



26 September 2022

Ms Jane Seaborn

By email: foi+request-9132-9d349267@righttoknow.org.au

Dear Ms Seaborn

**Freedom of Information
FOI Reference number: 22/23 - 2**

I refer to your email dated 15 July 2022 to the Fair Work Commission (**Commission**), in which you requested access to documents under the *Freedom of Information Act 1982 (FOI Act)*.

I am authorised to make a decision in relation to your request pursuant to section 23 of the FOI Act.

Timeframe for Processing Request

The 30 day statutory time period for processing this request commenced on the day following the day on which your request was received (subsection 15(5) of the FOI Act).

On 1 August 2022, I sent you an estimate of preliminary charges to process your request, and on the same date you agreed to pay the estimated charges. The time to process your request was suspended on 1 August 2022 and started again when confirmation of the deposit being paid was received by the Commission. The Commission received the deposit on 16 August 2022, therefore the new due date for your request was 28 August 2022.

On 23 August 2022, I notified you that as your request covers documents which contain the personal information of other individuals, if it is reasonably practicable, the Commission is required (under section 27A of the FOI Act) to consult with those individuals before making a decision on the release of those documents.

For this reason, the period for processing your request was extended by 30 days to allow the Commission time to consult. The due date for a decision on your request is now **26 September 2022**.

Your Request

You requested access to the following documents:

'Documents, emails, file notes and other communications and records relating to all complaints made about former Fair Work Commissioner Barbara Deegan, and details of the resulting investigations by the FWC and any independent investigations into Ms Deegan's conduct during her entire employment (of some 18 years) with the FWC.'

Decision

I conducted searches of the Commission's archived system and requested searches to be conducted by Commission staff of the Complaints mailbox and archived system and the Presidents mailbox for documents within the scope of your request.

As set out at **Attachment 1**, I have identified 371 pages that are within the scope of your request.

I have decided to grant you access in full to 25 pages (pages 22, 96 to 117, 134, 135).

I have decided to give you edited copies of 9 pages (15, 21, 23, 35, 94, 129, 133, 222, 298).

In summary:

- Page 15 is a response to a complaint with the complainant's personal information redacted
- Page 21 is a copy of a complaint with the complainant's personal information redacted
- Page 22 is a copy of an invitation to an HR Practitioner's Forum presented by the Australian Government Solicitor
- Page 23 is a response to a complaint with the complainant's personal information redacted
- Page 35 is a response to a complaint with the complainant's personal information redacted
- Page 94 is a response to a complaint with the complainant's personal information redacted
- Pages 96 to 117 are a copy of a transcript that was attached to page 94
- Page 129 is a response to a complaint with the complainant's personal information redacted
- Page 133 is a response to a complaint with the complainant's personal information redacted
- Pages 134 and 135 are a Guide to appealing a decision, published by Fair Work Australia, which was attached to page 133
- Page 222 is a response to a complaint with the complainant's personal information redacted
- Page 298 is a response to a complaint with the complainant's personal information redacted

I have decided to refuse access to 337 pages.

The reasons for my decision are set out below.

Reasons for decision

In reaching my decision I took the following material into account:

- your correspondence of 15 July 2022 outlining the particulars of your request;
- documents falling within the scope of your request;
- the FOI Act. Some relevant provisions are set out in **Attachment 3**;
- submissions made by a third party who was consulted under section 27A of the FOI Act; and
- the guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (**Guidelines**).

Conditional Exemptions

Certain operations of agencies

Section 47E of the FOI Act relevantly provides:

A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to, do any of the following:

...

(c) have a substantial adverse effect on the management or assessment of personnel by the Commonwealth or by an agency

(d) have a substantial adverse effect on the proper and efficient conduct of operations of an agency.

There must be at least a real, significant or a material possibility of adverse effect and the adverse effect must be sufficiently serious to cause concern to a reasonable person.

Paragraph 5.20 of the Guidelines provides:

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.

...

Paragraph 6.115 of the Guidelines provides:

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

Paragraph 6.114 of the Guidelines provides:

6.114 For the exemption in section 47E(c) to apply, the documents must relate to either:

- the management of personnel – including the broader human resources policies and activities, recruitment, promotion, compensation, discipline, harassment and occupational health and safety; or
- the assessment of personnel – including the broader performance management policies and activities concerning competency, in-house training requirements, appraisals and under performance, counselling, feedback, assessment for bonus or eligibility for progression.

