

# FOI Guide - FOI Section 26 Notices - Statements of Reasons

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# Purpose

This Guide provides assistance for the purpose of preparing a Statement of Reasons as required by section 26 of the *Freedom of Information Act 1982* (FOI Act).

## Overview of Statement of Reasons requirements

- Where an agency refuses to grant an FOI applicant access to a document in accordance with his or her request, or allows access to a document but at a later date, section 26 of the FOI Act requires the agency to give the applicant written notice of the decision. The notice must state the findings on any material questions of fact, refer to the material on which those findings were based, and state the reasons for the decision.
- Statement of Reasons are required at both primary decision and internal review stages.
- In this guide, the term ‘statement of reasons’ covers the whole of a section 26 notice, and not merely the part of the notice that contains the reasons for the decision in the narrower sense.
- Agencies are obliged to make every effort to assist applicants who are seeking access to documents under the FOI Act. This includes providing clearly written and well explained reasons for a decision so that applicants can understand the basis for the decision and any grounds affecting their appeal rights.

## Statement of Reasons

### When a Statement of Reasons is required

A Statement of Reasons is required where a decision maker refuses to grant an applicant access to a document or allows access to a document but defers that access to a later date under the FOI Act. The requirement applies to a primary decision or a decision on internal review when:

- the document is not a document of an agency or an official document of a Minister
- the document is exempt from release
- the Act’s access provisions do not apply to the document
- the document has not been sufficiently identified in the request
- the document is in the agency’s or Minister’s possession but cannot be found, or does not exist
- giving access in a form other than that requested by the applicant;
- deferring the provision of access to a document; or
- refusing to amend or annotate a record of personal information about a person.

The FOI Act does not require a Statement of Reasons where an agency is allowing access to documents in accordance with an applicant’s request. However, good

administrative practice requires that the applicant still receive a written notice of the decision, including appropriate information about review rights. The applicant may wish to contend that the agency's searches were inadequate and that a decision purporting to give access to all documents in fact did not do so.

## **Providing a Statement of Reasons after consultation with third parties**

If an agency decides to release a document despite the objections of a third party, that party should be notified in writing at the same time the applicant is notified of the decision (subparagraphs 26A(2)(a), 27(2)(a) and 27A(2)(a)). An affected third party has a right of review under the FOI Act and the agency is unable to release the documents in question until the review period has expired.

If a third party is not satisfied with what is said in the notification of the decision, it is open to the third party, as a person entitled to apply to the Administrative Appeals Tribunal (the AAT) for review of the decision, to seek a full statement of reasons under section 28 of the *Administrative Appeals Tribunal Act 1975* (the AAT Act). In appropriate cases there would be a right to seek a full statement of reasons under section 13 of the *Administrative Decisions (Judicial Review) Act 1977* (the AD(JR) Act).

Further information on third party consultations may be obtained from FOI Guide — *Consultation*.

## **Deemed refusals**

If there is a 'deemed refusal' under section 56 to grant access to requested documents (that is, the time for assessing an FOI request has expired and the applicant has not received notice of the decision, enabling an application to the AAT), an agency will usually make an actual decision on the request in order to narrow the issues required to be determined by the AAT. In those cases the applicant should be advised of the decision in the form of a Statement of Reasons as soon as possible after the actual decision.

## **Content of a Statement of Reasons**

A well-written statement of reasons displays the following qualities.

- It must show how the decision was arrived at, based on enumerated findings of fact.
- It should show a rational connection between the findings of fact and the decision.
- It should address all elements of relevant statutory criteria.
- It should relate exemption claims to each specific document, or part of a document, and must not simply repeat the wording of the exemption section or the terms of the decision itself.

- It should quote the precise words of any claimed exemption for the applicant's information (a copy of the actual exemption can be attached to the decision) and should refer to other, relevant, law where necessary.
- It should distinguish between exemptions based on expected results, or the character of the disclosure, and those protecting a particular class or kind of document.
- It should establish a rational expectation of damage based on probative evidence and public interest tests (which requires all grounds, for *and* against disclosure, to be set out). Mere conjecture, unsupported by evidence, is inadequate.
- It must refer to the guidelines or policy directions relied on and the decision maker must incorporate adopted material into the decision, not merely refer to it.
- It should deal with any submissions by the applicant.
- It should explain why an agency is not exercising its discretion to release the documents.

## **Who can prepare a Statement of Reasons?**

Anyone can prepare a Statement of Reasons on behalf of the decision maker. The preparation of a draft notice and Statement of Reasons will assist in structuring the issues the decision maker has to consider. These documents should remain in draft form until a formal decision is made.

