

NEW FOI MEMORANDUM NO. 26

SECTION 26 NOTICES: STATEMENTS OF REASONS

This memorandum supersedes FOI Memo No.32, issued 1 October 1982. It has been renumbered 26 to correspond with the relevant section of the Act. The previous FOI Memo No.26, 'Application of the FOI Act to Staff Reports' (issued 13 September 1982) is now out of date and misleading and the topic will be covered in the forthcoming new FOI Memo No.23 (section 41, personal information), which will itself be renumbered Memo No.41.

This memo outlines the requirements of section 26 of the FOI Act 1982 and provides guidance on the practical issues involved in preparing a section 26 statement. Because notifications of FOI decisions are accompanied by statements of reasons, FOI decision-making and preparation of statements of reasons are closely connected, and the memo deals with the issues involved in decision-making under the FOI Act.

For statements under section 37 of the AAT Act, see FOI Memo. No. 76, 'AAT Practice Direction: Filing of Affidavits and Schedules of Documents in Freedom of Information Matters' (3 June 1985). See also FOI Memo No. 65, 'Disclosure of the Existence of Documents to the Administrative Appeals Tribunal', and FOI Memo No. 19, 'Preliminary and Procedural Matters' (issued 1 September 1982, and under revision), paras 44-59 on the obligations to assist applicants.

Acknowledgment is made of the assistance furnished in revision of this memo by Taxation Ruling No. MT 2037 containing *Guidelines for Preparing Statements of Reasons for Decisions under Section 13 of the Administrative Decisions (Judicial Review) Act (AD(JR) Act)* (dated 1987 and itself now in need of review). See also the Explanatory Memorandum prepared by the Administrative Review Council on 'Statements of Reasons' under section 13 of the ADJR Act and section 28 of the Administrative Appeals Tribunal Act (Appendix II, *ARC Third Annual Report, 1979*).

JUNE 1993 ATTORNEY-GENERAL'S DEPARTMENT,
CANBERRA

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Guide to using this memo

- This memo is a reference and training tool for decision makers and others involved in making and notifying FOI decisions. It is recommended that new FOI decision makers should read Section 1 on the purposes and importance of statements of reasons long before they make their first decisions on requests! A sound knowledge of the role of reasons statements in contemporary administrative decision making, and their specific role in FOI requests, is vital to making good decisions and explaining the factual and rational bases on which they rest.
- The memo will not be sufficient as a means of training new staff in the skills required in making FOI decisions. It articulates the principles on which such decision making rests and gives practical examples of the issues which arise.
- In addition, the Information Access Unit of Attorney-General's, offer an Advanced Training Module on Writing a Statement of Reasons which provides *practical experience* in combining good decision making with the giving of good statements of reasons. For further information on training, please call 250 6678. Agency specific training can be provided on request.
- Section 2 tells you when a section 26 statement is required. Section 3 on the content and Section 4 on the form of FOI statements of reasons are central for those making and/or explaining FOI decisions. To assist decision makers Table 2 contains a checklist of matters to be dealt with in a statement of reasons. Table 3 sets out the information required in a schedule of documents. There are also examples on findings of fact and use of statutory standards respectively. Section 5 deals with what can be omitted from a statement, Section 6 with some miscellaneous matters.
- Attachment A contains examples of differing formats for statements of reasons. Attachment B is a copy of the AAT's 1985 Practice Direction on filing affidavits and other documentation, including schedules, in FOI matters. Attachment C sets out an example of a possible form of schedule as part of a statement of reasons. Attachment D contains examples of standard forms for notifying review rights.
- The Summary of the Memo below may be used to get an overview of what is covered in each section of the memo, or as a quick reminder of the main points covered. It is not meant as a substitute for reading the relevant sections.
- Note that statements of reasons are required at both primary decision and internal review stages, and the memo does not usually distinguish between the two – the same principles apply in both cases.
- Note also that instead of using the technically correct term 'a notice under section 26 (of the FOI Act)', this memo normally uses the term 'statement of reasons', as it is more commonly used and more helpful. When used in this way the term covers the whole of a section 26 notice including notice of the decision, statements of the findings on material questions of fact, references to the material on which those findings are based, and the reasons for the

decision, and not merely the part of the notice that contains the reasons for the decision in the narrower sense.

Summary

This summary is designed as a brief overall resume of the main points covered in the memo so that decision makers can quickly remind themselves of the legal and practical requirements of a statement of reasons under section 26 of the FOI Act. It does not serve as a substitute for reading the body of the memo and the examples given. First time readers should turn to Section 1 and read on.

SECTION 1 THE PURPOSES AND IMPORTANCE OF STATEMENTS OF REASONS

- Reasons statements must be given on request for a majority of reviewable Commonwealth decisions.
- FOI Act, section 26 is similar in wording to other statutory provisions, but requires notification of decision and reasons for decision at the same time. It applies to most decisions under the Act (see Section 2 of the memo).
- Statements of reasons are taken very seriously by the Federal Court and Administrative Appeals Tribunal (AAT). Purposes of statements of reasons include:
 - acting as discipline in making reasoned and principled decisions – should lead decision makers to focus on real issues and facts of individual requests and not rely on impressionistic grounds – avoiding appearance or reality of arbitrary decisions lacking proper rational basis
 - explaining to applicant true basis of agency’s decision – should reveal the real findings of fact and the real reasons for decision
 - giving applicant meaningful grounds on which to decide whether to accept or challenge decision
 - helping redress balance between administrator and citizen, especially in FOI matters where applicant does not know details of relevant documents – FOI decision making process should be as transparent as possible
 - if necessary, providing a firm foundation from which to conduct internal review, to prepare documentation in response to appeal to the AAT (AAT Act, section 37), and for discovery and litigation on appeal to the Federal Court.
- It is in an agency’s own interest to prepare a good statement of reasons. Consequences of poor statements of reasons include:
 - provides no check on poor decisions – innocuous documents may be refused and sensitive ones released
 - applicant doesn’t understand basis of decision and unnecessarily seeks review

- internal and AAT review processes made much more difficult, and difficult to respond adequately to Ombudsman investigations
 - statement may be adversely reviewed by AAT
 - may be public criticism of agency for lack of co-operation.
- AAT has power under section 62(2) to review adequacy of a section 26 statement and declare it does not comply with requirements of that provision – agency must then provide additional statement containing further and better particulars about specified matters.

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SECTION 2 WHEN AN FOI STATEMENT OF REASONS IS NEEDED

- Section 26 statement needed where a decision (whether primary or on internal review) is made:
 - on ground that document is not a document of an agency or an official document of a Minister, as case may be
 - on ground that document is exempt, whether under Part IV of the Act, or by virtue of section 7 and Schedule 2
 - on ground that access provisions of Part III of the Act do not apply to document
 - on ground that document has not been sufficiently identified in the request (and note s.15(3))
 - on ground that document is in the agency's or Minister's possession but cannot be found, or on the ground that it does not exist in the agency's or Minister's possession (s.24A)
 - on ground of the substantial and unreasonable diversion of resources involved in dealing with the request (ss 17 and 24)
 - that access will be given in a form other than that requested by the applicant (s.20)
 - to defer the provision of access to a document under section 21 (s.26(1))
 - refusing to amend or annotate a record of personal information about a person in accordance with a request under section 48 (s.51D(3)).
- Notification of decision to certain third parties required where reverse FOI consultation has occurred (ss 26A(2)(a), 27(2)(a), and 27A(2)(a)).
- Under section 22, where an edited copy of a document is released with deletions, there is no requirement (unless the applicant so requests) to give a statement of reasons in respect of the decision not to give access to the full document, BUT applicant must be informed that document is a copy with deletions and the grounds on which matter is regarded as exempt.
- Requirement to give a section 26 statement applies also to an actual decision made after a 'deemed refusal' (s.56).

- There are some decisions under the FOI Act to which section 26 does not apply. These include a decision to give a 'conclusive' certificate under section 33, 33A, 34, 35 or 36.
- Sections 29(8) and (9) and 30A(3) and (4) require a statement equivalent to a section 26 statement in relation to decisions not to reduce or not to impose charges, and not to remit applications fees in whole or part.
- No obligation to give further statements under section 13 of the ADJR Act or section 28 of the AAT Act where a section 26 statement has been given (ss 26(1A) and 62(1)).
- No obligation to give further statements under section 13 of the ADJR Act where a section 29(8) statement or a section 30A(3) statement has been given.

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SECTION 3 CONTENT OF A STATEMENT OF REASONS

- A section 26, section 29(8) or section 30A(3) statement *must* include the following:
 - notice in writing of the decision
 - name and designation of decision maker in an agency
 - a statement of findings on material questions of fact
 - reference to the material on which those findings are based
 - a statement of the reasons for the decision(s)
 - appropriate information about rights of review.
- A statement should desirably also include:
 - a statement concerning the consideration given to the possibility of making available a document with exempt material deleted (section 22)
 - the reasons why the document or documents have not been released outside the FOI Act (section 14).
- Notice of decision must refer to the specific documents relevant to the request.
- Section 26, section 29(8) or section 30A(3) notice must give name and designation of decision maker, and should refer to authorisation under section 23 – not required to be signed by or on behalf of decision maker – desirable for decision maker to commit decision to writing on file and sign it – drafting of statement of reasons closely connected with actual decision.
- Findings on material questions of fact – *material* facts are the facts required to establish factual basis of the decision – must state all material facts taken into account – only material facts should be taken into consideration.
- Material findings of fact may concern either ‘primary facts’ or ‘ultimate facts’ – they include:
 - findings on basic (‘primary’) factual matters on which decision depends, e.g. identification of relevant documents, possession or transfer of documents
 - findings of (‘primary’) evidentiary fact on which final conclusions ultimately based – could include facts in dispute between agency and applicant and essential to reaching a decision

- the conclusions of fact necessary to satisfy statutory standard of an exemption etc. ('ultimate facts') – usually expressed in terms of statutory standard.
- Must state weight given to a finding on a question of fact relevant to a decision.
- The identification of documents is a finding on a material question of fact – what is 'a document' may vary with circumstances.
- Discretion under section 24(5) not to identify or locate any or all documents where apparent from the nature of the documents as described that ALL the documents are exempt AND there would be no obligation to provide edited copies of ANY of the documents under section 22 – provision rarely satisfied.
- Other material questions of fact needing to be dealt with include:
 - the scope of the request as interpreted by the agency
 - any transfers or partial transfers of requests to other agencies or Ministers under section 16
 - –any relevant consultations, statutory or other wise, which have taken place
 - any matters of fact which have, for example, influenced a decision to defer access to a document (s.21) or to provide access in a form other than that requested (s.20)
 - any other matters of fact relevant to the processing of the request.
- Findings on scope of request necessary where any doubt about it – interpretation of scope of request is reviewable by AAT and Ombudsman – no point in being legalistic or narrow in interpretation of scope of request.
- 'Material on which the findings of fact are based' – means the information available to decision maker from which conclusions of fact are drawn – i.e. the evidence or sources for making necessary findings of material fact – usually, but not necessarily only, documentary material – must be sufficient reference to show there is a proper basis for findings of fact based on them – not necessary to
- set out in detail, unless reasons for decision can't be understood without doing so – source or nature should be given depending on circumstances – should be referred to with sufficient particularity to be identified by someone not familiar with subject matter – description needed of documents and date, author and addressee, etc. – don't just refer to file – should be clear which facts derived from which sources.
- 'Reasons for decision' – statement must show how decision arrived at on basis of the findings of fact and why decision maker reached that decision – show rational connection between findings of fact and decision – need to address all elements of relevant statutory criteria – need to relate exemption claim to each specific document or part of a document – must not simply repeat wording of exemption section or terms of decision itself – however, give precise words of exemption for applicant's information – should refer to other relevant law if necessary – distinction between exemptions based on expected results or character of disclosure, and those protecting particular class or kind of document – appropriate standard of expectation of damage must be employed based on probative evidence – public interest tests require all public interest grounds, for *and* against disclosure, to be set out.

- Statement must refer to guidelines or policy directions relied on – decision maker must incorporate adopted material in decision, not merely refer to it – need to deal with any submissions by applicant.
- ‘Appropriate information about rights of review’ – includes information about right to complain to Ombudsman – give information about internal review where relevant – what is ‘appropriate’ information depends on circumstances – Code of Practice for Notification of Reviewable Decisions and Rights of Review – may use standard attachments concerning review rights, but must be appropriate to particular matter.
- Section 22 – possibility of provision of edited copy by making deletions of exempt material must be considered in relation to each document refused as a whole – decision maker must go meticulously through every document for non-exempt material – FOI Act favours maximum disclosure possible of non-sensitive material – exceptions in case of section 7 – statement inadequate if consideration of deletion not shown, unless (a) not possible to make a non-exempt copy with deletions, or (b) not reasonably practicable to make copy with necessary deletions (workload test), or (c) it is apparent from request or consultation with applicant that applicant wouldn’t want edited copy.
- A statement of reasons should also explain why an agency is not exercising discretion to release documents even if exempt (s.14).

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SECTION 4 THE FORM OF A SECTION 26 STATEMENT

- No particular form required for a statement under section 26, section 29(8) or section 30A(3).
- Use of schedules explained – must contain all information necessary for applicant to identify and understand nature of documents or parts of documents, be aware of all relevant exceptions or exemptions and locate full detailed reasons for each decision – where possible, description of document should provide
- prima facie justification of grounds of exemption – see also Table 3 and Attachment C.
- Copies of documents must be dealt with in statement – schedule can refer back to first reference to original – if copy also contains other material (annotations etc.) treat as a totally separate document.
- Not necessary to give great detail about released documents, but may be just as easy to include details in schedule where also a large number of documents being refused.
- Schedule under section 26 should not include exempt material (s.26(2)) (see also sections 29(11) and 30A(6)) – similar situation with a schedule prepared under AAT 1985 Practice Direction – may need to prepare two versions of schedule at appeal stage.

SECTION 5 WHAT CAN BE OMITTED FROM A STATEMENT OF REASONS?

- Section 26(2) (see also sections 29(11) and 30A(6)) – statement not required to include matter which would make the statement itself an exempt document – i.e. material claimed to be exempt, or, in case of document of a Minister, material not relating to affairs of an agency – on *very rare* occasions, statement may have to be completely silent about existence of a document in order not to include exempt material – existence of document would need to be disclosed to AAT on appeal.
- Section 25(1) & (2) – broadly, provisions permit non-disclosure of fact of existence or non-existence of a document in certain limited cases.
- Section 25(1) – permits agency or Minister not to give information about existence or non-existence of document (Document A) where:
 - inclusion of that information in a notional document of agency or Minister (Document B, e.g. a reasons statement) –
 - would cause Document B to be exempt under one or more of sections 33, 33A and 37(1).
- Section 25(2) – enables agency or Minister to give a notice ‘neither confirming nor denying’ the existence, as a document of the agency or an official document of the Minister, of a requested document (Document A) of a kind mentioned in section 25(1), whether that document exists or not, BUT ONLY WHERE, assuming its existence, Document A would *itself* be exempt under one or more of sections 33, 33A and 37(1) – use of sub-section is discretionary – required to give a section 26 statement as if the section 25(2) notice were a refusal of access – decision under section 25(2) deemed to be a decision refusing access under section 33, 33A or 37(1), and subject to internal or AAT review – must inform applicant of right of review and right to complain to Ombudsman.
- On rare occasions may be permitted under section 26(2) to neither confirm nor deny existence in agency’s possession of document.
- Cabinet and Executive Council Documents – conclusive certificates may be issued certifying that a document described in a request would, if it existed, be exempt under section 34(1) or section 35(1) as the case may be – in such cases, decision on request may be that access is refused on ground that, if such a document existed, it would be exempt under section 34(1) or section 35(1) – section 26(1) statement should state this reason.

SECTION 6 OTHER MATTERS

- Neither the decision maker nor the AAT is bound by the exemption claims and reasons in a section 26, section 29(8) or section 30A(3) notice – an agency may reconsider its decision if it believes it may have made an error – agencies should NOT make surprise claims at the door of the AAT.

