

# Part 6 — Conditional exemptions

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# Introduction

- 6.1 This Part of the FOI Guidelines sets out each of the conditional exemptions in Division 3 of Part IV of the FOI Act and explains the threshold criteria that must be met before deciding that a document is conditionally exempt.
- 6.2 Section 11A(5) of the FOI Act provides that when a document is conditionally exempt under a conditional exemption in Division 3 of Part IV of the FOI Act, access must be given to the document unless, in the circumstances, giving access would, on balance, be contrary to the public interest (s 11A(5)).
- 6.3 After discussing each conditional exemption and its threshold criteria, Part 6 sets out how decision-makers should apply the public interest test, which is common to all conditional exemptions in Division 3 of Part IV.
- 6.4 It is important to recognise that agencies and ministers retain a discretion to provide access to a document, even if the document meets the criteria for one of the exemptions in Division 2 of Part IV (s 3A). In each case, agencies and ministers should consider the information sought and the public interest factors in favour of release of a conditionally exempt document. This process can involve factors such as the current context, the passage of time and the availability of related information.
- 6.5 Sections 90, 91 and 92 of the FOI Act provide protection against civil and criminal liability when documents are disclosed or published in good faith in the belief that publication or disclosure is required or permitted under the FOI Act or otherwise, whether under an express legislative power or not.
- 6.6 As noted in *‘ACV’ and Tertiary Education Quality and Standards Agency*,<sup>1</sup> agencies [and ministers] are not legally bound to refuse access if a document is exempt and may consider disclosure of a document if this is not otherwise legally prohibited. Such an approach is consistent with the pro-access parliamentary intention underpinning the FOI Act.

## Decision making under Division 3 of Part IV

- 6.7 Deciding whether a document is exempt under Division 3 of Part IV of the FOI Act requires decision makers to:
- consider the document at issue and the criteria that must be established for each conditional exemption
  - decide, in the context of each individual document, whether the threshold for one or more conditional exemptions is met<sup>2</sup>
  - consider whether giving access would be contrary to the public interest test (s 11A(5)) by:
    - identifying the public interest factors favouring disclosure (s 11B(3)) (see [6.229] – [6.231])
    - identifying the public interest factors against disclosure (see [6.232] – [6.233])
    - ensuring that irrelevant factors are not considered (s 11B(4)) (see [6.234] – [6.235])

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<sup>1</sup> *‘ACV’ and Tertiary Education Quality and Standards Agency (Freedom of information)* [2023] AICmr 3 [89] and [90].

<sup>2</sup> If the statutory criteria for the conditional exemption is not met, the document is not conditionally exempt. Unless another exemption applies, access to the document must be given (s 11A(5) of the FOI Act).

- weighing the relevant factors for and against disclosure to reach a decision (see [6.237] – [6.239]). It is only if the factors against disclosure outweigh those for disclosure that the document will be exempt
- make a decision and notify the applicant; and
- if refusing access to information provide written reasons for that decision which meet the requirements of s 26.

## Identifying the matters that must be established for each conditional exemption

6.8 A document is conditionally exempt if it satisfies all the elements of any of the 8 conditional exemptions listed below. Conditional exemptions in Division 3 of Part IV that are subject to the public interest test relate to the following:

- Commonwealth-State relations (s 47B)<sup>3</sup>
- deliberative processes (s 47C)<sup>4</sup>
- financial or property interests of the Commonwealth (s 47D)<sup>5</sup>
- certain operations of agencies (s 47E)<sup>6</sup>
- personal privacy (s 47F)<sup>7</sup>
- business (other than documents to which s 47 applies) (s 47G)<sup>8</sup>
- research (s 47H)<sup>9</sup>
- the economy (s 47J).<sup>10</sup>

6.9 For each conditional exemption there is a balancing of public interest factors for and against disclosure of information. For a document that is found to be conditionally exempt, the balancing test requires the decision maker to determine that release of the information would be contrary to the public interest. In circumstances where the decision maker is not satisfied that release would be contrary to the public interest, the information must be released. The use of the word *contrary* sets a high threshold, in summary, demonstrating that the factors against disclosure are oppositional to the public interest.

6.10 Under Division 3 a document will be conditionally exempt if its disclosure:

- would, or could reasonably be expected to, *cause damage* to relations between the Commonwealth and a State (s 47B(a))
- would have a *substantial adverse effect* on the financial or property interests of the Commonwealth or an agency (s 47D)

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<sup>3</sup> See [6.222]–[6.45] below.

<sup>4</sup> See [6.466]–[6.78] below.

<sup>5</sup> See [6.79]–[6.83] below.

<sup>6</sup> See [6.844]–[6.1158] below.

<sup>7</sup> See [6.119]–[6.176] below.

<sup>8</sup> See [6.1777]–[6.212] below.

<sup>9</sup> See [6.213]–[6.2144] below.

<sup>10</sup> See [6.215]–[6.221] below.

- would, or could reasonably be expected to, have a *substantial adverse effect* on the management or assessment of personnel by the Commonwealth or by an agency, or on the proper and efficient conduct of the operations of an agency (ss 47E(c) and 47E(d))
- would involve the *unreasonable disclosure* of personal information about any person (including a deceased person) (s 47F)
- would disclose information concerning a person in respect of their business or professional affairs or concerning the business of commercial or financial affairs of an organisation or undertaking in a case in which the disclosure of the information would, or could reasonably be expected to, *unreasonably affect that person adversely* in respect of their lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs (s 47G(1))
- before the completion of research would be *likely unreasonably to expose the agency or officer to disadvantage* (s 47H)
- would, or could reasonably be expected to, have a *substantial adverse effect* on Australia's economy (s 47J).

6.11 Agencies and ministers must administer each FOI request individually, having regard to the contents of the document and should apply the public interest test to the particular document to decide whether to grant access at that time.<sup>11</sup> An agency cannot rely on a class claim contention when refusing access to a document under a conditional exemption.

## Commonly used terms

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

### ***Would or could reasonably be expected to***

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

- Commonwealth-State relations (s 47B)
- certain operations of agencies (ss 47E(a)-(d))
- business affairs (ss 47G(1)(a)-(b))
- the economy (s 47J).

6.14 The test requires the decision maker to assess the likelihood of the predicted or forecast event, effect or damage occurring after disclosure of a document.<sup>12</sup>

<sup>11</sup> See *Crowe and Department of the Treasury* [2013] AICmr 69 [36]–[45]; *Cornerstone Legal Pty Ltd and Australian Securities and Investment Commission* [2013] AICmr 71 [32]–[41] and [53]; '*FI*' and *Australian Securities and Investments Commission* [2015] AICmr 28 [14]; *MacTiernan and Secretary, Department of Infrastructure and Regional Development (Freedom of Information)* [2016] AATA 506 [63]; *Dan Conifer and Department of the Prime Minister and Cabinet (No. 2) (Freedom of information)* [2017] AICmr 117 [15]; '*ABH*' and *Australian Transport Safety Bureau (Freedom of information)* [2022] AICmr 27 [27]; '*ZT*' and the *Department of Home Affairs* [2022] AICmr 4 [23]. See also discussion of class claims in *Patrick and Secretary, Department of Prime Minister and Cabinet (Freedom of Information)* [2021] AATA 2719 [230]–[244].

<sup>12</sup> The test 'would or could reasonably be expected' has been discussed in various decisions. For example see *Bell and Secretary, Department of Health (Freedom of information)* [2015] AATA 494 [37]; *Xenophon and Secretary, Department of Defence (Freedom of information)* [2019] AATA 3667 [98]–[103].

- 6.15 The use of the word ‘could’ is less stringent than ‘would’ and requires analysis of the reasonable expectation rather than the certainty of an event, effect or damage occurring. It may be a reasonable expectation that an effect has occurred, is presently occurring, or could occur in the future.<sup>13</sup>
- 6.16 The mere risk, allegation, possibility, or chance of prejudice does not qualify as a reasonable expectation.<sup>14</sup> There must be, based on reasonable grounds, at least a real, significant or material possibility of prejudice.<sup>15</sup>

### **Substantial adverse effect**

- 6.17 Several conditional exemptions<sup>16</sup> require the decision maker to assess the impact and scale of an expected effect or event that would follow disclosure of the document. That is, the expected effect needs to be both ‘substantial’ and ‘adverse’.
- 6.18 The term ‘substantial adverse effect’ broadly means ‘an adverse effect which is sufficiently serious or significant to cause concern to a properly concerned reasonable person’.<sup>17</sup> The word ‘substantial’, in the context of substantial loss or damage, has been interpreted as including ‘loss or damage that is, in the circumstances, real or of substance and not insubstantial or nominal’.<sup>18</sup>
- 6.19 A decision maker should clearly describe the expected effect and its impact on the usual operations or activity of the agency in the statement of reasons under s 26 to show their deliberations in determining the extent of the expected effect. It may sometimes be necessary to use general terms to avoid making the statement of reasons itself an ‘exempt document’ (s 26(2)).

### **Prejudice**

- 6.20 Some exemptions and conditional exemptions<sup>19</sup> require the decision maker to assess whether the potential disclosure of a document would be prejudicial. The FOI Act does not define prejudice. The Macquarie Dictionary definition of ‘prejudice’ requires:
- (a) disadvantage resulting from some judgement or action of another
  - (b) resulting injury or detriment.
- 6.21 A prejudicial effect is one which would cause a bias or change to the expected results leading to detrimental or disadvantageous outcomes. The expected outcome does not need to have an impact that is ‘substantial and adverse’.<sup>20</sup>

<sup>13</sup> *Re Maksimovic and Australian Customs Service* [2009] AATA 28 [28].

<sup>14</sup> *Re News Corporation Limited v National Companies and Securities Commission* [1984] FCA 400; (1984) 5 FCR 88 per Fox and Woodward JJ; *Re Maher and Attorney-General's Department* [1985] AATA 180 [41]; (1985) 7 ALD 731 at 742.

<sup>15</sup> *Chemical Trustee Limited and Ors and Commissioner of Taxation and Chief Executive Officer, AUSTRAC (Joined Party)* [2013] AATA 623 [79].

<sup>16</sup> Sections 47D, 47E(c), 47E(d) and 47J.

<sup>17</sup> See *Re Thies and Department of Aviation* [1986] AATA 141 [24].

<sup>18</sup> See *Tillmanns Butcheries Pty Ltd v Australasian Meat Employees Union & Ors* [1979] FCA 85 [14]–[15]; (1979) 27 ALR 367 [383]; per Deane J in relation to the meaning of ‘substantial loss’ in s 45D of the *Trade Practices Act 1974*. Although Deane J noted that it was unnecessary that he form a concluded view, Deane J’s interpretation of ‘substantial’ provides general guidance on the interpretation of this term under the FOI Act. See also for example *Re Marko Ascic v Australian Federal Police* [1986] FCA 260.

<sup>19</sup> Sections 37(1)(a), 37(2)(a), 37(2)(c), 47E(a), 47E(b) and 47G(1)(b).

<sup>20</sup> See *Re James and Ors and Australian National University* [1984] AATA 501; (1984) 6 ALD 687 per President Hall on the operation of s 32 of the FOI Act.

## Documents affecting Commonwealth-State relations (s 47B)

6.22 Section 47B conditionally exempts a document where disclosure:

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

6.23 For the purposes of this conditional exemption, a State includes the Australian Capital Territory and the Northern Territory (s 4(1)).

### Relevance of the author of the document

6.24 A document does not have to have been supplied or written by the Commonwealth, a State agency, a State authority or an authority of Norfolk Island to fall within this conditional exemption. The content of the document (and potentially the reason why or circumstances in which the document was created) is the deciding factor, rather than the originator's identity. It follows that it is also not a relevant consideration that all the parties referred to in the document are aware of the document or of the reference to the particular agency.

### Cause damage to Commonwealth-State relations

6.25 A decision maker may consider that disclosure would, or could reasonably be expected to, damage the relations of the Commonwealth and one or more States (s 47B(a)). The term 'relations' has received judicial consideration under the term 'working relations', which was found to encompass all interactions of the Australian Government and the States,<sup>21</sup> from formal Commonwealth-State consultation processes such as the National Cabinet through to any working arrangements between agencies undertaken as part of their day-to-day functions.

6.26 Disclosure of a document may cause damage by, for example:

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<sup>21</sup> See *Arnold (on behalf of Australians for Animals) v Queensland* [1987] FCA 148; (1987) 73 ALR 607.



- interrupting or creating difficulty in negotiations or discussions that are underway, including in the development of joint or parallel policy<sup>22</sup>
  - adversely affecting the administration of a continuing Commonwealth-State project
  - substantially impairing (not merely modifying) Commonwealth-State programs<sup>23</sup>
  - adversely affecting the continued level of trust or co-operation in existing inter-office relationships<sup>24</sup>
  - impairing or prejudicing the flow of information to and from the Commonwealth.<sup>25</sup>
- 6.27 Decision makers may also need to consider future working relationships where disclosure may, for example:
- impair or prejudice the future flow of information
  - adversely affect Commonwealth-State police operations or investigations
  - adversely affect the development of future Commonwealth-State projects.
- 6.28 The potential damage need not be quantified,<sup>26</sup> but the effect on relations arising from the disclosure must be adverse.
- 6.29 The Administrative Appeals Tribunal (AAT) warns against applying class claims to documents under s 47B(a), explaining that this and other conditional exemptions require a closer analysis of the nature of the information in each document to determine whether a particular document is conditionally exempt.<sup>27</sup>
- 6.30 Decision makers should also consider whether all or only some of the information in the requested documents would damage Commonwealth-State relations if disclosed. For example, in *Diamond and Australian Curriculum, Assessment and Reporting Authority*, the FOI Commissioner found that disclosing school data provided by State and Territory Governments to the Australian Curriculum, Assessment and Reporting Authority for publication on the ‘My School’ website would damage Commonwealth-State relations.<sup>28</sup> Releasing the data would have breached an agreement between the Commonwealth and State and Territory Governments to keep the data confidential and might reasonably cause State and Territory Governments to decline to provide further data for the website. However, the FOI Commissioner found that release of a list of schools featured on the website would not breach the confidentiality agreement as it would not disclose any State or Territory Government data.
- 6.31 Guidance on the application of the public interest test to documents found to be conditionally exempt under s 47B can be found at [6.222] – [6.238] and [6.240] – [6.44].

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<sup>22</sup> See *Arnold (on behalf of Australians for Animals) v Queensland* [1987] FCA 148; (1987) 73 ALR 607. See also *Rex Patrick and Department of Agriculture, Water and the Environment (Freedom of information)* [2021] AICmr 57 [31] in which the conditional exemption was found not to apply because the negotiations referred to in the statement of reasons had concluded.

<sup>23</sup> See *Re Cosco Holdings Pty Limited and Department of Treasury* [1998] AATA 124.

<sup>24</sup> See *Arnold (on behalf of Australians for Animals) v Queensland* [1987] FCA 148; (1987) 73 ALR 607.

<sup>25</sup> See *Re Shopping Centre Council and Australian Competition and Consumer Commission* [2004] AATA 119; 78 ALD 494.

<sup>26</sup> See *Re Angel and the Department of Arts, Heritage and Environment; HC Sleigh Resources Ltd Tasmania* [1985] AATA 314.

<sup>27</sup> See *MacTiernan and Secretary, Department of Infrastructure and Regional Development (Freedom of Information)* [2016] AATA 506 [63]; also these Guidelines above at [6.11].

<sup>28</sup> *Diamond and Australian Curriculum, Assessment and Reporting Authority* [2013] AICmr 57.