Where a person, other than the decision maker, is preparing these documents, the decision maker must exercise his or her own power of decision-making based on an examination of the documents in question, and other relevant material, and not simply adopt the draft at face value. In other words, the decision maker must actually *make* a decision.

Any draft Statement of Reasons used to inform a decision maker's decision should conform with the criteria above.

If the decision maker is preparing a notice of the decision without a draft statement of reasons, the record of the decision must be sufficiently detailed to enable the preparation, by another officer, of a full statement of the real reasons for the decision, and not leave it to the author to guess at those reasons.

## **Formal requirement of a Statement of Reasons**

The following elements constitute the formal statutory requirements of a Statement of Reasons:

1. a notice in writing of the decision
2. the name and designation of the decision maker
3. a statement of the findings on any material questions of fact, including reference to the material on which those findings are based
4. the reasons for the decision to refuse or to defer access, and

5. appropriate information about rights of review and lodging a complaint with the Commonwealth Ombudsman.

In addition, there are two other matters that should be mentioned in the Statement of Reasons:

1. consideration of the possibility of making available a copy of a document where exempt matter has been deleted in accordance with section 22 of the FOI Act, and
2. the reasons why the document(s) has not been released outside the FOI Act.

Each element is discussed in greater detail below.

## **1. Notice in writing of the decision**

Applicants must be given notice of the decision in writing. This notice must:

- clearly identify the documents in issue (without disclosing any exempt material where exemptions are claimed)
- state the decisions in relation to each document or part of a document
- provide the reasons for the decision, referring to the specific documents
- clearly state which exemptions are being claimed for each document or part of a document, and
- set out the process of reasoning, including any findings of fact and the material on which those findings are based, which explains the basis for the exemption being claimed.

It is not sufficient to say, for example, that *'access is refused under section 45 because the documents contain material obtained in confidence'*. The notice needs to explain *why* the documents meet the criteria for exemption.

## **2. Name and designation of the decision maker**

FOI decisions should only be made by persons who are properly authorised under section 23 of the FOI Act to do so. The Statement of Reasons for a decision must state the name and designation of the person who made the decision.

The Statement of Reasons should refer to the authorisation details. For example:

'Mr Brown, the Assistant Secretary of Compliance, is authorised under section 23 of the FOI Act to make decisions in relation to . . .'

or

'I am authorised by the Secretary of this department, under section 15 of the FOI Act, to make decisions on requests for access to documents, or requests for amendment of records of information (under section 48 of the FOI Act). My name and designation are set out below.'

### 3. What are findings on ‘material questions of fact’

There is a distinction between basic factual matters and evidentiary facts, and the factual conclusions drawn from them. These are referred to as ‘primary, or basic, facts’ and ‘ultimate facts’.

Conclusions based on primary and ultimate facts are referred to as ‘material questions of fact’. Material questions of fact refer to any key, or essential, factual information (primary or ultimate) which affects the outcome of the final decision. There is no easy guide to what constitutes a material question of fact. This is a judgment made by a decision maker using the information available while recognising that facts have varying degrees of relevance and importance.

The following are examples of types of findings which were based on material questions of fact.

- A basic finding of fact concerning the identification, location, possession or transfer of documents.
- A finding based on evidentiary facts on which a decision is ultimately based. For example, findings based on primary facts supporting a claim that material was given and received in confidence and that disclosure would therefore be a breach of confidence under section 45. Another example would be a finding, based on factual grounds, that it would be reasonable to expect a detrimental effect should a document be disclosed.
- A finding as to a fact which is in dispute between the applicant and the agency and which *must* be resolved in order to reach a decision. For example, a finding of primary fact as to the actual nature of a previous disclosure of information which an applicant contends would defeat a claim by the agency for an exemption under section 43 (business affairs information).
- A finding of fact which *must* be made in order for the decision in question to be reached. An example of a finding as to an ultimate fact would be a finding that information is personal information about an identifiable individual (see subsections 41(1) and 4(1)), *or* a finding under subparagraph 36(1)(b) as to where the balance of public interest lies).

It is important to give an indication of the weighting of a particular fact where it is relevant to a decision. For example:

‘In considering the public interest arguments for and against disclosure I considered the following factors to be relevant to my decision.

- I considered the object of the FOI Act, which sets out a right of general access to documents held by the Government. I gave considerable weight to this factor.
- On the other hand I considered the arguments against disclosure to be..... .

On balance, I consider that the factors in support of the claimed exemption (exempting the documents from disclosure) to be greater than those favouring disclosure.’

