protect the confidentiality of 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

5.174 The PBO exemption applies to documents that:

- (a) originate 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) are 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) are 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) are drafts of any of the above type of documents (s 45A(1)(d)).

5.175 The exemption also applies to a full or partial copy of a document of a category listed at [5.174] 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 5.62).

¹⁴⁵ *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434 [443] referring to *Commonwealth v John Fairfax & Sons Ltd* (1980) 32 ALR 485.

¹⁴⁶ *Re Callejo and Department of Immigration and Citizenship* [2010] AATA 244; *Petroulias and Others and Commissioner of Taxation* [2006] AATA 333.

¹⁴⁷ *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) 89 ALR 366.

¹⁴⁸ *Re B and Brisbane North Regional Health Authority* (1994) 1 QAR 279.

5.176 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 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.

5.177 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 exemption

5.178 There are four 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 covered by the exemption (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)).

5.179 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 (Protocols)* and the *Memorandum of Understanding (MOU) between the Parliamentary Budget Office and the Heads of Commonwealth Bodies in relation to the Provision of Information and Documents*.¹⁴⁹

Withholding information about the existence of documents

5.180 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 [5.50] – [5.53] above).

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

¹⁴⁹ Available at www.finance.gov.au.

5.181 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.

5.182 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.

5.183 This provision takes its scope from the principles of privilege and the general law of contempt of court. While these powers have a 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.

Apart from this Act

5.184 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

5.185 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 put improper pressure on a party to court proceedings¹⁵⁰ 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.¹⁵¹

5.186 Documents protected under s 46(a) include documents which 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 would be exempt.

¹⁵⁰ *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.

¹⁵¹ For further information on contempt of court see AGS Legal Briefing # 56, available at www.ags.gov.au.

Contrary to an order or direction

5.187 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. Royal Commissions are established for a fixed time period. However any confidentiality orders continue in effect past this period.¹⁵²

Infringe the privileges of Parliament

5.188 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.¹⁵³

5.189 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 UK 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.

5.190 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 which 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).¹⁵⁴

5.191 Section 4 of the Parliamentary Privileges Act 1987 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.

5.192 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.

5.193 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

¹⁵² *Re KJ Aldred and Department of Prime Minister and Cabinet* [1989] AATA 148.

¹⁵³ See Senate Brief No 11, available at www.aph.gov.au.

¹⁵⁴ See *Seven Network (Operations) Limited and Australian Federal Police (Freedom of information)* [2019] AICmr 32.

a member of Parliament's free performance of his or her duties as a member.

5.194 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 him or her in responding 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.

5.195 When assessing documents 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.

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

5.196 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.

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

- (a) in respect of the applicant's business or professional affairs
- (b) in respect of an undertaking and the applicant is the proprietor of the undertaking or a person acting on behalf of the proprietor
- (c) in respect of an organisation and the applicant is the organisation or a person acting on behalf of the organisation (s 47(2)).

5.198 These exceptions reflect that no harm would result from disclosure of documents 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

5.199 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.¹⁵⁵

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

¹⁵⁵ *Department of Employment, Workplace Relations and Small Business v Staff Development and Training Company* (2001) 114 FCR 301.

- 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.¹⁵⁶

5.201 Factors that a decision maker might regard as useful guidance but not an exhaustive list of matters to be considered include:

- the extent to which the information is known outside the business of the owner of that information
- the extent to which the information is known by persons engaged in the owner's business
- measures taken by the owner to guard the secrecy of the information¹⁵⁷
- the value of the information to the owner and to his or her 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.¹⁵⁸

5.202 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.¹⁵⁹

5.203 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.¹⁶⁰

Information having a commercial value

5.204 To be exempt under s 47(1)(b) a document must satisfy two 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.¹⁶¹

5.205 It is a question of fact whether information has commercial value, and

¹⁵⁶ *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) 108 ALR 163.

¹⁵⁷ See *Cordova 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.

¹⁵⁸ *Re Organon (Aust) Pty Ltd and Department of Community Services and Health* [1987] AATA 396.

¹⁵⁹ *Australian Broadcasting Corporation and Australian Fisheries Management Authority* [2016] AICmr 43 [30]. (However, note that as at August 2016 this decision is on appeal to the AAT).

¹⁶⁰ *Searle Australia Pty Ltd and Public Interest Advocacy Centre and Department of Community Services and Health* (1992) 108 ALR 163.

¹⁶¹ See *McKinnon and Department of Immigration and Citizenship* [2012] AICmr 34.

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.¹⁶² The information need not necessarily have ‘exchange value’, in the sense that it can be sold as a trade secret or intellectual property.¹⁶³ The following factors may assist in deciding in a particular case whether information has commercial value:

- whether the information is known only to the agency or person for whom it has value or, if it is known to others, to what extent that detracts from its intrinsic commercial value
- whether the information confers a competitive advantage on the agency or person to whom it relates — for example, if it lowers the cost of production or allows access to markets not available to competitors
- whether a genuine ‘arm’s-length’ buyer would be prepared to pay to obtain that information¹⁶⁴
- whether the information is still current or out of date (out of date information may no longer have any value)¹⁶⁵
- whether disclosing the information would reduce the value of a business operation or commercial activity — reflected, perhaps, in a lower share price.

5.206 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.¹⁶⁶

5.207 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.¹⁶⁷ 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.¹⁶⁸

¹⁶² *Re Mangan and The Treasury* [2005] AATA 898; *Re Metcalf Pty Ltd and Western Power Corporation* [1996] WAICmr 23.

¹⁶³ *McKinnon and Department of Immigration and Citizenship* [2012] AICmr 34 [42].

¹⁶⁴ *Re Cannon and Australian Quality Egg Farms* (1994) 1 QAR 491 and *Re Hassell and Department of Health of Western Australia* [1994] WAICmr 25.

¹⁶⁵ *Re Angel and the Department of the Arts, Heritage and the Environment; HC Sleigh Resources Ltd and Tasmania* [1985] AATA 314.

¹⁶⁶ *Re Hassell and Department of Health Western Australia* [1994] WAICmr 25.

¹⁶⁷ See for example *'D' and Civil Aviation Safety Authority* [2013] AICmr 13.

¹⁶⁸ *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 has commercial value such that a competitor would be willing to pay for it, and that value would be diminished by disclosure. However, as at August 2016 this decision is on appeal to the AAT.

Consultation

5.208 Where release of a document may disclose a trade secret or commercially valuable information belonging to an individual, organisation or undertaking other than the applicant, the decision maker should consult the relevant parties. Section 27 requires an agency or minister to consider whether that individual, organisation or undertaking might reasonably wish to make a submission that the document should be exempt from disclosure. If the decision maker's view is that the third party would wish to make a submission, they must consult them before giving access if it is reasonably practicable to do so. For further guidance on third party consultation see Parts 3 and 6.

Electoral rolls and related documents (s 47A)

5.209 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.

5.210 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)).

5.211 The exemption does not apply where 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)).

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.

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

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: <ul style="list-style-type: none"> • 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

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 OAIIC 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 before¹⁷ or after¹⁸ 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

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 charge²⁴
- 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 public²⁵
- 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

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*

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.

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

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 3 —

Processing and deciding on requests for access

Version 1.8, December 2021

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Administering the FOI Act — general considerations

Key principles

- 3.1 The FOI Act closely regulates the way that agencies and ministers must process requests for access to documents. In addition to the detailed rules discussed in this Part, agencies and ministers should have regard to central principles that underpin the right to obtain access to documents held by government (see Part 1 of these Guidelines). These include:
- subject to the FOI Act, every person has a legally enforceable right to obtain access to government documents (s 11(1))
 - a person's reasons for seeking access to a document, or an agency or minister's belief about a person's reasons for seeking access, are not relevant (s 11(2))¹
 - the functions and powers given by 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))
 - the Act does not limit any power to give access to information under other legislative or administrative arrangements (s 3A(2)).

Access to government information — administrative release

- 3.2 An agency may choose to provide administrative access outside the formal FOI Act request process.² This may be as informal and flexible as providing information or documents when requested by a member of the public, or collating and releasing data or statistics following a specific request. Alternatively, an agency may choose to establish and notify on its website an administrative access arrangement that is to operate alongside the FOI Act, either generally or for specific categories of information or documents.
- 3.3 Administrative release can offer benefits to agencies and members of the public. The advantages of administrative release include that it:
- advances the objects of the FOI Act to foster open government
 - encourages flexibility and engagement with the public
 - can rely on technology to facilitate easy collation, integration and distribution of information
 - can offer a lead-in to the FOI process by enabling an applicant to clarify the type of information requested from an agency
 - aligns with the broader movement in public administration to facilitate dialogue and negotiation between parties before formal legal processes are used
 - potentially offers cost benefits and quicker processing times.

¹ A person's right to access should not be affected by their reasons for seeking access. However, it may be a relevant consideration when deciding whether the document is exempt.

² For more information see OAI, *Administrative access* at www.oaic.gov.au

- 3.4 An administrative access arrangement should be tailored to the size of an agency, its work, the requests it typically receives for information or documents, and its regular procedures for public contact and access.
- 3.5 Administrative access arrangements should operate alongside FOI Act processes. Importantly, there should be an efficient process for referral of requests to the formal FOI process where FOI is more appropriate or where the requester would prefer to apply under the FOI Act.³ Agencies must comply with obligations arising from the formal FOI process, including the obligation to provide reasons for its decision within the stipulated timeframes. In circumstances where the requester has requested documents under the FOI Act, but the agency is minded to release the documents under administrative access arrangements, it is expected that the agency will seek the requester's consent, and withdrawal of the FOI request, before releasing the documents administratively. Administrative release of an individual's own personal information must also comply with the minimum requirements set out in Australian Privacy Principle (APP) 12 of the Privacy Act even if the agency has separately formalised a process for applying for access and correction under the Privacy Act. Similarly, arrangements that allow for correction of personal information must comply with the minimum requirements set out in APP 13.⁴

Principles of good decision making under the FOI Act

- 3.6 The public expects agencies and ministers to act fairly, transparently and consistently in their administrative decision making and to be accountable for the decisions they make. The quality of decisions under the FOI Act is particularly important given the integral role freedom of information requests can have in securing open government.
- 3.7 Decisions made under the FOI Act must be consistent both with the requirements of the Act and with general principles of good decision making. Those general principles are explained in five best practice guides published by the Administrative Review Council (ARC).⁵ This Part discusses how those principles can be relevant to decisions made under the FOI Act. In summary, as the ARC guides explain, the general principles require that decisions are lawfully made, that procedural fairness is observed, that decisions are based on findings of fact, reasons are given for decisions, and that people directly affected by administrative decisions are informed of their review rights.

Lawfulness

General principle

- 3.8 A decision that is made under legislation must conform to the requirements of the legislation, and be made by an authorised decision maker. This requirement is explained in further detail in the ARC Best Practice Guide No 1, *Decision Making: Lawfulness*.

³ Where it appears that the document is likely to contain a substantial number of redactions, it would generally be more appropriate for the request to be processed under the FOI Act.

⁴ For more information, see Chapters 12 and 13 of the Information Commissioner's APP Guidelines, available at www.oaic.gov.au

⁵ See ARC *Best Practice Guides*, 2007, at <https://www.arc.ag.gov.au/Publications/Reports/Pages/OtherDocuments.aspx>

Decision making under the FOI Act

- 3.9 The FOI Act specifies in detail how decisions are to be made and the criteria and principles on which decisions are to be based. For example, the Act specifies the agencies and documents to which the Act applies, the procedure for making and notifying decisions on FOI requests, and the exempt documents to which access can be refused. Those FOI provisions are discussed below and in other Parts of these Guidelines.
- 3.10 Decision making under the FOI Act must take into account the objects in s 3. As discussed in further detail in Part 1 of these Guidelines, the objects embody a policy — or presumption — of open government that is relevant to all FOI decision making. This is emphasised in s 3(4), which states Parliament’s intention ‘that 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’. Another specific object, stated in s 3A, is that agencies and ministers retain an administrative discretion (subject to other legislation) to provide access to information and documents other than under the FOI Act.
- 3.11 Decision makers must also have regard to these Guidelines when making decisions under the FOI Act (s 93A). The Guidelines are not a legislative instrument (s 93A(3)) and, by contrast with the provisions of the FOI Act, do not have binding force. However, it is well established that decision-makers should, at a minimum, have regard to the Guidelines in discharging the powers and functions under the FOI Act.⁶

Authorised decision makers

- 3.12 The FOI Act specifies that a decision relating to a request made to an agency may be made by the responsible minister or the principal officer of the agency, or by officers who are properly authorised (s 23(1)). An officer should confirm that they are authorised before making a decision. A decision on a request made to a court may be made by the principal officer, or an officer acting within their scope of authority (s 23(2)).
- 3.13 Agencies should ensure a sufficient number of officers are authorised at appropriately senior levels to make both original and internal review decisions. The capabilities and work level standards of APS employees may assist agencies to ensure they authorise officers who have the necessary skills.⁷ A decision made on a request to a minister may be made by the minister personally or by someone the minister has authorised to act on their behalf, either a member of their staff or an officer of an agency. It would be prudent for a minister to make an authorisation in writing, as the decision will be a decision of the minister, not of the person acting on the minister’s behalf.

⁶ With respect to FOI decision makers and the Administrative Appeals Tribunal (AAT), in *Francis and Department of Defence* [2012] AATA 838, applied in *Bradford and Australian Federal Police (Freedom of Information)* [2016] AATA 775, the AAT explained that FOI decision makers (including members of the Tribunal reviewing FOI matters) should ‘apply the Guidelines unless there is a cogent reason to do otherwise’. However, in *Wood; Secretary, Department of Prime Minister and Cabinet and (Freedom of Information)* [2015] AATA 945, the AAT noted that insofar as the second level of external merits review, s 93A of the FOI Act only requires the AAT to ‘have regard’ to the Guidelines, and in having regard to the Guidelines, the AAT must be tempered by its obligation to make correct decisions under the FOI Act. In *Utopia Financial Services Pty Ltd and Australian Securities and Investments Commission (Freedom of information)* [2017] AATA 269, it was further explained that the AAT is only required to have regard to the Guidelines to the extent that they are consistent with the functions and powers conferred upon it by the FOI Act.

⁷ For more information about these standards see the Australian Public Service Commission’s website at www.apsc.gov.au

- 3.14 Authorised officers may obtain assistance from other officers, and take advice and recommendations into account, but they are nevertheless responsible for reaching an independent decision and exercising any discretion.⁸

Procedural fairness

General principle

- 3.15 A decision that directly affects the rights or interests of a person or organisation must be made in accordance with the principles of natural justice (also known as procedural fairness). The decision maker is required to follow a fair decision-making process, complying with the ‘bias rule’ and the ‘hearing rule’. These requirements are explained in further detail in the ARC Best Practice Guide No 2, *Decision Making: Natural Justice*.
- 3.16 The bias rule requires a decision maker to be impartial and have no personal stake in the decision to be made. The decision maker must be free of both actual and apparent bias, that is, of conduct that might appear to a fair-minded observer to affect their impartiality in reaching a decision.⁹
- 3.17 The hearing rule requires that a person who could be adversely affected by a decision be notified that a decision may be made and is given an opportunity to express their views before that occurs.¹⁰ The nature of this ‘notice and comment’ procedure can vary from one decision or context to another. The minimum requirement, however, is that a person should be given sufficient information and a reasonable opportunity to comment, to ensure that procedural fairness is upheld.

The bias rule and FOI decision making

- 3.18 The bias rule is relevant to all decision making under the FOI Act. Two examples of where caution is needed are:
- An authorised FOI decision maker who knows an FOI applicant personally should consider passing the matter to another officer for decision, especially if there is a close or social relationship. Generally, a decision maker is not prevented from making a decision by reason only of former contact with an FOI applicant, which may be a regular occurrence in some agencies.
 - An FOI decision maker must approach each decision with an open mind and, for example, consider any submission by an applicant as to why a document is not exempt or a charge should be reduced. Generally, a decision maker is not prevented from making a decision by reason of having dealt previously with a similar issue or applicant, or having expressed a view about FOI Act principles or requirements.
- 3.19 The Australian Public Service Commission has issued guidance material to assist agencies to identify and manage conflicts of interest (available at www.apsc.gov.au).

The hearing rule and FOI decision making

- 3.20 The FOI Act specifies in detail the procedure to be followed in making decisions on FOI requests. For example, agencies are required to provide reasonable assistance to persons to

⁸ See ARC Best Practice Guide No 1, *Decision Making: Lawfulness*, 2007, p 6.

⁹ *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.

¹⁰ *Kioa v West* (1985) 159 CLR 550; see also ARC Best Practice Guide No 2, *Decision Making: Natural Justice*, 2007, p 1.

make FOI requests (s 15(3)), notify an applicant that a request has been received (s 15(5)), allow an applicant a reasonable opportunity to revise a request before it is refused for a practical refusal reason (s 24AB), allow an applicant to respond before a charge is imposed (s 29), provide to the applicant a written statement of the reasons for the decision (s 26), and advise the applicant of their right to seek internal review or IC review of an adverse decision (s 26(1)(c)). The FOI Act also specifically recognises the right of third parties to be consulted about release of documents that affect their interests in certain circumstances (ss 26A, 27 and 27A — see Part 6 of these Guidelines).

- 3.21 A person who disagrees with a decision on access to documents, or amendment or annotation of personal records, has the right to apply for internal review by the agency and review by the Information Commissioner, provided the application is made within the relevant statutory timeframes (see Parts 9 and 10 of these Guidelines). The review processes provide an opportunity for an affected person to be heard, and to that extent, for natural justice to be observed.

Facts and evidence

General principle

- 3.22 An administrative decision must be based on facts. A central obligation of a decision maker is therefore to identify and separate the ‘material questions of fact’; gather and assess information or evidence to support each finding of fact; and explain how each finding of fact was reached. These requirements are explained in further detail in the ARC Best Practice Guide No 3, *Decision Making: Evidence, Facts and Findings*.
- 3.23 A material question of fact is one that is necessary to a decision — or, put another way, the existence or non-existence of the fact can affect the decision to be made. A statute will ordinarily set out the factual matters that must be considered, but sometimes these will be present more by implication than by direct legislative statement.
- 3.24 The obligation rests on a decision maker to be reasonably satisfied that a finding of fact can or cannot be made on the available evidence. Unless legislation states otherwise, there is no onus or burden on a party to prove that a fact does or does not exist. In discharging the obligation to be reasonably satisfied, the decision maker may have to draw inferences from the available evidence or information known to the decision maker. The evidence should be logically capable of supporting the decision maker’s findings of fact.

Fact finding in FOI decision making

- 3.25 The obligation on FOI decision makers to base each decision on facts is captured in s 26(1)(a). The statement of reasons for a decision to refuse or defer access to a document ‘shall state the findings on any material question of fact, referring to the material on which those findings were based, and state the reasons for the decision’ (see below [3.177]–[3.179] below).
- 3.26 The provisions of the FOI Act specify the material facts that must be examined in deciding whether to grant access to documents in response to an FOI request. Similarly, it is implicit in many provisions of the Act that findings, including inferences from known facts, may need to be made. The following examples are illustrative:
- a material fact in considering whether a document is exempt under s 33(a)(ii) is whether release of the document would cause damage to the defence of the Commonwealth

- a material fact in considering whether a document is exempt under s 34 is whether the document was created for the dominant purpose of consideration by Cabinet
- in making a decision about release of documents, it is implied that the decision maker must first make findings about the scope of the request and the documents in the agency's possession that fall within that scope
- in deciding whether payment of a charge would cause financial hardship to an applicant (s 29(5)(a)), a decision maker may need to consider the financial position of an applicant, including for example whether the applicant receives income support.

3.27 The standard principle in administrative proceedings — that no party bears an onus of proof, and the decision maker must be reasonably satisfied of the matters to be decided — does not apply to IC review proceedings (see Part 10 of these Guidelines).

Reasons

General principle

- 3.28 Members of the public are entitled to know the reasons why an administrative decision that affects them has been made. Giving reasons promotes fairness, transparency and accountability. It allows the person affected by the decision the opportunity to have the decision explained and to seek review if they wish. This fundamental theme in administrative law and good decision making is explained further in the ARC Best Practice Guide No 4, *Decision Making: Reasons*.
- 3.29 The stated reasons should be meaningful and accurate, setting out what the decision maker considered and why, including addressing arguments put to the decision maker. Providing good statements of reasons can lead to greater acceptance by applicants of decisions, with a corresponding reduction in complaints and requests for review.

Reasons under the FOI Act

- 3.30 Section 26 of the FOI Act requires an applicant to be given the reasons for a decision to refuse or defer access to a document. The section specifies the matters that must be included in the statement of reasons, including the findings on material questions of fact, the public interest factors taken into account in applying a conditional exemption, the name and designation of the agency officer making a decision, and information about the applicant's review rights (see below at [3.171]–[3.188]).
- 3.31 The FOI Act also requires the Information Commissioner to provide reasons for a decision on a complaint (s 75(4)) or investigation (s 86(2)) and an application for IC review (s 55K(4)).

Accountability

General principle

- 3.32 Decision makers are accountable for their decisions. There are many different forms of accountability, including political, ethical and legal accountability. The system of administrative law ensures both legal accountability and good decision making, through external scrutiny, review and transparency measures. Administrative law accountability is explained in further detail in the ARC Best Practice Guide No 5, *Decision Making: Accountability*.

Accountability arrangements under the FOI Act

3.33 The FOI Act contains detailed provisions for review and oversight of FOI decision making by the OAI (see Parts 10 and 11 of these Guidelines). Section 26(1)(c) of the Act requires information to be included in the statement of reasons about the applicant's rights to review and the procedures for exercising those rights, and their right to make a complaint to the Information Commissioner.

Right of access

3.34 Any person has the right to apply for access to a document of an agency or an official document of a minister (s 11(1)). An applicant does not have to reside in Australia or be an Australian citizen.¹¹ The term 'person' also includes a body politic or body corporate, such as a company.¹²

Reasons for a request

3.35 A person's right of access is not affected by any reasons they give for seeking access or any belief the agency or minister may have as to the reasons for seeking access (s 11(2)). In general, any use an applicant might make of the documents is not relevant to the decision whether to grant them access. In the decision of *'FG' and National Archives of Australia*, the Commissioner explained that s 11(2) is to be read as meaning that a person's right of access is not to be adversely affected or diminished by their stated or assumed reasons.¹³ However, the Commissioner in *'FG'* also explained that an applicant's reasons for requesting the information may be a relevant consideration for the purposes of considering whether disclosure would be unreasonable where required under an exemption.¹⁴ For example, when deciding whether the disclosure of personal information about a person under s 47F(1) would be unreasonable, an agency may take into account the likelihood of an FOI applicant publishing the personal information in an article.

3.36 Nothing in the FOI Act limits what an applicant may do with the released documents (although other legal restrictions such as copyright will still apply, see [3.222]). A decision to give a person access should therefore be made in the knowledge that the applicant may share the content of the documents with others or publish them to a larger audience.¹⁵ However, it would be incorrect for an agency to proceed on the premise that disclosure under the FOI Act is always the same as 'disclosure to the world at large'.¹⁶ Although the FOI Act does not limit further dissemination by the applicant, agencies should be aware that not every applicant would disseminate information obtained via an FOI request. Agencies should ensure that each case is examined on its own merits when deciding whether disclosure of the information would be unreasonable under a particular exemption, where unreasonableness is a relevant consideration.

¹¹ *Re Lordvale Finance Ltd and Department of the Treasury* [1985] AATA 174.

¹² See s 2C of the *Acts Interpretation Act 1901*.

¹³ [2015] AICmr 26 [40].

¹⁴ [2015] AICmr 26 [44].

¹⁵ *Re Sunderland and Defence* [1986] AATA 278; *'FG' and National Archives of Australia* [2015] AICmr 26; and *'BA' and Merit Protection Commissioner* [2014] AICmr 9.

¹⁶ See *'FG' and National Archives of Australia* [2015] AICmr 26.

- 3.37 In addition, the disclosure log provisions require general publication within 10 working days of information being released to individual applicants, subject to limited exceptions for personal, business and other information (see Part 14 of these Guidelines). Agencies and ministers are encouraged to provide advance notice to FOI applicants and third parties that, if released, the documents will be published in a disclosure log subject to certain exceptions.¹⁷

The applicant's identity

- 3.38 The FOI Act does not require an applicant who is a natural person to disclose or provide proof of their identity, nor require a body corporate or politic to establish that it is a legal entity. The Act does not prevent a natural person using a pseudonym.¹⁸
- 3.39 An applicant's identity can nevertheless be relevant in deciding if requested documents are exempt. Where a person has submitted an FOI request for their own personal information or documents relating to their business affairs, an agency or minister's office should be satisfied of the applicant's identity before giving the applicant access to the documents, particularly where the applicant purports to seek access to their own personal or business information. The protections under ss 90–92 of the FOI Act for officers disclosing documents in good faith may not apply if an agency or minister's office has been negligent in failing to make appropriate enquiries (see [3.219]–[3.220]).
- 3.40 If a need arises to establish an FOI applicant's identity, an agency should seek only the minimum amount of personal information required (consistent with APP 3 in the Privacy Act). The minimum amount of personal information required will vary depending on the nature of the documents sought by the applicant and whether the documents contain sensitive material. An applicant's identity should not be provided to any third party without prior consultation and agreement by the applicant. This also applies if there is a request consultation process under ss 26A, 27 or 27A or if another agency is consulted. Nevertheless, knowing an applicant's identity may help a third party decide more easily whether to object to disclosure and to frame any specific objections, and this issue can be raised with an applicant in consultation.

Requests by agents and groups

- 3.41 An FOI request may be made by one person on behalf of another person (who may be a natural person or a body corporate), by an organisation on behalf of a client, or by a person as the agent or representative of a group of individuals or corporate bodies. This is acknowledged in s 29(5)(a), which refers to payment of an FOI charge causing financial hardship 'to a person on whose behalf the application was made'.
- 3.42 A logical consequence of the principle that a request can be made by a person using a pseudonym (see [3.38]) is that a request may be made by a group of individuals or corporate

¹⁷ The relevant exceptions are listed in s 11C(1) and include personal information about any person; information about the business; commercial, financial or professional affairs of any person; other information that the information Commissioner determines would be unreasonable to publish; and any information that would not be reasonably practicable to publish due to the extent of modifications or deletions.

¹⁸ This principle is also reflected in APP 2 in the Privacy Act, which provides that an individual has the option when dealing with an entity to which the Privacy Act applies (which includes agencies and ministers) 'of not identifying themselves, or of using a pseudonym'. Two exceptions to APP 2 include where an entity is required or authorised by a law, or a court/tribunal order to deal with an identified individual or it is not practicable to deal with an individual who is not identified. Those exceptions may apply to some FOI requests, but not in all instances.

bodies or an unincorporated association.¹⁹ This is consistent with s 23 of the Acts Interpretation Act 1901, which provides that ‘words in the singular number include the plural’ (that is, a reference to ‘person’ in s 11(1) of the FOI Act can have a singular or plural meaning).

- 3.43 It may nevertheless be problematic to process (or continue processing) a request that is not made singly by an individual or body corporate unless the agency or minister can obtain further information or the name of a contact person. The following is a non-exhaustive summary of those circumstances.
- 3.44 Firstly, as discussed at [3.39], the identity of an applicant can be relevant when the documents that have been requested contain personal or business affairs information or are subject to secrecy provisions that prohibit release except to certain persons or in certain circumstances. Where an applicant seeks access to a document on behalf of another person, and the document contains information pertaining to that person, it may be necessary for the applicant to demonstrate that they have the authority of that person to obtain access and, if necessary, to confirm their right to the information under the secrecy provision (see [5.118]-[5.125]).
- 3.45 Secondly, an FOI applicant can apply under s 29(5) of the Act for payment of a charge to be reduced or not imposed for the reason that payment of the charge would cause financial hardship to the applicant or to a person on whose behalf the application is made. If an FOI request is made by a group of people, it may be difficult for an agency or minister to decide that issue without receiving more information about the members of the group.
- 3.46 Thirdly, where the FOI applicant has an affiliation with an organisation but leaves that organisation while the request is being processed (for example, a journalist who leaves a media organisation), it may be necessary to ascertain whether the request was made in a personal or a representative capacity (noting that this should be done when the FOI request was first received by the agency), and whether the FOI applicant wishes the processing of the request to continue. This issue may become more important if an access charge is payable, the request has reached the stage of internal or IC review, or a third party objects to disclosure under ss 26A, 27 or 27A of the FOI Act.

The formal requirements of an FOI access request

- 3.47 A request for documents under the FOI Act must meet the following formal requirements:
- The request must be in writing (s 15(2)(a)).
 - The request must state that it is a request for the purposes of the FOI Act (s 15(2)(aa)). This requirement distinguishes an FOI request from a simple enquiry requesting administrative access. Agencies and ministers should nevertheless take a flexible approach when assessing whether an applicant has met this requirement. If an

¹⁹ The AAT reached a contrary view in *Re Apache Energy Pty Ltd and National Offshore Petroleum Safety and Environmental Management Authority* [2012] AATA 296. The AAT ruled that the reference in FOI Act s 15 to a request from ‘a person’ was confined to the singular and that a request could not validly be made by a partnership. A similar view, that a person may not act in concert with others to make a single FOI request, was adopted by the AAT in *CKI Transmission Finance (Australia) Pty Ltd; HEI Transmission (Australia) Pty Ltd and Australian Taxation Office* [2011] AATA 654. The Information Commissioner’s reasons for disagreeing with that AAT ruling are explained in *Who qualifies as a ‘person’ eligible to make a request under s 15 of the Freedom of Information Act 1982?*, January 2013, available at www.oaic.gov.au

applicant's intention is not clear, the agency or minister should contact them to confirm whether the request was intended to be made under the FOI Act.

- The request must provide such information as is reasonably necessary to enable a responsible officer of the agency or the minister to identify the document that is requested (s 15(2)(b)) (see [3.109]). Before refusing a request for failing to meet this requirement an agency or minister must undertake a 'request consultation process' (see [3.127]–[3.132]).
- The request must give details of how notices under the FOI Act may be sent to the applicant (s 15(2)(c)). The return address may be a physical, postal or electronic address (such as an email address).²⁰
- The request must be sent to the agency or minister. This may be done by:
 - delivery of the request in person to a central or regional office of the agency or minister as specified in a current telephone directory
 - sending of the request by pre-paid post to an address of the agency or minister as specified in a current telephone directory; or
 - sending by electronic communication to an email or fax address specified by the agency or minister²¹ (s 15(2A)).

Assisting an applicant

- 3.48 An agency or minister may refuse a request that does not meet the formal requirements set out in s 15 (subject to conducting a request consultation process before basing a decision on s 15(2)(b)). However, an agency also has a duty to take reasonable steps to assist a person to make a request that complies with the formal requirements of the FOI Act (s 15(3)). This duty applies both when a person wishes to make a request and when they have made a request that does not meet the formal requirements. While the Act places an obligation only on agencies, ministers' offices may adopt a similar approach to assisting applicants.
- 3.49 An agency has a separate duty to take reasonable steps to assist a person to direct their request to the appropriate agency or minister (s 15(4)). This duty may arise, for example, if the document requested is not in the possession of the agency but is known or likely to be in the possession of another agency or minister. An agency or minister may also transfer a request to another agency or minister under s 16 of the Act if it does not have the document in its possession, or the document requested is more closely connected with the functions of the other agency or minister (see [3.57]–[3.68] below).
- 3.50 The nature of the duty to take 'reasonable steps' to assist an applicant to make a request, and to direct the request to the appropriate agency or minister, will depend on the circumstances of each request. For example, where a practical refusal reason exists and the

²⁰ The OpenAustralia Foundation Ltd, a registered charity, has developed a website (www.righttoknow.org.au) that automates the sending of FOI requests to agencies/ministers and automatically publishes all correspondence between the FOI applicant and the agency/minister. Agencies should consider whether the FOI request involves personal information or business information when dealing with public internet platforms facilitating FOI requests.