## Damage to be reasonably expected

- 6.32 The term ‘could reasonably be expected to’ is explained in greater detail at [6.13]–[6.16] above. There must be real and substantial grounds for expecting the damage to occur which can be supported by evidence or reasoning.<sup>29</sup> There cannot be a mere assumption or allegation that damage may occur if the document is released. For example, when consulting a State agency or authority as required under s 26A, the agency should ask the State agency or authority for its reasons for expecting damage, as an unsubstantiated concern will not satisfy the s 47B(a) threshold.
- 6.33 The word ‘damage’ in s 47B is not qualified by any adjective as to extent or character and it may refer to forms of intangible damage.<sup>30</sup> It can also be taken to connote a less severe effect than ‘a substantial adverse effect’, which is the expression used in ss 47D, 47E and 47J of the FOI Act.<sup>31</sup>

## Information communicated in confidence

- 6.34 Section 47B(b) conditionally exempts information communicated in confidence to the Commonwealth Government or an agency by a State or an authority of a State. It is not necessary for the decision maker to find that disclosure may found an action for breach of confidence for this element to apply (as is required for an exemption under s 45).
- 6.35 This exemption only applies if disclosure would divulge information that is communicated in confidence by a State Government or authority to the Commonwealth Government or agency, and not the reverse.<sup>32</sup>
- 6.36 When assessing whether the information was communicated in confidence, the test is whether the communication was considered to be confidential at the time of the communication. The circumstances of the communication may also need to be considered, such as:
- whether the communication was ad hoc, routine, or required<sup>33</sup>
  - whether there were any existing, implied or assumed arrangements or understandings between the Commonwealth and a State concerning the exchange or supply of information<sup>34</sup>

<sup>29</sup> See *Attorney-General’s Department and Australian Iron and Steel Pty Ltd v Cockcroft* [1986] FCA 35; (1986) 10 FCR 180. See also *Community and Public Sector Union and Attorney-General’s Department (Freedom of information)* [2019] AICmr 75 [22] and *Dan Conifer and National Disability Insurance Agency (Freedom of information)* [2020] AICmr 33 [28] in which the Information Commissioner stresses the need for agencies and ministers to provide evidence to support claims that there are real and substantial grounds for expecting disclosure would cause damage to Commonwealth-State relations.

<sup>30</sup> *Diamond v Chief Executive Officer of the Australian Curriculum, Assessment and Reporting Authority* [2014] AATA 707 [103].

<sup>31</sup> *Patrick and Secretary, Department of Prime Minister and Cabinet (Freedom of Information)* [2021] AATA 2719 [216].

<sup>32</sup> *MacTiernan and Secretary, Department of Infrastructure and Regional Development (Freedom of Information)* [2016] AATA 506 [83].

<sup>33</sup> See *Re Maher and Attorney-General’s Department* [1985] AATA 180.

<sup>34</sup> See *Re Maher and Attorney-General’s Department* [1985] AATA 180 for agreements and *Re Queensland and Australian National Parks and Wildlife Service (Australians for Animals, party joined)* [1986] AATA 224 for assumed arrangements. See *Bradford and Australian Federal Police (Freedom of information)* [2021] AATA 3984 [146]–[151] for examples of existing arrangements and understandings.

- how the information was subsequently handled, disclosed or otherwise published.<sup>35</sup>

6.37 See also the discussion on s 33(b) (international relations) in Part 5 of these Guidelines. That provision is expressed in the same language but for the relevant entities which are to have communicated the information.

6.38 It may be difficult to establish that s 47B applies if the document relates to routine or administrative matters or are already in the public domain.<sup>36</sup> The relevant test is whether the relevant information was communicated in confidence by or on behalf of a State. However this is not to say that the fact that the document has already been released or its contents are already known by members of the public is irrelevant deciding whether s 47B applies.<sup>37</sup>

## A State and an authority of a State

6.39 An ‘authority of a State’ is an entity that has been established by the State for a public purpose, given the power to direct or control the affairs of others on the State’s behalf, reports to and is under some control of the State.<sup>38</sup> Where there is doubt as to whether an entity is an ‘authority of a State’, the agency should consult the entity. The view of the State Government or the entity as to its status will be an influential, but not decisive, factor.

## Consultation with a State (s 26A)

6.40 In circumstances where:

- an FOI request is made to an agency or minister for access to a document
- that originated with, or was received from, the State or an authority of the State or
- the document contains information that originated with, or was received from, the State or an authority of the State

agencies and ministers are required to consult the State or authority of the State before deciding to release the document. Consultation is only required if it appears that the State may reasonably wish to contend that the document is conditionally exempt under s 47B and that giving access to the document would be contrary to the public interest.

6.41 Consultation is to be undertaken in accordance with arrangements made between the Commonwealth and the States (s 26A(2)). Such arrangements have been made to facilitate consultation where this is required under s 26A. Agreement has been obtained from the States that all correspondence and communication should, at first instance, be with the delegated FOI contact officer of the particular agency and not directly with the author or action officer whose name may appear in the document.<sup>39</sup> This process has been put in place to ensure FOI requests are appropriately received and monitored, and to minimise

<sup>35</sup> See *McGarvin and Australian Prudential Regulation Authority* [1998] AATA 585; *Rex Patrick and Department of Agriculture, Water and the Environment (Freedom of information)* [2021] AICmr 57 [30]–[31].

<sup>36</sup> In *Rex Patrick and Department of Agriculture, Water and the Environment (Freedom of information)* [2021] AICmr 57 [30]–[31] the requested document was shared with the Department on a confidential basis at the time of the consultation, but since then the final version of the document had been published.

<sup>37</sup> *Diamond and Chief Executive Officer of the Australian Curriculum, Assessment and Reporting Authority* [2014] AATA 707 [98].

<sup>38</sup> See *General Steel Industries Inc v Commissioner for Railways (NSW)* [1964] HCA 69; (1964) 112 CLR 125; *Committee of Direction of Fruit Marketing v Delegate of the Australian Postal Commission* [1980] HCA 23; (1980) 144 CLR 577.

<sup>39</sup> See FOI Memo No. 26A dated June 1996 which is available at [17 Mar 2012 - www.dpmc.gov.au/foi/guidelines.cfm](http://www.dpmc.gov.au/foi/guidelines.cfm) - Trove ([nla.gov.au](http://nla.gov.au)).

inconsistency across jurisdictions if a person makes FOI requests to several Australian Government and State agencies. FOI practitioners can find FOI contact information on the relevant State government agency website.<sup>40</sup>

- 6.42 Part 3 of these Guidelines provides information about consultation, including consultation with a State or an authority of a State. Part 3 also provides further information in relation to advising the State or State authority of the FOI decision, review rights and applicable timeframes. The State, or authority of the State, may apply for internal review or IC review if it disagrees with the agency's or minister's access grant decision (ss 54B and 54M).
- 6.43 Formal consultation under s 26A extends the time in s 15(5)(b) for deciding an FOI request by 30 days (s 15(6)). The Information Commissioner recommends that consultation be undertaken at an early stage in processing an FOI request, that is, when the agency is gathering information that would show whether the documents are conditionally exempt under s 47B.

## Consultation comments to be considered when assessing conditional exemption

- 6.44 The decision maker must take into account any concerns raised by the consulted State, or State or Norfolk Island authority. The consulted authority does not have the right to veto access and agencies and ministers should take care that the State or authority is not under such a misapprehension. All other relevant considerations should be taken into account to ensure a sound decision is made.
- 6.45 The information provided during the consultation can assist the decision maker in assessing whether the document contains material that concerns Commonwealth-State relations, and to assess what damage, if any, could occur from disclosure.

## Documents subject to deliberative processes (s 47C)

- 6.46 This conditional exemption is characterised by a 3-stage decision making process reflecting the statutory requirements. Firstly, the decision maker must be satisfied that information within the scope of the request includes deliberative matter. Secondly, if the decision maker is satisfied, they are then required to be satisfied that the deliberative matter was obtained, prepared or recorded in the course of, or for the purposes of, deliberative processes. Thirdly, the decision maker must be satisfied that the deliberative processes were involved in the functions exercised by or intended to be exercised by an Australian Government agency or minister. The decision maker must be satisfied that of each of these requirements is met.
- 6.47 Deliberative matter is content that is in the nature of, or relating to either:
- an opinion, advice or recommendation that has been obtained, prepared or recorded or
  - a consultation or deliberation that has taken place, in the course of, or for the purposes of, a deliberative process of the government, an agency or minister (s 47C(1)).

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<sup>40</sup> Not all States use the term 'Freedom of Information' or 'FOI', so checking the website for 'access to information', 'right to information' or similar terms may be necessary.

- 6.48 Deliberative matter does not include operational information or purely factual material (s 47C(2)). ‘Operational information’ is defined in s 8A and is information that an agency must publish under the Information Publication Scheme (see Part 13 of these Guidelines).
- 6.49 The conditional exemption does not apply to:
- a) reports (including reports concerning the results of studies, surveys or tests) of scientific or technical experts, whether employed within an agency or not, including reports expressing the opinions of such experts on scientific or technical matters (see [6.73] – [6.72] below)
  - b) reports of a body or organisation, prescribed by the regulations, that is established within an agency (currently none are prescribed)
  - c) the record of, or a formal statement of the reasons for, a final decision given in the exercise of a power or of an adjudicative function (s 47C(3)).
- 6.50 The deliberative processes conditional exemption provides a framework through which the nature and context of the information must be examined before the conditional exemption will apply. Firstly, the information must include content of a specific type, namely deliberative matter. If a document does not contain deliberative matter, it cannot be conditionally exempt under this provision. This requires a factual determination by the decision maker as an initial step in satisfying themselves that the conditional exemption applies because the document contains deliberative matter involved in a deliberative process.
- 6.51 The decision-maker must also be satisfied that the information relates to a deliberative function and that that function was or was intended to be exercised by one of 3 entities: an agency, a minister, or the Government of the Commonwealth.
- 6.52 Agencies and ministers should only claim this conditional exemption in clearly applicable circumstances, noting that s 47C is subject to an overriding public interest test that is weighted toward disclosure. Not every document generated or held by a policy area of an agency is ‘deliberative’ in the sense used in this provision, even if it appears to deal with the development or implementation of a policy. This is reinforced by the language of the FOI Act which describes what does not constitute ‘deliberative matter’. A decision maker should ensure that the content of a document strictly conforms with the criteria for identifying ‘deliberative matter’ prepared or recorded for the purposes of a ‘deliberative process’ before claiming this conditional exemption (see [6.46] above and [6.59] – [6.58] below).
- 6.53 Guidance in relation to the role of inhibition of frankness and candour when applying the public interest test to documents found to be conditionally exempt under s 47C can be found at [6.245] – [6.252].

## Deliberative process

- 6.54 A deliberative process involves the exercise of judgement in developing and making a selection from different options:

The action of deliberating, in common understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing upon one's course of action. In short, the deliberative processes involved in the functions of an agency are its thinking processes – the processes of reflection, for

example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.<sup>41</sup>

- 6.55 It is not enough for the purposes of s 47C(1) that an opinion, advice or recommendation is merely obtained, prepared or recorded; it must be obtained, prepared or recorded *in the course of, or for the purposes of*, the deliberative processes involved in the functions of the agency, minister or government.<sup>42</sup>
- 6.56 The functions of an agency are usually found in the Administrative Arrangements Orders or the instrument or Act that established the agency. For the purposes of the FOI Act, the functions include both policy making and the processes undertaken in administering or implementing a policy. The functions also extend to the development of policies in respect of matters that arise in the course of administering a program. The non-policy decision making processes required when carrying out agency, ministerial or governmental functions, such as code of conduct investigations, may also be deliberative processes.<sup>43</sup>
- 6.57 A deliberative process may include the recording or exchange of:
- opinions
  - advice
  - recommendations
  - a collection of facts or opinions, including the pattern of facts or opinions considered<sup>44</sup>
  - interim decisions or deliberations.
- 6.58 An opinion or recommendation does not need to be prepared for the sole purpose of a deliberative process. However, it is not sufficient that an agency or minister merely has a document in its possession that contains information referring to matters for which the agency or minister has responsibility.<sup>45</sup>

## Assessing deliberative matter

- 6.59 ‘Deliberative matter’ is a shorthand term for ‘opinion, advice and recommendation’ and ‘consultation and deliberation’ that is recorded or reflected in a document.<sup>46</sup> There is no

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<sup>41</sup> See *Re JE Waterford and Department of Treasury (No 2)* [1984] AATA 67 [58]; (1984) 5 ALD 588; *British American Tobacco Australia Ltd and Australian Competition and Consumer Commission* [2012] AICmr 19 [15]–[22] and *Carver and Fair Work Ombudsman* [2011] AICmr 5 in relation to code of conduct investigations.

<sup>42</sup> *Patrick and Secretary, Department of Prime Minister and Cabinet (Freedom of information)* [2020] AATA 4964 (‘Patrick’) [72]. In ‘Patrick’ Deputy President Britten-Jones concluded at [77] that an audit report prepared to assess the effectiveness and value for money of the Department of Defence’s acquisition of light protected vehicles did not involve a deliberative process because the audit report did not involve the weighing up or evaluation of competing arguments and did not involve the exercise of judgment in developing and making a selection from different options. In so far as the audit report disclosed an opinion, the opinion was not obtained, prepared or recorded in the course of, or for the purposes of, any deliberative processes involved in the functions of the Auditor-General. As a consequence, the audit report was not found to be conditionally exempt under s 47C.

<sup>43</sup> 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.

<sup>44</sup> See *Chapman and Chapman and Minister for Aboriginal and Torres Strait Islander Affairs* [1996] AATA 210; (1996) 43 ALD 139.

<sup>45</sup> *Secretary, Department of Prime Minister and Cabinet and Secretary, Department of Infrastructure and Regional Development and Sanderson (Party Joined)* [2015] AATA 361 [93].

<sup>46</sup> As discussed by Bennett J in *Dreyfus and Secretary Attorney-General’s Department (Freedom of information)* [2015] AATA 962 [18].

reason generally to limit the ordinary meanings given to the words ‘opinion, advice or recommendation, consultation or deliberation’.<sup>47</sup>

- 6.60 The agency must assess all the material to decide if it is deliberative matter that relates to, or is in the nature of, the deliberative processes of the agency or minister.<sup>48</sup>
- 6.61 The presence or absence of particular words or phrases is not a reliable indication of whether a document includes deliberative matter. The agency or minister should assess the substance and content of the document before concluding it includes deliberative matter. Similarly, the format or class of the document, such as a ministerial brief or submission, or the document being a draft version of a later document does not automatically designate the content as deliberative matter.
- 6.62 Material that is not deliberative matter, where not already excluded as operational information, purely factual material or a scientific report, would include:
- content that is merely descriptive
  - incidental administrative content<sup>49</sup>
  - procedural or day to day content<sup>50</sup>
  - the decision or conclusion reached at the end of the deliberative process<sup>51</sup>
  - matter that was not obtained, prepared or recorded in the course of, or for the purposes of, a deliberative process.
- 6.63 Where material was gathered as a basis for intended deliberations, it may be deliberative matter.<sup>52</sup> 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.<sup>53</sup>
- 6.64 Matter may still be deliberative even if the deliberative process has stalled or been overtaken by other events.<sup>54</sup>

## Consultation

- 6.65 A consultation undertaken for the purposes of, or in the course of, a deliberative process includes any discussion between the agency, minister or government and another person in relation to the decision that is the object of the deliberative process.<sup>55</sup>

<sup>47</sup> As explained by Forgie DP in *Wood; Secretary, Department of Prime Minister and Cabinet and (Freedom of Information)* [2015] AATA 945 [39].

<sup>48</sup> See *Secretary, Department of Employment, Workplace Relations v Small Business and Staff Development and Training Centre Pty Ltd* [2001] FCA 1375; (2001) 114 FCR 301.

<sup>49</sup> See *Re VXF and Human Rights and Equal Opportunity Commission* [1989] AATA 107.

<sup>50</sup> See *Subramanian and Refugee Review Tribunal* [1997] AATA 31.

<sup>51</sup> See *Chapman and Chapman and Minister of Aboriginal and Torres Strait Islander Affairs* [1996] AATA 210; (1996) 43 ALD 139; *British American Tobacco Australia Ltd and Australian Competition and Consumer Commission* [2012] AICmr 19; *Briggs and the Department of the Treasury (No. 3)* [2012] AICmr 22.

<sup>52</sup> See *Secretary, Department of Employment, Workplace Relations and Small Business v Staff Development and Training Centre Pty Ltd* [2001] FCA 1375; (2001) 114 FCR 301.

<sup>53</sup> See *Re Susic and Australian Institute of Marine Science* [1993] AATA 97; *Re Booker and Department of Social Security* [1990] AATA 218.

<sup>54</sup> *Parnell & Dreyfus and Attorney-General's Department* [2014] AICmr 71 [38].

<sup>55</sup> *McGarvin and Australian Prudential Regulation Authority* [1998] AATA 585.

- 6.66 The agency should create the consultation document with the intention of initiating a 2-way exchange between at least 2 parties.<sup>56</sup> If the other person does not respond or participate, the consultation document may still be deliberative matter.