Other material questions of fact that may need to be considered include:

- the scope of the request as interpreted by the agency
- any transfers, or partial transfers, of requests to other agencies or Ministers
- any relevant consultations, statutory or otherwise, which have taken place
- any matters of fact which have, for example, influenced a decision to defer access to a document or to provide access in a form other than that requested, and
- any other matters of fact relevant to the processing of the request.

If a material question of fact is not stated in a Statement of Reasons the AAT may determine the matter on the basis that it was not considered in the first instance. In an AD(JR) action, the Federal Court may determine that the decision was defective for not taking all relevant considerations into account.

Sometimes an ultimate fact will be immediately apparent from the material before the decision maker. Alternatively, it may be reached only by a process of reasoning where it is deduced from the primary facts. A primary fact can itself be based on other primary facts. Where a decision maker refers to a material fact from the other facts, which is in turn established by secondary evidence or material, it may be necessary for the decision maker to highlight this in support of the decision.

### **Identification of documents is essential to ‘findings on a material question of fact’**

One of the material questions of primary fact which *must* be decided in relation to an FOI request is the identification of all the documents in the possession of an agency, or Minister, which fall within the terms of the request. Not only must the relevant documents be identified as part of the decision-making process, a statement must also contain sufficiently detailed descriptions of the documents to enable the applicant to know which documents are in issue and the nature of those documents. Agencies should identify relevant documents by providing:

- the dates of the documents
- the authors and the addressees of all documents (where applicable and where this information is not, of itself, exempt) and
- a brief description indicating the nature of the document (as long as these details are not themselves exempt material).

If an agency is uncertain as to whether particular documents fall within a request, it must either consult the applicant or reveal their existence as part of its response. If information about relevant documents (or parts of documents) is not included, the statement will be completely deficient because there will be no findings on the most basic material fact of all: namely, which documents are in issue?

There is no precise guidance on what constitutes 'a document' for the purpose of practical decision-making. Technically, each copy of the same document is a separate document for the purposes of the FOI Act. It is good administrative practice to identify, as separate documents, each item that is different from other items in respect of: source, author, date, addressee, contents, place of publication, etc. This will greatly assist making specific decisions on any exempt material. Where the exemptions, or the specific reasons for claiming exemptions, are different, each part of the document should be individually identified.

## **Describing findings of fact in a Statement of Reasons**

Findings of fact are usually expressed in terms of a statutory standard. However, they may also involve matters which are opinions or matters of judgment. It is necessary, therefore, to set out the process of reasoning used to arrive at a conclusion based on primary facts.

### **Example:**

Ms White requests an amendment to a document, seeking to have the ticks removed from the YES boxes in Questions 6(c)(i) and (iii) which, Ms White believes, indicates that she has at some stage lived in a de facto relationship. She contends that this implication is untrue.

The decision maker would need to include in the Statement of Reasons the material on which the findings of fact were made. It might read as follows.

'I have taken into account the following material in making my findings of fact.

'Your claims in your letter of 1 February 1993 that:

- '1. you were not asked questions 6(c)(i) and (iii)
- '2. the ticks were not on the form when you signed it
- '3. you did not insert the ticks in the boxes relating to the relevant questions
- '4. you did not authorise the making of those ticks
- '5. the ticks are misleading, giving the impression that you had made or authorised the making of the ticks
- '6. the ticks are misleading in conveying the impression that you were previously in a relationship with a spouse or de facto spouse from whom you have separated, and
- '7. you are single and have not been in such a relationship and that, therefore, the questions were, and remain, inapplicable.

'The supervisor of the field officer who conducted the interview has confirmed in writing (there is a copy on the file dealing with your request for amendment: File X) that the officer orally assured him that the ticks did appear on the form at the time you signed it. The supervisor did not have any information on whether those ticks were brought to your attention at the time or on whether you specifically authorised them.

'I have been unable to contact the field officer to ascertain at first hand her account of the circumstances surrounding completion of the form. The relevant officer has now left the employment of the Department.

‘The original interview report form has been misplaced and our attempts to find it have failed. The only relevant document on file is a poor quality copy of the interview report form. On the file copy some of the ticks differ slightly from others. It is not possible to tell whether the ticks in the relevant boxes were made in another ink or by a person different from the person who filled out the other information on the form.

‘Information has been provided by Mr J James to the Department stating that you lived with him in a de facto relationship during the period April 1990 to June 1999.’

The findings of fact may then be expressed as follows.

‘I have made the following findings of fact based on the above material.

