

# PART 6 — CONDITIONAL EXEMPTIONS

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## PART 6 — CONDITIONAL EXEMPTIONS

### Introduction

6.1 As outlined in Part 5 of these Guidelines, where a document is conditionally exempt under a provision of Division 3 of Part IV of the FOI Act, access must be given unless in the circumstances giving access would, on balance, be contrary to the public interest (s 11A(5)).

6.2 Conditional exemptions under Division 3 of Part IV that are subject to the public interest test relate to the following:

- Commonwealth-State relations (s 47B)<sup>1</sup>
- deliberative processes (s 47C)<sup>2</sup>
- financial or property interests of the Commonwealth (s 47D)<sup>3</sup>
- certain operations of agencies (s 47E)<sup>4</sup>
- personal privacy (s 47F)<sup>5</sup>
- business (other than documents to which s 47 applies) (s 47G)<sup>6</sup>
- research (s 47H)<sup>7</sup>
- the economy (s 47J).

6.3 Each of these categories of conditional exemption is discussed in detail below.

### ***The public interest test***

6.4 There is a single public interest test to apply to each of the conditional exemptions. This public interest test is defined to include certain factors that must be taken into account where relevant, and some factors which must not be taken into account

6.5 The public interest test is considered to be:

- something that is of serious concern or benefit to the public, not merely of individual interest<sup>8</sup>
- not something of interest to the public, but in the interest of the public<sup>9</sup>
- not a static concept, where it lies in a particular matter will often depend on a balancing of interests<sup>10</sup>

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<sup>1</sup> See [6.29] – [6.51] below.

<sup>2</sup> See [6.52] – [6.88] below.

<sup>3</sup> See [6.89] – [6.94] below.

<sup>4</sup> See [6.95] – [6.123] below.

<sup>5</sup> See [6.124] – [6.179] below.

<sup>6</sup> See [6.180] – [6.213] below.

<sup>7</sup> See [6.214] – [6.215] below.

<sup>8</sup> *British Steel Corporation v Granada Television Ltd* [1981] AC 1096. The 1979 Senate Committee on the FOI bill described the concept of ‘public interest’ in the FOI context as: ‘a convenient and useful concept for aggregating any number of interests that may bear upon a disputed question that is of general – as opposed to merely private – concern.’ Senate Standing Committee on Constitutional and Legal Affairs, *Report on the Cth Freedom of Information Bill 1978*, 1979, paragraph 5.25.

<sup>9</sup> *Johansen v City Mutual Life Assurance Society Ltd* (1904) 2 CLR 186.

<sup>10</sup> As explained by Forgie DP in *Wood; Secretary, Department of Prime Minister and Cabinet and (Freedom of information)* [2015] AATA 945 at [54] citing *McKinnon v Secretary, Department of Treasury* [2005] FCAFC 142;

- necessarily broad and non-specific,<sup>11</sup> and
- related to matters of common concern or relevance to all members of the public, or a substantial section of the public.<sup>12</sup>

6.6 It is not necessary for a matter to be in the interest of the public as a whole. It may be sufficient that the matter is in the interest of a section of the public bounded by geography or another characteristic that depends on the particular situation. A matter of particular interest or benefit to an individual or small group of people may also be a matter of general public interest.

### **Applying conditional exemptions and the public interest**

6.7 The decision maker is not required to consider the public interest test (s 11A(5)) until they have first determined that the document is conditionally exempt. A decision maker cannot withhold access to a document simply because it is conditionally exempt. Disclosure of conditionally exempt documents is required unless in the particular circumstances and, at the time of the decision, there is, on balance, countervailing harm which offsets the inherent public interest of giving access.

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

6.9 The six steps in determining if a document is conditionally exempt and applying the public interest test are set out below.

#### **Step 1: Determine if the document is conditionally exempt**

6.10 A document is conditionally exempt if it satisfies all the elements of any of the eight conditional exemptions listed above at [6.2]. For each conditional exemption, the harm threshold that must be reached is specified in the provision. The exception is the deliberative processes exemption (s 47C), which does not include any requirement of harm, only that the document includes deliberative matter. Specific guidance on the criteria to be met in each of the eight conditional exemptions is provided later in this Part.

6.11 A decision maker's initial consideration of the harm that may arise is concerned with whether the document meets the criteria for being a conditionally exempt document. This may require a balancing of public interest and non-public interest factors.<sup>13</sup> However, this is not a determination of where on balance the public interest lies as s 11A(5) requires a decision maker to separately undertake a balancing exercise of public interest factors. Section 11A(5) does not allow room for consideration of factors that cannot be framed in terms of the public interest, or aspects of it.<sup>14</sup>

6.12 For example, s 47G(1)(a) concerns documents that relate to the lawful business or

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(2005) 145 FCR 70; 220 ALR 587; 88 ALD 12; 41 AAR 23 at [231]; 139; 78; 92 per Jacobson J with whom Tamberlin J agreed, citing *Sankey v Whitlam* [1978] HCA 20; (1978) 140 CLR 1 at 60 per Stephen J.

<sup>11</sup> Because what constitutes the public interest depends on the particular facts of the matter and the context in which it is being considered.

<sup>12</sup> *Sinclair v Maryborough Mining Warden* [1975] HCA 17; (1975) 132 CLR 473 at 480 (Barwick CJ).

<sup>13</sup> For example, as with the s 47G, business affairs public interest conditional exemption.

<sup>14</sup> *Bell and Secretary, Department of Health (Freedom of Information)* [2015] AATA 494 [49].

professional affairs of an individual, or the lawful business, commercial or financial affairs of an organisation or undertaking. In order to find that s 47G(1)(a) applies, a decision maker would need to be satisfied that if the document were disclosed there would be: an unreasonable adverse effect, on the business or professional affairs of an individual, or the lawful business, commercial or financial affairs of an organisation or undertaking.

6.13 These criteria require more than simply asserting that a third party's business affairs would be adversely affected by disclosure. The effect would need to be unreasonable. This requires a balancing of interests, including the private interests of the business and other interests such as the public interest. Where other interests, for example environmental interests, outweigh the private interest of the business this conditional exemption cannot apply.<sup>15</sup> Likewise, where the documents reveal unlawful business activities the 47G(1)(a) conditional exemption cannot apply (see [6.180] below).

### ***Step 2: Identify the specific harm threshold***

6.14 Because each exemption is different, there is necessarily a high degree of specificity in the considerations relevant to each decision about granting access. This directly affects how the factors favouring disclosure and those favouring non-disclosure are determined. These factors must be directly relevant to both the particular harm threshold of the conditional exemption and to the particular document, the particular circumstances and the particular time.

6.15 Using the previous example of s 47G(1)(a), the specific harm that must be shown is an 'unreasonable adverse effect' on the business or professional affairs of a person, or the business, commercial or financial affairs of an organisation or undertaking.

6.16 While both Steps 1 and 2 involve consideration of harm, there is a distinction in the nature and purpose of this consideration. In Step 1, the consideration relates to whether or not the harm threshold has been met in order to determine whether the document is conditionally exempt. Step 2 relates to quantifying the harm as a preparatory step to weighing the factors in favour and against disclosure.

### ***Step 3: Identify the factors favouring disclosure***

6.17 The FOI Act sets out four factors favouring access, which must be considered if relevant. They are that disclosure would:

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

6.18 For example, disclosure of a document that is conditionally exempt under s 47G(1)(a) might, in the particular circumstances, both inform debate on a matter of public importance, and promote effective oversight of public expenditure. These would be factors in favour of disclosure in the public interest. Similarly, it would be a rare case in which disclosure would

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<sup>15</sup> See Deputy President Forgie's discussions in *Bell and Secretary, Department of Health (Freedom of information)* [2015] AATA 494 particularly at [44]. The Information Commissioner has discussed and followed the 'Bell' approach in a number of recent IC review decisions, see for example *Linton Besser and Department of Employment* [2015] AICmr 67.

not promote the objects of the FOI Act, including by increasing scrutiny, discussion, comment and review of the government's activities.

6.19 The four factors favouring disclosure are broadly framed but they do not constitute an exhaustive list. Other factors favouring disclosure may also be relevant in the particular circumstances. A non-exhaustive list of factors is below.

**Public interest factors favouring disclosure**

- (a) promotes the objects of the FOI Act, including to:
  - i. inform the community of the Government's operations, including, in particular, the policies, rules, guidelines, practices and codes of conduct followed by the Government in its dealings with members of the community
  - ii. reveal the reason for a government decision and any background or contextual information that informed the decision
  - iii. enhance the scrutiny of government decision making
- (b) inform debate on a matter of public importance, including to:
  - i. allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official<sup>16</sup>
  - ii. reveal or substantiate that an agency or official has engaged in misconduct or negligent, improper or unlawful conduct
  - iii. reveal deficiencies in privacy or access to information legislation<sup>17</sup>
- (c) promote effective oversight of public expenditure
- (d) allow a person to access his or her personal information, or
  - i. the personal information of a child, where the applicant is the child's parent and disclosure of the information is reasonably considered to be in the child's best interests
  - ii. the personal information of a deceased individual where the applicant is a close family member (a close family member is generally a spouse or partner, adult child or parent of the deceased, or other person who was ordinarily a member of the person's household)
- (e) contribute to the maintenance of peace and order
- (f) contribute to the administration of justice generally, including procedural fairness<sup>18</sup>
- (g) contribute to the enforcement of the criminal law
- (h) contribute to the administration of justice for a person
- (i) advance the fair treatment of individuals and other entities in accordance with the law in their dealings with agencies

<sup>16</sup> See also *Carver and Fair Work Ombudsman* [2011] AICmr 5.

<sup>17</sup> See *'FG' and National Archives of Australia* [2015] AICmr 26.

<sup>18</sup> This refers to administration of justice in a more general sense. Access to documents through FOI is not intended to replace the discovery process in particular proceedings in courts and tribunals, which supervise the provision of documents to parties in matters before them: *'Q' and Department of Human Services* [2012] AICmr 30, [17].

- (j) reveal environmental or health risks of measures relating to public health and safety and contribute to the protection of the environment
- (k) contribute to innovation and the facilitation of research.

**Step 4: Identify any factors against disclosure**

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

6.21 Citing the specific harm defined in the applicable conditional exemption is not itself sufficient to conclude that disclosure would be contrary to the public interest. However, the harm is an important consideration that the decision maker must weigh when seeking to determine where the balance lies.