²¹ The OAIC encourages agencies to use a specified email address (ie FOI@agency.gov.au) and to make this email address available on their website. For further information, see OAIC, *Guidance for agency websites: 'Access to information' web page*, available at www.oaic.gov.au. Applicants are encouraged to use this address to make the FOI process more efficient for both agencies and the applicant.

applicant responds to a notice under s 24AB(2), the agency or minister must take reasonable steps to assist the applicant to revise the request so that the practical refusal reason no longer exists (s 24AB(3)). Reasonable steps in this scenario might include providing a breakdown of the time estimated for each step of the process and suggesting what would be a reasonable request in the circumstances.²²

- 3.51 Other factors that may be relevant include the nature of a request, the extent of detail required to clarify the scope of a request, an applicant's knowledge (or lack of knowledge) of the structure of government and the functions of agencies, and whether an applicant needs special assistance because of language or literacy issues or a disability.
- 3.52 If a person has not yet made a request and contacts an agency or minister's office to enquire whether they hold particular information, it is appropriate to explain the agency's functions and the type of information that is held. A person should be advised if the request relates to information that the agency or minister's office has already published in its disclosure log or as part of the Information Publication Scheme (IPS) (see Parts 14 and 13 of these Guidelines respectively).
- 3.53 An agency or minister should also be flexible in assisting an applicant to provide the details necessary for a request to fulfil the formal requirements of the FOI Act (for example, notifying the applicant of a missing detail by telephone or email). This contact can be made either before or after a request is formally acknowledged. It should rarely be necessary to require the submission of a fresh written FOI request if only a minor detail, such as a date relevant to a particular document or the applicant's return address, has been omitted from the access request. Once the further information is provided, the agency or minister's office should inform the applicant that their request meets the statutory requirements and that the timeframe for deciding the request has commenced. It is important to keep good records of contact with applicants, such as file notes of conversations, so that an agency can demonstrate if required that it has taken reasonable steps in accordance with s 15(3) or (4).

Interpreting the scope of a request

- 3.54 A request should be interpreted as extending to any document that might reasonably be taken to be included within the description the applicant has used.²³ A request for a 'file' should be read as a request for all of the documents contained in the file, including the file cover. There have been instances of agencies using s 22 to delete the names of government officials below the Senior Executive Service (SES) rank on the basis that those names are irrelevant to the scope of an FOI request. There is no apparent logical basis for treating the names of SES officials as being within the scope of a request, but other officials as being irrelevant to the request.²⁴ Without further explanation as to why the names of government officials are irrelevant to the scope of an applicant's request, it is unlikely that the application of s 22 is appropriately justified.
- 3.55 A request for all documents relating to a particular subject would also include any document or print-out which lists the names of all of the files the agency may consider relevant to the request. An agency will need to exercise care in relation to any sensitive material, such as personal names, that may appear on the list. If in doubt, the agency or

²² *Maria Jockel and Department of Immigration and Border Protection* [2015] AICmr 70 [31].

²³ *Re Gould and Department of Health* [1985] AATA 63.

²⁴ *'LK' and Department of the Treasury (Freedom of Information)* [2017] AICmr 47 [79] and *'FM' and Department of Foreign Affairs and Trade* [2015] AICmr 31 [14].

minister should consult the applicant to discuss exactly what documents are being requested. Other considerations relevant to construing the scope of a request are discussed below at [3.110].

- 3.56 It is irrelevant in making a decision on an FOI request whether or not the applicant already has copies of the documents they have requested. However, an agency or minister may choose to consult with the applicant to seek their agreement to exclude such material from the scope of the request.

Transferring requests to other agencies

- 3.57 Section 16 provides for the transfer of FOI requests between agencies and ministers.²⁵ A transfer can occur in some circumstances by agreement between agencies or ministers; in other circumstances a transfer is mandatory (see [3.67]). As noted at [3.49], an agency also has a duty under s 15(4) to take reasonable steps to assist a person to direct their request to the appropriate agency or minister, and this enables an agency to discuss with an applicant where a request could be directed.
- 3.58 An agency or minister may partially or wholly transfer a request (s 16(3A)). When an agency or minister receives a request for documents, some of which are in the possession of different agencies, the request is notionally divided into different requests. Each agency or minister then has obligations to make their own response to the request in accordance with the Act.
- 3.59 The transfer of a request under s 16 can facilitate access by avoiding the need for the applicant to make a new request to another agency or minister and by providing a whole of government approach to making information available to the public. Transfer of a request also allows the decision to be made by the agency or minister best placed to make an informed assessment about disclosure of relevant documents.
- 3.60 As the transfer of an FOI request under s 16 affects the obligations of agencies and ministers, consultation between them is essential. Informal consultation is particularly important in the case of complex requests or requests where an applicant has requested the same documents from numerous agencies or ministers. Agencies and ministers' offices are encouraged to consult each other as soon as possible and, where a request may contain more than one part, agree promptly as to who will be responsible for which part. A decision to transfer a request under s 16 is not open to external review as it is neither an access refusal nor access grant decision.
- 3.61 The agency or minister who first receives an FOI request is referred to in the following paragraphs as the 'transferring agency', and the agency or minister who receives the transferred FOI request is referred to as the 'receiving agency'.

Timeframe

- 3.62 A transferred request is deemed to have been received by the receiving agency at the time it was received by the transferring agency (s 16(5)(b)). In other words, the decision-making period commences when the request was originally received, and the receiving agency or minister is not given extra time. It is therefore important that agencies and ministers give early consideration to whether a request should be transferred. This will enable the notices

²⁵ Section 16 refers to agencies, but provides in s 16(6) that '**agency** includes a Minister'.

to the applicant under s 15(5)(a) (acknowledgement of receipt) and s 16(4) (transfer of request) to be combined and ensure that the receiving agency or minister is not disadvantaged by delay. In these circumstances, the receiving agency may also wish to consider seeking an extension with the agreement of the applicant under s 15AA. In order for the extension to be valid, the agency must ensure that the requirements under s 15AA are followed. Further information about the timeframe for notifying a decision under the FOI Act is below at [3.137].

Notifying the applicant

3.63 The transferring agency must advise the applicant that the request has been transferred (s 16(4)). The notification should state when the request was transferred and why, and the name and contact details of the agency or minister to whom the request was transferred. Particular care needs to be taken in relation to certain documents whose existence should neither be confirmed nor denied (see [3.68]). Where it is necessary to enable the receiving agency to deal with the request, the transferring agency should also send a copy of the relevant document to the receiving agency (s 16(4)).

Transfer of requests with agreement

3.64 An agency or minister who receives a request may transfer the request, or part of the request, to another agency or minister with their agreement if:

- the document is not in the first agency or minister's possession but is to their knowledge in the possession of another agency or minister, or
- the subject matter of the document is more closely connected with the functions of another agency or minister (s 16(1)).

3.65 It is implicit in those requirements that a request cannot be transferred solely as a matter of administrative convenience, or because another agency or minister produced the document requested or also has a copy of it. Equally, before a decision is made to transfer a request an agency or minister should take whatever reasonable steps are necessary to ascertain whether they have the documents that may meet the description in the FOI request.²⁶

3.66 Documents generated by the joint activities of a number of agencies (such as an interdepartmental committee) might be 'more closely connected' with the agency that chaired the committee or which initiated the production of the document.

Mandatory transfer of requests

3.67 Section 16 provides for the mandatory transfer of requests of certain types specified in Table 1. This requirement partially overlaps with s 7, which provides that all agencies and ministers are exempt from the operation of the FOI Act in relation to intelligence agency documents and defence intelligence documents (see Part 2 of these Guidelines).

²⁶ *Bienstein v Attorney-General* (2007) 96 ALD 639.

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 Government Solicitor, or security intelligence agency)	the functions of the exempt agency	the responsible portfolio department (s 16(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 16(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 16(3)).

Transfer of requests without revealing existence of documents

3.68 Where appropriate, the transferring agency should consult with the receiving agency about the possible application of s 25 before completing a transfer. Section 25 makes it clear that an agency or minister does not have to confirm or deny the existence and characteristics of certain documents, that is, documents that are exempt under s 33 (national security, defence or international relations), 37(1) (law enforcement or public safety) or 45A (Parliamentary Budget Office documents). Consultation with the receiving agency is particularly important to prevent inadvertently confirming to an applicant the existence of such a document before the decision maker has had the chance to consider whether to rely on s 25.

Consultation

3.69 Prompt and effective consultation with relevant parties involved in dealing with an FOI access request is essential to good administration.

Consultation with other agencies

3.70 Each agency or minister is required to make their own decision in relation to a request for access under the FOI Act. However, before making a decision about release of a document it is good practice to consult with other relevant agencies, even when the FOI Act does not require consultation and when the agency does not intend to disclose the document. Through consultation the decision maker may discover that another agency has already disclosed the document in response to an access request or made it publicly available. Consulting with other agencies will also assist in managing requests where an FOI applicant has requested access to the same or similar documents from several agencies.

- 3.71 In some cases, more than one agency will be involved in creating a document, such as through an inter-agency working group. In such circumstances, agencies should ensure that there are procedures in place to determine at the time a document is created whether it will be published under the IPS (see Part 13 of these Guidelines) or released in response to FOI requests. This may lessen the need for consultation between agencies if an FOI request is later received.

Consultation with the applicant

- 3.72 Various provisions of the FOI Act require contact with an applicant. However, agencies and ministers' offices are encouraged, as a matter of good administrative practice, to contact an applicant to discuss their request as soon as practicable after receiving the request. This contact provides an early opportunity to assist the applicant to address any formal requirements that have not been met (see [3.47] above). Early consultation can also lead to greater efficiency in the process. The agency or minister can discuss with the applicant the scope of their request, particularly if a preliminary assessment indicates there may be a practical refusal reason or estimated charges may be high (see [3.108]–[3.135] below and Part 4 of these Guidelines). In many cases, an applicant may not be aware of the nature and volume of the agency's records, and, as a result, their request might be expressed in wider terms than is necessary.
- 3.73 An agency or minister may also wish to seek the applicant's agreement to extend the processing period (including the period as extended under ss 15(6) or (8)) by no more than 30 days to deal with a large or complex request (s 15AA).

Consultation with third parties

- 3.74 An agency or minister may need to consult a third party where documents subject to a request affect Commonwealth-State relations (s 26A), are business documents (s 27) or are documents affecting another person's privacy (s 27A).
- 3.75 Where an agency or minister finds that disclosure of a document would likely affect Commonwealth-State relations, the agency or minister must not decide to give the applicant access to the document unless consultation has taken place in accordance with arrangements entered into between the Commonwealth and the State about consultation under s 26A.
- 3.76 The consultation requirements in relation to documents that are business documents (s 27) or documents affecting personal privacy (s 27A) only require an agency or minister to undertake consultations if it is reasonably practicable to give that person a reasonable opportunity to make submissions in support of the exemption contention (ss 27(5) and 27A(4)). In determining whether it would be reasonably practicable to consult, the agency or minister should have regard to all circumstances, including the time limits for processing the request.
- 3.77 There must be some rational basis which the agency or Minister can discern, based on the face of the document or from anything else actually known to the decision-maker, indicating that disclosure of the document would, or could be expected to, unreasonably affect the person adversely in relation to his or her personal information, lawful business or professional affairs.²⁷ The mere appearance of a person's name in the document, in the

²⁷ *Dreyfus and Attorney-General (Commonwealth of Australia) (Freedom of information)* [2015] AATA 995 [42]–[49].

absence of anything more, may not be sufficient for it to be apparent that a person might reasonably wish to make an exemption contention.²⁸

3.78 Where an agency or minister is required to consult with a third party:

- the timeframe for making a decision is extended by 30 days (s 15(6))
- the agency or minister must give the third party a reasonable opportunity to make submissions in support of the exemption contention (ss 27(4)(a) and 27A(3)(a))
- any submissions by the third party must be considered (ss 27(4)(b) and 27A(3)(b))
- the third party must be given notice of the decision and their review rights (ss 27(6) and 27A(5)), and
- the applicant will only be given access to a document when the third party's opportunities for review have run out (ss 27(7) and 27A(6)).

3.79 The extension of the processing period by 30 days referred to in s 15(6) does not apply to the internal review or IC review. Where an agency identifies during an internal review that there is a need to consult with a third party who had not previously been consulted, the timeframe for processing the internal review request is not extended.

3.80 If an affected third party does not agree with a decision by an agency or minister to give an applicant access to a document, the agency or minister should also explain to the third party that a submission²⁹ must be made in support of the exemption contention before the third party's review rights would apply.³⁰ If the third party does not make a submission in support of the exemption contention, the agency or minister is not required to provide written notice of the decision to the third party concerned, nor is the agency or minister required to wait until the third party's review rights have expired before providing access to the applicant (ss 27(8) and 27A(7)).

3.81 If a third party is consulted, they should be advised that if a response is not received within the specified timeframe the agency or minister may proceed to make an access grant decision.

3.82 More information on consultation with third parties is in Part 6 of these Guidelines. The third party should also be made aware that the agency or minister is generally required to publish the documents that are released in response to an access request unless an exception applies (see Part 14 of these Guidelines). Agencies should also be mindful when consulting with third parties that consultations are undertaken in accordance with the Privacy Act and that the requester's personal information is not provided to the third party without their consent.

Decisions on requests for access to documents

3.83 In response to a request for access to documents under the FOI Act, a decision maker may decide to:

²⁸ *Dreyfus and Attorney-General (Commonwealth of Australia) (Freedom of information)* [2015] AATA 995 [49]. See also *Attorney-General v Honourable Mark Dreyfus* [2016] FCAFC 119 [65].

²⁹ 'Submission' is not defined in the FOI Act. However, any submission should support the exemption contention to which the third party was consulted in accordance with ss 27 and 27A.

³⁰ For more information about third party review rights, see OAIC, *Personal and business information — third-party review rights*, at www.oaic.gov.au

- refuse a request that does not meet the formal requirements for making a request in s 15 (see [3.47])
- refuse access under s 24A on the basis that the document sought does not exist, cannot be found or was not received from a contractor (see [3.85])
- allow access to all documents as requested, even if some are exempt (s 3A(2)(a))
- withhold all requested documents as exempt, or withhold some documents and allow access to others (discussed in Parts 5 and 6 of these Guidelines)
- provide access to the personal information of the applicant through a qualified person under s 47F(5) (discussed in Part 6 of these Guidelines)
- delete exempt or irrelevant material from documents and provide access to edited copies under s 22 (see [3.95])
- defer access to the requested documents until a later date under s 21 (see [3.101])
- refuse under s 25 to confirm or deny that a document which would be exempt under s 33, 37(1) or 45A exists (see [3.103])
- refuse a request if a practical refusal reason exists under s 24AA, following a request consultation process (see [3.108])
- impose a charge for processing a request or for access to a document to which a request relates under s 29 (see Part 4 of these Guidelines)
- amend or annotate a record of the applicant's personal information as requested under s 48 (see Part 7 of these Guidelines)
- decline to amend or annotate a record of the applicant's personal information as requested under s 48 (see Part 7 of these Guidelines).

Refusing access to an exempt document

3.84 An agency or a minister is not required to give a person access to a document at a particular time if at that time the document is an 'exempt document' (s 11A(4)). An 'exempt document' is:

- a document that is exempt, or conditionally exempt where disclosure would be contrary to the public interest, under Part IV of the Act (see Parts 5 and 6 of these Guidelines)
- a document in respect of which an agency, person or body is exempt from the operation of the Act under s 7 (see Part 2 of these Guidelines)
- an official document of a minister that contains some matter that does not relate to the affairs of an agency or of a Department of state (s 4(1)).

Refusing a request for a document that does not exist, cannot be found or is not received from a contractor

3.85 An agency or minister may refuse a request if it has taken 'all reasonable steps' to find the document requested, and is satisfied that the document cannot be found or does not exist

(s 24A(1)).³¹ There are two elements that must be established before an agency or minister can refuse a request for access to a document under s 24A:

- the agency or minister must have taken all reasonable steps to find the document, and
- the agency or minister is satisfied that the document cannot be found or does not exist.

- 3.86 It is not enough for an agency or minister to simply assert that the document cannot be found or does not exist before taking any demonstrable steps to try and find the requested document.
- 3.87 An agency or minister can also refuse a request for access if it has taken contractual measures to ensure it receives a document from a contracted service provider but has not done so after taking all reasonable steps to receive the document in accordance with the contractual measures (s 24A(2)).³²
- 3.88 The Act is silent on what constitutes ‘all reasonable steps’. The meaning of ‘reasonable’ in the context of s 24A(1)(a) has been construed as not going beyond the limit assigned by reason, not extravagant or excessive, moderate and of such an amount, size or number as is judged to be appropriate or suitable to the circumstances or purpose.³³
- 3.89 Agencies and ministers should undertake a reasonable search on a flexible and common sense interpretation of the terms of the request. What constitutes a reasonable search will depend on the circumstances of each request and will be influenced by the normal business practices in the agency’s operating environment or the minister’s office.³⁴ At a minimum, an agency or minister should take comprehensive steps to locate documents, having regard to:
- the subject matter of the documents
 - the current and past file management systems and the practice of destruction or removal of documents
 - the record management systems in place
 - the individuals within an agency or minister’s office who may be able to assist with the location of documents, and
 - the age of the documents.³⁵
- 3.90 It may also be prudent for agencies and ministers to explain in its decision the steps that were taken to search for the document, including the dates as to when the searches were conducted, the search parameters used, the time taken to conduct the search and whether any relevant backups were examined.³⁶ This may assist the applicant in understanding how the searches were conducted and whether there is any merit in seeking further review of the

³¹ *Cristovao and Secretary, Department of Social Security* (1998) AATA 787.

³² For further information on contracted service providers see OAIC, *Documents held by government contractors: Agency obligations under the Freedom of Information Act 1982*, available at www.oaic.gov.au.

³³ *De Tarle and Australian Securities and Investments Commission (Freedom of information)* [2015] AATA 770, applying *Re Cristovao and Secretary, Department of Social Security* (1998) 53 ALD 138.

³⁴ *Chu v Telstra Corporation Limited* (2005) FCA 1730 [35], Finn J: ‘Taking the steps necessary to do this may in some circumstances require the agency or minister to confront and overcome inadequacies in its investigative processes’.

³⁵ *‘KE’ and Cancer Australia* [2016] AICmr 87; *John Singer and Comcare* [2016] AICmr 63; and *De Tarle and Australian Securities and Investments Commission (Freedom of information)* [2015] AATA 770, applying *Langer and Telstra Corporation Ltd* (2002) AATA 341.

³⁶ *Ben Fairless and Minister for Immigration and Border Protection (Freedom of information)* [2017] AICmr 115 [21].

decision by the agency or minister. The OAIC has developed a checklist and sample notice to assist agencies with the content of a statement of reasons.³⁷

- 3.91 Agencies and ministers are responsible for managing and storing records in a way that facilitates finding them for the purposes of an FOI request.³⁸ The steps taken to search for documents should include the use of existing technology and infrastructure to conduct an electronic search of documents, as well as making enquiries of those who may be able to help locate the documents.³⁹
- 3.92 Whether it is necessary for an agency or minister to conduct a search of its backup systems for documents will depend on the circumstances. For example, if the agency is aware that its backup system merely duplicates documents that are easily retrievable from its main records system, a search of the backup system would be unnecessary. Similarly, if an agency retains its backed up data for a maximum period of 12 months, and the applicant is seeking documents that are older than 12 months, it would not be necessary to undertake a search of the backup system.⁴⁰
- 3.93 On the other hand, if an agency or minister is aware that its backup system may contain relevant documents not otherwise available or if the applicant clearly includes backup systems in the request, a search of the backup system may be required (provided it does not involve a substantial and unreasonable diversion of agency resources, see [3.111]).
- 3.94 Agencies and ministers should assist applicants to identify the specific documents they are seeking. To do so would facilitate and promote public access to information in accordance with the objects of the Act. If the document still cannot be located, the statement of reasons given to the applicant should sufficiently identify the document, explain why it cannot be found or is known not to exist or to be in the agency's possession, describe the steps the agency took to search for the document, and note the limitations of any search. If a record is known or likely to have been destroyed under an agency's Records Disposal Authority, or in the course of normal administrative practice,⁴¹ this should be explained, if possible by a reference to the date of destruction and the agency's records management policy. A record of searches to plan and keep track of the steps taken to search for a document will be useful, particularly when managing complex requests for many documents or in later explaining the search that was undertaken. The OAIC has developed a checklist and search minute which sets out the steps that an agency or minister should follow to locate documents within the scope of an FOI request and the steps taken when searching for documents.⁴²

³⁷ The checklist can be found on the OAIC website — <https://www.oaic.gov.au/assets/freedom-of-information/guidance-and-advice/processing-foi-requests-reasonable-steps-checklist.pdf>

The sample access refusal notice can also be found on the OAIC website — <https://www.oaic.gov.au/assets/freedom-of-information/guidance-and-advice/sample-foi-notice-foi-sample-notice-access-refusal-decision.rtf>

³⁸ See *Langer and Telstra Corporation Ltd* [2002] AATA 341.

³⁹ See *Smith and Australian Federal Police (Freedom of information)* [2016] AATA 531; *'MC' and Department of Defence (Freedom of information)* [2017] AICmr 74; *William Yabsley and Australia Post (Freedom of information)* [2017] AICmr 35; *'JG' and Department of Human Services* [2016] AICmr 53; *'JF' and Family Court of Australia* [2016] AICmr 50; *John Singer and Comcare* [2016] AICmr 63; and *John Mullen and Australian Aged Care Quality Agency* [2016] AICmr 51.

⁴⁰ *'HL' and Department of Defence* [2015] AICmr 73.

⁴¹ Normal administrative practice allows agencies to destroy certain types of records which are not needed to document business decisions or are not significant records of an agency's business. For further guidance see the National Archives of Australia website at www.naa.gov.au/information-management/managing-information-and-records/destroying/NAP/index.aspx

⁴² The checklist and search minute can be found on the OAIC website — <https://www.oaic.gov.au/freedom-of-information/guidance-and-advice/processing-foi-requests-taking-all-reasonable-steps-to-find-documents/>

Deleting exempt or irrelevant content from a document

- 3.95 An agency or minister may refuse access to a document on the ground that it is exempt. If so, the agency or minister must consider whether it would be reasonably practicable to prepare an edited copy of the document for release to the applicant, that is, a copy with relevant deletions (s 22). It is important for agencies to keep in mind that the implicit purpose of s 22 is to facilitate access to information promptly and at the lowest reasonable cost through the deletion of material that can readily be deleted, and that an applicant has either agreed or is likely to agree that the material is irrelevant.⁴³
- 3.96 An agency or minister is under the same obligation to consider preparing an edited copy of a document by deleting information that would reasonably be regarded as irrelevant to the request.⁴⁴ Deleting irrelevant information from a document that is to be released can have advantages for both agencies and applicants. An agency may not have to consider whether the deleted information is exempt or if a third party should be consulted, and can more quickly reach a decision to provide access to the non-exempt information, and perhaps at a lower access charge. An applicant who disagrees that information deleted from a document is irrelevant to the request can make a fresh FOI request, as an alternative to seeking internal or IC review of the agency's decision.
- 3.97 The obligation to prepare an edited copy of a document so that it does not contain exempt or irrelevant content is subject to the following conditions:
- it is possible for the agency or minister to prepare an edited copy of the document (s 22(1)(b))
 - it is reasonably practicable to prepare an edited copy, having regard to the nature and extent of the modification required, and the resources available to modify the document (s 22(1)(c)), and
 - it is not apparent, from an applicant's request or consultation with the applicant, that the applicant would decline access to the edited copy (s 22(1)(d)).
- 3.98 Applying those considerations, an agency or minister should take a common sense approach in considering whether the number of deletions would be so many that the remaining document would be of little or no value to the applicant. Similarly, the purpose of providing access to government information under the FOI Act may not be served if extensive editing is required that leaves only a skeleton of the former document that conveys little of its content or substance.⁴⁵
- 3.99 Consideration should be given to consult the applicant before making a decision to edit a document to delete exempt or irrelevant content. An applicant may be willing to alter the scope of the request to a specific part of the document,⁴⁶ or to be given administrative access to particular information in the document (see [3.2]).

⁴³ 'FM' and Department of Foreign Affairs and Trade [2015] AICmr 31 [15].

⁴⁴ Re Russell Island Development Association Inc and Department of Primary Industries and Energy [1994] AATA 2; Re LJXW and Australian Federal Police and Another [2011] AATA 187. Section 22 does not apply to a document that contains only irrelevant information, which should be treated as beyond the scope of an applicant's request: *Nikjoo and Minister for Immigration and Border Protection* [2013] AATA 921 [44].

⁴⁵ *Paul Farrell and Australian Customs and Border Protection Service* [2015] AICmr 52; 'JL' and Department of the Prime Minister and Cabinet [2016] AICmr 58; and *Parnell & Dreyfus and Attorney-General's Department* [2014] AICmr 71.

⁴⁶ 'Document' is defined in s 4 to include 'any part of a document'.

3.100 If a decision is made to delete or edit exempt or irrelevant content, an agency or minister must give the applicant notice in writing that the edited copy has been prepared (s 22(3)). This notice must include the grounds for the deletions, including any specific provisions on which matter the agency or minister claims to be exempt was deleted. It is generally helpful to an applicant to mark on the document where text has been deleted and the grounds for the deletion.

Deferring access to a document

3.101 Where an agency or minister decides to grant access to a document, they may defer access:

- where publication of the document is required by law — until the expiration of the period within which the document is required to be published (s 21(1)(a))
- where the document has been prepared for presentation to Parliament or for the purpose of being made available to a particular person or body, or with the intention that it should be so made available — until the expiration of a reasonable period after its preparation for it to be so presented or made available (s 21(1)(b))
- where the premature release of the document would be contrary to the public interest — until an event occurs or the period of time expires after which the release of the document would not be contrary to the public interest⁴⁷ (s 21(1)(c))
- where a minister considers that the document is of such general public interest that the Parliament should be informed of the contents of the document before the document is otherwise made public — until the expiration of five sitting days of either House of Parliament (s 21(1)(d)).

3.102 The agency or minister must inform the applicant of the reasons for deferring access and, as far as practicable, indicate how long the deferment period will be (s 21(2)). A decision to defer access is an access refusal decision that is reviewable by the Information Commissioner (other than where a minister considers that Parliament should first be informed of the contents of the document) (s 53A(d)).

Refusing to confirm or deny existence of a document

3.103 The act of confirming or denying the existence of a document can sometimes cause damage similar to disclosing the document itself. For example, merely knowing that an agency has a current telecommunications interception warrant in connection with a specific telephone service would be sufficient warning to a suspect who could modify their behaviour and possibly undermine an investigation into serious criminal activity.

3.104 Section 25(2) allows an agency or minister to give an applicant notice in writing that does not confirm or deny the existence of a document but instead tells the applicant that, if it existed, such a document would be exempt.

3.105 The agency or minister does not have to search for or conduct an inquiry into the nature of the document being sought. Rather, s 25(2) requires only an assessment of whether a document of the kind requested is, or would be, an exempt document under ss 33 (documents affecting national security, defence or international relations), 37(1) (documents affecting enforcement of law and protection of public safety) or 45A

⁴⁷ For example, in *Wellard Rural Exports Pty Ltd and Department of Agriculture* [2014] AICmr 131, as disclosure of the documents at issue might prejudice an investigation, access to those documents was deferred until the conclusion of the investigation.

(Parliamentary Budget Office documents).⁴⁸ In answering this question, the decision maker must first turn their mind to whether the document sought is of such a kind that it would fall within the scope of the FOI request by considering the terms of the request and the technical expertise of the decision maker.⁴⁹ Where a document of the kind requested is, or would be, exempt under ss 33, 37(1) or 45A, the agency or minister is entitled to rely on s 25 in neither confirming or denying the existence of the document.

- 3.106 Similarly, where a decision is made to refuse access to a document in accordance with the request, agencies and ministers should keep in mind not to inadvertently disclose in its reasons for decision the existence of a document where that disclosure would reveal exempt matter (s 26(2)).⁵⁰ The other requirements of a notice under s 26 still apply (see [3.172] below).
- 3.107 Agencies and ministers should use s 25 only in exceptional circumstances. For the purposes of IC review, a notice under s 25 is deemed to be notice of a decision to refuse access on the grounds that the document sought is exempt under s 33, 37(1) or 45A, as the case may be (s 25(2)).

Refusing access when a practical refusal reason exists

- 3.108 An agency or minister may refuse a request if a ‘practical refusal reason’ exists. These are of two types: a request does not sufficiently identify the requested documents (s 24AA(1)(b)); or the resource impact of processing the request would be substantial and unreasonable (s 24AA(1)(a)). In either instance, the agency or minister must first follow a ‘request consultation process’ before refusing the request.

Request does not sufficiently identify documents

- 3.109 A formal requirement of making an FOI request is that the request must provide such information as is reasonably necessary to enable a responsible officer of the agency or the minister to identify the document that is requested (s 15(2)(b)). This differs from other formal requirements, in that a failure to comply with this requirement is classified by the Act as a ‘practical refusal reason’ for which a request consultation process is required.
- 3.110 An agency should not wait until the practical refusal stage to help an applicant to clarify their request. The following considerations should also be borne in mind before a request consultation process is commenced:
- A request can be described quite broadly and must be read fairly by an agency or minister, being mindful not to take a narrow or pedantic approach to its construction.⁵¹
 - An applicant may not know exactly what documents exist and may describe a class of documents, for example: all documents relating to a particular person or subject matter; or all documents of a specified class that contain information of a particular kind; or all documents held in a particular place relating to a subject or person. Where the applicant has requested a class of documents, it may be useful for the agency to explain to the applicant the information that is contained in those documents, as this

⁴⁸ *Paul Farrell and Australian Federal Police (Freedom of information)* [2017] AICmr 113 [35].

⁴⁹ *Paul Farrell and Australian Federal Police (Freedom of information)* [2017] AICmr 113 [36].

⁵⁰ *TFS Manufacturing Pty Limited and Department of Health* [2016] AICmr 73.

⁵¹ *‘BI’ and Professional Services Review* [2014] AICmr 20, applying *Re Anderson and AFP* [1986] AATA 79.

may assist the applicant to narrow the scope of his or her request to a specific set of documents, resulting in less time spent on processing irrelevant material.

- Although a request under the FOI Act must be for ‘documents’, rather than for ‘information’, a request may be phrased by reference to the information that a document contains. This may in fact be an effective and concise way for an FOI applicant to identify documents.
- A request does not need to quote a file or folio number.

Resource impact of processing request would be substantial and unreasonable

3.111 A ‘practical refusal reason’ exists if:

- in the case of an agency — the work involved in processing the request would substantially and unreasonably divert the resources of the agency from its other operations (s 24AA(1)(a)(i))
- in the case of a minister — the work involved in processing the request would substantially and unreasonably interfere with the performance of the minister’s functions (s 24AA(1)(a)(ii)).