‘On balance, I have concluded that the ticks were not on the form when you signed it and that you did not, in fact, authorise them.

‘On the basis of the evidence from Mr James and the evidence provided by you, I am not satisfied that you have not been in a de facto relationship in the relevant period.

‘While I agree that, under the amendment of records provision (subsection 50(1) of the FOI Act), the ticks on the form are misleading in conveying the impression that you had in some way authorised them, I have concluded that those markings are accurate in that they produce the correct outcome. Based on the evidence before me, the form will not be amended.’

## **4. Reasons for the decision**

Applicants must be provided with the reasons for the decision. These reasons must demonstrate how *each* decision has been arrived at on the basis of the findings of fact. This will normally involve a discussion as to which elements have to be met to establish, say, an exemption, or some other statutory criterion on which access was refused or deferred.

An agency should look at each relevant document, or separate part of a document, and state specifically why access to it is being refused.

Where a document is being released with deletions, it is only necessary to state *the grounds* on which the deletions have been made, and not the full reason (unless the applicant actually requests this).

A good decision is evidenced by a rational explanation. The Statement of Reasons should contain such an explanation. The failure to give a considered and logical explanation may lead to a decision being set aside by the Federal Court should the matter be the subject of a review under the AD(JR) Act.

While a Statement of Reasons should be more than a quotation of the exemption sections and decisions, the applicant should still be given a copy of the relevant sections of the FOI Act being relied on. These may be quoted in the body of the statement or attached as an annex. The decision maker’s understanding of the relevant

law should be set out and, where necessary, the decisions of the AAT or courts, as to the correct interpretation of the statutory provisions, should be referred to.

Be specific as to why the documents concerned are believed to come within an exemption without revealing details of the exempt material.

**Example:**

A decision based on the exemption contained in subparagraph 40(1)(d) of the FOI Act (substantial adverse impact on agency operations) might read like this.

‘These documents represent records of confidential conversations between the Department and independent experts. All of these conversations occurred, within the past 12 months, in preparation for a draft contract which was never issued. On the basis of [the decision maker’s] own experience, he has concluded that it would be extremely difficult to obtain such information in future if the experts concerned knew that information they thought was confidential had been released under the FOI Act.

‘I am satisfied that the interest of potential tenderers in monitoring developments in this area (see *Australian Financial Review*, 9 February 1993, page X) would result in widespread knowledge and concern about such a release. This would affect the ability of the Department to make confidential investigations before drawing up a contract and would substantially adversely affect the conduct of the operations of the Department.

‘On the basis of his duties as an officer of this department over the past 3 months, together with his reading of the daily press, [the decision maker] finds as a fact that there is a public debate about the actions of the Minister in the tender process for this project, and that there would be some public benefit in disclosure of the information in the documents to which this reason applies. That benefit would be in adding further specific information to the debate and in enabling the public to reach better judgments about the merits of the letting of this contract.

‘In [the decision maker’s] view this aspect of the public interest is strong. He has also taken into account the general public interest in the widest possible disclosure of government-held information. Having said this, [the decision maker] is satisfied that the ability of the Commonwealth to make necessary investigations before drawing up a contract would be severely reduced by the release of this information, and has concluded, on balance, that disclosure would not be in the public interest.’

These are concrete and specific reasons and not simply a repetition of the words of the exemption. The Statement of Reasons explains the likelihood of any statutorily specified consequences and refers to the source on which the findings of fact supporting the conclusion are based. It tells the applicant where the real sensitivity of the documents is thought to lie, and should help the applicant to decide whether to accept the decision or challenge the exemption being claimed. Note, however, that other documents, for which the same exemption is claimed, may require a Statement of Reasons that is entirely different of course, depending on the circumstances of each case.

## **Describing exemptions when giving reasons for the decision**

It is essential that a Statement of Reasons addresses every element of an exemption as set out in the FOI Act. The Act requires the decision maker to treat exemptions independently. Nevertheless, there are some common elements in the exemptions that require careful attention in your Statement of Reasons.

Broadly, exemptions in the FOI Act are of two basic kinds:

1. exemptions which depend upon the expected results or the character of disclosure of the specific documents, and
2. exemptions which protect documents of a particular class or kind without specific or implicit reference to the effects of disclosure of the contents.

### **Exemptions that depend upon the expected results or character of disclosure of the content of specific documents**

To satisfy an exemption under the first category (including sections 33(1)(a), 33A(1)(a), 36, 37, 39, 40, 41(1), 43, 43A, 44, 45, and 46(a) and (c)) you must establish that the document:

1. meets any description in the section (eg a document containing personal information about any person: subsection 41(1)), and
2. addresses the reasons (and the facts and sources on which those reasons are based) where there is an expectation of damage if the documents were to be disclosed (the reasons should address the kind, and degree, of damage being referred to).