## Purely factual material

- 6.67 The exclusion of purely factual material under s 47C(2)(b) is intended to allow disclosure of material used in the deliberative process.
- 6.68 A conclusion involving opinion or judgement is not purely factual material. Similarly, an assertion that something is a fact may be an opinion rather than purely factual material.
- 6.69 Conversely, when a statement is made of an ultimate fact, involving a conclusion based on primary facts which are unstated, such a statement may be a statement of purely factual material.<sup>57</sup>
- 6.70 'Purely factual material' does not extend to factual material that is an integral part of the deliberative content and purpose of a document, or is embedded in or intertwined with the deliberative content such that it is impractical to excise it.<sup>58</sup>
- 6.71 Where a decision maker finds it difficult to separate the purely factual material from the deliberative matter, both the elements may be exempt.<sup>59</sup> If the 2 elements can be separated, the decision maker should consider giving the applicant a copy with deletions under s 22 to provide access to the purely factual material.<sup>60</sup>
- 6.72 The action taken by decision-makers in relation to the provision of edited copies of documents is an important element of the operation of the FOI Act. There are preconditions described in s 22(1) and in circumstances where these preconditions are met, s 22(2) provides that the agency or minister must prepare an edited copy of the document and give the FOI applicant access to the edited copy.

## Reports on scientific or technical matters

- 6.73 As noted at [6.49] above, the s 47C conditional exemption does not apply to reports (including reports concerning the results of studies, surveys or tests) of scientific or technical experts, including reports expressing experts' opinions on scientific or technical matters (s 47C(3)(a)).
- 6.74 The sciences include the natural sciences of physics, chemistry, astronomy, biology (such as botany, zoology and medicine<sup>61</sup>) and the earth sciences (which include geology, geophysics,

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<sup>56</sup> *Re Booker and Department of Social Security* [1990] AATA 218.

<sup>57</sup> *Re Waterford and the Treasurer of the Commonwealth of Australia* [1984] AATA 518 [15], citing *Harris v Australian Broadcasting Corporation* [1984] FCA 8; (1984) 51 ALR 581 [586].

<sup>58</sup> *Dreyfus and Secretary Attorney-General's Department (Freedom of information)* [2015] AATA 962 [18].

<sup>59</sup> See *Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 and *Chapman and Chapman and Minister of Aboriginal and Torres Strait Islander Affairs* [1996] AATA 210; (1996) 43 ALD 139. See also *Parnell & Dreyfus and Attorney-General's Department* [2014] AICmr 71 [40] in which the Information Commissioner found that factual material was so integral to the deliberative content that the analysis and views in the document would be robbed of their essential meaning if it was not included. Further, the Information Commissioner concluded that it would also be impractical to separate the factual material from the deliberative content, as the 2 were intertwined.

<sup>60</sup> See *Re Harris v Australian Broadcasting Corporation* [1983] FCA 242; (1983) 78 FLR 236.

<sup>61</sup> See *Re Wertheim and Department of Health* [1984] AATA 537.



hydrology, meteorology, physical geography, oceanography, and soil science). Technical matters involve the application of science, and includes engineering.<sup>62</sup>

- 6.75 For the purposes of s 47C(3)(a), the social sciences, or the study of an aspect of human society, are not scientific (for example, anthropology, archaeology, economics,<sup>63</sup> geography, history, linguistics, political science, sociology and psychology).

## Interaction with Cabinet documents exemption

- 6.76 In some cases, a document may contain deliberative matter that relates to Cabinet in some way but is not exempt under the Cabinet documents exemption in s 34. An example would be a document containing deliberative matter that is marked ‘Cabinet-in-Confidence’ but nonetheless does not satisfy any of the exemption criteria in s 34.<sup>64</sup> Disclosing a document of this kind will not necessarily be contrary to the public interest only because of the connection to Cabinet deliberations. For example, disclosure is less likely to be contrary to the public interest if:

- the document contains deliberative but otherwise non-sensitive matter about a policy development process that has been finalised and
- the Government has announced its decision on the issue.<sup>65</sup>

- 6.77 Even if the Government has not announced a decision on the issue, disclosure of such a document is less likely to be contrary to the public interest if it is public knowledge that the Government considered, or is considering, the issue.<sup>66</sup> The key public interest consideration in both situations is to assess whether disclosure would inhibit the Government’s future deliberation of the issue.

- 6.78 Examples of non-sensitive matter in this context include information that is no longer current or that is already in the public domain, or information that provides a professional, objective analysis of potential options without favouring one over the other. For guidance about the Cabinet documents exemption see Part 5 of these Guidelines.

## Documents affecting financial or property interests of the Commonwealth (s 47D)

- 6.79 Section 47D conditionally exempts documents where disclosure would have a substantial adverse effect on the financial or property interests of the Commonwealth or an agency.<sup>67</sup>

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<sup>62</sup> See *Re Harris v Australian Broadcasting Corporation and Keith Cameron Mackriell* [1983] FCA 242; (1983) 78 FLR 236 per Beaumont J.

<sup>63</sup> See *Re Waterford and the Treasurer of the Commonwealth of Australia* [1985] AATA 114.

<sup>64</sup> See *Combined Pensioners and Superannuants Association of NSW Inc and Deputy Prime Minister and Treasurer* [2013] AICmr 70 [17].

<sup>65</sup> *Combined Pensioners and Superannuants Association of NSW Inc and Deputy Prime Minister and Treasurer* [2013] AICmr 70 [13]–[21]; *Australian Private Hospitals Association and Department of the Treasury* [2014] AICmr 4 [38]–[45].

<sup>66</sup> *Philip Morris Ltd and Department of Finance* [2014] AICmr 27 [49]–[52]; *Sanderson and Department of Infrastructure and Regional Development* [2014] AICmr 66 [29]–[37].

<sup>67</sup> For an example of the application of this exemption see *Briggs and the Department of the Treasury (No. 3)* [2012] AICmr 22.

## Financial or property interests

6.80 The financial or property interests of the Commonwealth or an agency may relate to assets, expenditure or revenue-generating activities. An agency's property interests may be broader than merely buildings and land, and may include intellectual property or the Crown's interest in natural resources.<sup>68</sup>

## Substantial adverse effect

6.81 For the conditional exemption to apply, the potential effect that would be expected to occur following disclosure must be both substantial<sup>69</sup> and adverse. This standard is discussed in more detail at [6.17] – [6.19] above.

6.82 A substantial adverse effect may be indirect. For example, where disclosure of documents would provide the criteria by which an agency is to assess tenders, the agency's financial interest in seeking to obtain the best value for money through a competitive tendering process may be compromised.<sup>70</sup>

6.83 An agency or government cannot merely assert that its financial or property interests would be adversely affected following disclosure.<sup>71</sup> The particulars of the predicted effect should be identified during the decision-making process and should be supported by evidence. Where the conditional exemption is relied on, the relevant particulars and reasons should form part of the decision maker's statement of reasons, if they can be included without disclosing exempt matter (s 26, see Part 3 of these Guidelines). The effect must bear on the actual financial or property interests of the Commonwealth or an agency.<sup>72</sup>

## Documents affecting certain operations of agencies (s 47E)

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

6.85 There are 4 separate grounds for the conditional exemption, one or more of which may be relevant in a particular case. A document is conditionally exempt if its disclosure under the FOI Act would, or could reasonably be expected to, do any of the following:

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<sup>68</sup> See *Re Connolly and Department of Finance* [1994] AATA 167 in which the Commonwealth property was the uranium stockpile.

<sup>69</sup> See *Harris v Australian Broadcasting Corporation* [1983] FCA 242; (1983) 78 FLR 236.

<sup>70</sup> See *Secretary, Department of Employment, Workplace Relations and Small Business v Staff Development & Training Centre Pty Ltd* [2001] FCA 1375; (2001) 114 FCR 301.

<sup>71</sup> See *Community and Public Sector Union and Attorney-General's Department (Freedom of information)* [2019] AICmr 75 [57]–[61] in which the Information Commissioner found that the respondent had not provided particulars to explain why disclosure of the particular material it decided was exempt under s 47D would adversely impact the ability of the government to manage its financial matters. See also *'DB' and Australian Federal Police* [2014] AICmr 105 [37]–[40] in which the acting Freedom of Information Commissioner found that the respondent had made broad assertions about the need to exempt documents containing financial and budgetary information from disclosure but had not addressed the actual contents of each document. The respondent also did not substantiate its claim that disclosure would have a 'substantial adverse impact' on its financial or property interests.

<sup>72</sup> See *Re Hart and Deputy Commissioner of Taxation* [2002] AATA 1190; (2002) 36 AAR 279.

- a) prejudice the effectiveness of procedures or methods for the conduct of tests, examinations or audits by an agency
  - b) prejudice the attainment of the objects of particular tests, examinations or audits conducted or to be conducted by an agency
  - c) have a substantial adverse effect on the management or assessment of personnel by the Commonwealth or an agency or
  - d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.
- 6.86 Where an agency is considering documents relating to its industrial relations activities, conditional exemptions such as s 47E(c) (management of personnel) or s 47E(d) (proper and efficient conduct of the operations of the agency) may be relevant.
- 6.87 Terms used in this conditional exemption are discussed below.

## Prejudice

- 6.88 Sections 47E(a) and (b) require a decision maker to assess whether the conduct or objects of tests, examinations or audits would be prejudiced in a particular instance. The term 'prejudice' is explained at [6.20] – [6.21] above.
- 6.89 In the context of this conditional exemption, a prejudicial effect could be regarded as one that would cause a bias or change to the expected results leading to detrimental or disadvantageous outcomes. The expected change does not need to have an impact that is 'substantial and adverse', which is a stricter test.<sup>73</sup>

## Reasonably be expected

- 6.90 For the grounds in ss 47E(a)–(d) to apply, the predicted effect needs to be reasonably expected to occur. The term 'could reasonably be expected' is explained in greater detail at [6.13] – [6.16] above. There must be more than merely an assumption or allegation that damage may occur if the document is released.
- 6.91 Where the document relates more closely to investigations into compliance with a taxation law or the enforcement of or proper administration of the law due to the involvement of police or the Director of Public Prosecutions, or by an agency's internal investigators, the agency may need to consider the law enforcement exemption under s 37 (see Part 5).

## Reasons for predicted effect

- 6.92 An agency cannot merely assert that an effect will occur following disclosure. The particulars of the predicted effect should be identified during the decision-making process, including whether the effect could reasonably be expected to occur. Where the conditional exemption is relied on, the relevant particulars and reasons should form part of the decision maker's statement of reasons, if they can be included without disclosing exempt matter (s 26, see Part 3).

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<sup>73</sup> See *Re James and Ors and Australian National University* [1984] AATA 501; (1984) 6 ALD 687.

## Prejudice the effectiveness of testing, examining or auditing methods or procedures (s 47E(a))

- 6.93 Where a document relates to a procedure or method for the conduct of tests, examinations or audits by an agency, the decision maker must address both elements of the conditional exemption in s 47E(a), namely that:
- an effect would reasonably be expected following disclosure
  - the expected effect would be, overall, prejudicial to the effectiveness of the procedure or method of the audit, test or examination being conducted.
- 6.94 The decision maker will need to consider the content and context of the document to be able to identify the purpose, methodology or intended objective of the examination, test or audit. This operational information provides the necessary context in which to assess the document against the conditional exemption and should be included in the statement of reasons issued under s 26.
- 6.95 The decision maker should explain how the expected effect will prejudice the effectiveness of the agency's testing methods.<sup>74</sup> A detailed description of the predicted effect will enable a comprehensive comparison of the predicted effect against the usual effectiveness of existing testing methods. The comparison will indicate whether the effect would be prejudicial.
- 6.96 Examples of testing methods considered by the Information Commissioner and the AAT include:
- safety audits and testing regimes<sup>75</sup>
  - licensing board examinations<sup>76</sup>
  - risk assessment matrices<sup>77</sup>
  - compliance audit indicators<sup>78</sup> and any comparative weighting of the indicators
  - accident investigation techniques<sup>79</sup>
  - tests or examinations leading to qualifications<sup>80</sup>
  - potential fraud case assessment and analysis tools.<sup>81</sup>
- 6.97 Circumstances considered by the AAT where disclosure of the testing method may prejudice the method include:
- providing forewarning of the usual manner of audits

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<sup>74</sup> See for example 'ADR' and Inspector-General of Taxation (Freedom of information) [2023] AICmr 51 [57]–[60] in which the Acting FOI Commissioner rejected a claim that a document was conditionally exempt under s 47E(a) on the basis that the Inspector-General had not explained how disclosure could prejudice the effectiveness of its review or audit methods and procedures nor why that prejudice could reasonably be expected to follow from disclosure of the document.

<sup>75</sup> See *Vasta and McKinnon and Civil Aviation Safety Authority* [2010] AATA 499; (2010) 116 ALD 356.

<sup>76</sup> *Australian Federation of Air Pilots and Civil Aviation Safety Authority (Freedom of information)* [2022] AICmr 65.

<sup>77</sup> See *Lobo and Secretary, Department of Education, Science and Training* [2007] AATA 1891 and *Fortitude East Pty Ltd and Australian Trade Commission* [2016] AICmr 71.

<sup>78</sup> *Besser and Department of Infrastructure and Transport* [2013] AICmr 19 [31]–[32].

<sup>79</sup> See *Vasta and McKinnon and Civil Aviation Safety Authority* [2010] AATA 499; (2010) 116 ALD 356.

<sup>80</sup> See *Re James and Ors and Australian National University* [1984] AATA 501; (1984) ALD 687.

<sup>81</sup> See *Splann and Centrelink* [2009] AATA 320.

- permitting analysis of responses to tests or examinations or information gathered during an audit
- facilitating cheating, fraudulent or deceptive conduct by those being tested or audited<sup>82</sup>
- permitting pre-prepared responses which would compromise the integrity of the testing process.<sup>83</sup>

## Prejudice the attainment of testing, examination or auditing objectives (s 47E(b))

6.98 Where a document relates to the integrity of the attainment of the objects of tests, examinations or audits by an agency, the decision maker must address both elements of the conditional exemption in s 47E(b). The decision maker must be satisfied that:

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

6.99 The agency needs to conduct, or propose to conduct, the testing, examination or audit to meet particular requirements, and have a particular need for the results (the test objectives). The operational reason for conducting the test, examination or audit is the context for assessing whether s 47E(b) applies and this operational reason should be included in the s 26 statement of reasons.

6.100 Some examples of test objects include:

- ensuring only properly qualified people are flying aircraft
- ensuring the selection of the most competent and best candidates for promotion<sup>84</sup>
- determining suitability for highly technical positions<sup>85</sup>
- ensuring that an agency's expenditure is being lawfully spent through proper acquittal.<sup>86</sup>

6.101 The AAT has accepted that disclosure would be prejudicial to testing methods where it would:

- allow for plagiarism or circulation of questions or examination papers that would lead to a breach of the integrity of the examination system<sup>87</sup>
- allow for examiners to be inhibited in future marking by the threat of challenge to their marking<sup>88</sup>
- 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

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<sup>82</sup> See *Re Marko Ascic and Australian Federal Police* [1986] AATA 108.

<sup>83</sup> See *Re Crawley and Centrelink* [2006] AATA 572.

<sup>84</sup> See *Re Marko Ascic and Australian Federal Police* [1986] AATA 108.

<sup>85</sup> *Australian Federation of Air Pilots and Civil Aviation Safety Authority (Freedom of information)* [2022] AICmr 65 [21] and [30].

<sup>86</sup> *Besser and Department of Infrastructure and Transport* [2013] AICmr 19 [35].

<sup>87</sup> See *Re Marko Ascic and Australian Federal Police* [1986] AATA 108.

<sup>88</sup> See *Re Marko Ascic and Australian Federal Police* [1986] AATA 108.

psychometric testing to ascertain an applicant's eligibility for a certain pension<sup>89</sup> or patent examiner examinations.<sup>90</sup>

## Substantial adverse effect on management or assessment of personnel (s 47E(c))

6.102 Where a document relates to an agency's policies and practices in relation to the assessment or management of personnel, the decision maker must address both elements of the conditional exemption in s 47E(c), namely that:

- an effect would reasonably be expected following disclosure
- the expected effect would be both substantial and adverse.

6.103 For this conditional exemption to apply, the document must relate to either:

- the management of personnel – including broader human resources policies and activities, recruitment,<sup>91</sup> promotion, compensation, discipline, harassment and work health and safety
- the assessment of personnel – including the broader performance management policies and activities concerning competency, in-house training requirements, appraisals and underperformance, counselling, feedback, assessment for bonus or eligibility for progression.

6.104 The terms 'would reasonably be expected' and 'substantial adverse' have the same meaning as explained at [6.13] – [6.16] and [6.17] – [6.19] above. If the predicted effect would be substantial but not adverse, or may even be beneficial, the conditional exemption does not apply. It will be unlikely that the potential embarrassment of an employee would be considered to be an effect on the agency as a whole.

