



**Australian Government**  
**Department of the Prime Minister and Cabinet**

# **GUIDE FOR FOI DECISION-MAKERS**

**OCTOBER 2003**

## **IMPORTANT**

If your area receives a request under the FOI Act direct from the applicant, please advise the Access and Administrative Review Section, Government Division, promptly.

If you have been asked to make a decision under the FOI Act, or will be assisting in a decision making process, please read relevant parts of this Guide carefully before embarking on that process.

This Guide is intended to provide general information on key provisions of the Act, but does not remove the need to refer to specific provisions of the Act or seek advice on individual requests in appropriate cases.

This document was prepared for internal use within the Australian Government Department of the Prime Minister and Cabinet; it is subordinate to the FOI Guidelines available at <http://www.pmc.gov.au/foi/guidelines.cfm> and is not advice to any other Australian Government agency. Any queries may be referred to the Department of the Prime Minister and Cabinet's FOI Coordinator at [foi@pmc.gov.au](mailto:foi@pmc.gov.au).

## EXECUTIVE SUMMARY

The **object** of the *Freedom of Information Act 1982* (the Act) is **to extend, as far as possible, the Australian community’s right of access to information in the possession of the Australian Government and its agencies.** (While the Act’s title refers to “information”, it is only documents that are subject to the Act.) The Act applies to the majority of Australian Government agencies. It applies to courts and tribunals, and the Official Secretary to the Governor-General, but only in respect of matters of an administrative nature. It also applies to records held by Ministers that relate to the affairs of Australian Government agencies. In relation to the PM&C portfolio, all of the portfolio agencies are covered by the Act save for:

- the Australian National Audit Office
- the Office of the Inspector-General of Intelligence and Security (IGIS)
- the National Australia Day Council (NADC), and
- the Office of National Assessments.

**The Access and Administrative Review Section in Government Division coordinates the processing of the Department’s FOI requests and provides advice and assistance.** All officers of the Section hold appropriate security clearances. On receipt of a request, the Section identifies the areas of the Department likely to hold relevant records, and will liaise with those offices, the applicant and agencies outside the Department where necessary. **The decision-maker in the first instance will usually be the branch head of the operational area in which the bulk of the documents subject to the request are held.** Decision-makers are expected to consult with other areas of the Department in relation to release or non-release of their documents, and with other agencies where appropriate. Consultation is especially important in the case of sensitive requests. Generally, the Section will take care of administrative matters relating to the request and the decision-making process, leaving the decision-maker to:

- manage identification of relevant documents
- estimate charges
- manage consultation and briefing on the request
- make decisions on access to the material
- make decisions as to the remission of charges, and
- direct formulation of, and finalise, statements of reasons.

The processing of an FOI request has a number of distinct steps, which are governed overall by **statutory time limits.** The major steps are:

- acknowledging and clarifying the request
- identifying relevant documents
- assessing charges
- making decisions on exemptions and charges
- writing up those decisions, and
- notifying the applicant.

**Some documents do not fall within the ambit of the Act** because they:

- were created or received by an agency prior to 1977 (although there are some exceptions to this)
- are available for public access by other means, including public registers and documents available for purchase
- are more than 30 years old and may be accessed through the National Archives of Australia
- were created by agencies which fall outside the Act – ASIO, ASIS, DIO, ONA, DSD and IGIS, or
- are explicitly excluded from the Act’s definition of ‘document’, such as Cabinet notebooks and library material maintained for reference purposes.

Where some or all of the documents sought are **more closely associated with the functions of another agency**, or are not in the possession of PM&C but are thought to be in the possession of another agency, arrangements may be made through the FOI Coordinator to transfer all or part of the request to that agency.

In some cases the Act requires that **third parties be consulted** in relation to decisions on access, when information about them is contained in requested documents. These third parties include identifiable individuals, State and Territory governments, and bodies with business affairs. Note that the FOI Coordinator will normally undertake referrals and consultation. If the request is from a **current or former employee** of the receiving agency and the subject of the request is his or her personnel records, before making an FOI request for these records the employee must first seek access under any established procedures of the agency by which such requests are normally satisfied.

The decision-maker should remember that the Act provides a prima facie **right of access** to all relevant records. It is up to the decision-maker to justify a denial of access in the statement of reasons and that can only be done by calling on one or more of the statutory exemptions. The main heads of **exemption** relate to:

- documents affecting national security, defence or international relations
- documents affecting relations with States and Territories
- Cabinet and Executive Council documents
- internal working documents
- documents affecting enforcement of law and protection of public safety
- documents to which secrecy provisions of enactments apply
- documents affecting financial or property interests of the Commonwealth
- documents affecting personal privacy
- documents subject to legal professional privilege
- documents relating to business affairs and to research
- documents affecting the national economy
- documents containing material obtained in confidence
- documents the public disclosure of which would be contempt of Parliament or contempt of court

- certain documents arising out of companies and securities legislation
- electoral rolls and related documents

A number of exemptions, including the one relating to internal working documents, are not absolute exemptions, but depend on a judgement about the public interest.

A **fee** is payable on making an application both for an original request and for a request for internal review. In addition, **charges** are assessed pro rata for a number of activities involved in processing the request. However, the applicant can request that the fees and charges be remitted in part or totally. Where an applicant has paid the charges levied, access must be granted to the relevant, non-exempt documents. In most cases access will be provided in the form of copies, and the Act provides that where material is exempt and it is possible to do so, copies of documents shall have exempt and irrelevant material deleted. In certain circumstances access in that form may be refused, but access in another form must be granted. Note that this only affects the **form of access** to be provided, not the requirement to provide access as such. Access may be **deferred** in certain circumstances, and the statement of reasons to the applicant must state the period of deferral. The Act specifies the outer limits of these periods, and an eventual provision of access must be envisaged.

Where a decision has been made to **refuse or defer access** the decision-maker must provide the applicant with a notice of the decision and a statement of reasons in writing. This statement of reasons must include:

- findings on any material questions of fact
- reasons for the decision, including any relevant public interest considerations
- the name and designation of the decision-maker, and
- information concerning review and appeal mechanisms open to the applicant.

**Statements of reasons are important documents for the applicant and the Department, and drafting should not be undertaken lightly.** They contribute significantly to the applicant's belief as to whether a request has been dealt with properly and in good faith and they form the basis of any appeal of the decision. The FOI Coordinator will be able to assist the decision-maker with the drafting. All signed statements of reasons should be submitted to the FOI Coordinator for forwarding to the applicant. Where a decision is being made by a Branch Head, the signed statement of reasons **must be accompanied** by a minute from the relevant Division Head relating to sensitivities and possible briefing requirements. If a Division Head is not available, the minute could be signed by the relevant Deputy Secretary. Where a decision is being made by a Division Head, the Division Head would provide an accompanying note confirming consideration of sensitivities and possible briefing requirements.

The Act also provides a right for people to have erroneous information recorded about them **amended or annotated**. The procedure for applying is largely the same as that for making a general FOI request, with the exception that there is no fee. There are three pre-conditions that must be met by an applicant, being that:

- the person has had lawful access to a document of an agency or an official document of a minister

- the document contains personal information about them, and
- the document contains material that is incomplete, incorrect, out of date or misleading and is being used by an agency or a Minister for an administrative purpose.

**Internal review** of decisions under the Act can be sought on a variety of grounds, including: a denial of access to documents; the imposition of charges and fees; or, a refusal to amend or alter personal records. Internal review is carried out by an officer at a higher level than the original decision-maker. The internal review decision-maker approaches the request afresh and makes a new decision. Internal review is not available where the original decision was taken by the responsible Minister or principal officer of the agency – any appeal from these decisions must go straight to the Administrative Appeals Tribunal (AAT).

