PART 5 — EXEMPTIONS

Version 1.5, June 2019

PAGE

Introduction **1**

Documents exempt under Part IV **1**

Commonly used terms **3**

Would or could reasonably be expected to 3

Substantial adverse effect 4

Prejudice 4

Documents affecting national security, defence or international relations (s 33) **5**

Reasonably expected 5

Damage 5

Security of the Commonwealth 6

Defence of the Commonwealth 7

International relations 7

The mosaic theory 8

Information communicated in confidence 8

Classification markings 9

Extended processing period for consultation 10

Refusal to confirm or deny existence of a document 10

Evidence from Inspector-General of Intelligence and Security 11

Cabinet documents (s 34) **11**

Documents included in exemption 11

Documents excluded from exemption 12

Documents created for the dominant purpose of submission to Cabinet 13

Official record of the Cabinet 13

Cabinet briefings 13

Draft Cabinet documents 13

Copies and extracts 14

Documents disclosing a deliberation or decision of Cabinet 14

Purely factual material 15

'Officially disclosed' 15
Documents affecting law enforcement and public safety (s 37) 15
Withholding information about the existence of documents 16
Reasonable expectation 16
Investigation of a breach of law 17
Disclosure of a confidential source 17
Scope of confidentiality 18
Enforcement or administration of the law 19
Disclosure of identity 19
Endanger the life or physical safety of any person 19
Prejudice to a fair or impartial trial 20
Prejudice to law enforcement methods and procedures 21
Protection of public safety 22
Documents to which secrecy provisions apply (s 38) 22
Documents subject to legal professional privilege (s 42) 24
Whether a document attracts legal professional privilege 24
Legal adviser-client relationship, independence and in house lawyers 24
For the dominant purpose of giving or receiving legal advice, or use in actual or anticipated litigation 26
Legal advice privilege 26
Litigation privilege 26
The scope of a claim of legal professional privilege over a document 27
Confidentiality 27
Waiver of privilege 27
The 'real harm' test 28
Copies or summary records 28
Exception for operational information 29
Documents containing material obtained in confidence (s 45) 29
Breach of confidence 29
Specifically identified 30
Quality of confidentiality 30
Mutual understanding of confidence 30
Unauthorised disclosure or threatened disclosure 31

Detriment 32

Parliamentary Budget Office documents (s 45A) 32

Documents included in exemption 32

Documents excluded from exemption 33

Withholding information about the existence of documents 33

Documents whose disclosure would be in contempt of the Parliament or in contempt of court (s 46) 33

Apart from this Act 34

Contempt of court 34

Contrary to an order or direction 35

Infringe the privileges of Parliament 35

Documents disclosing trade secrets or commercially valuable information (s 47) 36

Trade secrets 36

Information having a commercial value 37

Consultation 39

Electoral rolls and related documents (s 47A) 39

PART 5 — EXEMPTIONS

Introduction

5.1 Where an FOI request for a document has been made and any required charges have been paid, an agency or minister must give access to the document unless the document at that time is an exempt document (s 11A). An exempt document is:

(a) a document of an agency which is exempt from the operation of the FOI Act in whole or in part (see Part 2 of these Guidelines)

(b) an official document of a minister that contains some matter not relating to the affairs of an agency or a Department of State (see Part 2), or

(c) exempt for the purposes of Part IV of the FOI Act — that is, it meets the criteria for an exemption provision (s 4(1)).

5.2 An agency or minister can withhold access to a document under Part IV only if the document is exempt at the time the access request is determined. A document that was exempt at one point in time may not necessarily be exempt at a later time because circumstances have changed.

5.3 A 'document' includes any part of a document that is relevant to the terms of the FOI request. Consequently, a decision maker should consider whether it is practicable to delete exempt material and provide the balance to the applicant. If it is practicable to delete the exempt material and prepare a meaningful non-exempt edited copy to provide to the applicant, an agency or minister must do so (s 22).

5.4 In cases where the applicant seeks access only to that part of a document that does not contain exempt material, and the exempt material can be easily separated from the remainder of the document, it is practicable to treat the exempt material as outside the scope of the request.