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WORDING OF SECTION 26

Reasons and other particulars of decisions to be given

26. (1) Where, in relation to a request, a decision is made relating to a refusal to grant access to a document in accordance with the request or deferring provision of access to a document, the decision-maker shall cause the applicant to be given a notice in writing of the decision, and the notice shall:

(a) state the findings on any material questions of fact, referring to the material on which those findings were based, and state the reasons for the decision;

(b) where the decision relates to a document of an agency, state the name and designation of the person giving the decision; and

(c) give to the applicant appropriate information concerning:

(i) his rights with respect to review of the decision;

(ii) his rights to make a complaint to the Ombudsman in relation to the decision; and

(iii) the procedure for the exercise of the rights referred to in subparagraphs (i) and (ii);

including (where applicable) particulars of the manner in which an application for review under section 54 may be made.

(1A) Section 13 of the *Administrative Decisions (Judicial Review) Act 1977* does not apply to a decision referred to in subsection (1).

(2) A notice under this section is not required to contain any matter that is of such a nature that its inclusion in a document of an agency would cause that document to be an exempt document.

WORDING OF SECTIONS 29(8) TO 29(11) AND 30A(3) TO 30A(6)

Note: The wording of sections 29(8) to 29(11) and 30A(3) to 30A(6) differs from that in section 26 but the effect is the same - see section 25D of the *Acts Interpretation Act 1901*:

25D. Where an Act requires a tribunal, body or person making a decision to give written reasons for the decision, whether the expression "**reasons**", "**grounds**" or any other expression is used, the instrument giving the reasons shall also set out the findings on material questions of fact and refer to the evidence or other material on which those findings were based.

Some quotations

‘POINS Come, your reason, Jack, your reason.

FALSTAFF What, upon compulsion? Zounds, an I were at the strapado, or all the racks in the world, I would not tell you on compulsion. Give you a reason on compulsion? If reasons were as plentiful as blackberries, I would give no man a reason upon compulsion, I.’

(Falstaff is covering up his cowardice at Gad’s Hill.)

Shakespeare, *Henry IV, Part I*

"He who has no reasons must employ excuses."

(Monteverdi, *The Coronation of Poppea*)

‘[Arthur Clennam] was readmitted to the presence of Barnacle Junior [an official in the Circumlocution Office], and found that young gentleman singeing his knees now [at the fire], and gaping his weary way on to four o’clock.

"I say. Look here. You stick to us in a devil of a manner," said Barnacle Junior, looking over his shoulder.

"I want to know – ."

"Look here. Upon my soul you mustn’t come into the place saying you want to know, you know," remonstrated Barnacle Junior, turning about and putting up the eye–glass.’

From the chapter ‘Containing the Whole Science of Government’ in Charles Dickens’s *Little Dorrit* (1857)

‘...the giving of reasons is required by the ordinary [person’s] sense of justice and is also a healthy discipline for all who exercise power over others.’

HWC Wade, *Administrative Law*, 5th ed (1982), p.486

‘[The AAT Act did] effect a quiet revolution in regard to [reviewable] decisions. The Act lowered a narrow bridge over the moat of executive silence ...’

Deane J in *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 31 ALR 666 at 686

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NEW FOI MEMORANDUM NO.26

SECTION 26 NOTICES ²: STATEMENTS OF REASONS

1. The purposes and importance of statements of reasons

The ability to give a rational explanation of a decision is central to good decision making in all areas of administration. The requirement that decision makers should normally when requested have to provide statements of reasons for their decisions was a central element in the administrative law reforms of the 1970s and 1980s. ‘...the Commonwealth administrative law package ... placed emphasis upon the reasoning process lying behind a decision.... The legislative package emphasised the need for reasoned decision-making and made available to affected persons means of ascertaining what the reasons for a decision had been.’ (Davies J in *Minister for Immigration Local Government and Ethnic Affairs v Taveli* (1990) 94 ALR 177 at 179).

- Statements of reasons are legally required by statute to be given on request to potential applicants for review in relation to a majority of decisions made under Commonwealth enactments which are subject to judicial or merits review (see section 13 of the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) and section 28 of the *Administrative Appeals Tribunal) Act 1975* (AAT Act)).
- The AAT is required by section 43(2) of the AAT Act to give reasons, and where those reasons are in writing they must conform to the same requirements as in the above provisions (s.43(2B)).
- Again, section 25D of the *Acts Interpretation Act 1901* provides that where there is a statutory requirement for a tribunal, body or person to give written reasons for a decision, a document giving reasons must set out the findings on material questions of fact and refer to the evidence or other material on which those findings were based.

2. Section 26 of the FOI Act requires that notice be given of most decisions under the Act (see Section 2 below) and that the notice must:

‘state the findings on any material question of fact, referring to the material on which those findings were based, and state the reasons for the decision’.

While the language of the central provisions of section 26 is virtually identical to the other provisions already mentioned, its application to the circumstances of an FOI decision requires specific discussion of the issues involved in decisions concerning

the release or amendment of information in documents and related decisions (see Sections 2–6).

3. The AAT and the Courts take very seriously the responsibilities of agencies to provide good statements of reasons. They do not want their time wasted by receiving poorly made or poorly explained decisions (these are often the same, of course). The

Chief Justice of the High Court, Sir Anthony Mason, has described the creation of the obligation to provide statements of reasons for decisions as ‘a dramatic advance in arming the individual with effective remedies in the overall scheme to ensure administrative justice’, adding that ‘reasoned and principled administrative decisions are an indispensable element in a modern democracy’ (quoted *Administrative Review Council, Fifteenth Annual Report (1990–1991)*, page 17). A good overall view of reasons statements (relating to s.13 of the ADJR Act) is contained in the judgment of Burchett J in *ARM Constructions Pty Ltd v Deputy Commissioner of Taxation* (1986) 10 ALN N118 at N119):

‘Section 13 is a crucial provision designed to ensure that the basis upon which a decision is made is able to be seen, so that its legality can be determined. It should not be viewed by any decision-maker as a threat to be evaded by a camouflage of obscurity. All it requires to be set out is a statement of the matters the administrator must have considered in making the decision in the first place – what he [or she] found the facts to be, what material he [or she] considered in arriving at those findings, and the reasons for his ultimate decision.’

It would be wrong for courts to construe reasons in any overly critical spirit, forgetful that they are the reasons of an administrator, not of the draftsman of an Act. But it would be as bad to betray the aims of the [ADJR Act], by ignoring what has been required by the parliament to be disclosed in the interests of just and lawful (and not merely unassailable) administration.’

Note also the comment of the AAT, Fisher J presiding, in *Re Palmer and Minister for the Capital Territory* (1978) 1 ALD 183 at 192–3:

‘The obligations imposed by s 28 and s 37 [of the AAT Act, requiring reasons for decisions] are a crucial feature of the current right of the citizen to obtain from an impartial Tribunal a review of an administrative decision, and where appropriate the substitution of another decision.’

4. Statements of reasons are not an afterthought designed to obscure what has really been done. The duty to provide a statement of reasons ‘demands a statement of the real findings and the real reasons’ (French J in *Minister for Immigration and Ethnic Affairs v Taveli* (1990) 94 ALR 177 at 194). A statement of reasons should not attempt to obscure the basis of the decision, or to bluff the applicant by omitting the necessary detail. A statement is required to show the true basis of an agency’s

decisions, and the need to prepare it acts as a discipline to correct and proper decision making:

‘The discipline of expressing intellectually satisfying reasons not infrequently causes decision-makers to depart from opinions impressionistically formed.’

(Our Town FM Pty Ltd v Australian Broadcasting Tribunal
(1987) 16 FCR 465 at 486, per Wilcox J)

5. If you *can't* write a good statement explaining the reasons for a decision, then it's very likely your decision is wrong, or at least has not been properly thought through. If you *don't* write a good statement of reasons, especially in the FOI area, you are failing in your obligation to the applicant, risking unnecessary appeals and ensuring difficulty in responding to any appeals lodged.

6. A good statement of reasons is no harder to write than a bad one (it may take longer to write, but this will usually save time elsewhere in the process). If there is an appeal, a good statement will serve you well in an internal review – where a more senior decision maker will not appreciate having to deal with a decision which is unclear and unexplained – or as the basis of your statement to the AAT under section 37 of the AAT Act. A bad statement of reasons will frequently cause you a great deal of trouble.

7. The FOI Act provides exemptions in cases where documents contain information the disclosure of which would be contrary to the ‘protection of essential public interests and private and business affairs’ of third parties (see FOI Act, s.3(1)(b)). At the same time, the Act provides that the decision making process should be as transparent as possible without revealing exempt material. This is particularly important because the applicant usually does not know what documents are held or what is in them. Because of this, at the very least you need to tell the applicant:

- what documents are in issue, describing them as fully as possible without revealing exempt material
- why the documents are sensitive
- what exemptions are claimed for which documents or parts of documents
- why those exemptions are relevant to specific documents
- what the expected factual consequences of the release of specific information are expected to be (where this is relevant to the exemption(s) claimed) and why it is reasonable to expect those consequences
- why those consequences are so substantially adverse to important public or third party interests as to warrant a refusal of access to the documents, and
- what aspects of the public interest tend in favour of the disclosure of information claimed to be exempt, as well as those which tend against disclosure.

8. A summary of some of the purposes and consequences of good and bad reasons statements is set out in **Table 1 below**. To fulfil those purposes a statement of reasons must be intelligible to the recipient (*Re Palmer and Minister for the Capital Territory* (1978) 1 ALD 183 at 193) – that is, in an FOI matter the statement must make sense

to the applicant and tell her or him all that is needed to understand the real basis of the decision, although without disclosing exempt material. A statement of reasons should be expressed in 'clear and unambiguous language, not in vague generalities or the formal language of legislation' (*Ansett Transport Industries (Operations) Pty Ltd v Wraith* (1983) 48 ALR 500 at 507). It need not be lengthy: the length will depend on the nature and importance of the decision and its complexity (*Ansett Transport Industries*, 507) (see Section 4 below on the form of a statement of reasons).

9. In order to be intelligible to a lay person a statement of reasons is best expressed in 'plain English'. The recently made Code of Practice for Notification of Reviewable Decisions and Rights of Review (see para.68 below) states that:

'When you are preparing a notice of decision and of rights of review, it should be given in plain English. Everyday language should be used, wherever possible, for ease of understanding. The notice must be clear, and expressed as simply as the subject matter permits.'

Plain English has also been described in the following way:

'[Plain English] is the opposite of gobbledygook and of confusing and incomprehensible language. Plain English is clear, straightforward expression, using only as many words as are necessary. It is language that avoids obscurity, inflated vocabulary and convoluted sentence construction. It is not baby talk, nor is it a simplified version of the English language.'

Writers of plain English let their audience concentrate on the message instead of being distracted by complicated language. ...'

(Robert D. Eagleson, *Writing in Plain English*, AGPS, Canberra, 1990, page 4)

Eagleson's book is an excellent short guide to writing clearly and intelligibly for the public.

10. An FOI applicant must be able to understand all the elements involved in claiming an exemption and why *that particular exemption* applies to *this specific document or part of a document*. As in other areas, **the statement of reasons must 'express findings and reasons for decision adequate for the purpose of enabling a proper understanding of the basis on which the decision has been reached'** (*Australian Telecommunications Commission v Barker* (1990) 12 AAR 490 at 492, per Davies, Gummow and Hill JJ). Only a detailed and complete explanation will give an applicant a genuine opportunity to decide whether to accept a decision or test it on appeal. Mr Justice Woodward's words concerning a section 13 ADJR Act statement are equally applicable to a section 26 FOI Act statement:

'[A decision maker is required to explain his or her decision] in a way which will enable a person aggrieved to say in effect: "Even though I may not agree with it, I now understand why the decision went against me. I am now in a position to decide

whether that decision has involved an unwarranted finding of fact, or an error of law, which is worth challenging.” (*Ansett Transport Industries*, above, 507)

11. It is in the interests of an agency to prepare a statement of reasons that fulfils the purposes summarised in **Table 1**, since an understanding of the basis of a decision that has been properly made will often satisfy an applicant who might otherwise have sought internal or external review. External review may involve all parties in expensive litigation.

12. It is not proper or necessary to reveal the contents of exempt documents in a statement of reasons under section 26 (see Section 5), but within that limit every effort should be made to inform the applicant of the nature of the document (see *Re Warren and Department of Defence* (D299)).

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AAT review of adequacy of section 26 notice (section 62(2))

13. The AAT has power under section 62(2) of the FOI Act to review the adequacy of a section 26 statement and may declare that it does not comply with the requirements of section 26. Where such a declaration is made, an additional statement containing further and better particulars in relation to the matters specified in the declaration must be provided. A declaration under section 62(2) is a form of relief separate from review of a substantive access decision (see *Re Gregory and Department of Social Security*, D160; compare *Re Warren and Department of Defence*, D299).

Note: Section 62(2) does not apply to section 29(8) and section 30A(3) statements. In relation to such statements an applicant should apply under section 28(5) of the *Administrative Appeals Tribunal Act 1975*.

Approval will be sought for an amendment to section 62(2) to resolve this.

REMEMBER THAT THE INFORMATION ACCESS UNIT OF THE ATTORNEY–GENERAL’S DEPARTMENT IS ALWAYS HAPPY TO GIVE ADVICE ON THE PROPER DRAFTING OF A REASONS STATEMENT (PHONE (02) 6250 5892)

2. When an FOI statement of reasons is needed³

14. Section 26 of the FOI Act requires a written notice of the decision(s), including a written statement of reasons for them, to be given to a person who has requested access to a document under the Act, in any case where a decision is made refusing to grant access in accordance with a request or deferring provision of access to a document. (See Section 3 for the details of the content of the statement of reasons.) The requirement applies where a decision (whether a primary decision or a decision on internal review¹ (s.54(4)) is made:

- on the ground that the document is not a document of an agency or an official document of a Minister, as the case may be (see s.4(1), definitions of ‘document of an agency’ and ‘official document of a Minister’)
- on the ground that the document is an exempt document (whether under the exemption provisions of Part IV of the Act, or by virtue of section 7 and Schedule 2)
- on the ground that the document is one to which the access provisions of Part III of the Act do not apply (s.12)
- on the ground that the document has not been sufficiently identified in the request
- on the ground that the document is in the agency’s or Minister’s possession but cannot be found, or on the ground that it does not exist in the agency’s or Minister’s possession (s.24A)
- on the ground of the substantial and unreasonable diversion of resources involved in dealing with the request (ss 24 and 17)
- that access will be given in a form other than that requested by the applicant (s.20)
- to defer the provision of access to a document under section 21 (s.26(1))
- refusing to amend or annotate a record of personal information about a person in accordance with a request under section 48 (s.51D(3)).

See also Section 5 below on statements of reasons under section 25(2).

Table 1 Purposes and Consequences of FOI Reasons Statement

A good statement of reasons should fulfil the following purposes:

- Fulfilling the responsibility of agencies to inform the public of the real basis of decisions, avoiding lack of openness and honesty about the reasons for a decision.
- Helping decision-makers to identify the reasons which motivate specific decisions and consider carefully the correct and proper outcome in all the circumstances. (In FOI matters it will usually be sensible to prepare a draft reasons statement before the decision is made – see para.25 below.)
- Serving as a check on the existence of a proper FOI decision making process in an agency.

- Avoiding the appearance or reality of an arbitrary decision lacking a proper rational basis.
- Ensuring decisions of better quality by stating all relevant considerations, and providing applicants with full information about all matters considered in the agency's decision.
- Enabling the applicant:
 - to understand correctly and in detail why a decision was made, and
 - on that basis to determine whether he or she should challenge the decision and how to do so.
 Very often a well reasoned and properly explained decision will be accepted, even if the applicant does not like it.
- Assisting a decision maker on internal review to identify quickly what was decided and why, and to undertake the making of a new decision from an informed position.
- Serving as the firm basis for defending an appeal and preparing a section 37 statement for the AAT or for discovery at the Federal Court level.