In *Carver and Fair Work Ombudsman*,¹ the Australian Information Commissioner discussed the importance for an agency of it being able to collect frank evidence in relation to a code of conduct investigation of an employee, noting that persons providing such evidence would expect it not to be widely disclosed.²

In *De Tarle and Australian Securities and Investments Commission*,³ the Administrative Appeals Tribunal (**AAT**) stated:

*I accept that candour is essential when an agency seeks to investigate complaints ... staff may be reluctant to provide information and cooperate with investigators if they were aware that, the subject matter of those discussions would be disclosed and made public. That then would, in my view, have a substantial adverse effect on the management of the agency's personnel.*⁴

With the exception of pages 127, 146, 155, 212, 231, 237, 253 and 259 (which are parts of emails but just include generic disclaimers about use of the email), and pages 134 - 135, all of the pages that are within the scope of your request contain information which was collected or created for the purposes of dealing with particular complaints about a Commission Member.

From the commencement of the *Fair Work Act 2009 (FW Act)*, complaints about Commission Members have been handled pursuant to the complaints handling process administered by the President of the Commission under section 581A of the FW Act. The Commission's Procedure for dealing with complaints about Members (**Complaints Procedure**) provides details of the procedure followed in dealing with such complaints.⁵

The Complaints Procedure operates in a statutory context in which the President cannot compel a Commission Member to provide a response to a complaint or has limited power to take

¹ [2011] AICmr 5.

² Ibid at [22].

³ [2016] AATA 230.

⁴ Ibid at [42].

⁵ Available at <https://www.fwc.gov.au/about-us/contact-us/feedback-and-complaints/complain-about-member-commission/procedure-dealing>.

disciplinary action against a Member. Under the FW Act, a Member may generally only be removed from office by the Parliament on the grounds of proved misbehaviour or inability to perform the duties of office because of physical or mental incapacity.

It follows that the capacity of the Commission to appropriately resolve a complaint, including by identifying and addressing any Member performance issues, depends to a significant extent upon the cooperation of the Member involved. If Members held a concern that information collected for the purposes of dealing with complaints under the Complaints Procedure has the potential to be disclosed to others, it is expected that Members will be reluctant to participate openly and candidly in the process.

Further, people making complaints about Commission Members do so on the understanding that their complaint will not be made public. The Commission does not publish copies of complaints received, and only publishes de-identified, aggregate data about complaints in its annual reports. If people thought that the detail they provide in complaints might be made publicly available, this may limit the frankness with which they raise their concerns.

In *Jones and Australian Federal Police*,⁶ the AAT found that Australian Federal Police Professional Standards investigations relied upon information being treated confidentially. The AAT found documents relating to such an investigation to be conditionally exempt under section 47E having regard to their content and the following additional factors:

- the documents contain information that was obtained in circumstances where there was an expectation of confidentiality;
- the documents do not reveal any unlawful activity in the ... investigation process;
- the documents relate to events in the recent past; and
- the people who provided information to the ... investigation have not consented to the disclosure of that information.⁷

While I note that the pages within the scope of your request do not relate to events in the recent past, I otherwise consider that the factors listed above apply in this case. The pages within scope contain information obtained under the Complaints Procedure, through which there was and remains an expectation of confidentiality by the complainants and the relevant Members. Additionally, they do not reveal any unlawful activity in the complaint handling process. Accordingly, I am satisfied that granting access to material in the pages that was collected from complainants and Members would have a substantial adverse effect on the Commission's ability to manage and assess its personnel and could reasonably be expected to prejudice the Commission's ability to effectively and properly investigate and resolve future complaints about Members. I am satisfied that this information is conditionally exempt under sections.47E(c) and (d).

Pages 1 to 14, 90 to 91, 118 to 127, 168 to 216 and 260 to 292 relate to complaints arising in the context of conferences before the Commission, and include details of the discussions, parties to, and outcomes of those conferences, including copies of Terms of Settlement. In accordance with sections 368(2), 374(2), 398(2) and 776(2) of the FW Act,⁸ conferences must be conducted in private and in general, discussions in private conferences are treated as being confidential. The FW Act's predecessor legislation similarly required that compulsory conferences generally be conducted in private (see *Workplace Relations Act 1996* (Cth), s.115(3)).