6.105 The predicted effect must arise from the disclosure of the document being assessed.<sup>92</sup> The decision maker may also need to consider the context of the document and the integrity of a system that may require those documents, such as witness statements required to investigate a workplace complaint,<sup>93</sup> or referee reports to assess job applicants.<sup>94</sup>

6.106 The AAT has accepted that candour is essential when an agency seeks to investigate staff complaints, especially those of bullying.<sup>95</sup> In such cases staff may be reluctant to provide information and cooperate with investigators if they are aware that the subject matter of those discussions may be disclosed through the FOI process.<sup>96</sup>

<sup>89</sup> See *Re Crawley and Centrelink* [2006] AATA 572.

<sup>90</sup> See *Re Watermark and Australian Industrial Property Organisation* [1995] AATA 389.

<sup>91</sup> See *Re Dyrenfurth and Department of Social Security* [1987] AATA 140.

<sup>92</sup> See *Re Dyrenfurth and Department of Social Security* [1987] AATA 140 [16].

<sup>93</sup> See *Harris v Australian Broadcasting Corporation* [1983] FCA 242; (1983) 78 FLR 236; *Re Marr and Telstra Corporation Limited* [1993] AATA 328.

<sup>94</sup> See *Department of Social Security v Dyrenfurth* [1988] FCA 148; (1988) 80 ALR 533; (1988) 8 AAR 544.

<sup>95</sup> *De Tarle and Australian Securities and Investments Commission (Freedom of Information)* [2016] AATA 230 [42].

<sup>96</sup> *Plowman and Australian Securities and Investments Commission (Freedom of information)* [2020] AATA 4729 [16]. See also 'LC' and *Australia Post (Freedom of information)* [2017] AICmr 31 [21]; 'QM' and *Australian Federal Police (Freedom of information)* [2019] AICmr 41 [36]; 'RM' and *Australian Taxation Office (Freedom of information)* [2020] AICmr 1 [30].

6.107 Information relating to staff training and development, such as confidential feedback where public release could undermine confidence and inhibit candour in performance review processes, may also be conditionally exempt under this provision.<sup>97</sup>

6.108 Where the FOI applicant is primarily seeking documents relating to personnel management or assessment matters more closely related to their own employment and circumstances, the agency should encourage them to access the records using the agency's established procedures for accessing personnel records in the first instance (see s 15A).

*Public servants and s 47E(c)*

6.109 In some circumstances it may be appropriate to address concerns about the work health and safety impacts of disclosing public servants' personal information (such as names and contact details) under s 47E(c).<sup>98</sup>

6.110 An assessment conducted on a case-by-case basis, based on objective evidence, is required when considering whether it is appropriate to apply s 47E(c).<sup>99</sup> The type of objective evidence needed to found a decision that disclosure of a public servant's personal information may pose a work health and safety risk will depend on all the circumstances. For example, the security risks to operational law enforcement and intelligence agencies, and to the employees of law enforcement and intelligence agencies more generally, will be well known to the agency based on experience and understanding of the operating environment. Some agencies will already be aware of, and have documented, abusive behaviour by individuals that will be sufficient evidence not to disclose the personal information of their staff to those individuals. That information may have informed a decision by an agency to impose communication restrictions on an individual to mitigate work health and safety risks. In some cases, a public servant may be able to provide evidence of online abuse or harassment. Additionally, self-report by an individual of their health and safety concerns should this information be disclosed may be sufficient.

6.111 Relevant factors to consider when deciding whether s 47E(c) applies to conditionally exempt the names and contact details of public servants include:

- the nature of the functions discharged by the agency<sup>100</sup>
- the relationship between the individual public servant and the exercise of powers and functions discharged by the agency (i.e., are they a decision maker?)<sup>101</sup>
- the personal circumstances of the individual public servant which may make them more vulnerable to, or at greater risk of, harm if their name and contact details are released, for example – due to family violence or mental health issues
- whether the relevant information is already publicly available

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<sup>97</sup> See, for example, *Paul Cleary and Special Broadcasting Service* [2016] AICmr 2 [25]–[27] in which the Information Commissioner upheld the exemption where feedback provided to cadet journalists was found to be given in the expectation that it feedback would be treated confidentially and public release would undermine confidence in the system of providing cadet feedback. Also *'ACT' and Merit Protection Commissioner (Freedom of information)* [2023] AICmr 1 [38].

<sup>98</sup> *Paul Farrell and Department of Home Affairs (Freedom of information)* [2023] AICmr 37.

<sup>99</sup> *Lisa Martin and Department of Home Affairs (Freedom of Information)* [2019] AICmr 47 [105].

<sup>100</sup> *Paul Farrell and Department of Home Affairs (Freedom of information)* [2023] AICmr 37 [71]; *Paul Farrell and Department of Home Affairs (Freedom of information)* [2023] AICmr 37 [72]; *Paul Farrell and Department of Home Affairs (Freedom of information)* 52 [68].

<sup>101</sup> For example, in *'NN' and Department of Human Services (Freedom of information)* [2018] AICmr 1 the FOI applicant sought access to the name of the person who completed an assessment that resulted in the cancellation of their pension.

- whether the FOI applicant has a history of online abuse, trolling or insults
- any communication restrictions the agency has imposed upon the individual
- whether the FOI applicant has a history of harassment or abusing staff.<sup>102</sup>

## Substantial adverse effect on an agency’s proper and efficient conduct of operations (s 47E(d))

6.112 An agency’s operations may not be substantially adversely affected if the disclosure would, or could reasonably be expected to, lead to a change in the agency’s processes that would enable those processes to be more efficient.<sup>103</sup>

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

- disclosure of the Australian Electoral Commission’s policies in relation to the accepted reasons for a person’s failure to vote in a Federal election would result in substantial changes to their procedures to avoid jeopardising the effectiveness of methods and procedures used by investigators<sup>104</sup>
- disclosure of information provided by industry participants could reasonably be expected to prejudice the Australian Competition and Consumer Commission’s ability to investigate anti-competitive behaviour and its ability to perform its statutory functions<sup>105</sup>
- disclosure of the Universal Resource Locators and Internet Protocols of internet content that is either prohibited or potentially prohibited content under Schedule 5 to the *Broadcasting Services Act 1992* could reasonably be expected to affect the Australian Broadcasting Authority’s ability to administer a statutory regulatory scheme for internet content to be displayed<sup>106</sup>
- disclosure of the details of a complaint made by a member of the public to the Civil Aviation Safety Authority could make potential informants reluctant to bring matters of unlawful and unsafe conduct to the attention of the regulator, thus undermining the agency’s ability to effectively perform its public safety functions.<sup>107</sup>

6.114 The conditional exemption may also apply to a document that relates to a complaint made to an investigative body. Disclosure of this type of information could reasonably affect the willingness of people to make complaints to the investigative body, which would have a substantial adverse effect on the proper and efficient conduct of the investigative body’s operations.<sup>108</sup> Further, disclosure of information provided in confidence by parties to a

<sup>102</sup> ‘NN’ and Department of Human Services (Freedom of information) [2018] AICmr 1 [25]–[27].

<sup>103</sup> 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.

<sup>104</sup> *Re Murphy and Australian Electoral Commission* [1994] AATA 149; (1994) 33 ALD 718.

<sup>105</sup> *Re Telstra Australia Limited and Australian Competition and Consumer Commission* [2000] AATA 71.

<sup>106</sup> *Re Electronic Frontiers Australia and the Australian Broadcasting Authority* [2002] AATA 449.

<sup>107</sup> *Pascoe and Civil Aviation Safety Authority (Freedom of information)* [2018] AATA 1273 [30]–[38].

<sup>108</sup> For examples of the application of the exemption to complaints processes see *Australian Broadcasting Corporation and Commonwealth Ombudsman* [2012] AICmr 11; *British American Tobacco Australia Ltd and Australian Competition and Consumer Commission* [2012] AICmr 19; *Wilson AM and Office of the Australian Information Commissioner (Freedom of Information)* [2023] AATA 458 [47].



complaint or investigation may reduce the willingness of parties to provide information relevant to a particular complaint and may reduce their willingness to participate fully and frankly with the investigative process. In such cases the investigative body's ability to obtain all information would be undermined and this may have a substantial adverse effect on the proper and efficient conduct of the investigative body's operations.<sup>109</sup>

- 6.115 The predicted effect must bear on the agency's 'proper and efficient' operations, that is, the agency is undertaking its operations in an expected manner. Where disclosure of the documents reveals unlawful activities or inefficiencies, this element of the conditional exemption will not be met and the conditional exemption will not apply. This is for reasons including the irrelevant factors that must not be taken into account in deciding whether access to the document would, on balance, be contrary to the public interest.

*Public servants and s 47E(d)*

- 6.116 Unless an agency can establish that disclosure of public servants' personal information (for example, names and contact details) will have a *substantial adverse effect* on an agency's operations, it will not be appropriate to exempt this material under s 47E(d). In most cases the impact may be more of an inconvenience or distraction for an individual officer, rather than something that impacts substantially on the operations of the agency. Should an agency have evidence that provision of such information would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the agency's operations, a case may be more likely to be made.
- 6.117 Further, for future conduct to amount to a risk that requires mitigation by refusing access to contact details from disclosure in response to an FOI request, that conduct must be reasonably expected to occur.
- 6.118 As discussed above at [6.109], concerns about the work health and safety impacts of disclosing public servants' personal information may be more appropriately addressed under the conditional exemption in s 47E(c).

## Documents affecting personal privacy (s 47F)

- 6.119 Section 47F conditionally exempts a document where disclosure would involve the unreasonable disclosure of personal information of any person (including a deceased person). This conditional exemption is intended to protect the personal privacy of individuals.
- 6.120 This conditional exemption does not apply if the personal information is only about the FOI applicant (s 47F(3)). Where the information is joint personal information, however, the exemption may apply. For more information about joint personal information see [6.1433] – [6.145] below.
- 6.121 In some cases, providing indirect access to certain personal information via a qualified person may be appropriate (s 47F(5) – see [6.171] – [6.176] below).

## Personal information

- 6.122 The FOI Act shares the same definition of 'personal information' as the *Privacy Act 1988* (Privacy Act), which regulates the handling of personal information about individuals (see

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<sup>109</sup> Wilson AM and Office of the Australian Information Commissioner (*Freedom of Information*) [2023] AATA 458 [47].

s 4(1) of the FOI Act and s 6 of the Privacy Act). The cornerstone of the Privacy Act's privacy protection framework is the Australian Privacy Principles (APPs), a set of legally binding principles that apply to both Australian Government agencies and private sector organisations that are subject to the Privacy Act. Detailed guidance about the APPs is available in the Information Commissioner's APP guidelines, available at [www.oaic.gov.au](http://www.oaic.gov.au).

6.123 Personal information means information or an opinion about an identified individual, or an individual who is reasonably identifiable:

- a) whether the information or opinion is true or not and
- b) whether the information or opinion is recorded in a material form or not.<sup>110</sup>

6.124 In other words, personal information:

- is information about an identified individual or an individual who is reasonably identifiable
- says something about a person
- may be opinion
- may be true or untrue
- may or may not be recorded in material form.

6.125 Personal information can include a person's name, address, telephone number,<sup>111</sup> date of birth, medical records, bank account details, taxation information<sup>112</sup> and signature.<sup>113</sup>

## A person who is reasonably identifiable

6.126 What constitutes personal information will vary depending on whether an individual can be identified or is reasonably identifiable in the particular circumstances. For particular information to be personal information, an individual must be identified or reasonably identifiable.

6.127 Where it may be possible to identify an individual using available resources, the practicability, including the time and cost involved, will be relevant to deciding whether an individual is 'reasonably identifiable'.<sup>114</sup> An agency or minister should not, however, seek information from the FOI applicant about what other information they have or could obtain.

6.128 Where it may be technically possible to identify an individual from information, but doing so is so impractical that there is almost no likelihood of it occurring, the information is not personal information.<sup>115</sup> In *Jonathan Laird and Department of Defence* [2014] AICmr 144, the Privacy Commissioner was not satisfied that DNA analysis of human remains could reasonably identify a World War II HMAS Sydney II crew member. In finding that the DNA sequencing information held by the Department was not personal information, the Privacy

<sup>110</sup> See s 4 of the FOI Act and s 6 of the Privacy Act.

<sup>111</sup> See *Re Green and Australian and Overseas Telecommunications Corporation* [1992] AATA 252; (1992) 28 ALD 655.

<sup>112</sup> See *Re Murtagh and Commissioner of Taxation* [1984] AATA 249; (1984) 54 ALR 313; (1984) 6 ALD 112 and *Re Jones and Commissioner of Taxation* [2008] AATA 834.

<sup>113</sup> See *Re Corkin and Department of Immigration & Ethnic Affairs* [1984] AATA 448.

<sup>114</sup> Explanatory Memorandum to the Privacy Amendment (Enhancing Privacy Protection) Bill 2012, p 61.

<sup>115</sup> Australian Privacy Principles guidelines at [B.93].

Commissioner discussed that identifying the remains using DNA sequencing would be ‘impractical for a reasonable member of the public’.<sup>116</sup>

- 6.129 Similarly, in a series of IC review decisions,<sup>117</sup> the Information Commissioner had to decide whether or not aggregate information relating to the nationality, language and religion of refugees resettled under Australia’s offshore processing arrangements was the personal information of the relevant individuals. In each case, the Information Commissioner found that the individuals were not reasonably identifiable from the aggregated information.
- 6.130 Therefore, whether or not an individual is reasonably identifiable depends on the practicability of linking pieces of information to identify them.

## Says something about a person

- 6.131 The information needs to be ‘about’ an individual – there must be a connection between the information and the person.<sup>118</sup> This is a question of fact and depends on the context and circumstances. Some information is clearly about an individual – for example, name, date of birth, occupation details and medical records. A person’s signature, home address, email address, telephone number, bank account details and employment details will also generally constitute personal information. Other information may be personal information if it reveals a fact or opinion about the person in a way that is not too tenuous or remote. Invoices related to the purchase of alcohol for Prime Ministerial functions do not disclose personal information about the Prime Minister if it is possible that a staff member made the purchases based on something other than the Prime Minister’s preferences.<sup>119</sup> Examples of when information is not ‘about’ a person and therefore the information is not personal information for the purposes of s 6 of the Privacy Act, include the colour of a person’s mobile phone or their network type (e.g., 5G).<sup>120</sup>

## Natural person

- 6.132 An individual is a natural person and does not include a corporation, trust, body politic or incorporated association.<sup>121</sup> Section 47F(1) specifically extends to the personal information of deceased persons.

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<sup>116</sup> *Jonathan Laird and Department of Defence* [2014] AICmr 144 [17].

<sup>117</sup> *Alex Cuthbertson and Department of Immigration and Border Protection* [2016] AICmr 18; *Alex Cuthbertson and Department of Immigration and Border Protection* [2016] AICmr 19; *Alex Cuthbertson and Department of Immigration and Border Protection* [2016] AICmr 20.

<sup>118</sup> *Privacy Commissioner v Telstra Corporation Limited* [2017] FCAFC 4 [63].

<sup>119</sup> In *Penny Wong and Department of the Prime Minister and Cabinet* [2016] AICmr 27 [13]–[19], the Information Commissioner discussed that there was nothing before him to indicate the former Prime Minister had any involvement with the purchase of alcohol for prime ministerial functions. Therefore, purchase invoices did not contain the personal information of the former Prime Minister. However, if it had been shown that the purchases had been made to accord with the Prime Minister’s personal preferences, the Information Commissioner accepted that the alcohol brands could be the personal information of the former Prime Minister.

<sup>120</sup> *Privacy Commissioner v Telstra Corporation Limited* [2017] FCAFC 4 [63].

<sup>121</sup> See s 2B of the *Acts Interpretation Act 1901*.

## Unreasonable disclosure

6.133 The personal privacy conditional exemption is designed to prevent the unreasonable invasion of third parties' privacy.<sup>122</sup> The test of 'unreasonableness' implies a need to balance the public interest in disclosure of government-held information and the private interest in the privacy of individuals. The test does not, however, amount to the public interest test of s 11A(5), which follows later in the decision-making process. It is possible that the decision maker may need to consider one or more factors twice, once to determine if a projected effect is unreasonable and again when assessing the public interest balance.