A bad statement of reasons can have the following consequences:

- A poor draft of an FOI reasons statement encourages poor decision making – innocuous documents are refused and access is granted to sensitive ones.
- The applicant fails to understand the real basis of the exemption claims, and unnecessarily seeks internal or external review of the decision in order to find out what the real basis is for the decision.
- The decision-maker on internal review does not know from the statement what documents have already been identified or what is in them, and does not know why they have been exempted. (Consider your career options carefully!)
- The decision is appealed to the AAT – writing the section 37 statement and preparing the documentation is much more difficult than it should be and takes far too long. The AAT is critical of the decision because it was not properly made.
- The statement is criticised by the Ombudsman, and you have to do extra work to reassess and explain your decision.
- The applicant takes the decision and reasons to his MP who is not impressed

by their poor quality – she gives wide publicity to the statement and its inadequacies.

- The applicant goes straightaway to the AAT and obtains a declaration that the statement is inadequate (see s.62(2)). The press picks up on the AAT's scathing remarks on the agency's decision making.

Note: See note added to para. 13

- The agency fails to come to grips with the real issues and becomes involved in a war of attrition, wasting resources fighting to refuse access to innocuous documents.

15. The provisions in the Act concerning consultation with third parties and 'reverse FOI' rights require that an agency or Minister making a decision that a document is not exempt must notify the decision to third parties who were consulted and made submissions before the decision, at the same time as notifying the applicant of the decision (see ss 26A(2)(a), 27(2)(a) and 27A(2)(a)). If that is not done, of course, a third party's right to seek review of the decision to grant access cannot practically be exercised, although the right to apply to the AAT is not dependent on notification (see ss 58F, 59 and 59A). As a third party with 'reverse-FOI' rights to seek review is a person affected by the decision to release information, a notification of review rights to a third party is required to include the information referred to in the Code of Practice for Notification of Reviewable Decisions and Rights of Review (see paras 68–70 below). The FOI Act does not specifically require that a detailed statement of reasons be given for the decision, but if the third party's right to seek review is to be made meaningful the real basis of the decision should be made clear. 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 AAT for review of the decision, to seek a full statement of reasons under section 28 of the AAT Act. In appropriate cases there would be a right to seek a full statement under section 13 of the ADJR Act.

16. Section 22 makes one exception to the general requirements set out in paragraph 14 above. Where access is given to a document with exempt matter deleted in accordance with that section, there is no need, *unless the applicant so requests*, to give a statement of reasons under section 26 in respect of the decision that the applicant is not entitled to access to the whole of the document. In such a case, however, the applicant must be informed:

- that the document which is supplied is a copy of the requested document with exempt matter deleted; and
- of the grounds on which that matter was regarded as exempt (s.22(2)).

As a matter of practice, where some documents are released with deletions and access is denied to other whole documents, the required information concerning deletions under section 22 should be included as part of the section 26 notice. (See also paras 71–74 on section 22.)

17. Except in the case referred to in the preceding paragraph, the statement of reasons under section 26 must be given when the decision refusing access in accordance with

the request is communicated to the applicant. Apart from that one exception, the obligation does not depend upon the applicant requesting a statement of reasons for the decision.

18. Even where there is a deemed refusal under section 56 to grant access to requested documents, an agency will usually wish to make an actual decision on the request in order to narrow the issues required to be determined at the AAT. Such a decision must be communicated to the applicant in the normal form of a section 26 statement of reasons as soon as possible after the actual decision. The AAT has power under section 56(5) to extend its review to the actual decision. (The suggestion in *Re Susic and Australian Institute of Marine Science* (D313), to the effect that the provisions of section 56 are no longer applicable where an actual decision is made following a deemed decision, is clearly wrong.)

19. There are some decisions under the FOI Act to which section 26 does not apply. These include a decision to give a ‘conclusive’ certificate under section 33, 33A, 34, 35 or 36. Sections 29(8) and (9) and 30A(3) and (4) require a statement equivalent to a section 26 statement in relation to decisions not to reduce or not to impose a charge, and not to remit an applications fee in whole or part.

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Relationship to section 13 of ADJR Act and section 28 of AAT Act

20. Where a section 26, 29(8) or 30A(3) notice is given in respect of a decision under the Act, there is no obligation to give any further statement under section 13 of the AD(JR) Act (see s.26(1A)) or under s.28 of the AAT Act (s.62(1) of the FOI Act). However, an applicant may seek a statement under section 28 of the AAT Act where a decision is reviewable by the AAT but no section 26 or similar statement is required: note in particular decisions to release a document with material deleted (s.22, although s.22(2)(b) enables an applicant to seek a s.26 statement of reasons for the deletions, and if this right has been exercised section 28 of the AAT Act would not apply: s.28(4)(b)). (Note also para.15 above on rights to statements of reasons in ‘reverse FOI’ cases.) Section 13 does not apply to Ministerial decisions concerning the revocation of certificates (see section 58A(7))

3. Content of a statement of reasons ⁴

‘Generally speaking, [a statement of reasons] should refer to the relevant law and evidence, should present any findings of fact on which the decision-maker’s conclusions depend [and the sources on which those findings were based] and should explain the reasoning process which led to those conclusions.’

21. The formal requirements of a section 26, section 29(8) or section 30A(3) statement are that it must include the following elements:

- notice in writing of the decision (see paras 22–23 below)

- the name and designation of the decision-maker, where the decision relates to a document of an agency (see paras 24–25 below)
- a statement of the findings on any material questions of fact (see paras 26–45 below), and
- a reference to the material on which those findings are based (see paras 46–48 below)
- a statement of the reasons for the decision to refuse access (or whatever the decision is) (see paras 49–66 below), and
- appropriate information about rights of review (see paras 67–70 below).

In addition, there are two other matters which should be mentioned in the statement:

- consideration of the possibility of making available a copy of a document with exempt matter deleted under section 22 (see paras 70–73 below); [the scheme of the Act is to enable the disclosure of as much information as possible, and any document for which exemption is being claimed must be examined to see if it can be released in an edited version with exempt material deleted]
- the reasons why the document or documents have not been released outside the FOI Act (see para.75 below).

An examination of what these formal requirements mean in practice in relation to FOI decisions is contained in the following paragraphs. Section 4 contains comments and suggestions on the forms a statement may take. See also **checklist in Table 2** on matters required to be dealt with in a statement of reasons.

Table 2 Checklist of Matters to be Dealt with in a Section 26 Statement of Reasons

Statutory Requirements of S.26 Statement	Practical Requirements in Giving Reasons for FOI Decisions, and Comments
Notice in writing of the decision	Decision on access to each relevant document must be clear from the notice (see in particular Section 4 on schedules).
Name and designation of decision maker	As in statutory requirement. Statement of reasons need not be signed by decision maker. Notification of decision given at same time as statement of reasons, so good administrative practice for decision maker to prepare or consider draft of full section 26 statement at time of decision.
Findings on any material questions of fact	A ‘finding’ on a question of fact is a conclusion of fact reached by a decision maker. A ‘material’ question of fact is one necessary or relevant

	<p>to a claim for exemption (or other decision) and includes:</p> <ul style="list-style-type: none"> – the scope of the request as interpreted by the agency – identification and description of documents within the scope of the request – any transfers or partial transfers to other agencies under section 16 – any relevant consultations, statutory or otherwise, which have taken place – any ‘primary’ fact which is relevant to reaching a decision on the application of an exemption or to concluding that a document is not subject of access under FOI because of an exception (such as those in ss. 12 and 13) – any conclusion of fact or opinion (an ‘ultimate’ fact) which is necessary to the decision and is based on the ‘primary’ facts – any matters of fact which may have, for example, influenced a decision to defer access to a document (s.21), or to provide access in a form other than that requested (s.20) – any other matters of fact relevant to explaining the processing of the request.
<p>Reference to the material on which the findings of fact were based</p>	<p>It is only necessary to refer to this material, not to set it out in full, but it must be properly identified and described.</p> <p>In effect, ‘the material etc.’ means the sources from which the decision maker has obtained the facts he or she has ‘found’, and includes documents, oral representations, views of agency officers, etc. Only credible material should be relied on.</p>
<p>A statement of the reasons for the decision</p>	<p>The statement should show a rational connection [i.e. one supported by a chain of reasoning] between the findings of fact and the decision. It should contain a logical explanation of each decision, setting out all the steps of the reasoning process linking the primary facts, the ultimate facts and the actual decision made. Reasons should be concrete and specific, not a rehash of the exemption provision.</p>

	<p>Where there is conflicting evidence, or evidence has been rejected or given reduced weight, state the reason for preferring one piece of evidence, or rejecting or giving reduced weight to evidence.</p>
<p>Appropriate information concerning rights of review (either internal review or review by the AAT) and rights to complain to the Ombudsman, and concerning the procedure for exercising those rights</p>	<p>Always inform applicant of right to complain to the Ombudsman (mention that the Ombudsman usually does not investigate a complaint until after an internal review) and that there cannot be concurrent Ombudsman and AAT review.</p> <p>If the applicant is required to seek an internal review first, give full information on internal review and brief information on next level of review. If applicant entitled to seek AAT review, give full details concerning that review. (See paras 66–69 and Attachment D.)</p> <p>Where a deemed refusal under s.56 has occurred, and the agency then gives an actual decision, inform applicant of both the right to internal review under s.54(1) and the right to AAT review.</p> <p>Agencies can use standard statements of review rights, but may need to vary them in appropriate cases.</p>
<p>Sections 22 (edited documents) and 14 (release outside the FOI Act)</p>	<p>A statement should also include the consideration given to the application of section 22, providing for provision of edited documents, in each case where a complete document has been refused. It should also address the question why documents have not been released outside the FOI Act.</p>

Notice in writing of decision

22. Section 26 requires that *notice in writing of the decision* be given to an applicant at the same time as the *reasons for that decision* are given. The two elements to some extent blend into each other. In order for a notice of the decisions made in connection with a number of documents to be adequate, it must clearly identify the documents in issue and state the decisions in relation to each document or part of a document. Similarly, a statement of reasons in relation to refusal of access to documents to be adequate must refer to the specific documents, and it must clearly state what 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 claim. As a matter of convenience, questions relating to the identification and description of the documents in issue are dealt with below under the heading ‘Identification of documents is a finding on a material question of fact’ (paras 35–38).

23. It is never enough to say, for example, that all documents requested are being refused on the basis of the exemptions in such and such sections. The requirements of

section 26 as to stating the reasons for a decision make it necessary to give full details of the basis for the decision(s). It is insufficient simply to reject the request without giving reasons which can rationally support the rejection (compare *Minister for Immigration and Ethnic Affairs v Pashmforoosh* (1989) 18 ALD 77 at 80). In FOI matters, the fact that the actual decision and the statement of reasons for that decision are being given to the applicant at the same time should mean that all decisions are fully explained. There is no scope in FOI for making a decision on the run, recording it briefly and justifying it at a later date if required to. (See also para.25 below on knowledge of documents by decision-maker.)

Name and designation of the decision-maker

24. A section 26, section 29(8) or section 30A(3) statement of reasons for a decision must state the name and designation of the person who made the decision in respect of which the statement is given. Where the notice is given in respect of a refusal to grant access to a document, or a refusal to amend a document under Part V of the Act, the decision-maker whose name is stated must be a person who is authorised to make such a decision in relation to those documents in accordance with section 23(1) of the Act. It is desirable for the statement of reasons to refer to the authorisation details. There is no requirement for the section 26 notice to be signed by or on behalf of the decision-maker. However, good administrative practice requires the decision-maker to commit the decision to writing on the file and sign it, and not simply to communicate it orally to some other person for that person to notify the applicant of the decision(s) and reasons (see *Re Proudfoot and Human Rights and Equal Opportunity Commission* (D301)).

25. Because the statement of reasons accompanies the notice of decision, it will usually be an advantage in practice for a draft of the section 26 statement to be prepared before the decision is formally made. This is most certainly the case where the author of the section 26 statement is not the actual decision maker. This will help to structure the issues which the decision-maker has to consider, although, of course, he or she must not simply adopt a draft of reasons but must exercise her or his own power of decision based on examination of the documents in question, and other relevant material. The statement of reasons must accurately set out *the decision-maker's* findings, refer to the material on which those findings were actually based and the reasons *of the decision-maker* for the decision. The decision-maker must make any changes to a draft statement of reasons submitted to him or her that are necessary to ensure that it represents his or her decision. It is vital that a decision-maker her- or himself is completely familiar with the documents (see the facts in *Re Kalman and Department of Veterans Affairs* (D303) where the decision maker on internal review did not even inspect the documents). If the decision-maker is preparing a decision in written form without a draft statement of reasons, the record of the decision must be full enough 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, which would be improper.

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What are findings on material questions of fact?

26. The following comments concerning tribunals are equally applicable to decision making by administrators:

‘...the requirement that findings of material fact of a statutory tribunal must ordinarily be based on logically probative material and the requirement that the actual decision of such a tribunal must, when relevant questions of fact are in issue, ordinarily be based upon such findings of material fact and not on mere suspicion or speculation.’ (Deane J in *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 31 ALR 666 at 690)

27. First, then, what are *material* questions of fact? ‘Material’ facts are facts which are relevant to the decision. They are the facts required to establish the factual basis for the decision to refuse access (or whatever the decision may be). All material matters of fact which were taken into account must be clearly stated (*Re Warren and Department of Defence* (D299)) Only material facts are to be taken into account in making a decision. All specific findings in relation to the decision must be set out.

‘Primary facts’ and ‘ultimate facts’

28. There is a distinction between basic factual matters and evidentiary facts, on the one hand, and, on the other hand, the factual conclusions which are drawn from them which are necessary to establish, for example, that an exemption applies. This is sometimes described as a distinction between ‘**primary facts**’ (or ‘basic facts’) and ‘**ultimate facts**’ (see *Harris v ABC* (1984) 5 ALD 564 at 568 (D10/3) for the distinction – see also Fullagar J in *Hayes v Federal Commissioner of Taxation* (1956) 96 CLR 47 at 51 on the distinction between ‘the ultimate fact in issue’ and ‘the facts adduced to prove or disprove that fact’, and Deputy President Thompson on ‘ultimate facts’ in *Re Hopper and AMLR&DC* (1990) 11 AAR 329 at 332). **The quotation from an article by Dr Flick on the next page is helpful in understanding this distinction.**

29. The ‘findings on material questions of fact’ are the decision-maker’s conclusions about both ‘primary’ and ‘ultimate’ material facts, based on the information which is available to the decision-maker (‘the material on which those findings were based’ – see paras 46–48 below) on which he or she bases her or his conclusions on the ‘material facts’ necessary for the making of the decision.

(Note that the word ‘material’ in the phrase ‘material questions of fact’ is an adjective, while in the phrase ‘the material on which those findings were based’ it is a noun.)

30. The following are some examples of findings of kinds of material facts:

- **A basic finding of fact, for example concerning the identification, location, possession or transfer of documents.**
- **A finding of evidentiary fact on which a decision is ultimately based** (e.g. findings of ‘primary’ fact concerning the circumstances of the communication and treatment of allegedly confidential information which support a claim that

material was given and received in confidence and that disclosure would therefore be a breach of confidence under s.45, *or* a finding concerning the factual grounds which support a claim that it would be reasonable to expect an alleged detrimental effect of disclosure of a document, as in such provisions as ss. 37, 40, 43 etc.); this could include the next point also.

- **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** (e.g. a finding of ‘primary’ fact as to the actual nature of a previous disclosure of information which an applicant contends would defeat a claim for exemption under s.43 (business affairs information)).
- **A finding of fact which *must* be made in order for the decision in question to be reached** (i.e. a finding as to an ‘ultimate’ fact – e.g. a finding that information is personal information about an identifiable individual (see ss.41(1) and 4(1)), *or* a finding under s.36(1)(b) as to where the balance of public interest lies).