In *'L' and Australian Human Rights Commission*,⁹ the Australian Information Commissioner held that disclosure of documents containing a record of discussions between the respondent and the conciliation officer during the conciliation of a complaint made by the applicant:

would undermine the confidential nature of its conciliations and affect the willingness of people to engage in an open and frank manner during the conciliation process in the future. That would have

⁶ [2016] AATA 329.

⁷ Ibid at [21]-[22].

⁸ See also s.592(3) of the FW Act.

⁹ [2012] AICmr 21.

a substantial adverse effect on the proper and efficient conduct of the Commission's operations. Accordingly, the documents sought by the applicant are conditionally exempt under s 47E(d).¹⁰

The Commission's conciliation processes are intended to facilitate settlements of disputes and avoid litigation. This could be said to facilitate access to justice. I consider there is a real possibility that disclosure of pages 1 to 14, 90 to 91, 118 to 127, 168 to 216 and 260 to 292 may undermine or be perceived to undermine the confidentiality of settlement discussions and the processes of the Commission as disclosure of such discussions may adversely impact the willingness of parties to engage in full and frank settlement discussions. This could reduce the rate of settlement achieved at or following conciliation, resulting in increased costs to parties and to the Commission or courts in the future. Accordingly, I am satisfied that the pages concerning complaints arising in the context of Commission conferences are conditionally exempt under section 47E(d).

Personal Information

Section 47F of the FOI Act

I have applied the conditional exemption in section 47F(1) of the FOI Act, which deals with unreasonable disclosure of personal information to pages 1 to 14, 16 to 20, 24 to 34, 37 to 93, 95, 118 to 128, 130, 131, 132, 136 to 221, 223 to 297, 299 to 371 and to certain parts of pages 15, 21, 23, 35, 94, 129, 133, 222, 298.

Section 47F of the FOI Act relevantly provides:

- '(1) A document is conditionally exempt if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).
- (2) In determining whether the disclosure of the document would involve the unreasonable disclosure of personal information, an agency or Minister must have regard to the following matters:
 - (a) the extent to which the information is well known;
 - (b) whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document;
 - (c) the availability of the information from publicly accessible sources;
 - (d) any other matters that the agency or Minister considers relevant.'

Personal Information

Section 4(1) of the FOI Act states that the term 'personal information' has the same meaning as in the *Privacy Act 1988* (Cth). Section 6(1) of the *Privacy Act 1988* (Cth) (**Privacy Act**) defines 'personal information' as:

'...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...'

Paragraph 6.130 of the Guidelines provides:

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

¹⁰ Ibid at [10].

I consider that, with the exception of pages 127, 146, 155, 212, 231, 237, 253 and 259 (which are the final pages of emails and just include a disclaimer about use of the email), and pages 134 - 135, all of the pages that are within the scope of your request contain the 'personal information' of people other than you (**Third Party Personal Information**). This includes the names and contact details of complainants and other people involved in their matters before the Commission, details of their complaint, details of their Commission case and information provided or evidence given in proceedings before the Commission. In some cases, this includes sensitive information (as that term is defined in the Privacy Act), such as information about a complainant's medical condition or sexual orientation or practices. It also includes copies of documents that include complainants' financial information.

'Unreasonable' disclosure

In addition to the factors specified in section 47F(2) of the FOI Act, paragraph 6.138 of the Guidelines provides:

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

As discussed in *'FG' and National Archives of Australia* [2015] AICmr 26, other factors that may be relevant are:

- The nature, age and current relevance of the information
- Any detriment that disclosure may cause to the person to whom the information relates
- Any opposition to disclosure expressed or likely to be held by that person
- The circumstances of an agency's collection and use of the information
- The fact that the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act
- Whether disclosure of the information might advance the public interest in government transparency and integrity.

I have considered the above factors and am satisfied that the disclosure of the Third Party Personal Information would be unreasonable for the following reasons.

Due to the passage of time and noting the approximately 18 year period covered by your request, I consider that it is not reasonably practicable (within the meaning of section 27A(4)) for me to consult with all of the individuals whose personal information is included in the Third Party Personal Information. However, during the processing of your request I invited an individual, under section 27A of the FOI Act, to make submissions on whether disclosure of the documents would involve the unreasonable disclosure of their personal information and would, on balance, be contrary to the public interest. I received submissions from the individual, which I have taken into account as required by section 27A of the FOI Act.