6.134 In considering what is unreasonable, the AAT in *Re Chandra and Minister for Immigration and Ethnic Affairs* stated that:

... whether a disclosure is 'unreasonable' requires ... a consideration of all the circumstances, including the nature of the information that would be disclosed, the circumstances in which the information was obtained, the likelihood of the information being information that the person concerned would not wish to have disclosed without consent, and whether the information has any current relevance ... it is also necessary in my view to take into consideration the public interest recognised by the Act in the disclosure of information ... and to weigh that interest in the balance against the public interest in protecting the personal privacy of a third party ...<sup>123</sup>

6.135 An agency or minister must have regard to the following matters in determining whether disclosure of the document would involve an unreasonable disclosure of personal information:

- a) the extent to which the information is well known
- b) whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document
- c) the availability of the information from publicly accessible sources<sup>124</sup>
- d) any other matters that the agency or minister considers relevant (s 47F(2)).<sup>125</sup>

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

6.137 Key factors for determining whether disclosure is unreasonable include:

- a) the author of the document is identifiable<sup>126</sup>

<sup>122</sup> See *Re Chandra and Minister for Immigration and Ethnic Affairs* [1984] AATA 437; (1984) 6 ALN N257; *Parnell and Department of the Prime Minister and Cabinet* [2012] AICmr 31; 'R' and *Department of Immigration and Citizenship* [2012] AICmr 32.

<sup>123</sup> See *Re Chandra and Minister for Immigration and Ethnic Affairs* [1984] AATA 437 [259]; (1984) 6 ALN N257.

<sup>124</sup> See *Re Jones and Commissioner of Taxation* [2008] AATA 834; 'Q' and *Department of Human Services* [2012] AICmr 30.

<sup>125</sup> 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.

<sup>126</sup> Note: s 11B(4)(c) provides that when the public interest test is considered, the fact that the author of the document was (or is) of high seniority in the agency is not to be taken into account (see these Guidelines at [6.235]).

- b) the document contains third party personal information
- c) release of the document would cause stress to the third party
- d) no public purpose would be achieved through release.<sup>127</sup>

6.138 As discussed in the IC review decision of *'FG' and National Archives of Australia* [2015] AICmr 26, other factors considered to be relevant include:

- the nature, age and current relevance of the information
- any detriment that disclosure may cause to the person to whom the information relates
- any opposition to disclosure expressed or likely to be held by that person
- the circumstances of an agency's or minister's collection and use of the information
- the fact that the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act
- any submission an FOI applicant chooses to make in support of their request as to their reasons for seeking access and their intended or likely use or dissemination of the information and
- whether disclosure of the information might advance the public interest in government transparency and integrity.<sup>128</sup>

6.139 The leading IC review decision on s 47F is *'BA' and Merit Protection Commissioner*<sup>129</sup> in which the Information Commissioner explained that the object of the FOI Act to promote transparency in government processes and activities needs to be balanced with the purpose of s 47F to protect personal privacy, although care is needed to ensure that an FOI applicant is not expected to explain their reason for access contrary to s 11(2).<sup>130</sup>

6.140 Disclosure that supports effective oversight of government expenditure may not be unreasonable, particularly if the person to whom the personal information relates may have reasonably expected that the information would be open to public scrutiny in future.<sup>131</sup> It may not be unreasonable to disclose work related travel expense claims for a named government employee if this would advance the public interest in government transparency and integrity around the use of Australian Government resources.<sup>132</sup> On the other hand, disclosure may be unreasonable if the person provided the information to the Australian Government on the understanding that it would not be made publicly available, and there are no other statutory disclosure frameworks that would require release of the information.<sup>133</sup>

6.141 Deciding whether disclosure of personal information would be unreasonable should not be uniformly approached on the basis that the disclosure will be to the 'world at large'.<sup>134</sup>

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<sup>127</sup> *Re McCallin and Department of Immigration* [2008] AATA 477.

<sup>128</sup> See *'FG' and National Archives of Australia* [2015] AICmr 26 [47]–[48].

<sup>129</sup> *'BA' and Merit Protection Commissioner* [2014] AICmr 9 [64].

<sup>130</sup> *'BA' and Merit Protection Commissioner* [2014] AICmr 9 [64], citing M Paterson, *Freedom of Information and Privacy in Australia* (LexisNexis Butterworths, 2005) 241.

<sup>131</sup> *'AK' and Department of Finance and Deregulation* [2013] AICmr 64 [18]–[24].

<sup>132</sup> *Rex Patrick and Department of Defence* [2020] AICmr 31.

<sup>133</sup> *'Z' and Australian Securities and Investments Commission* [2013] AICmr 43 [11].

<sup>134</sup> See *'FG' and National Archives of Australia* [2015] AICmr 26 [19]–[44].

Examples of situations in which FOI applicants assert an interest in obtaining access that would not be available generally to any member of the public include:

- an FOI applicant who is seeking access to correspondence they sent to an agency or minister that contains the personal information of other people – that is, personal information provided by the FOI applicant to the agency
- an FOI applicant who is seeking access to the medical records of a deceased parent to learn if the parent had a genetic disorder that may have been transmitted to the FOI applicant
- an FOI applicant who is seeking access to their own personal information, which is intertwined with the personal information of other people who may be known to the FOI applicant (such as family members, or co-signees of a letter or application)
- a professional who is seeking access to records that include client information, and who gives a professional undertaking not to disclose the information to others (for example, a doctor who seeks patient consultation records in connection with a Medicare audit, or a lawyer who seeks case records of a client to whom legal advice is being provided)
- a ‘care leaver’ (meaning a child who was brought up in care as a state ward, foster child or in an orphanage) who is seeking access to third party personal information.<sup>135</sup>

6.142 It would be problematic in each of these instances for an agency or minister to grant access under the FOI Act if it proceeded from the premise that ‘if one person can be granted access to a particular document under the FOI Act, any other person who cares to request it and to pay the relevant fees, can be granted access to it’.<sup>136</sup> In instances such as these, an agency or minister can make a practical and risk-based assessment about whether to provide access to a particular FOI applicant.

## Joint personal information

6.143 Documents often contain personal information about more than one individual. Where possible, personal information should be dealt with separately under the conditional exemption. An individual’s personal information may, however, be intertwined with another person’s personal information, for example, information provided for a joint loan application, a medical report or doctor’s opinion, or information about a relationship provided to Services Australia or the Child Support Agency.

6.144 Intertwined personal information should be separated where possible, without diminishing or impairing the quality or completeness of the FOI applicant’s personal information.<sup>137</sup> Where it is not possible to separate an FOI applicant’s personal information from a third party’s personal information, the conditional exemption may be claimed if it is unreasonable to release the third party’s personal information.

6.145 Whether it is unreasonable to release personal information may depend on the relationship between the individuals. Decisions about the release of joint personal information should be made after consultation with the third party where such consultation is reasonably practical. For more information about consultation see [6.156] – [6.163]. below.

<sup>135</sup> *‘FG’ and National Archives of Australia* [2015] AICmr 26 [38].

<sup>136</sup> *Re Callejo and Department of Immigration and Citizenship* [2010] AATA 244[101]; (2010) 51 AAR 308 per Forgie DP.

<sup>137</sup> *Re Anderson and Australian Federal Police* [1986] AATA 79 and *Re McKinnon and Department of Immigration and Ethnic Affairs* [1995] AATA 364.

## Personal information about agency employees

- 6.146 Documents held by agencies or ministers often include personal information about public servants. For example, a document may include a public servant’s name, work email address, position or title, contact details, decisions or opinions.
- 6.147 In some circumstances, an individual public servant will not be reasonably identifiable from their first name alone (that is, without their family name).<sup>138</sup> In such circumstances the first name will not be personal information for the purposes of s 47F. However in some circumstances the first name of a public servant, without their surname, would reasonably identify them and therefore will be personal information for the purposes of s 47F.<sup>139</sup> Relevant factors for decision makers to consider when deciding whether the first names of staff, without their family names, would make an individual reasonably identifiable may include the particular context in which the name appears in the document, the size of the agency, the context in which the document was created and the uniqueness of the first name.
- 6.148 Previous IC review decisions, and previous versions of these Guidelines, expressed the view that where a public servant’s personal information is included in a document because of their usual duties or responsibilities, it will not be unreasonable to disclose it unless special circumstances exist. Further, previous versions of the FOI Guidelines considered that agencies and ministers should start from the position that including the full names of staff in documents released in response to FOI requests increases transparency and accountability of government and is consistent with the objects of the FOI Act. The OAI considered these issues in a position paper titled *‘Disclosure of public servant details in response to a freedom of information request’* published in August 2020.<sup>140</sup> This paper noted the evolution of the digital environment and the new risks for both public servants and citizens but confirmed the Information Commissioner’s view that agencies and ministers should start from the position that including the full names of staff in documents released in response to FOI requests increases transparency and accountability of government and is consistent with the objects of the FOI Act.
- 6.149 This position was considered but not accepted by Deputy President Forgie in *Warren; Chief Executive Officer, Services Australia and (Freedom of information)*<sup>141</sup> (*Warren*). In *Warren*, Deputy President Forgie accepted that the words of s 47F should be the starting point of any consideration, rather than any presumption that disclosing the full names of staff in documents increases transparency and promotes the objects of the FOI Act, or that absent special circumstances a public servant’s name should generally be disclosed. Deputy President Forgie said:

... It is important to understand the exemptions in the context of the FOI Act as enacted. Its objects, as set out in ss 3 and 3A, make no reference to accountability. Apart from objects associated directly with accessibility to information held by the Commonwealth as a public resource, the objects focus on the way in which accessibility promotes Australia’s representative democracy. In particular, they focus on increasing public participation in “*Government processes*” and on increasing scrutiny, discussion, comment and review of “*Government activities*”. The word “*accountability*” tends to blur

<sup>138</sup> *‘ADM’ and Services Australia (Freedom of information)* [2023] AICmr 38 [26].

<sup>139</sup> *AIJ’ and Services Australia (Freedom of information)* [2024] AICmr 55 [77].

<sup>140</sup> Available on the OAI website - [Disclosure of public servant details in response to a freedom of information request | OAI](#).

<sup>141</sup> [2020] AATA 4557.

that focus and take scrutiny to the level of scrutiny of individual APS employees and contractors. The FOI Act's objectives do not establish a separate merits review process of the activities of individuals engaged in the Government's processes or activities.

There may be cases in which disclosure of individual's names may increase scrutiny, discussion or comment of Government processes or activities. In others, the names of those responsible for the processes or activities may be neither here nor there in their scrutiny.<sup>142</sup>

- 6.150 Following this decision, IC review decisions from 2021 have adopted the considerations identified by DP Forgie in *Warren*.<sup>143</sup>
- 6.151 Concerns about the work health and safety impacts of disclosing public servants' personal information may be more appropriately addressed under the conditional exemption in s 47E(c) rather than under s 47F (see [6.109]).
- 6.152 When considering whether it would be unreasonable to disclose the names of public servants, there is no basis under the FOI Act for agencies to start from the position that the classification level of a departmental officer determines whether their name would be unreasonable to disclose. In seeking to claim the exemption, an agency needs to consider the factors identified above at [6.135] – [6.138] in the context of the document, rather than start from the assumption that such information is exempt.<sup>144</sup> A document may however be exempt for another reason, for example, where disclosure would, or could reasonably be expected to, endanger the life or physical safety of any person (s 37(1)(c)).

## Information relating to APS recruitment processes

- 6.153 Following Australian Public Service (APS) recruitment processes, an agency may receive an FOI request from an unsuccessful candidate seeking information about the person selected for the position or about the other applicants.
- 6.154 The IC review decision in *'BA' and Merit Protection Commissioner*<sup>145</sup> offers some guiding principles for assessing an FOI request seeking access to recruitment documentation. However, an agency must consider each FOI request on its merits. A separate decision is required in each case as to whether disclosure of personal information about candidates from an APS recruitment process would be unreasonable.<sup>146</sup>
- 6.155 The Public Service Commissioner has issued guidelines to assist agencies understand how s 103 of the *Public Service Regulations 2023* affects their ability to use and disclose the personal information of staff within their agencies and with other APS agencies. Agency compliance with these guidelines will be a relevant consideration in deciding whether

<sup>142</sup> *Warren; Chief Executive Officer, Services Australia and (Freedom of information)* [2020] AATA 4557 [115].

<sup>143</sup> See for example, *'YO' and Department of Home Affairs (Freedom of Information)* [2021] AICmr 67; *YQ' and Airservices Australia (Freedom of Information)* [2021] AICmr 69; *Lisa Cox and Department of Agriculture, Water and the Environment (Freedom of information)* [2021] AICmr 72; *Ben Butler and Australian Prudential Regulation Authority (Freedom of information)* [2022] AICmr 34; *ABK' and Commonwealth Ombudsman* [2022] AICmr 44; *'ADM' and Services Australia (Freedom of information)* [2023] AICmr 38.

<sup>144</sup> *Maurice Blackburn Lawyers and Department of Immigration and Border Protection* [2015] AICmr 85 [3].

<sup>145</sup> *'BA' and Merit Protection Commissioner* [2014] AICmr 9 [2], [89].

<sup>146</sup> *'BA' and Merit Protection Commissioner* [2014] AICmr 9 [66].



disclosure of personal information relating to a public official would be unreasonable under s 47F and contrary to the public interest.<sup>147</sup>

## Consultation

- 6.156 Where a document includes personal information relating to a person who is not the FOI applicant, an agency or minister should give that individual (the third party) a reasonable opportunity to contend that the document is exempt from disclosure before making a decision to give access (s 27A). If the third party is deceased, their legal representative should be given this opportunity.
- 6.157 Such consultation should occur where it appears to the agency or minister that the third party might reasonably wish to make a submission that the document is exempt from disclosure having regard to:
- the extent to which the information is well known
  - whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the information
  - whether the information is publicly available, and
  - any other relevant matters (s 27A(2)).
- 6.158 Section 27A(3) provides that an agency or minister must not decide to give access to a document without giving the person concerned a reasonable opportunity to make submissions in support of an exemption contention. It follows that if the decision maker decides, after reviewing the document, that it is exempt there may be no need to consult a third party. Conversely in *Dreyfus and Attorney-General (Commonwealth of Australia) (Freedom of information)* the AAT found that where an entry in a diary disclosed the name of a person who was scheduled to meet the Attorney-General and nothing more, in the ordinary course disclosure of that fact would not involve the unreasonable disclosure of personal information, and so there would be no basis upon which people mentioned in the diary might reasonably wish to make an exemption contention.<sup>148</sup>
- 6.159 Agencies and ministers should generally start from the position that a third party may reasonably wish to make a submission. This is because the third party may bring to the agency or minister's attention sensitivities that may not have been otherwise apparent.
- 6.160 Consultation may not be reasonably practicable in all circumstances. Whether it is reasonably practicable to consult a third party will depend on all the circumstances including the time limits for processing the FOI request (s 27A(4)). For example, it may not be reasonably practicable if the agency cannot locate the third party in a timely way.<sup>149</sup> Where it

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<sup>147</sup> See 'Circular 2016/2: Use and disclosure of employee information' on the Australian Public Service Commissioner website [www.apsc.gov.au](http://www.apsc.gov.au).

<sup>148</sup> *Dreyfus and Attorney-General (Commonwealth of Australia) (Freedom of information)* [2015] AATA 995 [37] and [40]. The AAT's decision was upheld by the Federal Court in *Attorney-General v Honourable Mark Dreyfus* [2016] FCAFC 119.