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

**Public interest factors against disclosure**

- (a) could reasonably be expected to prejudice the protection of an individual's right to privacy, including where:
  - i. the personal information is that of a child, where the applicant is the child's parent, and disclosure of the information is reasonably considered not to be in the child's best interests
  - ii. the personal information is that of a deceased individual where the applicant is a close family member (a close family member is generally a spouse or partner, adult child or parent of the deceased, or other person who was ordinarily a member of the person's household) and the disclosure of the information could reasonably be expected to affect the deceased person's privacy if that person were alive
  - iii. the personal information is that of a government employee in relation to personnel management and the disclosure of the information could be reasonably considered to reveal information about their private disposition or personal life.<sup>19</sup>
- (b) could reasonably be expected to prejudice the fair treatment of individuals and the information is about unsubstantiated allegations of misconduct or unlawful, negligent or improper conduct
- (c) could reasonably be expected to prejudice security, law enforcement, public health or public safety
- (d) could reasonably be expected to impede the administration of justice generally, including procedural fairness
- (e) could reasonably be expected to impede the administration of justice for an

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<sup>19</sup> See 'GC' and *Australian Federal Police* [2015] AICmr 44, *Paul Cleary and Special Broadcasting Service* [2016] AICmr 2.

- individual
- (f) could reasonably be expected to impede the protection of the environment
  - (g) could reasonably be expected to impede the flow of information to the police or another law enforcement or regulatory agency
  - (h) could reasonably be expected to prejudice an agency's ability to obtain confidential information
  - (i) could reasonably be expected to prejudice an agency's ability to obtain similar information in the future
  - (j) could reasonably be expected to prejudice the competitive commercial activities of an agency
  - (k) could reasonably be expected to harm the interests of an individual or group of individuals
  - (l) could reasonably be expected to prejudice the conduct of investigations, audits or reviews by the Ombudsman or Auditor-General<sup>20</sup>
  - (m) could reasonably be expected to discourage the use of agency's access and research services<sup>21</sup>
  - (n) could reasonably be expected to prejudice the management function of an agency
  - (o) could reasonably be expected to prejudice the effectiveness of testing or auditing procedures

***Step 5: Ensure that no irrelevant factor will be considered***

6.23 The decision maker must take care not to consider factors that are not relevant in the particular circumstances. The FOI Act also specifies certain factors which must not be taken into account, as explained at [6.78] below.

6.24 The irrelevant factors are:

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

***Step 6: Weigh the relevant factors to determine where the public interest lies***

6.25 The decision maker must determine whether access to a conditionally exempt document is, at the time of the decision, contrary to the public interest, taking into account the factors for and against disclosure. The timing of the request may be important. For example it is possible that certain factors may be relevant when the decision is made, but

<sup>20</sup> See *Australian Broadcasting Corporation and Commonwealth Ombudsman* [2012] AICmr 11.

<sup>21</sup> See *'FG' and National Archives of Australia* [2015] AICmr 26.



would not be relevant if the request were to be reconsidered some time later. In such circumstances a new and different decision could be made.

6.26 In weighing the factors for and against release of a document, it is not sufficient simply to list the factors. The decision maker's statement of reasons must explain the relevance of the factors and the relative weights given to those factors (s 26(1)(aa)) (see Part 3).

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

### ***Conditional public interest exemptions and classes of documents***

6.28 In the course of processing an FOI request, an agency may come to a view that a certain class of documents should always be exempt due to particular recurring factors weighing against the public interest in disclosure. However, an agency cannot rely on a class claim contention when withholding a document under a conditional exemption. Rather, agencies and ministers must administer each request individually with regard to the contents of a document and apply the public interest test to the particular document to decide whether an exemption claim should be upheld at that time.<sup>22</sup>

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

6.29 Section 47B conditionally exempts a document where disclosure:

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

6.30 For the purposes of this exemption, a State includes the Australian Capital Territory and the Northern Territory (s 4(1)) (see Part 1 of these Guidelines).

### ***Relevance of the author of the document***

6.31 The document does not have to have been supplied or written by the Commonwealth,

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<sup>22</sup> See *Crowe and Department of the Treasury* [2013] AICmr 69 [36]–[45], *Cornerstone Legal Pty Ltd and Australian Securities and Investment Commission* [2013] AICmr 71 [32]–[41] and [53] and *'FI' and Australian Securities and Investments Commission* [2015] AICmr 28 [14].

a State agency or a State authority to fall within this exemption. The content of the document (and potentially the reason or circumstances why the document was created) is the deciding factor, rather than the originator's identity. It is also not a relevant consideration that all the parties referred to in the document are aware of the document or of the reference to the particular agency.

### ***Cause damage to Commonwealth-State relations***

6.32 A decision maker may consider that disclosure would, or could reasonably be expected to damage the working relations of the Commonwealth and one or more States (s 47B(a)). 'Working relations' encompass all interactions of the Commonwealth and the States,<sup>23</sup> from formal Commonwealth-State consultation processes such as the Council of Australian Governments through to any working arrangements between agencies undertaken as part of their day to day functions.

6.33 Disclosure of the document may cause damage by, for example:

- interrupting or creating difficulty in negotiations or discussions that are underway, including in the development of joint or parallel policy<sup>24</sup>
- adversely affecting the administration of a continuing Commonwealth-State project
- substantially impairing (but not merely modifying) Commonwealth-State programs<sup>25</sup>
- adversely affecting the continued level of trust or co-operation in existing inter-office relationships<sup>26</sup>
- impairing or prejudicing the flow of information to and from the Commonwealth.<sup>27</sup>

6.34 Decision makers may also need to consider future working relationships where disclosure may, for example:

- impair or prejudice the future flow of information
- adversely affect Commonwealth-State police operations or investigations
- adversely affect the development of future Commonwealth-State projects.

6.35 The potential damage need not be quantified,<sup>28</sup> but the effect on relations arising from the disclosure must be adverse.

6.36 The AAT warns against applying class claims to documents under s 47B(a), explaining that this, and other conditional exemptions, require a closer analysis of the nature of the information contained in each document to determine whether a particular document is conditionally exempt.<sup>29</sup>

6.37 Decision makers should also consider whether all or only some of the information in

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<sup>23</sup> See *Arnold (on behalf of Australians for Animals) v Queensland* (1987) 73 ALR 607.

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

<sup>25</sup> See *Re Cosco Holdings Pty Limited and Department of Treasury* [1998] AATA 124.

<sup>26</sup> See *Arnold (on behalf of Australians for Animals) v Queensland* (1987) 73 ALR 607.

<sup>27</sup> See *Re Shopping Centre Council and Australian Competition and Consumer Commission* [2004] AATA 119.

<sup>28</sup> See *Re Angel and the Department of Arts, Heritage and Environment; HC Sleigh Resources Ltd Tasmania* [1985] AATA 314.

<sup>29</sup> See *MacTiernan and Secretary, Department of Infrastructure and Regional Development (Freedom of Information)* [2016] AATA 506 at [63]; also these Guidelines above at [6.28].

the requested documents would damage Commonwealth-State relations if disclosed. For example, in *Diamond and Australian Curriculum, Assessment and Reporting Authority*, the FOI Commissioner found that disclosing school data provided by State and Territory Governments to the Australian Curriculum, Assessment and Reporting Authority for publication on the ‘My School’ website would damage Commonwealth-State relations.<sup>30</sup> Releasing the data would have breached an agreement between the Commonwealth and State and Territory Governments to keep the data confidential, and might reasonably have caused State and Territory Governments to decline to provide further data for the website. However, the FOI Commissioner found that release of a list of schools featured on the website would not breach the confidentiality agreement as it would not disclose any State or Territory Government data.

### ***Damage to be reasonably expected***

6.38 The term ‘could be reasonably expected’ is explained in greater detail in Part 5. There must be real and substantial grounds for expecting the damage to occur which can be supported by evidence or reasoning.<sup>31</sup> There cannot be merely an assumption or allegation that damage may occur if the document were released. For example, when consulting a State agency or authority as required under s 26A, the agency should ask the agency or authority for its reasons for expecting damage, as an unsubstantiated concern would not satisfy the s 47B(a) threshold.

### ***Information communicated in confidence***

6.39 Section 47B(b) conditionally exempts information communicated in confidence to the Commonwealth Government or an agency by a State or an authority of a State. It is not necessary for the decision maker to find that disclosure may found an action for breach of confidence for this element to apply.<sup>32</sup>

6.40 This exemption only applies if disclosure would divulge information that is communicated in confidence by a State Government or authority to the Commonwealth Government or agency, and not the reverse.<sup>33</sup>

6.41 When assessing whether the information was communicated in confidence, the test is whether the communication was considered to be confidential at the time of the communication. The circumstances of the communication may also need to be considered, such as:

- whether the communication was ad hoc, routine or required<sup>34</sup>
- whether there were any existing, implied or assumed arrangements or understandings between the Commonwealth and State concerning the exchange or supply of information<sup>35</sup>

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<sup>30</sup> *Diamond and Australian Curriculum, Assessment and Reporting Authority* [2013] AICmr 57.

<sup>31</sup> See *Attorney-General’s Department and Australian Iron and Steel Pty Ltd v Cockcroft* (1986) 10 FCR 180.

<sup>32</sup> See *Re Mann and Australian Tax Office* [1985] AATA 144.

<sup>33</sup> *MacTiernan and Secretary, Department of Infrastructure and Regional Development (Freedom of Information)* [2016] AATA 506 [83].

<sup>34</sup> See *Re Maher and Attorney-General’s Department* [1985] AATA 180.

<sup>35</sup> See *Re Maher and Attorney-General’s Department* [1985] AATA 180 for agreements and *Re Queensland and Australian National Parks and Wildlife Service (Australians for Animals, party joined)* [1986] AATA 224 for assumed arrangements.

- how the information was subsequently handled, disclosed or otherwise published.<sup>36</sup>

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

6.43 This exemption should not be claimed where the documents relate to routine or administrative matters or documents that are already in the public domain.

### ***A State and an authority of a State***

6.44 An ‘authority of a State’ is an entity that has been established by the State for a public purpose, given the power to direct or control the affairs of others on the State’s behalf, reports to and is under some control of the State.<sup>37</sup> Where there is doubt as to whether an entity is an ‘authority of a State’, the agency should consult the entity. The view of the State Government or the entity as to its status would be an influential but not decisive factor.

### ***Consultation with a State***

6.45 If arrangements have been entered into between the Commonwealth and a State under s 26A, agencies and ministers are required to consult the State in accordance with the arrangements, before deciding to release a document where the State or the Commonwealth may reasonably contend that the document is conditionally exempt and that disclosure of the document would be contrary to the public interest.

6.46 Part 3 provides further details on consultation with a State or an authority of a State or the Commonwealth, including advising the State, the State authority or the Commonwealth of the decision and the available review rights and the applicable timeframes. The State, or the Commonwealth may apply for internal review or IC review when it disagrees with the agency’s access grant decision (ss 54A, 54M).

6.47 Formal consultation under s 26A grants agencies an additional 30 days in which to provide an access decision (s 15(6)). The Information Commissioner recommends that consultation be undertaken at an early stage in processing a request, that is, when the agency is gathering the information that would show whether or not the documents were conditionally exempt under s 47B.

