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Exemptions and conditional exemptions under the Freedom of Information Act 1982

Date: 1 September 2011

The exemptions and conditional exemptions under the Freedom of Information Act 1982 (FOI Act) ensure that sensitive information is properly protected. A person has a legally enforceable right of access to a document of an agency or an official document of a minister unless the document is exempt or conditionally exempt. You should refer to the FOI Guidelines Parts 5 (Exemptions) and 6 (Conditional exemptions) for full details.

Exemptions

- s 33** Exempts documents if their disclosure would, or could reasonably be expected to, cause damage to Australia's **national security, defence or international relations**, or would divulge information communicated in confidence to the Commonwealth by a foreign government or an international organisation. This includes information communicated pursuant to a treaty or formal instrument on protection of classified information.
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s 34 Exempts **Cabinet documents**, which are Cabinet submissions, official records of the Cabinet, briefings to a minister on a Cabinet submission, and drafts of Cabinet submissions, official records and Cabinet briefings.

A Cabinet submission must have been created for the dominant purpose of being submitted for Cabinet's consideration and must have actually been submitted or be proposed by a sponsoring minister to be submitted (s 34(1)).

Includes a document that is a copy, part of or an extract from an exempt document (s 34(2)), and a document that contains information which would reveal a Cabinet deliberation or decision (except where the deliberation or decision has been officially disclosed) (s 34(3)).

A document is not exempt merely because it is an attachment to an exempt document (s 34(4)).

A document by which a Cabinet decision is officially published (such as a media release) is not an exempt document (s 34(5)).

Information in a Cabinet document is not exempt matter if the information consists of purely factual information, unless disclosure would reveal a Cabinet deliberation or decision whose existence has not been officially disclosed (s 34(6)).

s 37 Exempts documents if their disclosure would or could reasonably be expected to affect the **enforcement of law and protection of public safety**, including by:

- ***prejudicing the conduct of an investigation of a breach relating to taxation or proper administration of the law***
 - revealing the existence or identity of a confidential informant (see s 37(2A) for confidential sources)
 - endangering any person's life or physical safety
 - prejudicing a fair trial
 - disclosing lawful methods of investigation or prejudicing methods for protecting public safety.
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s 38 Exempts documents to which **secrecy provisions** apply under a provision of another Act and either:

- ***that provision is specified in Schedule 3 of the FOI Act, or***
- s 38 is expressly applied to the document or information in the document, by that secrecy provision, or by another provision of that or any other enactment (s 38(1)(b)).

There are two limitations to this exemption. An applicant has a right of access to a document that is exempt if the relevant secrecy provision does not prohibit disclosure to that applicant. The exemption does not apply if the applicant requests a document which contains their own personal information, except if disclosure is prohibited under the Migration Act 1958.

s 42 Exempts documents subject to **legal professional privilege** (LPP).

The dominant purpose test and the independent legal adviser and client relationship are determinative when considering LPP. Documents are not exempt if the person entitled to claim LPP waives the claim (s 42(3)(a)). Section 42 does not apply to an agency's operational information (as defined in s 8A).

s 45 Exempts documents containing **material obtained in confidence**, 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.

s 46 Exempts documents if their disclosure would, apart from the FOI Act and any immunity of the Crown, be in **contempt of court or infringe the privileges of the Parliament**.

A contempt of court is an action which interferes with the due administration of justice. 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.

s 47 Exempts documents disclosing **trade secrets** or **commercially valuable information** whose value would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed.

See also the business or professional affairs conditional exemption (s 47G).

s 47A Exempts **electoral rolls**, including:

- ***print, microform and digital copies of electoral rolls***
 - documents that set out particulars of individual electors that were used to prepare electoral rolls or were derived from electoral roll data.
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Conditional exemptions

Application of the public interest test to conditional exemptions

An agency or minister must give access to a conditionally exempt document unless at the time disclosure would, on balance, be contrary to the public interest (s 11A(5)). The FOI Act sets out certain factors that favour access and some that must not be taken into account (s 11B(3) and (4)).

s 47B Conditionally exempts documents if their disclosure would or could reasonably be expected to damage **Commonwealth-State relations** or relations with Norfolk Island or disclose information communicated in confidence by or on behalf of a government or authority of a State to the Commonwealth or the Government of Norfolk Island.

s 47C Conditionally exempts documents if their disclosure would disclose **deliberative processes**.

Deliberative matter includes opinions, advices or recommendations that have been obtained, prepared or recorded, and consultations or deliberation that have taken place, as part of the deliberative processes relating to the functions of an agency, a minister or the Government of the Commonwealth or Norfolk Island. Operational information (as defined in s 8A) and purely factual material are not deliberative matter.

Does not apply to:

- **reports of scientific or technical experts**
- reports of a body or organisation established within an agency
- records of a final decision given in the exercise of a power or of an adjudicative function (s 47C(3)).

s 47D Conditionally exempts documents if their disclosure would have a substantial adverse effect on the **financial or property interests of the Commonwealth or Norfolk Island**.

Relates both to expenditure and revenue-generating activities, including intellectual property and the Crown's interests in natural resources.

s 47E Conditionally exempts documents if their disclosure would reasonably be expected to affect **certain operations of agencies** on one or more of the following grounds:

- ***prejudice to the effectiveness of procedures or methods for the conduct of tests, examinations or audits***
- prejudice to the attainment of the objects of particular tests, examinations or audits
- a substantial adverse effect on the management or assessment of personnel
- a substantial adverse effect on the proper and efficient conduct of operations.

s 47F Conditionally exempts documents if their disclosure would involve the unreasonable disclosure of **personal information** about any person (including a deceased person).

An agency or minister must take into account:

- ***the extent to which the information is well known***
- whether the person to whom the information relates is known to be associated with the matters dealt with in the document
- the availability of the information from publicly accessible sources
- any other relevant matters (s 47F(2)).

Access can be given to a qualified person nominated by the applicant if it would be detrimental to the applicant's health or well-being to be given direct access to the documents. The qualified persons include medical practitioners, psychiatrists, psychologists, counsellors and social workers.

s 47G Conditionally exempts documents if their release would disclose information about a person's **business** or professional affairs, or the business, commercial or financial affairs of an organisation or undertaking, and the disclosure:

- ***would or could reasonably be expected to unreasonably affect those lawful affairs, or***
- could reasonably be expected to prejudice the supply of information to the Commonwealth, Norfolk Island or an agency.

Consider also the trade secrets or commercially valuable information exemption (s 47).

s 47H Conditionally exempts documents containing information about **research** being undertaken by an agency officer if its disclosure would be likely unreasonably to expose the agency or officer to disadvantage.

Only applies to CSIRO and Australian National University (ANU) (see Schedule 4).

s 47J Conditionally exempts documents if their disclosure would reasonably be expected to have a substantial adverse effect on Australia's **economy** (including on a particular sector of the economy or the economy of a particular region), by:

- *influencing a decision or action, or*
- giving a person or class of persons an undue benefit or detriment in relation to their business by providing premature knowledge of an action or inaction.

Documents include those containing matter relating to currency or exchange rates, interest rates, taxes, financial regulation and foreign investment.