I have decided that disclosure of the Third Party Personal Information would involve the unreasonable disclosure of personal information because:

- you do not have the consent from the individuals for the release of their personal information to you;
- the information is not available from publicly accessible sources;
- the information includes sensitive information, such as information about individuals' health and sexual orientation and practices;
- the individual I was able to consult with has opposed the release of the information in pages 10 to 15 and 206 to 216 on the grounds that disclosure may cause them

prejudice, and I am satisfied that the individual's contentions are reasonable in the circumstances.

I have also taken into consideration that the FOI does not control or restrict any subsequent use or dissemination of information released under the FOI Act, and that a decision to give a person access should therefore be made in the knowledge that the applicant may share the content of the pages with others or publish them to a larger audience.¹¹ Accordingly, I believe that granting unrestricted access to the Third Party Personal Information would affect the personal privacy of the individuals involved, noting that in some cases the pages contain significant personal information about them, which could be widely distributed with no restrictions imposed on their further use.

Based on the above, I have decided that the Third Party Personal Information is conditionally exempt under section 47F(1) of the FOI Act.

Public Interest Test

Under section 11A(5) of the FOI Act, the Commission must give you access to conditionally exempt documents unless in the circumstances it would be, on balance, contrary to the public interest to do so.

When weighing up the public interest for and against disclosure under section 11A(5) of the FOI Act, I have taken into account relevant factors in favour of disclosure. In particular, I have considered the extent to which disclosure would:

- promote the objects of the FOI Act; and

I have also considered the relevant factors weighing against disclosure. In particular, I have considered the extent to which disclosure could reasonably be expected to:

- harm the interests of an individual;
- prejudice the protection of an individual's right to privacy;
- prejudice the Commission's ability to obtain confidential information;
- prejudice an agency's ability to obtain similar information in the future; and
- impede the administration of justice generally, including procedural fairness.

As discussed earlier, disclosure of the pages within the scope of your request would disclose personal information about the individuals involved in the matters to which the complaints relate, which was provided to the Commission with an expectation of confidentiality. Disclosure of these pages could also be reasonably expected to prejudice the ability of the Commission to effectively investigate and appropriately resolve future complaints about Commission Members.

Furthermore, disclosure of pages concerning private conferences could reasonably be expected to undermine the perceived confidentiality of settlement discussions and processes and so adversely impact the willingness of parties to engage in full and frank settlement discussions.

Based on these factors, I have decided that in the circumstances of this particular matter, the public interest in disclosing the conditionally exempt material is outweighed by the public interest against disclosure.

I have not taken into account any of the irrelevant factors set out in section 11B(4) of the FOI Act in making this decision.

In this instance, I consider that the public interest is weighted more heavily against disclosure and therefore giving access to the conditionally exempt material would, on balance, be contrary to the public interest. Accordingly, I refuse access to the conditionally exempt material.

¹¹ Guidelines at paragraph 3.36.

Redacting documents

A refusal to give access to exempt documents triggers a requirement to consider section 22 of the FOI Act. This section relevantly requires that if an agency decides to refuse access to an exempt document, if possible, the agency must prepare an edited copy of a document, modified by deletions. It must be reasonably practicable for an edited copy to be prepared, particularly having regard to the nature and extent of the modification and the resources available to modify the document.

The Guidelines provide that an agency '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 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...'.¹²

I have concluded that it is reasonably practicable to prepare edited copies of pages 15, 21, 23, 35, 94, 129, 133, 222, 298 , but not the other pages containing exempt material. The nature and extent of the modifications that would be required mean that redacting the exempt material from those documents would leave a skeleton of the former documents and strip them of their meaning and substance, and the time and resources required to apply the redactions would be significant. I note that pages 46 to 50, 52 to 58, 60, 62 to 67, 168, 223 to 259, 305, 306 to 310, 314 also contain material that I consider to be outside the scope of your request, which I have redacted as irrelevant.

I have deleted the exempt information from pages 15, 21, 23, 35, 94, 129, 133, 222, 298 in accordance with section 22 on the basis that the information was exempt under sections 47F(1) or 47(E) and 11A(5) of the FOI Act. I will provide you with the edited copies of these pages.

I have decided that pages 22, 36, 96, to 117, 134, 135 do not contain exempt material and accordingly I have not redacted any information from them.

Release of documents

The Commission received a number of exemption contentions from the individual consulted under section 27A which were not accepted in relation to page 15. I notified these parties of my decision on 26 September 2022. These parties have 30 days to apply for internal or Information Commissioner review of my decision. The information on page 15 relating to the individual will be withheld under section 27A(5) of the FOI Act, until all opportunities for review or appeal of the decision to give access to the information have run out, and the access decision still stands.