For example, a claim that documents are deliberative process documents (popularly, but inaccurately, called internal working documents) would need to:

- establish that the documents *were* deliberative documents, as defined in the exemption, by demonstrating that they contained matter in the nature of, or relating to, opinion, advice or recommendation, obtained, prepared, or recorded, or that consultation or deliberation that had taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of an agency or a Minister
- establish that the release of the documents was contrary to the public interest by including a balancing of all public interest factors, whether in favour of or against the disclosure, and
- consider whether the documents contained purely factual information.

### **Exemptions that protect documents of a particular class or kind without specific or implicit reference to the effects of disclosure**

Reasons for claiming an exemption of the second kind (including *sections 34, 35, 38, 42, 47, 47A, and section 7 and Schedule 2*) must ensure that all criteria defining the particular class of documents are established.

For example, for a valid claim under subparagraph 34(1)(a), a document must be one that:

- has been submitted to Cabinet for its consideration, or
- is proposed by a Minister to be so submitted, *and*
- is a document brought into existence for the purpose of submission for consideration by Cabinet, and
- is not purely factual in nature.

A Statement of Reasons will, therefore, have to address the question of when the document was submitted to Cabinet or, alternatively, the evidence on which you base the contention that a Minister proposes to submit it to Cabinet. As is the case with *any* Cabinet document subject to an FOI request, the FOI Coordinator in the Department of the Prime Minister and Cabinet should be consulted as soon as practicable.

### **Giving reasons where exempt information has been deleted**

The possibility of deleting exempt matter from a document must be considered when a decision is made that a document is an exempt document. The Statement of Reasons will not be complete unless it is shown that the possibility of releasing an edited document was taken into account. Where the decision is to refuse access altogether on the grounds that the document is an exempt document, the Statement of Reasons must establish either that the document does not contain any matter which is capable of being disclosed or that, for a reason referred to in section 22 of the FOI Act, it is not proposed to make available a copy of the document with the exempt matter deleted.

The circumstances referred to in section 22, where provision of edited copies is not required, are as follows:

- where it is not possible to make a copy of a document with deletions so that the copy is not an exempt document
- where it is not reasonably practicable for an agency or Minister to make a copy with the necessary deletions — the decision maker may take into account the nature and extent of the work involved in deciding on, and making, those deletions and the resources available for that work, and
- where it is apparent from the request, or as a result of consultation with the applicant, that the applicant would not wish to have a copy with the necessary deletions.

In practice, you should briefly explain why each document is not being released in an edited form under section 22. It is necessary, therefore, to distinguish sensitive material not for disclosure from information that can be released.

### **Where a Statement of Reasons is not required**

There is one limited circumstance where a decision maker has a discretion not to identify and describe documents in the Statement of Reasons. Subsection 24(5) of the FOI Act permits refusal of access in accordance with a request without having identified any or all relevant documents, and without specifying the exemption

claimed in respect of each document. This discretion arises *only* if it is apparent from ‘the nature of the documents as described’ in the request that:

- all of the documents are exempt, *and*
- there would be no obligation to provide edited copies of any of the documents under section 22. Alternatively, it may be apparent from the request, or as a result of consultation with the applicant, that the applicant would not wish to have access to an edited copy of any of the documents.

## **Release outside the FOI Act**

The FOI Act does not prevent or discourage the publishing or disclosure of documents (*including exempt documents*) where it is required by law, or where it is otherwise not unlawful, to do so.

While there is no technical requirement to do so under the Act, it is desirable for agencies, where access is refused, to include in their Statement of Reasons the reasons for not exercising their discretion to grant access to exempt documents outside the FOI Act.

Accordingly, when giving Statements of Reasons for decisions to refuse access, agencies should state why they are not prepared to grant access to exempt documents as a matter of discretion.

## **Other matters**

A Statement of Reasons should also:

- mention any official guidelines or government policy direction that has been followed (such as those in an FOI Memorandum or Handbook or Guide)
- incorporate (and not merely refer to) any adopted recommendation, advice, report or results of investigation by another officer or an external expert, and
- refer to any arguments, submissions or evidence presented by the applicant to the decision maker in support of access and indicate how these have been dealt with.