### ***Consultation comments to be considered when assessing conditional exemption***

6.48 The decision maker must take into account any concerns raised by the consulted State or State authority. The consulted authority does not, however, have the right to veto access and agencies should take care that the authority is not under such a misapprehension. All other relevant considerations should be taken into account to ensure a sound decision is made.

6.49 The information provided during the consultation process can assist the decision maker in assessing whether or not the document does contain material that concerns Commonwealth-State relations, and to assess what damage, if any, could occur from disclosure.

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<sup>36</sup> See *McGarvin and Australian Prudential Regulation Authority* [1998] AATA 585.

<sup>37</sup> See *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125, *Committee of Direction of Fruit Marketing v Delegate of the Australian Postal Commission* (1980) 144 CLR 577.

***Applying the public interest test***

6.50 The fact that disclosure would damage Commonwealth-State relations is not determinative of whether it would be contrary to the public interest to allow access, although it would be a relevant factor to consider. Other public interest factors may also be relevant (such as the desirability of allowing scrutiny of government activities).

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

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

6.52 Section 47C conditionally exempts documents containing deliberative matter. Deliberative matter is content that is in the nature of, or relating to either:

- an opinion, advice or recommendation that has been obtained, prepared or recorded, or
- a consultation or deliberation that has taken place, in the course of, or for the purposes of, a deliberative process of the government, an agency or minister (s 47C(1)).

6.53 Deliberative matter does not include operational information or purely factual material (s 47C(2)). ‘Operational information’ is defined in s 8A and is information that an agency must publish under the Information Publication Scheme (see Part 13 of these Guidelines).<sup>38</sup>

6.54 The conditional exemption does not apply to:

- (a) reports (including reports concerning the results of studies, surveys or tests) of scientific or technical experts, whether employed within an agency or not, including reports expressing the opinions of such experts on scientific or technical matters (see [6.75] below)
- (b) reports of a body or organisation, prescribed by the regulations, that is established within an agency (currently none are prescribed)
- (c) the record of, or a formal statement of the reasons for, a final decision given in the exercise of a power or of an adjudicative function (s 47C(3)).

6.55 The deliberative processes exemption differs from other conditional exemptions in that no type of harm is required to result from disclosure. The only consideration is whether the document includes content of a specific type, namely deliberative matter. If a document does not contain deliberative matter, it cannot be conditionally exempt under this provision, regardless of any harm that may result from disclosure.

6.56 While identifiable harm resulting from disclosure is not a specific factor in determining whether a document may be categorised as ‘deliberative’, it may be relevant subsequently when deciding where the balance of the public interest lies. If, in a particular case, a deliberative document may be released without appreciable harm resulting, this would tend to indicate that it would not be contrary to the public interest to disclose the document and therefore it must be released to the applicant.

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<sup>38</sup> Section 8A came into effect on 1 May 2011.

6.57 This conditional exemption has a potentially broad reach. The Information Commissioner expects, however, that agencies will claim this conditional exemption only in clearly applicable circumstances. Not every document generated or held by a policy area of an agency is ‘deliberative’ in the sense used in this provision, even if it appears to deal with the development or implementation of a policy. A decision maker should ensure that the content of a document strictly conforms with the criteria for identifying ‘deliberative matter’ prepared or recorded for the purposes of a ‘deliberative process’ before claiming this conditional exemption (see [6.52] above and [6.63] – [6.67] below).

### ***Deliberative process***

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

The action of deliberating, in common understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing upon one’s course of action. In short, the deliberative processes involved in the functions of an agency are its thinking processes – the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.<sup>39</sup>

6.59 ‘Deliberative process’ generally refers to the process of weighing up or evaluating competing arguments or considerations or to thinking processes – the process of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.<sup>40</sup>

6.60 The deliberative process must relate to the functions of an agency, minister or the government of the Commonwealth. The functions of an agency are usually found in the Administrative Arrangements Orders or the instrument or Act that established the agency. For the purposes of the FOI Act, the functions include both policy making and the processes undertaken in administering or implementing a policy. The functions also extend to the development of policies in respect of matters that arise in the course of administering a program. The non-policy decision making processes required when carrying out agency, ministerial or governmental functions, such as code of conduct investigations, may also be deliberative processes.<sup>41</sup>

6.61 A deliberative process may include the recording or exchange of:

- opinions
- advice
- recommendations
- a collection of facts or opinions, including the pattern of facts or opinions considered<sup>42</sup>
- interim decisions or deliberations.

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<sup>39</sup> See *Re JE Waterford and Department of Treasury (No 2)* [1984] AATA 67. See *British American Tobacco Australia Ltd and Australian Competition and Consumer Commission* [2012] AICmr 19, [15]–[22]. See also *Carver and Fair Work Ombudsman* [2011] AICmr 5 in relation to code of conduct investigations.

<sup>40</sup> *Dreyfus and Secretary Attorney-General’s Department (Freedom of information)* [2015] AATA 962 [18].

<sup>41</sup> See *Re Murtagh and Commissioner of Taxation* [1984] AATA 249, *Re Reith and Attorney-General’s Department* [1986] AATA 437, *Re Zacek and Australian Postal Corporation* [2002] AATA 473.

<sup>42</sup> See *Chapman and Chapman and Minister for Aboriginal and Torres Strait Islander Affairs* [1996] AATA 210.

6.62 An opinion or recommendation does not need to be prepared for the sole purpose of a deliberative process. However, it is not sufficient that an agency merely has a document in its possession that contains information referring to matters for which the agency has responsibility.<sup>43</sup>

### **Assessing deliberative matter**

6.63 ‘Deliberative matter’ is a shorthand term for ‘opinion, advice and recommendation’ and ‘consultation and deliberation’ that is recorded or reflected in a document.<sup>44</sup> There is no reason generally to limit the ordinary meanings given to the words ‘opinion, advice or recommendation, consultation or deliberation’.<sup>45</sup>

6.64 The agency must assess all the material to decide if it is deliberative matter that relates to, or is in the nature of, the deliberative processes of the agency or minister.<sup>46</sup>

6.65 The presence or absence of particular words or phrases is not a reliable indication of whether a document includes deliberative matter. The agency should assess the substance and content of the document before concluding it includes deliberative matter. Similarly, the format or class of the document, such as a ministerial brief or submission, or the document being a draft version of a later document does not automatically designate the content as deliberative matter.

6.66 Material that is not deliberative matter, where not already excluded as operational information, purely factual material or a scientific report, would include:

- content that is merely descriptive
- incidental administrative content<sup>47</sup>
- procedural or day to day content<sup>48</sup>
- the decision or conclusion reached at the end of the deliberative process<sup>49</sup>
- matter that was not obtained, prepared or recorded in the course of, or for the purposes of, a deliberative process.

6.67 Where material was gathered as a basis for intended deliberations, it may be deliberative matter.<sup>50</sup> However, if the material was obtained before there was a known requirement that the material would be considered during a deliberative process, that material would not be deliberative matter.<sup>51</sup>

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<sup>43</sup> *Secretary, Department of Prime Minister and Cabinet and Secretary, Department of Infrastructure and Regional Development and Sanderson (Party Joined)* [2015] AATA 361 [93].

<sup>44</sup> As discussed by Bennett J in *Dreyfus and Secretary Attorney-General’s Department (Freedom of information)* [2015] AATA 962 at [18].

<sup>45</sup> As explained by Forgie DP in *Wood; Secretary, Department of Prime Minister and Cabinet and (Freedom of information)* [2015] AATA 945 at [39].

<sup>46</sup> See *Secretary, Department of Employment, Workplace Relations v Small Business and Staff Development and Training Centre Pty Ltd* (2001) 114 FCR 301.

<sup>47</sup> See *Re VXF and Human Rights and Equal Opportunity Commission* [1989] AATA 107.

<sup>48</sup> See *Subramanian and Refugee Review Tribunal* [1997] AATA 31.

<sup>49</sup> See *Chapman and Chapman and Minister of Aboriginal and Torres Strait Islander Affairs* [1996] AATA 210; *British American Tobacco Australia Ltd and Australian Competition and Consumer Commission* [2012] AICmr 19; *Briggs and the Department of the Treasury (No. 3)* [2012] AICmr 22.

<sup>50</sup> See *Secretary, Department of Employment, Workplace Relations and Small Business v Staff Development and Training Centre Pty Ltd* (2001) 114 FCR 301.

<sup>51</sup> See *Re Susic and Australian Institute of Marine Science* No Q89/580 AAT [6189], *Re Booker and Department*

### **Consultation**

6.68 A consultation undertaken for the purposes of, or in the course of, a deliberative process includes any discussion between the agency, minister or government and another person in relation to the decision that is the object of the deliberative process.<sup>52</sup>

6.69 The agency should create the consultation document with the intention of initiating a two way exchange between at least two parties.<sup>53</sup> If the other person does not respond or participate, the consultation document may still be deliberative matter.

### **Purely factual material**

6.70 The exclusion of purely factual material under s 47C(2)(b) is intended to allow disclosure of material used in the deliberative process.

6.71 A conclusion involving opinion or judgement is not purely factual material. Similarly, an assertion that something is a fact may be an opinion rather than purely factual material.

6.72 Conversely, when a statement is made of an ultimate fact, involving a conclusion based on primary facts which are unstated, such a statement may be a statement of purely factual material.<sup>54</sup>

6.73 'Purely factual material' does not extend to factual material that is an integral part of the deliberative content and purpose of a document, or is embedded in or intertwined with the deliberative content such that it is impractical to excise it.<sup>55</sup>

6.74 Where a decision maker finds it difficult to separate the purely factual material from the deliberative matter, both the elements may be exempt.<sup>56</sup> If the two elements can be separated, the decision maker should consider giving the applicant a copy with deletions under s 22 to provide access to the purely factual material.<sup>57</sup>

### **Reports on scientific or technical matters**

6.75 As noted in [6.54] above, the s 47C conditional exemption does not apply to reports (including reports concerning the results of studies, surveys or tests) of scientific or technical experts, including reports expressing experts' opinions on scientific or technical matters (s 47C(3)(a)).

6.76 The sciences include the natural sciences of physics, chemistry, astronomy, biology (such as botany, zoology and medicine<sup>58</sup>) and the earth sciences (which include geology, geophysics, hydrology, meteorology, physical geography, oceanography, and soil science). Technical matters involve the application of science, and include engineering.<sup>59</sup>

6.77 The social sciences, or the study of an aspect of human society, are not scientific for

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*of Social Security* No Q89/193 AAT NO 6189.

<sup>52</sup> *McGarvin and Australian Prudential Regulation Authority* [1998] AATA 585.

<sup>53</sup> *Re Booker and Department of Social Security* [1990] AATA 218.