3.112 An important similarity in both tests is that they require consideration of whether processing a request would have a ‘substantial’ and ‘unreasonable’ effect. There may be circumstances where the processing of an applicant’s request would have a substantial effect on an agency or minister, but may not necessarily be unreasonable in the circumstances. For example, an agency that is particularly large may not necessarily find that the processing of a request to be unreasonable, despite the fact that processing the request would have a substantial effect on the agency. Such agencies are likely to have dedicated resources to ensure that it can appropriately handle requests and reduce the impact of the requests on other business areas of the agency through the establishment of a permanent FOI team, as well as assigning additional temporary resources to handle a peak in the number or complexity of requests.⁵²

3.113 Similarly, where there is significant public interest value in the disclosure of the information contained in the documents, and/or where an individual has been significantly personally affected by decisions of government, the agency may find it difficult to justify that a practical refusal reason exists on the basis that processing the request would have an unreasonable effect on the agency even where the FOI processing burden is substantial.

3.114 Another similarity is that the Act specifies the same non-exhaustive list of matters that must be considered in applying both tests, and matters that cannot be considered. An important textual difference between the tests is that for agencies it is ‘whether a request would divert an agency’s resources from its other operations’ whereas for ministers it is ‘whether a request would interfere with the performance of a minister’s functions’.⁵³ This means that different considerations may arise in applying the tests.

3.115 The evident purpose of this practical refusal ground is to ensure that the capacity of agencies and ministers to discharge their normal functions is not undermined by processing FOI requests that are unreasonably burdensome. On the other hand, it is

⁵² ‘AP’ and Department of Human Services [2013] AICmr 78 [54].

⁵³ *Dreyfus and Attorney-General (Commonwealth of Australia) (Freedom of information)* [2015] AATA 995.

implicit in the objectives of the FOI Act that agencies and ministers must ensure that appropriate resources are allocated to dealing with FOI matters. This may include assigning additional temporary resources to handle a peak in the number or complexity of requests or to overcome inadequate administrative procedures. Poor record keeping or an inefficient filing system would not of themselves provide grounds for a claim that processing the request would be a substantial and unreasonable diversion of resources.⁵⁴ Similarly, although a broadly worded request is more likely to constitute an unreasonable diversion of resources than a request that is narrowly focused,⁵⁵ the fact that a large number of documents lies within the scope of a request may not be determinative if the documents can be easily identified, collated and assessed.

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

- identifying, locating or collating documents within the filing system of the agency or minister
- examining the documents
- deciding whether to grant, refuse or defer access
- consulting with other parties
- redacting exempt material from the documents
- making copies of documents
- notifying an interim or final decision to the applicant.

3.117 Other matters that may be relevant in deciding if a practical refusal reason exists include:⁵⁶

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

⁵⁴ See *'AP' and Department of Human Services* [2013] AICmr 78 [38]; and *Paul Farrell and Department of Immigration and Border Protection (Freedom of Information)* [2017] AICmr 116 [38].

⁵⁵ *Philip Morris Ltd and Department of Health and Ageing* [2013] AICmr 49 [35].

⁵⁶ See *Davies and Department of the Prime Minister and Cabinet* [2013] AICmr 10; *Fletcher and Prime Minister of Australia* [2013] AICmr 11; and *Langer v Telstra Corporation Ltd* [2002] AATA 341.

3.118 The Act also specifies matters that an agency or minister must not have regard to in deciding if a practical refusal reason exists:

- any reasons that the applicant gives for requesting access
- the agency or minister's belief as to the applicant's reasons for requesting access
- any maximum amount, specified in the regulations, payable as a charge for processing a request of that kind (s 24AA(3)).

3.119 Whether a practical refusal reason exists will be a question of fact in the individual case. Bearing in mind the range of matters that must and can be considered, it is not possible to specify an indicative number of hours of processing time that would constitute a practical refusal reason. Agencies should not adopt a 'ceiling' in relation to processing times; for example, deciding that a practical refusal reason exists once the estimated processing time exceeds 40 hours.⁵⁷ Rather, each case should be assessed on its own merits, and the findings in individual AAT and IC review decisions which discuss estimated processing times should be viewed in that light.⁵⁸

3.120 It is nevertheless expected that an agency or minister will provide a breakdown of the time estimated for each stage in processing a request. As discussed in Part 4 of the Guidelines, a commonly used tool for estimating processing time is a 'charges calculator'. Some versions of charges calculators contain a number of predetermined parameters based on assumptions as to how long an FOI request should take to process. Agencies should be mindful that the use of a 'charges calculator' with these predetermined parameters only provides a rough estimate of how long FOI decision-making will take and is not suitable for estimating the processing time for the purposes of practical refusal decision.⁵⁹

3.121 An estimate of processing time is only one consideration to be taken into account when deciding whether a practical refusal reason exists.⁶⁰ It is recommended that agencies examine a sample of the documents to assess the complexity of the material against whether the work involved in processing the request would constitute a substantial and unreasonable diversion of resources from the agency's other operations. A representative

⁵⁷ *Aloysia Brooks and Department of the Prime Minister and Cabinet* [2015] AICmr 66.

⁵⁸ For examples of relevant factors in IC review and AAT decisions affirming practical refusal reasons, see: *Tate and Director, Australian War Memorial* [2015] AATA 107 (estimate of 150 hours to process request of 1003 pages; small agency with one staff member available as a Freedom of Information resource and assigning staff from other areas of the agency to assist with processing the request would effectively mean that resources would be diverted from important priority operations and projects); *'FF' and Australian Taxation Office* [2015] AICmr 25 (estimate of 94.16 hours to process request of approximately 6500 pages); *Gurjit Singh and Attorney-General's Department* [2015] AICmr 20 (estimate of 74 hours to process a request of 1800 pages; the documents sought relate to financial grant to a University and processing the request would not cast light on a decision that has a significant personal impact on the applicant). For examples of relevant factors where practical refusal reasons were set aside, see: *Dreyfus and Attorney-General (Commonwealth of Australia) (Freedom of information)* [2015] AATA 995 (estimate of 228–630 hours to process request for the Attorney-General's diary was found to be unrealistic, as there was no rational basis upon which it could appear that every person named in the diary might reasonably wish to make an exemption contention for the purposes of consultation under ss 27 and 27A); *'JH' and Australian Securities and Investments Commission* [2016] AICmr 55 (where the agency is willing to process a separate, but identical request in exchange for a charge, they would not be able to continue to claim that a practical refusal reason exists); *Paul Farrell and Prime Minister of Australia (Freedom of information)* [2017] AICmr 44 (where it was not established that the documents were sufficiently complex or voluminous to justify the existence of a practical refusal reason).

⁵⁹ *Cash World Gold Buyers Pty Ltd and Australian Taxation Office (Freedom of information)* [2017] AICmr 20; *'KT' and Department of Foreign Affairs and Trade (Freedom of information)* [2017] AICmr 15; *'JC' and Department of Health* [2016] AICmr 47; and *Rita Lahoud and Department of Education and Training* [2015] AICmr 41.

⁶⁰ *'JC' and Department of Health* [2016] AICmr 47; and *'FX' and Department of Prime Minister and Cabinet* [2015] AICmr 39.

sample of between 10 to 15% of the documents⁶¹ within the scope of the request has been considered to be an appropriate sample size for the purposes of calculating processing time when deciding whether a practical refusal reason exists.⁶² A person with appropriate knowledge or expertise should assess the sample of the documents, looking at each document as if they were making a decision on access, including indicating the number of documents that could be released in an edited form.⁶³ The assessment of the sample would provide an indication of the complexity of the potential decision, that is, the number of exemptions required, the topic and content of the documents, and the number of consultations required and effort required to contact third parties based on available contact details.⁶⁴

Multiple requests

3.122 In deciding whether a practical refusal reason exists, two or more requests may be treated as a single request if the agency or minister is satisfied that:

- the requests relate to the same document or documents (s 24(2)(a))
- the subject matter is substantially the same for the requests (s 24(2)(b)).

3.123 The most common circumstance in which requests may be combined under s 24(2) is likely to be multiple requests from a single applicant. However, s 24(2) can also apply to two or more requests from different applicants. An example is where different applicants made more than 100 requests for documents relating to individual incidents reported on a single spread sheet published on an agency's disclosure log.⁶⁵ Multiple requests can only be combined as a single request under s 24(2) if there is a clear connection between the subject matter of the requested documents. Straightforward examples are where one request is for folios 1–100 of a file, and another request for folios 101–200 on the same file; or where three requests relate to three different chapters of one report.

3.124 Where a decision on the FOI request is not made within the statutory processing period, the agency or minister is deemed to have made a decision refusing access. Once there is a deemed refusal, it is not open to an agency or minister to combine the FOI request with another under s 24(2).⁶⁶ Section 24(2) allows an agency to combine multiple requests where the agency or Minister is satisfied that a practical refusal reason exists, but only during the statutory processing period, as such this power is not available where a decision refusing the request is deemed to have been made under s 15AC(3).

3.125 Where multiple requests from different applicants are being treated as a single request, an agency must still follow the request consultation process with each applicant, unless an applicant has agreed to another arrangement. An agency's power to treat two or more

⁶¹ Where the number of documents are not high, it may be more appropriate for a sampling of more than 20% of the documents to be conducted. See *Paul Farrell and Prime Minister of Australia (Freedom of information)* [2017] AICmr 44 where the sample size used for estimating processing time was small and the Information Commissioner was not satisfied that the estimated processing time was reasonable.

⁶² *'GD' and Department of the Prime Minister and Cabinet* [2015] AICmr 46; *Farrell and Department of Immigration and Border Protection (No. 2)* [2014] AICmr 121; *'DC' and Department of Human Services* [2014] AICmr 106; *Farrell and Department of Immigration and Border Protection (No. 2)* [2014] AICmr 121; *'DC' and Department of Human Services* [2014] AICmr 106; and *'AP' and Department of Human Services* [2013] AICmr 78.

⁶³ *Paul Farrell and Prime Minister of Australia (Freedom of information)* [2017] AICmr 44 [25].

⁶⁴ See *Dreyfus and Attorney-General (Commonwealth of Australia) (Freedom of information)* [2015] AATA 995 [57].

⁶⁵ *Farrell and Department of Immigration and Border Protection* [2014] AICmr 74 [19].

⁶⁶ *Paul Farrell and Department of Immigration and Border Protection (Freedom of information)* [2017] AICmr 116 [9].

requests as a single request for the purpose of making a practical refusal reason decision, does not override the legally enforceable right of each applicant under s 11 to obtain access to documents in accordance with the FOI Act.⁶⁷ Consequently, agencies are obliged to deal individually with each request that is not withdrawn or revised before the end of the consultation period.

- 3.126 If an FOI applicant requests access to multiple documents, an agency can choose to undertake a practical refusal consultation process in relation to some but not all of the documents, while still processing the remainder of the request.⁶⁸ But the agency cannot undertake a consultation process in relation to all of the requested documents and then, if the applicant does not withdraw or revise the request, unilaterally decide to give access under the FOI Act to some of the requested documents and refuse access to others on practical refusal grounds. It is open to an agency to give administrative access to a document that was part of a request that was refused on practical refusal grounds, but that decision is not a decision under the FOI Act and FOI review rights will not apply.⁶⁹

Request consultation process

- 3.127 Where an agency or minister is satisfied that a practical refusal reason exists, they must undertake a request consultation process with the applicant before making a decision to refuse the request (s 24AB).
- 3.128 Before commencing a formal request consultation process, agencies and ministers' offices are encouraged to discuss the request with the applicant. This is often a more efficient way of obtaining further information from the applicant and helping them to refine a request that is too large or vague. However, if the applicant cannot be contacted promptly, or the discussion does not elicit information that allows relevant documents to be identified, the request consultation process should be commenced.
- 3.129 The agency or minister must give the applicant a written notice that states:
- an intention to refuse access to a document in accordance with a request
 - the practical refusal reason
 - the name and contact details of an officer with whom the applicant may consult during the process, and details of how the applicant may contact them
 - that the consultation period during which the applicant may consult the contact person is 14 days after the day the applicant is given the notice (s 24AB(2)).
- 3.130 Agencies should also ensure that all relevant steps specified in s 24AB are followed when undertaking a request consultation process, including by ensuring that the contact person, as far as possible, is available for the entire consultation period specified in the request consultation notice (s 24AB(2)(e)), and by ensuring that the contact person is aware of their obligation to take all reasonable steps to assist the applicant to revise the scope of the request so that a practical refusal reason no longer exists (s 24AB(3)). Failure to adhere to the requirements under s 24AB would amount to a procedural defect and may invalidate the practical refusal decision.⁷⁰

⁶⁷ *Farrell and Department of Immigration and Border Protection* [2014] AICmr 74 [24]–[26].

⁶⁸ See *Fist and Australian Broadcasting Corporation* [2014] AICmr 14 [10]–[11].

⁶⁹ See *'AR' and Australian Federal Police* [2013] AICmr 80.

⁷⁰ See *Maria Jockel and Department of Immigration and Border Protection* [2015] AICmr 70.

- 3.131 An agency or minister may wish to state how an applicant is to consult with the contact person, such as by telephone. However, agencies should consider adopting a flexible approach. The consultation period may be extended by agreement between the contact officer and applicant, in which case the contact officer must give the applicant written notice of the extension (s 24AB(5)). The request consultation process period is disregarded in calculating the timeframe for making a decision on the request (s 24AB(8)), that is, the process ‘stops the clock’.
- 3.132 Agencies and ministers are only obliged to undertake a request consultation process once for any particular request (s 24AB(9)), but they may choose to continue discussions with an applicant in order to refine a request that is still too large or vague.

Assisting the applicant during a request consultation process

- 3.133 If an applicant contacts a contact officer during the consultation period, the contact officer must take reasonable steps to help them revise the request so that the practical refusal reason no longer exists (s 24AB(3)). For example, a contact officer could provide a breakdown of the time estimated for each step of the process, explain the difficulties the agency will have in dealing with the request and suggest what would be a reasonable request in the circumstances.⁷¹

Consultation outcome

- 3.134 Before the end of the consultation period the applicant must by written notice to the agency or minister:
- withdraw the request
 - revise the request, or
 - indicate that they do not wish to revise the request (s 24AB(6)).
- 3.135 The request⁷² is taken to have been withdrawn if the applicant does not contact the contact person or provide the required written notice during the consultation period (s 24AB(7)). This includes where a verbal agreement is reached with the applicant to revise the request but the applicant does not do so.
- 3.136 Where an agency has treated multiple requests as a single request under s 24(2), (see [3.122]), they must deal individually with any requests that have not been withdrawn or revised at the end of the consultation period. This could include refusing any or all of these requests because a practical refusal reason exists.⁷³

⁷¹ See *‘AP’ and Department of Human Services* [2013] AICmr 78 [21]-[25]; *Maria Jockel and Department of Immigration and Border Protection* [2015] AICmr 70 [31].

⁷² Section 4 provides that a ‘request’ means an application made under subsection 15(1). This does not include an application for internal review or IC review.

⁷³ See, for example, *Farrell and Department of Immigration and Border Protection* [2014] AICmr 74 [28]-[30].

Timeframe for notifying a decision

Default period for requests for access

- 3.137 The obligation on an agency or minister to notify an applicant that a request has been received, and to make and notify a decision on the request within the statutory timeframe, commences upon receipt of a request that meets the formal requirements in ss 15(2),(2A) (see [3.47]). These Guidelines refer to this period as the processing period.
- 3.138 An agency or minister must, as soon as practicable, and within 14 days of receiving a request, take all reasonable steps to enable the applicant to be notified that the request has been received (s 15(5)(a)). This requirement will be met by sending a notice of receipt to the contact address provided by the applicant. The 14-day timeframe commences on the day after the request is received by or on behalf of an agency or minister's office.
- 3.139 An agency or minister must, as soon as practicable, and no later than 30 days after receiving a request, take all reasonable steps to enable the applicant to be notified of a decision on the request (s 15(5)(b)). Section 15(5)(b) provides that the 30-day processing period commences on the day after the day the agency or minister is taken to have received a request that meets the formal requirements of s 15(2), (2A). An agency should act promptly to assist an applicant whose request does not meet the formal requirements in keeping with its obligations under s 15(3). Table 2 below sets out the time of receipt.

Table 2: Time of receipt 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 date the letter is delivered in the ordinary course of post ⁷⁴
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

- 3.140 An email or similar electronic communication is received at the time it is capable of being retrieved by the addressee.⁷⁵ This is assumed to be the time it reaches the addressee's nominated electronic address⁷⁶ (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).
- 3.141 The processing period refers to calendar days, not business (working) days. This will include any public holidays that fall within the processing period.⁷⁷ If the last day for notifying a

⁷⁴ Acts Interpretation Act s 29.

⁷⁵ Electronic Transactions Act 1999 s 14A.

⁷⁶ This does not require the addressee to open the communication for it to be taken to have been received. In general an electronic communication should be taken to have been received by the addressee on the same day it was sent, as may be nominated by the applicant under s 15(2)(c).

⁷⁷ See OAIC, *Public holidays and agency shut-down periods — Calculating timeframes under the Freedom of Information Act 1982* at www.oaic.gov.au

decision falls on a Saturday, Sunday or a public holiday, the timeframe will expire on the first business day following that day.⁷⁸ The 30-day processing period does not include:

- the time that an agency may take in a request consultation process to decide if a practical refusal reason exists (s 24AB(8))
- the time elapsing between an applicant being notified that a charge is payable and either the applicant paying the charge (or a deposit on account of the charge) or the agency varying the decision that a charge is payable (s 31).

In summary, the time spent on those matters is to be disregarded in calculating the processing period.

Timeframe applying to requests for amendment or annotation of personal records

3.142 A decision on amendment or annotation of personal records must be made within 30 days after the day the application was received (s 51D). The extension of time provisions set out above for access requests do not apply to amendment and annotation requests. An agency or minister can informally seek an applicant's agreement to an extension of time, or apply to the Information Commissioner for an extension of the processing period after the initial period has expired and there is a deemed refusal (s 51DA(3)). For more information, see Part 7 of these Guidelines.

Internal review

3.143 An agency must make an internal review decision within 30 days after the day the application for review was received (initial decision period) (s 54C(3)). Where an internal review decision is not made within this timeframe, the principal officer of the agency is taken to have made a decision to personally affirm the original decision on the last day of the initial decision period (s 54D(2)(a)) (see below at [3.1660]). The agency can apply to the Information Commissioner for an extension of time to finalise the review (s 54D(3)) (for more information, see Part 9 of these Guidelines).

Extending the decision notification period

3.144 The FOI Act contains extension of time provisions which are set out in Table 3 below.⁷⁹ Agencies and ministers are encouraged to build into their FOI process an early and quick assessment of whether an extension of time may be required, to ensure that decisions are made within the statutory processing period.

⁷⁸ Acts Interpretation Act s 36.

⁷⁹ Further guidance is available in OAIC, *Extension of time for processing requests* at www.oaic.gov.au

Table 3: Extension of time provisions

Reason for extension	Extension period	Determined by	Notification requirement
Third party consultation: consultation with a state, or a person or business concerning personal or business information (s 15(6))	30 days	by default if agency or minister determines ss 26A, 27 or 27A apply	agency or minister must inform applicant of extension as soon as practicable (s 15(6)(b))
Consultation with foreign entity required to determine if 33(a)(iii) or 33(b) exemptions apply (s 15(7),(8))	30 days	by default if agency or minister determines consultation is needed	agency or minister must inform applicant of extension as soon as practicable (s 15(8)(b))
By agreement between applicant and agency or minister (s 15AA)	up to 30 days, as either a single extension or a series of shorter extensions. This may be in addition to an extension for third party consultation	agency or minister but only with written agreement of applicant	agency or minister must give written notice of the extension to the Information Commissioner as soon as practicable (s 15AA(b))
Complex or voluminous request (s 15AB)	30 days or other period	Information Commissioner, upon request from agency or minister	Commissioner must inform applicant and agency or minister of an extension period as soon as practicable where a decision is made to grant the extension (s 15AB(3))
Following a deemed refusal (s 15AC(4))	as determined by the Information Commissioner	Information Commissioner, upon request from agency or minister	no legislative requirement but Commissioner may require agency or minister to notify applicant or third party as a condition of granting the extension (s 15AC(6))

3.145 The extension of time provisions outlined above only apply to the processing time available to an agency or minister in deciding an FOI request, or a request for internal review of an FOI decision. There are no extensions of time provisions available under the FOI Act for alternative purposes, including to meet a timeframe stipulated by the Information Commissioner in a s 55K decision. An agency or minister must comply with a decision of the Information Commissioner, including any timeframes stipulated in the IC review decision under s 55K (s 55N). If an agency or minister fails to comply with s 55N, an application may be made by the Information Commissioner or the IC review applicant to the Federal Court of Australia for an order directing the principal officer of an agency or minister to comply. Further information about compliance with the Information Commissioner's decision is available in Part 10 of these Guidelines.

Extension of time with agreement under s 15AA

- 3.146 An agency or minister may extend the timeframe for dealing with a request by a period of no more than 30 days if:
- the applicant agrees to the extension in writing, and
 - the agency or minister gives written notice of the extension to the Information Commissioner as soon as practicable after the agreement is made. It is desirable that a copy of the written agreement is provided to the OAIC with the written notice.
- 3.147 It is not sufficient to advise the applicant that the processing period will be extended under s 15AA. The processing period can only be extended under s 15AA with written agreement from the applicant. The applicant's written agreement must be sought prior to the expiration of the processing period referred to in s 15(5)(b). An agreement under s 15AA cannot be made once an FOI request has become a deemed refusal under s 15AC.
- 3.148 The agency or minister can also ask the applicant for further extensions under s 15AA as long as the combined length of all agreed extensions does not exceed 30 days.
- 3.149 If the agency or minister does not notify the Information Commissioner of the applicant's written agreement under s 15AA, the extension is invalid. This can affect an agency or minister's ability to seek further extensions of time under s 15AA or 15AB, or to impose a charge.

Applying to the Information Commissioner for an extension of time under s 15AB

- 3.150 An agency or minister applying to the Information Commissioner for an extension of time under s 15AB should explain why the applicant's FOI request is complex or voluminous, including details about:
- the scope of the request and the range of documents covered
 - work already undertaken on the request
 - any consultation with the applicant concerning length of time
 - whether other agencies or parties have an interest in the request
 - measures to be taken by the agency or minister to ensure a decision is made within the extended time period and to keep the applicant informed about progress.⁸⁰
- 3.151 An agency or minister should only seek an extension of time under s 15AB after the agency or minister has first obtained, or attempted to obtain, the applicant's agreement to providing an extension of time under s 15AA, and the agency or minister has fully utilised the 30 day period available under s 15AA (to the extent the applicant has agreed to this).
- 3.152 An application for an extension of time under s 15AB may only be made in relation to a specific FOI request. The complexity or volume described in a s 15AB application relates to the particular request for which an extension of time is sought. It does not relate to the complexity and volume of the aggregated FOI caseload of the agency or minister. The

⁸⁰ For guidance about applying for an extension of time, see OAIC, *Extension of time for processing requests* at www.oaic.gov.au

discretion in s 15AB cannot be exercised to provide a ‘blanket’ extension of time to a cohort of cases; each request needs to be made and considered on its individual merits.

- 3.153 In considering an application to extend the processing time under s 15AB, the Information Commissioner may share the agency or minister’s submission with the FOI applicant and any other affected third parties.
- 3.154 Where an agency or minister intends to apply for an extension of the timeframe for processing the applicant’s FOI request under s 15AB, the application to the Information Commissioner must be made before the expiration of the processing period referred to in s 15(5)(b). An extension of time application under s 15AB can only be requested if the processing time has not expired. The processing period under s 15AB can be extended even if the Information Commissioner decides to grant the application after the date in which the request was originally due to expire, provided the application was made within the period referred to in s15(5)(b).
- 3.155 Staff absences due to public holidays or agency shutdown periods may be relevant to whether an extension should be granted, if the particular staff members have skills or knowledge that may be required to process the request in the normal statutory timeframe. However a lack of staff because of inadequate allocation of resources to FOI processing or failure to assign additional temporary resources to FOI processing at peak times will not normally justify an extension in the absence of other extenuating circumstances.

Deemed decisions

- 3.156 A ‘deemed refusal’ occurs if the time for making a decision on a request for access to a document has expired and an applicant has not been given a notice of decision. If this occurs, the principal officer of the agency or the minister is taken to have personally made a decision refusing to give access to the document on the last day of the ‘initial decision’ period (s 15AC).
- 3.157 Similarly, where the time for making a decision on a request for amendment or annotation of a record has expired and the applicant has not been given a notice of decision, the principal officer of the agency or the minister is taken to have personally made a decision refusing to amend or annotate the record (s 51DA).
- 3.158 In internal review, a ‘deemed affirmation’ of the initial decision occurs when the time for making an internal review decision (30 days) has expired and the applicant has not been given a notice of the internal review decision. If this occurs, the principal officer of the agency is taken to have personally affirmed the original decision (s 54D(2)(a)).
- 3.159 A notice of the deemed decision under s 26 is taken to have been given on the last day of the decision period (ss 15AC(3)(b), 51DA(2)(b) and 54D(2)(b)).
- 3.160 The consequence of a deemed refusal is that an applicant may apply for IC review (s 54L(2)(a)). An applicant or third party can also apply for IC review of a deemed affirmation of a decision on internal review (ss 54L(2)(b), 54M(2)(b)). In addition, once the time has expired and there is a deemed decision, the agency or minister cannot impose a charge for access (see Part 4 of these Guidelines).
- 3.161 Where an access refusal decision is deemed to have been made before a substantive decision is made, the agency or minister continues to have an obligation to provide a statement of reasons on the FOI request. This obligation to provide a statement of reasons on the FOI request continues until any IC review of the deemed decision is finalised. The

competing view — that a decision maker is *functus officio* if a deemed decision arises — would have the consequence that an applicant’s right of access under the FOI Act would be impeded through delay on an agency’s part and could only be revived by an application for IC review. This result would be contrary to the objectives and requirements of the FOI Act.

Information Commissioner’s power to grant an extension of time following a deemed decision

- 3.162 Where there has been a deemed decision, the decision maker may apply to the Information Commissioner in writing for further time to deal with the request (ss 15AC(4), 51DA(3), 54D(3)). The Information Commissioner may allow further time for the decision maker to deal with the request (ss 15AC(5), 51DA(4), 54D(4)). If the Information Commissioner allows further time to deal with the request under s 15AC(5), it would not be open to the agency to extend the processing time further under s 15(6). Any application under s 15AC(4) should include the time required to undertake any consultations with affected third parties.
- 3.163 In considering what further time may be appropriate, the Information Commissioner will take into account the details in the agency’s application, which should address the scope and complexity of the request, the reasons for delay in making an initial decision, the extension sought, the estimated total processing time, and whether discussions with the applicant about the delay and extension application have occurred. The Commissioner will also consider the total elapsed processing time and the desirability of the decision being decided by the agency or minister rather than by IC review.
- 3.164 There is no obligation upon the Information Commissioner to seek the views of an applicant about a request for an extension of time under s 15AC following a deemed decision.⁸¹ However, the Information Commissioner is not precluded from seeking the views of an applicant where it is a relevant consideration in deciding whether to grant the request for an extension of time.
- 3.165 In allowing further time the Information Commissioner may impose conditions (ss 15AC(6), 51DA(5) and 54D(5)). For example, the Commissioner may require the decision maker to:
- notify the applicant of the further time allowed
 - provide regular progress reports to the Information Commissioner and the applicant
 - provide a copy of the notice of decision when made to the Information Commissioner.
- 3.166 If the decision is made in the further time allowed and any conditions imposed by the Information Commissioner are met, the deemed refusal decision no longer applies and is taken never to have applied (ss 15AC(7), 51DA(6) and 54D(6)). However, if this occurs the agency or minister remains unable to impose charges (reg 5(2) of the Charges Regulations).
- 3.167 If the decision is not made within the extended time or any imposed conditions are not met, the deemed refusal decision continues to apply (ss 15AC(8), 51DA(7) and 54D(7)). The Information Commissioner cannot provide further time in which the decision maker may make the decision or comply with the conditions (ss 15AC(9), 51DA(8) and 54D(8)). The applicant can seek IC review of the deemed refusal (see Part 10 of these Guidelines).

⁸¹ *O’Donoghue v Australian Information Commissioner (No. 3)* [2012] FCA 1244 [23].

- 3.168 If a person applies for IC review of a deemed decision, the Information Commissioner allows the decision maker further time and a decision is made within that further time, that decision is substituted for the deemed decision under review (s 54Y(2)).⁸²
- 3.169 Alternatively, at any time during an IC review, an agency or minister may substitute a deemed access refusal decision with a decision to favour the applicant by:
- giving access to a document in accordance with the request (s 55G(1)(a))
 - relieving the IC review applicant from liability to pay a charge (s 55G(1)(b)), or
 - requiring a record of personal information to be amended or annotated in accordance with the application (s 55G(1)(c)) (see Part 10 of these Guidelines).
- 3.170 The agency or minister must notify the Information Commissioner in writing of the substituted decision as soon as practicable, and that substituted decision becomes the decision under review (s 55G(2)) (see Part 10 of these Guidelines).

Statement of reasons

- 3.171 A decision maker must give the applicant a statement of reasons if they refuse any aspect of the FOI request or defer access to documents (s 26(1)). Specifically, a statement of reasons must be provided to the applicant for a decision where:
- access to a requested document is refused, including because:
 - a requested document is exempt from release (Part 4 of the FOI Act)
 - the document has not been sufficiently identified in the request (s 15(2))
 - the document does not exist or cannot be found (s 24A)
 - a practical refusal reason exists (s 24)
 - the access provisions do not apply to the document (for example, it is a document to which ss 12 or 13 apply, or the requested document is not a document of an agency or an official document of a minister as defined under s 4(1))
 - access to the requested document is deferred (s 21)
 - access will be given in a different form to that requested by the applicant (s 20)
 - a request to amend or annotate a record is refused (s 51D)
 - any of the above decisions is made on internal review (ss 53A, 54C(4)).

Content of a s 26 statement of reasons

- 3.172 A statement of reasons is a notice in writing of:
- the decision
 - the findings on any material questions of fact
 - the evidence or other material on which those findings are based

⁸² While an agency can technically request an extension of time under s 15AC after an applicant has sought IC review, it may be more practical for requests for additional processing time to be addressed within the IC review process.

- the reasons for the decision (including any public interest factors taken into account in deciding to refuse access to a conditionally exempt document)
- the name and designation of the person making the decision
- information about the applicant's rights to make a complaint or seek a review and the procedure for doing so (s 26(1)).

3.173 A statement of reasons should not include any information that, if it were in a document, would cause that document to be exempt (s 26(2)).⁸³ It may be necessary to use s 25 to neither confirm nor deny the existence and characteristics of a document (see [3.103]-[3.107] above).

3.174 There is no specified form for a statement of reasons. A letter to the applicant may be sufficient as long as it contains all the required information. Where the request involves numerous documents or complex issues relating to exemptions, a statement of reasons and a schedule of documents attached to a letter to the applicant may be more appropriate. The OAIC has developed a checklist and a sample notice to assist agencies with the content of a statement of reasons.⁸⁴

The decision

3.175 The statement of reasons must set out the decision made in relation to each document (or part of document) and address all relevant legislative provisions. The ARC suggests that decision makers should quote from the actual legislative provisions rather than paraphrasing to avoid inadvertently changing the meaning.⁸⁵

3.176 The decision needs to identify clearly the documents considered by the decision maker for release (without disclosing exempt material if exemptions are claimed). Preparing a schedule of documents is often helpful in the decision-making process. When the decision is made, the schedule (minus any exempt material considered during the process) can be attached to the statement of reasons.