31. It is important also to state the weight given to a finding of fact where that is relevant to the decision, for example the weight given to the evidence for and against a finding that disclosure under section 36 would be contrary to the public interest, or to the evidence for a finding that substantial adverse effect to a person’s business affairs could reasonably be expected (see e.g. *Re Salazar–Arbelaez and Minister for Immigration and Ethnic Affairs* (1977) 1 ALD 98 at 100).

32. If a material question of fact is not stated in a statement of reasons, the AAT may assume that it was not considered material, while in an ADJR action the Federal Court

‘Findings are of two kinds: basic [or primary] and ultimate. And findings are distinguishable from reasons. ... First, the evidence must be taken and weighed both as to its accuracy and credibility. Secondly, basic and underlying facts must be reached. Thirdly, ultimate facts, usually in the language of the statute, are to be inferred from the basic facts. Fourthly, the application of the statutory criteria will lead to the decision.’

‘[An example is where the US Federal Communications Commission, before issuing a construction permit], was required by the statute to be convinced that the public interest, convenience, or necessity would be served. A finding on this topic would be an ultimate finding. This ultimate finding, however, would be reached from a consideration of such basic facts as the probable existence or non–existence of electrical interference in view of the number of other radio stations operating in the area, their power, wavelength, and the like. These basic facts would emerge from the evidence presented.’

may find that the decision is defective in not taking all relevant considerations into account (*Sullivan v Department of Transport* (1978) 20 ALR 323).

33. Sometimes an ultimate fact will be immediately apparent from the material before the decision maker. In other cases, the ultimate facts will be reached by a process of reasoning, where they are deduced from the primary facts. It will ordinarily be necessary to state the material primary facts and the process of derivation or inference from those facts in order to provide adequate information about the ways in which the decision was reached. A primary fact may itself be based on other primary facts.

34. Findings on ultimate facts will usually be expressed in terms of the language of a statutory standard – for example, that disclosure of particular documents (identified and described) would, or could reasonably be expected to, unreasonably adversely affect a business in respect of its business affairs (s.43(1)(c)(i)) – **but the statement should be specific as to the kind of damage which is expected and why it is reasonable to expect it**. As the second example in the box on the next two pages illustrates, such findings of fact may involve matters which are opinions or matters of judgement, and it is necessary to set out the process of reasoning which leads to the conclusion from the primary facts, unless this is obvious on the face of the conclusion.

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Identification of documents is a finding on a material question of fact

35. 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. (See also FOI Memo. No. 65, ‘Disclosure of the existence of documents to the AAT’, *Re Witheford and Department of Foreign Affairs* (1983) 5 ALD 534 (D6). Not only must the relevant documents be identified as part of the decision-making process – a statement must contain sufficiently detailed descriptions of the documents to enable the applicant to know what documents are in issue and the nature of those documents. This requires at least the giving of the date, the authors and the addressees of all documents where applicable, and a brief description indicating the nature of the document (so long as these details are not themselves exempt material). (However, see Section 5 for the rare circumstances in which it is unnecessary to identify and describe documents, and paras 39–43 below on the limited discretion not to locate and identify documents.) In order to set out the sorts of information needed so that the applicant can best understand what relevant documents are in the agency’s possession and why it is making these particular decisions, it is suggested below that the information will usually be best presented in the form of a schedule of documents (see Section 4 and Attachment C).

36. If an agency is unsure whether particular documents fall within a request, it must either consult with the applicant or reveal their existence as part of its response (see new FOI Memo. No.19, paras 6.1 to 6.7); also *Re Witheford*(above)) and *Re O’Grady and Australian Federal Police* (1983) 5 ALN N420 (D16)). (See also para.45 below.)

37. If information as to the relevant documents (or parts of documents) is not properly included in the section 26 statement, **that statement will be completely deficient because there will be no findings on the most basic material fact of all, namely ‘what documents are in issue?’**. There is nothing optional about the requirement to

properly identify and describe those documents; it follows from the wording of section 26 which would be interpreted by the Federal Court as imposing the same high standards as the identical language in section 13 of the ADJR Act. *Re Warren and Department of Defence* (D299) is an example of a similar situation. The AAT made a declaration that the section 26 notice was inadequate on the basis of the agency's failure to identify the *specific information in documents* which the agency claimed *in a general statement* could not be amended under s.48 of the FOI Act because, in the agency's view, they did not contain 'personal affairs information' (now replaced by the concept 'personal information'). Again, the AAT made it clear in *Re PIAC & DCSH & Schering Pty Ltd* (1991) 23 ALD 714 (D279) that each document must be examined in detail to determine exempt material.

38. There is no precise guidance as to what constitutes 'a' document for the purpose of decision making. Generally it is good administrative practice to identify as separate documents each item that is different from other items in such respects as: source, author, date, addressee, contents, place of publication etc.. This will strongly assist in the process of making specific decisions on the exempt material (if any) in all such items. In any case, it is necessary to identify each part of a document individually where the exemptions or the specific reasons for claiming exemptions are different. It is also necessary to examine every part of a document to determine whether there is material which can be released under section 22 (see below paras 71–74). Where edited copies are released under section 22 it is necessary to deal with the grounds for all deletions one by one (see para.16 above). In some rare cases it may be justifiable to include disparate material together as a single document. The AAT has said that in some cases a collection of material may be treated as one document, in others as a number of documents: it is a matter of common sense (*Re PIAC & DCSH & Schering Pty Ltd* (above)).

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Examples concerning findings of fact

Note

The use of these examples does not imply that the decisions would have been upheld as correct. They are merely intended to indicate the role of findings of material facts in the process of giving reasons.

Example 1

A document contains information about the cost structure of a certain manufacturing operation. The information has been supplied to the department concerned at its request to assist in the evaluation of an Industry Commission report. The company which supplied the information asked that it not be disclosed to its competitors, because knowledge of it might enable them to undercut its operations. The agency has independent information about the manufacturing industry concerned that supports the claims of the company. It has also received submissions and evidence, from the applicant and others, that indicate deep concern on the part of many consumers and consumer groups about the cost structure of this industry. The decision-maker determines that all these are material (primary) facts, sets them out fully in the

statement, referring to the material on which the findings were based, and indicates the weight accorded to each in the final decision. On the basis of these facts she draws the conclusions of ultimate fact that disclosure of the information could reasonably be expected to adversely affect the company in its business operations. She also concludes that the effect was unreasonable in the particular circumstances because the substantial public interest in scrutiny by consumers was outweighed by the public interest in protecting the third party's commercial affairs. The decision-maker notes that in other circumstances the proper result could be different, referring to the comment in *Searle v PIAC & DCSH* (1992) 108 ALR 163 (D294) that even a 'serious adverse effect' may be reasonable under some circumstances. The agency refuses access.

Note

Section 43(1)(c)(i) is a good example of the principle that the mere recitation of the terms of an exemption provision is wholly inadequate as a statement of reasons. In the application of this paragraph of section 43 are involved both issues of causality (i.e. is it reasonable to expect, in objective terms, the alleged detrimental effect on business?) and of the modified public interest test (i.e. are the circumstances such that the greater public good outweighs the harm imposed on the third party by disclosure?). The determination of these issues requires the making of findings of material primary fact which would support or contradict affirmative conclusions to those questions. A finding concerning the ultimate fact of a section 43(1)(c)(i) effect of disclosure must address these and other relevant matters.

Examples concerning findings of fact

Example 2

An agency considers a request for a document containing an interview conducted by an officer for the purpose of preliminary investigations into a sexual harassment allegation. The interview was conducted on the basis that the actual record of interview would be kept confidential. The applicant states that he requires the document for use in compensation purposes and that release would be in the public interest. The interviewee does not consent to the release of any part of the document. The agency is aware from other investigations that officers complaining of sexual harassment are reluctant to speak up unless their actual interview is kept confidential. On the basis of these primary facts, the agency draws the conclusions of ultimate fact that (a) it could reasonably be expected that disclosure under the FOI Act of the interview material would have a substantial adverse effect on the management of personnel (s.40(1)(c)), and (b) that on balance it would be contrary to the public interest to disclose the material on the grounds that disclosure could lead to victimisation of an interviewee and could make it difficult to obtain similar information in the future (s.40(2)). The agency takes account of the general public interest in the widest possible access to government held information and in individuals having access to information concerning them, and to the general fact that amendment of personal records under section 48 depends on an applicant obtaining lawful access to the records. Nonetheless, it concludes that at this date the degree of harm to its sexual harassment procedures far outweighs any public interest that would

flow from disclosure. [The applicant's specific intention to use the report in compensation proceedings is not relevant since disclosure under FOI is in effect to the world at large (see *Searle* above and s.11(2)).]

Example 3

An FOI request is received by an agency for access to a copy in its possession of a document arising from an audit by a private firm of accountants of a non-government overseas aid organisation. The decision maker finds as material (primary) facts that statements in the document were obtained from the accountants on the express basis that the information would not be disclosed except where absolutely necessary, and that the agency has carefully limited internal access to such information, and shares it on a confidential basis only with those parties involved in consideration of the audit. On the basis of these findings of fact, the agency concludes as (ultimate) facts that the information is and remains of a confidential character and was communicated and received in confidence, and that to release it to other than the narrow range of people involved in considering the audit would be unauthorised. The further finding of (ultimate) fact is therefore that disclosure under the Act would be an actionable breach of confidence (s.45). [Note in the case of deliberative process documents under s.36(1)(a) it is also necessary to be sure that section 45(2) does not operate to remove them from the operation of section 45(1).]

But this does not relieve the decision maker from detailed examination of each document to determine exempt material (see comment in *Schering* case). The guide should always be the purposes of the section 26 statement (see Section 1), including the need to explain the true basis of each exemption claim so that an applicant understands that basis and can make an informed decision on whether or not to challenge the decision.

Discretion in certain cases not to locate and identify any or all requested documents – section 24(5)

39. There is one **limited situation** where there is a discretion for a decision maker not to locate and identify relevant documents as part of the decision making process, and not to identify and describe the documents in the section 26 statement. Section 24(5) permits the 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, **but only if** it is apparent from 'the nature of the documents as described' in the request:

- that **all** of the documents are exempt, **and**
- that 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).

40. The intention behind the provision was to avoid unnecessary work where it was clear on the face of the request that every document sought would be exempt and that there would be no occasion to consider making deletions. **The double test in this provision is likely to be satisfied only very rarely.** The provision may only be used where, as a matter of logic, the request itself makes it clear that only exempt documents are being sought. If any question may arise as to their exempt status, the section cannot operate. One example would be:

- a request for ‘all documents relating to me held by ASIO’ – the combination of section 7(2A) and Schedule 2, Part I means that by definition the documents are all completely exempt and no question of edited copies arises (though there is nothing to prevent ASIO from considering the release of the documents outside the FOI Act).

41. However, where any question may arise as to whether exemption is properly claimed in respect of a document, or as to whether parts of the document do not constitute exempt material, there is no scope for resort to the provision. Once again, the provision is not meant to deny the applicant useful information where there might be a real question concerning the exempt status of any of the documents, and use of the provision is discretionary not mandatory.

42. An example where use of section 24(5) would be wrong is a request by X for all documents held relating to X’s previous de facto wife Y, made to an agency which has a secrecy provision prohibiting the disclosure by an officer of information with respect to the affairs of another person acquired in the course of the officer’s duties. Before it could be held that section 38(1) of the FOI Act operated to protect the particular documents it would be necessary to be satisfied that neither section 38(1A)(access to a document, or an edited version of it under section 22, is not prohibited where it would not be prohibited by the secrecy provision itself) nor section 38(2) (access is not prohibited to personal information, *including joint persona information*, about the applicant) applied to any of the documents or parts of documents. It would therefore be necessary to take out the documents to ascertain whether section 38(1A) or (2) had any application – for example to documents containing joint personal information concerning both X and Y – enabling release of some information. There is no scope here for use of section 24(5).

43. Any refusal of a request under section 24(5) is subject to internal review and AAT review, as well as to scrutiny by the Ombudsman, and at the AAT level it will be necessary to comply with the provisions of section 37 of the AAT Act and the AAT’s Practice Direction of 12 April 1985 as to scheduling documents (see Attachment B). (See also New Memo. No. 19, ‘Preliminary and Procedural Matters’, forthcoming.)

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Other material questions of fact

44. Other findings on material questions of fact which will need to be dealt with where appropriate include:

- the scope of the request as interpreted by the agency;

- any transfers or partial transfers of requests to other agencies or Ministers under section 16;
- 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 (section 21) or to provide access in a form other than that requested (section 20);
- any other matters of fact relevant to the processing of the request.

45. A finding on the agency's interpretation of the scope of a request will need to be set out if, for example, there has been doubt about it leading to considerable discussion or correspondence with the applicant on the question, or if the agency has been unsure about the application of the request to particular documents. In the latter case it should reveal the existence of the documents with enough information to allow the applicant to challenge the decision not to include them (see para.36 above) or to put in another request. An agency's decision on the scope of a request is reviewable by the AAT (and by the Ombudsman) which will be critical of incomplete disclosure of relevant documents (see e.g. cases mentioned in FOI Memo. No. 65). There is no point in adopting a legalistic or narrow interpretation of a request, as the applicant can always put in another request if dissatisfied, and would have a good case for remission of the application fee if the request has been approached narrowly.

'Material on which the findings of fact are based' – the evidence or sources

46. A proper FOI decision must be based on the detailed and complete evidence required in the context of the particular circumstances and the exemption provision at issue. This foundation of the decision in properly considered evidence must be reflected in the findings set out in a statement of reasons and in its references to the material supporting those findings.

47. The 'material on which the findings of fact are based' is the information which is available to the decision-maker and from which he or she draws her or his conclusions of fact, both of a primary or an ultimate character. Put another way, this information constitutes the decision maker's evidence or sources for making the necessary findings of material fact. It will usually be documentary material, including the contents of the documents which have been requested, but may be supplemented by other information such as personal representations made to the decision maker, the decision maker's own knowledge of particular relevant circumstances, or any other relevant and credible source of information. If such material is not referred to a statement of reasons will lack adequate foundations and will not carry the conviction to the applicant it would do otherwise.

48. It is not necessary to set out this source material in detail. All that is required is a sufficient *reference* to it to show that there is a proper basis for the findings of fact which have been made after consideration of the sources. However, it may not be possible to understand the reasons for decision without setting out the evidence or part of it, in which case this should be done (*Re Australian Mutual Provident Society and Minister for Territories and Local Government* (1984) 6 ALN N50). The material may be identified by stating its source or its nature, whichever is most intelligible. A mere list of documents before the decision maker is unlikely to be sufficient (see *ARM*

Constructions Pty Limited v Deputy Commissioner of Taxation (1986) 10 ALN N118 at N119). The material should be referred to with sufficient particularity for it to be identified by someone not familiar with the subject matter in question. In the case of documentary sources, this requires a description of the document, its date, its author and addressee, and so on. Where documents are on a particular file or files it is desirable to list the details of the relevant documents rather than merely to refer to the file as a whole. It is also very important that the statement makes it clear which facts are derived from which sources.

Reasons for the decision

49. It is a requirement of section 26 that a notice given in accordance with its provisions must 'state the reasons for the decision'. (See Section 4 and Attachment A for possible forms for this part of the statement.) A section 26 statement must show how *each* decision has been arrived at on the basis of the findings of fact, and why the decision maker reached that decision. Stating the reasons for a decision will normally involve a discussion as to what criteria have to be met to establish an exemption or for some other action (e.g. a transfer to another agency). An agency should look at each relevant specific document, or separate part of a document, and state specifically why access to it is being refused (*Re PIAC & DCSH & Schering* (1991) 23 ALD 714 (D279) and *Re Warren and Department of Defence* (D299)). Where a document is being released with deletions, however, it is only necessary to state the *grounds* on which the deletions have been made, not the full reasons (see para.16 above). **The statement should show a rational connection – i.e. a connection supported by a chain of reasoning – between the findings of fact and the decision.** A proper decision should always be capable of rational explanation, and a section 26 statement should contain such an explanation. A failure to give a rational explanation may lead to a decision being set aside by the Federal Court under the AD(JR) Act, since the decision may appear to be an arbitrary one and not based on proper considerations, or to the statement being held to be inadequate by the AAT under section 62(2) of the FOI Act (see para. 13 above and note).