<sup>54</sup> *Re Waterford and the Treasurer of the Commonwealth of Australia* [1984] AATA 518 [15], citing *Harris v ABC* [1984] FCA 8; (1984) 51 ALR 581 at p.586.

<sup>55</sup> *Dreyfus and Secretary Attorney-General's Department (Freedom of information)* [2015] AATA 962 [18].

<sup>56</sup> See *Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60; and; *Chapman and Chapman and Minister of Aboriginal and Torres Strait Islander Affairs* [1996] AATA 210.

<sup>57</sup> See *Re Harris v Australian Broadcasting Corporation* (1983) 78 FLR 236.

<sup>58</sup> See *Re Wertheim and Department of Health* [1984] AATA 537.

<sup>59</sup> See *Re Harris v Australian Broadcasting Corporation and Keith Cameron Mackriell* (1983) 78 FLR 236 per Beaumont J.



the purposes of this exception (for example, anthropology, archaeology, economics,<sup>60</sup> geography, history, linguistics, political science, sociology and psychology).

### **Applying the public interest test**

6.78 There is considerable case law on the former exemption provision (formerly s 36). Agencies should be cautious in applying those precedents in light of the changes to the FOI Act in 2009 and 2010. Many of those earlier decisions applied or referred to the AAT's decision in *Re Howard and the Treasurer*,<sup>61</sup> which listed five factors that could support a claim that disclosure would be contrary to the public interest. Three of those factors are now declared to be irrelevant considerations by s 11B(4) of the Act (the high seniority of the author of the document in the agency to which the request for access to the document was made, misinterpretation or misunderstanding of a document, and confusion or unnecessary debate following disclosure). It is important that agencies now have regard to the more extensive range of public interest factors that may favour or be against disclosure (see [6.17] – [6.22] above).

### **Inhibition of frankness and candour**

6.79 Previously, a common factor considered to weigh against disclosure of internal working documents was that disclosure would inhibit frank and candid advice from public servants in the future. Frankness and candour claims were given weight by decisions such as *Re Howard and the Treasurer* (discussed above at [6.78]) However, a finding that disclosure of deliberative material would pose a risk to the frankness and candour has been significantly affected by the 2010 reforms to the FOI Act, as demonstrated by a number of post reform AAT and Information Commissioner decisions.<sup>62</sup>

6.80 The AAT has said that there is an 'essential balance that must be struck between making information held by government available to the public so that there can be increased public participation leading to better informed decision-making and increased scrutiny and review of the government's activities and ensuring that government may function effectively and efficiently'.<sup>63</sup>

6.81 In *Rovere and Secretary, Department of Education and Training* [2015] AATA 462,<sup>64</sup> the AAT said that in relation to pre-decisional communications, a frankness and candour claim cannot be a public interest factor against access.<sup>65</sup> The Information Commissioner reads *Rovere* as authority that a confidentiality or candour claim carries no weight by itself but must be related to some particular practice, process, policy or program in government.<sup>66</sup>

6.82 The Information Commissioner considers that frankness and candour in relation to the

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<sup>60</sup> See *Re Waterford and the Treasurer of the Commonwealth of Australia* [1985] AATA 114.

<sup>61</sup> *Re Howard and the Treasurer* [1985] AATA 100.

<sup>62</sup> In particular, *Rovere and Secretary, Department of Education and Training* [2015] AATA 462, 'GI' and *Department of the Prime Minister and Cabinet* [2015] AICmr 51, *Wood; Secretary, Department of Prime Minister and Cabinet and (Freedom of Information)* [2015] AATA 945 and *Dreyfus and Secretary Attorney-General's Department (Freedom of information)* [2015] AATA 962.

<sup>63</sup> As per Forgie DP in *Wood; Secretary, Department of Prime Minister and Cabinet and (Freedom of Information)* [69].

<sup>64</sup> Note - currently on appeal to the Federal Court (as at 8 April 2016).

<sup>65</sup> As per Popple SM in *Rovere and Secretary, Department of Education and Training* [2015] AATA 462 at [42] and [48]-[53]. In *Dreyfus and Secretary Attorney-General's Department (Freedom of information)* [2015] AATA 962 at [100] Bennett J appears to give her approval to the position taken by Popple SM in *Rovere*.

<sup>66</sup> 'GI' and *Department of the Prime Minister and Cabinet* [2015] AICmr 51 [20].

s 47C conditional exemption may have some application as one public interest factor against disclosure in combination with other factors, and possibly as the sole factor where the public interest is clearly, heavily weighted against disclosure of a document of a minister, or a document that would affect the effective and efficient functioning of government.

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

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

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

#### ***Interaction with Cabinet documents exemption***

6.86 In some cases, a document may contain deliberative matter that relates to Cabinet in some way but is not exempt under the Cabinet exemption in s 34. An example would be a document containing deliberative matter that is marked 'Cabinet-in-Confidence' but nonetheless does not satisfy any of the exemption criteria in s 34.<sup>67</sup> Disclosing a document of this kind would not necessarily be contrary to the public interest only because of the connection to Cabinet deliberations. For example, disclosure is less likely to be contrary to the public interest if:

- the document contains deliberative but otherwise non-sensitive matter about a policy development process that has been finalised, and
- the Government has announced its decision on the issue.<sup>68</sup>

6.87 Even if Government has not announced a decision on the issue, disclosure of such a document is less likely to be contrary to the public interest if it is public knowledge that the Government considered or is considering the issue.<sup>69</sup> The key public interest consideration in both situations is to assess whether disclosure would inhibit the Government's future deliberation of the issue.

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

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<sup>67</sup> See *Combined Pensioners and Superannuants Association of NSW Inc and Deputy Prime Minister and Treasurer* [2013] AICmr 70 [17].

<sup>68</sup> *Combined Pensioners and Superannuants Association of NSW Inc and Deputy Prime Minister and Treasurer* [2013] AICmr 70 [13]–[21]; *Australian Private Hospitals Association and Department of the Treasury* [2014] AICmr 4 [38]–[45].

<sup>69</sup> *Philip Morris Ltd and Department of Finance* [2014] AICmr 27 [49]–[52]; *Sanderson and Department of Infrastructure and Regional Development* [2014] AICmr 66 [29]–[37].

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

6.89 Section 47D conditionally exempts documents where disclosure would have a substantial adverse effect on the financial or property interests of the Commonwealth or an agency.<sup>70</sup>

### *Financial or property interests*

6.90 The financial or property interests of the Commonwealth or an agency may relate to assets, expenditure or revenue-generating activities. An agency's property interests may be broader than merely buildings and land, and include intellectual property or the Crown's interest in natural resources.<sup>71</sup>

### *Substantial adverse effect*

6.91 For the conditional exemption to apply, the potential effect that would be expected to occur following disclosure must be both substantial<sup>72</sup> and adverse. This standard is discussed further in Part 5.

6.92 A substantial adverse effect may be indirect. For example, where disclosure of documents would provide the criteria by which an agency is to assess tenders, the agency's financial interest in seeking to obtain best value for money through a competitive tendering process may be compromised.<sup>73</sup>

6.93 An agency or government cannot merely assert that its financial or property interests would be adversely affected following disclosure.

6.94 The particulars of the predicted effect should be identified during the decision making process and should be supported by evidence. Where the conditional exemption is relied upon, the relevant particulars and reasons should form part of the decision maker's statement of reasons, if they can be included without disclosing exempt material (s 26, see Part 3). The effect must bear on the actual financial or property interests of the Commonwealth or agency.<sup>74</sup>

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

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

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

- (a) prejudice the effectiveness of procedures or methods for the conduct of tests, examinations or audits by an agency

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<sup>70</sup> For an example of the application of this exemption see *Briggs and the Department of the Treasury (No. 3)* [2012] AICmr 22.

<sup>71</sup> See *Re Connolly and Department of Finance* [1994] AATA 167, in which the Commonwealth property was the uranium stockpile.

<sup>72</sup> See *Harris v Australian Broadcasting Corporation* (1983) 78 FLR 236.

<sup>73</sup> See *Secretary, Department of Employment, Workplace Relations and Small Business v Staff Development & Training Centre Pty Ltd* (2001) 114 FCR 301.

<sup>74</sup> See *Re Hart and Deputy Commissioner of Taxation* [2002] AATA 1190.

- (b) prejudice the attainment of the objects of particular tests, examinations or audits conducted or to be conducted by an agency
- (c) have a substantial adverse effect on the management or assessment of personnel by the Commonwealth or an agency or
- (d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency (s 47E).

6.97 Where an agency is considering documents relating to its industrial relations activities, conditional exemptions such as s 47E(c) (management of personnel), s 47E(d) (effective operations of the agency) or s 47F (personal privacy) may be relevant.

6.98 Various terms used in this conditional exemption are discussed below.

### ***Prejudice***

6.99 Sections 47E(a) and (b) require a decision maker to assess whether the conduct or objects of tests, examinations or audits would be prejudiced in a particular instance. The term 'prejudice' is explained in Part 5.

6.100 In the context of this exemption, a prejudicial effect could be regarded as one which would cause a bias or change to the expected results leading to detrimental or disadvantageous outcomes. The expected change does not need to have an impact that is 'substantial and adverse', which is a stricter test.<sup>75</sup>

### ***Reasonably be expected***

6.101 For the grounds in ss 47E(a)–(d) to apply, the predicted effect needs to be reasonably expected to occur. The term 'could reasonably be expected' is explained in greater detail in Part 5. There must be more than merely an assumption or allegation that damage may occur if the document were to be released.

6.102 Where the documents relate more closely to investigations relating to compliance with a taxation law or the enforcement or proper administration of the law, due to the involvement of a police service or the Director of Public Prosecutions, or by the agency's internal investigators, the agency may need to consider the law enforcement exemption under s 37 (see Part 5).

### ***Reasons behind predicted effect***

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

### ***Prejudice the effectiveness of testing, examining or auditing methods***

6.104 Where the document relates to a procedure or method for the conduct of tests, examinations or audits by an agency, the decision maker must address both elements of the conditional exemption in s 47E(a), namely that:

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<sup>75</sup> See *Re James and Ors and Australian National University* (1984) 6 ALD 687.

- an effect would reasonably be expected following disclosure
- the expected effect would be, overall, prejudicial to the effectiveness of the procedure or method of the audit, test or examination being conducted.

6.105 The decision maker will need to consider the content and context of the document to be able to identify the purpose, methodology or intended objective of the examination, test or audit. This operational information provides the necessary context in which to assess the document against the conditional exemption and should be included in the statement of reasons (s 26).

6.106 The decision maker should explain how the expected effect would prejudice the effectiveness of the agency's testing methods. A detailed description of the predicted effect would enable a comprehensive comparison of the predicted effect against the usual effectiveness of existing testing methods. The comparison would indicate whether or not the effect would be prejudicial.