If the applicant still disputes the decision on access, or on the imposition of fees or charges, or on the amendment or alteration of personal records, he or she may **appeal to the AAT**. **The failure to meet any of the prescribed time-limits** attaching to an FOI application is treated as a deemed refusal and **allows for immediate appeal to the AAT**, bypassing the internal review stage. A decision of the AAT can be appealed to the **Federal Court**, but on a point of law only.

At any time, the applicant may make a **complaint to the Ombudsman**, but this may limit an applicant's access to review.

More detailed information about the operation of the Act appears in the following pages. While this Guide should answer most preliminary questions, officers in the Access and Administrative Review Section are able to give more detailed advice on matters arising under the Act.

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## **1. WHO THE ACT APPLIES TO**

The object of the Freedom of Information Act is to extend, as far as possible, the right of the Australian community to access information in the possession of the Australian Government and its agencies. (While the Act's title refers to "information", it is only documents that are subject to the Act.) The Act applies to the majority of Australian Government agencies. It applies to courts and tribunals, and to the Official Secretary to the Governor-General, but only in respect of matters of an administrative nature. It also applies to records held by Ministers that relate to the affairs of Australian Government agencies. In relation to the PM&C portfolio, all of the portfolio agencies are covered by the Act save for:

- the Australian National Audit Office,
- the Office of the Inspector-General of Intelligence and Security (IGIS),
- the National Australia Day Council (NADC), and
- the Office of National Assessments.

The Act does not apply to the security or intelligence agencies or to the Parliamentary Departments.

For information as to which records the Act applies, see the section 'Identifying Relevant Documents' below.

Note that this Guide uses the terms 'request' and 'application' interchangeably.

## **2. ROLES OF FOI COORDINATOR AND DECISION-MAKERS**

The Access and Administrative Review Section in Government Division coordinates the Department's FOI requests, and in most cases requests are directed to that Section in the first instance. Areas that receive an FOI request directly should refer it to the Access and Administrative Review Section immediately for advice. The Section will be able to advise in detail on the matters covered in this guide.

On receipt of a request, the Section identifies the areas of the Department likely to hold relevant records, and will liaise with those areas, the applicant and agencies outside the Department where necessary. It provides advice about applicable exemptions, assists in the drafting of decisions, and undertakes all communications with the applicant. Generally, it will take care of administrative matters relating to the request and the decision-making process, leaving the decision-maker to:

- manage identification of relevant documents
- estimate charges
- manage consultation and briefing on the request
- make decisions on access to the material
- make decisions as to the remission of charges, and
- direct formulation of, and finalise, statements of reasons.

The Section is available to provide advice and assistance in these matters. The person in the Access and Administrative Review Section who coordinates FOI requests is the

FOI Coordinator; however, any of the officers in the Access and Administrative Review Section can be approached for advice.

For most requests, the initial decision-maker will be the Branch Head of the operational area in which the bulk of any relevant documents are held. The Branch Head to whom the request is forwarded will need to consider whether he or she is the appropriate decision-maker and seek agreement from the Division Head. In some cases it may be more appropriate for the initial decision-maker to be at a higher level. The FOI Coordinator can advise on the appropriate level of decision-maker.

The decision-maker will need to consider all aspects of the request, including any public interest considerations that might apply in relation to disclosing or not disclosing particular material. In forming a view on relevant factors, the decision-maker may consult as he or she thinks fit, however, the decision ultimately must be that of the decision-maker alone. The decision must not be made at the direction of anyone else.

Before a decision is finalised by a Branch Head, he or she will need to discuss with his or her Division Head whether there are any sensitivities arising from the proposed decision.

Once the decision is made, a Branch Head decision-maker will need to consult with his or her Division Head about whether there is any need to brief the Secretary and anyone else as appropriate about the thrust of the decision and key issues. The Division Head will need to confirm in writing to the FOI Coordinator that discussions about the appropriate decision-maker, any sensitivities and any briefing took place. If a Division Head is not available, the minute could be signed by the relevant Deputy Secretary. Where a decision is being made by a Division Head, the Division Head would provide an accompanying note confirming consideration of sensitivities and possible briefing requirements.

The first element of the decision-making process will be managing the identification of relevant documents. Of course, decision-makers can be assisted by others, but the final decision will be the responsibility of the decision-maker, who may be required to justify it to the Ombudsman or in proceedings in the Administrative Appeals Tribunal (AAT). Note, however, that a decision-maker's personal liability arising from FOI activities is limited as the Commonwealth, agencies, Ministers and officers are protected from actions for defamation, breach of confidence and breach of copyright which might otherwise arise from the provision of access or through the consultation process (section 91). Similarly, persons authorising access, or providing access to others as part of the consultative process, are protected from criminal prosecution that might otherwise arise from that disclosure (section 92).

### **3. OUTLINE OF PROCESS**

The processing of an FOI request has a number of distinct stages, most of which are subject to statutory time limits, and these are outlined below. Further information and details relevant to each step will be given in subsequent sections.

#### **1. Receipt of the request**

The Department must acknowledge the request in writing within 14 days of receipt and provide a decision within 30 days. (These are calendar days, not working days.) Any area that receives a request directly should immediately forward it to the FOI Coordinator so as not to affect adversely our compliance with the statutory time limits.

#### **2. Identifying the relevant documents**

The process of identifying relevant documents requires careful attention to the terms of the applicant's request, as the threshold criterion is relevance. As most requests do not specify a particular organisational element of the Department, this also requires consideration of whether other areas might also hold relevant documents. This may involve other line areas, particularly where a request relates to more than one area of responsibility; the decision-maker will also need to consider if documents might be held in Cabinet Secretariat or Briefing Section.

The decision-maker should arrange for searches by the Records Management Unit for relevant files and by the Ministerial Correspondence Unit for relevant correspondence. The Act applies to all documents in the Department's possession, whether on file or not. Consideration needs to be given to whether relevant documents may be held electronically (e.g. e-mails) or in other ways (e.g. officers' notebooks or diaries).

(The situation where the department has multiple copies of a given document is addressed below in section 5, 'Identifying relevant documents'.)

The decision-maker should ensure that a record is kept of the process undertaken to locate relevant documents.

#### **3. Assessment of charges**

In many cases dealt with by this Department, the applicant will be liable to pay a charge to have the request processed, and the decision-maker will be asked by the FOI Coordinator to estimate the cost of processing the applicant's request. The FOI Coordinator will write to the applicant advising of the estimate of the charges and will request payment of a deposit before proceeding with the request.

#### **4. Making a decision**

This continues step 2. Decision-makers assess whether or not the relevant documents are exempt using the heads of exemption as the criteria. The end result will be a decision and statement of reasons listing the documents the decision-maker has considered and the exemptions being claimed, if any. The decision-maker will also decide on any request for the remission of fees and charges.

#### **5. Notifying the applicant**

The FOI Coordinator will write to the applicant again providing a copy of the decision and giving the applicant the option of: paying the rest of the charges and receiving copies of the documents; or, immediately seeking an internal review of the decision/s. In any event, the applicant has 30 days after being notified of the decision/s in which to request an internal review. If the applicant accepts the decision/s and pays the balance of the charges, the FOI Coordinator will prepare copies for release, with any exemptions made, to be checked by the relevant line area/s, and the FOI Coordinator will then forward these to the applicant.

#### **6. Internal review**

Internal review of any decision under the Act is carried out by an officer at a higher level than the original decision-maker, who approaches the request and documents afresh and repeats the step 4 assessment (and step 2 if necessary). Once again, the FOI Coordinator is available for any advice required, and will advise the applicant of the result. Internal review can be sought in relation to the decision on the documents, and in relation to the decision relating to fees and charges.