<sup>149</sup> See for example, *Ray Brown and Department of Immigration and Border Protection* [2014] AICmr 146 in which the Acting Information Commissioner found that it would not be reasonably practicable for the Department to consult (for the purposes of s 27A(4)) 526 staff members because of the time and resources involved and the type of personal information contained in the document (although ultimately the Acting Information Commissioner decided that the Department could decide to give access to the document without providing staff a reasonable opportunity to make submissions under s 27A). In *Stefania Maurizi and Department of Foreign Affairs and Trade (Freedom of information)* [2021] AICmr 31 [59] the Information Commissioner found that consultation would not be reasonably practicable to undertake because of the unique personal

is not reasonably practicable to consult a third party, agencies and ministers should consider whether, in the circumstances, it is likely the third party would oppose disclosure of their personal information. The relevant circumstances may include the nature of the personal information in the document, whether the personal information has already been disclosed<sup>150</sup> and whether the third party is known to be associated with the information in the document.<sup>151</sup>

- 6.161 Where it appears that consultation will be required with a large number of individuals, an agency should carefully consider whether consultation is reasonably practicable before deciding that consultation is required. This is particularly the case where an agency is relying on such consultation to decide that a practical refusal reason exists (s 24) and thereby to refuse the FOI request. For example, it is impractical, and therefore unnecessary, for an agency to consult 600 individuals before making a decision whether to give access to an organisational chart.<sup>152</sup>
- 6.162 Where there is a need to consult third parties under s 27A, the timeframe for making a decision in s 15(5)(b) is extended by 30 days (s 15(6)). Agencies and minister should identify as soon as possible within the initial 30-day decision-making period whether there is a need for consultation.
- 6.163 To assist the third party make a submission, it may be necessary, where practical, to give them a copy of the document. This can be done by providing an edited copy of the document, for example, by deleting any material that may be exempt under another provision. Agencies and ministers should also take care not to breach their obligations under the APPs in the Privacy Act during consultation, for example, by disclosing the FOI applicant's personal information to a third party, unless the FOI applicant has consented or another exception under the APPs applies.<sup>153</sup>

## Submissions

- 6.164 Where consultation occurs, a third party consulted under s 27A should be asked whether they object to disclosure and invited to make submissions about whether:
- the conditional exemption should apply and
  - on balance, access would be contrary to the public interest.
- 6.165 An affected third party who is consulted under s 27A may contend that s 47F applies to the requested document. Where the third party contends that exemptions other than s 47F apply, it is open to the agency or minister to rely on those exemptions in its decision.<sup>154</sup>

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circumstances of the third party and the fact that consultation may have revealed confidential discussions between Australia and foreign governments.

<sup>150</sup> *Ben Butler and the Australian Securities and Investments Commission (No. 2) (Freedom of Information)* [2023] AICmr 56 [104].

<sup>151</sup> For example in *ADW' and Department of Health and Aged Care (Freedom of information)* [2023] AICmr 59 [47] the Acting Freedom of Information Commissioner considered that disclosure of health information, which is sensitive information for the purposes of s 6 of the Privacy Act, would be unreasonable in circumstances in which the relevant individuals had not been consulted. Similarly, in *'ADV' and Department of Home Affairs (Freedom of information)* [2023] AICmr 58 [88] the Acting Information Commissioner considered that a third party would likely oppose disclosure of sensitive personal information in circumstances in which they had not been consulted.

<sup>152</sup> As the Acting Information Commissioner found in *Maria Jockel and Department of Immigration and Border Protection* [2015] AICmr 70 [36].

<sup>153</sup> For more information about an agency's obligations regarding the disclosure of personal information, see the Guidelines to the Australian Privacy Principles at [www.oaic.gov.au](http://www.oaic.gov.au).

<sup>154</sup> See *Australian Broadcasting Corporation and Civil Aviation Safety Authority* [2015] AICmr 21 [5].

However, should the agency or minister decide to grant access to the documents, the third party does not have a right to seek review of that decision on grounds other than those specified in s 27A (that is, the decision that s 47F does not apply).

- 6.166 The third party should be asked to provide reasons and evidence to support their submission. The third party's submissions should address their individual circumstances – generalised submissions or assertions of a theoretical nature will make it difficult for an agency or minister to accept that s 47F applies to the document.<sup>155</sup>
- 6.167 The letter to the third party should also include information about the obligation on agencies and ministers to provide the public with access to a document that has been released to an FOI applicant (on the agency or minister's disclosure log), subject to certain exceptions such as personal or business information that it would be unreasonable to publish (s 11C).
- 6.168 An agency or minister must have regard to any submissions made by the third party before deciding whether to give access to the document (ss 27A(3) and 27A(4)). However, the third party does not have the right to veto access and agencies and ministers should take care to ensure the third party is not under such a misapprehension. The statement of reasons should clearly set out the weight applied to submissions and the reasons for that weight.
- 6.169 When an agency or minister decides to give the FOI applicant access to documents after a third party has made submissions, they must give the third party written notice of the decision (s 27A(5)). Access to a document must not be given to the FOI applicant until the third party's opportunities for review have run out, or if a review was undertaken, the decision still stands (s 27A(6)).
- 6.170 General information about consultation is provided in Part 3 of these Guidelines. Part 3 provides guidance about extended timeframes, notices of decision, review rights and when access to documents may be provided.

## Access given to qualified person

- 6.171 An agency or minister may provide a qualified person with access to a document that would otherwise be provided to an FOI applicant where:
- the personal information was provided by a qualified person acting in their capacity as a qualified person (s 47F(4)(a)) and
  - it appears to the agency or minister that disclosing the information to the FOI applicant might be detrimental to their physical or mental health, or wellbeing (s 47F(4)(b)).
- 6.172 A broad approach should be taken in considering an FOI applicant's health or wellbeing. The possibility of detriment must appear to be real or tangible.<sup>156</sup>
- 6.173 Where access is to be provided by a qualified person, the FOI applicant is to nominate a qualified person (s 47F(5)(b)). The nominated qualified person must carry on the same occupation as the qualified person who provided the document (s 47F(5)(a)).

<sup>155</sup> 'ADM' and Services Australia (Freedom of information) [2023] AICmr 38 [46]–[47].

<sup>156</sup> *Re K and Director-General of Social Security* [1984] AATA 252. See 'PT' and Aged Care Quality and Safety Commission (Freedom of information) [2019] AICmr 3 [26] in which the Information Commissioner decided that access to certain information was to be given to a qualified person because evidence was led that a previous releases of similar information had a negative effect on the FOI applicant's well-being.

6.174 A qualified person means a person who carries on (and is entitled to carry on) an occupation that involves providing care for a person’s physical or mental health or wellbeing including:

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

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

6.176 APP 12.6 of the Privacy Act allows agencies to give an individual access to their personal information through a mutually agreed intermediary.<sup>157</sup> This provision is more flexible than the equivalent provision under s 47F of the FOI Act. For example, an intermediary under APP 12 does not have to carry on the same occupation as the person who provided the information. Where giving access in accordance with APP 12.6 might more satisfactorily meet an FOI applicant’s needs, an agency or minister may wish to suggest they request the information they seek under APP 12.6

## Documents disclosing business information (s 47G)

6.177 Section 47G conditionally exempts documents where disclosure would disclose information concerning a person in respect of his or her business or professional affairs, or concerning the business, commercial or financial affairs of an organisation or undertaking (business information), where the disclosure of the information:

- would, or could reasonably be expected to, unreasonably affect the person adversely in respect of his or her lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs (s 47G(1)(a)) or
- could reasonably be expected to prejudice the future supply of information to the Commonwealth or an agency for the purpose of the administration of a law of the Commonwealth or of a Territory or the administration of matters administered by an agency (s 47G(1)(b)).

6.178 If the business information concerns a person, organisation or undertaking other than the FOI applicant, the decision maker may be required to consult that third party (see [6.201] – [6.207] below).

## Exemption does not apply in certain circumstances

6.179 The conditional exemption does not apply if the document contains only business information about the FOI applicant (s 47G(3)). Where the business information concerns both the FOI applicant and another business, the provision may operate to conditionally

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<sup>157</sup> For more information, see Chapter 12 of the APP guidelines at [www.oaic.gov.au](http://www.oaic.gov.au).

exempt the FOI applicant's information, but only if the FOI applicant's business information cannot be separated from the information of the other business or undertaking.

6.180 This conditional exemption does not apply to trade secrets or other information to which s 47 applies (s 47G(2)). In other words, a decision maker should consider an exemption under s 47 for documents containing trade secrets or other information to which s 47 applies if the circumstances call for it. This is a limited exception to the normal rule that more than one exemption may apply to the same information (see s 32).

## Elements of the exemption

6.181 The operation of the business information conditional exemption depends on the effect of disclosure rather than the precise nature of the information itself. Nevertheless, the information in question must have some relevance to a person in respect of his or her business or professional affairs or to the business, commercial or financial affairs of an organisation or undertaking (s 47G(1)(a)).

6.182 For the purposes of this conditional exemption, an undertaking includes an undertaking carried on by, or by an authority of, the Commonwealth, Norfolk Island or a state or territory government (s 47G(4)). However, it has been held that the business affairs exemption is not available to a person within a government agency or undertaking, nor to the agency or undertaking itself.<sup>158</sup> 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.<sup>159</sup> As an alternative, one of the specific exemptions for agencies in respect of particular documents in Part II of Schedule 2 may be available.

## Could reasonably be expected

6.183 This term is explained at [6.13] – [6.16] above. As in other situations, it refers to an expectation that is based on reason. Mere assertion or speculative possibility is not enough.<sup>160</sup>

## Unreasonable adverse effect of disclosure

6.184 The presence of 'unreasonably' in s 47G(1) implies a need to balance public and private interests. The public interest, or some aspect of it, will be one of the factors in determining whether the adverse effect of disclosure on a person in respect of his or her business affairs is unreasonable.<sup>161</sup> A decision maker must balance the public and private interest factors to decide whether disclosure is unreasonable for the purposes of s 47G(1)(a), but this does not amount to the public interest test in s 11A(5) which follows later in the decision process. It is possible that the decision maker may need to consider one or more factors twice, once to determine if a projected effect is unreasonable and again in assessing the public interest test. Where disclosure would be unreasonable, the decision maker will need to apply the

<sup>158</sup> *Harris v Australian Broadcasting Corporation* [1983] FCA 242; (1983) 78 FLR 236.

<sup>159</sup> In *Secretary, Department of Employment, Workplace Relations and Small Business v Staff Development and Training Centre Pty Ltd* [2001] FCA 1375; (2001) 114 FCR 301 the Full Federal Court seemed to accept (without referring to *Harris*) that a government agency could claim this conditional exemption, although it did not decide the case on this point. The question therefore remains uncertain.

<sup>160</sup> *Re Actors' Equity Association (Aust) and Australian Broadcasting Tribunal (No 2)* [1985] AATA 69 [25].

<sup>161</sup> As explained by Forgie DP in *Bell and Secretary, Department of Health (Freedom of Information)* [2015] AATA 494 [48].

public interest test in s 11A(5). This is inherent in the structure of the business information exemption.

- 6.185 ‘Would or could reasonably be expected’ to have a particular impact demands the application of an objective test. The test of reasonableness applies not to the claim of harm but to the objective assessment of the expected adverse effect. For example, the disclosure of information that a business’ activities pose a threat to public safety, damage the natural environment, or that a service provider has made false claims for government money, may have a substantial adverse effect on that business but may not be unreasonable in the circumstances to disclose. Similarly, it would not be unreasonable to disclose information about a business that revealed serious criminality.<sup>162</sup> These considerations require weighing the public interest against a private interest – preserving the profitability of a business. However at this stage it bears only on the threshold question of whether disclosure would be unreasonable.<sup>163</sup>
- 6.186 Section 47G(1)(a) concerns documents that relate to the *lawful* business or professional affairs of an individual, or the lawful business, commercial or financial affairs of an organisation or undertaking. To find that s 47G(1)(a) applies, a decision maker needs to be satisfied that if the document was disclosed there would be an unreasonable adverse effect, on the business or professional affairs of an individual, or on the lawful business, commercial or financial affairs of an organisation or undertaking.
- 6.187 These criteria require more than simply asserting that a third party’s business affairs would be adversely affected by disclosure. The effect needs to be *unreasonable*. This requires a balancing of interests, including the private interests of the business and other interests such as the public interest. Where other interests, for example environmental interests, outweigh the private interest of the business this conditional exemption cannot apply.<sup>164</sup> Likewise, where the documents reveal unlawful business activities the s 47G(1)(a) conditional exemption cannot apply.
- 6.188 The AAT has said, for example, that there is a strong public interest in knowing whether public money was accounted for at the appropriate time and in the manner required, and in ensuring that public programs are properly administered.<sup>165</sup>
- 6.189 The AAT has distinguished between ‘truly government documents’ and other business information collected under statutory authority. The first category includes documents that have been created by government or that form part of a flow of correspondence and other documents between government and business. The AAT concluded that such documents incline more to arguments favouring scrutiny of government activities when considering

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<sup>162</sup> *Searle Australia Pty Ltd v Public Interest Advocacy Centre and Department of Community Services and Health* [1992] FCA 241; (1992) 108 ALR 163; 36 FCR 111.

<sup>163</sup> In relation to the test of reasonableness, see ‘E’ and *National Offshore Petroleum Safety and Environmental Management Authority* [2012] AICmr 3.

<sup>164</sup> See Deputy President Forgie’s discussions in *Bell and Secretary, Department of Health (Freedom of information)* [2015] AATA 494 particularly at [44]. The Information Commissioner has discussed and followed the *Bell* approach in a number of IC review decisions, for example *Linton Besser and Department of Employment* [2015] AICmr 67; ‘VO’ and *Northern Australia Infrastructure Facility (Freedom of information)* [2020] AICmr 47; *Boston Consulting Group and Australian National University (Freedom of information) (No 2)* [2022] AICmr 16.

<sup>165</sup> As explained by Forgie DP in *Bell and Secretary, Department of Health (Freedom of information)* [2015] AATA 494 [68] and as discussed by the Information Commissioner in *Linton Besser and Department of Employment* [2015] AICmr 67.

whether disclosure would be unreasonable.<sup>166</sup> By implication, the conditional exemption is more likely to protect documents obtained from third party businesses.

- 6.190 Where disclosure would result in the release of facts already in the public domain, that disclosure would not amount to an unreasonable adverse effect on business affairs.<sup>167</sup>

## Business or professional affairs

- 6.191 The use of the term ‘business or professional affairs’ distinguishes an individual’s personal or private affairs and an organisation’s internal affairs. The term ‘business affairs’ has been interpreted to mean ‘the totality of the money-making affairs of an organisation or undertaking as distinct from its private or internal affairs’.<sup>168</sup>
- 6.192 The internal affairs of an organisation include its governance processes and the processes by which organisations are directed and controlled. For example, documents relating to member voting processes are not exempt under s 47G, because member voting forms part of the governance affairs of an organisation.<sup>169</sup>
- 6.193 In the absence of a definition in the FOI Act, ‘professional’ bears its usual meaning. For FOI purposes, ‘profession’ is not static and may extend beyond the occupations that have traditionally been recognised as professions, reflecting changes in community acceptance of these matters.<sup>170</sup> For example, the Information Commissioner accepts that medical and scientific researchers have professional affairs.<sup>171</sup> The word ‘profession’ is clearly intended to cover the work activities of a person who is admitted to a recognised profession and who ordinarily offers professional services to the public for a fee. In addition, s 47G(5) makes it clear that the conditional exemption does not apply merely because the information refers to a person’s professional status.
- 6.194 Any extension of the normal meaning of ‘profession’ will require evidence of community acceptance that the occupation in question should be regarded as a profession. For example, the absence of any evidence indicating, at that time, community acceptance of the audit activities of officers of the Australian Taxation Office as constituting ‘professional affairs’ led the AAT to refuse to extend the ordinary meaning of the expression in that case.<sup>172</sup>

## Organisation or undertaking

- 6.195 The term ‘organisation or undertaking’ should be given a broad application, including Commonwealth, Norfolk Island or State undertakings (s 47G(4)). An organisation or undertaking need not be a legal person. However, a natural individual cannot be an organisation but may be the proprietor of an undertaking, for example, when the individual

<sup>166</sup> *Re Actors’ Equity Association (Aust) and Australian Broadcasting Tribunal (No 2)* [1985] AATA 69 [31].

<sup>167</sup> *Re Daws and Department of Agriculture Fisheries and Forestry* [2008] AATA 1075 [22]. See also *DPP Pharmaceuticals Pty Ltd and IP Australia (Freedom of information)* [2020] AICmr 29 [34] and *Boston Consulting Group and Australian National University (Freedom of information) (No 2)* [2022] AICmr 16 [34]–[40].

<sup>168</sup> *Re Mangan and The Treasury* [2005] AATA 898 citing *Cockcroft and Attorney-General’s Department and Australian Iron and Steel Pty Ltd (party joined)* (1985) 12 ALD 462.

<sup>169</sup> See ‘GD’ and *Department of the Prime Minister and Cabinet* [2015] AICmr 46 [56].

<sup>170</sup> *Re Fogarty and Chief Executive Officer, Cultural Facilities Corporation* [2005] ACTAAT 14.

<sup>171</sup> In ‘GO’ and *National Health and Medical Research Council* [2015] AICmr 56 [33] the Information Commissioner said that a ‘researcher’s professional affairs would usually involve working on more than a single research project and that his or her research would contribute to a body of knowledge over many years’.

<sup>172</sup> *Re Dyki and Commissioner of Taxation* (1990) 22 ALD 124; (1990) 12 AAR 554.

is a sole trader. The exemption may apply to information about an individual who is a sole trader to the extent that the information concerns the undertaking's business, commercial or financial affairs.