6.107 Examples of testing methods considered by the AAT include:

- safety audits and testing regimes<sup>76</sup>
- licensing board examinations
- risk assessment matrices<sup>77</sup>
- compliance audit indicators and any comparative weighting of the indicators
- accident investigation techniques<sup>78</sup>
- tests or examinations leading to qualifications<sup>79</sup>
- potential fraud case assessment and analysis tools.<sup>80</sup>

6.108 Circumstances considered by the AAT where disclosure of the testing method may prejudice the method include:

- providing forewarning of the usual manner of audits
- permitting analysis of responses to tests or examinations or information gathered during an audit
- facilitating cheating, fraudulent or deceptive conduct by those being tested or audited<sup>81</sup>
- permitting pre-prepared responses which would compromise the integrity of the testing process.<sup>82</sup>

### ***Prejudice the attainment of testing, examination and/or auditing objectives***

6.109 Where the document relates to the integrity of the attainment of the objectives of the tests, examinations or audits by an agency, the decision maker must address both elements of the conditional exemption in s 47E(b), that is, that:

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<sup>76</sup> See *Vasta and McKinnon and Civil Aviation Safety Authority* [2010] AATA 499.

<sup>77</sup> See *Lobo and Secretary, Department of Education, Science and Training* [2007] AATA 1891.

<sup>78</sup> See *Vasta and McKinnon and Civil Aviation Safety Authority* [2010] AATA 499.

<sup>79</sup> See *Re James and Ors and Australian National University* (1984) ALD 687.

<sup>80</sup> See *Splann and Centrelink* [2009] AATA 320.

<sup>81</sup> See *Ascic and Australian Federal Police* [1986] AATA 108.

<sup>82</sup> See *Re Crawley and Centrelink* [2006] AATA 572.

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

6.110 The agency would be undertaking the testing or examination to meet particular requirements, and have a particular need for the results (the test objectives). The underlying operational requirements for the test objectives is the context for assessing the document against the conditional exemption and should be included in the statement of reasons (s 26) if the exemption is relied upon.

6.111 Some examples of test objectives include:

- ensuring only properly qualified people are flying aircraft
- ensuring the selection of the most competent and best candidates for promotion<sup>83</sup>
- ensuring that an agency's expenditure is being lawfully spent through proper acquittal.

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

- allow for plagiarism or circulation of questions or examination papers that would lead to a breach of the integrity of the examination system<sup>84</sup>
- allow for examiners to be inhibited in future marking by the threat of challenge to their marking<sup>85</sup>
- allow scrutiny of past test results or questions for the pre-preparation of expected/acceptable responses, rather than honest or true responses, for example in psychometric testing to ascertain an applicant's eligibility for a certain pension<sup>86</sup> or patent examiner examinations.<sup>87</sup>

### ***Substantial adverse effect on management or assessment of personnel***

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

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

6.114 For this exemption to apply, the documents must relate to either:

- the management of personnel – including the broader human resources policies and activities, recruitment,<sup>88</sup> promotion, compensation, discipline, harassment and occupational health and safety
- the assessment of personnel – including the broader performance management policies and activities concerning competency, in-house training requirements,

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<sup>83</sup> See *Ascic and Australian Federal Police* [1986] AATA 108.

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

<sup>85</sup> See *Ascic and Australian Federal Police* [1986] AATA 108.

<sup>86</sup> See *Re Crawley and Centrelink* [2006] AATA 572.

<sup>87</sup> See *Re Watermark and Australian Industrial Property Organisation* (1995) 70 FOIR 61.

<sup>88</sup> See *Re Dyrenfurth and Department of Social Security* [1987] AATA 140.

appraisals and underperformance, counselling, feedback, assessment for bonus or eligibility for progression.

6.115 The terms ‘would reasonably be expected’ and ‘substantial adverse’ have the same meanings as explained in Part 5. If the predicted effect would be substantial but not adverse or maybe even beneficial, the conditional exemption does not apply.<sup>89</sup> It would be unlikely for the potential embarrassment of an employee to be considered to be an effect on an agency.<sup>90</sup>

6.116 The predicted effect must arise from the disclosure of the documents that are being assessed.<sup>91</sup> The decision maker may also need to consider the context of the document and the integrity of a system that may require those documents, such as witness statements that are required to investigate a workplace complaint,<sup>92</sup> or referee reports to assess job applicants.<sup>93</sup>

6.117 The AAT has accepted that candour is essential when an agency seeks to investigate staff complaints, especially those of bullying.<sup>94</sup> In such cases staff may be reluctant to provide information and cooperate with investigators if they were aware that the subject matter of those discussions would be disclosed through the FOI process.

6.118 Release of information relating to staff training and development, such as confidential feedback, where public release could undermine confidence and inhibit candour in performance review processes, may also be exempt under this provision.<sup>95</sup>

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

### ***Substantial adverse effect on an agency’s proper and efficient conduct of operations***

6.120 An agency’s operations may not be substantially adversely affected if the disclosure would, or could reasonably be expected to lead to a change in the agency’s processes that would enable those processes to be more efficient.<sup>96</sup>

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

- disclosure of the Australian Electoral Commission policies in relation to the accepted reasons for a person’s failure to vote in a Federal election would result in substantial

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<sup>89</sup> Substantial and adverse effect is also discussed at [6.120] below.

<sup>90</sup> See *Wilson and Australian Postal Corporation* [1994] AATA 189.

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

<sup>92</sup> See *Harris v Australian Broadcasting Corporation* (1983) 78 FLR 236 and *Re Marr and Telstra Corporation Limited* [1993] AATA 328.

<sup>93</sup> See *Department of Social Security v Dyrenfurth* (1988) 8 AAR 544.

<sup>94</sup> *De Tarle and Australian Securities and Investments Commission (Freedom of Information)* [2016] AATA 230 [42].

<sup>95</sup> See, for example, *Paul Cleary and Special Broadcasting Service* [2016] AICmr 2 [25]-[27] where the Information Commissioner upheld the exemption where feedback provided to cadet journalists was found to be given in the expectation that the feedback will be treated confidentially and public release would undermine confidence in the system of providing cadet feedback.

<sup>96</sup> For example, in *Re Scholes and Australian Federal Police* [1996] AATA 347, the AAT found that the disclosure of particular documents could enhance the efficiency of the Australian Federal Police as it could lead to an improvement of its investigation process.

changes to their procedures to avoid jeopardising the effectiveness of methods and procedures used by investigators<sup>97</sup>

- disclosure of information provided by industry participants could prejudice the Australian Competition and Consumer Commission's ability to investigate anti-competitive behaviour and its ability to perform its statutory functions<sup>98</sup>
- disclosure of the Universal Resource Locators (URLs) and Internet Protocols (IPs) of internet content that is either prohibited or potentially prohibited content under Schedule 5 to the *Broadcasting Services Act 1992* could reasonably be expected to affect the Australian Broadcasting Authority's ability to administer a statutory regulatory scheme for internet content to be displayed.<sup>99</sup>

6.122 The exemption may also apply to documents that relate to a complaint made to an investigative body. The disclosure of this type of information could reasonably affect the willingness of people to make complaints to the investigative body, which would have a substantial adverse effect on the proper and efficient conduct of the investigative body's operations.<sup>100</sup>

6.123 The predicted effect must bear on the agency's 'proper and efficient' operations, that is, the agency is undertaking its expected activities in an expected manner. Where disclosure of the documents reveals unlawful activities or inefficiencies, this element of the conditional exemption will not be met and the conditional exemption will not apply.

### **Documents affecting personal privacy (s 47F)**

6.124 Section 47F conditionally exempts documents where disclosure would involve the unreasonable disclosure of personal information of any person (including a deceased person). This exemption is intended to protect the personal privacy of individuals.

6.125 This exemption does not apply if the personal information is only about the applicant (s 47F(3)). Where the information is joint personal information, however, the exemption may apply. For more information about joint personal information see [6.149] below.

6.126 In some cases, providing indirect access to certain personal information via a qualified person may be appropriate (s 47F(5) – see [6.174] below).

### **Personal information**

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

6.128 Personal information means information or an opinion about an identified individual,

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<sup>97</sup> *Re Murphy and Australian Electoral Commission* [1994] AATA 149.

<sup>98</sup> *Re Telstra Australia Limited and Australian Competition and Consumer Commission* [2000] AATA 71.

<sup>99</sup> *Re Electronic Frontiers Australia and the Australian Broadcasting Authority* [2002] AATA 449.

<sup>100</sup> For examples of the application of the exemption to complaints processes see *Australian Broadcasting Corporation and Commonwealth Ombudsman* [2012] AICmr 11; *British American Tobacco Australia Ltd and Australian Competition and Consumer Commission* [2012] AICmr 19.



or an individual who is reasonably identifiable:

- (a) whether the information or opinion is true or not; and
- (b) whether the information or opinion is recorded in a material form or not.<sup>101</sup>

6.129 In other words, personal information:

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

6.130 Personal information can include a person's name, address, telephone number,<sup>102</sup> date of birth, medical records, bank account details, taxation information<sup>103</sup> and signature.<sup>104</sup>

### **A person who is reasonably identifiable**

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

6.132 Where it may be possible to identify an individual using available resources, the practicability, including the time and cost involved, will be relevant to deciding whether an individual is 'reasonably identifiable'.<sup>105</sup> An agency or minister should not, however, seek information from the applicant about what other information they have or could obtain.

6.133 Where it may be technically possible to identify an individual from information, if doing so is so impractical that there is almost no likelihood of it occurring, the information is not personal information.<sup>106</sup> In *Jonathan Laird and Department of Defence* [2014] AICmr 144, the Privacy Commissioner was not satisfied that DNA analysis of human remains could reasonably identify the World War II HMAS Sydney II crewmember. In finding that the DNA sequencing information held by the Department was not personal information, the Commissioner discussed that identifying the remains by utilising DNA sequencing would be 'impractical for a reasonable member of the public'.<sup>107</sup>

6.134 Similarly, in a series of recent IC review cases,<sup>108</sup> the Information Commissioner had to decide whether or not aggregate information relating to the nationality, language and religion of refugees resettled under Australia's offshore processing arrangements is the personal

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<sup>101</sup> See s 4 of the *Freedom of Information Act 1982* and s 6 of the *Privacy Act 1988*.

<sup>102</sup> See *Re Green and Australian and Overseas Telecommunications Corporation* [1992] AATA 252.

<sup>103</sup> See *Re Murtagh and Commissioner of Taxation* [1984] AATA 249 and *Re Jones and Commissioner of Taxation* [2008] AATA 834.

<sup>104</sup> See *Re Corkin and Department of Immigration & Ethnic Affairs* [1984] AATA 448.

<sup>105</sup> Explanatory Memorandum to the Privacy Amendment (Enhancing Privacy Protection) Bill 2012, p 61.

<sup>106</sup> Australian Privacy Principles guidelines at [B.93].