#### **7. Further appeals**

If the applicant still disputes the decision, he or she may appeal to the AAT, which undertakes a merits review. Further appeal lies to the Federal Court, but only on a point of law. Any failure to comply with a time limit in regard to the original request may be treated as a deemed refusal of access, and allows for immediate appeal to the AAT.

At any time the applicant may make a complaint to the Ombudsman about the processing of his or her request, including any delay.

### **4. RECEIPT OF THE REQUEST**

For a request to be valid under the Act, it must (under section 15):

- be in writing
- be accompanied by an application fee
- provide sufficient information to identify relevant documents, and
- specify a return address in Australia.

The Department must acknowledge the request in writing within 14 days of receipt and provide a decision within 30 days. (These are calendar days, not working days.) Time does not start running until all four of the above requirements are satisfied. For example, if there is insufficient information to identify the documents the applicant is seeking, then time spent consulting with an applicant to reach agreement on terms will not be included in calculating processing time. Any area that receives a request directly should immediately forward it to the FOI Coordinator so that the validity of the request can be determined and consultations can take place.

While payment of the application fee is necessary to make the application valid under the Act, if the applicant makes a claim for remission at the time of applying, the decision-maker will need to decide whether the fee should be remitted – for further information see the section ‘Fees and Charges’ below. The FOI Coordinator will be able to assist decision-makers with determinations in this area.

It is the responsibility of the agency which originally receives an FOI request to assist the applicant in:

- clarifying the terms of the request
- complying with the requirements of a valid request, and
- directing the request to another agency, if appropriate (sub-sections 15(3) and (4)).

If the request is from a current or former employee of the receiving agency and the subject of the request is his or her personnel records, before making an FOI request for these records the employee must first seek access under any established procedures of the agency by which such requests are normally satisfied. In these circumstances an FOI request can only be made if the applicant is not satisfied with the result of that prior request or if they have not received a decision on that earlier request within 30 days of making it (section 15A). Note that requests for access to ‘personnel records’ are a different thing to requests for other records which contain personal information about the applicant or another individual.

## **5. IDENTIFYING RELEVANT DOCUMENTS**

The process of identifying relevant documents starts with reading the terms of the request very carefully. Those terms should not be construed as if contained in a legal document, but should be interpreted in a common sense way. However, the request can always be clarified with the applicant if need be. As most requests do not specify a particular organisational element of the Department, this stage of the process requires you to consider whether other areas might also hold relevant documents. Usually the FOI Coordinator will have considered this at the time the request was referred to the decision-maker and copied the referral to those areas, but if a relevant area has been overlooked the FOI Coordinator should be informed. The decision-maker will need to contact Cabinet Secretariat and Briefing Section if it is likely they might hold relevant documents.

The decision-maker should arrange for searches by the Records Management Unit for relevant files and by the Ministerial Correspondence Unit for relevant correspondence.

The Act applies to all documents in the Department's possession, whether on file or not. Consideration needs to be given to whether relevant documents may be held electronically (e.g. e-mails) or in other ways (e.g. officers' notebooks or diaries).

The decision-maker should ensure that a record is kept of the process undertaken to locate relevant documents.

Where the department has multiple copies of the same document, the request can be satisfied by providing a single copy of the document (with any exempt and/or irrelevant material deleted). Care must be taken, however, in ensuring that the copies in question are exact duplicates. Whilst there may be several copies of the same original document, any variation between those copies requires that all variations be separately identified and considered separately for release or non-release. This arises especially where annotations are made on documents.

Records held in a particular work area may not come within the Act for one of three reasons: they do not fall within the Act's definition of "document"; they are documents, but they are specifically excluded because of their type; or, they are documents, but they are specifically excluded because of their creating agency. Detail on each of these is provided below.

While the Act provides a right to obtain access to documents (section 11), and not information as such, its definition (section 4) of "document" is very broad and includes:

- paper or other material on which there is writing, or symbols or perforations having a meaning for persons qualified to read them
- a map, plan, drawing or photograph
- any article or material from which sound, images or writing can be reproduced, with or without the aid of any other article or device
- any article on which information has been stored electronically or mechanically
- any other record of information, and
- any copy or reproduction of the above.

Note that the Act's definition of document refers to any of, or any part of, the things listed above. This means, for example, that in a minute covering a range of issues of which only one is relevant to the FOI request, only those parts of the minute dealing with that issue will constitute the document. Just because part of the minute is relevant, it does not mean that the whole minute must be considered.

**Cabinet notebooks and library material maintained for reference purposes are explicitly excluded from the definition of 'document'.**

Some documents are excluded from the ambit of the Act: by virtue of being available for public access by other means, including public registers and documents available for purchase; or because the documents are more than 30 years old and may be accessed through National Archives of Australia under the *Archives Act 1983* (section 12). Other documents are excluded by virtue of being created by certain agencies

which fall outside the Act – ASIO, ASIS, DIO, ONA, DSD and IGIS (subsection 7(2A)). The records of completed Royal Commissions **do** fall within the Act, and PM&C is the responsible Department for decisions on access to them (subsection 13(3)).

One case where the Act does provide for access to information, rather than documents, is in the case of ‘virtual records’ held in electronic formats – that is, where the records have not previously been in physical form. This is particularly relevant to e-mail accounts. Where a request seeks information that is stored only in electronic form, access can be supplied electronically in the form of a floppy or compact disk. Alternatively, where an equivalent physical form of the document could be produced (e.g. paper), then if the applicant does not want that information in electronic form the request is taken to be for that subsequently produced document (section 17). The document will be taken to be in the possession of the agency and the agency must respond to the request unless to do so would substantially and unreasonably divert agency resources from other operations. A special charges scheme may apply to access to documents held electronically. This is detailed below.

Note that, by section 25, nothing requires an agency or Minister to confirm or deny the existence of a document if that information would, if contained in a document of its own, attract the exemptions in section 33 (national security, defence or international relations), section 33A (documents affecting relations with States) or subsection 37(1) (law enforcement).

Finally, the FOI Act only applies to documents that became agency documents (that is, documents that were created or received by an agency) from 1977 onwards, except where:

- access to an earlier document would be reasonably necessary to understand a document to which the applicant had legally obtained access; or
- the earlier document contains personal information about the applicant or their business, commercial or financial affairs (subsection 12(2)).

For the particular conditions attaching to requests by people to have erroneous information recorded about them amended or annotated, see the Personal Records section in this guide.

## 6. FEES AND CHARGES

An application fee is payable for both an original request and for a request for internal review. (The exception to this requirement is where the documents sought relate to prescribed income support benefits.) However, the applicant can request that the fees be waived (“remitted”) in part or totally. On receiving a request for remittal, the decision-maker **must** consider the financial hardship that would affect the applicant if he or she had to pay the fee, or whether the giving of access is in the general public interest or in the interest of a substantial section of the public and **may** consider other relevant factors (section 30A). The FOI Coordinator will advise on the processes to

be followed and the standards generally applied, and will advise the applicant of the final decision in relation to fees.

In many cases dealt with by this Department, the applicant will be liable to pay a charge to have the request processed. This charge differs from the application fee in that, while the fee is a set amount, charges are *pro rata* to the hours of work involved in processing the application. The referral to the decision-maker from the FOI Coordinator will be accompanied by a request for an assessment of the approximate cost of processing the applicant's request, in terms of:

- search and retrieval time @ \$15 per hour
- decision making time @ \$20 per hour
- (including consultation with third parties)
- photocopying @ 10c per page

(The rate of the charges is set out in Regulations made under the Act.)

Search and retrieval activities include:

- searching a file index to establish the location of a document
- physically locating and extracting the document from its storage place, and
- reading the file to locate documents relevant to the request.