## Prejudice future supply of information

6.196 A document that discloses the kind of information described at [6.177] above will be conditionally exempt if the disclosure could reasonably be expected to prejudice the future supply of information to the Commonwealth or an agency for the purpose of the administration of a law of the Commonwealth or of a Territory or the administration of matters administered by an agency (s 47G(1)(b)).

6.197 This limb of the conditional exemption comprises 2 parts:

- a reasonable expectation of a reduction in the quantity or quality of business affairs information to the government
- the reduction will prejudice the operations of the agency.<sup>173</sup>

6.198 There must be a reasonable likelihood that disclosure will result in a reduction in either the quantity or quality of business information flowing to the government.<sup>174</sup> In some cases, disclosing the identity of the person providing the business information may be sufficient to prejudice the future supply of information.<sup>175</sup> Disclosure of the person's identity may also be conditionally exempt under s 47F (personal privacy). In these cases, consideration should be given to whether the information may be disclosed without also disclosing the identity of the person supplying the information.

6.199 Where the business information in question can be obtained compulsorily, or is required for some benefit or grant, no claim of prejudice can be made. No prejudice will occur if the information at issue is routine or administrative (that is, generated as a matter of practice).<sup>176</sup>

6.200 The agency will usually be best placed to identify, and be concerned about, the circumstances where the disclosure of documents might reasonably be expected to prejudice the future supply of information to it.<sup>177</sup>

## Consultation

6.201 Where a document includes business information relating to a person, organisation or undertaking other than the FOI applicant, an agency or minister should give that individual or organisation (the third party) a reasonable opportunity to make a submission that the document is exempt from disclosure under s 47 (trade secrets) or conditionally exempt under s 47G, and that disclosure would be contrary to the public interest, before making a decision to give access (s 27).

<sup>173</sup> *Re Angel and the Department of the Arts, Heritage and the Environment; HC Sleigh Resources Ltd and Tasmania* [1985] AATA 314.

<sup>174</sup> *Re Maher and the Attorney-General's Department* [1986] AATA 16, *Re Telstra and Australian Competition and Consumer Commission* [2000] AATA 71 [15].

<sup>175</sup> *Re Caruth and Department of Health, Housing, Local Government and Community Services* [1993] ATA 187 [17].

<sup>176</sup> *Re Kobelke and Minister for Planning* [1994] WAICmr 5.

<sup>177</sup> See, for example 'HZ' and *Australian Securities and Investments Commission* [2016] AICmr 7 [34]; *Wellard Rural Exports Pty Ltd and Department of Agriculture* [2014] AICmr 131 [43].



6.202 For the purposes of consulting a third party ‘business information’ means:

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

6.203 Because the requirement to consult extends to a third party who may wish to contend that a document is exempt under s 47 as well as conditionally exempt under s 47G, business information includes information about trade secrets and any business information the value of which would be destroyed or diminished if disclosed. See Part 5 of these Guidelines for further guidance on the application of s 47.

6.204 Consultation should occur where:

- a) it is reasonably practicable. This will depend on all the circumstances, including the time limits for processing the FOI request (s 27(5)). For example, it may not be reasonably practicable if the agency or minister cannot locate the third party in a timely and effective way.<sup>178</sup>
- b) it appears to the agency or minister that the third party might reasonably wish to make a submission that the document is exempt from disclosure under either s 47 or s 47G having regard to:
  - the extent to which the information is well known
  - whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the information
  - whether the information is publicly available, and
  - any other relevant matters (s 27(3)).

6.205 Agencies and ministers should generally start from the position that a third party might reasonably wish to make an exemption contention. This is because the third party may bring to the agency or minister’s attention sensitivities that may not otherwise have been apparent.

6.206 Where there is a need to consult third parties under s 27, the timeframe for making a decision is extended by 30 days (s 15(6)). Decision makers should identify as soon as possible within the initial 30-day decision-making period whether there is a need for consultation. Where consultation is undertaken, the agency or minister must inform the FOI applicant as soon as practicable that the processing period has been extended (s 15(6)(b)).

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

## Submissions

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

- whether the conditional exemption apply

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<sup>178</sup> For discussion of the relevant principles when there are a large number of third parties see *PL’ and Department of Home Affairs (Freedom of information)* [2018] AICmr 67 [34]–[40]. See also *Christis Tombazos and Australian Research Council (Freedom of information)* [2023] AICmr 14 [45].

- whether, on balance, access would be contrary to the public interest.

- 6.209 An affected third party who is consulted under s 27 may contend that exemptions under ss 47 or 47G apply. Where the third party contends that exemptions other than ss 47 or 47G apply, it is open to an agency or minister to rely on those exemptions in its decision.<sup>179</sup> However, should the agency or minister decide to grant access to the documents, the third party does not have a right to seek review of that decision on grounds other than those specified in s 27.
- 6.210 The third party should be asked to provide reasons and evidence for their exemption contention. To assist them to make an exemption contention it may be necessary to provide a copy of the document. This can be done by providing an edited copy of the document, for example, by deleting any material that may be exempt under another provision. An agency or minister should take care not to breach any obligations under the Privacy Act during consultation, for example, by identifying the FOI applicant without their consent. If an edited copy of the document has been provided for consultation purposes, that copy should be clearly marked where material has been edited, and it should state that the copy has been provided for the purpose of consultation. The copy may be annotated or watermarked to indicate it is a consultation copy.
- 6.211 An agency or minister must have regard to any submissions made before deciding whether to give access to the document (ss 27(4) and 27(5)). The third party does not, however, have the right to veto access and agencies and ministers should take care that the third party is not under such a misapprehension. The statement of reasons will need to demonstrate the weight attributed to these submissions and their subsequent impact on the final decision.
- 6.212 Where an agency or minister decides to give the FOI applicant access to documents after a third party has made an exemption contention, they must give the third party written notice (s 27(6)). Access to a document must not be given to the FOI applicant until the third party's opportunities for review have run out, or if review did occur, the decision still stands (s 27(7)).

## Research documents (s 47H)

- 6.213 Section 47H conditionally exempts material where:
- it contains information relating to research that is being, or is to be, undertaken by an officer of an agency specified in Schedule 4 of the Act (that is, the Commonwealth Scientific and Industrial Research Organisation and the Australian National University) and
  - disclosure of the information before the completion of the research would be likely to unreasonably to expose the agency or officer to disadvantage.
- 6.214 There are no AAT or court decisions on this provision.

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<sup>179</sup> See *Australian Broadcasting Corporation and Civil Aviation Safety Authority* [2015] AICmr 21 [5] and s 27(1)(b) of the FOI Act.

## Documents affecting the Australian economy (s 47J)

6.215 Under s 47J(1) a document is conditionally exempt if its disclosure under the FOI Act would, or could reasonably be expected to, have a substantial adverse effect on Australia's economy by:

- a) influencing a decision or action of a person or entity or
- b) giving a person (or class of persons) an undue benefit or detriment, in relation to business carried on by the person (or class), by providing premature knowledge of proposed or possible action or inaction of a person or entity.

6.216 The economy conditional exemption reflects the need for the government to be able to maintain the confidentiality of certain information if it is to carry out its economic policy responsibilities, including the development and implementation of economic policy in a timely and effective manner.

6.217 Section 47J(2) makes it clear that a 'substantial adverse effect on Australia's economy' includes a substantial adverse effect on a particular segment of the economy, or the economy of a particular region of Australia (s 47J(2)). For example, the disclosure of the results of information regarding the impacts of economic conditions or policies on particular sectors of the market may distort investment decisions within that sector and, in turn, adversely affect the Government's ability to develop and implement economic policies more generally.

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

6.219 The types of documents to which s 47J(1) applies includes documents containing matters related to any of the following:

- currency or exchange rates
- interest rates
- taxes, including duties of customs or of excise
- the regulation or supervision of banking, insurance and other financial institutions
- proposals for expenditure
- foreign investment in Australia
- borrowings by the Commonwealth, a State or an authority of the Commonwealth, Norfolk Island or of a State (s 47J(3)).

6.220 The terms 'reasonably be expected' and 'substantial adverse effect' are explained in greater detail at [6.13] – [6.16] and [6.17] – [6.19] above. There must be more than an assumption, allegation or possibility that the adverse effect would occur if the document were released.

6.221 A decision maker must focus on the expected effect on Australia's economy if a document is disclosed. The types of circumstances that would, or could reasonably be expected to, lead to a substantial adverse effect could include:

- premature disclosure of information could compromise the Government's ability to obtain access to information

- 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.<sup>180</sup>

## The public interest test

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

6.223 To decide whether giving access to a conditionally exempt document would, on balance, be contrary to the public interest under s 11A(5), the factors set out in s 11B must be considered. Some of these factors must be taken into account (where relevant) and some factors must not be taken into account. Decision makers are required to balance the factors for and against disclosure and decide whether it would be contrary to the public interest to give access to the requested document(s).

### **What is the public interest?**

6.224 The public interest is considered to be:

- something that is of serious concern or benefit to the public, not merely of individual interest<sup>181</sup>
- not something of interest to the public, but in the interest of the public<sup>182</sup>
- not a static concept, where it lies in a particular matter will often depend on a balancing of interests<sup>183</sup>
- necessarily broad and non-specific<sup>184</sup> and
- related to matters of common concern or relevance to all members of the public, or a substantial section of the public.<sup>185</sup>

6.225 It is not necessary for an issue to be in the interest of the public as a whole. It may be sufficient that the issue is in the interest of a section of the public bounded by geography or another characteristic that depends on the particular situation. An issue of particular

<sup>180</sup> See Explanatory Memorandum to the Freedom of Information Amendment (Reform) Bill 2010, pp. 21–22. For an example of the application of this exemption see *Washington and Australian Prudential Regulation Authority* [2011] AICmr 11.

<sup>181</sup> *British Steel Corporation v Granada Television Ltd* [1981] AC 1096. The 1979 Senate Committee on the FOI bill described the concept of ‘public interest’ in the FOI context as: ‘a convenient and useful concept for aggregating any number of interests that may bear upon a disputed question that is of general – as opposed to merely private – concern.’ Senate Standing Committee on Constitutional and Legal Affairs, *Report on the Cth Freedom of Information Bill 1978, 1979*, [5.25].

<sup>182</sup> *Johansen v City Mutual Life Assurance Society Ltd* [1904] HCA 43; (1904) 2 CLR 186.

<sup>183</sup> As explained by Forgie DP in *Wood; Secretary, Department of Prime Minister and Cabinet and (Freedom of information)* [2015] AATA 945 [54] citing *McKinnon v Secretary, Department of Treasury* [2005] FCAFC 142 [231]; (2005) 145 FCR 70; 220 ALR 587; 88 ALD 12; 41 AAR 23 per Jacobson J with whom Tamberlin J agreed, citing *Sankey v Whitlam* [1978] HCA 43; (1978) 142 CLR 1 [60] per Stephen J.

<sup>184</sup> Because what constitutes the public interest depends on the particular facts of the matter and the context in which it is being considered.

<sup>185</sup> *Sinclair v Maryborough Mining Warden* [1975] HCA 17 [16]; (1975) 132 CLR 473 at 480 (Barwick CJ).

interest or benefit to an individual or small group of people may also be a matter of general public interest.

## Applying the public interest test

6.226 A decision maker is not required to consider the public interest test (s 11A(5)) until they have first determined that the document is conditionally exempt. A decision maker cannot withhold access to a document simply because it is conditionally exempt. Disclosure of a conditionally exempt document is required unless in the particular circumstances and, at the time of the decision, it would be contrary to the public interest to give access to the document.

6.227 The pro-disclosure principle declared in the objects of the FOI Act is given specific effect in the public interest test, as the test is weighted towards disclosure. If a decision is made that a conditionally exempt document should not be disclosed, the decision maker must include the public interest factors they took into account in their statement of reasons under s 26(1)(aa) (see Part 3 of these Guidelines).

6.228 Applying the public interest test involves the following sequential steps:

- Identify the factors favouring access
- Identify any factors against access
- Review to ensure no irrelevant factors are taken into account
- Weigh the relevant factors for and against access to determine where the public interest lies (noting that the public interest test is weighted in favour of disclosure).

More information about each of these steps is provided below.

### Identify the factors favouring access

6.229 The FOI Act sets out 4 factors favouring access that must be considered if relevant. They are that disclosure would:

- a) promote the objects of the FOI Act
- b) inform debate on a matter of public importance<sup>186</sup>
- c) promote effective oversight of public expenditure<sup>187</sup>
- d) allow a person to access his or her personal information (s 11B(3)).

6.230 For example, disclosure of a document that is conditionally exempt under s 47G(1)(a) might, in the particular circumstances, both inform debate on a matter of public importance and promote effective oversight of public expenditure. These would be factors favouring access in the public interest. Similarly, it would be a rare case in which disclosure would not promote the objects of the FOI Act, including by increasing scrutiny, discussion, comment and review of the government's activities.

6.231 The 4 factors favouring disclosure are broadly framed but they do not constitute an exhaustive list. Other factors favouring disclosure may also be relevant in the particular circumstances. The FOI Act recognises the temporal nature of the public interest test

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<sup>186</sup> See *Janet Rice and Department of Health and Aged Care (Freedom of information)* [2024] AICmr 41 [45]–[47].

<sup>187</sup> See *Janet Rice and Department of Health and Aged Care (Freedom of information)* [2024] AICmr 41 [45]–[47].

through references to factors and considerations ‘at a particular time’. Accordingly, the decision maker must consider factors of public interest relevant to the document sought together with the context and the pro-disclosure object of the FOI Act. A non-exhaustive list of factors is listed below.

### Public interest factors favouring access

- a) promotes the objects of the FOI Act, including to:
  - i) inform the community of the Government’s operations, including, in particular, the policies, rules, guidelines, practices and codes of conduct followed by the Government in its dealings with members of the community
  - ii) reveal the reason for a government decision and any background or contextual information that informed the decision
  - iii) enhance the scrutiny of government decision making
- b) inform debate on a matter of public importance,<sup>188</sup> including to:
  - i) allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official<sup>189</sup>
  - ii) reveal or substantiate that an agency or official has engaged in misconduct or negligent, improper or unlawful conduct
  - iii) reveal deficiencies in privacy or access to information legislation<sup>190</sup>
- c) promote effective oversight of public expenditure<sup>191</sup>
- d) allow a person to access his or her personal information, or
  - i) the personal information of a child, where the applicant is the child’s parent and disclosure of the information is reasonably considered to be in the child’s best interests
  - ii) the personal information of a deceased individual where the applicant is a close family member (a close family member is a spouse or partner, adult child or parent of the deceased, or other person who was ordinarily a member of the person’s household)
- e) contribute to the maintenance of peace and order
- f) contribute to the administration of justice generally, including procedural fairness<sup>192</sup>
- g) contribute to the enforcement of the criminal law
- h) contribute to the administration of justice for a person

<sup>188</sup> *Rex Patrick and Department of Agriculture, Water and the Environment (Freedom of information)* [2021] AICmr 57 [66]–[72].

<sup>189</sup> See also *Carver and Fair Work Ombudsman* [2011] AICmr 5.

<sup>190</sup> See ‘FG’ and *National Archives of Australia* [2015] AICmr 26.

<sup>191</sup> For example, *Linton Besser and Department of Employment* [2015] AICmr 67 [25]–[26] and [53]; *Rex Patrick and Department of Agriculture, Water and the Environment (Freedom of information)* [2021] AICmr 57 [72]; *Janet Rice and Department of Health and Aged Care (Freedom of information)* [2024] AICmr 41 [27].

<sup>192</sup> This refers to administration of justice in a more general sense. Access to documents through FOI is not intended to replace the discovery process in particular proceedings in courts and tribunals, which supervise the provision of documents to parties in matters before them: ‘Q’ and *Department of Human Services* [2012] AICmr 30 [17].

- i) advance the fair treatment of individuals and other entities in accordance with the law in their dealings with agencies
- j) reveal environmental or health risks of measures relating to public health and safety and contribute to the protection of the environment
- k) contribute to innovation and the facilitation of research.

## Identify any factors against access

6.232 The FOI Act does not list any factors weighing against access. These factors, like those favouring disclosure, will depend on the circumstances. However, the inclusion of the exemptions and conditional exemptions in the FOI Act recognises that disclosure of some types of documents will, in certain circumstances, prejudice an investigation, unreasonably affect a person's privacy or reveal commercially sensitive information which may, on balance be contrary to the public interest. Such policy considerations are reflected in the application of public interest factors that may be relevant in a particular case.