<sup>107</sup> *Jonathan Laird and Department of Defence* [2014] AICmr 144 [17].

<sup>108</sup> *Alex Cuthbertson and Department of Immigration and Border Protection* [2016] AICmr 18; *Alex Cuthbertson and Department of Immigration and Border Protection* [2016] AICmr 19; and *Alex Cuthbertson and Department of Immigration and Border Protection* [2016] AICmr 20.

information of the relevant individuals. In each case, the Commissioner found that the individuals were not reasonably identifiable from the aggregated information.

6.135 Therefore, whether or not the individual is reasonably identifiable depends on the practicability of linking pieces of information to identify the individual.

### **Says something about a person**

6.136 The information needs to convey or say something about a person, rather than just identify them. The mere mention of a person's name or signature may, however, reveal personal information about them depending on the context.<sup>109</sup> For example, a person's name may appear in a list of benefit recipients, and given that context, the information would be personal information. Conversely, where information does not say anything about that person the information would not be personal information.<sup>110</sup>

### **Natural person**

6.137 An individual is a natural person and does not include a corporation, trust, body politic or incorporated association.<sup>111</sup> Section 47F(1) specifically extends to the personal information of deceased persons.

### **Unreasonable disclosure**

6.138 The personal privacy exemption is designed to prevent the unreasonable invasion of third parties' privacy.<sup>112</sup> The test of 'unreasonableness' implies a need to balance the public interest in disclosure of government-held information and the private interest in the privacy of individuals. The test does not, however, amount to the public interest test of s 11A(5), which follows later in the decision making process. It is possible that the decision maker may need to consider one or more factors twice, once to determine if a projected effect is unreasonable and again when assessing the public interest balance.

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

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

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<sup>109</sup> See *Re Veale and Town of Bassendean* [1994] WAICmr 4.

<sup>110</sup> In *Penny Wong and Department of the Prime Minister and Cabinet* [2016] AICmr 27 [18], the Information Commissioner discussed that there was nothing before him that indicated that the former Prime Minister had any involvement with the purchases of alcohol for prime ministerial functions. Therefore, purchase invoices did not contain the personal information of the former Prime Minister. However, if it had been shown that the purchases had been made to accord with the Prime Minister's personal preferences, the Information Commissioner accepted that the alcohol brands could be the personal information of the former Prime Minister.

<sup>111</sup> See s 22 of the *Acts Interpretation Act 1901*.

<sup>112</sup> See *Re Chandra and Minister for Immigration and Ethnic Affairs* [1984] AATA 437; *Parnell and Department of the Prime Minister and Cabinet* [2012] AICmr 31; *'R' and Department of Immigration and Citizenship* [2012] AICmr 32.

privacy of a third party ...<sup>113</sup>

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

- (a) the extent to which the information is well known
- (b) whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document
- (c) the availability of the information from publicly accessible sources<sup>114</sup>
- (d) any other matters that the agency or minister considers relevant (s 47F(2)).<sup>115</sup>

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

6.142 Key factors for determining whether disclosure is unreasonable include:

- (a) the author of the document is identifiable<sup>116</sup>
- (b) the documents contain third party personal information
- (c) release of the documents would cause stress on the third party
- (d) no public purpose would be achieved through release.<sup>117</sup>

6.143 As discussed in the leading s 47F IC review decision of *'FG' and National Archives of Australia* [2015] AICmr 26, other factors considered to be relevant include:

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

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<sup>113</sup> See *Re Chandra and Minister for Immigration and Ethnic Affairs* [1984] AATA 437 at 259.

<sup>114</sup> See *Re Jones and Commissioner of Taxation* [2008] AATA 834; *'Q' and Department of Human Services* [2012] AICmr 30.

<sup>115</sup> For example, where a 'care leaver' requests access to third party personal information, decision makers should note that it is government policy that a care leaver have such access. A 'care leaver' is a child in Australia in the 20<sup>th</sup> century who was brought up 'in care' as a state ward, foster child, or in an orphanage. See the government response to recommendation 12 of the report of the Senate Community Affairs References Committee (2009) *Lost innocents and Forgotten Australians revisited report on the progress with the implementation of the recommendations of the Lost Innocents and Forgotten Australians reports*, Commonwealth of Australia, Canberra.

<sup>116</sup> Note: s 11B(4)(c) provides that when the public interest test is considered, the fact that the author of the document was (or is) of high seniority in the agency is not to be taken into account (see these Guidelines at [6.24]).

<sup>117</sup> *Re McCallin and Department of Immigration* [2008] AATA 477.

government transparency and integrity.<sup>118</sup>

6.144 For example, in *Colakovski v Australian Telecommunications Corp*, Heerey J considered that ‘... if the information disclosure were of no demonstrable relevance to the affairs of government and was likely to do no more than excite or satisfy the curiosity of people about the person whose personal affairs were disclosed ... disclosure would be unreasonable’.<sup>119</sup> This illustrates how the object of the FOI Act of promoting transparency in government processes and activities needs to be balanced with the purpose of s 47F to protect personal privacy, although care is needed to ensure that an FOI applicant is not expected to explain their reason for access contrary to s 11(2).<sup>120</sup>

6.145 Disclosure that supports effective oversight of government expenditure may not be unreasonable, particularly if the person to whom the personal information relates may have reasonably expected that the information would be open to public scrutiny in future.<sup>121</sup> On the other hand, disclosure may be unreasonable if the person provided the information to Government on the understanding that it would not be made publicly available, and there are no other statutory disclosure frameworks that would require release of the information.<sup>122</sup>

6.146 Whether the motives and identity of the applicant are relevant when considering unreasonableness is not settled.<sup>123</sup> The FOI Act provides that a person’s right of access is not affected by any reasons they give for seeking access, or what beliefs the agency or minister has about the person’s reasons for seeking access (s 11(2)). This leads to the position that an objective test of balancing public interests should be taken.

6.147 Deciding whether disclosure of personal information would be unreasonable should not be uniformly approached on the basis that the disclosure be to the ‘world at large’.<sup>124</sup> Examples of situations in which applicants assert an interest in obtaining access that would not be available generally to any member of the public include:

- an applicant who is seeking access to correspondence they have sent to an agency that contains personal information of other people – that is, personal information in fact provided by the applicant to the agency
- an applicant who is seeking access to medical records of a deceased parent to learn if the parent had a particular genetic disorder that may have been transmitted to the applicant
- an applicant who is seeking access to their own personal information, which is intertwined with the personal information of other people who may be known to the applicant (such as family members, or co-signees of a letter or application)
- a professional who is seeking access to records that include client information, and who gives a professional undertaking not to disclose the information to others (for example, a doctor who seeks patient consultation records in connection with a Medicare audit, or a lawyer who seeks case records of a client to whom legal advice is

<sup>118</sup> See ‘FG’ and *National Archives of Australia* [2015] AICmr 26 [47]-[48].

<sup>119</sup> *Colakovski v Australian Telecommunications Corporation* (1991) 29 FCR 429.

<sup>120</sup> ‘BA’ and *Merit Protection Commissioner* [2014] AICmr 9 [64], citing M Paterson, *Freedom of Information and Privacy in Australia* (LexisNexis Butterworths, 2005) 241.

<sup>121</sup> ‘AK’ and *Department of Finance and Deregulation* [2013] AICmr 64 (2013) [18]-[24].

<sup>122</sup> ‘Z’ and *Australian Securities and Investments Commission* [2013] AICmr 43 [11].

<sup>123</sup> See *Re Carter and Department of Health (ACT)* [1995] AAT 101, *Re Williams and Registrar of Federal Court of Australia* [1985] AATA 226.

<sup>124</sup> See ‘FG’ and *National Archives of Australia* [2015] AICmr 26 [19]-[44].

being provided)

- a ‘care leaver’ (meaning a child who was brought up in care as a state ward, foster child or in an orphanage) who is seeking access to third party personal information.<sup>125</sup>

6.148 It would be problematic in each of those instances for an agency to grant access under the FOI Act if it proceeded from the premise that ‘if one person can be granted access to a particular document under the FOI Act, any other person who cares to request it and to pay the relevant fees, can be granted access to it’.<sup>126</sup> It is the Information Commissioner’s view that in instances such as these, an agency can make a practical and risk-based assessment of whether to provide access to a particular applicant.

### ***Joint personal information***

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

6.150 Intertwined personal information should be separated where possible, without diminishing or impairing the quality or completeness of the applicant’s personal information.<sup>127</sup> Where it is not possible to separate an applicant’s personal information from a third party’s personal information, the exemption may be claimed if it is unreasonable to release the information.

6.151 Whether it is unreasonable to release the information may depend on the relationship between the individuals. Decisions about the release of joint personal information should be made after consultation with the third party where such consultation is reasonably practical. For more information about consultation see [6.161] below.

### ***Information about agency employees included in documents because of their usual duties or responsibilities***

6.152 Documents held by agencies or ministers often include personal information about public servants. For example, a document may include a public servant’s name, work email address, position or title, contact details, decisions or opinions.

6.153 Where public servants’ personal information is included in a document because of their usual duties or responsibilities, it would not be unreasonable to disclose unless special circumstances existed. This is because the information would reveal only that the public servant was performing their public duties.<sup>128</sup> Such information may often also be publicly available, such as on an agency website.

6.154 When considering whether it would be unreasonable to disclose the names of public servants, there is no basis under the FOI Act for agencies to start from the position that the classification level of a departmental officer determines whether his or her name would be

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<sup>125</sup> ‘FG’ and National Archives of Australia [2015] AICmr 26 [38].

<sup>126</sup> *Re Callejo and Department of Immigration and Citizenship* [2010] AATA 244 at [101] per Forgie DP.

<sup>127</sup> *Re Anderson and Australian Federal Police* [1986] AATA 79 and *Re McKinnon and Department of Immigration and Ethnic Affairs* [1995] AATA 364.

<sup>128</sup> See *Commissioner of Police v District Court of NSW* (1993) 31 NSWLR 606.

unreasonable to disclose. In seeking to claim the exemption an agency needs to identify the special circumstances which exist rather than start from the assumption that such information is exempt.<sup>129</sup>

6.155 In *Maurice Blackburn Lawyers and Department of Immigration and Border Protection* [2015] AICmr 85, where the agency raised the concern that disclosure would affect the personal safety of its officers, the Information Commissioner said that there is no apparent logical basis for distinguishing between the disclosure of SES officers and other officers' names, particularly where the purported concern is that disclosure could affect personal safety.<sup>130</sup>

6.156 A document may, however be exempt for another reason, for example, where disclosure would, or could reasonably be expected to, endanger the life or physical safety of any person (s 37(1)(c)). In addition, where an individual has a propensity to pursue matters obsessively and there is no need for them to contact a particular public servant in the future, disclosure of the public servant's name may be unreasonable.<sup>131</sup>

6.157 There needs to be careful consideration of the exemption where the personal information does not relate to the public servant's usual duties and responsibilities. For example, if a document included information about an individual's disposition or private characteristics, disclosure is likely to be unreasonable.<sup>132</sup> This would generally include the reasons a public servant has applied for personal leave, information about their performance management or whether they were unsuccessful during a recruitment process.