Decision making activities include:

- examining the document
- consulting with any person or body
- making a copy with deletions, and
- notifying a decision.

These costs are estimated prior to the actual processing in order to avoid unnecessary work should the applicant not wish to proceed. Importantly, while the estimated charge can be reduced at a later stage, in light of the actual costs of processing, it cannot be increased once notified. The FOI Coordinator will write to the applicant advising the total estimated charge, and the 30 day clock for providing a decision stops when the applicant receives this advice and will not restart until agreement to the charges and a deposit is received or a decision is made to waive the charges.

Note that where the applicant has sought access to electronic records and access is being provided in the form of a floppy or compact disk, the amount of the charge levied against the applicant for producing a copy (that is, what would have been the photocopying element of the charge in the case of paper documents) cannot be more than the actual cost of producing that disk.

As with fees, provision is made for the applicant to dispute the assessment of charges, and/or to ask for the charges to be reduced or waived entirely (section 29). Again, the decision-maker must consider the financial hardship that would affect the applicant if he or she had to pay the fee, or whether the giving of access is in the general public interest or in the interest of a substantial section of the public (subsection 29(5)). If

this situation arises the FOI Coordinator will advise the decision-maker of the relevant considerations.

## **7. SHARING AND TRANSFER OF REQUESTS**

Where some or all of the documents sought are more closely associated with the functions of another agency, or are not in the possession of PM&C but are thought to be in the possession of another agency, arrangements may be made through the FOI Coordinator to transfer all or part of the request to that agency (section 16). Similarly, requests directed to other agencies may be transferred to PM&C where appropriate. A request relating to more than one agency might need to be dealt with by transferring part of the request to other agencies. In this case, each agency will make a decision on its own documents but should consult as necessary. As time will run for the second agency from when the first agency received the request (subsection 16(5)), it is important that referral requirements be identified as early as possible.

For the purposes of the transfer provisions in the Act, “agency” includes a Minister. If it is thought likely that relevant documents might be in the possession of the Prime Minister’s Office, consideration needs to be given to possible transfer in relation to such documents. The FOI Coordinator can advise further on this.

Where a request is made to one agency, which relates to documents held by it but originating from an agency that is exempt from the operation of the FOI Act, that request will be transferred to the Department within the same portfolio as the exempt agency (subsection 16(2)). In relation to this portfolio, exempt agencies of this type are:

- the Australian National Audit Office
- the Office of the Inspector-General of Intelligence and Security, and
- the Office of National Assessments.

A similar situation arises where a request is made to an agency relating to documents held by it, but originating from a certain agency and being of a class of documents specifically exempt from the Act (even though the agency as a whole is not), or where those documents have originated from a body corporate established under certain specified legislation (subsection 16(3)). In those cases, the request may be transferred to those other agencies in certain circumstances. (Those other agencies are generally of the type that are competing with the private sector.) The FOI Coordinator will provide advice on transfers of this type.

## **8. CONSULTATION WITH THIRD PARTIES**

In some cases the Act requires that the views of third parties be sought in relation to decisions on access when information about them is contained in requested documents. These third parties include identifiable individuals, State and Territory governments, and commercial bodies. While the Act does not require it, as a matter of practicality other Australian Government agencies and foreign governments may need to be consulted in certain circumstances (for example, where another Department

is the source of a document held by PM&C). Any requirement, under the sections mentioned below, to consult with a third party except another Australian Government agency or a foreign government extends the response period by 30 days, making the total 60 days (subsection 15(6)). Note that third parties except other Australian Government agencies and foreign governments may dispute the decision to **release** the documents and request an internal review or appeal directly to the AAT under sections 58F, 59 and 59A. See the section 'Internal Review' below for more information. Note that the FOI Coordinator will undertake referrals and consultation.

### **Other Australian Government Agencies and Foreign Governments**

Consultation with other agencies may be necessary to determine if they hold relevant documents (in cases where the request is subject-specific and not agency-specific), to refer applications or transfer requests, to coordinate similar or identical requests addressed to a number of agencies, and to seek their views on the release of documents of which we hold copies and which are relevant to the request. (Note that other Australian Government agencies are instructed to seek advice from PM&C in relation to any Cabinet and Executive Council documents held by them which are subject to an FOI request.)

Similarly, where relevant documents are from, concern or affect a foreign government, they might need to be referred to the Department of Foreign Affairs and Trade for further referral to that government.

Consultation with other Australian Government agencies and foreign governments does not extend the decision time limit and so it is important that potential referrals be brought to the attention of the FOI Coordinator **as early as possible**.

### **Personal Information**

[For information on the amendment and annotation of personal records concerning the applicant see the later section titled 'Personal Records'.]

In some cases a request will be directed at documents which contain personal information about an identifiable individual. Personal information is defined as information or an opinion, whether true or not, about an individual whose identity is apparent or can reasonably be ascertained from the information or opinion. (It does not matter if that person is still alive or has died.) If it appears to the decision-maker that this person, or his or her successors, might reasonably wish to claim that the information is exempt under section 41 (as an unreasonable disclosure of personal information), the subject person or their legal personal representative must be given a reasonable opportunity to make submissions, and the decision-maker must consider those submissions before making a decision on the documents (section 27A).

In assessing whether the identifiable individual might reasonably wish to submit that the personal information should not be disclosed and should therefore be consulted, a decision-maker must consider:

- how well known the information is already

- whether the person is known to be associated with the matters dealt with in the document
- the availability of the information from publicly accessible sources, and
- any other matter the decision-maker believes is relevant in the circumstances.

If the decision is taken following consultation that the documents are not exempt under section 41 (because disclosure would not be unreasonable), the decision-maker must inform the individual of this decision in writing and of the right to seek internal review or to apply to the AAT. He or she must not give the applicant access to the records until either the period in which the identifiable individual can appeal to the AAT has expired (30 days), or the AAT has dismissed or ruled against such an appeal. If documents relating to personal affairs are identified, alert the FOI Coordinator immediately.

There is an important variation in cases where the applicant is the identifiable individual. If the relevant document contains information concerning the applicant which has been provided by a medical practitioner, psychiatrist, psychologist, marriage guidance counsellor or social worker (among others) in their professional capacity, certain access procedures apply under section 41. If it appears to the Minister or principal officer of the agency that disclosure of the information directly to the applicant might be detrimental to the applicant's physical or mental health, he or she may order that the access be given instead to a person nominated by the applicant and carrying on the same profession as the provider of the original information. Whenever a request results in the disclosure of medical or psychiatric personal information which has been provided by one of the types of professionals given above, reasonably practicable steps must be taken to notify that professional. The FOI Coordinator can advise further on this.

### **States and Territories**

Arrangements can be made under section 26A between the Commonwealth and a State or a Territory with regard to documents created by or received from that State or Territory and documents containing information created by or received from that State or Territory. It is this Department's practice to consult with the relevant State or Territory wherever such documents are subject to an FOI request. If the State or Territory could reasonably contend that the documents subject to the request would be exempt under section 33A (damage to relations, or disclosure of confidential information, between the Commonwealth and a State or Territory), then no decision to grant access to the subject document can be made unless the required consultation process has taken place. If the decision is taken that the documents are not exempt under section 33A, the decision-maker must inform the relevant State or Territory of this decision in writing. He or she must not give the applicant access to the records until either the period in which the State or Territory can appeal to the AAT has expired, or the AAT has dismissed or ruled against such an appeal. If State or Territory-sourced documents are identified, alert the FOI Coordinator immediately.