## **5. Information about rights of review**

The applicant must be given ‘appropriate’ information concerning the applicant’s rights of review of the decision and the procedure for the exercise of those rights. This includes information for internal review (and how to request it) and external review. In all cases the applicant must be given appropriate information concerning her or his right to make a complaint to the Ombudsman in relation to the decision or have the decision reviewed by the AAT or by the Federal Court.

Further assistance in review rights is contained in FOI Guide — *Review of FOI Decisions*.

Any notification of rights of review of FOI decisions should contain or address the following:

- the name, location, postal and document exchange addresses, and the telephone and facsimile numbers, of the review authority
- whether the review authority is independent of the agency which made the decision and whether the authority has the power to overturn the decision
- how applications for review are to be made and any time limits applying to them
- whether fees are payable for applications for review and, if they are, the amount and by when they are payable
- whether an applicant may seek the waiver of a fee payment and, if so, the basis for the application
- any time limits within which the review authority must review the decision
- any right the person has to obtain access to documents about the decision under the *Freedom of Information Act 1982*, or any other Act or administrative arrangement, and the basic procedures for exercising that right
- information about the availability of legal, financial and other forms of advice and assistance, whether there are provisions permitting costs to be awarded against parties, and any procedures of the review authority of which the person should be particularly aware, eg a requirement to attend proceedings and the availability of interpreter services, and
- whether or not a particular level of review constitutes a statutory prerequisite to any further review.

Agencies may find it convenient to prepare a standard statement of rights of review, which can be varied according to individual circumstances, and attach an appropriate statement to the section 26 notice. However, care must be taken to ensure that the correct statement of review rights is made in each particular instance, and this will not always be met by a standard form letter.

## **The form of a section 26 statement**

There is no particular form for the Statement of Reasons although the necessary elements must be included. Where there are numerous documents and/or complex issues as to the application of exemptions, a format which includes separate explanations of the differing reasons for decisions, and a schedule of all relevant documents, would seem the best means of dealing adequately with all the issues (see Table 2 below).

A letter written to the applicant will be sufficient as long as it contains all of the information required by the Act. Alternatively, the applicant may be given a letter with an attached Statement of Reasons.

# **What can be omitted from a Statement of Reasons**

## **Omission of exempt material**

A Statement of Reasons need not contain any material which is itself exempt, or which would, in the case of a document of a Minister, disclose information that does not relate to the affairs of an agency. A Statement of Reasons is not required to, *and must not*, disclose the very information which forms the basis for the decision to refuse access.

In rare cases, the Statement of Reasons may need to be silent about the existence and characteristics of a document. This should be avoided wherever possible in order not to deprive an applicant of knowledge of the document's existence and the opportunity to test whether access to it has been properly refused. Where this course is adopted, the existence of the document must be disclosed to the AAT in any review of the decision as a whole.

## **Non-disclosure of the existence or non-existence of a document**

The inter-related provisions of subsections 25(1) and (2) permit, in broad terms, an agency not to disclose whether a requested document exists in certain limited cases.

An agency or Minister can give a notice neither confirming nor denying the existence of a requested document held in its possession. The agency has the discretion not to give a notice under that provision to the applicant. Where it does provide a notice, the agency should provide a proper Statement of Reasons with copies of the relevant sections. The applicant must be informed of their right to review (internal and AAT) as well as their right to complain to the Ombudsman.

# Other matters

## Preparation and use of schedules

There is no legal requirement to prepare a schedule before an appeal is made to the AAT but, once an appeal has been made, a schedule must be prepared and lodged with the AAT and served on the applicant.

In all but the simplest cases, agencies will usually find that it is an advantage to prepare a schedule at the earliest possible opportunity and to use this in conjunction with the decision-making process. When the decision is made, the final schedule can be attached as part of the decision notice.

It is crucial that a schedule not be used as an inadequate substitute for a full, detailed statement of reasons which contains information about the basis for all decisions to refuse or to defer access to information. Don't adopt the approach that if full reasons won't fit neatly into your schedule, they needn't be stated at length.

### **TABLE 1 — Information required in a schedule of documents**

<b>Suggested Readings</b>	<b>Kinds of Information Required</b>
Date of document	Date(s) document is created (or date received, if date of creation not known or not relevant) and date further annotated
File/folio (or other location) reference	References to location of documents, which should be correlated in the schedule in a rational manner
Author(s) and addressee(s) of each document where applicable	Give full details (unless you are claiming exemption for this information)
Description of each document	The description should enable the reader to relate the contents of each relevant document or part of a document to the exemption(s) claimed and the reasons for claiming those exemptions, but without disclosing exempt material. When an exemption claim relates only to part of a document, give a description of the part or parts involved (eg para. 6, or para. 6, lines 2 and 3 only). (See note 1 below on copies.) State whether document is being released (see note 2 below), or released with deletions, or access is refused on the basis of one or more specific exemptions or exceptions (incorporate provisions in, or attach to, the separate full statement of the reasons for decision), or the document has been transferred to another agency (section 16), or access to it is being deferred (section 21), or access is being granted in a different form from that requested (section 20), etc.
Decision on access	

Reasons for decisions                      Refer to separate full reasons for individual decisions contained in letter or annex (see Example 2 in Attachment A).