50. The reasons section of a section 26 statement will be inadequate if it simply repeats the wording of the exemption sections relied on (see comments on statements of reasons generally in *Re Proudfoot and Human Rights and Equal Opportunity Commission* (D301).) It will also be inadequate if it merely restates the decisions themselves (*ARM Constructions Pty Ltd v Deputy Commissioner of Taxation* (1986) 10 ALN N118 at N119). Nonetheless, it is useful to the applicant if the precise words of the exemption are given to her or him, and the best way of doing this is either by attachments containing the statutory provisions or by quoting them in the section 26 statement itself before undertaking explanations of the reasons why particular exemptions have been claimed for particular documents or parts of documents.

51. A statement of reasons should set out the decision maker's understanding of the relevant law (see *Ansett Transport Industries (Operations) Pty Ltd v Wraith* (1983) 48 ALR 500). In addition to the provisions of the FOI Act it may also be necessary to refer briefly in the statement, as part of the chain of reasoning from material findings of fact to conclusions, to decisions of the AAT or the courts as to the correct interpretation of the statutory provisions where this is necessary to explain the decision(s) reached (see von Doussa J in *McAuliffe v Secretary, Department of Social*

Security (1991) 13 AAR 462 at 469). This does not require a dissertation on the law, but merely a simple summary of the effect of relevant decisions where that is necessary to an understanding of the FOI decision.

52. It is essential to be as specific as possible as to why the specific documents concerned are claimed to come within an exemption, but without revealing exempt material. For example (reason A in Example 2 in Attachment A), the reasons why specific documents (but *only* those documents) are claimed to be exempt under section 40(1)(d) (reasonable expectation of substantial adverse effect on the conduct of operations of an agency) might be expressed as follows:

A. These documents represent records of confidential conversations which occurred within the last 12 months with experts 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 investigations if it became known that this information has been released under FOI. I am satisfied that the interest of potential tenderers in monitoring developments in this area (see *Australian Financial Review*, 9 February 1993, page ...) 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 quite strong. He has also taken into account the general public interest in the widest possible disclosure of government-held information. However, [the decision-maker] is satisfied that the ability of the Commonwealth to make 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.

53. In a case such as that just given, of course, there may well be such strong public interest factors in favour of disclosure that they will prevail over even quite 'serious' adverse effects (see *Searle c PIAC & DCSH* (1992) 108 ALR 163 (D294)).

54. These are **concrete and specific reasons**, not a rehash of the exemption section. The statement explains why the statutory consequences are reasonably to be expected, and it refers to the source on which the findings of fact supporting that 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 claim for exemption. Other documents, for which the same exemption is claimed, may require the statement of entirely different reasons (see Attachment A, Example 2, reason B).

Consideration of statutory elements of exemptions

55. As the preceding comments make clear, it is most important that a statement of reasons address carefully every element of the statutory provisions of an exemption. This is not the place to discuss in detail what is required in each FOI exemption. For that you will need to consult the terms of the exemptions themselves supplemented by the existing FOI Memos on the individual exemptions (and revised versions as they are issued). However, it is possible to refer to some common elements in the exemptions which require careful attention in your reasons statements. These are discussed in the following comments.

56. Speaking very broadly, exemptions in the FOI Act are of two basic kinds:

- **exemptions which depend upon the expected results or character of disclosure of the specific documents** (for example, ss 33(1)(a), 33A(1)(a), 36, 37, 39, 40, 41(1), 43, 43A, 44, 45, and 46(a) & (c)); and
- **exemptions which protect documents of a particular class or kind without specific or implicit reference to the effects of disclosure** (for example, ss 34, 35, 38, 42, 47, 47A, and s.7 and Schedule 2).

57. The reasons for claiming an exemption of the **first kind** must establish, *first*, that the document meets any description in the section (e.g. a document containing personal information about any person: s.41(1)), and, *secondly*, must address the reasons (and the facts and sources on which those reasons are based) for expecting the damage which it is feared could result from disclosure of the documents *and* for expecting the specific kind and degree of damage referred to. Similarly, the reasons and supporting facts and sources) for concluding that disclosure would on balance be contrary to the public interest – including a balancing of **all** public interest factors, whether in favour of or against disclosure – must be stated in all cases where a public interest test is part of the exemption provision (ss 33A 36(1), 39, 40, 41, 43 – and see para.62 below). Reasons for claiming an exemption of the **second kind** must ensure that all criteria defining the particular **class** of documents are established.

58. Where an exemption of either kind could relate to several different kinds of documents, it will be necessary to explain which kind of document is in issue (see *Department of Industrial Relations v Burchill* (1989) 105 ALR 327 (D250) where the Court found a conclusive certificate, which referred to section 34(1)(c) and (d), invalid on the ground of uncertainty as it did not specify the particular kind of document in respect of which the exemption had been claimed).

59. The **Examples below** illustrate the need, in relation to both kinds of exemptions, to address the question whether the specific information satisfies a description of an exempt document contained in an exemption.

60. Another issue which arises in many exemptions is the appropriate standard of expectation of the damage which it is claimed disclosure would cause. Some exemptions require that disclosure **‘would’** produce particular damage (ss. 33(1)(b), 33A(1)(b), 34(1)(d), 35(1)(d), 36(1), 39, 41(1), 42(1), 43(1)(a), 45(1), and 46 (s.43A,

concerning information concerning research in progress, is expressed in terms of whether disclosure ‘would be likely’ to have certain consequences).). To make a valid claim under section 41, for example, it is necessary to establish that disclosure **would** involve unreasonable disclosure of personal information about a person. Under s.36(1) it is necessary to show that disclosure of deliberative documents **would** be contrary to the public interest. The test is whether on the basis of probabilities the specified result would follow (but note the change which issue of a conclusive certificate makes to the task of the AAT on review). Further, where, for example, a third party is consulted in relation to a request for personal information about that person, it is necessary to **evaluate** the reasons that person may give for disclosure being unreasonable under section 41(1). The decision-maker must reach an objective decision on the matter.

61. Other exemptions require that the specified damage ‘**would, or could reasonably be expected to**’ occur (ss 33(1)(a), 33A(1)(a), 37(1) & (2), 40(1), 43(1)(b) & (c)(i) & (ii), 44(1)) (in some cases the phrase used is simply ‘could reasonably be expected’, but that makes no real difference in practice to the standard an agency must reach). This is a slightly lesser standard to satisfy, but requires that the evidence for the expectation be carefully assessed in the decision and presented in the statement of reasons. Mere assertion of belief in the reasonableness of the expectation cuts no ice. The Federal Court has emphasised that it is not the reasonableness of the *claim* for exemption that is the question in issue, but the reasonableness of expecting the particular effect of disclosure (*Searle Australia Pty Ltd v PIAC & DCSH* (1992) 108 ALR 163 (D294)). This is a vital distinction. Your reasons statement must demonstrate the asserted reasonableness by mustering the evidence for and against the expectation of damage. For example, under section 43(1)(c)(i), it will be necessary to determine the facts which taken together justify an expectation of damage to a person’s lawful business or professional affairs, and to present these in the reasons statement and refer to the material on which they are based. This means that, based on your objective knowledge of the surrounding circumstances, including any findings of material facts, you must evaluate any subjective claims about detriment made by a third party.

62. One further common example, where all primary facts both for and against an ultimate conclusion must be presented in detail, is **where an exemption contains a public interest test**. Several exemptions contain such a test either in the form that the disclosure of specified information would be contrary to the public interest (s.36(1)(b)), or (what amounts to the same thing) a test of whether disclosure would, on balance, be in the public interest, which will override a finding that specific damage could reasonably be expected to result from disclosure (e.g. s.40(1) & (2)). It is necessary to balance all relevant aspects of the public interest in reaching the decision, and to explain this process fully in the reasons statement (see e.g. reason A in Example 2 of Attachment A).

63. Section 36(7) specifically requires a statement of reasons concerning a section 36 exemption claim to state the ground (or grounds) of public interest on which the decision is based (both for and against disclosure), but it is just as necessary to do so in other cases where the public interest is an element in the decision. This is equally true of the so-called ‘modified public interest’ tests in such exemptions as section 41 (‘unreasonable’ disclosure of personal information) and section 43(1)(c)(i)

(‘unreasonably’ adversely affect a person’s business or professional affairs etc.). What is *in* the public interest (i.e. to the benefit of the public) is seldom clear-cut, and your reasons statement must show that you have considered those factors which favour release as well as those which tend against it. Factors favouring release will always include the general public interest in the widest possible access to government-held information (*Arnold v Queensland and Australian National Parks and Wildlife Service* (1987) 73 ALR 607 (D189)), as well as more specific public interest factors, such as contribution to an important ongoing debate, contribution to public knowledge on important matters such as health and safety issues, environmental matters, public corruption, etc. etc.

64. The general public interest in the openness of administration may also be stronger in particular cases where the integrity of actions of the administration is called into question. Decision-makers should not assume that their task is complete because they have identified one or more aspects of the public interest which favour refusal of access (including those represented in the exemption wording). Drawing on their own knowledge or the submissions of the applicant or other information, they should think laterally to identify relevant public interests favouring disclosure, and balance these fairly against those tending against disclosure before reaching a final decision. In the course of this exercise preliminary views will often change.

Other matters

65. A section 26 statement should mention any official guideline or government policy direction that has been followed (such as those in an FOI Memorandum). A notice should incorporate (and not merely refer to) any adopted recommendation, advice, report or results of investigation by another officer or an outside qualified expert, together with findings as to the facts (and a reference to the evidence or other material on which they are based) and the reasons leading to that recommendation etc.. It is insufficient merely to state that the decision-maker has relied upon the advice of a named person. If a draft statement of reasons is presented to a decision maker, he or she should make any changes to the draft that are necessary to ensure the final statement reflects *the real reasons of the decision-maker* for the decision.

66. Where an applicant has presented arguments, submissions or evidence to the decision-maker in support of access – for example, concerning aspects of the public interest favouring disclosure of the documents – these should be referred to and the way in which they have been dealt with indicated.

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Examples of need to address statutory descriptions of documents

- For a **valid claim under s.34(1)(a)** (a class claim concerning one kind of **Cabinet document**), the document must be one that:
 - either has been submitted to the Cabinet for its consideration,

– or is proposed by a Minister to be so submitted

– (in both cases*) being a document brought into existence for the purpose of submission for consideration by the Cabinet.

(*Revised FOI Memo No. 34 (issued 1 December 1984), paras 7–8; the AAT has not always agreed – *Re Porter and Department of Community Services and Health* (1988) 14 ALD 430 (D214) and *Re Aldred and Department of Foreign Affairs and Trade* (1990) 20 ALD 264 (D248), but this is thought to be incorrect; contrast *Re Anderson and Australian Federal Police* (1986) 4 AAR 414 (D137).)

Your reasons statement 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. You will have to establish on the evidence the circumstances of the document’s creation which you claim establish the necessary purpose of submitting the document to Cabinet (see Revised FOI Memo No.34, para.8). (As a matter of practice you should also consult with the FOI Co-ordinator in the Department of the Prime Minister and Cabinet.)

You will also need to consider whether any material is of a purely factual nature, in which case that material will not be exempt under s.34(1)(a) **unless** its disclosure would disclose any deliberation or decision of Cabinet the fact of which has not already been published (s.34(1A)).

Information about rights of review

67. Section 26(1)(c) requires a notice under the section to give the applicant ‘appropriate’ information concerning the applicant’s rights of review of the decision and the procedure for the exercise of those rights. Where applicable, the information must include particulars of the manner in which an application for internal review under section 54 should be made (see *Re Ward and Department of Industry and Commerce* (1983) 5 ALN 235 (D13/1) – and see next para.). The provision also includes a requirement that in all cases the applicant be given appropriate information concerning her or his rights to make a complaint to the Ombudsman in relation to the decision. The Ombudsman will not usually investigate a complaint concerning a substantive decision until any right of internal review has been exercised, and the applicant should be informed of that. However, the Ombudsman may at any time investigate complaints of delay in decision making. There cannot be simultaneous Ombudsman and AAT review (ss. 56(2) & 57(3)).

Examples of need to address statutory descriptions of documents

- **A claim under section 36(1)** (an exemption based on the expected consequences of disclosure of **deliberative documents**, i.e. that disclosure would be contrary to the public interest) would need first to establish that the documents *were* deliberative documents as defined in the exemption. This

would involve demonstrating that they contain 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, a Minister or the Commonwealth Government.

Your reasons statement would thus have to deal carefully with whether the contents of the document are, perhaps, in the nature of a recommendation, or a record of consultation, and **then** confront the issue of whether the recommendation or consultation could truly be said to have been obtained or carried out as part of the deliberative processes (or ‘thinking processes’, *Re Waterford and Department of Treasury (No.2)* (1984) 5 ALD 588 (D18/1)) involved in the agency’s functions. There are many agency documents which do not come within the description in s.36(1)(a) (see e.g. *Re VXH and HREOC* (1989) 17 ALD 491 (D234), *Re Booker and Department of Social Security* (D258) and *Re Southern and Department of Employment, Education and Training* (D310)).

You would also have to consider whether the documents contained purely factual information, in which case that information would not be exempt (s.36(5)), and whether the provisions excepting various kinds of reports (s.36(6)) apply to any of the material.

The question whether disclosure would also be contrary to the public interest (i.e. the consequences of disclosure) would then need to be addressed (see paras 62–64).

68. Because section 26 of the FOI Act itself requires decision-makers to give notice of the rights to review of most FOI decisions (see Section 2), the Code of Practice for Notification of Reviewable Decisions and Rights of Review, made by the Attorney-General on 11 June 1993 under section 27A of the AAT Act, has no formal application to the giving of a section 26 notice (s.27A(2) of the AAT Act). However, the Code does apply to some minor decisions to which section 26 does not apply (see para.19 above) and to statutorily required notifications of third party review rights (para.15 above). The Code’s requirements for information concerning review rights are in many respects fuller than those in the FOI Act, and as a matter of good administrative practice it is strongly suggested that notification of rights of review of FOI decisions should contain the same kinds of information as the Code requires. The relevant additional heads of information which should be included are:

- ‘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 applications;

- whether or not fees are payable for applications for review and, if so, the amount of the fees and when they are payable;
- whether a waiver of fee payment may be applied for and, if so, the basis of the application;
- any time limits within which the review authority must review the decision;
- any right that 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.’

In addition, the Code suggests officers should consider including 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 procedures of the review authority of which the person should be particularly aware, e.g. requirement of attendance at proceedings and availability of interpreter services.

69. What is appropriate information concerning rights of review (other than concerning the right to complain to the Ombudsman) will depend on the circumstances. The Code requires that, where prior review is a prerequisite to a review by the AAT:

- ‘notices of rights of review should normally be provided according to the stages of the review process through which the person has progressed; and
- notification of the immediate level of review should be given and brief notification of the subsequent level or levels of review should also be given;
- notices should indicate whether or not a particular level of review is a statutory prerequisite to further review.’

It is again strongly suggested that rights of review of FOI decisions should follow the guidelines in the Code. **The examples of standard letters in Attachment D** present one way in which these and the other relevant guidelines in the Code can be implemented in relation to FOI decisions. The following points should also be noted:

- Where the decision is made by a Minister or principal officer, do not include information about the right of internal review pursuant to section 54, since the section does not apply in such cases, but it will be necessary to inform the applicant of her or his AAT review rights.
- Where a primary decision has been made by a person authorised under section 23 to make such decisions, then give information concerning the right to internal review and brief notification of the subsequent level of AAT review and the fact that internal review is a prerequisite to AAT review.
- Where access has been denied on internal review, give the details concerning AAT review required by the Code (see above).
- As the Act stands at present, following a decision a third party with the right to seek review under the reverse-FOI provisions should also be informed of her or his right to seek *either* internal review (followed by AAT review if sought) *or* immediate AAT review (see ss.27A, 54(1C)-(1E) and 58F, 59 and 59A) (but the third party cannot seek internal review of an internal review requested by an applicant (s.54(3)(a)). The third party should be given the details concerning both internal and AAT review required by the Code.