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

### Public interest factors against access

- a) could reasonably be expected to prejudice the protection of an individual's right to privacy,<sup>193</sup> including where:
  - i. the personal information is that of a child, where the applicant is the child's parent, and disclosure of the information is reasonably considered not to be in the child's best interests
  - ii. the personal information is that of a deceased individual where the applicant is a close family member (a close family member is a spouse or partner, adult child or parent of the deceased, or other person who was ordinarily a member of the person's household) and the disclosure of the information could reasonably be expected to affect the deceased person's privacy if that person were alive
  - iii. the personal information is that of a government employee in relation to personnel management and the disclosure of the information could reasonably be considered to reveal information about their private disposition or personal life.<sup>194</sup>
- 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<sup>195</sup>

<sup>193</sup> 'PX' and Australian Federal Police (Freedom of Information) [2019] AICmr 8 [119]–[120]; Paul Farrell and Department of Home Affairs (Freedom of Information) [2023] AICmr 31 (28 April 2023) [41]–[46].

<sup>194</sup> See 'GC' and Australian Federal Police [2015] AICmr 44, Paul Cleary and Special Broadcasting Service [2016] AICmr 2. As noted at [6.156], agency compliance with guidelines issued by the Australian Public Service Commission to assist agencies understand how s 103 of the Public Service Regulations 2023 affects their ability to use and disclose the personal information of staff within their agencies and with other APS agencies will be a relevant consideration in deciding whether disclosure of an employee's personal information would be unreasonable (for the purposes of s 47F) and contrary to the public interest.

<sup>195</sup> For example, Bradford and Australian Federal Police (Freedom of information) [2021] AATA 3984 [202]–[203].

- d) could reasonably be expected to impede the administration of justice generally, including procedural fairness
- e) could reasonably be expected to impede the administration of justice for an individual
- f) could reasonably be expected to impede the protection of the environment<sup>196</sup>
- g) could reasonably be expected to impede the flow of information to the police or another law enforcement or regulatory agency<sup>197</sup>
- h) could reasonably be expected to prejudice an agency's ability to obtain confidential information<sup>198</sup>
- i) could reasonably be expected to prejudice an agency's ability to obtain similar information in the future<sup>199</sup>
- j) could reasonably be expected to prejudice the competitive commercial activities of an agency<sup>200</sup>
- k) could reasonably be expected to harm the interests of an individual or group of individuals<sup>201</sup>
- l) could reasonably be expected to prejudice the conduct of investigations, audits or reviews by the Ombudsman or Auditor-General<sup>202</sup>
- m) could reasonably be expected to discourage the use of agency's access and research services<sup>203</sup>
- n) could reasonably be expected to prejudice the management function of an agency<sup>204</sup>
- o) could reasonably be expected to prejudice the effectiveness of testing or auditing procedures.

## Ensure no irrelevant factor is considered

6.234 The decision maker must take care not to consider factors that are not relevant in the particular circumstances. The FOI Act specifies certain factors that must not be taken into account.

6.235 The irrelevant factors are:

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<sup>196</sup> *Australian Broadcasting Corporation and Secretary, Department of Industry, Science, Energy and Resources (Freedom of information)* [2022] AATA 1451 [101].

<sup>197</sup> *Outside the Square Solutions and Australian Skills Quality Authority (Freedom of information)* [2019] AICmr 33 [24]–[28]; *'PX' and Australian Federal Police (Freedom of Information)* [2019] AICmr 8 [119]–[120]; *Wilson AM and Office of the Australian Information Commissioner (Freedom of Information)* [2023] AATA 458 [66].

<sup>198</sup> *Outside the Square Solutions and Australian Skills Quality Authority (Freedom of information)* [2019] AICmr 33 [24]–[28]; *'PX' and Australian Federal Police (Freedom of Information)* [2019] AICmr 8 [119]–[120].

<sup>199</sup> *Wilson AM and Office of the Australian Information Commissioner (Freedom of Information)* [2023] AATA 458 [66].

<sup>200</sup> *MacTiernan and Secretary, Department of Infrastructure and Regional Development (Freedom of Information)* [2016] AATA 506 [134] and [142].

<sup>201</sup> *Washington and Australian Prudential Regulation Authority* [2011] AICmr 11 [27]–[29]; *Paul Farrell and Department of Home Affairs (Freedom of information)* [2023] AICmr 37 [93].

<sup>202</sup> See *Australian Broadcasting Corporation and Commonwealth Ombudsman* [2012] AICmr 11 [33].

<sup>203</sup> See *'FG' and National Archives of Australia* [2015] AICmr 26.

<sup>204</sup> *Paul Farrell and Department of Home Affairs (Freedom of information)* [2023] AICmr 37 [93].



- access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government
- access to the document could result in any person misinterpreting or misunderstanding the document
- the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made
- access to the document could result in confusion or unnecessary debate (s 11B(4)).

## Weigh the relevant factors to determine where the public interest lies

6.236 The decision maker must determine whether giving access to a conditionally exempt document is, at the time of the decision, contrary to the public interest, taking into account the factors for and against access. The timing of the FOI request may be important. For example, it is possible that certain factors may be relevant when the decision is made, but may not be relevant if the FOI request were to be reconsidered some time later.<sup>205</sup> In such circumstances a new and different decision could be made.<sup>206</sup>

6.237 In weighing the factors for and against access to a document, it is not sufficient simply to list the factors. The decision maker's statement of reasons must explain the relevance of the factors and the relative weight given to them (s 26(1)(aa)) (see Part 3 of these Guidelines).<sup>207</sup>

6.238 To conclude that, on balance, disclosure of a document would be contrary to the public interest is to conclude that the benefit to the public resulting from disclosure is outweighed by the benefit to the public of withholding the information. The decision maker must analyse, in each case, where on balance the public interest lies based on the particular facts at the time the decision is made.<sup>208</sup>

6.239 As noted in *Jonathan Sequeira and Australian Broadcasting Corporation (No. 3) (Freedom of information)*:

Access must be provided unless the degree of that harm is such that it outweighs the public interests in disclosure that underpin the FOI Act and apply in the particular case. The test is not whether disclosure would be positively in the public interest. Rather it is whether, on balance, disclosure would be contrary to the public interest, that is, that some harm or damage to the public interest which outweighs the benefit to the public in disclosure would ensue.<sup>209</sup>

<sup>205</sup> *Rovere and Secretary, Department of Education and Training* [2015] AATA 462 [67].

<sup>206</sup> See *Wood; Secretary, Department of Prime Minister and Cabinet and (Freedom of information)* [2015] AATA 945 [78]–[79]; *Raymond Williams and Department of Defence (Freedom of information)* [2023] AICmr 26 [61]–[64].

<sup>207</sup> See for example the weight given to individual public interest factors and how these are balanced to determine whether disclosure would be contrary to the public interest in *'AHZ' and the Australian Securities and Investments Commission (No. 1) (Freedom of Information)* [2024] AICmr 45 [114]–[118]; *'AHZ' and the Australian Securities and Investments Commission (No. 2) (Freedom of Information)* [2024] AICmr 47 [79]–[83].

<sup>208</sup> *'PM' and Department of Industry, Innovation and Science (Freedom of information)* [2018] AICmr 70 [35].

<sup>209</sup> *Jonathan Sequeira and Australian Broadcasting Corporation (No. 3) (Freedom of information)* [2023] AICmr 30 [90].

## The public interest test and s 47B (Commonwealth-State relations)

6.240 When applying the public interest test to a document considered to be conditionally exempt under s 47B(a), it may be relevant to take into account whether disclosure would, or could reasonably be expected to, cause damage to Commonwealth-State relations. However, the fact that damage may result from disclosure is not determinative of whether it would be contrary to the public interest to give access to the conditionally exempt document.<sup>210</sup> Other public interest factors may also be relevant (such as the desirability of allowing scrutiny of government activities).

6.241 Conversely, in relation to another provision of s 47B, such as 47B(b) and information or matter communicated in confidence, where disclosure of a document may reasonably be expected to have a positive or neutral effect on Commonwealth-State relations, then that may be a public interest factor in favour of disclosure.

6.242 It is not uncommon that documents considered to be conditionally exempt under s 47B(b) are documents shared between law enforcement agencies. In such cases factors favouring access will include:

- promoting the objects of the FOI Act
- enhancing the scrutiny of government operations or decision making and promoting governmental accountability and transparency
- informing debate on a matter of public importance
- [and in some cases] allowing applicants to access their own personal information.

6.243 Countervailing factors may include:

- inhibiting the future supply of information, which would prejudice the conduct of future investigations
- prejudicing an agency's ability to obtain confidential information and
- prejudicing an agency's ability to obtain similar information in the future.

6.244 When balancing these public interest factors, the factors against access will often outweigh those in favour. While the public interest is served by promoting the objects of the FOI Act, the risk of damage to relations between law enforcement agencies is often very high and could have serious and lasting effects on the effectiveness of agency operations in the future.

## Inhibition of frankness and candour

6.245 Prior to the FOI Act reforms of 2010, a common factor considered to weigh against access of deliberative matter (s 47C) was that giving access would inhibit the giving of frank and candid advice by public servants. Frankness and candour arguments have been significantly affected by the 2010 reforms to the FOI Act, as demonstrated by a number of AAT and Information Commissioner decisions.<sup>211</sup>

<sup>210</sup> *Patrick and Secretary, Department of Prime Minister and Cabinet (Freedom of Information)* [2021] AATA 2719 [224].

<sup>211</sup> In particular, *Rovere and Secretary, Department of Education and Training* [2015] AATA 462; *'GI' and Department of the Prime Minister and Cabinet* [2015] AICmr 51; *Wood; Secretary, Department of Prime Minister and Cabinet and (Freedom of Information)* [2015] AATA 945 and *Dreyfus and Secretary Attorney-General's Department (Freedom of information)* [2015] AATA 962.

6.246 The ability of public servants to provide robust and frank advice (often referred to as frank and fearless advice) is still often identified as a public interest factor against access by decision makers. Decision maker should exercise caution if this is the only public interest factor identified as being against access. The Australian Information Commissioner said in ‘GI’ and Department of the Prime Minister and Cabinet:

... a more recent decision of the Administrative Appeals Tribunal, *Rovere and Secretary, Department of Education and Training* [2015] AATA 462 has held that ‘A frankness and candour claim, made in circumstances where there is no (other) factor against access ... cannot be a factor against access when applying the public interest test’ (at 52). I read that as a comment only that a confidentiality or candour claim carries no weight by itself but must be related to some particular practice, process, policy or program in government.<sup>212</sup>

6.247 In *Rovere and Secretary, Department of Education and Training* the AAT said that in relation to pre-decisional communications, a frankness and candour claim cannot be a public interest factor against access.<sup>213</sup> The Information Commissioner reads *Rovere* as authority for the proposition that a confidentiality or candour claim carries no weight by itself but must be related to some particular practice, process, policy or program in government.<sup>214</sup>

6.248 The Information Commissioner considers that frankness and candour in relation to s 47C may have some application as one public interest factor against disclosure in combination with other factors. However frankness and candour may be the sole factor where the public interest is clearly, heavily weighted against disclosure of a document of a minister, or a document that would affect the effective and efficient functioning of government.

6.249 Public servants are expected to operate within a framework that encourages open access to information and recognises Government information as a national resource to be managed for public purposes (ss 3(3) and (4)). In particular, the FOI Act recognises that Australia’s democracy is strengthened when the public is empowered to participate in Government processes and scrutinise Government activities (s 3(2)). In this setting, transparency of the work of public servants should be the accepted operating environment and fears about a lessening of frank and candid advice correspondingly diminished.

6.250 Agencies should therefore start with the assumption that public servants are obliged by their position to provide robust and frank advice at all times and that obligation will not be diminished by transparency of government activities.<sup>215</sup>

6.251 The AAT has said there is an ‘essential balance that must be struck between making information held by government available to the public so that there can be increased public participation leading to better informed decision-making and increased scrutiny and review of the government’s activities and ensuring that government may function effectively and efficiently’.<sup>216</sup>

<sup>212</sup> ‘GI’ and Department of the Prime Minister and Cabinet [2015] AICmr 51 [20].

<sup>213</sup> As per Popple SM in *Rovere and Secretary, Department of Education and Training* [2015] AATA 462 [42] and [48]–[53]. In *Dreyfus and Secretary Attorney-General’s Department (Freedom of information)* [2015] AATA 962 [100] Bennett J appears to give her approval to the position taken by Popple SM in *Rovere*.

<sup>214</sup> ‘GI’ and Department of the Prime Minister and Cabinet [2015] AICmr 51 [20].

<sup>215</sup> *Raymond Williams and Department of Defence (Freedom of information)* [2023] AICmr 26 [65]–[76]; *Justin Warren and Services Australia (Freedom of information)* [2023] AICmr 13 [66]–[71].

<sup>216</sup> As per Forgie DP in *Wood; Secretary, Department of Prime Minister and Cabinet and (Freedom of Information)* [2015] AATA 945 [69].

6.252 While frankness and candour claims may still be contemplated when considering deliberative material and weighing the public interest, they should be approached cautiously and in accordance with ss 3 and 11B. Generally, the circumstances will be special and specific.

## Incoming government briefs and the public interest test

6.253 An incoming government brief is a briefing prepared by an Australian Government department during the caretaker period before a federal election. Incoming government briefs play an important role because ministers are considered to be immediately responsible for the portfolios they hold and therefore require comprehensive and frank briefs. Their purpose is to enable a smooth transition from one government to another following a general election.

6.254 The incoming government brief is prepared before the election outcome and the identity of the new Minister are known. As a result, incoming government briefs differ from other advice that may be prepared at the Minister's request or as part of the department's normal support and advising function.

6.255 In *Crowe and Department of the Treasury* the Information Commissioner found the claim that all incoming government briefs should be exempt under s 47C would fail on the basis that s 47C is a conditional exemption and access must be given unless disclosure of the document 'at the time would, on balance, be contrary to the public interest'.<sup>217</sup> Accordingly, each FOI request for access to an incoming government brief must be considered separately and with consideration to the public interest factors that apply at the time of the decision.

6.256 However, it will usually be contrary to the public interest under s 11A(5) to release deliberative matter in an incoming government brief, having regard in particular to the special purpose of the brief to provide frank and helpful advice to a new Minister at a critical juncture in the system of responsible parliamentary government.<sup>218</sup>

6.257 Special treatment is given to the brief prepared for a party that does not form government.<sup>219</sup> This brief is not provided to the party, which does not have the opportunity to consider and respond to it. Relevant public interest considerations may include:

- The confidentiality of discussions and briefings provided to the new Minister are essential at that early stage in developing a relationship that accords with the conventions of responsible parliamentary government. Public release of any portion of the brief would compromise the department's role in managing the transition from one government to another.
- It is important, in the early days of a new government, that the public service is not drawn into political controversy, or is required publicly to defend the advice provided to a new government.<sup>220</sup>

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<sup>217</sup> *Crowe and Department of the Treasury* [2013] AICmr 69 [40].

<sup>218</sup> *Parnell & Dreyfus and Attorney-General's Department* [2014] AICmr 71 [82]; *Dreyfus and Secretary Attorney-General's Department (Freedom of information)* [2015] AATA 962 [102].

<sup>219</sup> *Crowe and Department of the Treasury* [2013] AICmr 69 [91].

<sup>220</sup> *Crowe and Department of the Treasury* [2013] AICmr 69 [85].

- It is unfair to the party that did not form government to make public the assessment of its policies by a department, when the party has not had an opportunity to adjust or implement those policies.

6.258 It is a convention of Cabinet government that the Cabinet papers of one government are not available to the Ministers of another. By extension, the high-level advice that was prepared for a party in the expectation that it may (but did not) form government should not be released publicly under the FOI Act.<sup>221</sup>

6.259 However the Information Commissioner found that the same considerations also applied to incoming government briefs prepared for the party that forms government, and may also apply where the previous government is re-elected. In so finding, The Information Commissioner said that consideration of the damage that is likely to arise from disclosure of the incoming government brief should not be limited to damage relating to the relationship between current agencies and ministers in the present government, but should also include the likelihood of damage to relationships between agencies and their respective ministers in the future.<sup>222</sup>

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<sup>221</sup> *Crowe and Department of the Treasury* [2013] AICmr 69 [91]–[92].

<sup>222</sup> *Dan Conifer and Department of the Prime Minister and Cabinet (No. 2) (Freedom of information)* [2017] AICmr 117 [35]; *Dreyfus and Secretary Attorney-General's Department (Freedom of information)* [2015] AATA 962 [102], [105], [107].