#### ***Information about agency employees included in APS vocational assessment documents***

6.158 During recruitment processes, an agency may receive an FOI request from an unsuccessful candidate for information about the person awarded the position or the other applicants.

6.159 The decision in *'BA' and Merit Protection Commissioner*<sup>133</sup> offers some guiding principles for assessing an FOI request for vocational assessment information. However, an agency must consider each request on its merits. A separate decision is required in each case as to whether disclosure of personal information about candidates from an APS recruitment process would be unreasonable.<sup>134</sup>

6.160 Regulation 9.2(6) of the *Public Service Regulations 1999* allows the Public Service Commissioner, in consultation with the Information Commissioner, to release guidelines about the use and disclosure of personal information. Agency compliance with any such guidelines will be a relevant consideration in deciding under s 47F whether disclosure of personal information relating to a public official would be unreasonable and contrary to the public interest.

#### ***Consultation***

6.161 Where a document includes personal information relating to a person who is not the

<sup>129</sup> *Maurice Blackburn Lawyers and Department of Immigration and Border Protection* [2015] AICmr 85 [3].

<sup>130</sup> *Maurice Blackburn Lawyers and Department of Immigration and Border Protection* [2015] AICmr 85 [24].

<sup>131</sup> *Re Bartucciotto and Commonwealth Ombudsman* [2005] AATA 1109.

<sup>132</sup> *Re Toomer & Department of Primary Industries and Energy* [1990] AATA 85 and *Re Dyki & Federal Commissioner of Taxation* (1990) 12 AAR 554.

<sup>133</sup> *'BA' and Merit Protection Commissioner* [2014] AICmr 9.

<sup>134</sup> *'BA' and Merit Protection Commissioner* [2014] AICmr 9 [66].

applicant, an agency or minister should give that individual (the third party) a reasonable opportunity to make a submission that the document should be exempt from disclosure before making a decision to give access (s 27A). If the third party is deceased, their legal representative should be given this opportunity.

6.162 Such consultation should occur where:

- (a) it is reasonably practicable. This will depend on all the circumstances including the time limits for processing the request (s 27A(4)). For example, it may not be reasonably practicable if the agency cannot locate the third party in a timely and effective way.
- (b) it appears to the agency or minister that the third party might reasonably wish to make a submission that the document should be exempt from disclosure having regard to:
  - the extent to which the information is well known
  - whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the information
  - whether the information is publicly available, and
  - any other relevant matters (s 27A(2)).

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

6.164 As discussed at [6.153] above, public servants' personal information included in a document because of their usual duties or responsibilities is usually not unreasonable to disclose. Therefore, the Information Commissioner suggests that before engaging in consultation with staff under s 27A, agencies and ministers should carefully consider whether such special circumstances exist that a public servant might reasonably wish to contend that the document is exempt and giving access would be contrary to the public interest. Consultation is unlikely to be necessary where a request is made for a document of a general administrative character on which a staff member's name appears simply because of the position they hold.

6.165 Where it appears that consultation would be required with a large number of staff members, an agency should carefully consider whether consultation is reasonably practicable before deciding that consultation is required. This is particularly the case where an agency is relying on such consultation to decide that a practical refusal reason exists (s 24) and thereby to refuse the request. For example, it is impractical, and therefore unnecessary for an agency to consult with 600 employees before making a decision on whether or not to give access to an organisational chart.<sup>135</sup>

6.166 Where there is a need to consult third parties under s 27A, the timeframe for making a decision is extended by 30 days (s 15(6)). Agencies should identify as soon as possible within the initial 30 day decision making period whether there is a need for consultation.

### **Submissions**

6.167 Where consultation occurs, a third party consulted under s 27A should be asked if

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<sup>135</sup> As the Commissioner found in *Maria Jockel and Department of Immigration and Border Protection* [2015] AICmr 70 [36].

they object to disclosure and invited to make submissions about whether:

- the conditional exemption should apply, and
- on balance, access would be contrary to the public interest.

6.168 An affected third party who is consulted under s 27A may contend that the s 47F exemption should apply. Where the third party contends that exemptions other than s 47F should apply, it is open to agency or minister to rely on those exemptions in its decision.<sup>136</sup> However, should the agency or minister decide to grant access to the documents, the third party does not have a right to seek review of that decision on grounds other than those specified in s 27A.

6.169 The third party should be asked to provide reasons and evidence for their submission. To assist them to make a submission it may be necessary to give them a copy of the information. This could be done by providing an edited copy of the document, for example, by deleting any material that may be exempt under another provision. An agency should also take care not to breach any of its obligations under the Privacy Act during consultation, for example, by identifying the applicant without consent. For more information about an agency's obligations regarding the disclosure of personal information, see the guidelines to the Australian Privacy Principles at [www.oaic.gov.au](http://www.oaic.gov.au).

6.170 The letter to the third party may also include information about the obligation of agencies and ministers to provide the public with access to information that has been released in documents provided to an applicant (s 11C).

6.171 An agency or minister must have regard for any submissions made before deciding whether to give access to the document (ss 27A(3) and 27A(4)). The third party does not, however, have the right to veto access and agencies should take care that the third party is not under such a misapprehension.

6.172 Where an agency or minister decides to give the applicant access to documents, after a third party has provided a submission, they must give the third party written notice (s 27A(5)). Access to a document must not be given to the applicant until the third party's opportunities for review have run out, or if review did occur, the decision still stands (s 27A(6)).

### ***General information about consultation***

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

### ***Access to qualified person (indirect access)***

6.174 An agency or minister may provide a qualified person with access to a document that would otherwise be provided to an applicant where:

- the personal information was provided by a qualified person acting in their capacity as a qualified person (s 47F(4)(a)), and
- it appears to the agency or minister that disclosing the information to the applicant might be detrimental to their physical or mental health, or wellbeing (s 47F(4)(b)).

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<sup>136</sup> See *Australian Broadcasting Corporation and Civil Aviation Safety Authority* [2015] AICmr 21 [5] and Sections 27A(1)(b), 53C, 54A, 54M, 54P of the FOI Act.



6.175 A broad approach should be taken in considering an applicant's health or wellbeing. The possibility of detriment must appear to be real or tangible.<sup>137</sup>

6.176 Where indirect access is to be provided, the applicant is to nominate a qualified person (s 47F(5)(b)). The nominated qualified person must carry on the same occupation as the qualified person who provided the document (s 47F(5)(a)).

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

- a medical practitioner
- a psychiatrist
- a psychologist
- a counsellor<sup>138</sup>
- a social worker (s 47F(7)).

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

6.179 APP 12.6 of the Privacy Act allows agencies to give an individual access to their personal information through a mutually agreed intermediary.<sup>139</sup> This provision is more flexible than the equivalent provision under s 47F of the FOI Act. For example, an intermediary under APP 12 does not have to carry on the same occupation as the person who provided the information. Where giving access in accordance with APP 12.6 would more satisfactorily meet an FOI applicant's needs, an agency may wish to suggest to the applicant that they withdraw their FOI request on the basis that the agency will give access in accordance with APP 12.6.

### **Documents disclosing business information (s 47G)**

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

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

6.181 If the business information concerns a person, organisation or undertaking other than

<sup>137</sup> *Re K and Director-General of Social Security* [1984] AATA 252.

<sup>138</sup> The *Freedom of Information (Amendment) Reform Act 2010* replaced the previous reference to 'marriage guidance counsellor' with a reference to 'counsellor'.

<sup>139</sup> For more information, see Chapter 12 of the APP guidelines at [www.oaic.gov.au](http://www.oaic.gov.au).

the applicant, the decision maker may be required to consult that third party (see [6.202] – [6.213] below).

***Exemption does not apply in certain circumstances***

6.182 The conditional exemption does not apply if the document contains only business information about the applicant (s 47G(3)). Where the business information concerns both the applicant and another business, the provision may operate to exempt the information of the applicant, but only if the applicant’s business information cannot be separated from the information of the other business or undertaking.

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

***Elements of the exemption***

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

6.185 For the purposes of this conditional exemption, an undertaking includes an undertaking carried on by, or by an authority of, the Commonwealth, Norfolk Island or a state or territory government (s 47G(4)). However, it has been held that the business affairs exemption is not available to a person within a government agency or undertaking, nor to the agency or undertaking itself.<sup>140</sup> In other words, it is intended to protect the interests of third parties dealing with the government. Therefore, decision makers should be aware that the application of this conditional exemption to an agency’s own business information is uncertain and should avoid relying on it, even if the agency is engaged in competitive business activities.<sup>141</sup> As an alternative, one of the specific exemptions for agencies in respect of particular documents in Part II of Schedule 2 may be available.

***Could reasonably be expected***

6.186 This term is explained in Part 5. As in other applications, it refers to an expectation that is based on reason. Mere assertion or speculative possibility is not enough.<sup>142</sup>

***Unreasonable adverse effect of disclosure***

6.187 The presence of ‘unreasonably’ in s 47G(1) implies a need to balance public and private interests. The public interest, or some aspect of it, will be one of the factors in determining whether the adverse effect of disclosure on a person in respect of his or her

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<sup>140</sup> *Harris v Australian Broadcasting Corporation* (1983) 78 FLR 236.

<sup>141</sup> In *Secretary, Department of Employment, Workplace Relations and Small Business v Staff Development and Training Centre Pty Ltd* (2001) 114 FCR 301 the Full Federal Court seemed to accept (without referring to the *Harris* case) that a government agency could claim this conditional exemption, although it did not decide the case on this point. The question therefore remains uncertain.

<sup>142</sup> *Re Actors’ Equity Association (Aust) and Australian Broadcasting Tribunal (No 2)* [1985] AATA 69.

business affairs is unreasonable.<sup>143</sup> A decision maker must balance the public and private interest factors to decide whether disclosure is unreasonable for the purposes of s 47G(1)(a); but this does not amount to the public interest test of s 11A(5) which follows later in the decision process. It is possible that the decision maker may need to consider one or more factors twice, once to determine if a projected effect is unreasonable and again in assessing the public interest balance. Where disclosure is not unreasonable, the decision maker will need to apply the public interest test in s 11A(5). This is inherent in the structure of the business information exemption.