Findings of fact and the evidence or other material on which they are based

3.177 The notice of decision should make it clear how the decision was reached, based on findings of fact. General points about evidence and findings of fact are set out at [3.22]-[3.27]. The documents that are the subject of an FOI request will often contain evidence that would need to be considered. For example, a decision maker considering whether to release a document that contains information about Commonwealth-State relations will need to consider whether releasing the document may damage those relations.

3.178 When referring to material or evidence it is important to describe it so it can be easily identified. Merely providing a list of documents that the decision maker considered is unlikely to be sufficient.⁸⁶ The decision maker needs to explain how each finding was rationally based on the evidence.

⁸³ See *News Corporation Ltd v National Companies and Security Commission* (1984) 57 ALR 550; and *TFS Manufacturing Pty Limited and Department of Health* [2016] AICmr 73.

⁸⁴ See OAIC, *Statement of reasons checklist* and OAIC, *Sample FOI notices* at www.oaic.gov.au

⁸⁵ See ARC Best Practice Guide No 4, *Decision Making: Reasons*, 2007, p 7.

⁸⁶ See *ARM Constructions Pty Limited v Deputy Commissioner of Taxation* (1986) 65 ALR 343.

- 3.179 The statement of reasons should also set out how any conflicting evidence was considered, which evidence was preferred and why.⁸⁷ If the decision maker considered recommendations or reports in making their decision, references to those should also be included.

Relevant and irrelevant considerations

- 3.180 In considering the evidence to make findings of fact, a decision maker must examine and weigh all relevant considerations. For many FOI decisions, the FOI Act sets out the relevant considerations. For example, in making a decision about whether a document is exempt because it is subject to legal professional privilege, a decision maker must consider whether that privilege has been waived (s 42(2)).
- 3.181 The decision maker must also ensure they do not take into account any irrelevant considerations. The FOI Act specifies irrelevant considerations in relation to some decisions, including the public interest test that applies to conditionally exempt documents (s 11B(4) — see Part 6 of these Guidelines). Similarly, the applicant's reason(s) for making a request are also irrelevant in making a practical refusal decision (s 24AA(3)(a)).

The reasons for the decision

- 3.182 The notice of decision must state the reasons for the decision (s 26(1)(a)). The reasons should show a rational connection between the findings of material fact, the decision maker's understanding of the relevant statutory provisions and the decision itself. Where a statutory provision requires an agency to be satisfied that disclosure of a document would result in a substantial adverse effect, it is not sufficient for an agency to simply declare that a substantial adverse effect will occur without any further details or reasons. Similarly, it is not enough for the decision maker to state that he or she is satisfied that a document or parts of a document is exempt. Agencies must provide adequate justification as to why an exemption applies by reference to the provisions in the FOI Act, having regard to these Guidelines. In an IC review, s 55D places the onus on the agency or minister in establishing that its decision in relation to a request or application is justified, or that the Information Commissioner should give a decision adverse to the IC review applicant. Similarly, where an application for review is made to the AAT, s 61 places the onus on the agency or minister to establish that the decision is (or is not) justified and that the AAT should give a decision adverse to the applicant (see Part 10 of these Guidelines).
- 3.183 If the decision is to refuse access to a conditionally exempt document, the reasons must include any public interest factors the decision maker took into account (s 26(1)(aa)). In considering the public interest factors, the decision maker must weigh factors for and against disclosure to determine whether access would, on balance, be contrary to the public interest (see Part 6 of these Guidelines). Evidence of the harm that may result from release would need to be considered as part of that process.
- 3.184 When explaining the reasons, the decision maker should refer to the specific documents requested (or records for amendment/annotation requests) and set out the reasoning process that led to the decision based on the material findings of fact. They must explain the relevant legislative provisions and, if appropriate, can refer to these Guidelines and/or IC review, AAT and court decisions in support of their interpretation of the provisions.

⁸⁷ See ARC Best Practice Guide No 4, *Decision Making: Reasons*, 2007, p 8 and *Dornan v Riordan* (1990) 95 ALR 451.

- 3.185 Where a document is released with deletions under s 22, the grounds on which the deletions have been made should be provided, setting out the findings on material questions of fact and referring to the evidence or other material on which those findings were based (see [3.100] above).
- 3.186 A draft statement of reasons may be prepared by someone other than the decision maker. However, the decision maker must carefully consider the draft to ensure that it is satisfactory and that he or she personally endorses the reasoning and conclusions.

Other required information

- 3.187 The statement of reasons should also include:
- the name and designation of the decision maker (where the decision relates to a document of an agency) (s 26(1)(b)). Information about the authorisation should also be included (see [3.12])
 - the applicant's review rights, including how to apply for internal and IC review (see Parts 9 and 10 of these Guidelines)
 - the applicant's right to complain to the Information Commissioner (see Part 11 of these Guidelines).
- 3.188 The notice of decision should also explain (if applicable) that the document will be published or notified on a disclosure log (see Part 14).

Requirement to provide better reasons

- 3.189 During an IC review, the Information Commissioner may require a decision maker to provide a statement of reasons if they have not done so, or a better statement of reasons if what they provided was inadequate (s 55E).
- 3.190 An applicant in proceedings before the AAT may also apply to the AAT for a declaration that the statement of reasons provided to them does not contain adequate particulars of:
- findings on material questions of fact
 - the evidence
 - other material on which those findings were based
 - the reasons for the decision (s 62).

If the AAT makes such a declaration, the decision maker must provide those particulars to the applicant within 28 days (s 62(2)).

Other notices of decision

- 3.191 Other provisions of the FOI Act require that notices of particular kinds be given to applicants and third parties. Some of those provisions expressly require the decision maker to give reasons for the decision under either s 26 of the FOI Act or s 25D of the *Acts Interpretation Act*

1901.⁸⁸ If no express requirement of that kind applies, a decision maker may nevertheless be guided by s 26 in deciding the nature of the information to include in a notice.

3.192 Provisions of the FOI Act that require a notice of decision are:

- to the applicant:
 - a notice that an applicant is liable to pay a charge (s 29(1))
 - a notice of decision to an applicant as to the charge payable, following a submission by the applicant that a charge should be reduced or not imposed (s 29(6)). If the decision is to reject the applicant's contention in whole or part, the notice must provide a statement of reasons that complies with Acts Interpretation Act s 25D (s 29(8),(9))
 - a notice of decision to provide access to a document, following consultation with the Commonwealth or a State about whether the document would be exempt under s 47B (intergovernmental relations) (ss 26A(3)(b))
 - a notice of decision to provide access to a document, following consultation with a person or organisation about whether the document would be exempt under s 47 or 47G (trade secrets, business information) (s 27(6)(b))
 - a notice of decision to provide access to a document, following consultation with a person about whether the document would be exempt under s 47F (personal information) (s 27A(5)(b))
- to a third party:
 - a notice of decision to the Commonwealth or a State that a document about which either was consulted is not exempt under s 47B (intergovernmental relations) (ss 26A(3)(a))
 - a notice of decision to a person or organisation that a document about which the person or organisation was consulted is not exempt under s 47 or 47G (trade secrets, business information) (s 27(6)(a))
 - a notice of decision to a person that a document about which the person was consulted is not exempt under s 47F (personal information) (s 27A(5)(a)).

3.193 It is also open to an applicant or third party (in relation to any of the decisions above) to request a statement of reasons under s 13 of the *Administrative Decisions (Judicial Review) Act 1977*.

Giving applicants access to documents

3.194 Where a decision has been made to give an applicant access to a requested document, that access should be given as soon as practicable, but only after:

- any charges the applicant is liable to pay are paid (s 11A(1)(b) and reg 11, Charges Regulations), and
- all opportunities a third party may have to seek review of the decision have run out, and the decision still stands or is confirmed (ss 26A(4), 27(7) and 27A(6)).

⁸⁸ Section 25D of the Acts Interpretation Act requires that the statement of reasons must give the reasons for the decision and set out the findings on material questions of fact and refer to the evidence or other material on which those findings were based.

- 3.195 Where a third party has review rights in relation to only some of the documents falling under the access grant decision, an agency or minister should provide the applicant with access to the remaining documents as soon as practicable. Similarly, if a third party has a review right in relation to multiple documents but seeks review of the decision to release some only of those documents, the agency or minister should release the remaining documents to the applicant as soon as practicable once the third party's opportunity to seek review has run out.
- 3.196 Where there is undue delay in providing access to documents, an applicant may consider making a complaint to the Information Commissioner (s 70(1) — see Part 11 of these Guidelines).

Charges

- 3.197 The applicant must pay all charges before being given access, except where the charge relates to supervisory time for the applicant to inspect documents (reg 11(2) of the Charges Regulations). Where a charge was notified, but the decision on the request was not made within the statutory time limit, the charge cannot be imposed (regs 5(2) and 5(3)). More information about charges is in Part 4 of these Guidelines.

Third party review opportunities

- 3.198 The review rights of a third party depend on the provision under which they were consulted. A third party who was consulted about the release of a document affecting Commonwealth-State relations (s 26A) may seek internal review or IC review of a decision to grant access (ss 53B, 53C, 54A and 54M).
- 3.199 Similarly, a third party who was invited to make a submission about the release of a document affecting business information (s 27) or documents affecting personal privacy (s 27A) and who made a submission in support of the relevant exemption contention may seek internal review or IC review of a decision to grant access (ss 53B, 53C, 54A and 54M). A business entity or person who was invited to make a submission under s 27 or s 27A but did not do so, is neither required to be notified of an access grant decision nor entitled to apply for internal review or IC review of that decision. A third party who was not invited to make a submission, but believes they should have been invited under s 27 or s 27A, may complain to the Information Commissioner (s 70 — see Part 11 of these Guidelines).
- 3.200 'Run out' times are defined in s 4(1), as set out in Table 4 below.

Table 4: When time runs out for third party review

Circumstances	When time runs out	Maximum time period for third party to apply (in calendar days)
Third party does not apply for either internal or IC review	The latest time for applying for internal review or IC review has ended	<ul style="list-style-type: none"> i) 30 days to apply for internal review from notification of initial decision (or deemed notification) (agency can extend s 54B(1)) ii) 30 days to apply for IC review from notification of initial decision (the Information Commissioner can extend s 54T(2))

Circumstances	When time runs out	Maximum time period for third party to apply (in calendar days)
Third party applies for internal review	Internal review has ended (review either completed or decision deemed) and time for applying for IC review has ended	Internal review must be completed within 30 days (decision deemed to have been affirmed after 30 days s 54D), unless Information Commissioner grants an extension (s 54D(4)) 30 days from that point to apply for IC review (s 54S(2)) (Information Commissioner can extend s 54T(2))
Third party applies for IC review	IC review has concluded and the time for applying to the AAT (for review) and appealing to the Federal Court (on a question of law) has ended, and the person has not applied or appealed	Must apply to AAT and Federal Court within 28 days after the IC review decision is given to the IC review applicant (s 29(2) of the AAT Act, s 56(2) FOI Act)
Third party applies for AAT review	AAT proceedings have concluded, and i) the time for appealing to the Federal Court has ended and the person has not appealed, or ii) if an appeal has been instituted, the proceedings have concluded	28 days after the AAT's decision is given to the third party applicant (s 44(2A) AAT Act), or if an appeal has been lodged, when appeal proceedings have concluded

3.201 Agencies should check with the OAIC as to whether an application has been made for IC review before they give the applicant documents whose release a third party may wish to oppose. This is particularly important because the Information Commissioner may extend the time a person has to apply for IC review.

3.202 It is also good practice to check directly with an affected third party if the agency has not received any indication as to whether that third party intends to seek internal or IC review.

Providing access in stages

3.203 Where the request relates to a large number of documents, it is open to an agency and an applicant to consult and agree on a staged approach to the release of the documents.⁸⁹ A staged approach may also be appropriate if access to some (but not all) documents is to be deferred under s 21 (see [3.101]). Where an agency agrees with the applicant that the documents at issue are to be released in stages, it is recommended that the agency obtains the appropriate extensions of time under the FOI Act for processing the request. For example, the agency would need to obtain a written agreement from the applicant and to provide written notice of the extension to the Information Commissioner in accordance with s 15AA. If necessary, an agency may also consider applying to the Information Commissioner

⁸⁹ See *Re Eastman and Department of Territories* (1983) 5 ALD 187 and *Re William Richard Clifford Geary and Australian Wool Corporation* (1987) AATA 370.

under s 15AB for an extension of time, providing evidence of the agreement between the parties in its application.

3.204 A staged approach can assist agencies in managing its resources and avoid a practical refusal reason from arising by allowing the agency more time to consider and process the request. For example, the agency may propose to process part of the request by a certain date, and the remainder of the request by a date agreed between the agency and the applicant.

Form of access

3.205 Subject to limited exceptions, an applicant who requests access to a document in a particular form has a right to be given access in that form (s 20(2)). Available forms of access are:

- providing a copy of the document (the most common form of access)
- giving a reasonable opportunity to inspect the document
- where the document is an article or thing from which sounds or visual images are capable of being reproduced, making arrangements for the person to hear or view those sounds or images
- where words are recorded in a manner capable of being reproduced in the form of sound or where words are in the form of shorthand writing or in code, providing a written transcript of the words recorded or contained in the document (s 20(1)).

3.206 The right to access a document in a particular form may be refused and access given in another form in the following circumstances:

- where access would interfere unreasonably with the agency's operations or the performance of a minister's functions (s 20(3)(a)) — for example, if an applicant asks to inspect documents that an agency requires for everyday operations
- if it would be detrimental to the preservation of the document or not appropriate given the physical nature of the document (s 20(3)(b)) — for example, if a document is fragile or if giving access outside its normal environment might result in damage, or the document cannot be photocopied due to its condition or because it is a painting, model or sculpture
- if giving an applicant access to a document in a certain form would, but for the FOI Act, involve an infringement of copyright in relation to the matter contained in the document (s 20(3)(c)). This provision does not apply where the matter contained in the document relates to the affairs of an agency or department of state or if the copyright holder is the Commonwealth, an agency, or a State.

3.207 Agencies and ministers are expected to make reasonable use of available technology to facilitate access to documents — for example, by providing copies by electronic transmission, or to provide access in a particular form that is possible only through technology. Access to documents by means that do not require physical inspection in an agency office should generally be preferred.

3.208 The FOI Act gives a legally enforceable right of access to documents that already exist, and an agency is not required to create a new document to satisfy an FOI request. However, an agency should consult with an applicant as to the most effective manner of providing access

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].

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))

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.

PART 11 — COMPLAINTS AND INVESTIGATIONS

Version 1.4, February 2018

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PART 11 — COMPLAINTS AND INVESTIGATIONS

11.1 The Information Commissioner can investigate under Part VIIB of the FOI Act agency actions relating to the handling of FOI matters. This involves investigating complaints as well as conducting own motion investigations (that is, investigations at the Information Commissioner's initiative) (s 69(1)).¹

11.2 The Information Commissioner cannot investigate a minister's handling of FOI matters. A similar restriction applies to the Commonwealth Ombudsman.

Investigating complaints or undertaking IC review

11.3 The complaints process set out in Part VIIB is primarily intended to deal with the manner in which agencies handle FOI requests and procedural compliance matters. Examples might include:

- a complaint that an agency did not provide adequate assistance to an FOI applicant to frame a request
- a complaint by a third party that an agency failed to consult with them before deciding to release a document, or
- a complaint alleging a conflict of interest by the decision maker.

11.4 The Commissioner's view is that making a complaint is not an appropriate mechanism where 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 in that manner. IC review will ordinarily be the more appropriate avenue for a person to seek review of the merits of an FOI decision, particularly an access refusal or access grant decision.²

Own motion investigations

11.5 The Information Commissioner may undertake an own motion investigation into an agency's actions in performing its functions or exercising its powers under the FOI Act (s 69(2)).³ The investigation may look at a single agency decision or action, at a systemic problem or recurring pattern in an agency's practices and processes in handling FOI matters, or at a practice or problem occurring in more than one agency. The issue to be investigated

¹ The Office of the Information Commissioner has issued a *Freedom of Information Regulatory Action Policy* which provides guidance on the approach of the Australian Information Commissioner to the exercise of FOI regulatory powers, including the investigation of complaints and conducting own motion investigations. The Policy is located at <<https://www.oaic.gov.au/about-us/our-regulatory-approach/all/>>.

² See resource 'What is the difference between a complaint and an application for review of an Freedom of Information decision?' located at <<https://www.oaic.gov.au/freedom-of-information/faqs-for-agencies/what-is-the-difference-between-a-complaint-and-an-application-for-review-of-an-freedom-of-information-decision>>.

³ See for example the following reports of own motion investigations: 'FOI at the Department of Human Services' published on 2 December 2014 and located at <<https://www.oaic.gov.au/freedom-of-information/foi-decisions/foi-omi-reports/foi-at-the-dhs>> and 'Processing of non-routine FOI requests by the Department of Immigration and Citizenship' published on 26 September 2012 and located at <<https://www.oaic.gov.au/freedom-of-information/foi-decisions/foi-omi-reports/processing-of-non-routine-foi-requests-by-the-department-of-immigration-and-citizenship>>.

may come to the attention of the Information Commissioner as a result of an IC review or a series of applications for IC review, or in some other way.

How to make a complaint

11.6 A person may complain to the Information Commissioner about an action taken by an agency under the FOI Act (s 70(1)).⁴ A complaint must be in writing and identify the agency against which the complaint is made (s 70(2)). The Information Commissioner's office must give 'appropriate assistance' to anyone who wishes to complain and needs help to formulate their complaint (s 70(3)). This need may arise, for example, if a person has language or literacy difficulties or otherwise needs assistance in ascertaining the scope of an agency's FOI Act obligations and framing a complaint against the agency.

Preliminary inquiries

11.7 The Information Commissioner may make preliminary inquiries for the purpose of determining whether or not to investigate a complaint (s 72). This could be done, for example, to determine whether the complaint relates to an action taken by an agency under the FOI Act.

Deciding whether to expedite a matter

11.8 The Information Commissioner may expedite the investigation of a complaint. The Information Commissioner may decide to expedite an investigation in response to a request or as a result of identifying individual IC review applications that involve factors that are outlined below.

11.9 When considering whether to expedite the investigation of a complaint, the Information Commissioner may have regard to any of the following factors:

- whether expedition would best facilitate and promote public access to information
- whether expedition would best increase the promptness of public access to information. For example, this factor may be relevant where the FOI complaint is related to an IC review
- whether expedition would best facilitate public access to information at the lowest reasonable cost, and
- taking into account the objects of the FOI Act, any other factors which the Information Commissioner considers relevant in the circumstances.

Deciding not to investigate

11.10 The Information Commissioner has the discretion not to investigate or continue investigating a complaint in the following circumstances (set out in s 73):

- the action that is the subject of the complaint is not taken by an agency in performing its functions or exercising its powers under the FOI Act (s73(a))
- the complainant has or had a right to have the action reviewed by the agency, a court or a tribunal, or by the Information Commissioner under Part VII of the FOI Act, and has not exercised that right when it would be reasonable to do so (s 73(b))

⁴ See resource 'How do I make an FOI complaint?' located at <<https://www.oaic.gov.au/freedom-of-information/foi-complaints>>.

- the complainant has or had a right to complain to another body and has not exercised that right when it would be reasonable to do so (s 73(c))
- the agency has dealt, or is dealing, adequately with the complaint, or has not yet had an adequate opportunity to do so (s 73(d))
- the complaint is frivolous, vexatious, misconceived, lacking in substance or not made in good faith (s 73(e))
- the complainant does not have a sufficient interest in the subject matter of the complaint (s 73(f)).

11.11 If the Information Commissioner decides not to investigate or continue investigating a complaint, the Information Commissioner must give a written notice (with reasons) to the complainant and the agency (s 75). An agency must also be notified if the Information Commissioner discontinues an own motion investigation (s 75(2)(b)).

11.12 The Information Commissioner does not have the same power as the Commonwealth Ombudsman to decline to investigate a complaint that relates to action that occurred more than 12 months previously (see *Ombudsman Act 1976* s 6(1)(a)). However, this is a matter that the Information Commissioner would take into account in formulating the investigation results following the completion of an investigation (see [11.33]-[11.38] below).

Relationship with Commonwealth Ombudsman investigations

11.13 The Commonwealth Ombudsman retains authority to investigate under the Ombudsman Act a complaint about action taken by an agency under the FOI Act (s 89F). However, an amendment to the Ombudsman Act qualifies the Ombudsman's discretion to deal with such complaints. Section 6C of the Ombudsman Act provides that the Ombudsman must consult with the Information Commissioner before deciding to investigate a complaint about a matter that is the subject of a completed investigation by the Information Commissioner, or that is or could be the subject of a complaint to the Information Commissioner and could be dealt with more appropriately or effectively by the Information Commissioner. The Ombudsman and the Information Commissioner must consult with a view to avoiding the same matter being investigated by both officers. If the Ombudsman decides not to investigate a complaint on this basis, the Ombudsman must transfer the complaint and all relevant documents and information to the Information Commissioner, and notify the complainant in writing (with reasons for the decision) (s 6C(3) of the Ombudsman Act). The Information Commissioner must then deal with the matter as a complaint under Part VIIB of the FOI Act (s 6C(4) of the Ombudsman Act).

11.14 The Information Commissioner has a similar power to transfer a complaint (or part of a complaint) to the Ombudsman if the Information Commissioner is satisfied that it could be dealt with more effectively or appropriately by the Ombudsman (s 74). Two examples of such situations are given in the FOI Act (examples to s 74). One is where the complaint is about how the Information Commissioner dealt with an Information Commissioner review. The second example is where the complaint is only one part of a wider grievance about an agency's actions. The Information Commissioner must consult with the Ombudsman to avoid any overlap in inquiries, and may decide not to investigate or continue an investigation after that consultation (s 74(2)). If the Information Commissioner decides not to investigate a complaint on this basis, the Information Commissioner must transfer the complaint and all relevant documents and information to the Ombudsman, and notify the complainant in writing (with reasons for the decision) (ss 74(3), (4)).

Giving notice of an investigation

11.15 The Information Commissioner must notify the agency where an investigation of a complaint or an own motion investigation is proposed (s 75(1)). Similarly, the Information Commissioner must give written notice (with reasons) to the agency and the complainant (if there is one) if the Information Commissioner decides not to investigate or continue to investigate (ss 75(2)–(4)).

Conduct of investigations

11.16 The FOI Act sets out certain rules that apply to the conduct of the Information Commissioner's complaint investigations and own motion investigations. The guiding principle is that an investigation shall be conducted in private and in the way the Information Commissioner considers fit (s 76(1)). The same principle applies to investigations conducted by the Commonwealth Ombudsman (Ombudsman Act s 8(2)).

General powers

11.17 The Information Commissioner may obtain information from an agency officer and make any inquiry relevant to an investigation (s 76(2)). The Information Commissioner also has specific powers to compel the production of information by agencies (discussed below at [11.23]–[11.32]).

Entering premises

11.18 The Information Commissioner has a limited power to enter premises to carry on an investigation or to inspect documents on the premises. This could be done, for example, to inspect agency documents, or to investigate whether an agency conducted a proper search for documents.

11.19 An 'authorised person' may enter premises occupied by an agency, or premises occupied by a contracted service provider that are used predominantly for the purposes of a Commonwealth contract (ss 77(1), (2)). An 'authorised person' means an information officer (the Information Commissioner, the FOI Commissioner or the Privacy Commissioner, as defined in the *Australian Information Commissioner Act 2010*), or an APS employee at Executive Level 2 or above in the OAIC who has been authorised by the Information Commissioner (s 77(6)).

11.20 The power to enter premises is conditional on the consent of the principal officer of the agency or, in the case of a contracted service provider, the person in charge (s 77(3)). The authorised person must leave the premises if the consenting person asks (s 77(4)).

11.21 Certain places require written ministerial approval before entry is allowed (s 78(1)). These are:

- a place referred to in s 80(c) of the *Crimes Act 1914* (mainly defence-related places)
- a place that is a prohibited area for the purposes of the *Defence (Special Undertakings) Act 1952*
- a restricted area declared under s 14 of the *Defence (Special Undertakings) Act*.

11.22 The Attorney-General may also prohibit entry to a place by declaration, if satisfied an investigation at that place may prejudice the security or defence of the Commonwealth (ss

78(3), (4)).

These requirements are consistent with the rules applying to the Ombudsman's powers of entry for an investigation (Ombudsman Act ss 14(2), (3)).

Powers to compel agencies to produce information

11.23 The Information Commissioner has certain compulsory powers:

- to require production of information and documents
- to require production of exempt documents
- to require a person to attend to answer questions and to take an oath or affirmation.

11.24 Each of these powers is discussed below. The powers are the same as the Commissioner's powers when conducting a review (ss 55R–55U, 55W–55X — see Part 10 of these Guidelines).

Production of information and documents

11.25 The Information Commissioner can by written notice require the production of information and documents in connection with an investigation (s 79). This power ensures the Information Commissioner can obtain all the material relevant to an investigation. Failure to comply with a production notice is an offence punishable by six months imprisonment (s 79(5)).

11.26 The Information Commissioner can take possession of the documents, make copies, take extracts and hold the documents as long as necessary for the investigation (s 80(1)). While the Information Commissioner holds the documents, the Information Commissioner must permit a person to exercise any right they otherwise have to inspect the documents (s 80(2)).

Exempt documents

11.27 The Information Commissioner has the same power to require production of exempt documents in conducting investigations as in exercising the IC review function (s 81). The limitations that apply to the exercise of this power under the IC review function, including in relation to national security and cabinet documents, also apply to investigations. These include the requirements to return exempt documents and to ensure that they are not disclosed to people other than staff of the OAIC in the course of performing their duties. For more details about these limitations, see Part 10 of these Guidelines.

Attendance to answer questions

11.28 The Information Commissioner can by written notice require a person to attend to answer questions for the purposes of an investigation (ss 82(1), (2)). Failure to comply with a notice is an offence punishable by six months imprisonment (s 82(3)).

11.29 A person who appears before the Information Commissioner pursuant to a notice under s 82 can be required to take an oath or affirmation that their answers will be true (ss 83(1), (2)). Refusing to take the oath or affirmation, refusing to answer a question or giving false testimony is an offence punishable by six months imprisonment (s 83(3)).

Protections for those involved

11.30 A claim for legal professional privilege is preserved in respect of information or a document given to the Information Commissioner in connection with an investigation (s 84).

11.31 A person is immune from civil proceedings and from criminal or civil penalty, for the action of giving information, producing a document or answering a question in good faith for the purposes of an investigation (s 85). The protection applies even if the person did not produce information in response to the exercise by the Information Commissioner of powers to compel production of information (a person can voluntarily give information under s 76(2) which gives the Information Commissioner the power to obtain information from any officer of an agency that he or she thinks is relevant to the investigation).

11.32 A person who complains to the Commissioner under s 70 is also immune from civil proceedings, provided the complaint is made in good faith (s 89E).

Completing an investigation

11.33 On completing an investigation, the Information Commissioner must provide a 'notice on completion' to the agency and to the complainant (if there is one) (s 86). The Information Commissioner's notice must include the investigation results, the investigation recommendations (if any), and the reasons for those results and any recommendations (s 86(2)). A notice must not include exempt matter or information about the existence or non-existence of a document that would be exempt under s 33, 37(1) or 45A (ss 89C and 25(1)).

11.34 The 'investigation results' under s 87 are:

- the matters that the Information Commissioner has investigated
- any opinion that the Information Commissioner has formed in relation to those matters
- any conclusions that the Information Commissioner has reached
- any suggestions that the Information Commissioner believes might improve the agency's processes
- any other information of which the Information Commissioner believes the agency should be aware.

11.35 The agency may provide comments on the notice to the Information Commissioner (s 86(3)).⁵ The FOI Act does not detail a procedure the Information Commissioner is to follow upon receiving comments from an agency. Whether the Information Commissioner replies to the agency or takes further action will depend on the nature of the agency's comments in responding to any opinions, conclusions or suggestions of the Information Commissioner in the notice on completion. If the notice included an investigation recommendation, the Information Commissioner will take the agency comments into account in deciding whether to take further action.

11.36 In addition to including opinions, conclusions or suggestions in a notice on

⁵ See for example the Department of Immigration and Citizenship's response to the OMI report on processing non-routine FOI requests located at <<https://www.oaic.gov.au/freedom-of-information/foi-decisions/foi-omi-reports/diac-response-to-omi-report-on-processing-of-non-routine-foi-requests>>.

completion, the Information Commissioner may also make ‘investigation recommendations’, which are ‘formal recommendations to the respondent agency that the Information Commissioner believes that the agency ought to implement’ (s 88). If the Information Commissioner is not satisfied that the agency has taken adequate and appropriate action to implement a formal recommendation, the Information Commissioner may issue a written ‘implementation notice’ requiring the agency to provide within a specified time particulars of any action the agency will take to implement the Information Commissioner’s recommendations (s 89).

11.37 The Information Commissioner may subsequently report to the minister responsible for the agency and the minister responsible for the FOI Act if the Information Commissioner is not satisfied that the agency has taken adequate and appropriate action to implement the recommendations or has not responded to the implementation notice within the specified time (s 89A). The minister responsible for the FOI Act must table the report before each House of the Parliament (s 89A(5)). Section 89B prescribes the matters that must be addressed in a report to ministers, including the action that the Information Commissioner believes would be adequate and appropriate to implement the investigation recommendations. The report must not include exempt matter or information about the existence or non-existence of a document that would be exempt under s 33, 37(1) or 45A (ss 89C and 25(1)).

11.38 In deciding whether and how to exercise the power to enforce recommendations, the Information Commissioner balances the following factors:

- whether the enforcement action would facilitate and promote public access to information
- whether the enforcement action would increase the promptness of public access to information
- whether the enforcement action would facilitate public access to information at the lowest reasonable cost, and
- any other factors which the Information Commissioner considers relevant in the circumstances.

Amending records

11.39 Under Part V of the FOI Act, a person has the right to apply for amendment or annotation of an incorrect record of personal information that is used by an agency for administrative purposes (see Part 7 of these Guidelines). As in an IC review, the Information Commissioner as part of an own motion investigation or complaint investigation can recommend that such incorrect records be amended, subject to certain limitations (s 89D).



Australian Government

Office of the Australian Information Commissioner

Part 13 – Information Publication Scheme

Version 1.5



17 July 2023

Angelene Falk
Australian Information Commissioner

OAIC

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Part 13 — Information publication scheme

Overview

Part 13 of the Freedom of Information guidelines (FOI guidelines) sets out, and provides guidance in relation to, the Information Publication Scheme (IPS) requirements that apply to Australian Government agencies subject to the *Freedom of Information Act 1982*. This includes guidance on:

- principles that should guide agencies to meet their IPS obligations [13.16 - 13.17]
- the overlapping publication requirements [13.24 - 13.25]
- the structure and contents of an agency plan [13.30 - 13.32], including a Model Agency Plan [Annexure A]
- ensuring the currency of IPS entries [13.91]
- how to meet the requirement to publish contact details of an officer under s 8(2)(i) [13.107 - 13.109]
- examples of categories of information that would not ordinarily fall within the definition of operational information [13.123]
- the types of ‘other information’ that agencies should consider making available [13.135] and guidance as to issues to consider in deciding what information should be published [13.138]
- relevant governance and leadership arrangements, including the appointment of an Information Champion [13.143 - 13.146]
- publication of IPS entries on a website [13.147 - 13.151]
- review of agency IPS compliance [13.163 - 13.165]
- the Information Commissioner’s powers to investigate complaints about an agency’s compliance [13.166 - 13.168] and monitoring and reporting of the administration of agencies’ IPS [13.169 - 13.171].

