



# FOI agency resources

## The deliberative processes exemption

This resource explains the deliberative process exemption<sup>1</sup> and sets out steps required to be considered for the exemption claim to be justified.<sup>2</sup>

It is important to recognise that the *Freedom of Information Act 1982* (FOI Act) does not limit any power to give access to information under other legislative or administrative arrangements (s 3A(2)).

### The deliberative processes exemption (s 47C)

Subject to exceptions, s 47C of the FOI Act provides that a document is conditionally exempt if its disclosure under this Act would disclose matter (*deliberative matter*) in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation which has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of an agency, or a minister or government of the Commonwealth.

The deliberative processes exemption is subject to the public interest test under s 11A(5).

#### Applying the deliberative processes exemption

This conditional exemption is characterised by a 3-stage decision making process.

On receiving and reviewing the documents identified in response to an FOI request, the decision maker must demonstrate that they have satisfied the requirements of each stage if they make a decision to claim the deliberative processes exemption.

#### Stage 1: General application: Identification of deliberative matter

The decision maker must be satisfied that information within the scope of the request involves *deliberative matter*.

This initial stage requires the decision maker to be satisfied that the information is *deliberative matter* by examining the content and nature of the information and by ensuring that the information does not fall within the exceptions set out in ss 47C(2) and (3)).

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<sup>1</sup> FOI Act s 47C

<sup>2</sup> This resource should be read with the FOI Act and the *Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act* (the FOI Guidelines)

## Stage 2: Identification of the relevant deliberative process

The decision maker must be satisfied, that the *deliberative matter* was obtained, prepared for, and recorded in the course of or for the purposes of the *deliberative processes*.

This stage requires examination of the manner in which the information was obtained and the purpose for which it was prepared, and how it has been documented or recorded.

## Stage 3: Consideration of relationship of deliberative process with agency, minister or government functions

The decision maker must be satisfied that the deliberative function was exercised by or intended to be exercised by an agency, a minister, or the government of the Commonwealth.

This stage requires examination of the exercise or intended exercise of a deliberative function and the agency, minister, or government of the Commonwealth exercising that deliberative process.

## Decision making checklist: Deliberative processes exemption

Section 47C conditionally exempts documents containing deliberative matter.

- Deliberative matter* could be (paragraph [6.57] of the FOI Guidelines):
  - opinion
  - advice
  - recommendation
  - consultation
  - deliberation.
- It is important to assess the substance and the content; the format or class of the document, such as a ministerial brief or submission, or if the document is a draft version of a later document, this does not automatically designate the content as *deliberative matter*.
- If *deliberative matter* has been identified, proceed to any exemptions.

## Exemptions

- Deliberative matter* does not include<sup>3</sup>:
  - operational information – ‘operational information’<sup>4</sup> is information that an agency must publish under the information publication scheme<sup>5</sup>
  - purely factual material.<sup>6</sup>
- Section 47C does not apply to<sup>7</sup>:
  - 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
  - reports of a body or organisation, prescribed by the regulations, that is established within an agency (currently none are prescribed)
  - 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.
- Decision makers must consider these express exceptions described generally
  - as factual material
  - material that should/could be published
  - material that explains a government decision made in an adjudicative function, generally by a single decision maker.
- If none of the exceptions apply, proceed to Stage 2.

## Stage 2: Identification of the relevant deliberative process

### Identification of the deliberative process

- Deliberating involves the exercise of judgement and the weighing up/evaluation of competing arguments/considerations<sup>8</sup>
- If a deliberative process has been identified, proceed to Stage 3.

## Stage 3: Consideration of the relationship of deliberative process with agency, minister or government functions

### What function is being exercised and who is exercising that function?

- 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<sup>9</sup>

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<sup>3</sup> FOI Act s 47C(2)

<sup>4</sup> FOI Act s 8A

<sup>5</sup> FOI Guidelines, Part 13

<sup>6</sup> FOI Act s 47C(2); FOI Guidelines, paragraph [6.49]

<sup>7</sup> FOI Act s 47C(3)

<sup>8</sup> FOI Guidelines, paragraph [6.55]

<sup>9</sup> FOI Guidelines, paragraph [6.51]

- Consideration of whether the deliberative process remains underway is also required. This is because the decision maker should take into account if a decision has been implemented or announced. If so, the deliberative process may have concluded and as such it may not be relied upon.

Consider all stages

- If the decision maker is satisfied that each stage has been met, the document may be conditionally exempt under s 47C and must then be considered against the public interest test, before making a decision as to whether to give, or refuse, access to the document
- The FOI agency resource Considering the public interest test explains the public interest test and sets out the steps required to be considered in applying the public interest test. That resource also notes that the FOI Guidelines set out specific guidance regarding the interaction between s 47C and the public interest test<sup>10</sup>
- The decision maker should consider that disclosure of *deliberative matter* is less likely to be contrary to the public interest in certain circumstances
- The decision maker may also decide to grant access to a document containing *deliberative matter*, and defer access in certain circumstances, as set out in s 21 of the FOI Act.<sup>11</sup>

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<sup>10</sup> That specific interaction between s 47C and the public interest test involve circumstances of inhibition of frankness and candour (paragraphs [6.245] to [6.252], and incoming government briefs (paragraphs [6.253] to [6.259])

<sup>11</sup> For example, the decision maker may defer access to the document where the premature release of the document would be contrary to the public interest – until an event occurs or the period of time expires after which its release would not be contrary to the public interest.