Charges

On 1 August 2022 I notified you of my preliminary assessment of charges for the processing of your FOI request. The Commission received your deposit of \$365.50 on 16 August 2022. Upon completion of your request, I confirm the actual amount for processing was calculated to be \$1052.

Documents for release will be provided following receipt of the balance of the processing charge which is \$686.50.

Length of documents	
Number of pages	371

PROCESSING CHARGES
A. Search and retrieval

¹² Guidelines at paragraph 3.98.

Task	Time	Cost @ \$15/hr
Search and retrieval of documents	11.5 hours	\$172
B. Decision making		
Task	Time	Cost @ \$20/hr
Examination of pages for decision making	27 hours	\$540
Consultation with third parties	10 hours (actually 12 hours, but only charging 10 as quoted)	\$200
Preparation of documents for release including redacting exempt or irrelevant material	4 hours	\$80
Preparation of decision letter	4 hours (actually 7 hours but only charging 4 hours as quoted)	\$80
Preparation of schedule of documents	4 hours	\$80
<i>Decision making subtotal (before deduction of 5 hours)</i>	49hours	\$980
<i>Decision making subtotal (after deduction of first 5 hours free)</i>	44 hours	\$880

FINAL TOTALS AND DEPOSIT	
<i>TOTAL (total of A and B)</i>	<i>\$1052</i>
<i>LESS DEPOSIT</i>	<i>\$365.50</i>
<i>REMAINING BALANCE</i>	<i>\$686.50</i>

Please note that charges are calculated on the actual time taken to process your FOI request, which includes searching for and reviewing all pages, including those that are exempt in part or full from release under the FOI Act. The charges do not reflect the number of pages that you are being granted access to, nor how helpful they will be to you (noting that I do not know the reason for your FOI request).

The pages below are the pages I have granted you access to in part or full:

I have decided to grant you access to 25 pages (pages 22, 96 to 117, 134, 135).

I have decided to give you edited copies of 9 pages (15, 21, 23, 35, 94, 129, 133, 222, 298).

All other pages I have refused you access to under the FOI Act as stated above in my decision letter.

You can pay the remaining balance by bank transfer to:

Account Name: FWC Official Departmental Receipts Account
BSB: 093-003

Account Number: 110440

Access to documents

Once I have confirmation that the remaining balance has been paid, I will send you a copy of the pages that I have granted you access to in full or part.

Rights of review

I have set out your rights to seek a review of my decision at **Attachment 2**.

Should you have any queries concerning this matter, please contact me via email on foi@fwc.gov.au.

Kind regards

Tracey
FOI and Privacy Officer
Fair Work Commission
Email: foi@fwc.gov.au

Attachment 1 - Schedule of Documents – Barbara Deegan – 22/23 - 2

Pages	Description	Decision	FOI exemption	Comments
1 to 371	Documents related to complaints about former Commissioner Barbara Deegan	Exempt in part	<p>s47F(1)</p> <p>s47E(c) and (d)</p> <p>s47E(d)</p>	<p>s47F(1) – to third party information</p> <p>Exempt in full to pages – 1 to 14, 16 to 20, 24 to 34, 37 to 93, 95, 118 to 128, 130, 131, 132, 136 to 221, 223 to 297, 299 to 371</p> <p>Exempt in part to pages – 15, 21, 23, 35, 94, 129, 133, 222, 298</p> <p>Redactions applied under s22</p> <p>s47E(c) and (d) – applied to information that could have a substantial adverse effect on the management of complaints</p> <p>Exempt in full to pages – 1 to 6, 10 to 13, 15 to 20, 24 to 91, 118 to 132, 136 to 166, 168, 169, 198 to 221, 260 to 278, 292 to 371</p> <p>Exempt in part to pages - 133</p> <p>Redactions applied under s22</p> <p>s47E(d) - applied to information that could have a substantial adverse effect on the conduct of conferences</p> <p>Exempt in full to pages – 1 to 14, 90 to 91, 118 to 127, 168 to 216 and 260 to 292</p>

				<p>Release in full – page 22, 36, 96, to 117, 134, 135</p> <p>Release in part to pages – 15, 21, 23, 35, 94, 129, 133, 222, 298</p> <p>s22(1)(c) – applied to pages 25 to 36, 45 to 60, 61 to 89, 223 to 259 and 305 to 330</p> <p>s22 – information outside the scope of the request – pages 46 to 50, 52 to 58, 60, 62 to 67, 168, 223 to 259, 305, 306 to 310, 314</p>
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Attachment 2 - Rights of Review

Internal review

If you disagree with my decision, you have the right to apply for an internal review by the Commission. If you want to apply to the Commission for internal review, you should do so within 30 days after you are notified of my decision. The internal review will be conducted by an officer other than myself, and the Commission must make a review decision within 30 days.