Introduction

13.1 Part II of the FOI Act establishes an IPS for Australian Government agencies subject to the FOI Act. The IPS requires agencies to publish a broad range of information on their website and authorises agencies to proactively publish other information. Agencies must also publish a plan that explains how they intend to implement and administer the IPS (an agency plan).

13.2 The IPS underpins a pro-disclosure culture across government and is one of a number of mechanisms through which government-held information is made available to the public. Other mechanisms that reflect the pro-disclosure goals of the FOI Act include the ability of agencies to

release information administratively,¹ the publication of information released through an FOI request on agencies' disclosure logs² and self-service options which allow people to access their own personal information (for example, MyGov).

13.3 The IPS requires agencies to regularly consider and publish information that is of value to the public. The IPS requirements also reflect the object of the FOI Act: that information held by government is a national resource to be managed for public purposes (s 3(3)).

13.4 Publication of government information can stimulate innovation and economic prosperity. It can also enhance participatory democracy by assisting the public to better understand how government makes decisions and administers programs. An informed community can participate more effectively in government processes and contribute to better policy and decisions. Transparency in government can also lessen the risk that people will be disadvantaged in dealings with government through lack of knowledge or a misunderstanding of government processes.

13.5 The IPS sets minimum requirements for publication of information and supports publication of a wide range of information (s 8(4)). Agencies are encouraged to identify and publish additional information, beyond the minimum requirements of s 8(2) of the FOI Act. Further, agencies can take steps to make existing information more accessible to members of the public.

13.6 The IPS requirements are intended to facilitate and promote public access to information promptly and at the lowest reasonable cost. Strong commitment to proactive disclosure through the IPS is not only consistent with the objects of the FOI Act and supports Australia's democratic values; it may also reduce the need for applicants to seek formal release of documents through FOI requests.

Elements of the IPS

13.7 The IPS requires Australian Government agencies to which the FOI Act applies to:

- publish an agency plan (ss 8(1) and 8(2)(a))
- publish specified categories of information (s 8(2))
- consider proactively publishing other government information (s 8(4)).

13.8 Together, these 3 elements are referred to in these Guidelines as an agency's IPS entry. Individual agencies' IPS entries constitute the IPS.

13.9 Agencies must have regard to the objects of the FOI Act and these Guidelines in complying with the IPS requirements (ss 9A and 93A). These Guidelines provide information about the IPS requirements applying to agencies. They also include recommendations and guidance to encourage better practice.

¹ See s 3A(2)(b) of the FOI Act and Parts [3.2] – [3.5] of the FOI Guidelines (Access to government information – administrative release).

² Section 11C of the FOI Act and Part 14 of the FOI Guidelines.

13.10 Agencies are also required to keep their IPS entry accurate, up-to-date and complete.

13.11 The IPS does not apply to ministers' offices. However, ministers are subject to other FOI Act requirements, including the obligation to give access to documents on request under Part III of the FOI Act and the obligation to publish a disclosure log under s 11C (see Part 14 of these Guidelines). As noted above [13.6], proactive disclosure of documents is likely to reduce reliance on formal access requests under the FOI Act.

The IPS and disclosure log requirements

13.12 The FOI Act requires agencies to have both an IPS entry and a disclosure log. These are distinct and separate requirements under the FOI Act.

13.13 The purpose of the IPS is to make more information available to the public by mandating the publication of specified categories of information and authorising other information to be published. Regular and active consideration of which information is of value to the public will assist agencies to meet the legislative intent of Part II of the FOI Act in making that information publicly available on their website. As noted above [13.1]) the requirement for agencies to have an IPS entry is contained in Part II of the FOI Act.

13.14 If an agency gives access to a document in response to an FOI request, it is required to publish that information to the public on a website (the **disclosure log**) within 10 days of giving access to the information (subject to certain exceptions for personal and business information that it would be unreasonable to publish – see Part 14 of these Guidelines). The disclosure log is therefore a list of all the information in documents that the agency has released in response to FOI requests, unless an exception applies. The rationale for the disclosure log requirement is that if certain information is of interest to an individual, it may also be of interest to others. Publication of information released in response to an FOI request is therefore likely to enhance transparency and accountability and to reduce the need for agencies to respond to individual FOI requests because the information is publicly available. The requirement for agencies to have a disclosure log is contained in s 11C of the FOI Act.

Guiding principles

13.15 The FOI Act contains 6 principles that should guide agencies in meeting their IPS obligations:

- agency plans and IPS compliance should further the objects of the FOI Act
- information published by an agency under the IPS should be easily discoverable, understandable and machine-readable
- published information should be accessible — in particular, it should comply with an agency's obligation to meet the Web Content Accessibility Guidelines version 2.0 Level AA (WCAG 2.0) see [13.157]
- agencies are encouraged to adopt the publication framework set out in these Guidelines, to enhance accessibility through a consistent look and feel to IPS entries across all agencies

- published information should, so far as it is reasonable and practicable, be made available for reuse on open licensing terms, to enhance the economic and social value of the information
- published information should be reviewed regularly for accuracy, currency and completeness.

13.16 Agencies are also encouraged to have regard to the 8 principles on open public sector information published by the Australian Information Commissioner.³ The principles are:

Principle 1: Open access to information — a default position

Principle 2: Engaging the community

Principle 3: Effective information governance

Principle 4: Robust information asset management

Principle 5: Discoverable and useable information

Principle 6: Clear reuse rights

Principle 7: Appropriate charging for access

Principle 8: Transparent enquiry and complaints processes.

Open by design

13.17 The proactive disclosure of government-held information promotes open government and advances our system of representative democracy.⁴ Australian Government agencies are strongly encouraged to commit to being ‘Open by Design’ by embedding a culture of transparency within their agency and by prioritising, promoting and resourcing proactive disclosure of information they hold which is of value to the public.

13.18 To build a culture of transparency, agencies should continually consider what documents they can make pro-actively available and adopt a pro-disclosure approach when deciding what information to publish. It is recommended that documents be published if they are of value and interest to the public.

13.19 Agencies should be attuned to what is of interest to the community and make that information available. Agencies can demonstrate transparency by proactively publishing information with current relevance. This may also reduce the number of FOI requests made for that information.

13.20 Agencies may decide not to publish a document that is otherwise required to be published under s 8(2) if ss 8C(1) or (2) apply (for example, if secrecy provisions apply). In those circumstances, agencies are strongly encouraged to record the reasons for the decision not to publish the document on an IPS information register, (see [13.40 - 13.44] for more information about maintaining an IPS

³ See: <https://www.oaic.gov.au/about-the-OAIC/information-policy/information-policy-resources/principles-on-open-public-sector-information>

⁴ See s 3(2) of the FOI Act.

information register), and regularly review the decision to ensure that ss 8C(1) or (2) continue to apply.

13.21 Information published on an agency's IPS entry must be accurate, up-to-date, complete and accessible to the public.

13.22 Agencies should consider how they can promote proactive publication arrangements across their organisation and clarify documents they already have publicly available, to reduce the need for formal access requests.

Overlapping publication requirements

13.23 The requirement to publish certain government-held information may arise from more than one source, including the IPS requirements in Part II of the FOI Act. For example, agencies are required to publish their annual reports on the Transparency Portal after the annual report has been tabled in Parliament, and also to publish the annual report as part of the agency's IPS (s 8(2)(e) of the FOI Act).

13.24 The requirement to publish information arising under a different legislative scheme or policy does not override the requirement to publish the same information on an agency's IPS entry if publication is also required under Part II of the FOI Act.

13.25 However, it may be appropriate to provide a link to a document from the IPS entry if it is already published on another website, rather than creating multiple copies of the same document. Providing multiple access points to information increases accessibility and searchability.

13.26 It is recognised that many agencies publish a wide range of corporate information and it may not always be practicable to link to individual documents from the IPS entry. In these circumstances, it may be appropriate for the IPS entry to link to other agency websites containing links to information that the agency is required or permitted to publish under the IPS – for example, to a 'Corporate Information' or 'Operational Information' webpage.

Agency plan

13.27 Section 8(1) of the FOI Act requires agencies to prepare a plan showing:

- (a) the information the agency proposes to publish under the IPS (its IPS entry)
- (b) how, and to whom, the agency proposes to publish that information
- (c) other steps the agency will take to comply with IPS requirements.

13.28 The purpose of an agency plan is to explain how an agency will comply with the IPS requirements.

13.29 Section 8B requires agencies to ensure that all information the agency publishes under the IPS, including the agency plan, is 'accurate, up-to-date and complete'. Agencies should therefore ensure that the agency plan is regularly reviewed and updated where necessary. This review could be undertaken as part of an agency's annual strategic planning.

13.30 An agency plan and IPS entry can be strengthened by inviting public comment on them. Agencies should explain in their plan how they will evaluate and act on any comments received.

Structure and contents of the agency plan

13.31 Agencies should consider adopting the following headings in their agency plan, to promote consistency across government and make it easier for the public to access agency information:

- establishing and administering the agency's IPS entry
- IPS information architecture
- information required to be published under the IPS (s 8(2))
- other information to be published (s 8(4))
- IPS compliance review (s 8F).

13.32 Each of these headings is discussed in more detail below. In addition, an agency plan template is available at **Annexure A** — Model Agency plan .

13.33 The agency plan should explain how the agency will facilitate public access to the information published in an agency's IPS entry. Matters that can be addressed include:

- whether information will be published on the agency's website, or on another website, for example, the website of the portfolio department (where applicable), legislation.gov.au or data.gov.au
- the headings under which information will be published (see [13.152] below for a suggested heading structure)
- how the IPS entry will be clearly identified on the agency website (for example, by using the IPS icon recommended by the Information Commissioner in the Guidance for agency websites: 'Access to information' webpage)⁵
- whether a sitemap and search function will be provided
- whether an alert service will be provided for changes or additions to the IPS and how a member of the public can subscribe to the alert service
- how the agency will comply with its WCAG 2.0 Level AA obligations in establishing and maintaining its IPS entry⁶
- the mechanism(s) that will be adopted by the agency for inviting community feedback on its IPS entry and compliance, and how the agency will evaluate and respond to comments received.

⁵ Available as an agency resource at www.oaic.gov.au

⁶ The Digital Transformation Agency strongly encourages agencies to meet WCAG 2.1 Level AA which provides a more accessible experience. See: <https://www.dta.gov.au/help-and-advice/digital-service-standard/digital-service-standard-criteria/9-make-it-accessible>.

Establishing and administering the agency's IPS entry

13.34 The agency plan should explain the steps the agency will take to prepare its IPS entry and to manage the entry on an ongoing basis. The following matters could be addressed:

- who (within the senior executive) is responsible for leading the agency's work on IPS compliance
- the resources allocated to establishing and administering the agency's IPS entry
- the processes and timetable for identifying information required to be published under s 8(2), for publishing additional information under s 8(4), and for adding to or revising the agency's IPS entry
- measures being taken to ensure that the agency's IPS entry is accurate, up-to-date and complete - discussed below at [13.154 – 13.155]
- measures (if any) being taken to improve an agency's information asset management framework, to support its IPS compliance, see [13.36 – 13.37]
- whether the agency has developed an internal IPS information register to assist it to efficiently identify documents for publication, record decisions made in relation to publication and systematically review IPS information for accuracy, currency and completeness, see [13.40 – 13.43]
- provide details of access charges (if any) that the agency may impose for accessing information published under the IPS, and how charges will be calculated (ss 8D(4) and(5)), see [13.158 – 13.163]

13.35 The details of the agency plan are likely to reflect the agency's size, functions and reporting obligations, and its resources and skills in information and communications technology, and information management. The agency plan could elaborate on those matters.

Information asset management framework

13.36 An information asset management framework brings together key corporate planning activities and information asset management.

13.37 An information asset is 'a body of information, defined and managed as a single unit so it can be understood, shared, protected and exploited efficiently'.⁷

13.38 Information asset management involves developing a process to manage, develop and guide the acquisition, use and disposal of information assets. This process is intended to maximise service delivery potential and manage risks and costs over an information asset's lifecycle.

⁷ For further information about information assets see 'What is an information asset' published by the National Archives of Australia at <https://cdn.nationalarchives.gov.uk/documents/information-management/information-assets-factsheet.pdf>.

13.39 An information asset management framework is a subset of an agency's wider asset management framework and deals specifically with information assets.⁸ It would ideally be linked to an agency's records management system and IPS information register.

IPS information register

13.40 It is recommended that agencies build IPS publication considerations into clearance processes when developing or reviewing all new corporate, policy and procedural documents.

13.41 The pro-disclosure objects of the FOI Act support agencies in adopting a starting position that all corporate, policy and procedural documents will be published on an agency's IPS unless there are clear and documented reasons for not doing so.⁹ Further consideration should also be given to whether other documents created by the agency (see s 8(4) and [13.131 – 13.138]), can be published if they meet the criteria identified at [13.42] below.

13.42 In deciding whether a document will be published following clearance an agency could consider:

- whether the document contains information of interest to the public or information of public value
- whether the document contains information that may assist members of the public understand the work of the agency or understand the decisions it makes
- whether the document would be released if access was requested under the FOI Act
- whether, if the document contains exempt matter, limited redactions can be made to create a version that is suitable for publication.

13.43 It is recommended that the agency make and record a decision about whether the document will be published on the IPS when finalised and the reasons for not doing so (if a decision is made not to publish the document). Where a decision is taken not to publish a document on the IPS, agencies are encouraged to regularly review that decision, to check whether the reasons for non-publication continue to apply, and to publish the document when those reasons are no longer applicable. This approach assists agencies to meet the requirements of the FOI Act at section 8B, discussed below.

13.44 Section 8B of the FOI Act requires agencies to ensure that the information published on the IPS is 'accurate, up-to-date and complete'. The OAIC encourages agencies to develop and maintain an IPS information register to assist agencies ensure compliance with this requirement. The IPS information register can be incorporated into existing information asset management frameworks.

13.45 An IPS information register could include the following information:

⁸ For further discussion about information asset management frameworks, see the OAIC issues paper, *Towards an Australian Government Information Policy* (November 2010), at www.oaic.gov.au or [Towards an Australian Government Information Policy: Issues Paper 1 \(from the NLA web archive\)](#), November 2010

⁹ Section 8C(1) of the FOI Act provides that an agency is not required to publish exempt matter. Section 8C(2) provides that publication of particular information is not required if an enactment restricts or prohibits publication.

- the business area within the agency that is responsible for a particular document
- the date the document was created, and its revision history (including dates)
- the date the document was published on the IPS
- if a decision is made not to publish the document on the agency's IPS:
 - the date that decision was made
 - the name and/or position of the person who made the decision
 - the reason(s) for the decision not to publish the document
 - the date(s) the decision not to publish the document has been reviewed, the outcome of that review(s) and the name and/or position of the person who reviewed the decision
- the formats in which the document is available
- if the document is not published online, who may be contacted within the agency to arrange public access and the number of requests received.

Information required to be published under the IPS

13.46 The agency plan should describe the information an agency will publish as required by s 8(2). Those requirements are described in more detail below. A series of headings that agencies can use to enhance public access to government information published under the IPS is suggested below at [13.153].

Other information to be published under the IPS

13.47 The agency plan should describe the information an agency will publish under s 8(4), discussed further below at [13.131 – 13.138]. The plan should specify how the agency has or will identify other information to be published. The timetable for publishing the information should also be included.

IPS compliance review

13.48 Agencies are required to complete a review of their IPS compliance at least once every 5 years, in conjunction with the Information Commissioner (ss 8F(a) and 9(1)). The OAIC's compliance review program is described at [13.163 – 13.168].

13.49 The OAIC encourages agencies to undertake more regular reviews, and to regularly review the individual elements of its IPS, noting the requirement in s 8B that an agency must ensure that information published as required or permitted by Part II is accurate, up-to-date and complete. The agency plan should indicate when and how the agency will undertake its compliance reviews. The plans should also explain whether the public will be invited to comment on the agency's IPS entry as part of the compliance review.

Information required to be published under the IPS

13.50 Agencies are required by s 8(2) of the FOI Act to publish the following information:

- the agency plan (discussed above at [13.31 – 13.36])
- details of the structure of the agency’s organisation (for example, in the form of an organisation chart) [13.53 – 13.58] below
- details of the agency’s functions, including its decision-making powers and other powers affecting members of the public (or any particular person or entity, or class of persons or entities) [13.62 – 13.71] below
- details of appointments of officers of the agency that are made under Acts (other than Australian Public Service employees within the meaning of the *Public Service Act 1999* — such as appointments of statutory office holders [13.74 – 13.75] below
- the agency’s annual reports [13.78 – 13.79] below
- details of arrangements for members of the public to comment on specific policy proposals for which the agency is responsible, including how (and to whom) those comments may be made [13.82 – 13.84]
- information in documents to which the agency routinely gives access in response to requests under Part III (access to documents) of the FOI Act, except information that is otherwise exempt [13.87 – 13.100]
- information that the agency routinely provides to the Parliament in response to requests and orders from the Parliament [13.103 – 13.105]
- details of an officer (or officers) who can be contacted about access to the agency’s information or documents under the FOI Act [13.108 – 13.108]
- the agency’s operational information (information held by the agency to assist it 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 — for example the agency’s rules, guidelines, practices and precedents relating to those decisions and recommendations) [13.111 – 13.127].

13.51 Each of these categories of information are discussed below.

Agency plan

13.52 Agencies must publish an agency plan. This requirement was discussed above at [13.31].

Agency organisation structure

13.53 Agencies must publish details of their organisational structure (s 8(2)(b)). This requirement is designed to make the details of an agency’s organisation structure easily accessible and discoverable by the public on the agency’s website. In meeting this requirement, agencies should

consider their main audience — the general public — as well as particular classes of people or entities that are likely to visit the agency website.

13.54 Organisational information may be presented as a chart and supported by other information about the agency. It is important that any abbreviation, acronym or specialist description or term that is used in the organisation chart is explained. If this explanation is given in a separate document on the website, a clear link should be provided.

13.55 Agencies already publish organisational information in various locations, including the agency website, the agency annual report, and on directory.gov.au. Agencies may achieve compliance with their IPS obligations by linking to another webpage where the organisational information is already published.

Level of detail required

13.56 The level of detail an agency provides about its organisational structure may depend on the agency's particular characteristics, such as its size and functions.

13.57 For smaller agencies, or those with a limited number of functions, it may be appropriate to identify each business line or unit that is managed by an officer in the Senior Executive Service responsible for carrying out one of the agency's functions or powers. The lines of accountability from the manager of the business unit through to the agency's chief executive officer could be specified. The nature of the agency function or power, and the role of the business unit, could also be explained.

13.58 For larger agencies, providing comprehensive organisational information could make the IPS entry unhelpfully long. If so, an agency should consider limiting its organisational information to the responsibilities of key Senior Executive Service officers. The nature of the agency function or power that officer supervises, and the key business units that carry out the function, could be explained. If this approach is taken, details should be given of how a person may obtain further information about the agency's organisational structure.

13.59 Where an agency is responsible for a statutory committee, the agency should provide information about the committee and committee members.

13.60 Although not expressly required by s 8(2)(b), it is good practice to provide the name and position title for each manager of a business unit.

Organisational change

13.61 Information about an agency's organisational structure must be accurate, up-to-date and complete [13.154]. An agency's IPS entry should be updated at the earliest opportunity following an internal agency reorganisation or a reallocation of responsibilities between agencies. It may assist the public to explain any key organisational changes, and to provide a link to other relevant agencies.

Functions and powers

13.62 Agencies must publish details of their functions. This includes an agency's decision-making and other powers that affect members of the public (or any particular person or entity, or class of persons or entities) (s 8(2)(c)). This requirement extends to functions and powers that derive from an enactment or an executive scheme (s 8(5)).

13.63 Agencies are not required to publish details of the activities they undertake that are incidental to their designated functions. See [13.71 – 13.73] below for more detail about incidental powers and functions.

13.64 Where agencies share responsibility for a function or power, the relationship between the agencies should be explained. For example, one agency may develop policy about a particular issue while another agency delivers a service based on that policy.

13.65 Agencies already provide details of their functions and powers in annual reports, and at other locations such as www.australia.gov.au. It may be appropriate to provide a link to this source, if the information provided there is comprehensive or presented in a way that will better assist the public to understand the agency's function.

Functions

13.66 An agency's functions should be described in terms that enable the public to ascertain the range and scope of those functions. Agency functions derive from many sources:

- The Administrative Arrangements Order (AAO) made by the Governor-General specifies the functions of departments of state. The AAO describes the responsibilities of each department and the legislation administered by the ministers responsible for each department.
- Decisions of the Government, often in the form of a ministerial announcement, may require an agency to administer a new policy or program. The activity may be sufficiently significant to be listed separately in an IPS entry as a function of the agency.
- The functions of a body or office holder established by legislation (a 'statutory authority') will be specified in the enabling legislation. Other legislation may also confer functions on the agency. The description of these functions in an IPS entry may need to go beyond the legislative definition of the function to convey a full picture of the agency's role.
- The functions of a body established by executive action — for example, by the Governor-General under s 65 of the *Public Service Act 1999* or by Cabinet or a minister — are likely to be described in the order or instrument establishing the body. The description of the function that is published may need to be more detailed than the description given in that order or instrument.
- Agencies sometimes develop other functions that should be described in an IPS entry. For example, a function may be developed with the assistance of funding received from a government funding or grant agency.

13.67 It may assist the public to provide a link to the legislation, instrument or government announcement that provides the source for the agency function.

Powers

13.68 Powers can be conferred on an agency either by an Act of Parliament, a legislative instrument (including subordinate legislation), or an executive instrument. An executive instrument may, for example, establish a grant program and confer power to award a grant to a member of the public, impose conditions on a grant, and revoke a grant.

13.69 An agency's powers can be described in their IPS entry separately, or as part of the description of the agency's functions. Either way, the description should be adequate to enable the public to understand the range and scope of the agency's powers that can affect them. It is not necessary to refer separately or in detail to each specific power conferred by legislation or otherwise. A general description of an agency's powers and their source will be adequate. Nor is it necessary to refer to the particular section of an Act or clause of an instrument that confers a power, unless that will better assist a person to understand the agency's functions.

13.70 There is a risk that too much detail in describing the functions or powers of an agency may unnecessarily lengthen or complicate the description and make it harder for the public to understand the agency's role.

Incidental powers and functions

13.71 Agencies have incidental powers and functions to complement those expressly conferred on the agency. These incidental powers and functions enable an agency to carry on its business and administer the affairs of government. Examples are the corporate functions of an agency, such as its human resources, public relations and property management activities. Other incidental activities of government agencies include administering FOI requests and complying with the *Public Governance, Performance and Accountability Act 2013* (PGPA Act).

13.72 It is not necessary for an IPS entry to include these incidental functions and related powers that are common to all agencies. An exception would apply where the function is a core or designated function of a particular agency — for example, if the agency is established to provide training to other agencies, to administer the FOI Act or to manage Australian Government property.

13.73 An agency can include additional information in its IPS entry (s 8(4)), and it is therefore open to an agency to include information about functions and powers that are incidental, implied or not enumerated. This should be considered where the function is a distinct agency activity or the agency exercises a significant power. An example is the work an agency undertakes, or the powers it exercises, to ensure compliance with its directions or program conditions.

Statutory appointments

13.74 Agencies must publish details of appointments of agency officers that are made under Acts, other than the appointment of APS employees within the meaning of the *Public Service Act 1999* (s 8(2)(d)).

13.75 This requirement applies to officers who are appointed under statute to a position or role in an agency – for example, the Commonwealth Ombudsman appointed under the *Ombudsman Act 1976* s 4, or the Chief Executive of Centrelink appointed under the *Human Services (Centrelink) Act*

1997 s 7 (and who is also an Associate Secretary in the Department of Human Services). An officer who is appointed to a statutory position in another agency should be listed under the IPS entry of both agencies — for example, an officer of a department appointed to the Administrative Review Council under the *Administrative Appeals Tribunal Act 1975* (s 49).

13.76 An agency is not required to list staff appointed under statute to a position with a generic designation, such as ‘investigator’. Nor are agencies that employ staff other than under the *Public Service Act 1999* required to list staff they appoint under a general statutory authority.

13.77 Each appointment required to be listed in the IPS entry should include the following details:

- the name of the person appointed
- the length or term of appointment
- the position to which the person is appointed (and particulars of the position)
- the provision of the Act under which the person is appointed.

Annual reports

13.78 Agencies are required to publish the full text of their most recent annual report as laid before the Parliament (s 8(2)(e)). Agencies may also include the annual reports for earlier years, many of which are already published on the internet.

13.79 This requirement applies to annual reports of the following kind:

- the annual report prepared by each Commonwealth entity on their activities during the preceding financial year, as required by the PGPA Act s 46
- the annual report prepared by the directors of a Commonwealth company, as required by the PGPA Act s 97
- the annual report that a statutory agency is required to prepare on its operations during the year — for example, see the Ombudsman Act s 19
- the annual report that an officer is required to prepare on the operation of a particular statute during the year — for example, the *Environment Protection and Biodiversity Conversation Act 1999* s 516, which requires the Secretary to prepare a report on the operation of that Act; the *Bankruptcy Act 1966* s 12(1)(d) which imposes a similar obligation on the Inspector-General in Bankruptcy; and the *Superannuation (Government Co-contribution for Low Income Earners) Act 2003* which requires the Commissioner of Taxation to prepare quarterly (s 54(1)) and annual (s 54(2)) reports on the working of that Act
- a report prepared by an agency to enable a minister to satisfy an obligation to present an annual report to the Parliament — for example, the *Aged Care Act 1997* s 63.2.

13.80 Many other agency reports are laid before the Parliament, as requested by government or as the result of a specific agency inquiry. Publication of these reports is not required by s 8(2)(e), but publication is open to an agency under s 8(4).

13.81 To avoid duplicating information, if an agency is aware that its reports are published elsewhere (for example, on [transparency.gov.au](https://www.transparency.gov.au)) a link can be provided to that website rather than publishing the reports twice.

Consultation arrangements

13.82 Agencies that undertake public consultation on specific policy proposals for which they are responsible are required to publish details of how and to whom comments may be made (s 8(2)(f)). This requirement applies whenever an agency administers or establishes a public consultation arrangement in the course of developing a specific policy proposal.

13.83 Section 8(2)(f) applies to public consultation arrangements of a broad kind, including consultation:

- undertaken by an agency when making a legislative instrument, as required by the *Legislative Instruments Act 2003* s 17
- undertaken by an agency in preparing a regulatory impact statement, in accordance with the Australian Government Guide to Regulation¹⁰
- that an agency has decided to undertake for a specific policy development purpose
- under an arrangement that an agency has established to enable members of the public to provide ongoing comment on an existing policy or program that is administered by the agency.

13.84 Because s 8(2)(f) applies to policy development activity ‘for which the agency is responsible’, it can apply even if the obligation to consult is formally imposed by statute upon a minister or statutory officer. For example, the *Gene Technology Act 2000* s 22 provides that the Ministerial Council in developing policy principles may consult with ‘such industry groups ... and such environmental, consumer and other groups as the Ministerial Council considers appropriate’. The Australian Government agency that is carrying out that consultation for the Ministerial Council may need to publish details of that consultation.

13.85 There is no requirement to publish details of consultation that does not contribute to policy development. For example, s 8(2)(f) would not ordinarily apply to consultation undertaken by the Australian Heritage Council pursuant to the *Environment Protection and Biodiversity Conservation Act 1999* s 14, which requires the Council to consult a State before a property within that State is declared to be a World Heritage property.

13.86 If an agency has established an online consultation process for a specific policy proposal, the agency’s IPS entry should link to this process.

Information routinely given through FOI access requests

13.87 Agencies are required to publish information in documents to which the agency routinely gives access in response to FOI requests (s 8(2)(g)).

¹⁰ Available at <policyhub.gov.au/resources/Australian-government-guide-regulation>.

13.88 Section 8(2)(g) does not apply to:

- personal information about any individual, if it would be unreasonable to publish the information (s 8(2)(g)(i)); as a general rule, this does not prevent publication of the names of Australian Government agency staff in connection with their official duties,¹¹ although agencies may wish to consult relevant staff in cases where potential harm could arise from publishing their names (see also Part 14 of these Guidelines)
- information about the business, commercial, financial or professional affairs of any person, if it would be unreasonable to publish the information (s 8(2)(g)(ii))
- other information that the Information Commissioner has determined it would be unreasonable to publish under s 8(3) (s 8(g)(iii)) (see [13.99 – 13.100] below).

13.89 These exceptions indicate that agencies are generally not expected to publish information given to an individual or business in response to an FOI request that is personal to that individual or business.

13.90 In deciding what information is ‘routinely’ accessed, agencies should have regard to the similar requirement in s 11C to publish a disclosure log of information released in response to FOI requests (see Part 14 of these Guidelines). The purpose of the IPS is also relevant to deciding what is routine. It forms part of an approach to information disclosure that recognises information held by government is a national resource, and that agencies should proactively publish information that may be of public interest. The IPS is also designed to lessen the number of individual requests for documents made to agencies. Agencies should therefore take an expansive rather than a narrow view of what information is ‘routinely’ accessed. In particular, agencies should consider whether publishing the information would:

- promote the objects of the FOI Act
- be in the public interest
- reduce the likelihood of further requests for the information.

13.91 While the disclosure log will contain information an agency has released in response to individual requests, an IPS entry is to contain information that is ‘routinely’ released. That is, agencies are required to include in their IPS entry information that has been requested on multiple occasions. The information that was released may not have been identical on each occasion: it may have been revised or updated between requests, or the information may reflect a later development on the same topic. For example, an IPS entry could include statistical information about an agency’s service delivery performance that is regularly requested by the media or other members of the public. Another example would be the minutes of meetings that are regularly sought under the FOI Act.

13.92 To ensure an agency’s IPS entry contains current information of interest to the public, it is recommended as best practice, that agencies review the FOI requests the agency receives to identify

¹¹ Explanatory Memorandum to the Freedom of Information Amendment (Reform) Bill 2009, p 7.

trends and topics of interest (for example, on a 6-monthly basis) and make this information publicly available through their IPS.

13.93 Review of FOI requests will also assist agencies to identify commonly requested categories of personal information and to consider how the agency can use digital means, for example: self-service portals, to increase the accessibility and availability of this information to members of the public. In these cases, access to information can be provided without the need for an FOI request to be made under the FOI Act.

13.94 Publication of information in a disclosure log will sometimes satisfy the requirement in s 8(2)(g) to publish that information under the IPS. To avoid dual publication, an agency's IPS entry may contain a link to the disclosure log and a reference to the information to which the agency has routinely given access. Alternatively, an agency may decide that it is preferable, in complying with s 8(2)(g), for the IPS entry to contain either an extract from the disclosure log or a separate summary of information that is routinely released by the agency in response to FOI requests.

13.95 Whichever approach is adopted, agencies must ensure that the information is accurate, up-to-date and complete (s 8B). Consequently, if information in the disclosure log has been revised or replaced, an IPS entry which links to the disclosure log will also need to be amended.

Exceptions — personal and business information

13.96 As with the disclosure log requirements, an agency is not required to publish personal or business information as part of its IPS entry if it would be unreasonable to publish that information (ss 8(2)(g)(i) and (ii)). As noted above at [13.88], agencies will generally not publish information given to an individual or business in response to an FOI request that is personal to that applicant.

13.97 The third-party consultation requirements that apply before a decision can be made under Part III of the FOI Act to release business documents or documents affecting personal privacy in response to an FOI request (ss 27 and 27A) do not apply to IPS and disclosure log publication decisions. It is nevertheless open to an agency to develop procedures to ensure that it has considered the views or interests of an FOI applicant or third party before publishing information under the IPS or disclosure log.