- An agency, which has made an *actual* decision on a request, but has done so outside the statutory time limits, should inform the applicant of both the right to internal review under s.54(1) and the right to AAT review (s.56(1), (1A) & (3)). (Note that, where only a *deemed* decision exists (under s.56(1), (1A) or (3)), there is no provision for internal review: s.54(3)(b).)

70. Agencies may find it convenient to prepare standard statements concerning rights of review, which can be varied according to circumstances, and attach an appropriate statement to the section 26 notice. This would be sufficient compliance with section 26(1)(c). **Examples are shown in Attachment D.** 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.

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Additional matters for inclusion in statement of reasons

The application of section 22

71. The effect of section 22 of the Act is that, generally, the possibility of deletion of exempt matter from a document must be considered when a decision is made that a document is an exempt document (see FOI Memorandum No. 22, para. 9). Limited exceptions to this rule apply in relation to documents originating with or received from intelligence agencies (section 7(2A)) and documents relating to certain activities of some agencies (section 7(2) and (2AA)).

72. The consequence is that, apart from the above exceptions, the statement pursuant to section 26(1)(a) must show that consideration has been given to the possibility of making available an edited copy of any document completely refused, with the exempt matter deleted (see *Re PIAC & DCSH & Schering Pty Ltd* (1991) 23 ALD 714 (D279)). The statement will be inadequate unless this is shown. Where the decision is to refuse access altogether on the ground that the document is an exempt document, the statement must establish either that the document does not contain any matter which is not exempt or that, for a reason referred to in section 22, it is not proposed to make available a copy of the document with the exempt matter deleted.

73. 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 (see *Re Carver and Department of Prime Minister and Cabinet* (1987) 6 AAR 317 (D190), and FOI Memo. No. 22). In *Carver*, the AAT made it clear that this limb of s.22(1) can only be employed in relation to grounds on which a document has been claimed to be exempt, and not in relation to other possible grounds;

- where it is apparent from the request, or as a result of consultation with the applicant, that the applicant would not wish to have access to a copy with the necessary deletions.

74. In practice, you should explain briefly why each document, for which exemption is claimed as a whole, is not being released in an edited form under section 22 (see Example 2 in Attachment A and the example of a schedule in Attachment C). This will ensure that the decision maker actively considers this question in relation to all documents. It is part of the requirement to go meticulously through every document to ascertain what is not sensitive and can be released. While protecting appropriate government and third party interests, the FOI Act favours the maximum disclosure possible without injury to those interests. (Note, however, that it is not necessary to release material that is clearly irrelevant to the request: this may be also deleted under section 22.)

Reasons why documents not released outside the FOI Act

75. Section 14 of the FOI Act provides that nothing in that Act is intended to prevent or discourage the publishing or giving of access to documents (*including exempt documents*) otherwise than as provided by the FOI Act, where that can properly be done or is required by law to be done. Although there is no technical requirement to do so under the Act, as the then Attorney-General stated in the Parliament during the debate on the FOI Amendment Act 1983 (*Hansard*, Senate, 7 October 1983, p.1348) in the overwhelming majority of cases where access is refused agencies ought to include in their section 26 statements 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 (see Example 2 in Attachment A). It is Government policy that, wherever possible, information should be released even if it is technically exempt, if its disclosure would do no real damage to important government or third party interests. (See FOI Memo No.77 (June 1985), para.6.)

4. The form of the section 26 notice ⁵

76. Although section 26 specifies what information must be included in a written notice under that section, it does not require the notice to be set out in any particular form. **Attachment A** sets out examples of three possible forms of notices under section 26, and other forms are possible. The first example is in the form of a simple letter to the applicant; the second is in the form of a letter supplemented by a separate explanation of the reasons for each decision and a schedule (the latter is not shown); the third is cast in the form of a conventional statement of reasons since there is only one part of one document in issue. While no particular form is required so long as all of the necessary elements are 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 paras 78–85 below and **Table 3**). **Attachment C** contains an example of a form of schedule which could be used.

77. A letter written to the applicant will be sufficient so long as it contains all of the information required by the section (see Example 1 in Attachment A). There is no requirement for the section 26 notice to be signed by or on behalf of the decision maker, although the notice must inform the applicant of the terms of the decision and the name and designation of the decision maker (see para.24 above).

Use of schedules

78. Once an appeal has been made to the AAT, the AAT requires that a schedule be lodged with it and served on the applicant (see **Practice Direction, 12 April 1985, at Attachment B**, for what is required to be shown in the schedule; see also FOI Memorandum No. 76, ‘AAT Practice Direction: Filing of Affidavits and Schedules of Documents in Freedom of Information Matters’ (issued 3 June 1985), paras 4–7). There is no legal requirement for a schedule to be prepared before that point, although much of the information which would go in a schedule for the AAT is in fact required to be included in a statement of reasons under section 26(1) (see paras 35–37 above).

79. However, 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 section 26 notice.

80. A schedule will enable you to organise the basic facts concerning the documents in issue which are necessary for a decision – these include identification and adequate description of the documents, whether they are being released or exempted etc., and a reference to the full reasons for the decision. While the statement in full of the reasons for the decision will explain in detail why each exemption is claimed in relation to each document or part of a document, a schedule will enable both the agency and the applicant to identify and understand the character of each document or part of a document under discussion in that statement. It is crucial that a schedule not be used as an inadequate substitute for providing a full, detailed statement of reasons which contains meaningful information about the real basis for all decisions to refuse 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.

81. To meet the requirements of section 26 (and see also the AAT Practice Direction in Attachment B), the information shown in Table 3 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).

82. 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 (see *Re Warren and Department of Defence* (D299), where a schedule of reasons for refusal to amend each specific document or part of a document would probably have avoided the defect which the AAT found in the statement of reasons). 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 (see Attachment A, Example 2). 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 (see above paras 52–54).

83. The example of a possible schedule at Attachment C is adapted from the AAT's reasons for decision in *Re PIAC & DCSH & Schering Australia Pty Ltd* (1991) 23 ALD 714 (D279). The precise form is not important so long as the schedule contains all the information necessary for the applicant to identify and understand the nature of the relevant documents or parts of documents, to be aware of all relevant exceptions or exemptions claimed as a basis of refusal, and to locate full, detailed reasons for each refusal decision. However, if there is an appeal to the AAT, you will need to ensure that the schedule is in a form that satisfies the AAT's Practice Direction of 12 April 1985 (Attachment B).

84. The following matters should also be borne in mind in preparing a schedule of documents (see also FOI Memo No.76, para.6, for a fuller version of these and other points):

- Wherever possible, the description of a document should be sufficient to provide a prima facie justification of the grounds of exemption claimed. This is in the agency's interests as well as the applicant's.
- Where only part of a document is claimed to be exempt then the relevant part should be clearly identified.
- Care must be taken in dealing with copies (see Table 3, Note 1).

85. A schedule of documents prepared as part of a statement under section 26 should not include exempt material (s.26(2) (see also sections 29(11) and 30A(6)). Likewise, where a schedule is prepared in accordance with section 37 of the AAT Act, the AAT's Practice Direction of 12 April 1985, in providing that a schedule of documents to which exemption claims relate be lodged with the AAT and served on the applicant, makes an exception where to do so would disclose matter claimed to be exempt (para.2). In *News Corporation Ltd v National Companies and Securities Commission* (1984) 5 FCR 88 (D9/5), a case which preceded the Practice Direction, the Federal Court upheld under sections 35(2) of the AAT Act and 63(2) of the FOI Act, the withholding of a schedule of documents from the applicant where the schedule itself contained exempt material. It may be that now an agency would wish to prepare one version of a schedule (not containing exempt material) for the purposes of section 37 and the Practice Direction, and another (containing exempt material) for use by the AAT and for which a confidentiality order under section 35(2) of the AAT Act would be sought. (See also section 63 of the FOI Act, and FOI Memo No.76, paras 7 and 10–14.)

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5. What can be omitted from a statement of reasons?

Section 26(2) – omission of exempt material ⁶

86. Section 26(2) provides that a section 26 statement is not required to include any matter that is of such a nature that its inclusion in a document of an agency would cause that document to be an exempt document. That is, the statement need not contain any material to which an exemption claim relates, 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 section 26 statement is not required to, *and must not*, disclose the very information which forms the basis for the decision to refuse access (see, e.g., *News Corporation Ltd v National Companies and Security Commission* (1984) 5 FCR 88 (D9/5)).

Example: Where a person seeks access to a document which contains details of treatment undergone by a third person for schizophrenia, the statement of reasons should not say that access is refused because disclosure would show that the person concerned has been having psychiatric treatment – that would in itself be an unreasonable disclosure of personal information. All that need be said is that the document contains details of the medical history of a person and the disclosure of that medical history would be an unreasonable disclosure of personal information about that person, this being information of a kind which a person would reasonably wish to have withheld from the world at large.

87. In rare cases this reliance on section 26(2) may require the section 26 statement to be silent altogether about the existence and characteristics of a document, but 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. The AAT and the Ombudsman would view very seriously an improper reliance on section 26(2).

Non-disclosure of the existence or non–existence of a document – section 25(1) & (2)

‘Oh what a tangled web we weave, When first we practise to deceive!’ (Sir Walter Scott)

88. The inter–related provisions of section 25(1) and (2) are, unfortunately, quite complex and difficult to comprehend at first sight. In broad terms they permit the non–disclosure of the fact of the existence or non–existence of a requested document in certain limited cases. The underlying rationale is that, in some circumstances, merely to admit to the existence *or* non–existence of a document may itself convey information which is exempt (see *News Corporation Ltd v National Companies and Securities Commission* (1984) 5 FCR 88 (D9/5)). However, care must be taken in the use of section 25(2) in that, if it is not routinely used, its use may itself reveal that particular information is held. Routine use of section 25(2) may itself be problematic (see **example 4 in the box below**).

Table 3 Information Required in a Schedule of Documents

SUGGESTED HEADINGS	KINDS OF INFORMATION REQUIRED
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	<p>The description should enable the reader to relate the contents of each relevant document or part of document to the exemption(s) claimed and the reasons for claiming those exemptions, but without disclosing exempt material.</p> <p>When an exemption claim relates only to part of a document, give a description of the part or parts involved (e.g. para. 6, or para. 6, lines 2–3 only) (See note 1 below on copies.)</p>
Decision on access	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 (s.16), or access to it is being deferred (s.21), or access is being granted in a different form from that requested (s.20), etc..
Reasons for decisions	Refer to separate full reasons for individual decisions contained in letter or annex (see Example 2 in Attachment A).

Notes

1. Copies of documents are themselves documents under the FOI Act and must be identified in any schedule of documents. If they are exact copies it is appropriate to refer back to the first description of the documents. Where a copy also contains other material such as an annotation, the description must state that fact, and it must be treated as a totally separate document. The reasons for non-disclosure may be different in part.

2. Most responses to an FOI request involve a mixture of decisions to release information and decisions to claim exemptions for other information. Where documents are being released in large numbers, it will not be necessary to identify them in great detail. But, where there are many documents, the decision maker will

usually have had to ‘schedule’ them first before making a decision and it may not be very onerous to incorporate those parts of the schedule in the s.26 statement.

89. The provisions of **section 25(1)** permit an agency or Minister not to give information about the existence or non–existence of a document (**Document A**) where:

- inclusion in a notional document of the agency or Minister (**Document B** – e.g. a reasons statement) of information that Document A exists or does not exist –
- would cause Document B to be exempt under one or more of sections 33, 33A and 37(1).

(See analysis by Deputy President Todd in *Re Department of Community Services and Health and Jephcott* (1986) 5 AAR 318 at 324 (D124).)

This enables you to leave out of your section 26 statement any mention of Document A if those preconditions are met, but **only** where that would be the case.

90. Section 25(2) builds on section 25(1) by enabling an agency or Minister to give a notice neither confirming nor denying the existence in its possession of a requested document (Document A) of a kind mentioned in section 25(1) (see previous paragraph), whether that document exists or not,

BUT ONLY WHERE, assuming its existence, Document A would itself be exempt under one or more of sections 33, 33A and 37(1).

This is more stringent than the provisions of section 25(1), where it is enough that mention of Document A’s existence or non–existence would make Document B exempt – Document A itself does not have to be exempt.

91. Where section 25(2) can legitimately be used the agency has a *discretion* whether or not to give a notice under that provision to the applicant. The provisions of section 25(1) would justify the omission of reference to a requested document even where there were good reasons not to use the provisions of section 25(2). However, a decision to exercise the discretion not to give a notice under section 25(2), while at the same time omitting under section 25(1) all reference to a document, should be avoided wherever possible in order not to deprive an applicant of some indication that he or she may not be being told the full story, and therefore of the opportunity of challenging the decision in relation to that document.

92. Where a notice is given under section 25(2), section 26 applies as if the decision to give that notice were a decision referred to in section 26. In practice, a section 26 statement containing a section 25(2) notice should closely follow the terms of the latter section. It would be helpful to the applicant if copies of the relevant sections were enclosed. Because a decision to give a notice under section 25(2) is deemed to be a decision refusing to grant access to the relevant document, if it existed, under section 33, 33A or 37(1), it is reviewable on internal review and by the AAT in the normal way (s.25(2)(b)). The applicant must be informed of the right to review

conferred by section 25(2)(b) as well as the right to complain to the Ombudsman. (See examples in the box below of the use of section 25(2).)

93. There may be other cases in which a like result to that under section 25(2) may be achieved in reliance on section 26(2) (see paras 86–87). The fact that separate provision is made in section 25(2) for certain cases does not, it is thought, mean that there may not be other *rare* cases in which section 26(2) will permit a section 26 notice to be cast in a form which neither admits nor denies the existence of a document where to disclose information about its existence would cause the section 26 statement itself to be an exempt document. This approach should only be used in very clear cases.

Example: A paper is prepared by Treasury on possible changes in currency policy. A rumour that such a document has been prepared results in a financial journalist making a request under the FOI Act seeking access to a document described in the request as ‘any paper prepared in the last six months by Treasury on the subject of possible changes in currency policy. The section 26 statement might include some words such as ‘We are not prepared to disclose whether we have prepared any paper in the last six months concerning possible changes in currency policy, since, assuming the existence of such a paper, disclosure of any activity in this regard would of itself be reasonably expected to have a substantial adverse effect on the ability of the Government to manage the economy (see s.44(1)).’

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Cabinet and Executive Council documents – conclusive certificates

94. Note that sections 34(4) (Cabinet documents) and 35(4) (Executive Council documents) provide for the giving of conclusive certificates certifying that a document described in a request would, if it existed, be exempt under section 34(1) or section 35(1) as the case may be. Where such a certificate has been issued, the decision on the request may be that access is refused on the ground that, if such a document existed, it would be exempt under section 34(1) or 35(1) (see ss.34(5) and 35(5)). The section 26 statement should state this reason.

6. Other matters

Decision makers and AAT not bound by exemption claims and reasons in section 26 notice

95. Numerous decisions of the AAT and the Federal Court have made it clear that neither a decision maker nor the AAT is bound by the exemption claims and reasons in a section 26, section 29(8) or section 30A(3) notice (e.g. *Searle Australia Pty Ltd v*

PIAC & DCSH (1992) 108 ALR 163 (D294)). An agency is entitled to reconsider a decision adverse to an FOI applicant if it believes it may have made an error. So far as the AAT is concerned, its ability to consider other exemptions is due in part to the fact that the AAT is specifically prohibited from giving access to exempt matter in a document (section 58(2)), and so is not bound by the omissions or concessions of a decision maker, and

Some examples of the use of section 25(2)

Example 1

An agency receives a communication from an intelligence agency of an overseas government which is expressed to be provided in confidence. The communication deals in detail with all security arrangements between the two countries. Shortly afterwards, a request is received specifically seeking access to a recent document concerning the security arrangements between the two countries. It is the opinion of the agency, based on information from the overseas agency and its government, that disclosure of the contents of the document could reasonably be expected to cause damage to the security and international relations of the Commonwealth (s.33(1)(a)) by leading to a breakdown in security co-operation between the two countries. Moreover, it is the agency's opinion, based on the same evidence, that mere disclosure of the existence of the document could have the same consequences. It would therefore be able, if it wished, to employ the provisions of section 25(2) to neither confirm nor deny the existence or non-existence of the document as a document in its possession.