The schedule should refer in some way to the *specific reasons* for the refusal of access to each *specific document or part of a document* for which exemption is claimed. Where the same reason applies to a number of documents it may be convenient to give numbers or letters to those reasons so that it is not necessary to set out the reasons in full each time they are referred to. Care must be taken, however, to see that the correct reasons are stated in each case. The reasons for claiming one exemption for one particular document, or part of a document, will frequently be different from those for claiming the same exemption in relation to another document.

The following matters should also be borne in mind when preparing a schedule of documents:

- wherever possible, the description of a document should be sufficient to provide a prima facie justification for the grounds of exemption claimed
- where only part of a document is claimed to be exempt then the relevant part should be clearly identified, and
- care must be taken in dealing with copies.

A schedule of documents prepared as part of a Statement of Reasons should not include exempt material.

The precise form of a schedule is not important so long as it contains all the information necessary for the applicant to identify and understand the nature of the relevant documents, or parts of documents, and to be aware of all relevant exceptions or exemptions claimed as a basis for refusal, and to locate full, detailed, reasons for each refusal decision.

To meet the requirements of section 26 (and also the AAT Practice Direction), the information in Table 2 will be required in any schedule of documents (a heading for each of the columns containing each kind of information is suggested, but the precise headings will vary with the particular documents concerned).

## **TABLE 2 — Schedule of documents**

Example: Mr Brown wants ‘*all documents on File 2000/1111*’ held by Department X. File No 2000/1111:

<b>Folio No</b>	<b>Date</b>	<b>Author/recipient</b>	<b>Description of document</b>	<b>Decision</b>
1, 2	1/1/2000	Y to Smith Department	Form 111 — Application for Licence	Exempt — subsection 41(1) Third party application
3, 4	2/1/2000	Brown to Department	Form 111 — Application for Licence	Release in full

# Checklist for preparing a Statement of Reasons

## **STEP 1 Background/Scope**

- Ensure decision letter reflects the request as made by the applicant
- If necessary include details of correspondence/ conversations with applicant to clarify scope or amend scope (dates and what was agreed)
- If documents transferred state when and to whom and which part of the request not transferred is being dealt with

## **STEP 2 Authorisation**

- Ensure letter contains decision maker's authority to make the decision

## **STEP 3 Legislative basis for decision**

- Ensure that either in the body of the letter outlining the decision or as an attachment each section of the Act relied upon is set out so the applicant knows the actual text of the section relied on

## **STEP 4 Evidence/Material upon which findings are based**

- Identify documents at issue -what they are and where located
- What other material was used in the decision eg submissions by the applicant or third parties
- Did the decision maker rely on policy or procedural material, guidelines, handbooks or memos — if so what was it
- What other factors/evidence/documents were taken into account- state them

## **STEP 5 Decision**

- Set out the decision you have reached
- Set out why you have not been able to make deletions (if this is the case) so as to allow the document to be released
- Set out why you have not been able to release the documents outside the FOI Act

## **STEP 6 Reasons for decision**

- Set out the reasons why you believe each document meets the criteria for exemption eg documents are submissions prepared for Cabinet relating to costings
- Set out your understanding of the legislative basis eg a document is exempt under subsection 34(1), eg subparagraph 34(1)(a) provides a document is exempt if it is a document that has been submitted to the Cabinet etc
- Set out any evidence/findings you have to substantiate your claim for exemption eg I considered submissions

made by third parties in relation to their personal information. These parties objected to disclosure on the grounds of ..... I find that in those circumstances disclosure of the documents will be unreasonable

- Set out any public interest considerations including the weightings you gave to each consideration and your findings, eg on balance I considered that the public interest argument in not disclosing outweighs the public interest supporting disclosure
- Sum up your findings in the language of the statute, eg On the basis of the above I find that the documents are ones to which subsection 41(1) applies and that they are exempt from disclosure for the reasons outlined above

**STEP 7**  
**Review and**  
**complaint rights**

- Set out or attach appropriate rights of review
- Set out or attach rights to complain to Commonwealth Ombudsman

**STEP 8**

- Sign and date the Statement of Reasons
- Make sure all attachments are attached and that documents to be released are attached

## **Suggested Templates for Decision Makers**

### **Template 1**

#### **Decision notice including reasons for decision**

Dear <Applicant>

I refer to your request of <insert date> under the *Freedom of Information Act 1982* (the FOI Act) seeking

<insert scope>

I am an officer authorised under section 23 of the FOI Act to make decisions in respect of <insert what they are>. What follows is my decision, and the reasons for that decision.