13.98 Where information is not published because an exception applies, agencies may record this in an IPS information register, including the title of the document to which an exception applies and the reason it was not published under the IPS (see [13.40 – 13.43]) above on information registers). Capturing this information may help an agency if it needs to respond to any complaints to the Information Commissioner about its IPS compliance.

Exceptions — Information Commissioner determinations

13.99 The Information Commissioner may make a determination that the requirement to publish routinely accessed information under s 8(2)(g) does not apply to information specified in the determination (s 8(2)(g)(iii)). A determination of this kind is a legislative instrument for the purposes of the *Legislative Instruments Act 2003* (s 8(3)). A determination may apply to information of a general kind that is held by many agencies, or to a specific kind of information held by a particular agency. A similar exemption applies to the requirement to publish information in a disclosure log (s 11C(2)) (see Part 14 of these Guidelines).

13.100 In deciding whether to make a determination, the Information Commissioner will have regard to:

- the extent to which publication of the information in question would further the objects of the FOI Act
- whether there is an established and reasonable public demand for the information
- the estimated resource requirement for an agency to publish the information and whether this would impose an unreasonable burden on the agency.

13.101 For further information about determinations under s 8(3), see the Information publication scheme and disclosure log determinations policy and procedure (available at www.oaic.gov.au).

13.102 The Information Commissioner has not yet made a determination under s 8(3) of the FOI Act.

Parliamentary information

13.103 Agencies are required to publish information they hold that is routinely provided to the Parliament in response to requests and orders from the Parliament (s 8(2)(h)). This includes:

- Senate Order No 12: Production of departmental file lists
- Senate Order No 13: List of departmental contracts (\$100,000 or more)
- Senate Order No 14: List of advertising/public information projects (\$100,000 or more)¹²
- Information of a kind that is routinely requested from an agency by Parliament through a parliamentary committee.

13.104 Section 8(2)(h) does not apply to an answer provided to a Question on Notice in the Parliament, unless the Question is of a recurring nature for information of a similar kind (including a Question requesting an update or revision of information earlier provided in response to a Question). Nor does s 8(2)(h) apply to an agency submission to a parliamentary committee. It is nevertheless open to an agency to publish that information in the IPS under s 8(4) of the FOI Act (other information). Agencies should also note that s 8(2)(h) operates alongside another guideline that requires online publication of information presented to the Parliament — see Department of the Prime Minister and Cabinet, Guidelines for the Presentation of Documents to the Parliament (including Government Documents, Government Responses to Committee Reports, Ministerial Statements, Annual Reports and Other Instruments).¹³

13.105 In applying s 8(2)(h), agencies should adopt a similar approach to that for s 8(2)(g) (documents to which access is routinely given). In particular, an agency should consider including in its IPS entry information that was provided to the Parliament, if:

- this would promote the objects of the FOI Act

¹² [Parliament of Australia - Senate Orders for documents](#)

¹³ See [4.35] at <https://www.pmc.gov.au/publications/tabling-guidelines>

- the information is of public interest
- further requests or orders from the Parliament for the information are likely.

13.106 Agencies should establish internal procedures for ensuring that information routinely provided to the Parliament is identified as such and published under the IPS.

13.107 If an agency is aware that information provided to Parliament has been published elsewhere (for example, on the Parliament's website¹⁴), it may be appropriate to provide a link to that website.

Contact officers

13.108 Agencies must publish contact details of an officer (or officers) who can be contacted about access to the agency's information or documents under the FOI Act (s 8(2)(i)).

13.109 To meet this requirement, agencies should publish the name (or position title), telephone number and email address of the FOI contact officer or officers. Agencies should establish generic telephone numbers and email addresses (for example, foi@agency.gov.au) that will not change with staff movements.¹⁵

13.110 Where it is not appropriate to include the name and contact details for each FOI contact officer (for example, due to regular staff changes) the agency should provide contact details for the position.

Operational information

13.111 An agency's operational information must be published as part of an agency's IPS entry (s 8(2)(j)). 'Operational information' is defined in s 8A(1) as:

... information held by the agency to assist the agency to perform or exercise the agency's 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).

13.112 The publication of operational information ensures that members of the public are adequately informed about the rules, policies, principles and procedures that agencies apply in making decisions or recommendations that affect members of the public.

13.113 Publication of that information is important in its own right but is also necessary to ensure that members of the public are not disadvantaged by a lack of awareness of the information used by agencies to make decisions. Section 10 of the FOI Act reinforces that objective by providing that a person must not be subjected to any prejudice that could have been avoided by the person had they

¹⁴ Agencies are advised to check what information is accessible and where it can be located on the Parliament's website before providing links (for example, the majority of submissions to committees are published on the inquiry webpages of the committees).

¹⁵ See the model FOI page included in the Information Commissioner's *Guidance for agency websites: 'Access to information' webpage*, available as an agency resource at www.oaic.gov.au and [Guide to the access of information page on an agency's website](#)

been aware of operational information that should have been but was not published in the IPS. For more information about s 10 of the FOI Act, see [13.127 – 13.128].

13.114 Operational information is all information an agency holds, whether generated by the agency or not, that assists it to perform or exercise its functions or powers in making decisions or recommendations that affect members of the public (or any particular person or entity, or class of persons or entities). The person affected by an agency decision may be an individual, an organisation or a business entity. Examples of operational information include rules, guidelines, practices and precedents relating to decisions and recommendations affecting members of the public (s 8A).

13.115 Four terms in the definition of ‘operational information’ in s 8A(1) reflect the breadth of the concept:

- information held by an agency to ‘assist’ it
- in performing or exercising 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)’.

Those terms are discussed below.

Information that can assist the agency

13.116 Information that can assist the agency to make decisions and recommendations is deliberately broad. It is not confined to rules or precedents that can be applied directly to reach a decision but includes other documents that facilitate good decision making — such as policy guidance, procedures, decision templates, model letters, training packages and checklists. If an agency has multiple versions of the same document with minor variations, publication is only required of a contemporary single or representative document.

13.117 Information held by a contracted service provider that assists it to provide services to the public on the agency’s behalf may be operational information which an agency must publish in its IPS entry. This will apply if the agency holds a copy of the information (whether generated by the agency or the contracted service provider) and the information otherwise falls within the definition of operational information in s 8A(1). If the agency does not have a copy of the information held by the contracted service provider, the agency can nevertheless arrange for that information to be published under s 8(4) (optional information). This will advance the IPS objective of ensuring that the public has easy and direct access to information that is used by or on behalf of government agencies in making decisions about rights, privileges, benefits, obligations and penalties.

Functions or powers of an agency

13.118 An agency’s functions and powers must be published in the IPS under s 8(2)(c). As described above at [13.62]–[13.71], functions or power may be assigned to an agency by legislation, an executive instrument or in some other manner.

13.119 There may be overlap in the documents that are required to be published under s 8(2)(c) and s 8(2)(j). Nevertheless, s 8(2)(c) provides a reliable starting point in identifying operational information that is required to be published under s 8(2)(j).

Making decisions or recommendations

13.120 The term ‘decision’ is to be understood broadly. For example, the *Administrative Decisions (Judicial Review) Act 1977* s 4(2) defines ‘making a decision’ to include making, suspending, revoking or refusing to make an order, award or determination; giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission; issuing, suspending, revoking or refusing to issue a licence, authority or other instrument; imposing a condition or restriction; making a declaration, demand or requirement; retaining, or refusing to deliver up, an article; and doing or refusing to do any other act or thing.

13.121 The term ‘recommendation’ in s 8(2)(j) should be construed in a similarly broad manner.

Affecting members of the public or a class of people

13.122 These are words of limitation. They confine the concept of ‘operational information’ to decision making that affects members of the public in an individual manner or as members of a particular group or class (including an organisation or business entity). Examples are decisions or recommendations that concern a right, privilege or benefit of a member of the public or a class of people, or an obligation or penalty to which a person or class of people may be subject.

What is not operational information?

13.123 The concept of operational information does not encompass all government decision making that directly or indirectly affects the public. The following categories of information are examples that would not ordinarily fall within the definition of operational information, even though the information may influence government decision making:

- policy analysis and decisions occurring within government about legislation, budgets and programs
- discussions within government about the operation of a program or legislation
- case studies and capability reports that discuss an agency response to an actual or foreshadowed event
- audit and evaluation reports on the operation of a government program or compliance with legislative requirements
- agency case management procedures for recording the handling of an individual matter or the making of a decision.

13.124 Such documents that are not operational information can nevertheless be published by an agency under s 8(4) (other information).

13.125 The reference in the definition of operational information in s 8A(1) to information that assists an agency to make decisions or recommendations ‘affecting members of the public’ means

that the definition does not extend to agency manuals and rules relating to personnel management and staff conditions of employment. Those manuals and rules relate to employees in their employment capacity and not as members of the public. Nor, for the same reason, does the definition extend to information held by the Australian Public Service Commission relating to the review of decisions about APS employees. However, as noted at [13.129] such information can nevertheless be published by an agency under s 8(4) (other information).

13.126 Section 8A(2) provides that '[a]n agency's operational information does not include information that is available to members of the public otherwise than by being published by (or on behalf of) the agency'. This exclusion applies to information such as law reports, books, guides and standards that are published by another body and that are used by agency officers in making decisions that affect members of the public.

Failure to publish operational information

13.127 Section 10 provides that a person must not be subjected to any prejudice, stemming from an agency's performance of a function or exercise of a power, that the person could have avoided if they had had access to unpublished operational information. This rule applies, for example, where the eligibility requirements for a benefit or allowance (such as a closing date) are specified only in an agency publication, and should have been, but were not, published under the IPS. The rule applies only if the person could lawfully have avoided the prejudice if they had been aware of the unpublished information.

13.128 The rule does not apply to the agency's performance of a function or the exercise of a power unless the agency had existed for more than 12 months. The agency is nevertheless expected to publish operational information under the IPS as soon as reasonably practicable after it creates that information.

Exceptions to publication under the IPS

13.129 Section 8C(1) provides that an agency is not required to publish exempt matter in their IPS entry. Exempt matter is defined as, *matter the inclusion of which in a document causes a document to be an exempt document (s 4(1))*. An exempt document is:

- a document of an agency that is exempt under an exemption provision in Part IV of the Act; if a document contains exempt and non-exempt material the agency should prepare an edited copy (see Parts 5 and 6 of these Guidelines)
- an official document of a minister that contains information not relating to the affairs of an agency or a department of state (see Part 2 of these Guidelines), or
- a document in respect of which an agency, person or body is exempt under s 7 of the Act, such as an intelligence agency document or a document relating to the commercial activities of a specified body (see Part 2 of these Guidelines).

13.130 Section 8C(2) provides that an agency is not required to publish information that is restricted or prohibited from publication by an enactment. That is, an agency is not required to publish information contrary to a legislative secrecy provision.

Other information to be published under the IPS

13.131 The FOI Act does not limit or restrict what information an agency publishes, including information that is exempt from disclosure under the FOI Act (s 3A).

13.132 Section 8(4) of the FOI Act authorises agencies to publish ‘other’ information. The power to publish other information under s 8(4) is in addition to any other power an agency has to publish information.

13.133 Agencies and staff are protected against civil and criminal liability if they publish documents in good faith, believing publication is either required or permitted under the IPS (ss 90 and 92), see [13.178 – 13.183] below. However, if a document is subject to a secrecy provision, the protections in the FOI Act may not apply.

13.134 Agencies are generally best placed to identify other information that should be published under s 8(4). In doing so, agencies should strive to implement the objects of the FOI Act, which declare that information held by government is a national resource that should be managed for public purposes, and that the Parliament intends to increase scrutiny, discussion, comment and review of the Government’s activities (s 3). Agencies should also consider:

- open by design principles by prioritising, promoting and resourcing proactive disclosure of information held that is of value to the public¹⁶
- the Information Commissioner’s *Principles on open public sector information*, which encourage agencies to ensure government information is accessible without charge, based on open standards, easily discoverable, understandable, machine-readable, and freely reusable and transformable¹⁷
- the OAIC’s Information policy agency resource, *Open data quick wins – getting the most out of agency publications*, which explains how agencies can transform data they already publish in reports, websites and mobile apps into machine-readable formats that support reuse by others¹⁸
- advice about technical and other relevant matters that should be taken into account when publishing government information online.¹⁹

13.135 The term ‘other information’ can include a wide range of information, which will vary from agency to agency. The following are examples of information required to be published in other Australian jurisdictions that Australian Government agencies should consider making available:

¹⁶ See for example: <https://www.oaic.gov.au/newsroom/icic-endorses-oaic-resolution-on-proactive-publication>; <https://www.oaic.gov.au/freedom-of-information/guidance-and-advice/statement-of-principles-to-support-proactive-disclosure-of-government-held-information> and <https://www.oaic.gov.au/updates/news-and-media/information-access-commissioners-and-ombudsmen-make-recommendations-to-support-open-by-design-principles>.

¹⁷ Available at www.oaic.gov.au.

¹⁸ Available at www.oaic.gov.au.

¹⁹ Available at <https://www.dta.gov.au/help-and-advice/about-digital-service-standard>.

- A record of open access information that is not made publicly available because there is an overriding public interest against disclosure – Australian Capital Territory and New South Wales
- Register of cabinet decisions – Victoria
- A statement listing all boards, councils, committees, panels and other bodies that have been established by the agency (whether under an Act or otherwise) for the purpose of advising the agency or a Minister responsible for the agency – Australian Capital Territory
- Statement of advice, recommendations or reports held by an agency – Australian Capital Territory and Victoria
- Budget papers and Appropriation Acts – Australian Capital Territory
- Information about government grants made or administered by the agency – Australian Capital Territory
- Ministerial briefs – Australian Capital Territory
- Information an agency undertakes to make publicly available – Australian Capital Territory.

13.136 As recommended earlier in these Guidelines (see [13.34] above), agencies should explain in their agency plan the steps the agency will take to review their information holdings and identify information that may be suitable for publication. This information should be described in the agency plan. To the greatest extent possible, information that is suitable for publication should be identified as such from early in its lifecycle and published as soon as reasonably practicable. The agency plan should also provide a timetable of when information will be published or updated.

13.137 Agencies should review whether they hold any datasets that can be published for reuse.²⁰ Publication of datasets on data.gov.au should be considered.²¹ The agency website can link to that website to avoid duplication in publication. Agencies should ensure that published information is described according to the appropriate metadata standards to enable users to find it easily.

13.138 Agencies should have regard to the following in deciding what information to publish:

- What information is of interest to members of the public and external stakeholders?
- Is there a public demand for categories of information held by the agency?
- Will publication of particular information assist the public in dealing with the agency or in commenting on programs or policies for which the agency is responsible?
- Will publication of particular information promote greater agency accountability, or better public understanding of agency decisions?

²⁰ See Australian Government Public Data Policy Statement which requires Australian Government entities to make non-sensitive data open by default. The Policy Statement is available at: https://www.finance.gov.au/sites/default/files/2022-10/aust_govt_public_data_policy_statement.pdf.

²¹ For guidance about preparing open data and publishing datasets on data.gov.au, see <https://toolkit.data.gov.au>.

- Is information considered for publication in an appropriate format to make it accessible and reusable by the public?
- Will published information require revision or updating, or is it part of the historical record of agency activity?
- Are there privacy or security concerns that require information to be de-identified or aggregated before it is published?²²

13.139 Publication of information under s 8(4) should not be a burdensome task for agencies. Agencies may consider releasing data in ‘beta’ form²³ and with appropriate caveats on its limitations. Engagement with stakeholders prior to publication may help agencies identify the data and formats for which there is the greatest demand.

Managing an agency IPS entry

13.140 This section discusses the principles agencies should observe in managing their IPS entry. Some of the principles are expressly required by the FOI Act, while some others are implicit in the objects of the FOI Act (s 3) and in Part II establishing the IPS.

Performance of agency functions

13.141 Section 10A provides that a function or power given to an agency under Part II of the Act can be performed or exercised by the principal officer of the agency or by an agency officer in accordance with arrangements approved by the principal officer. This is an equivalent provision to s 23, which provides that a decision on a request to an agency for access to a document can be made on behalf of the agency by an authorised person.

13.142 Unless the principal officer of an agency intends to exercise all functions and powers under Part II of the Act, he or she must approve arrangements under s 10A nominating the authorised persons in the agency and the scope of their authority. The functions and powers to be exercised under Part II include:

- preparation of an agency plan under s 8(1)
- publication of information required to be published by the agency under s 8(2), including deciding whether information is exempt from publication under s 8(2)(g)
- publication of other information by the agency under s 8(4)
- ensuring that information published by the agency is accurate, up-to-date and complete as required by s 8B

²² For guidance about de-identifying data before publication, see *De-identification and the Privacy Act* at [De-identification and the Privacy Act | OAIC](#)

²³ Beta testing provides an opportunity for users to use a product in a production environment to identify issues before general release. Beta testing is the final round of testing before releasing a product to a wide audience.

- ensuring that information published by the agency is published on a website in accordance with ss 8D(2),(3)
- deciding whether the agency will impose a charge for accessing information published by the agency (s 8D(4)), and publishing details of any charges the agency may impose (s 8D(5))
- arranging for regular review (at least once every 5 years) of the agency's IPS (s 9)
- if the need arises, taking appropriate action under s 10 to ensure that a person is not subjected to any prejudice as a result of not having access to operational information that was not published as required by s 8(2)(j).

Governance arrangements

13.143 Leadership at a senior level is critical in establishing a culture within an agency for full compliance with the IPS requirements in Part II of the FOI Act. Agencies should consider appointing an Information Champion, or establishing an information access governance board, to provide the leadership, oversight and accountability necessary to promote and operationalise proactive publication.

13.144 Staff in the Senior Executive Service (SES) are well placed to fulfill the important role that an Information Champion has in leading their agency to develop a culture that gives full effect to the pro-disclosure objects of the FOI Act, and the IPS in particular.²⁴

13.145 Information Champions are responsible for ensuring the agency has appropriate governance mechanisms in place to ensure compliance with IPS obligations.

13.146 Information Champions can improve IPS practices by:

- informing staff of their responsibilities under the IPS
- publishing a broad range of documents on the agency's website at the time of their creation
- establishing governance regarding the publication of new and revised operational documents
- ensuring there is a process for regular review of documents not considered suitable for publication on the agency's IPS at a particular time, to consider whether those reasons continue to apply
- making the IPS a priority when developing corporate plans
- analysing the FOI requests received by the agency to assist in identifying information of interest to members of the public, and proactively publishing those documents
- ensuring that an agency's IPS entry is accurate, up-to-date and complete
- considering compliance with the IPS as a performance indicator for agency employees.

²⁴ For agencies without SES level staff, the most appropriate senior staff member may be appointed as the Information Champion.

Publication on a website

13.147 Information published under the IPS must be published on a website (s 8D(3)). The information may be published on the agency website, on another website to which a link is provided, or by some other accessible means that are described on the website.²⁵

13.148 Many agencies maintain their own website and will publish their IPS entry on that website. As stated in the guiding principles to these Guidelines (see [13.15] above), the IPS entry should be easily discoverable by the public, consistent with the object of the FOI Act to facilitate and promote public access to information, promptly and at the lowest reasonable cost (s 3(4)). Adopting the following practices will assist in facilitating public access:

- Agencies should consider using the IPS icon published by the Information Commissioner to link to their IPS entry. Options include using the IPS icon on the agency homepage or including the icon on a dedicated 'Access to information' webpage. The Information Commissioner's intention in publishing the icon is to aid the discoverability of agency IPS entries by encouraging a consistent approach across government. For more details see *Icons for agency websites — 'Access to information', Information Publication Scheme and FOI Disclosure Log*.²⁶
- An agency's IPS entry can contain links to other pages on the agency website or other websites where the required information is available. This may be particularly useful in cases where an agency has already published information falling under the IPS requirements.
- The sitemap for the agency website should list information that the agency is required to publish under s 8(2) or has decided to publish under s 8(4).
- The search function on the agency website should facilitate access to information published in the agency's IPS entry through key terms and descriptive metadata. To aid that search function, online content should be published in a format that can be searched.
- The agency should provide an alert service, such as an email notification service or RSS feed, to notify subscribers of new publications under the IPS or other developments in relation to the agency's compliance with the IPS. If the alert service provided by the agency involves the collection of personal information, the agency must also consider its obligations under the *Privacy Act 1988* and the *Australian Government Agencies Privacy Code*.²⁷

13.149 Guidance on publishing information on the web is available at the following places:

- the Digital Service Standard, which encourages agencies to consider appropriate tools and systems already used by government (Criterion 4), contains advice on using open standards and common platforms (Criterion 7), and advice about making online material accessible (Criterion 9)²⁸

²⁵ For guidance about accessible publication on the agency disclosure log see [14.62] Part 14 (Disclosure Log) of the FOI Guidelines

²⁶ Available as an agency resource at <https://www.oaic.gov.au/freedom-of-information/guidance-and-advice/icons-for-agency-websites-access-to-information-information-publication-scheme-and-foi-disclosure-log>

²⁷ See <https://www.oaic.gov.au/privacy/privacy-for-government-agencies/australian-government-agencies-privacy-code>

²⁸ See <https://www.dta.gov.au/help-and-advice/about-digital-service-standard>.

- the Australian Human Rights Commission, World Wide Web Access: Disability Discrimination Act Advisory Notes (Version 4.1),²⁹ discussed below at [13.157]
- technical guidance on implementing Metadata for the Web is available on the National Australian Archives (NAA) site. (The AGLS Metadata Standard (AS 5044-2010)) will be abolished from December 2023 – refer [AGLS Metadata Standard](#) for further information.³⁰

13.150 Some smaller agencies may not maintain their own website but have a homepage on the website of another agency, usually the portfolio department.

13.151 Agencies can also publish information that is part of their IPS entry on another website (s 8D(3)(b)). One such website is www.data.gov.au, which has been established to facilitate the publication of datasets for use by the commercial, research and community sectors. Other websites that publish information from across government are www.legislation.gov.au (a compilation of Australian Government legislation), www.directory.gov.au (the Government Online Directory), and <https://www.australia.gov.au/> (gateway to government information).

Structure of agency IPS entry

13.152 The FOI Act specifies the information an agency must publish under the IPS, but not the format of publication. The FOI Act does not require that agencies use the headings or language specified in s 8(2). It will however be easier for the public to locate information published by each agency under the IPS if there is a consistent presentation of information on agency websites.

13.153 Agencies may consider, where practicable, using the following headings in their publication framework. The information provided under those headings may extend beyond the categories of information described in s 8(2).

- Agency plan
 - The agency plan as required by s 8(2)(a)
- Who we are
 - The organisation and structure of the agency, the location of offices, governance arrangements, senior management team and statutory appointments referred to in s 8(2)(d)
- What we do
 - A description of the functions and powers of the agency, and the rules, guidelines, practices and precedents relating to those functions and powers (that is, operational information); including a link to operational information if published on another webpage
- Our reports and responses to Parliament
 - Annual reports laid before the Parliament, and other information routinely provided to the Parliament

²⁹ See www.humanrights.gov.au/disability_rights/standards/www_3/www_3.html.

³⁰ See <https://www.naa.gov.au/information-management/describing-information/metadata/metadata-web>

- Routinely requested information and disclosure log
 - Information to which the agency routinely gives access in response to FOI requests and the disclosure log of information that has been released under the FOI Act
- Consultation arrangements
 - Consultation arrangements that enable members of the public to comment on specific policy proposals for which the agency is responsible
- Our priorities
 - For example, the corporate and strategic plans of the agency, and assessments and reviews undertaken of agency programs
- Our finances
 - For example, financial information relating to pay and grading structures in the agency, procurement procedures, tendering and contracts
- Our lists
 - For example, agency contracts, grants and appointments, links to datasets published by the agency, information held in registers required by law, and other lists and registers relating to the agency's functions
- Contact us
 - The contact details of an officer (or officers) who can be contacted about access to the agency's information under the FOI Act.

Accuracy and currency of published information

13.154 Each agency IPS entry is required to be 'accurate, up-to-date and complete' (s 8B).

13.155 The action an agency should take to comply with that requirement may vary according to the nature of the information in the IPS entry. The following is given as a general guide for agencies, but does not diminish the obligation of agencies to ensure compliance with s 8B:

- Some categories of information should be updated as soon as reasonably practicable after any change to that information — for example, information about the structure of the agency, senior officers, statutory appointments, contact arrangements and reports that have been laid before the Parliament.
- Operational information should be updated in the IPS at the same time that a revised or updated version of the information is provided to agency officers.
- Other categories of information can be updated on a periodic basis, following a scheduled agency review of the accuracy, currency and completeness of the information — for example, the agency plan, and information that is routinely provided to the Parliament or in response to FOI requests. It is advisable to include a notation on the document that is published under the IPS indicating when it was last published or updated. It is also advisable when creating a document that is published to consider when it would be appropriate to review the content.

- Consultation arrangements should be updated as soon as a new or varied arrangement is established.
- Any change to an agency's functions or powers, especially a change resulting from a legislative amendment or alteration of an executive scheme, should be updated as soon as reasonably practicable.
- Agencies should bear in mind that other FOI Act provisions are relevant to the agency's publishing obligations: specifically, information must be published on a disclosure log within 10 days of release under the FOI Act (s 11C(6)), and a person cannot be subjected to any prejudice as a result of not having access to unpublished operational information (s 10).
- If an agency has multiple versions of a document that contain minor and insignificant variations (for example, training materials), it will be sufficient compliance with s 8(2) for the agency to publish one representative and current version of the document.
- Information published on a website can later be removed from the website and archived, provided that details are published of how the information can be obtained if the agency is still required to publish that information under s 8(2).

Accessibility

13.156 Information that forms part of the IPS must be published 'to members of the public generally' (s 8D(2)(a)) and, if an agency considers it appropriate to do so, 'to particular classes of persons or entities' (s 8D(2)(b)).

13.157 Accessibility of published information by all members of the community is an important principle underlying the IPS. Three requirements reinforce this principle:

- The *Disability Discrimination Act 1992* s 24 provides that it is unlawful for a person (including a government agency) to provide services to a person with a disability less favourably than to a person without that disability.
- Government agencies are required to conform to WCAG 2.0 Level AA.³¹ New web content needs to conform to these standards as far as possible.
- The Australian Human Rights Commission has also published *World Wide Web Access: Disability Discrimination Act Advisory Notes* (Version 4.1) which echoes the obligation on agencies to conform to WCAG 2.0 Level AA.³²

Charges

13.158 Subject to a limited exception, information published under the IPS must be available free of charge. An agency can charge for information under the IPS only where the information cannot be

³¹ See <https://www.dta.gov.au/help-and-advice/digital-service-standard/digital-service-standard-criteria/9-make-it-accessible>. However, the Digital Transformation Agency strongly encourages agencies to meet WCAG 2.1 Level AA which will provide a more accessible experience.

³² Available at www.humanrights.gov.au/disability_rights/standards/www_3/www_3.html.

downloaded from a website and the agency has incurred specific reproduction or incidental costs in giving a person access to that information under the IPS (s 8D(4)). The details of the charge must be published under the IPS before any charge is imposed (s 8D(5)).

13.159 For example, information may be contained in a recording that cannot be readily converted to electronic format for publication on and downloading from a website.³³ The agency can instead publish details of how the information may be obtained, including the charge that would be imposed for making it available in a suitable format (s 8D(3)(c)).

13.160 A charge for IPS access is separate from the charges that can be imposed for processing FOI requests under the Charges Regulations.³⁴ The Charges Regulations may, however, provide useful guidance to an agency in calculating or imposing a charge for access under the IPS. The Charges Regulations are discussed in Part 4 of these Guidelines.

Information Commissioner's IPS functions and powers

13.161 The FOI Act confers 3 specific functions on the Information Commissioner for reviewing the operation of the IPS (s 8F):

- reviewing the operation of the IPS in each agency, in conjunction with the agency
- investigating an agency's compliance with IPS requirements, either upon receipt of a complaint or at the Information Commissioner's initiative
- otherwise monitoring, investigating and reporting on the operation of the IPS.

13.162 Each of those functions is described in more detail below.

Review of agency IPS compliance

13.163 Each agency must complete a review of its IPS compliance at least once every 5 years (s 9(1)). The review must be undertaken in conjunction with the Information Commissioner. The OAIC encourages agencies to undertake more regular reviews, preferably annually.

13.164 The OAIC conducted major surveys of IPS compliance in 2012 and 2018.³⁵ Agencies can use the survey results to help improve their IPS performance.

13.165 In undertaking a review, agencies should focus on the following 5 key elements of IPS compliance when undertaking the s 9 review:

³³ Explanatory Memorandum to the Freedom of Information Amendment (Reform) Bill 2010, p 8.

³⁴ Explanatory Memorandum to the Freedom of Information Amendment (Reform) Bill 2010, p 8.

³⁵ The survey reports are available at <https://www.oaic.gov.au/freedom-of-information/freedom-of-information-guidance-for-government-agencies/proactive-publication-and-administrative-access/information-publication-scheme/information-publication-scheme-survey-2012> and <https://www.oaic.gov.au/freedom-of-information/freedom-of-information-guidance-for-government-agencies/proactive-publication-and-administrative-access/information-publication-scheme/information-publication-scheme-survey-2018>

1. *Agency plan* — has the agency published a comprehensive plan for its IPS compliance?
2. *Governance and administration* — does the agency have appropriate governance mechanisms in place to meet its IPS obligations, including an information management framework?
3. *IPS document holdings* — has the agency reviewed its document holdings to decide what information must be published under s 8(2) and further information that can be published under s 8(4)? Is the agency IPS entry accurate, up-to-date and complete?
4. *IPS information architecture* — does the agency have a publication framework in place and has it taken the necessary steps to ensure that information in its IPS entry is easily discoverable and accessible to the Australian community?
5. *Agency compliance review* — does the agency have appropriate processes, systems and resources in place to monitor and review its IPS compliance and to make necessary improvement in the agency's IPS implementation?

Investigations and complaints

13.166 The Information Commissioner can investigate complaints about an agency's IPS compliance (s 70). The Information Commissioner publishes summaries of investigation outcomes, including the outcomes of investigations into complaints about agency compliance with the IPS requirements.³⁶

13.167 The Information Commissioner can also undertake a Commissioner initiated investigation into an agency's performance of functions or exercise of powers under the FOI Act (s 69(2)). For more information see Part 11 of these Guidelines.

13.168 An agency's IPS obligations are not subject to IC review under Part VII of the FOI Act.

Monitoring and reporting

13.169 The Information Commissioner is required to prepare an annual report on the OAIC's operations (*Australian Information Commissioner Act 2010* s 30). The Information Commissioner will include in the annual report information on the administration of the IPS by agencies.

13.170 Section 93 of the FOI Act requires agencies to provide the Information Commissioner with information required to prepare an annual report.³⁷ From July 2011, agencies have been required to provide information about staff resources assigned to managing the IPS.

13.171 For more information about reporting requirements see Part 15 of these Guidelines.

³⁶ See https://www.oaic.gov.au/_data/assets/pdf_file/0014/11723/20211122-Outcomes-of-investigations-summary-table.pdf.

³⁷ See *FOIstats Guide* (June 2019), available at <https://www.oaic.gov.au/freedom-of-information/guidance-and-advice/foistats-guide/>.

Copyright

13.172 As noted in the guiding principles to these Guidelines (see [13.15] dot point 5 above), the Information Commissioner encourages agencies to make information they publish under the IPS available for reuse on open licensing terms, as far as that is reasonable and practicable to do. Agencies should have a clear statement on their websites, on their homepage or on their IPS entry page about the extent to which the public can reuse material in which they hold copyright.