If, on the other hand, no such document existed, the agency could use the provisions of section 25(2) if it was satisfied *both* that reference to its existence or non-existence would constitute exempt matter *and* that, if such a document existed, it would be exempt under section 33. In the case of a document that does not exist, these are not easy tests to satisfy.

As you do not have to disclose to the applicant any information which would cause the section 26 statement to be exempt (s.25(1)), you do not have to go into detail concerning why this particular document would be exempt under section 33 – to do so would obviously frustrate the purpose of using section 25(2). But you must not abuse the provisions of section 25(2) by claiming that a document would, if it existed, be exempt under one of the relevant sections if there is an actual document which would not be so exempt. The AAT would treat such a claim as an abuse of the agency's powers.

Example 2

An applicant requests access to other documents as well as to a specific document which does in fact exist, but for which there is a valid ground upon which to base a section 25(2) notice if desired.

The agency may give a section 26 statement in the normal way relating to the other documents and include within it a section 25(2) notice neither confirming nor denying the existence or non-existence of the document.

Some examples of the use of section 25(2)

Example 3

An applicant requests access to other documents as well as a specific document which does not in fact exist.

If it is clear from the description of the document in the request:

- that if the document in fact existed, it would be exempt under an appropriate section (this should not be readily assumed – some cases will be clear, but others will be much more doubtful; note also that the matter is open to review by the AAT), **and**
- that to refer to its existence or non-existence in a statement of reasons would make that statement itself exempt under one of those sections,

then it would be appropriate if desired to give a section 25(2) notice in your section 26 statement.

Example 4

Where a request would extend to a document of a kind normally held by the agency, but does not *specifically* request access to such a document. If the document is of a kind the existence or non-existence of which the agency would not wish to confirm nor deny, a practical problem may arise.

An example would be where a request to a law enforcement agency is for all documents held by it relating to the applicant, and in fact some of the documents concern an ongoing covert law enforcement investigation of the applicant. However, there is a risk that if the agency uses a section 25(2) notice in such a case it may over time reveal that its use of the provisions of section 25(2) in these circumstances occurs only when the agency does in fact have documents.

Use of a standard form of words in all section 26 statements where a request is capable of extending to such documents if they existed runs into difficulties of the inappropriate use of such a form of words. In such cases it is better to rely on the provisions of section 25(1) and not refer to the matter at all in your section 26 statements in relation to such requests. You would, however, need to disclose the existence of relevant documents of this kind to the AAT if the applicant appeals against the decision.

partly to the fact that the AAT is required to reach the correct and preferable decision on the material before it (see *Re PIAC & DCSH & Schering Pty Ltd* (1991) 23 ALD 714 (D279)).

96. Nonetheless, agencies should do their utmost to notify applicants at the time of the section 26 notice of all relevant exemptions, and **not to make surprise new exemption claims ‘at the door of the AAT’**. On the other hand, where an agency realises it has claimed exemption for documents which are either not exempt, or where, even if an exemption would technically be available, the disclosure of the document would not harm government or third party interests, the agency should release that document whether or not the applicant has yet sought review of the decision. In the case of non-exempt documents, it is better to do this than be compelled to release them later in the review process. However, release before a hearing will not necessarily conclude the review process as the AAT’s power of review is not displaced by agreement between the parties (see, for example, *Re Hancock and Department of Resources and Energy* (1986) 10 ALN N65 (D78), and *Re Bloomfield and Sub-Collector of Customs, ACT* (1981) 4 ALD 204 at 210–211)), or by a unilateral decision by an agency to disclose information (*Re Bradbury and Registrar, Administrative Appeals Tribunal* (1991) 22 ALD 412 (D263)). A question of a recommendation as to costs under section 66 may still arise (see for example *Re Thom Thi Nguyen and Department of Immigration, Local Government and Ethnic Affairs* (1988) 16 ALD 674 (D226)). It is not certain whether the protections of ss 91 and 92 apply to documents released after AAT proceedings have been commenced, or whether release would be considered by the AAT and the courts to have been made outside the Act (see s.14).

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ATTACHMENT A

Example 1

Dear Mr Jones,

In your letter of 25/1/93 you made a Freedom of Information (FOI) request for a copy of a report by officers of this Department on the effect of the aerial spraying of herbicides on birth deformities in sheep. We wrote to you on 3/2/93 informing you that we had not been able to identify any such report in our records. On 21/2/93, you telephoned the FOI Co-ordinator in this Department and referred him to a newspaper report of 15/12/92 where it was stated that two veterinary officers from the New South Wales Department of Agriculture had been seconded to this Department for such a study, and that they had completed a report on their studies.

Enquiries have shown that two State Officers did spend some time in this Department early last year to study material in the files of this Department on the effects of herbicides on animal reproduction. A search of Registry records and enquiry of the officers in the relevant Branch indicates that this Department has not received a copy of any report which might have been made by the State officers on the subject.

Consequently, I have decided under section 24A of the FOI Act to refuse your request for a copy of the report referred to in your letter on the ground that, all reasonable efforts having been taken to find the document, I am satisfied that the document does not exist, or, alternatively, if it is in the possession of this Department, it cannot be found. I would add that we have made oral enquiries of the Department of Health, Housing and Community Services and have been informed that that Department is

likewise unaware of any such report having been made. I have also been unable to contact the State officers concerned, and enquiries to the New South Wales Department of Agriculture have not been successful in identifying the report you are seeking.

However, as New South Wales has now passed its own FOI Act, you may wish to consider making a request under that legislation to the New South Wales Department of Agriculture, the address of which is: ...

Attached to this letter is a document [**see Attachment D**] setting out your rights under the FOI Act to seek review of this decision, and the procedure for the exercise of those rights. You may seek internal review of this decision by an officer appointed by the Secretary of the Department under section 54 of the FOI Act. Point 1 of the attached document gives particulars of the manner in which an application under section 54 should be made. You may also make a complaint to the Ombudsman about this decision. Point 2 of the attached document tells you how to lodge a complaint with the Ombudsman. [**Include information about charges.**]

[Name and designation of decision-maker]

10 March 1993

NOTES: This letter is signed by the decision maker but could just as well have been signed by another officer setting out the terms of Mr Roe's decision. Because no relevant document has been found no question arises as to the application of the deletion provisions of section 22 or of discretionary release outside the Act (see paras 71-74).

ATTACHMENT A Example 2

WARNING: This example is not intended as a precedent for drafting statements of reasons for individual exemptions. **ON THE CONTRARY**, it is meant to illustrate how **SPECIFIC** such claims should be in indicating the expected effects of disclosure.

Dear Mr Jones

I refer to your Freedom of Information (FOI) request of 27 November 1992 made to the Department of Sport, Tourism and Territories (DOSTAT) for documents concerning development and approval of a proposal for a theatrical entertainment at the Australian Pavilion, Expo 92.

2. As advised in our letter of 21 January 1993 this Department accepted a part transfer of the request, even though the transfer was out of time in relation to specific documents referred to in the transfer [see now s.16(5)(a)].

3. A decision has been made on the relevant documents by Harry Morant, Senior Assistant Secretary, Agreements Branch, Commercial Law Division, to grant access to some of the relevant documents while refusing access to others. The detailed terms of the decision are set out in the the attached notice of decision under section 26 of the FOI Act. The details of all documents in the possession of this Department covered by your request, and the decisions concerning each of them, are set out in the schedule attached to the notice [**not attached to this example**]. Against each document to which access has been refused, in the column headed 'Reasons', are the letters A to K which will enable you to identify the specific reason the document was considered exempt. Those reasons are contained in the attached notice of the decision.

4. [Information re charges to be paid before access given.]

5. Information regarding your rights of review in relation to this decision is attached [see **Attachment D**].

Yours sincerely

(John Ryker)
FOI Co-ordinator
11 February 1993

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ATTACHMENT A Example 2

Notice of decision under section 26 of the FREEDOM OF INFORMATION ACT 1982

Applicant: Mr J Jones

File reference: XZJ 116/92

Decision maker: Mr Harry Morant
Senior Assistant Secretary
Agreements Branch
Commercial Law Division

Decision: For the reasons set out below, Mr Morant has decided to grant access in full to the documents identified by the letter R on the attached schedule **[not attached to this example]**, to refuse access to the documents identified by the letter E, and to grant access with deletions to the decisions identified by the letters ERD. Where documents are marked TR, the request in respect of them has been transferred to another agency as shown, either on the ground that the documents are in the possession of the other agency (s.16(1)(a)), or that they are more closely connected with the functions of that agency (s.16(1)(b)) (see below for reasons). A copy of section 16 of the Act is enclosed. As agreed with you, documents marked Z are to have access decisions made about them by another agency as shown.

All documents marked E or ERD

In all cases where access to documents has been denied, consideration was given to the deletion of exempt material in accordance with section 22 of the FOI Act; where deletions have been made the document is marked ERD. Where no deletions have been made from a document, brief reasons are stated in the schedule for refusing the whole document.

All of the exempt documents could be expected to cause substantial and/or unreasonable damage to either the interests of a third party or the interests of the Commonwealth or a Commonwealth agency and could not therefore be released outside the Act as referred to in section 14 of the FOI Act.

Documents considered exempt under section 40(1)(d)

Section 40(1)(d) of the FOI Act states:

‘(1) A document is an exempt document if its disclosure under the Act would, or could reasonably be expected to:

...

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

Section 40(2) of the Act states:

‘(2) This section does not apply to a document in respect of matter in the document the disclosure of which under this Act would, on balance, be in the public interest.’

[An alternative is to attach standard copies of the relevant sections.]

A. These documents represent records of confidential conversations which occurred within the last 12 months with experts in preparation for a draft contract which was never issued. On the basis of Mr Morant’s own experience, he has concluded that it would be extremely difficult to obtain such information in investigations if it became known that this information has been released under FOI. I am satisfied that the interest of potential tenderers in monitoring developments in this area (see *Australian Financial Review*, 9 February 1993, page ...) 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, Mr Morant 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 Mr Morant's view this aspect of the public interest is quite strong. Mr Morant has also taken into account the general public interest in the widest possible disclosure of government-held information. However, Mr Morant is satisfied that the ability of the Commonwealth to make 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.

B. These documents represent communications with the claimant or its legal representative during the negotiation phase of the settlement. Release of the documents could reasonably be expected, on the basis of normal practice in the process of reaching agreed settlement of claims against the Commonwealth, to lead to a loss of confidence in the Department's settlement process if future claimants felt that such communications would be made public. On the basis of his experience in this area, Mr Morant is satisfied that such claimants require that their communications during negotiations will be kept confidential, and if this cannot be guaranteed it could be reasonably expected to impede the flow of information necessary for the negotiating process. This would substantially adversely affect the conduct of the operations of the Department in hindering its ability to negotiate the best price for the provision of goods and services to the Commonwealth and its agencies.

Mr Morant has taken account of those elements of the public interest favouring disclosure (which are the same as in A above) but has concluded that, when they are balanced against the grave effects on the Commonwealth's ability to conduct settlement processes, disclosure would not be in the public interest.

Documents considered exempt under section 43(1)(c)(i)

Section 43(1)(c)(i) of the Act states:

'43. (1) A document is an exempt document if its disclosure under this Act would disclose:

.....

(c) information ... concerning a person in respect of his business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking, being information:

(i) the disclosure of which would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs;’

C. Release of these documents would disclose detailed costing analysis, sources of supply and/or methods of production used by the Ajax Company and could reasonably be expected to unreasonably adversely affect the competitiveness of its business by enabling competitors to provide similar products at an equivalent or marginally lower cost. Mr Morant has taken into account the aspects of the public interest favouring disclosure of the information (which are the same as in A above) but has determined that on balance disclosure would not be in the public interest since the severe effect on the company’s business would be disproportionate to any benefit to the public as a result of disclosure.

Documents considered exempt under section 45(1)

Section 45(1) of the Act states:

‘A document is an exempt document if its disclosure under this Act would found an action, by a person other than the Commonwealth, for breach of confidence.’

D. These documents contain a confidential breakdown of the costs claimed by the Ajax Company revealing how the Company conducts its business. None of the information in them is public knowledge. They were supplied to the Department and received by it on an express understanding of confidentiality, and have only been seen by those concerned in the tender process or in conducting the litigation. Disclosure of these documents to third parties for other than tender purposes would be beyond the authorised use of the documents by the Department and would constitute a breach of confidence. There is no just cause or excuse known to this Department which would constitute a complete defence to any action by the Ajax Company for breach of confidence.

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Documents considered exempt under section 42

Section 42 of the Act states:

‘A document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.’

The documents considered exempt under section 42 were raised for the sole purposes either of giving or seeking legal advice or for use in possible legal proceedings, and fall into the following categories:

E. Instructions received from a client.

F. Confidential communication between a solicitor and a client.

G. Confidential communication between two solicitors in which information was conveyed or requested for the purpose of possible litigation.

H. A confidential communication between two solicitors of the one office for the purpose of possible litigation.

I. Legal research in relation to the claim.

J. Confidential communications between two solicitors acting for the same client in relation to the legal affairs of that client.

K. Notes which relate to information sought by a legal advisor to enable her to advise the client.

DOSTAT, which was the client in relation to documents considered exempt under section 42, has not agreed at this stage to waive its privilege in relation to these documents because of the effects this could have on the conduct of ongoing legal action against the tenderer. This decision is consistent with DOSTAT's own decision in this matter to refuse access to relevant documents in its possession subject to legal professional privilege where this could adversely affect the conduct of ongoing litigation.

Documents transferred to other agencies

[Reasons would need to be given in terms of paragraphs (a) and (b) of section 16. It might be possible to do this on the schedule.]

ATTACHMENT A Example 3

NOTICE OF DECISION UNDER SECTION 26 OF THE FREEDOM OF INFORMATION ACT 1982

Dear Ms X,

I refer to your request, dated 1 February 1993, for amendment under section 48 of the FOI Act (copy enclosed) of a file copy of an interview report form dated 7 June 1992. You were given FOI access on 10 October 1992 to a photocopy of that file copy. I note that you wish to have the ticks removed from the NO boxes in Questions 6(c)(i) and (iii) which you consider imply that you have at some stage lived in a de facto relationship.

I am a person authorised by the Secretary of this Department to make decisions on requests under section 15 for access to documents, or requests for amendment of records of information under section 48 of the FOI Act. [I enclose a copy of that authorisation.] My name and designation are set out below.

I am satisfied that the ticks in question constitute information as that term is used in the FOI Act and that the information falls within the definition of ‘personal information’ (see definition in section 4(1), copy enclosed) and that the information has been used, and is available for use, by the Department for an administrative purpose, namely assessing your eligibility for the sole parent’s pension.

Decision

Accordingly, I have made the following decision under section 50 of the FOI Act (copy enclosed):

I have decided to amend the records of the information referred to above on the ground that the information is misleading. I have decided to make the amendment by means adding to the answers to questions 6(c)(i) & (iii) a note in red ink specifying the respects in which I am satisfied that the information is incorrect and misleading. The text of the note is as follows:

‘After consideration of the statement by Ms X and other material on file XXXX, I find under section 50 of the FOI Act that the ticks in the ‘No’ boxes opposite questions 6(c)(i) & (iii) are misleading in conveying the impression that they were inserted with the authority of Ms X ’

My reasons for this decision are set out in the following paragraphs.