Applications for internal review should be sent to:

Murray Furlong
General Manager
Fair Work Commission
GPO BOX 1994
Melbourne VIC 3001
Email: generalmanager@fwc.gov.au

Review by the Information Commissioner

Under section 54L of the FOI Act, you can apply to the Information Commissioner for review of my decision. If you want to apply to the Information Commissioner for review, you must do so in writing within 60 days after you are notified of my decision.

More information is available on the Information Commissioner website at

<https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>.

How to make a complaint

You can complain to the Information Commissioner about action taken by the Commission in relation to your FOI request.

Enquires to the Information Commissioner can be directed to:

Phone: 1300 363 992 (local call charge)

For more information, visit: <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/make-an-foi-complaint>.

Attachment 3 - Relevant Provisions of the FOI Act

11A Access to documents on request

Scope

- (1) This section applies if:
 - (a) a request is made by a person, in accordance with subsection 15(2), to an agency or Minister for access to:
 - (i) a document of the agency; or
 - (ii) an official document of the Minister; and
 - (b) any charge that, under the regulations, is required to be paid before access is given has been paid.
- (2) This section applies subject to this Act.

Note: Other provisions of this Act are relevant to decisions about access to documents, for example the following:

- (a) section 12 (documents otherwise available);
- (b) section 13 (documents in national institutions);
- (c) section 15A (personnel records);
- (d) section 22 (access to edited copies with exempt or irrelevant matter deleted).

Mandatory access—general rule

- (3) The agency or Minister must give the person access to the document in accordance with this Act, subject to this section.

Exemptions and conditional exemptions

- (4) The agency or Minister is not required by this Act to give the person access to the document at a particular time if, at that time, the document is an exempt document.

Note: Access may be given to an exempt document apart from under this Act, whether or not in response to a request (see section 3A (objects—information or documents otherwise accessible)).

- (5) 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.

Note 1: Division 3 of Part IV provides for when a document is conditionally exempt.

Note 2: A conditionally exempt document is an exempt document if access to the document would, on balance, be contrary to the public interest (see section 31B (exempt documents for the purposes of Part IV)).

Note 3: Section 11B deals with when it is contrary to the public interest to give a person access to the document.

- (6) Despite subsection (5), the agency or Minister is not required to give access to the document at a particular time if, at that time, the document is both:
 - (a) a conditionally exempt document; and
 - (b) an exempt document:
 - (i) under Division 2 of Part IV (exemptions); or
 - (ii) within the meaning of paragraph (b) or (c) of the definition of *exempt document* in subsection 4(1).

11B Public interest exemptions—factors

Scope

- (1) This section applies for the purposes of working out whether access to a conditionally exempt document would, on balance, be contrary to the public interest under subsection 11A(5).
- (2) This section does not limit subsection 11A(5).

Factors favouring access

- (3) Factors favouring access to the document in the public interest include whether access to the document would do any of the following:
 - (a) promote the objects of this Act (including all the matters set out in sections 3 and 3A);
 - (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 own personal information.

Irrelevant factors

- (4) The following factors must not be taken into account in deciding whether access to the document would, on balance, be contrary to the public interest:
 - (a) access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government;
 - (b) access to the document could result in any person misinterpreting or misunderstanding the document;
 - (c) the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made;
 - (d) access to the document could result in confusion or unnecessary debate.

Guidelines

- (5) In working out whether access to the document would, on balance, be contrary to the public interest, an agency or Minister must have regard to any guidelines issued by the Information Commissioner for the purposes of this subsection under section 93A.