## **Business Affairs**

Where a request for access is directed to documents which contain information on the business or professional affairs of a person, or the business, commercial or financial affairs of a body, certain procedures must be followed before a decision on that request can be made (section 27). (Advice on the detailed definition of what constitutes these affairs can be obtained from the FOI Coordinator.) The relevant person or body has to be given a reasonable opportunity to claim that the subject information is exempt under section 43 (business affairs and trade secrets), and the decision-maker must consider that claim. If, despite a claim that the documents are exempt, the decision is taken that the documents should be released, the decision-maker must inform the subject person or body of this decision in writing. He or she must not give the applicant access to the records until either the period in which the subject person or body can appeal to the AAT has expired, or the AAT has dismissed or ruled against such an appeal. If documents relating to business affairs are identified, alert the FOI Coordinator immediately.

## **9. APPLYING EXEMPTIONS AND REFUSALS**

### **Exemptions**

Once a preliminary assessment has been made of which records are relevant to the request, it is time to go back and look at them and see if they really do deal with the applicant's area of interest (and that they fall within the ambit of the Act). This may reduce the number of documents at issue from the first assessment. However, it should be remembered that requests should **not** be read narrowly or literally, but in a commonsense way; for example, most applicants will not know the difference between a minute and a memorandum. If necessary, the decision-maker or FOI Coordinator should discuss the scope of the request with the applicant.

At this point the decision-maker is in a position to consider whether any part of these documents requires exemption from the request. To minimise double handling the decision-maker should be familiar with the heads of exemptions, discussed in this guide, before making this assessment. The decision-maker should remember that the Act provides **a prima facie right of access to all relevant records**. It is up to the decision-maker to justify a denial of access in the statement of reasons and that can only be done by calling on one or more of the statutory exemptions.

Familiarisation with the exemptions, prior to making the assessment, gives the decision-maker an idea of the type of reason why material may be exempted. However, the practical way of pursuing the examination is to read through the relevant documents and identify the information which the decision-maker considers has current sensitivity and should not be released. Then the process moves on to matching that information with the various statutory exemptions. The decision-maker should attach as many of the exemptions as clearly fit in a particular case. The arguments in support of particular exemptions may be weaker or stronger, and if the document **genuinely** warrants exemption under more than one provision it is unwise to rely on a

single exemption - **but**, the arguments supporting claimed exemptions must be reasonable. **Claimed exemptions which are not supported by the documents themselves should not be attempted.** The Act allows for only three ‘class claims’ - exemptions where a document’s membership of a class of documents is sufficient. These three class exemptions are sections 34, 35 and 42, being for Cabinet documents, Executive Council documents, and documents subject to legal professional privilege respectively. All other exemptions must be traced back to the actual contents of the documents. Note that national security or sensitive material classifications are irrelevant in themselves, although they could indicate that an exemption might be applicable.

It is at this point that the decision-maker will probably need to talk again to the FOI Coordinator, and if other areas of the Department are involved, a meeting between the relevant parties will be arranged. It is important that the decision-maker consults other areas in relation to release or non-release of their documents. Consultation is especially important in the case of sensitive requests, and any sensitivities in relation to their documents must be discussed with the other areas. Other areas must also be given an opportunity to participate in any briefing. The end product of this step will be a decision on access and a statement of reasons listing the documents considered, the exemptions claimed, and the justification for invoking those exemptions.

While there is no requirement that the Prime Minister’s Office or the office of another Minister be informed of a request and proposed decision, there is no bar on doing so. Where, for example, the request is made by a Member of Parliament or involves some matter of current sensitivity, it may be prudent to advise the relevant office and, if necessary, prepare a PPQ brief. In any event, the Branch Head decision-maker will need to discuss the decision with the Division Head to identify any sensitivities and whether there is a need for any briefing. The Division Head will need to confirm this in writing to the FOI Coordinator before the decision is sent to the applicant.

### **Conclusive Certificates**

The Act permits conclusive certificates to be issued in relation to some exemptions (see below). Where a certificate is issued, it establishes the matter certified and limits the AAT, in reviewing a decision, to considering whether there exist reasonable grounds for the claim made. In this context, “reasonable” means not “fanciful, imaginary or contrived ... based on reason, namely agreeable to reason, not irrational, absurd or ridiculous ...”. Where the AAT finds there are no reasonable grounds for the issue of a certificate, it may **recommend** that the certificate be revoked, but the Minister is not obliged to accept this recommendation (although he or she must explain his or her decision in Parliament).

Provision	Subject	Effect	Issued
section 33	Damage to national security, defence, international relations or would divulge information communicated in confidence by foreign government or an international organization	Establishes that document falls into exempt category	Minister or Secretary as delegate
section 33A	Damage to Commonwealth/State relations or would divulge information communicated in confidence by a State, not being information disclosure of which would be in public interest	Establishes that document falls into exempt category and that document does not contain information disclosure of which would be in public interest	Minister or Secretary as delegate
section 34	Disclosure of Cabinet document (as defined) not being a document containing purely factual material (unless disclosure would disclose deliberation or decision which has not been published)	Establishes that document falls into exempt category and does not contain purely factual material (unless disclosure would disclose deliberation or decision which has not been published)	Secretary to the Department of the Prime Minister & Cabinet
section 35	Disclosure of Executive Council document (as defined) not being a document containing purely factual material (unless disclosure would disclose deliberation or decision which has not been published)	Establishes that document falls into exempt category and does not contain purely factual material (unless disclosure would disclose deliberation or decision which has not been published)	Secretary to the Executive Council
section 36	Deliberative process documents, disclosure of which would be contrary to the public interest	Establishes that disclosure would be contrary to the public interest	Minister or Secretary as delegate

Conclusive certificates are employed rarely, and usually only after an application has been made to the Administrative Appeals Tribunal. A strong argument needs to be made for their use, and they should not be used as a means of avoiding the proper examination of documents and application of exemptions. Doing so can backfire (for example if a section 36 certificate is issued in relation to a document which does not fall within the class caught by the exemption). The FOI Coordinator can advise about conclusive certificates.

### Public Interest Considerations

Several of the heads of exemption are not absolute exemptions, but require an identification, and comparative assessment, of relevant public interest considerations. The public interest appears in the following provisions:

- under section 36, a document will be exempt only if disclosure would be contrary to the public interest
- under sections 33A, 39 and 40, a document will be exempt unless, on balance, disclosure would be in the public interest
- under sections 41 and 43, public interest-like factors must be considered by implication (i.e. whether disclosure would be “unreasonable”)
- under section 44 the public interest against disclosure is presumed but certain threshold tests must be met.

Public interest considerations may include (but are not limited to):

- the general public interest in obtaining access to government-held information

- the importance of open government and the transparency of its operations
- the public's need to be informed to enable them to participate in public affairs
- the need to be informed about measures relating to community health and safety, and the relationship between a regulating agency and the regulated enterprise
- premature release of tentative or partially considered policy matters may mislead the public and encourage ill-informed speculation or unwarranted advantage or disadvantage
- on-going negotiations between the government and third parties could be prejudiced by premature release
- that passage of time and diminution of relevance has lessened the sensitivity or potentially prejudicial effects of disclosure
- contribution of missing pieces to the totality of information available to the public and enhancement of the public debate generally
- the principle that a person should have access to information affecting him or her
- interference with the proper conduct of affairs of government or business
- the non-identification of particular Ministers' views as relevant to the principles of Cabinet confidentiality and collective Ministerial responsibility
- interference with the right of a Minister to receive advice from officials and others, to consider that advice and to decide for themselves whether to accept or reject it without being answerable for that advice, rather than for the decision ultimately made.