Questions in issue

In my view the following are the questions I have to answer in order to make a decision in this matter:

- (a) whether the ticks in the boxes are ‘incomplete, incorrect, out of date or misleading’ in the information they convey as to the answers you gave to the field officer at the interview;
- (b) I have also to consider whether the ticks require amendment in the sense that they are incorrect in giving the impression that within the period covered by the interview you had been in a relationship with a spouse or de facto spouse; and
- (c) if I find that the information is wrong in either of those respects, I must consider whether to alter the record, either as you request by removal of the ticks, or in some other way (see section 50(2)(a)), or to add to records of the information a note under section 50(2)(b) specifying the respects in which I find the information wrong.

Material on which findings of fact have been based

The following material has been taken into account by me in making my findings of fact:

- The claims made by you in your letter of 1 February 1993 requesting amendment of the record:
 - that you were not asked questions 6(c)(i) and (iii);
 - that the ticks were not on the form when you signed it;
 - that you did not yourself insert the ticks in the boxes relating to the relevant questions;
 - that you did not authorise the making of those ticks;
 - that the ticks are misleading in giving the impression that you had made or authorised the making of the ticks;
 - that 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;
 - that you are single and have not been in such a relationship, and that therefore the questions were and are not applicable.
- The supervisor of the field officer who conducted the interview has informed me in writing (there is a copy on the file dealing with your request for amendment: File XXXX) 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 they were specifically authorised by you.
- 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 officer has left the employment of the Department and I have been unable to locate her current address.
- The original interview report form has been misplaced and attempts to locate the original have failed. The only relevant document on file is a poor 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. I have no other evidence about the filling out of the form.
- Information provided by Mr J James claiming that you and he lived as de facto spouses during the period April 1990 to June 1992 (you obtained a copy of this information as a result of your FOI request).

Findings of fact

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

- I find, on the basis of probabilities, that the ticks were not on the form when you signed it and that you did not authorise them.

- On the basis of the evidence from the person mentioned above and the evidence provided by you, I am not satisfied that you have not been in a de facto relationship in the relevant period
- My conclusion under section 50(1) the FOI Act is therefore that the ticks are misleading in conveying the impression that you had in some way authorised them. However, I am unable to conclude that they are also incorrect in giving the impression that you have been in a de facto relationship in the relevant period.

Reasons for findings and decisions

My reasons for finding that the information the ticks convey is misleading are as follows:

- I have not been able to interview the field officer concerned and, although I have no reason to doubt that she made the statement her supervisor has reported, or that she was telling the truth as she recollected it at the time, I am unable to test her recollections and the statement does not address a number of questions such as: why there is an apparent difference in the ticks, whether the field officer was certain that she had made the ticks with Ms X's authorisation (and not simply in her presence) and that she had drawn them to the attention of Ms X, and how she was so sure of the facts of this particular case some months afterwards.
- You have consistently denied that you authorised 'No' answers to questions 6(c)(i) & (iii). Against this testimony I have only the second hand testimony of the field officer which I am unable to evaluate by questioning her, and which does not deal with a number of unanswered questions. In my opinion, in the absence of first hand and complete evidence from the field officer, your evidence must be preferred as being first hand and dealing specifically with all the issues within your knowledge.
- In these circumstances, on the balance of probabilities, I find that the ticks in the 'No' boxes next to questions 6(c)(i) & (iii) are misleading in conveying the impression that you authorised them at the time of the interview and should be amended as shown above.
- On the balance of probabilities I am not able to find that you have not been in a de facto relationship in the relevant period. I have weighed your statement against the statement referred to above alleging that a de facto relationship existed between you and Mr James. In view of the details given in the latter statement concerning place of residence and duration of relationship, and the absence of details in your statement, I am unable to accept your denial of such a relationship and cannot be satisfied on the balance of probabilities that the impression conveyed by the ticks that you had been in such a relationship is incorrect.
- The decision not to remove the ticks from the record, even though I consider they convey a misleading impression about their authorisation, but instead to rule a line through them in red ink and add a note to the record specifying the respects in which I am satisfied that the information is misleading, is based on the provisions of section 50(3) (copy enclosed) which require that the text of the record as it existed prior to amendment not be obliterated. It constitutes

part of the historical record of how the matter was dealt with, as is evident from the concurrent overpayment recovery proceedings.

You may wish to seek a review of my decisions that the ticks do not convey an incorrect impression in the way you claim, and refusing to amend the records by removal of the ticks rather than by removing the ticks altogether.**[Information on rights of review.]**

Yours sincerely,

Wendy Durassy,
Assistant Secretary,
Legal Branch

26 February 1993

NOTE: The example is very loosely based on *Re Jackson and Department of Social Security* (D286). It is not implied that the decision in that case, or the decisions given here, are necessarily correct (see comments in D286). However, it is hoped that the example serves to show a consistent and reasoned approach to decision-making.

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ATTACHMENT B AAT PRACTICE DIRECTION

FREEDOM OF INFORMATION ACT 1982 (Cth)

- Filing of Affidavits and Supporting Documentation

In respect to applications for review lodged with the Tribunal under the Freedom of Information Act 1982 (Cth) the following practice shall apply regarding the documentation to be lodged with the Tribunal in matters where documents which are the subject of an application for review are claimed to be exempt documents:

1. Where a respondent claims that a document is an exempt document the respondent should not include that document with the documents lodged with the Tribunal under s 37 of the Administrative Appeals Tribunal Act 1975 (Cth) (see s 64 of the Freedom of Information Act 1982 (Cth)). The Tribunal as constituted to hear the matter, will deal at the hearing with any questions as to production of those documents for its inspection. It is not appropriate to lodge the documents that are claimed to be exempt and then to request the Tribunal to make a confidentiality order under s 35 of the Administrative Appeals Tribunal Act 1975 (Cth).
2. Except where to do so would be to disclose matter claimed to be exempt, the respondent shall, not later than seven (7) days prior to the date appointed for the hearing, lodge with the Tribunal and serve upon the applicant a schedule (or schedules) of the documents to which the claims of exemption relate.

3. The schedule (or schedules) shall list the documents sequentially by number and, unless to do so would disclose the matter claimed to be exempt, shall provide the following details in respect of each document:

- (a) the date of the document;
- (b) the person or persons by whom the document was created and, where applicable, the person or person to whom it was directed;
- (c) a sufficient description of the nature of the contents of the document so as to provide a prima facie justification for the ground or grounds of exemption relied upon;
- (d) where applicable, a statement as to the ground or grounds of public interest relied upon in support of the claim of exemption;
- (e) where the claim of exemption relates only to part of the document, a concise indication of the part or parts involved (e.g., para 6 or part para 6);
- (f) where a document is no more than a copy of another document for which exemption is claimed, it should be so identified. The claims of exemption do not need to be repeated in respect of the copy document.

4. Unless the Tribunal otherwise directs, the respondent shall, not later than seven (7) days prior to the date appointed for the hearing, lodge with the Tribunal and serve upon the applicant an affidavit or affidavits setting out the evidence to be relied upon in support of the claims of exemption. In respect of any evidence for which a confidentiality order is to be sought pursuant to s 35(2) of the Administrative Appeals Tribunal Act 1975 (Cth) (see also s 63 of the Freedom of Information Act 1982 Cth)) that evidence shall be set out in a separate affidavit or affidavits clearly marked for the attention only of the members of the Tribunal constituted to hear the proceeding. Such affidavit or affidavits shall be lodged with the Tribunal, but copies thereof are not to be served upon the applicant.

5. Where any part of a request for access to documents has been transferred to another agency pursuant to the provisions of s 16 of the Freedom of Information Act 1982 (Cth), the referring agency shall identify clearly in its s 37 statement the respects in which the request for access has been so transferred, the name of the transferee agency or agencies and the date on which each transfer was made.

J D DAVIES J

President

12 April 1985

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ATTACHMENT C

FREEDOM OF INFORMATION ACT 1982
EXAMPLE OF A SCHEDULE OF DOCUMENTS

Document No.	Date	File/Vol Reference	Author	Addressee	Description
FILE BS82/209 1.	4/3/82	BS82/209	Outokumpuoy	-	Advice of change to length of insertion tube - enclosure to document 1(c)(copy of Doc. 20(a))
2	8/2/82.	BS82/209 f5	Outokumpuoy	-	Replacement page 18 to application for marketing approval - specifications of copper wire and insertion tube - enclosure to document 1(c)(copy of Doc. 20(b))
3	24/5/82	BS82/209 f6	Registration and Drug Information Officer, Schering	Therapeutic Goods Branch	Letter regarding replacement page 18 of application or marketing approval for Nova T

					device (copy of Doc. 20))	
4	4/3/82	BS82/209 f6	-	-	Advice of change to length of insertion tube (copy of Doc. 20(c))	R w d le 4
5	3/9/82	BS82/209 f8	-	-	Replacement page 18 to application for marketing approval - specifications of copper wire and insertion tube (copy of Doc. 20(b))	E 4 4
6	8/2/82	BS82/209 ff11-12	D Smyth, Pharmacology	Director, NBSL	Minute concerning safety testing of Nova T device	E 4 4 4

NOTE: Based on Schedule attached to AAT decision in *Re Public Interest Advocacy Centre and Department of Community Services and Health and Schering Pty Ltd (1991) 23 ALD 714 (D279)*.

**ATTACHMENT D
Example 1**

RIGHTS OF REVIEW, WHERE ACCESS REFUSED

SAMPLE

INFORMATION ON RIGHTS OF REVIEW

1. APPLICATION FOR INTERNAL REVIEW OF DECISION

You have the right to apply for an internal review of the decision refusing to grant access to documents in accordance with your request. If you make an application for review the Secretary of the Department will appoint an officer of the Department (not

the person who made this decision) to conduct a review and make a completely fresh decision on the merits of the case

You must apply in writing for a review of the decision within 30 days of receipt of this letter. You must also send an application fee of \$40.00 or request that the fee be remitted – or you can do both at the same time. You may apply for remission for any relevant reason, including one or both of the following reasons:

- payment of the fee, or part of the fee, would cause, or has already caused you financial hardship;
- the giving of access to the documents requested is in the general public interest or in the interest of a substantial section of the public.

The application itself will not be processed until either the fee is paid or remitted.

If you seek remission on any ground it would be helpful to provide supporting details, for example: brief details of your current financial position (weekly or monthly income and expenditure, money in the bank or other accounts, debts, etc.); substantiating detail for a claim that it would be in the general public interest to give access to the documents sought.

You do not have to pay any other fees or processing charges are payable for an internal review, except for providing access to further documents released as a result of the review (for example, photocopying, inspection etc.).

No particular form is required to apply for review although it is desirable (*but not essential*) to set out in the application the grounds on which you consider that the decision should be changed.

Application for a review of the decision should be addressed to:

The FOI Co-ordinator
Agency/department
Address, phone no., FACS and DX nos if applicable

If you make an application for internal review and a decision is not made by us within 30 days of receiving the application and the application fee (or of the application fee being remitted), you will be entitled to make an application within a further 60 days to the Administrative Appeals Tribunal for review of the original decision.

The Tribunal is a completely independent review body with the power to make a fresh decision. Your application should be accompanied by a filing fee of \$300, unless you are granted legal aid or you come within an exempt category of persons (check with the Tribunal registry in your State). The Registrar or Deputy Registrar may waive the fee on the ground that its payment would impose financial hardship on you. The fee may be refunded where you are successful. The Tribunal cannot award costs either in your favour or against you, although it may in some circumstances recommend

payment by the Attorney-General of some or all of your costs. Further information is available from the Tribunal on (07) 361 3066 (or other relevant State number).

If the decision on internal review is not to grant access to all documents in accordance with your request, you would then also be entitled to seek review of that decision by the Administrative Appeals Tribunal (see previous paragraph). You will be further notified of your rights of review at the time you are notified of the internal review decision.

2. COMPLAINTS TO THE COMMONWEALTH OMBUDSMAN

You may complain to the Ombudsman concerning action taken by an agency in the exercise of powers or the performance of functions under the Freedom of Information Act. There is no fee for making a complaint. The Ombudsman will conduct a completely independent investigation of your complaint.

You may complain to the Ombudsman either orally or in writing. The Ombudsman's address is:

Commonwealth Ombudsman
GPO Box 442
CANBERRA ACT 2601

Telephone: (06) 247 5833

FACS (06)

(or relevant State address).

The Ombudsman usually prefers applicants to seek internal review before they complain about a decision.

3. ACCESS TO DOCUMENTS

You are entitled under the Freedom of Information Act to seek access to documents concerning this decision. A request would be treated as a completely new request. If you wish to do so, you should apply in writing to the address given in paragraph 1 above and should send a fee of \$30. You may seek remission of the fee, either before or at the same time or afterwards, for the same reasons as are described in paragraph 1 above. The normal processing charges apply.

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ATTACHMENT D Example 2

RIGHTS OF REVIEW - AFTER INTERNAL REVIEW

(Or where Decision made by Principal Officer of Agency or Minister)

SAMPLE

INFORMATION ON RIGHTS OF REVIEW

1. ADMINISTRATIVE APPEALS TRIBUNAL

You have the right to apply to the Administrative Appeals Tribunal for a review of this decision within 60 days of the date when notice of this decision is given to you.

The Tribunal is a completely independent review body with the power to make a fresh decision. Your application should be accompanied by a filing fee of \$300, unless you are granted legal aid or you come within an exempt category of persons (check with the Tribunal registry in your State). The Registrar or Deputy Registrar may waive the fee on the ground that its payment would impose financial hardship on you. The fee may be refunded where you are successful. The Tribunal cannot award costs either in your favour or against you, although it may in some circumstances recommend payment by the Attorney-General of some or all of your costs. Further information is available from the Tribunal on (07) 361 3066 (or other relevant State number).

The address of the Tribunal is:

Deputy Registrar
Administrative Appeals Tribunal
22nd Floor
294 Adelaide Street
BRISBANE QLD 4000

Phone No.: (07) 361 3066

FACS

(or other relevant State address)

2. COMPLAINTS TO THE COMMONWEALTH OMBUDSMAN

You may complain to the Ombudsman concerning action taken by an agency in the exercise of powers or the performance of functions under the Freedom of Information Act. There is no fee for making a complaint. The Ombudsman will conduct a completely independent investigation of your complaint.

You may complain to the Ombudsman either orally or in writing. The Ombudsman's address is:

Commonwealth Ombudsman
GPO Box 442
CANBERRA ACT 2601

Telephone: (06) 247 5833

FACS (06)

(or relevant State address).

You cannot seek concurrent review by the Administrative Appeals Tribunal and Ombudsman of the same decision. The time limit on applications for review by the AAT is suspended while the Ombudsman is investigating the same matter.

3. ACCESS TO DOCUMENTS

You are entitled under the Freedom of Information Act to seek access to documents concerning this decision. A request would be treated as a completely new request. If you wish to do so, you should apply in writing to the address given below and should send a fee of \$30. You may seek remission of the fee, either before you pay the fee or at the same time or afterwards, for the reasons described below. The normal processing charges apply.

You may apply for remission of the application fee for any relevant reason, including one or both of the following reasons:

- payment of the fee, or part of the fee, would cause, or has already caused you financial hardship;
- the giving of access to the documents requested is in the general public interest or in the interest of a substantial section of the public.

The application itself will not be processed until either the fee is paid or remitted.

If you seek remission on any ground it would be helpful to provide supporting details, for example: brief details of your current financial position (weekly or monthly income and expenditure, money in the bank or other accounts, debts, etc.); substantiating detail for a claim that it would be in the general public interest to give access to the documents sought.

You should address any FOI application to:

The FOI Co-ordinator
Agency/department
Address, phone no., FACS and DX nos if applicable

Endnotes

¹ This memo does not usually distinguish between a statement of reasons concerning a primary decision and one concerning a decision on internal review. The principles on which both are required to be constructed are the same.

² Refer also to sections 29(8) to 29(11) and 30A(6)

³ See also sections 29(8) to 29(11) and 30A(3) to 30A(6)

⁴ This also applies to statements under ss 29(8) or 30A(3)

⁵ Paras 76-77 also apply to statements under sections 29(8) or 30A(3)

⁶ This also applies to statements under sections 29(8) or 30A(3); see sections 29(11) and 30A(6).