22 Access to edited copies with exempt or irrelevant matter deleted

Scope

- (1) This section applies if:
 - (a) an agency or Minister decides:
 - (i) to refuse to give access to an exempt document; or
 - (ii) that to give access to a document would disclose information that would reasonably be regarded as irrelevant to the request for access; and
 - (b) it is possible for the agency or Minister to prepare a copy (an *edited copy*) of the document, modified by deletions, ensuring that:
 - (i) access to the edited copy would be required to be given under section 11A (access to documents on request); and
 - (ii) the edited copy would not disclose any information that would reasonably be regarded as irrelevant to the request; and
 - (c) it is reasonably practicable for the agency or Minister to prepare the edited copy, having regard to:
 - (i) the nature and extent of the modification; and
 - (ii) the resources available to modify the document; and
 - (d) it is not apparent (from the request or from consultation with the applicant) that the applicant would decline access to the edited copy.

Access to edited copy

- (2) The agency or Minister must:
 - (a) prepare the edited copy as mentioned in paragraph (1)(b); and
 - (b) give the applicant access to the edited copy.

Notice to applicant

- (3) The agency or Minister must give the applicant notice in writing:
 - (a) that the edited copy has been prepared; and
 - (b) of the grounds for the deletions; and
 - (c) if any matter deleted is exempt matter—that the matter deleted is exempt matter because of a specified provision of this Act.
- (4) Section 26 (reasons for decision) does not apply to the decision to refuse access to the whole document unless the applicant requests the agency or Minister to give the applicant a notice in writing in accordance with that section.

27A Consultation—documents affecting personal privacy

Scope

- (1) This section applies if:
 - (a) a request is made to an agency or Minister for access to a document containing personal information about a person (including a person who has died); and
 - (b) it appears to the agency or Minister that the person or the person's legal personal representative (the *person concerned*) might reasonably wish to make a contention (the *exemption contention*) that:
 - (i) the document is conditionally exempt under section 47F; and
 - (ii) access to the document would, on balance, be contrary to the public interest for the purposes of subsection 11A(5).

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).

- (2) In determining, for the purposes of paragraph (1)(b), whether the person concerned might reasonably wish to make an exemption contention because of personal information in a document, the agency or Minister must have regard to the following matters:
 - (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 information;
 - (c) the availability of the information from publicly accessible sources;
 - (d) any other matters that the agency or Minister considers relevant.

Opportunity to make submissions

- (3) The agency or Minister must not decide to give the applicant access to the document unless:
 - (a) the person concerned is given a reasonable opportunity to make submissions in support of the exemption contention; and
 - (b) the agency or the Minister has regard to any submissions so made.
- (4) However, subsection (3) only applies if it is reasonably practicable for the agency or Minister to give the person concerned a reasonable opportunity to make submissions in support of the exemption contention, having regard to all the circumstances (including the application of subsections 15(5) and (6) (time limits for processing requests)).

Decision to give access

(5) If the agency or Minister decides to give access to the document, the agency or Minister must give written notice of the decision to both of the following:

- (a) the person concerned;
- (b) the applicant.

Access not to be given until review or appeal opportunities have run out

(6) However, the agency or Minister must not give the applicant access to the document unless, after all the opportunities of the person concerned for review or appeal in relation to the decision to give access to the document have run out, the decision to give access still stands, or is confirmed.

Note 1: The decision to give access to the document is subject to internal review (see Part VI), review by the Information Commissioner (see Part VII) and review by the Tribunal (see Part VIIA).

Note 2: For when all opportunities for review or appeal in relation to the decision to give access to the document have *run out*, see subsection 4(1).

Notice and stay of decision not to apply unless submission made in support of exemption contention

(7) Subsections (5) and (6) do not apply unless the person concerned makes a submission in support of the exemption contention as allowed under paragraph (3)(a).

Edited copies and personal information

(8) This section applies:

- (a) in relation to an edited copy of a document—in the same way as it applies to the document; and
- (b) in relation to a document containing personal information—to the extent to which the document contains such information.

47F Public interest conditional exemptions—personal privacy

General rule

- (1) A document is conditionally exempt if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).
- (2) In determining whether the disclosure of the document would involve the unreasonable disclosure of personal information, an agency or Minister must have regard to the following matters:
 - (a) the extent to which the information is well known;
 - (b) whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document;
 - (c) the availability of the information from publicly accessible sources;
 - (d) any other matters that the agency or Minister considers relevant.
- (3) Subject to subsection (5), subsection (1) does not have effect in relation to a request by a person for access to a document by reason only of the inclusion in the document of matter relating to that person.

47E Public interest conditional exemptions—certain operations of agencies

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 or by an agency;
- (d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).