Any contemplation of raising a public interest consideration along the lines of *'the preservation of the relationship between Ministers and public servants which allows for frank and candid advice must be preserved, and disclosure is likely to adversely affect the frankness and candour of that advice'* should be approached with caution. The AAT has strongly criticised what it has seen as attempts to employ this consideration as a de facto class claim. It **may** be available in cases where a Minister receives considered advice on a substantial matter from a senior official. If it is relevant to the documents under consideration, its application in the particular case must be substantiated.

## **Refusals**

On rare occasions an application for access can be refused without any processing at all (section 24). This can happen in cases where the work involved in processing an application would substantially and unreasonably divert the resources of an agency from its other operations or substantially and unreasonably interfere with the performance of a Minister's functions. However, access cannot be refused until the applicant has been informed of the intention to refuse, and given the opportunity to reformulate the request with the assistance of the agency or Minister's office. This not only applies to the considerations listed below but also to circumstances where the initial application has not included sufficient information to identify the relevant records.

The relevant considerations in making a determination of this kind are the effect on resources needed to:

- identify, locate or collate documents,
- decide whether to grant, refuse or defer access to the documents, including collateral processes of examination, consultation and referral,
- copy the documents, and
- notify decisions.

Factors which should **not** form part of the decision to refuse access are:

- the maximum amount of charges payable specified in any regulations, or
- the applicant's reasons for making the application, as stated by them or as presumed by the agency or Minister.

In certain circumstances access to documents may be refused without the necessity of identifying any or all of the documents relevant to the request, and without identifying the specific provisions of the Act allowing exemption (subsection 24(5)). These circumstances are that:

- it is apparent that all the relevant documents will be exempt, and
- either:
  - there would be no obligation to provide edited copies of the documents under section 22 (see the section 'Physical Access and Copies' below), or
  - the applicant would not want edited copies.

As an example, such a situation would arise if there was an application specifically for a particular Cabinet submission (the final form, not a draft).

Finally, requests may be refused if after taking all reasonable steps the agency or Minister is satisfied that the relevant documents are either in their possession but cannot be found, or that they do not exist (section 24A). These decisions are subject to review or complaint to the Ombudsman.

## **10. HEADS OF EXEMPTIONS**

The statutory exemptions are canvassed here in general terms only. For a more precise idea of their ambit, read the relevant sections of the Act and talk to the FOI Coordinator about interpretation of exemptions by the AAT and how the exemption might apply to the particular document. Several of the exemptions in the Act are composed of subsections and paragraphs, and the precise exemption must be cited in the statement of reasons.

### **s.33 - Documents affecting national security, defence or international relations**

A document is exempt if its disclosure would, or could reasonably be expected to, cause damage to the Commonwealth's interests in these areas. To claim that a reasonable expectation exists, reference must be made to the actual content of a specific disclosure (but without disclosing what is in the exempt document) and the damage likely to eventuate.

A document is also exempt if it would divulge any matter communicated in confidence from a foreign government or international organisation. To fall within this arm of the exemption, the information must be both given and received in confidence - that is, there must have been a consciousness on the part of both parties at the time of communication that the matter was confidential and was to remain so. There is no requirement to show that the foreign government or international organisation has maintained that confidence. Material communicated in confidence is the subject of the section 45 exemption discussed below.

A conclusive certificate can be issued under section 33.

### **s.33A - Documents affecting relations with States and Territories**

As for section 33 above, but in relation to the Commonwealth and a State or Territory. The one major difference is that by subsection 33A(5) this exemption does not apply where disclosure of the contents of the relevant document would, on balance, be in the public interest. See the section 'Applying Exemptions and Refusals' above for more information on public interest considerations.

Note that the consultation procedures under section 26A will most likely be employed as part of any consideration of the section 33A exemption - see the section 'Consultation with Third Parties' above.

A conclusive certificate can be issued under section 33A.

### **s.34 - Cabinet documents**

To come within this exemption the document must be:

- one submitted to Cabinet, or proposed by a Minister to be submitted, having been brought into existence for the purpose of submission to Cabinet, or
- an official record of the Cabinet, or
- a copy of all or part of, or containing an extract from, either of the above, or
- one the disclosure of which would reveal a deliberation or decision of Cabinet not being a document by which a decision of Cabinet was officially published.

**Cabinet notebooks** are not documents within the terms of the Act. Draft Cabinet submissions and memoranda, except to the extent that they are copies of part of the relevant submission or memorandum are unlikely to be covered by this exemption unless they are in (or close to) final form. A draft minute would be covered as a document disclosing a deliberation or a decision of Cabinet. An anticipatory minute

may not be covered. If documents not caught by section 34 are to be exempted, this must occur under a different section (for example, section 36). Legal authority suggests that a document that was once proposed to be submitted to Cabinet, but is no longer, does not qualify for the exemption.

This exemption does not apply to any purely factual material contained in the relevant document unless disclosing that would involve the disclosure of any deliberation or decision of Cabinet, and that deliberation or decision has not been officially published (subsection 34(1A)).

A conclusive certificate can be issued under section 34.

### **s.35 - Executive Council documents**

Notwithstanding the differences between Cabinet and Executive Council processes, the exemptions for both are in similar terms.

A conclusive certificate can be issued under section 35.

### **s.36 - Internal working documents**

To be exempt under this section a document must contain information detailing the deliberative processes of an agency, a Minister or the Government of the Commonwealth, **and** its disclosure must be contrary to the public interest. In the terms of the Act, relevant information is:

*matter in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of an agency or Minister or of the Government of the Commonwealth.*

The AAT has held that deliberative processes do not include material generated before or after the act of deliberation, nor material merely incidental to it. Deliberation involves the weighing up or evaluation of competing arguments or considerations, and is distinguishable from purely procedural administrative processes involved in the functions of an agency. Examples of documents that **may** fall into this class are:

- departmental briefings to Ministers, including on Cabinet matters
- draft Cabinet submissions
- letters exchanged between Ministers on matters of Government policy
- departmental consideration of policy options
- interdepartmental and committee reports
- drafts of correspondence submitted for approval
- minutes of meetings disclosing the views of Ministers or officials at all levels
- submissions or recommendations for decision to superior officers or Ministers
- internal minutes expressing opinions or recommendations at all levels, whether on policy or purely administrative matters

- interdepartmental memoranda expressing opinion, advice or recommendation, including comments on draft Cabinet submissions and draft interdepartmental reports
- file notes of opinions or advice given or received
- staff reports forming part of a deliberative process, including selection committee reports (note these may also be exempt under section 40).

The **public interest** element of the exemption requires that relevant questions of public interest be identified and weighed against each other. It is only if disclosure would be contrary to the public interest that the document is exempt. For information on public interest considerations see the section 'Applying Exemptions and Refusals' above.

A conclusive certificate can be issued under section 36.

### **s.37 - Documents affecting enforcement of law and protection of public safety**

This exemption relates to documents whose disclosure would, or could reasonably be expected to:

- prejudice the investigation of breaches of, or non-compliance with, any law in a particular instance, or
- disclose the existence or identity of a confidential source of information used in law-enforcement, whether explicitly or by inference, or
- endanger the life or physical safety of a person, or
- prejudice a fair-trial or impartial adjudication of a particular case, or
- disclose lawful law-enforcement methods or procedures to the detriment of their effectiveness, in relation to preventing, detecting, investigating or dealing with breaches or evasions of the law, or
- prejudice the maintenance or enforcement of lawful methods for the protection of public safety.

In relation to a confidential source of information, the relationship of confidentiality requires that the information was provided under an express or implied pledge of confidentiality. However, a person is automatically taken to be a confidential source of information used in law-enforcement if the person is receiving, or has received, protection under a witness protection program.