6.188 The test of reasonableness applies not to the claim of harm but to the objective assessment of the expected adverse effect. For example, the disclosure of information that a business' activities pose a threat to public safety, damage the natural environment; or that a service provider has made false claims for government money may have a substantial adverse effect on that business but may be reasonable in the circumstances to disclose. Similarly, it would not be unreasonable to disclose information about a business that revealed serious criminality.<sup>144</sup> These considerations require a weighing of a public interest against a private interest, preserving the profitability of a business, but at this stage it bears only on the threshold question of whether the disclosure would be unreasonable.<sup>145</sup>

6.189 The AAT has said, for example, that there is a strong public interest in knowing whether public money was accounted for at the appropriate time and in the manner required; and in ensuring that public programmes are properly administered.<sup>146</sup>

6.190 The AAT has distinguished between 'truly government documents' and other business information collected under statutory authority. The first category includes documents that have been created by government or that form part of a flow of correspondence and other documents between the government and business. The AAT concluded that such documents inclined more to arguments favouring scrutiny of government activities when considering whether disclosure would be unreasonable.<sup>147</sup> By implication, the exemption is more likely to protect documents obtained from third party businesses.

6.191 Where disclosure would result in the release of facts already in the public domain, that disclosure would not amount to an unreasonable adverse effect on business affairs.<sup>148</sup>

### ***Business or professional affairs***

6.192 The use of the term 'business or professional affairs' distinguishes an individual's personal or private affairs and an organisation's internal affairs. The term 'business affairs' has been interpreted to mean 'the totality of the money-making affairs of an organisation or undertaking as distinct from its private or internal affairs'.<sup>149</sup>

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<sup>143</sup> As explained by Forgie DP in *Bell and Secretary, Department of Health (Freedom of Information)* [2015] AATA 494 [48].

<sup>144</sup> *Searle Australia Pty Ltd v Public Interest Advocacy Centre and Department of Community Services and Health* (1992) 108 ALR 163.

<sup>145</sup> In relation to the test of reasonableness, see *'E' and National Offshore Petroleum Safety and Environmental Management Authority* [2012] AICmr 3.

<sup>146</sup> As explained by Forgie DP in *Bell and Secretary, Department of Health (Freedom of information)* [2015] AATA 494 [68] and as discussed by the Commissioner in *Linton Besser and Department of Employment* [2015] AICmr 67.

<sup>147</sup> *Re Actors' Equity Association (Aust) and Australian Broadcasting Tribunal (No 2)* [1985] AATA 69.

<sup>148</sup> *Re Daws and Department of Agriculture Fisheries and Forestry* [2008] AATA 1075.

<sup>149</sup> *Re Mangan and The Treasury* [2005] AATA 898, citing *Cockcroft and Attorney-General's Department and Australian Iron and Steel Pty Ltd (party joined)* (1985) 12 ALD 462.

6.193 The internal affairs of an organisation include its governance processes, the processes by which organisations are directed and controlled. For example, documents relating to member voting processes are not exempt under s 47G, because member voting forms part of the governance affairs of an organisation.<sup>150</sup>

6.194 In the absence of a definition in the FOI Act, ‘professional’ bears its usual meaning. For FOI purposes, ‘profession’ is not static and may extend beyond the occupations that have traditionally been recognised as professions, reflecting changes in community acceptance of these matters.<sup>151</sup> For example, the Information Commissioner accepts that medical and scientific researchers have professional affairs.<sup>152</sup> The word ‘profession’ is clearly intended to cover the work activities of a person who is admitted to a recognised profession and who ordinarily offers professional services to the public for a fee. In addition, s 47G(5) makes it clear that the conditional exemption does not apply merely because the information refers to a person’s professional status.

6.195 Any extension of the normal meaning of ‘profession’ will require evidence of community acceptance that the occupation in question should be regarded as a profession. For example, the absence of any evidence indicating community acceptance that the audit activities of officers of the Australian Taxation Office constituted ‘professional affairs’ led the AAT to refuse to extend the ordinary meaning of the expression in that case.<sup>153</sup>

### ***Organisation or undertaking***

6.196 The term ‘organisation or undertaking’ should be given a broad application, including Commonwealth, Norfolk Island or State undertakings (s 47G(4)). An organisation or undertaking need not be a legal person. However, a natural individual cannot be an organisation but may be the proprietor of an undertaking, for example, when the individual is a sole trader. The exemption may apply to information about an individual who is a sole trader to the extent that the information concerns the undertaking’s business, commercial or financial affairs.

### ***Prejudice future supply of information***

6.197 A document that discloses the kind of information described in [6.180] above will be conditionally exempt if the disclosure could reasonably be expected to prejudice the future supply of information to the Commonwealth or an agency for the purpose of the administration of a law of the Commonwealth or of a Territory or the administration of matters administered by an agency (s 47G(1)(b)).

6.198 This limb of the conditional exemption comprises two parts:

- a reasonable expectation of a reduction in the quantity or quality of business affairs information to the government
- the reduction will prejudice the operations of the agency.<sup>154</sup>

<sup>150</sup> See ‘GD’ and Department of the Prime Minister and Cabinet [2015] AICmr 46 [56].

<sup>151</sup> *Re Fogarty and Chief Executive Officer, Cultural Facilities Corporation* [2005] ACTAAT 14.

<sup>152</sup> In ‘GO’ and National Health and Medical Research Council [2015] AICmr 56 [33] the Commissioner said that a ‘researcher’s professional affairs would usually involve working on more than a single research project and that his or her research would contribute to a body of knowledge over many years’.

<sup>153</sup> *Re Dyki and Commissioner of Taxation* (1990) 12 AAR 554.

<sup>154</sup> *Re Angel and the Department of the Arts, Heritage and the Environment; HC Sleigh Resources Ltd and Tasmania* [1985] AATA 314.

6.199 There must be a reasonable likelihood that disclosure would result in a reduction in both the quantity and quality of business information flowing to the government.<sup>155</sup> In some cases, disclosing the identity of the person providing the business information may be sufficient to prejudice the future supply of information.<sup>156</sup> Disclosure of the person's identity may also be conditionally exempt under s 47F (personal privacy). In these cases, consideration should be given to whether the information may be disclosed without also disclosing the identity of the person supplying the information.

6.200 Where the business information in question can be obtained compulsorily, or is required for some benefit or grant, no claim of prejudice can be made. No prejudice will occur if the information in issue is routine or administrative (that is, generated as a matter of practice).<sup>157</sup>

6.201 The agency will usually be best placed to identify, and be concerned about the circumstances where the disclosure of documents might reasonably be expected to prejudice the future supply of information to it.<sup>158</sup>

### **Consultation**

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

6.203 For the purposes of consulting a third party, business information means:

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

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

6.205 Consultation should occur where:

- (a) it is reasonably practicable. This will depend on all the circumstances including the time limits for processing the request (s 27(5)). For example, it may not be reasonably practicable if the agency cannot locate the third party in a timely and effective way.
- (b) it appears to the agency or minister that the third party might reasonably wish to make a submission that the document should be exempt from disclosure under either s 47 or s 47G having regard to:

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<sup>155</sup> *Re Maher and the Attorney-General's Department* [1986] AATA 16, *Re Telstra and Australian Competition and Consumer Commission* [2000] AATA 71.

<sup>156</sup> *Re Caruth and Department of Health, Housing, Local Government and Community Services* (1993) 53 FOIR 65.

<sup>157</sup> *Re Kobelke and Minister for Planning* [1994] WAICmr 5.

<sup>158</sup> See, for example *'HZ' and Australian Securities and Investments Commission* [2016] AICmr 7 [34], and *Wellard Rural Exports Pty Ltd and Department of Agriculture* [2014] AICmr 131 [43].

- the extent to which the information is well known
- whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the information
- whether the information is publicly available, and
- any other relevant matters (s 27(3)).

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

6.207 From a practical perspective, a decision maker should identify early any need to undertake consultation to benefit from the 30-day extension to the timeframe for making a decision (s 15(6)). This is because the extension only applies when consultation starts within the initial decision making period (that is, in the first 30 days). Where consultation is undertaken, the agency or minister must inform the applicant as soon as practicable that the processing period has been extended (s 15(8)).

### **Submissions**

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

- whether the conditional exemption should apply
- whether, on balance, access would be contrary to the public interest.

6.209 An affected third party who is consulted under s 27 may contend that exemptions under ss 47 or 47G should apply. Where the third party contends that exemptions other than ss 47 or 47G should apply, it is open to agency or minister to rely on those exemptions in its decision.<sup>159</sup> However, should the agency or minister decide to grant access to the documents, the third party does not have a right to seek review of that decision on grounds other than those specified in s 27.

6.210 The third party should be asked to provide reasons and evidence for their submission. To assist them to make a submission it may be necessary to provide a copy of the information. This could be done by providing an edited copy of the document, for example, by deleting any material that may be exempt under another provision. An agency should also take care not to breach any obligation under the Privacy Act during consultation, for example, by identifying the applicant without their consent. If an edited copy of the document has been provided for consultation purposes, that copy should be clearly marked where material has been edited, and it should be stated that the copy has been provided for the purpose of consultation.

6.211 An agency or minister must have regard for any submissions made before deciding whether to give access to the document (ss 27(4) and 27(5)). The third party does not, however, have the right to veto access and agencies should take care that the third party is not under such a misapprehension.

6.212 Where an agency or minister decides to give the applicant access to documents, after a third party has provided a submission, they must give the third party written notice

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<sup>159</sup> See *Australian Broadcasting Corporation and Civil Aviation Safety Authority* [2015] AICmr 21 [5] and ss 27(1)(b), 53C, 54A, 54M and 54P of the FOI Act.

(s 27(6)). Access to a document must not be given to the applicant until the third party's opportunities for review have run out, or if review did occur, the decision still stands (s 27(7)).

### **General information about consultation**

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

### **Research documents (s 47H)**

6.214 Section 47H conditionally exempts material where:

- (a) it contains information relating to research that is being, or is to be, undertaken by an officer of an agency specified in Schedule 4 of the Act (that is, the Commonwealth Scientific and Industrial Research Organisation (CSIRO) and the Australian National University) and
- (b) disclosure of the information before the completion of the research would be likely to unreasonably to expose the agency or officer to disadvantage.

6.215 This provision is similar to the previous s 43A. There are no AAT or court decisions on the provision.

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

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

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

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

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

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

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

- currency or exchange rates
- interest rates

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

6.221 The terms ‘substantial adverse effect’ and ‘reasonably be expected’ are explained in greater detail in Part 5. There must be more than an assumption, allegation or possibility that the adverse effect would occur if the document were released.

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

- premature disclosure of information could compromise the Government’s ability to obtain access to information
- disclosure of information could undermine confidence in markets, financial frameworks or institutions
- disclosure of information could distort the Australian economy by influencing investment decisions or giving particular individuals or businesses a competitive advantage.<sup>160</sup>

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<sup>160</sup> See Explanatory Memorandum to the *Freedom of Information Amendment (Reform) Bill 2010*, pp. 21–22. For an example of the application of this exemption see *Washington and Australian Prudential Regulation Authority* [2011] AICmr 11.