13.173 In deciding on the appropriate licensing, agencies should consider the Australian Government Intellectual Property Manual³⁸ and the Guidelines on licensing public sector information for Australian Government entities.³⁹

13.174 While most of the information an agency publishes in its IPS entry will have been created by government, there may be documents in the agency's possession where a third party (such as the author or publisher of the material) owns the copyright.

13.175 No action lies against the Commonwealth, a minister, an agency or an officer of any agency for breach of copyright, among other things, if the minister or an agency officer publishes a document in good faith, in the belief that publication is required or permitted under the IPS or the disclosure log provisions (s 90(1)(a)). However, this provision does not constitute authorisation or approval for reuse of the material, including by members of the public.

13.176 Where a third party owns copyright in material an agency publishes as part of its IPS entry, the agency should include a clear statement on its website advising the public that they may need to seek permission from the copyright owner to reuse 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 that material.

13.177 If an agency knows the details of third-party ownership of copyright in material it has published under the IPS, the agency should, with the copyright owner's consent, provide contact details on its website, to help members of the public.

Legal protection for discretionary/good faith publication

13.178 The FOI Act provides legal protection where information has been published in good faith in the belief that publication was either required or permitted under the IPS (ss 90 and 92). The protection applies to the Commonwealth, a minister, an agency or an officer of an agency. The scope

³⁸ Available at <https://www.infrastructure.gov.au/media-centre/publications/australian-government-intellectual-property-manual>.

³⁹ Available at <https://www.infrastructure.gov.au/media-centre/publications/guidelines-licensing-public-sector-information-australian-government-entities>

of the protection is that no action lies for defamation, breach of confidence or infringement of copyright or (as to ministers and agency officers) criminal liability.

13.179 These protections complement the policy objective of the FOI Act to provide a secure framework for publication of Australian Government information. These protections are conditional and apply only where a minister or agency officer publishes a document in good faith in the belief that publication was required or permitted under the FOI Act.

13.180 The legal protection provided by ss 90 and 92 also applies to the release of information in response to an FOI request, and to publication apart from the FOI Act where a minister or agency officer believes in good faith that publication is required or permitted. For more information about these protections see Part 3 of these Guidelines.

Annexure A — Model Agency plan

Introduction

Outline why the agency has prepared the plan.

Purpose

Describe the purpose of the plan.

Objectives

Describe the agency's objectives in relation to the plan.

Establishing and administering the agency's IPS entry

Describe how the agency will prepare its IPS entry and manage the IPS entry on a continuing basis. This may include describing:

- who (within the senior executive) is responsible for leading the agency's work on IPS compliance
- the resources allocated to establishing and administering the agency's IPS entry
- the processes and timetable for identifying information required to be published under s 8(2), for publishing additional information under s 8(4), and for adding to or revising the agency's IPS entry
- measures being taken to ensure the agency's IPS entry is accurate, up-to-date and complete
- measures (if any) being taken to improve the agency's information asset management framework to support IPS compliance
- details of the agency's internal IPS information register to assist it to efficiently identify documents for publication, record decisions made in relation to publication and systematically review IPS information for accuracy, currency and completeness
- access charges (if any) that the agency may impose for accessing information published under the IPS and how charges will be calculated. Where no charges will be imposed, that should be stated.

Structure of the IPS

Describe how the agency will facilitate public access to the information published in an agency's IPS entry. This may include describing:

- whether information will be published on the agency's website, or on another website such as the website of the portfolio department, www.legislation.gov.au or www.data.gov.au
- the headings under which information will be published
- how the IPS entry will be identified on the agency website (for example, by using the IPS icon recommended by the Information Commissioner on the agency homepage or 'Access to information' page as described in the *Guidance for agency websites: 'Access to information' webpage* available at www.oaic.gov.au)

- whether a sitemap and search function will be provided
- whether an alert service will be provided for changes or additions to the IPS entry and how a member of the public can subscribe to the alert service
- how the agency will conform with WCAG 2.0 Level AA in establishing and maintaining its IPS entry
- the mechanism that will be adopted by the agency for inviting community feedback on its IPS entry and compliance, and how the agency will evaluate and respond to comments received.

Information required to be published under the IPS

Clearly identify the types of information (including datasets) the agency will publish under ss 8(2)(a) to 8(2)(j).

Describe any timeframes the agency proposes to follow to publish these documents.

Other information to be published under the IPS

Clearly identify the types of optional information (including datasets) the agency will publish under s 8(4) and the timeframes in which new or revised information will be published.

IPS compliance review.

Identify when the agency proposes to review their agency plan.

Identify when the agency will review its IPS entry and compliance, in conjunction with the Information Commissioner.

Outline the criteria the agency will adopt to measure its performance in complying with IPS requirements.



Part 14 —

Disclosure log

Version 1.7, March 2022

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Introduction

- 14.1 Agencies and ministers must publish information that has been released in response to every FOI request, subject to certain exceptions (s 11C). This publication is known as a ‘disclosure log’.
- 14.2 The requirement to publish a disclosure log complements the Information Publication Scheme (IPS) (see Part 13 of these Guidelines). Together these require agencies and, for the disclosure log, ministers, to publish a range of government information.
- 14.3 The disclosure log facilitates publication of information released to individuals in response to FOI requests, to the general public. This reinforces the objects of the FOI Act that promote proactive publication of information (s 3(1)(a)) and in recognition that information held by government is a national resource (s 3(3)).
- 14.4 In publishing information released in response to FOI requests, agencies and ministers should take account of the ‘lowest reasonable cost’ object in 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.
- 14.5 Agencies and ministers should interpret the ‘lowest reasonable cost’ object broadly in publishing government information under s 11C. That is, an agency or minister should have regard to the lowest reasonable cost to potential FOI applicants, the public in general, to the agency or minister, and the Australian Government as a whole.
- 14.6 The Explanatory Memorandum to the Freedom of Information Amendment (Reform) Bill 2009, states:
- Like the proposed publication scheme in Schedule 2, proposed subsection 11C(3) provides that the information is to be published to the public generally on a website. If the information cannot readily be published on a website, the website should give details of how the information may be obtained.
- 14.7 The Information Commissioner is of the view that consistent with better practice, agencies and ministers should seek to make all documents released in response to FOI requests available for download from the disclosure log or another website (s 11C(3)(a) or (b)) subject to applicable exceptions, unless it is not possible to upload documents due to a technical impediment, such as file size, the requirement for specialist software to view the information, or for any other reason of this nature. This approach is consistent with the objects of the FOI Act.
- 14.8 The Information Commissioner has powers to investigate agency compliance with disclosure log obligations, either in response to a complaint made under s 70 of the FOI Act, or on the Information Commissioner’s own initiative (s 69(2)) (see [14.74]–[14.75] below). Following an investigation, the Information Commissioner will inform the agency of the investigation findings and any recommendations to be implemented by the agency. The Information Commissioner can take further steps if not satisfied the agency has taken adequate and appropriate steps to implement any recommendations made (ss 89, 89A and 89B).

14.9 Disclosure log publication benefits both the public and the Australian Government by improving access to government information while assisting agencies and ministers to respond more efficiently to FOI requests by reducing multiple requests for the same information.

Nature and content of the disclosure log

14.10 To assist members of the public to access information published on a disclosure log, agencies and ministers should provide an introduction to their disclosure log which plainly and clearly explains its purpose and the agency's obligations under s 11C of the FOI Act, as well as the exceptions to publication.

14.11 A disclosure log lists information that has been released in response to FOI requests for documents held by the agency or minister (s 11C(1)). Subsection 11C(3) sets out 3 ways information can be published on a disclosure log:

- a) making the information available for downloading from the agency or minister's website or
- b) linking to another website where the information can be downloaded, or
- c) giving details of how the information can be obtained.

14.12 As discussed above at [14.7], the Information Commissioner considers that giving details of how information can be obtained (s 11C(3)(c)) should only be used if it is not possible to upload documents to a website so they can be directly accessed by members of the public. Relying on s 11C(3)(c) when it is possible to publish the information for download does not promote the objects of the FOI Act, which require that agencies and ministers facilitate and promote public access promptly and at the lowest reasonable cost.

14.13 Agencies and ministers must publish information on the disclosure log within 10 working days of giving the FOI applicant access to the document (s 11C(6)) (see [14.30] below). Where a person requests access to information not published on an agency's disclosure log (s 11C(3)(c)), the agency or minister should provide access to the information within a reasonable period, which should be no more than 5 working days after receiving the request.

14.14 The disclosure log requirement does not apply to:

- personal information about any person, if it would be unreasonable to publish the information (s 11C(1)(a))
- information about the business, commercial, financial or professional affairs of any person, if publication of that information would be unreasonable (s 11C(1)(b))
- other information of a kind determined by the Information Commissioner if publication of that information would be unreasonable (ss 11C(1)(c) and 11C(2))
- any information if it is not reasonably practicable to publish the information because of the extent of modifications that would need to be made to delete information listed in one of the above dot points (s 11C(1)(d)).

Guidance on when it may be unreasonable to publish information on a disclosure log is given at [14.24]–[14.28] below.

- 14.15 The FOI Act does not require agencies and ministers to publish FOI decisions and statement of reasons, however agencies and ministers may choose to do so subject to legal requirements, such as those under the *Privacy Act 1988*.

Disclosure log decision making

- 14.16 Although granting access to documents under the FOI Act and publishing information on a disclosure log are separate decisions, these decisions should be made as part of the same decision-making process. This will support prompt release and publication of information at the lowest reasonable cost.
- 14.17 However there are 2 important differences between FOI and disclosure log decision making. First, only a person ‘authorised’ under s 23 can grant or refuse access to documents in response to an FOI request. In contrast, the FOI Act does not specify who can make a decision to publish information on the disclosure log (including whether to delete material that would be unreasonable to publish). It is nevertheless advisable that agencies and ministers adopt processes for making decisions under s 11C.
- 14.18 Secondly, there is no requirement to consult when making a decision to publish information under s 11C, in contrast with the consultation requirements that apply before a decision can be made to release documents affecting Commonwealth-State relations, business documents or documents affecting personal privacy (ss 26A, 27 and 27A). It is open to an agency or minister to consult a person about whether publication of personal, business or other information may be unreasonable. If so, the agency or minister must complete the consultation in time to comply with the obligation to publish information within 10 working days of giving access to the FOI applicant (s 11C(6)).
- 14.19 An alternative is for agencies and ministers to give advance notice to FOI applicants and third parties that information released under the FOI Act may later be published on a disclosure log (subject to certain exceptions). This advance notice can be given to FOI applicants in the acknowledgement notice under s 15(5) and to affected third parties during a consultation process under ss 26A, 27 or 27A (see Part 6 of these Guidelines).¹ The applicant or a third party may express a view on this issue and identify personal or business information that, in their opinion, would be unreasonable to publish. However, it is important that applicants and third parties are also made aware of the pro-disclosure objects of the FOI Act embodied in s 11C.

¹ The OAIC has published sample FOI notices that agencies and ministers can use for their own purposes. The sample notices are available as an agency resource at <<https://www.oaic.gov.au/freedom-of-information/guidance-and-advice/sample-foi-notices/>>.

When access is granted to some (but not all) of the requested documents

14.20 If an FOI applicant is given access to only some of the documents requested (or to part of a requested document), the disclosure log requirement applies to the documents given to the applicant. If access is later given to additional documents following internal or IC review, the disclosure log requirement will apply at that (later) time to the additional documents released.

Disclosure log exceptions – determinations by the Information Commissioner

14.21 The Information Commissioner may make a determination that the requirement to publish information on a disclosure log under s 11C does not apply to information specified in the determination (ss 11C(1)(c) and 11C(2)). A determination of this kind is a legislative instrument for the purposes of the *Legislation Act 2003*. A determination may apply to information of a general kind that is held by many agencies or ministers, or to information of a specific kind held by a particular agency or minister.

14.22 There is currently one determination in force: Freedom of Information (Disclosure Log – Exempt Documents) Determination 2018.² This determination covers:

- a) information in a document that was an exempt document at the time that access was given by the agency or minister to the applicant and
- b) information in a document that the agency or minister would have decided was an exempt document at the time that access was given to the applicant, if the request for that document had been received from a person other than the applicant.

14.23 The determination has effect for 5 years from 1 December 2018. Further information about applying for a determination is provided in ‘Information Publication Scheme (IPS) and Disclosure Log determinations policy and procedure’, available on the OAIC website.³

Disclosure log exceptions – when publication would be ‘unreasonable’

14.24 As noted at [14.14], the requirement to publish information released to an FOI applicant on a disclosure log does not apply to 3 kinds of information if publication would be ‘unreasonable’:

- personal information
- information about a business

² Available from the Federal Register of Legislation <<https://www.legislation.gov.au/>>.

³ Available at <<https://oaic.gov.au/freedom-of-information/guidance-and-advice/information-publication-scheme-ips-and-disclosure-log-determinations-policy-and-procedure/>>.

- information covered by the Information Commissioner’s Freedom of Information (Disclosure Log – Exempt Documents) Determination 2018.

There is overlap between the information in these 3 categories. The following guidance about when an agency or minister may decide that publication would be unreasonable is not exhaustive.

14.25 Agencies have separate obligations under the Privacy Act to consider when disclosing personal information in the Disclosure Log.⁴ It is open to an agency or minister to decide that it is unreasonable to include information on the disclosure log about an individual or business that was released in response to an FOI request from that individual or business. The same applies to information about a person or business that was released to another FOI applicant, where the person or business was consulted under s 27 or 27A of the FOI Act and did not object to release to that particular FOI applicant but would object if the information was to become publicly available.⁵

14.26 The Explanatory Statement accompanying to the Information Commissioner’s Determination gives the following as an example of where publication may be unreasonable under 6(1)(a) of the Determination (information that was exempt at the time that access was granted):

[A]n agency may have released an exempt document to a particular FOI applicant in connection with a research project, in connection with legal proceedings in which the FOI applicant is involved, or because the confidential nature of information in a document would not be jeopardised by selective release to a particular FOI applicant. In these circumstances, the agency or Minister may decide that it is unreasonable to publish this information more widely in a disclosure log.

14.27 Whether it would be unreasonable to publish personal information about an Australian Government officer on the disclosure log will depend on a number of factors that should be considered case by case. These factors include the nature of the information, the seniority of the officer, and whether the officer has made out a special case against disclosure. As a general guide, it is open to a decision maker to decide in a particular instance that it is unreasonable to publish on a disclosure log the direct work telephone number of an officer, or an officer’s signature. On the other hand, published documents will often contain the names of officers involved in agency decision making. An agency may wish to consult affected staff about whether potential harm could arise from publishing their names.

14.28 An agency or minister should state when material is deleted from a document published on the disclosure log because of an exception in s 11C(1). This includes personal information about agency officers. The statement could be provided within the published document or in an

⁴ See ‘*ZJ and Chief Executive Officer for the Australian Centre for International Agricultural Research (Privacy)* [2021] AICmr 92 (17 December 2021) where the Australian Information Commissioner and Privacy Commissioner found the agency had interfered with the complainant’s privacy by disclosing their sensitive and personal information on a disclosure log in breach of Australian Privacy Principle 6. In that determination, the agency did not satisfy the Commissioner that it turned its mind to whether publication was ‘unreasonable’ or that it was open to find that publication was not unreasonable – see [80]-[90].

⁵ Explanatory Memorandum to the Freedom of Information Amendment (Reform) Bill 2009, p 14.

accompanying statement. It is then open to a member of the public who is interested in inspecting that information to make a request to the agency, including an FOI request.

Making information publicly available

14.29 When a decision has been made to publish information on a disclosure log, agencies and ministers need to consider a range of operational matters in making the information available and, more generally, in maintaining the disclosure log over time.

Time of publication

14.30 Agencies and ministers must publish information on the disclosure log within 10 working days of the FOI applicant being given access to a document (s 11C(6)).

14.31 The date on which an FOI applicant is given access may be later than the date of the decision to grant access (see Part 3 of these Guidelines). Before giving access, an agency or minister can require a charge to be paid (s 11A(1)(b) of the FOI Act and s 11(1) of the Freedom of Information (Charges) Regulations 2019 (Charges Regulations)). The agency or minister must also be satisfied that all opportunities for review by third parties have run out and that the decision to grant access stands or was affirmed (ss 26A(4), 27(7) and 27A(6)).

14.32 The date on which an FOI applicant is given access may vary according to the method by which access is given. For example, it is probable that a document sent by email will be received on the same day. If a document is sent by post it is presumed (unless the contrary is known) to have been received on the day it would be delivered in the ordinary course of post (s 29 *Acts Interpretation Act 1901*).

14.33 It is open to an agency or minister to publish information on a disclosure log earlier than the period of 10 days stipulated in s 11C(6). Independently of the FOI Act, an agency or minister may (subject to applicable secrecy provisions) publish information at any time and by any method (s 3A). The FOI Act does not erode this discretion.

14.34 It is for each agency and minister to decide, generally and in individual cases, the particular day (within the 10-day period stipulated in s 11C(6)) on which information will be published on a disclosure log. The general practice of the agency or minister (if one has been adopted) should be made known publicly on the agency website and drawn to an FOI applicant's attention.

14.35 The FOI Act does not preclude same day publication (that is, publication of information on the disclosure log within 24 hours of access being given to the FOI applicant), but nor does it require or promote it as a preferred publication practice.

14.36 When balancing competing interests regarding the time of publication, an agency or minister may consider the following issues:

- If the agency is proposing to publish documents on the disclosure log on the same day they are released to the FOI applicant, the applicant should be told this in advance of the proposed date of publication on the disclosure log. The agency or minister should ensure

the applicant receives the documents on that day by means other than publication on the disclosure log (unless the applicant agrees to that method of access).

- In a case of same day publication, the agency or minister should consider reducing or waiving any charges they may otherwise have imposed under s 29 (see Part 4 of these Guidelines). The reason for so doing is that the applicant will not have been given any different or greater access than the rest of the community.

14.37 To provide transparency in relation to the time of publication and an agency or minister's compliance with s 11C(6), it is recommended that both the date the FOI applicant was given access to the documents and the date the documents were published is listed on the disclosure log.

14.38 The Information Commissioner's function of investigating complaints about agency FOI administration (s 70) can include complaints about the timing of disclosure log publication. For more information, see [14.75] and [Part 11](#) of these Guidelines.

Design and contents of the disclosure log

14.39 The FOI Act does not prescribe the form of a disclosure log. The community may benefit if agencies and ministers adopt a common approach, so that disclosure logs have a consistent appearance across government and can be easily understood. A disclosure log template is annexed to this document (see [Annexure A – Template disclosure log](#)). Modification of the headings in the template may be appropriate, depending on the nature of FOI requests an agency handles and its IT systems and information platforms.

14.40 Essentially, a disclosure log has 3 parts:

- the log (or table) published on an agency's or minister's website, listing the information that is available for public access
- information, which may be accessible in different ways – for example, directly through the log as an attachment that can be downloaded, from another website, or on request if it is not reasonably practicable to publish on an agency or minister's website
- a search facility applying to both the disclosure log and any attached information.

14.41 Section 11C requires publication of information contained in documents to which access has been granted under the FOI Act, rather than publication of the documents themselves. However, publication of the actual documents released (subject to deletion of material under s 11C) is consistent with the objects of the FOI Act. Publication of the documents that are released can also avoid doubt about whether the disclosure log accurately records information released under the FOI Act.

14.42 Publication of documents efficiently facilitates public access and reduces an agency or minister's costs of processing requests for the same or similar information. As discussed at [14.7] above, the Information Commissioner considers that documents should be made available for download from a website (ss 11C(3)(a) or (b)). Publication of documents on the disclosure log, rather than providing a description of the documents and how they can be

obtained on request from the agency or minister, is consistent with the FOI Act object of facilitating public access to government information.⁶ Agencies should only publish a description of a document on the disclosure log and ask members of the public to contact them for access if it is not technically possible to upload documents due to file size, or the requirement for specialist software to view the information, or for any other reason of this nature.

- 14.43 If the disclosure log contains only a description of the documents released, that description should be sufficient to allow the public to understand what those documents contain, so that a person can make an informed decision about whether to request a copy. Providing only the FOI request reference number is not sufficient; the description needs to specifically identify the content of the documents.
- 14.44 If the document has not been published, it is recommended that, as well as providing a clear description of the subject matter of the documents, agencies specify the document type (for example, email, brief, text message, report etc).
- 14.45 When a person asks for a copy of documents described on a disclosure log, the documents should be provided promptly, no later than 5 working days after the request is received. It is not appropriate to treat an application for documents described on a disclosure log, but not directly available, as an FOI request under s 15 of the FOI Act. The purpose of publication on a disclosure log under s 11(3) is to ‘publish the information to members of the public generally’. Further, it is not appropriate to impose a charge under s 29 for access to the information described on a disclosure log. An agency or minister can only impose a charge in the limited circumstances outlined in s 11(4) (see [14.69]–[14.73] below).
- 14.46 In some limited circumstances, it may be more practical for an agency or minister to publish the content of a document on the disclosure log in a different form, rather than publishing the document itself. For example, if the FOI applicant inspected a document or viewed a video it may be necessary to make a different publication arrangement on the disclosure log. Similarly, if a document released to an FOI applicant would be difficult to publish online in an accessible fashion (see [14.61]–[14.66] below), publishing the information in the document in a different accessible form may be more efficient (for example, as a Word document or providing a textual description of an image).
- 14.47 It is also open to an agency or minister to supplement the information they are required to make available under s 11C, in particular by publishing the following additional information:
- the terms of the FOI request that prompted release of the information (this can be provided in a summary form, rather than as a copy of the FOI request)
 - whether the FOI applicant was given access to all documents requested, and if not, the exemption or other basis on which partial access was granted (this information can be provided in a summary form), and

⁶ See Explanatory Memorandum to the Freedom of Information Amendment (Reform) Bill 2009, p 14.

- whether all the information provided to the FOI applicant has been made publicly available under s 11C and, if not, the nature of the information that has not been made available.

14.48 These details will assist the public understand the information made available by an agency or minister on its disclosure log. For example, the topic or theme that unites a collection of papers may not be readily apparent unless the terms of the FOI request and the scope of the FOI release are explained.

14.49 A practical design issue that arises is whether additional information of the kind described above should be listed on the disclosure log or provided as an attachment or preface to the information made available under the disclosure log. The template disclosure log at [Annexure A – Template Disclosure Log](#) contains a column for summarising the relevant FOI request, so that all relevant information is provided in a single table. However, this will increase the size of the table and agencies and ministers may prefer to include this information elsewhere on their disclosure log webpage.

14.50 It is also open to an agency or minister to supplement the disclosure log in other ways. For example, an agency may wish to highlight that information in a document published on the disclosure log has been revised and published in a different form; that the information provides only partial or superseded information about an issue; or that the information is taken from an internal working paper or other document that does not necessarily reflect the views of the agency, minister or the Australian Government. Any supplementation of this kind should be distinct from the information published on the disclosure log. The disclosure log should provide an accurate historical record of information in documents released by an agency or minister under the FOI Act. However, s 11C does not require publication of documents recording the FOI decision-making process because the work involved in doing so may pose an additional administrative burden without any corresponding public benefit.

Facilitating access

14.51 The disclosure log is intended to facilitate public access to government information where there has been a demonstrated interest in that information. To fulfil this objective it is important that the disclosure log and attached documents are easy to find on an agency's or minister's website.

14.52 Agencies and ministers are strongly encouraged to ensure that the disclosure log (including attached documents) is:

- easily discoverable and understandable
- machine-readable
- presented in a table
- accessible — in particular, it should meet agency online accessibility obligations (see [14.61]–[14.66] below)

- as far as is possible, made available for reuse on open licensing terms, so as to enhance the economic and social value of the information.⁷

- 14.53 Agencies and ministers are encouraged to release information on the disclosure log as a machine readable or searchable PDF, or in HTML format to ensure readability and accessibility of information. Agencies and ministers should avoid publishing scanned documents on their disclosure log wherever possible.
- 14.54 The Information Commissioner recommends that the following 5 features be integrated into the design and ongoing administration of the disclosure log.
- 14.55 First, the disclosure log will be more easily discoverable if agencies and ministers use the ‘FOI Disclosure Log’ icon recommended by the Information Commissioner to link to the disclosure log from a prominent webpage (for example, the homepage or an ‘Access to information’ or ‘Freedom of Information’ webpage). Information about how to use the OAIC-developed icon is available in the OAIC’s ‘Guidance for agency websites: Access to information’ webpage.⁸
- 14.56 Second, agencies and ministers should clearly but briefly explain the purpose of the disclosure log — for example, to provide access to ‘publicly available information, released in response to an FOI request’.
- 14.57 Third, agencies and ministers should enable information on the disclosure log to be searched — for example by reference to particular words, categories or subject matter.⁹ Using HTML text to describe the documents will allow them to be indexed and discovered by external search engines.
- 14.58 Fourth, to ensure greater awareness of their disclosure log, agencies and ministers should consider using appropriate online channels to publicise its existence and content. At the time of writing, Twitter and Facebook are the most popular online tools for propagating government information; whereas in the past RSS (Really Simple Syndication) feeds were the primary channel used by agencies.¹⁰ Use of online and social media content has the additional benefit of being highly machine-readable. If used with appropriate open licences, automated news and announcement feeds, it can be used to make disclosure log content available for reuse in other services, applications and social media platforms, such as public websites that facilitate access to documents. This practice may encourage individuals to review agency disclosure logs before making an FOI request for specific documents.

⁷ See the *Australian Government Intellectual Property Manual and Guidelines on licensing public sector information for Australian Government entities* at <<https://www.communications.gov.au/documents/australian-government-intellectual-property-manual-0>>. See also the Information Commissioner’s *Principles on open public sector information* at <<https://www.oaic.gov.au/information-policy/information-policy-resources/principles-on-open-public-sector-information/>>.

⁸ See <<https://oaic.gov.au/freedom-of-information/guidance-and-advice/guidance-for-agency-websites-access-to-information-web-page/>>.

⁹ See the Australian Government’s ‘Writing for search engines’ at <<https://guides.service.gov.au/content-guide/search-engines/>>.

¹⁰ For a full list of Australian Government-approved social media channels, see <<https://www.australia.gov.au/news-and-social-media/social-media>>.

- 14.59 Fifth, it is important for agencies and ministers to generate and publish appropriate metadata. This will improve the visibility and accessibility of web services and linked data applications. Agencies and ministers should have regard to the ‘AGLS Metadata Standard’¹¹ and the ‘Australian Government Recordkeeping Metadata Standard Implementation Guidelines’.¹²
- 14.60 It is important that all disclosure logs are clearly identified and contain the features discussed in these Guidelines. As noted at [14.47] above, agencies may also wish to publish other information alongside the disclosure log, such as links to historical or other relevant information. This publication can fall under an agency’s general discretion to publish information outside of the FOI Act, where no other legal restrictions apply (s 3A). It can also fall under the explicit provision in s 8(4) which permits agencies to proactively publish information through the IPS.

Accessibility

- 14.61 The disclosure log must be published to ‘members of the public generally’ (s 11C(3)) and must be done in accordance with an agency’s accessibility obligations.¹³ Accessibility of published information by all members of the community is therefore an important issue for agencies and ministers to consider when managing a disclosure log.
- 14.62 Challenges associated with publishing documents in an accessible manner do not diminish the need to comply with the publication requirements in s 11C. Publishing documents in HTML format provides optimal accessibility however this may not be possible in all cases. If a document published on the disclosure log is not available in HTML, the agency or minister should provide an alternative means to access the information that is both timely and responsive to the needs of the user. The agency or minister must respond promptly to requests for alternative access.
- 14.63 Australian Government agencies and ministers are required to meet the Web Content Accessibility Guidelines Level AA and are strongly encouraged to meet WCAG 2.1 Level AA which provides a more accessible experience.¹⁴
- 14.64 The Australian Human Rights Commission has published *World Wide Web Access: Disability Discrimination Act Advisory Notes* (Version 4.1) which supports conformance to WCAG 2.0 to a minimum level of AA.¹⁵
- 14.65 It may not be straightforward to publish some documents in an accessible manner on a disclosure log. This may be an issue, for example, if information has been redacted from the document or the agency or minister only holds the hard copy document.

¹¹ Available at <<http://www.agls.gov.au/>>.

¹² Available at <<http://www.agls.gov.au/>>.

¹³ See <<https://www.dta.gov.au/help-and-advice/digital-service-standard/digital-service-standard-criteria/9-make-it-accessible>>.

¹⁴ See <<https://www.dta.gov.au/help-and-advice/digital-service-standard/digital-service-standard-criteria/9-make-it-accessible>>.

¹⁵ Available at <<https://www.humanrights.gov.au/world-wide-web-access-disability-discrimination-act-advisory-notes-ver-41-2014>>.

14.66 Other options that an agency or minister should consider to strengthen accessibility include:

- Working from original electronic documents wherever possible. Agencies and ministers should not publish scanned hard copies of electronic documents on their disclosure log. Instead, the original electronic document should be used wherever possible. Electronic redaction tools enable publication of electronic documents edited under s 22 (see [14.68]–[14.69] below).
- Applying optical character recognition (OCR) and associated accessibility optimisation to scanned hard copy documents when the original electronic document is not available. If it is necessary to publish a scanned document on the disclosure log, the agency or minister should use a multi-function printer or other device that can capture scans at a sufficiently high resolution to produce good-quality OCR. Agencies and ministers should also apply OCR to electronic documents containing images of text (such as image files, or PDF files not optimised for accessibility) where it is not reasonably practical to transcribe the content of the document in HTML.
- Including a description of the accessibility status of information on the disclosure log when the information is only available as a PDF. For example, consider stating that the information was created via OCR and is an approximation of the document provided to the FOI applicant. This description could form part of the ‘Other information’ listing in the template disclosure log at [Annexure A – Template Disclosure Log](#). Alternatively, accessibility information could be provided on an HTML document cover page that can be accessed using a link on the disclosure log.

Electronic redaction

14.67 Agencies and ministers are encouraged to use electronic rather than manual redaction. One reason agencies and ministers may prefer publishing scanned documents on the disclosure log is to preserve manual redactions made to the document given to the FOI applicant. However, effective redaction software exists that can be applied directly to electronic documents, enabling publication of more accessible information.

14.68 The Australian Signals Directorate and the Australian Cyber Security Centre tested the redaction functionality of Adobe Acrobat Pro DC 2017 in 2019 and reported that the tools were found to permanently delete the required information so that it was not present in any form in the redacted PDF file when used properly.¹⁶ This shows that correctly applied electronic redaction is as effective and reliable as manual processes.

Charges

14.69 The intention of s 11C is that information published or made available on a disclosure log should be freely accessible by the public (s 11C(4)). An agency may only impose a charge to

¹⁶ Available at <<https://www.cyber.gov.au/publications/redaction-functionality-in-adobe-acrobat-pro>>.

provide information that is not directly available for download from a website and only to reimburse the agency for a specific reproduction cost or an incidental cost (s 11C(4)(b)).

14.70 The Explanatory Memorandum to the Freedom of Information Amendment (Reform) Bill 2009 states:

... subsection 11C(4) makes it clear that an agency cannot charge a person for simply accessing information from the website. Charges may be imposed if the agency incurs a specific reproduction or incidental cost in providing access. This would include a situation where, for example, the information was contained in a recording that could not be readily converted to electronic format for uploading to the website, and the agency incurred costs in having that recording transcribed. Another example would be where a hard copy of a report is requested when the report is also available online.

14.71 If a disclosure log entry only describes the documents and how they can be obtained and a person asks for the documents published under s 11C, an agency or minister cannot:

- process as an FOI request under s 15 of the FOI Act or
- charge for access to the documents under s 29 of the FOI Act and the Charges Regulations.