### **s.38 - Documents to which secrecy provisions of enactments apply**

These secrecy provisions are those specified in Schedule 3 of the Act, or any other provisions which expressly invoke section 38. If there is a relevant secrecy provision that does not conform to these requirements then section 38 cannot apply, although it is possible that another head of exemption will. This exemption does not apply in so far as the document contains personal information about the applicant, or if the original secrecy provision would allow for access to be given to the applicant. The provisions specified in Schedule 3 are largely to do with taxation, health, intelligence and security matters.

### **s.39 - Documents affecting financial or property interests of the Commonwealth**

This exemption requires that disclosure would have a substantial adverse effect on the financial or property interests of the Commonwealth or of an agency, unless it would, on balance, be in the public interest. For information on public interest considerations see the section ‘Applying Exemptions and Refusals’ above. What constitutes a ‘substantial adverse effect’ will have to be established in relation to the circumstances of the particular case. Merely establishing that the effect may be adverse will not be sufficient.

### **s.40 - Documents concerning certain operations of agencies**

Unless disclosure would, on balance be in the public interest, this exemption applies to documents whose disclosure would:

- prejudice the effectiveness of procedures or methods for the conduct of tests, examinations or audits by an agency, or
- prejudice the attainment of the objects of particular tests, examinations or audits conducted or to be conducted by an agency, or
- have a substantial adverse effect on the management or assessment of personnel by the Commonwealth or an agency, or
- have a substantial adverse effect on the proper and efficient conduct of an agency’s operations, or
- have a substantial adverse effect on conduct by or on behalf of the Commonwealth or an agency of industrial relations.

Once again, what constitutes a ‘substantial adverse effect’ will have to be established in relation to the circumstances of the particular case. Merely establishing that the effect would be adverse will not be sufficient. Public interest considerations must be taken into account.

### **s.41 - Documents affecting personal privacy**

A document is exempt if its disclosure would involve the **unreasonable** disclosure of personal information about any person, living or dead. The assessment of what is reasonable and what is unreasonable implicitly imports public interest-like considerations - for information on public interest considerations see the section ‘Applying Exemptions and Refusals’ above. Note that the consultation procedures under section 27A will most likely be employed as part of any consideration of the section 41 exemption - see the section ‘Consultation with Third Parties’ above. If the relevant document contains information concerning the applicant which has been provided by a medical practitioner, psychiatrist, psychologist, marriage guidance counsellor or social worker in their professional capacity, special access procedures apply.

The Act itself does not elaborate on what disclosures are unreasonable, but the inclusion of the term ‘unreasonable’ requires a balancing of the competing considerations identified as relevant to non-disclosure. Personal information is defined as information or an opinion, whether true or not, about an individual whose

identity is apparent or can reasonably be ascertained from the information or opinion. The current view taken is that even the bare mention of someone's name can be an unreasonable disclosure of personal information in certain circumstances. It is highly unlikely that disclosure to the applicant of records concerning him or her would be considered unreasonable (although the material might attract other exemptions which will deny disclosure). This area is subject to on-going clarification through the AAT and the FOI Coordinator should be approached for the current interpretation.

#### **s.42 - Documents subject to legal professional privilege**

This exemption can apply to three types of documents which, if sought in litigation, could be exempt from being produced in court on the grounds of legal professional privilege. They are documents which:

- record legal advice provided to a client by a legal adviser;
- are brought into existence for the sole purpose of obtaining legal advice from a professional legal adviser; and
- are brought into existence for the sole purpose of addressing likely or pending litigation.

In relation to the first type of document only, for legal professional privilege to attach the relevant factors are that:

- the legal adviser was acting in his or her capacity as a professional legal adviser;
- the giving of advice was attended by a certain degree of independence; and
- the advice was confidential.

Typically this exemption applies to legal advice obtained by the agency or Minister from an external lawyer, such as the Australian Government Solicitor, although in certain circumstances it may also be applied in relation to an in-house lawyer. The fact that the advice arose out of a statutory duty does not preclude the doctrine.

Note that for the privilege to apply in relation to the second and third types of document, it is not a requirement that the author of the relevant document have been a lawyer.

#### **s.43 - Documents relating to business affairs, etc**

Documents fall within this exemption if their disclosure would disclose:

- trade secrets, or
- information having a commercial value the disclosure of which would, or could reasonably be expected to, injure that value, or
- other information relating to a person's business or professional affairs or an organisation's or undertaking's business, commercial or financial affairs the disclosure of which:
  - would, or could reasonably be expected to, unreasonably affect that person, organisation or undertaking adversely in those affairs, or
  - could reasonably be expected to prejudice the future supply of information to the Commonwealth.

Note that the consultation procedures under section 27 will most likely be employed as part of any consideration of the section 43 exemption - see the section 'Consultation with Third Parties' above. The exemption will not apply where the person or organisation is the applicant or is acting on behalf of the applicant. To claim a reasonable expectation reference must be made to the actual context of a specific disclosure and the damage likely to eventuate. A merely speculative claim would be unlikely to withstand AAT scrutiny. The inclusion of an unreasonable adverse effect in the last aspect of the exemption requires a balancing of the competing considerations identified as relevant. For information on public interest considerations see the section 'Applying Exemptions and Refusals' above.

Note that 'undertaking' includes an undertaking carried on by an element of the public sector, Commonwealth, State or local.

#### **s.43A - Documents relating to research**

The research contemplated here is that undertaken by officers of the CSIRO and ANU. Exemption requires that disclosure of the document would be likely unreasonably to expose the agency or officer to disadvantage. This section will not apply when the research has been completed. The inclusion of an unreasonable exposure to disadvantage requires a balancing of the competing considerations identified as relevant. For information on public interest considerations see the section 'Applying Exemptions and Refusals' above.

#### **s.44 - Documents affecting national economy**

Documents attracting this exemption are those the disclosure of which would be contrary to the public interest for one of two reasons. The first is the expected adverse effect on the ability of the Government to manage Australia's economy. The second canvasses disruption to the ordinary course of business in the community, or an undue benefit or detriment to an individual or a class of persons, caused by premature knowledge of future actions of the Government or Parliament.

#### **s.45 - Documents containing material obtained in confidence**

The meaning of 'in confidence' here is quite narrow – the exemption applies only where disclosure would found a legal action for breach of confidence. This exemption is not generally available simply on the basis of the obligations of confidentiality applying to work within the public service. It does not apply to internal working documents created in the course of their duties by public servants, Ministers or Minister's offices **unless** a confidence is owed to a member of the public or some non-Commonwealth body in relation to the documents or their contents.

A successful action for breach of confidence depends on five tests, namely:

1. the relevant information must be identified with specificity
2. the information must have been inherently confidential
3. the information must have been communicated and received in confidence

4. disclosure must have been an unauthorised use of the information
5. no overriding public policy defence is available.

These criteria will not be satisfied by the mere marking of documents as 'confidential'.

#### **s.46 - Documents the public disclosure of which would be contempt of Parliament or contempt of court**

A document will be exempt if its public disclosure would:

- be in contempt of court, or
- be contrary to an order or direction of a Royal Commission, tribunal or other person or body having power to take evidence on oath, or
- infringe the privileges of the Commonwealth Parliament or of a State Parliament or the Legislative Assembly of the Northern Territory or Norfolk Island.

The 'contempt of court' arm refers to documents containing material subject to a suppression order from any court, such as names of parties or witnesses, or the content of evidence given before the court. The 'privileges of Parliament' arm primarily refers to Standing Orders of the Commonwealth Parliament by which Parliament claims for itself the privilege of deciding if and when documents of or evidence presented to a Parliamentary Committee may be published. Section 46 extends this to analogous claims of other legislatures, and the current interpretation is that the two other arms are to be read similarly as applying to State and Territory persons and bodies.