#### **LEGISLATIVE BASIS FOR DECISION**

<insert exemptions, or sections of Act, being relied on>

#### **DECISION AND REASONS FOR DECISION**

I have decided that *<insert decision>*.

In assessing the material above, my findings were:

- *<list findings>*

Having weighed up all these factors, I am not satisfied that *<state findings>* because *<state the reasons for your findings>*. **If there are public interest arguments insert these.**

While coming to my decision to exempt documents, as outlined in the attached schedule of documents, I considered whether I could make deletions under section 22 of the FOI Act which would make the document available for release. I could not because *<state reasons>*.

I also considered whether I could release the documents to you outside the FOI Act, however for the following reasons I could not *<state reasons>*.

## **EVIDENCE/MATERIAL ON WHICH MY FINDINGS WERE BASED**

In reaching my decision to ..... I relied on the following documentary evidence.

- *<list documents>*
- *Freedom of Information Act 1982*
- *The Department's Freedom of Information Handbook*
- *Memorandum 98, produced by the Attorney-General's Department*
- *Submissions from you dated .....*
- *Submissions made by third parties, consulted under sections .....*
- *Other material considered*

## **REVIEW RIGHTS**

If you do not agree with my decision, then you may apply for a review of that decision. I have attached an information sheet that explains how you can lodge an application for a review of this decision.

You may also complain to the Commonwealth Ombudsman about this decision and the attached documents sets out your rights of complaint and how to exercise them.

Yours sincerely

*<name of decision maker>*

*<date>*

## **Template 2**

### **Letter plus Statement of Reasons**

Dear <applicant>

I refer to your request of <insert date> under the *Freedom of Information Act 1982* (the FOI Act) seeking

<insert scope>

Attached at A to this letter is my decision and the Statement of Reasons for that decision. A 'Schedule of Documents', identified as falling into the scope of your request, is at B. Review rights are attached at C.

Yours sincerely

<name of decision maker>

<date>

## **ATTACHMENT A**

### **STATEMENT OF REASONS RELATING TO AN FOI REQUEST BY**

<insert name of applicant>

I, <insert name and designation>, am an officer authorised under section 23 of the FOI Act to make decisions in relation to.....

What follows is my decision and the reasons for that decision.

### **BACKGROUND**

<insert details about the FOI request including what the agency sees as the scope of the request>

<if there has been correspondence about the matter, insert details of correspondence, when and what>

It is better not to paraphrase the request (unless it is absolutely voluminous) but to reiterate the request as made by the applicant.

<set out which documents fall into the scope and where they are held, eg 'The Department holds one file <No and title> containing X folios. Folios X-Y are relevant to your request.'>.

### **LEGISLATIVE BACKGROUND**

<insert sections being relied on in making the decision>

### **DECISION**

I have decided that .....

## **REASONS FOR DECISION**

Set out why you are making the decision you have made. This will involve explaining why the documents fall into the particular exemptions you have chosen to exercise and addressing any public interest arguments or any criteria that needs to be met, such as harm or unreasonable disclosure etc.

Set out your reasons for claiming the document meets the statutory standard for exemption. Set out any evidence you have for making the claim, eg *consultations with third parties who indicated the documents had been given in confidence and were confidential because.....*

Set out why you could not make deletions to allow exempt material to be released (if relevant) and why you could not release documents outside the FOI Act.

If you are refusing on section 24A grounds, set out the searches that were done for documents, when and by whom, and attach disposal schedules if documents have been destroyed.

## **EVIDENCE/MATERIAL ON WHICH MY FINDINGS WERE BASED**

In reaching my decision to ..... I relied on the following documentary evidence.

- *<list documents>*
- *Freedom of Information Act 1982*
- *The Department's Freedom of Information Handbook*
- *Memorandum 98, produced by the Attorney-General's Department*
- *Submissions from you dated .....*
- *Submissions made by third parties consulted, under sections .....*
- *Other material considered*

## **REVIEW RIGHTS**

*<set out or attach>*

*<sign and date>*