14.72 In determining whether to charge members of the public for information made available in another format, agencies and ministers should take account of the ‘lowest reasonable cost’ object in the FOI Act (s 3(4)).

14.73 Details of any charges that an agency or minister will apply must be published on their website (s 11C(5)).¹⁷ This should include an explanation for the charge and the amount of the charge likely to be imposed. For ease of reference this information should be provided on the disclosure log landing page, or, if that is not appropriate, in the introduction to the disclosure log (see Annexure A for more information).

14.74 Where an agency or minister does not apply charges for information accessed directly through the disclosure log, the introductory text to the disclosure log should tell members of the public that the information is available at no charge.

Information Commissioner’s functions and powers

14.75 The Information Commissioner plays an active role in monitoring the administration of disclosure logs by agencies and ministers.

14.76 The Information Commissioner’s power to investigate complaints about agency FOI administration extends to complaints about an agency’s disclosure log (s 70). The Information Commissioner can also undertake a Commissioner-initiated investigation into an agency’s FOI actions (s 69(2)). These complaint and investigation powers do not extend to the actions of

¹⁷ This is similar to the requirement to publish information about charges to access information under the IPS, see s 8D(5).

ministers. The disclosure log actions of an agency or minister are not subject to review by the Information Commissioner under Part VII of the Act.

14.77 To facilitate Information Commissioner oversight of agency disclosure logs, agencies are encouraged to keep an internal register which lists every FOI request:

- whether documents requested by the FOI applicant were released
- whether any such documents, or the information contained in them, are listed in the agency disclosure log, in full or in part
- if there is a listing, whether the information can be downloaded from the agency’s website (s 11C(3)(a)) or from another linked website (s 11C(3)(b)), or whether details are given about how the information may be obtained (s 11C(3)(c)).

14.78 The Information Commissioner is also required to prepare an annual report which includes information about freedom of information matters (see s 30 *Australian Information Commissioner Act 2010* and Part 15 of these Guidelines). The Commissioner’s annual report includes information on the following aspects of the administration of each agency and minister’s disclosure log:

- the number of FOI requests where access was granted that are listed in the agency or minister’s disclosure log
- the number of listings on the agency or minister's disclosure log that have been published under ss 11C(3)(a), (b) and (c) respectively
- if the agency or minister collects the figures, the number of unique visitors and page views for webpages that are part of the disclosure log.

Agencies and ministers are required to provide this information to the Information Commissioner under s 93 of the FOI Act (see Part 15 of these Guidelines).

Additional publication considerations

Copyright

14.79 Agencies and ministers should clearly state on their website, either on a dedicated copyright page or in a statement on or attached to the disclosure log, the extent to which the public can reuse material in which the agency or minister (or the Commonwealth) holds copyright.

14.80 Agencies and ministers should consider making information published on a disclosure log available on open licensing terms wherever possible (see [14.51]). In deciding on the appropriate licensing, agencies and ministers should consider the *Australian Government*

*Intellectual Property Manual*¹⁸ and *Guidelines on licensing public sector information for Australian Government entities*.¹⁹

- 14.81 While most of the information an agency or minister publishes on its disclosure log will have been created by government, there may be documents in the agency or minister’s possession to which a third party (such as the author or publisher of the material) owns the copyright.
- 14.82 No action lies against the Australian Government, a minister, an agency or an officer of any agency for breach of copyright if the minister or an agency officer publishes a document in good faith, in the belief that publication is required or permitted under the disclosure log provisions (s 90(1)(a)). However, this provision does not constitute authorisation or approval for reuse of the material, including by members of the public.
- 14.83 Where a third party owns copyright in material an agency or minister publishes as part of its disclosure log, the agency or minister should include a clear statement on their website advising the public that they may need to seek permission from the copyright owner to reuse 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 that material.
- 14.84 If an agency or minister knows the details of third party ownership of copyright in material it has published on its disclosure log, the agency or minister should, with the copyright owner’s consent, provide contact details on its website.

Retaining and archiving disclosure log information

- 14.85 The FOI Act does not specifically require information attached or referred to on a disclosure log to be made available indefinitely. However, the information listed on a disclosure log entry should be retained, even if a document or information attached to a listed item has been removed. Over time, the disclosure log will grow in length and provide a valuable current and historical record of information released by an agency or minister under the FOI Act. When an agency ceases to exist or is restructured, or a minister ceases to hold office, an adjustment may be necessary in accordance with change of government procedures applying at that time.
- 14.86 In the course of routine maintenance or updating of a website an agency or minister may decide to withdraw some disclosure log content, and make it available in another form, for example, on request. Similarly, an agency or minister may decide that it is inappropriate to publish particular information on its website following a change of government or ministerial or portfolio changes. Conversely, an agency may find that information listed in the disclosure log that is available only on request should instead be published on the agency website because of frequent requests for that information. Before agencies destroy or transfer documents or information in the course of removing content from their website, they must seek approval

¹⁸ < <https://www.communications.gov.au/documents/australian-government-intellectual-property-manual-0>>.

¹⁹ < <https://www.communications.gov.au/documents/guidelines-licensing-public-sector-information-australian-government-entities>.

from the National Archives of Australia (s 24 of the *Archives Act 1983*). Approval is granted through the issuing of general records authorities, agency-specific records authorities and normal administrative practice.

14.87 Agencies and ministers should indicate if documents or information attached to a disclosure log listing are identified for removal at a future date. For example, it may be appropriate that information or documents are removed after a certain period of time, for example 2 years, unless the information has enduring public value. Factors affecting how long an agency should retain disclosure log entries include the length of the disclosure log, and the number and file size of documents attached. After removal, details should be provided if information is made available after that date in some other way, or if it is no longer available (for example, if it has been archived)²⁰.

14.88 Routine monitoring by agencies and ministers of disclosure log activity will assist in deciding the best measures to further the FOI Act object of facilitating public access to government information.

Information Publication Scheme – routinely accessed information

14.89 Under the IPS, agencies must publish information in documents to which the agency routinely gives access in response to FOI requests (s 8(2)(g)), except:

- personal information about any individual, if it would be ‘unreasonable’ to publish the information (s 8(2)(g)(i))
- information about the business, commercial, financial or professional affairs of any person, if publication of that information would be ‘unreasonable’ (s 8(2)(g)(ii))
- other information of a kind determined by the Information Commissioner under s 8(3), if publication of that information would be ‘unreasonable’ (s 8(2)(g)(iii)).

14.90 Publication of information on a disclosure log will, in many instances, satisfy this IPS publication requirement. Nevertheless, the IPS should contain a clear link to the disclosure log and an explanation that it contains information to which the agency has routinely given access in response to FOI requests.

14.91 On the other hand, an agency may decide that it is preferable, in complying with s 8(2)(g), for the IPS to contain either an extract from the disclosure log or a separate summary of information routinely released by the agency in response to FOI requests. Whichever approach is adopted, agencies must observe the additional requirement in s 8(2)(g) that the IPS entry identify items of information that are ‘routinely’ disclosed by the agency in response to FOI requests.

²⁰ We note that agencies will generally make older disclosure log documents available to the public through Trove. Where this is the case, the disclosure log should refer to this practice and direct the public to the Trove document repository.

14.92 For more information on s 8(2)(g) and the IPS generally see Part 13 of these Guidelines.

Legal protection for disclosure log publication

14.93 The FOI Act provides legal protection where information has been published in good faith in the belief that publication was either required or permitted by an agency or minister on a disclosure log (ss 90 and 92). The protection applies to the Australian Government, a minister, an agency or an officer of an agency. The scope of the protection is that no action lies for defamation, breach of confidence or infringement of copyright and no minister or agency officers will be criminally liable.

14.94 These protections complement the policy objective of the FOI Act to provide a secure framework for publication of Australian Government information to the public. The protections are conditional, and apply only where a minister or agency officer publishes a document in good faith, in the belief that the publication was required or permitted under the FOI Act.

14.95 The legal protections provided by ss 90 and 92 also apply to the release of information in response to an FOI request, and to publication other than under the FOI Act where a minister or agency officer believes in good faith that publication is required or permitted. For more information about these protections see Part 3 of these Guidelines.

Annexure A – Template disclosure log

Freedom of Information disclosure log

The [agency/Minister] is required by the *Freedom of Information Act 1982* to publish this disclosure log on its website. The disclosure log lists information that has been released in response to an FOI request. The disclosure log requirement does not apply to:

- personal information about any person if publication of that information would be unreasonable
- information about the business, commercial, financial or professional affairs of any person if publication of that information would be unreasonable
- other information covered by a determination made by the Australian Information Commissioner if publication of that information would be unreasonable
- any information it is not reasonably practicable to publish because of the extent of modifications needed to be made to remove the information listed above.

The Information Commissioner’s determination covers:

- information in a document that was an exempt document at the time access was given to the applicant.
- information in a document that the agency or minister would have decided was exempt at the time access was given to the applicant, if the request was made by someone other than the applicant.

The information described in this disclosure log has been released by [agency/Minister] under the *Freedom of Information Act 1982* and is available for public access.

A link is provided if the information can be downloaded from this website or another website. Information that is not available on this website, due to technical limitations, may be obtained by writing to [address].

[If applicable] A charge may be imposed to reimburse the [agency/Minister] for the cost incurred in copying or reproducing the information or sending it to you.

[Insert information about the charges that may be imposed for providing access to documents not published on the disclosure log, or which can be provided in another format. This information should be comprehensive and include the basis upon which the charge will be imposed (for example, in accordance with the charges set out in Parts 1 and 2 Schedule 1 to the [Freedom of Information \(Charges\) Regulations 2019](#)).]

[If applicable] We do not impose a charge for providing access to information on our disclosure log. You will be notified if any charge is payable and required to pay the charge before the information is provided.

There may be documents on the disclosure log that are currently not available in HTML format. If you are unable to read the format provided, please contact [insert FOI contact details] for assistance.

[Optional] Information attached to, or referred to, in the [agency/Minister’s] disclosure log will generally be removed after 2 years, unless the information has enduring public value. The archived disclosure log can be found here: [provide a link to the separate archive if not included on the disclosure log].

Sample disclosure log

FOI reference number	Date of access ⁽¹⁾	Date of publication ⁽²⁾	FOI request ⁽³⁾	Information published on the disclosure log ⁽⁴⁾	Other information ⁽⁵⁾

(1) Agencies and Ministers should note the date the FOI applicant was given access to a document under s 11A.

(2) Agencies and Ministers should note the date the documents were published on the disclosure log.

(3) Agencies and Ministers should provide a short summary of the FOI access request.

(4) Agencies and Ministers should provide a short summary of information provided under s 11A.

(5) Agencies and ministers may note here, for example, that information is no longer available or that it has been revised by the agency or Minister. They may also describe the accessibility status of a document only presented in a format other than HTML



Information Commissioner (IC) review process

Stage	Process	Guidelines	Sample letters / guidance	Notes
Stage 1: Intake and Early Resolution / Production of documents	1. Triage: <ol style="list-style-type: none"> Review and acknowledge application (received via email, fax or smartform) for validity <ol style="list-style-type: none"> Invalid applications to be finalised under s 54N Valid applications – deemed – proceed to ‘Deemed process’ below and invite s 54T application (extension of time to make IC review application) Valid applications within time proceed to ‘Assessment’- see below 	10.28 – 10.32 (Application for IC review) 10.41 – 10.44 (extension of time for applying) 10.81 – 10.82 (Preliminary inquiries)	<ul style="list-style-type: none"> Acknowledgement letter D2022/011173 Acknowledgement letter where OAIC is respondent D2022/026515 	
	2. Deemed access refusals <ol style="list-style-type: none"> Conduct preliminary inquiries with Respondent and invite the applicant to lodge an application to make an IC review application under s 54T if required. If Respondent advises that the FOI request is not deemed to have been refused as the statutory processing time has not expired, the application is invalid and the application will be finalised under s 54N. If Respondent advises that the FOI request is deemed to have been refused as the statutory processing time has expired: <ol style="list-style-type: none"> Grant the applicant’s s 54T application if required Commence review, issue s 54Z/54T letter to the respondent and request relevant documentation If the Respondent makes a revised decision, confirm with the applicant whether they wish to proceed If the Respondent provides the processing documentation, proceed to ‘Review s 54Z response’ below 	10.4 – 10.5 (Deemed decisions) 10.82 (Preliminary inquiries) 10.67 – 10.74 (Revising the decision in the course of an IC review) 10.100 (Steps in the Information Commissioner review process) 10.105 – 10.107 (Deemed refusal or deemed affirmation of original decision)	<ul style="list-style-type: none"> Notice to commence review (DHA): D2022/019558 Deemed email templates (proceeds, withdrawals, ITDs) D2022/002690 	<i>Proposed amendments to the procedure directions if implemented will impact on these matters.</i>
	3. Assessment <ol style="list-style-type: none"> Review IC review application and statement of reasons and decide whether to: <ol style="list-style-type: none"> Commence review - see below Decline under s 54W - see below Conduct further enquiries 	10.81 – 10.82 (Preliminary inquiries)	<ul style="list-style-type: none"> Conducting IC reviews - assessments D2019/002542 Conducting IC reviews – case categorisation D2020/000377 Conducting IC reviews: Identification of systemic and significant issues worksheet D2019/001898 	
	4. Notice of commencement of IC review / Request for information (s 54Z) <ol style="list-style-type: none"> Issue notice of commencement of review and request for information, including notifying relevant parties 	10.55 (Obtaining information) 10.91 – 10.93 (The Information Commissioner’s powers to gather information) 10.100 (Steps in the Information Commissioner review process) 10.114 – 10.115 (Methods of providing documents to the Information Commissioner)	<ul style="list-style-type: none"> 54Z notice of IC review D2022/002669 Opening letter to applicant and 54Z cover email to respondent D2022/026520 55A notice of added party to proceeding D2019/009911 	<i>We have previously considered adopting a similar approach to the AAT in relation to the production of submissions – for a copy to be provided to the applicant as well, and then the applicant to have x weeks to provide submissions in response. I</i>
	5. Decline <ol style="list-style-type: none"> Issue intent to decline the applicant if under s 54W(a)(i) and to both applicant and respondent if under s 54W(b) 	10.85 – 10.90 (When the Information Commissioner will not review a matter)	<ul style="list-style-type: none"> Intention to decline (s 54W checklist) D2018/016246 Closure letter (s 54W checklist) D2018/016247 Conducting an IC review: Review of preliminary views/s 54W letters D2018/016248 54W (b) Intent to decline notice - D2022/011204 	

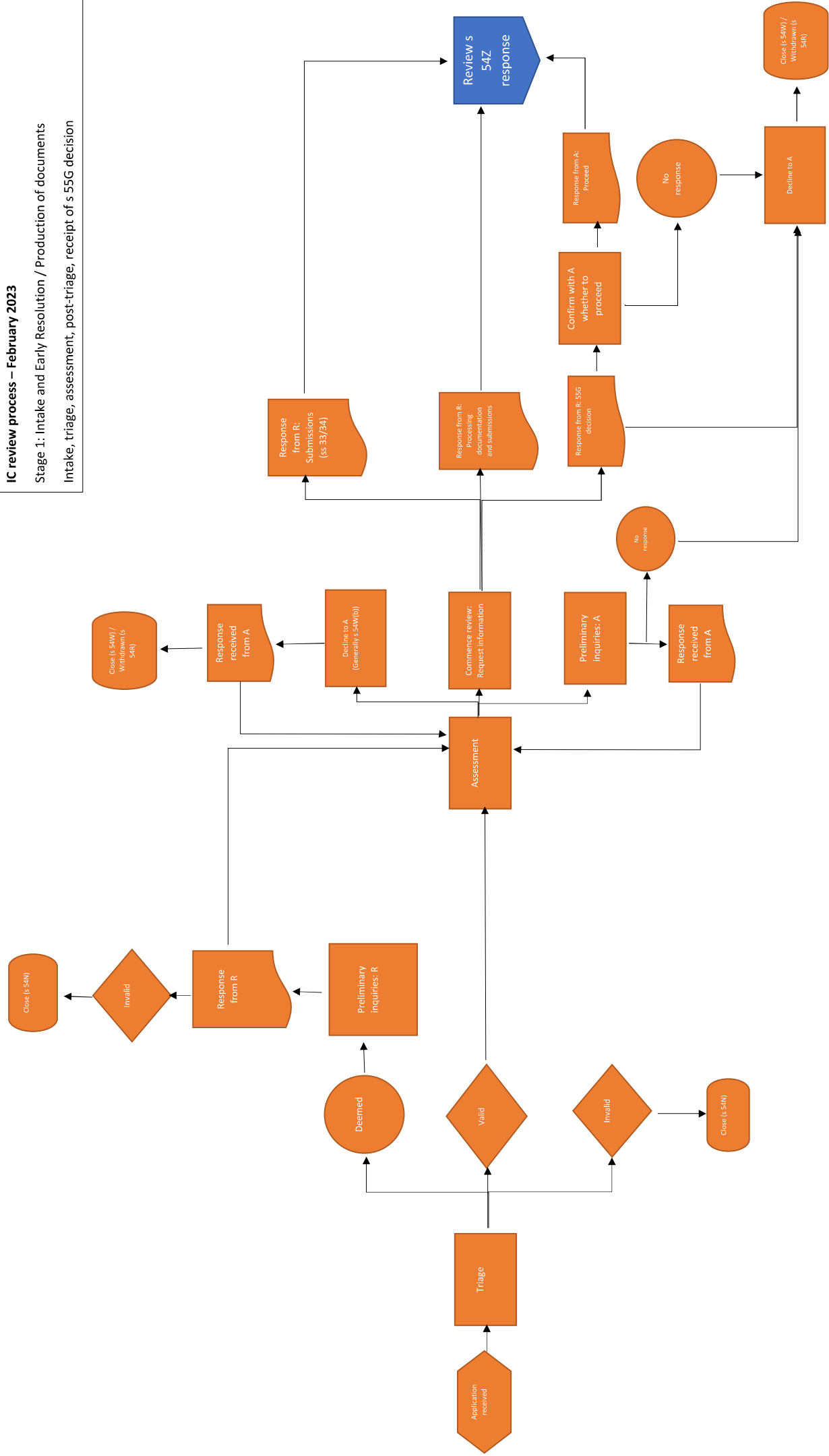
Stage	Process	Guidelines	Sample letters / guidance	Notes
	<p>a. s 54W(a)(i): if the applicant responds, consider the response and determine whether to proceed to close under s 54W or whether further information is required. If the applicant does not respond, proceed to close under s 54W.</p> <p>b. s 54W(b): If the parties do not respond, proceed to close. If the parties respond, consider the response and determine whether to proceed to close under s 54W or whether to re-assess.</p>		<ul style="list-style-type: none"> 54W(b) Decision notice D2022/026476 54W (a) Decline advice letter to applicant (i) (ii) (iii) D2022/011179 D2022/011181 D2022/011189 54W (a) Close letter to Applicant (i) (ii) (iii) D2022/011182 D2022/011183 D2022/011184 	
2: Case Management	<p>8. Review of s 54Z response</p> <p>a) If scope of IC review involves ss 33/34 exemptions and the OAIC does not hold the material at issue</p> <p>a. Consider whether to issue s 55U notice</p> <p>b. If a s 55U notice has been issued and the Respondent has provided the material at issue, consider whether on further review, more information is required from the applicant or respondent</p> <p>b) For all other reviews, consider:</p> <p>a. requests to provide confidential submissions</p> <p>b. whether more information is required from the applicant or respondent, including where a notice to compel the document at issue is required</p> <p>c. whether the request for information should be in the form of an intent to decline to the applicant or a preliminary view to the applicant or respondent</p>	<p>10.13 – 10.14 (Onus)</p> <p>10.67 – 10.74 (Revising the decision in the course of an IC review)</p> <p>10.77 – 10.80 Evidence by the Inspector-General of Intelligence and Security</p> <p>10.91 – 10.99 (The Information Commissioner’s powers to gather information)</p> <p>10.108 – 10.113 (Preliminary assessment and view)</p>	<ul style="list-style-type: none"> Reviews and Investigations case plan: D2023/002296 Preliminary steps checklist D2018/016244 Conducting an IC review – general information about case management D2018/016249 Submissions D2018/016243 Conducting an IC review: Preliminary view checklist D2018/016245 IC review case plan D2021/017910 55T notice to produce exempt documents - D2019/003535 55R notice to produce to agency - D2016/006882 	<i>Review advisers are encouraged to complete the case plan to assist with planning review, identifying and addressing procedural fairness issues and providing a brief document that sets out the history of the case</i>
	<p>7. Informal resolution and procedural fairness steps</p> <p>a) Ensure procedural fairness steps have been undertaken and where possible, facilitate resolution through the use of preliminary views/inviting s 55G decisions</p> <p>b) If the application proceeds to a decline under s 54W – see ‘Decline’ process above</p> <p>c) If the application proceeds to a decision under s 55K – see ‘Decision and finalisation’ stage below</p>	<p>10.52 – 10.62 (General procedure)</p> <p>10.67 – 10.74 (Revising the decision in the course of an IC review)</p> <p>10.85 – 10.90 (When the Information Commissioner will not review a matter)</p>		
3: Decision and finalisation	<p>8. Draft decision for clearance</p> <p>a) Decision drafted for Director and Assistant Commissioner clearance</p> <p>b) IC review applications involving searches, charges, practical refusals will proceed to the Assistant Commissioner for decision</p> <p>c) All other decisions will proceed to the FOI Commissioner or Information Commissioner for clearance</p> <p>d) At any time during the clearance stage, the matter may need to return to the case management stage.</p>	<p>10.118 (Written reasons to be given)</p> <p>10.125 – 10.26 (Compliance with the Information Commissioner’s decision)</p>	<ul style="list-style-type: none"> Decision writing checklist D2018/016241 Conducting an IC review- clearance using documents on Resolve check list D2020/005955 Snapshot for clearance of IC review decisions D2022/001851 Section 55K decision – s47C D2021/003889 Section 55K decision – s 47 F D2021/003888 	
	<p>9. Finalisation of Decision</p> <p>a) Once the decision has been approved, the decision is assigned a citation and is then sent to the relevant parties.</p> <p>b) For matters that are set aside or varied, a letter seeking confirmation of compliance/appeal is also sent to the Respondent.</p>	<p>10.125 – 10.126 (Compliance with the Information Commissioner’s decision)</p>	<ul style="list-style-type: none"> Attachment E of Decision writing checklist D2018/016241 Section: 55K compliance letter template D2020/012832 	
	<p>10. Return/destruction of exempt material</p>	<p>10.94 (Producing documents claimed to be exempt: general)</p>	<ul style="list-style-type: none"> Conducting an IC review – general information about case management D2018/016249 	
	<p>11. Publication of decision</p> <p>a) The decision is sent to AUSTLII for overnight publication.</p>	<p>10.118 (Written reasons to be given)</p>		
	<p>12. Summary</p>			

Stage	Process	Guidelines	Sample letters / guidance	Notes
	a) A summary of the decision, noting key points and whether any changes are required to the FOI Guidelines or IC review process, is circulated to the Commissioners, media, legal and FOI Branch.			

IC review process – February 2023

Stage 1: Intake and Early Resolution / Production of documents

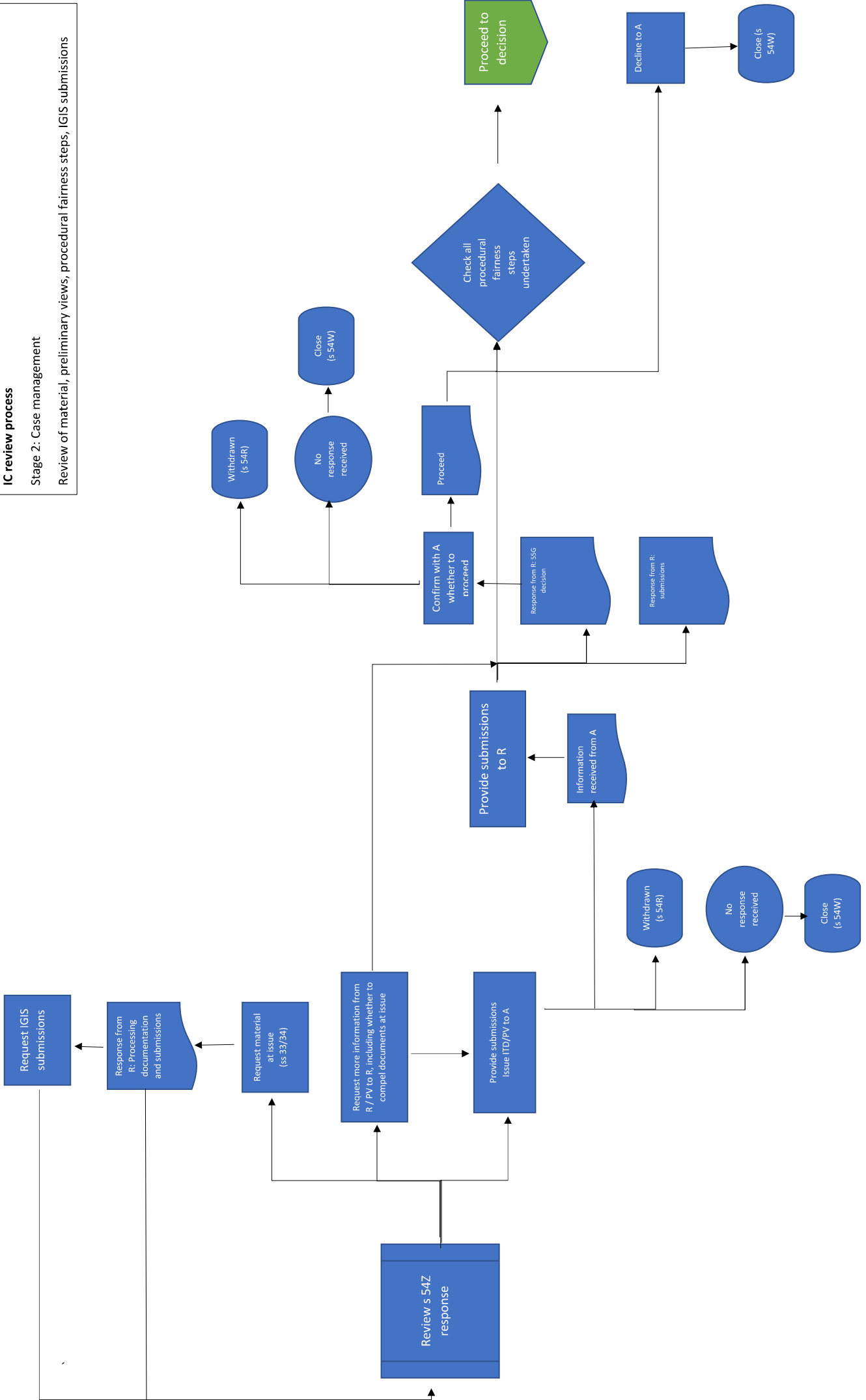
Intake, triage, assessment, post-triage, receipt of s 55G decision



IC review process

Stage 2: Case management

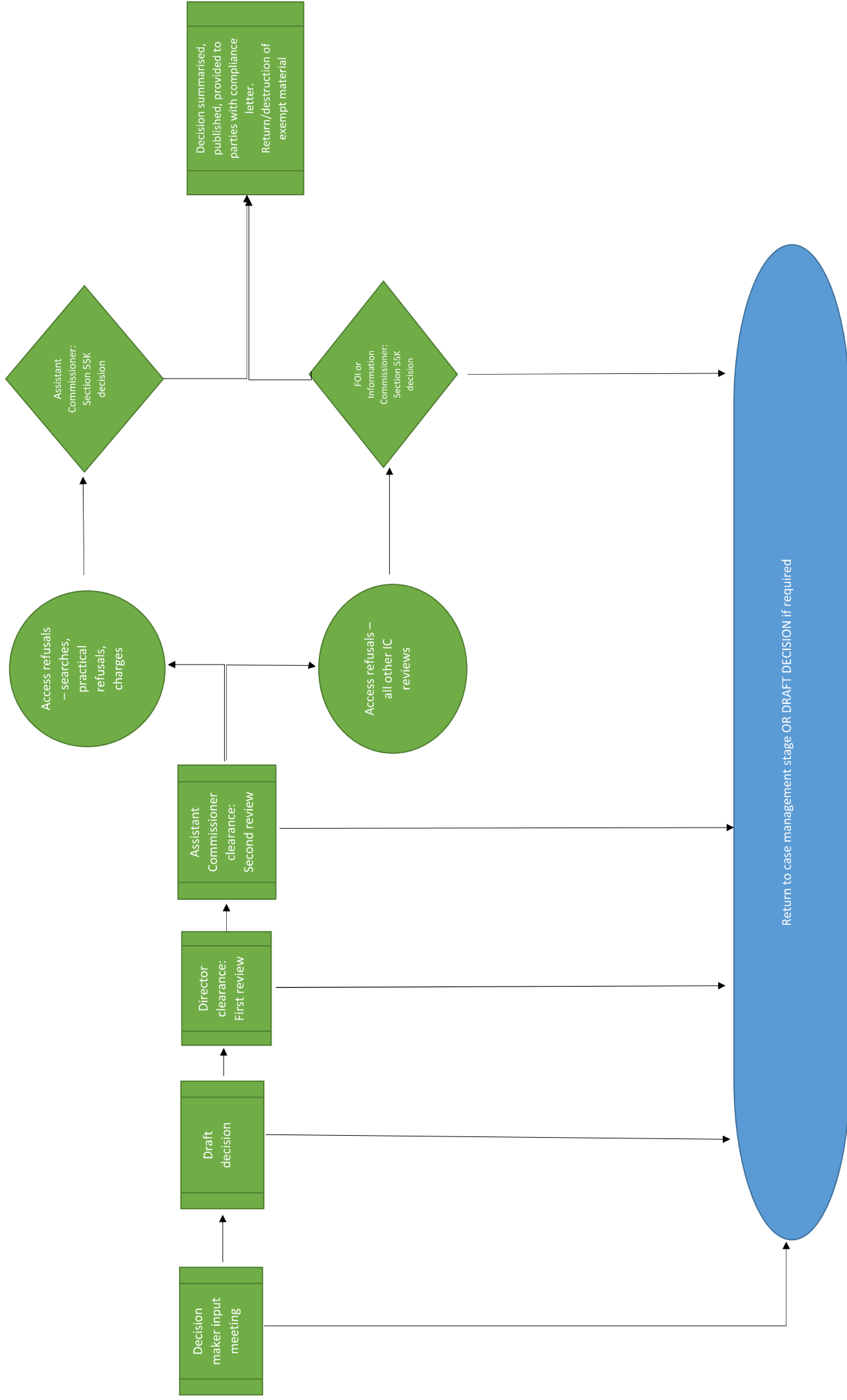
Review of material, preliminary views, procedural fairness steps, IGIS submissions

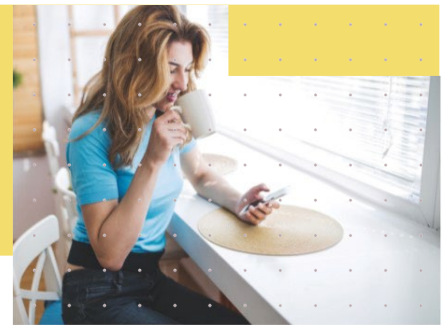


IC review process

Stage 3: Decision and finalisation

Draft decision, clearance and finalisation





Updated June 2023

Conducting an IC review: Identification of systemic and significant issues

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

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

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

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

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

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