#### **s.47 - Certain documents arising out of companies and securities legislation**

Documents covered by this exemption are those associated with the Ministerial Council for Companies and Securities. Refer to the Act for the particulars.

#### **s.47A - Electoral rolls and related documents**

This section covers Federal, State and Territorial electoral rolls in a variety of formats and source materials used to create them.

## **11. PHYSICAL ACCESS AND COPIES**

Where an applicant has paid the charges levied, access must be granted to the relevant, non-exempt documents (section 18), and may be given in one or more of the following forms:

- a reasonable opportunity to inspect the documents
- a copy of the documents
- in the case of audio-visual or electronic documents, hearing or viewing them through the appropriate equipment, or
- provision of a transcript where appropriate.

In most cases access will be provided in the form of copies, and the Act provides that where material is exempt and it is possible to do so, copies of documents shall have exempt and irrelevant material deleted (section 22). Generally, access must be provided in the form specified by the applicant. In certain circumstances access in that form may be refused, but access in another form must be granted (section 20).

The grounds for refusing the form of access are that to do so:

- would be to unreasonably interfere with the operations of the agency,
- would be detrimental to the physical form of the document, or
- would involve an infringement of copyright other than copyright owned by the Commonwealth.

Note that this only affects the form of access to be provided, not the requirement to provide access as such.

Access may be **deferred** in certain circumstances (section 21). These are:

- if the publication of the document concerned is required by law,
- if the document concerned has been prepared for presentation to Parliament or to be made available to a particular person
- if the premature release of the document would be contrary to the public interest, or
- if the Minister concerned believes the document contains information so important that Parliament should be informed of its contents before the document is made public.

Note that this is a deferral only and the statement of reasons to the applicant must state the period of deferral. The Act specifies the outer limits of these periods, and an eventual provision of access must be envisaged.

The preferred physical form of access when folios are only partly relevant or are only partly to be released is to take a photocopy, and apply masking tape to any exempt or irrelevant sections and then make a photocopy of the altered form. Where text has been masked, the relevant exemption provision will be written over the masked area, or where irrelevant material has been masked that will be noted. The FOI Coordinator will prepare copies for release to be checked by the relevant line area/s.

## **12. FORM OF STATEMENT OF REASONS**

Where a decision has been made to refuse or defer access the decision-maker must provide the applicant with a notice of the decision and a statement of reasons in writing (section 26). This statement of reasons must:

- state the findings on any material questions of fact, referring to the material on which those findings are based, and state the reasons for the decision, including any relevant public interest considerations and the assessment of competing weights,
- state the name and designation of the decision-maker, and
- provide the applicant with appropriate information concerning
  - his or her right in respect of review of the decision

- his or her rights to make a complaint to the Ombudsman in relation to the decision, and
- the procedure for the exercise of those two rights.

The statement of reasons does not need to, and should not, disclose any matter of a type that to include it in an agency document would be to make that document exempt. Statements of reasons are important documents for the applicant and the Department, and drafting should not be undertaken lightly. They contribute significantly to the applicant's belief as to whether a request has been dealt with properly and in good faith and they form the basis of any appeal of the decision. The FOI Coordinator will be able to assist the decision-maker with the drafting. All signed statements of reasons must be submitted to the FOI Coordinator for forwarding to the applicant. The signed statement of reasons **must be accompanied** by a minute from the Division Head confirming consideration of sensitivities and possible briefing requirements. If a Division Head is not available, the minute could be signed by the relevant Deputy Secretary.

The statement of reasons should identify the relevant documents in a schedule, unless very few documents are involved. The schedule should list all the relevant documents with date, brief description, number of pages and the decision in terms of release, noting any exemption provisions and if irrelevant material has been deleted. (An example is appended to this guide.) For the purposes of the Act, a document is only those parts of a minute, file note, briefing, etc (that is, what we ordinarily call a 'document') that come within the terms of the request.

### **13. INTERNAL REVIEW**

Internal review of decisions under the Act can be sought on a variety of grounds, including: a denial of access to documents; the imposition of charges and fees; and, a refusal to amend or alter personal records (section 54). Internal review is carried out by an officer at a higher level than the original decision-maker. The internal review decision-maker approaches the request afresh and makes a new decision. The person conducting the internal review has thirty days from receipt of the section 54 application to notify the applicant of the result of the review, after which time the applicant can apply directly to the AAT for further review. Of course, the applicant can seek further review from the AAT on the basis of a decision that is delivered within thirty days.

Internal review may also be sought by third parties consulted under section 26A, section 27 or section 27A arrangements when the decision has been to release the documents to the applicant. That is, these third parties were consulted and they wanted the documents exempted, but the decision-maker decided that they should be released, and now the third parties want to appeal that decision before the applicant gets access. (See the section 'Consultation with Third Parties' above for further details.) Note that third parties can dispute the decision only where it has been to release documents, not to exempt them.

Applications for internal review must be made in writing and be accompanied by the relevant fee. (No application fee is payable in cases where a third party has been consulted and is seeking internal review of a decision to release documents to an applicant.) The Act provides that such applications be made within 30 days of being informed of the original decision (subsection 54(1A)). Internal review is not available where the decision was taken by the responsible Minister or principal officer of the agency - any appeal from these decisions must go straight to the AAT. Once again, the FOI Coordinator is available for any advice required and should be contacted if a request for internal review is received.

## 14. FURTHER APPEALS

If the applicant still disputes the decision on access, or on the imposition of fees or charges, or on the amendment or alteration of personal records, he or she may appeal to the AAT (section 55). **The failure to meet any of the prescribed time-limits attaching to an FOI application is treated as a deemed refusal and allows for immediate appeal to the AAT**, bypassing the internal review stage. A decision of the AAT can be appealed to the Federal Court, but on a point of law only.

At any time the applicant may make a complaint to the Ombudsman about the handling of the request (section 57), but this may limit an applicant's access to review.

The AAT stands in the place of the original decision-maker and has the power to impose its own decision (section 58), except in the case of conclusive certificates, and to have the agency or Minister concerned conduct further searches for relevant documents (subsection 55(5A)).

## 15. PERSONAL RECORDS

This section is concerned with the circumstances in which people can get erroneous information recorded about them amended or annotated. There are three pre-conditions that must be met by an applicant.

The first is that the person has had lawful access to a document of an agency or an official document of a minister. This access may have been provided under the FOI Act or under any other regime, as long as it is lawful.

Secondly, that the document contains personal information about them. Personal information is defined in the Act as:

*information, whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.*

Thirdly, that the document contains material that is incomplete, incorrect, out of date or misleading and has been or is being used or is available for use by an agency or a Minister for an administrative purpose.

A person who believes erroneous information is recorded about them may apply to the appropriate record holder (section 48). The procedure for applying is largely the same as that for making a general FOI request, with the exception that there is no fee (section 49). The record may be amended accordingly where the agency or Minister is satisfied that all three conditions are satisfied. If the agency or Minister rejects the application the applicant can seek internal review of that decision and thereafter can appeal to the AAT if still unsatisfied.

If a request for the annotation or amendment of personal records is received, contact the FOI Coordinator.

## EXAMPLE OF DOCUMENT SCHEDULE

Schedule of documents relevant to FOI request from [applicant] re [subject]

Doc No.	Date	Name of Document	No. of Pages	Decision
1	6.9.02	Brief from department titled [title of briefing paper]	2	Part release with s.33 and s.36 exemptions and irrelevant material deleted under s.22
2	28.8.02	Letter from [third party] to Prime Minister with briefing note	3	Part release with s.41 and s.43 exemptions and irrelevant material deleted under s.22
3	28.9.02	Chain of emails (3) between Mr John Smith of PM&C and Ms Anne Jones of Treasury	2	Release in full