5.5 The decision maker must provide a statement of reasons under s 26 if any aspect of an FOI request is refused or if access is deferred (see Part 3 of these Guidelines).

5.6 Agencies and ministers have a discretion to provide access to a document where the law permits, even if the document is exempt (s 3A). Agencies and ministers should consider in each case whether an exempt document can be released without causing significant harm and allow access to documents wherever possible.

Documents exempt under Part IV

5.7 Exempt documents under Part IV of the FOI Act fall into two categories:

- exempt under Division 2
- conditionally exempt under Division 3, where access to the document must be given unless disclosure would, on balance, be contrary to the public interest (s 11A(5)).

5.8 Exempt documents in Division 2 of Part IV are:

- documents affecting national security, defence or international relations (s 33)
- Cabinet documents (s 34)
- documents affecting enforcement of law and protection of public safety (s 37)
- documents to which secrecy provisions of enactments apply (s 38)
- documents subject to legal professional privilege (s 42)
- documents containing material obtained in confidence (s 45)
- Parliamentary Budget Office documents (s 45A)
- documents disclosure of which would be contempt of Parliament or in contempt of court (s 46)
- documents disclosing trade secrets or commercially valuable information (s 47)
- electoral rolls and related documents (s 47A).

5.9 The exemptions in Division 2 of Part IV are not subject to an overriding public interest test. If a document meets the criteria to establish a particular exemption, it is exempt. There is no additional obligation to weigh competing public interests to determine if the document should be released.

5.10 By contrast, an agency or minister cannot refuse access to a document that is conditionally exempt under Division 3, Part IV without first applying a public interest test (s 11A(5)) (see Part 6 of these Guidelines).

5.11 Documents which are conditionally exempt under Division 3 relate to the following categories:

- Commonwealth-State relations (s 47B)
- deliberative processes (s 47C)
- financial or property interests of the Commonwealth (s 47D)
- certain operations of agencies (s 47E)
- personal privacy (s 47F)
- business (other than documents to which s 47 applies) (s 47G)
- research (s 47H)
- the economy (s 47J).

5.12 Where a document is assessed as conditionally exempt, the agency or minister must give access to it unless in the circumstances access would, on balance, be contrary to the public interest (s 11A(5)). The public interest test is weighted in favour of giving access to documents so that the public interest in disclosure remains at the forefront of decision making. The statement of reasons for the decision must include the public interest factors taken into account (s 26(1)(aa)). Further guidance on conditional exemptions and the public interest test is in Part 6.

5.13 Table 1 is extracted from s 31A of the FOI Act and summarises how the FOI Act applies to exempt and conditionally exempt documents.

Table 1: Access to exempt and conditionally exempt documents

Item	If ...	then ...	because of ...
1	a document is an exempt document under Division 2 (exemptions) or under paragraph (b) or (c) of the definition of exempt document in s 4(1) (s 7 or an official document of a minister that contains some matter not relating to agency affairs)	access to the document is not required to be given	s 11A(4)
2	a document is a conditionally exempt document under Division 3 (public interest conditional exemptions)	access to the document is required to be given, unless it would be contrary to the public interest	s 11A(5) (see also s 11B public interest factors)
3	a document is an exempt document as mentioned in item 1, and also a conditionally exempt document under Division 3	access to the document is not required to be given	ss 11A(4), 11A(6), and 32 (interpretation)
4	access to a document is refused because it contains exempt matter, and the exempt matter can be deleted	(a) an edited copy deleting the exempt matter must be prepared (if reasonably practicable); and (b) access to the edited copy must be given	s 22
5	a document is an exempt document because of any provision of this Act	access to the document may be given apart from under this Act	s 3A (objects – information or documents otherwise accessible)

Commonly used terms

5.14 Certain expressions in the FOI Act are common to several exemptions and conditional exemptions. They are explained below.

Would or could reasonably be expected to

5.15 The test 'would or could reasonably be expected' appears in the following exemptions and conditional exemptions:

- national security, defence or international relations (s 33(a))
- public safety and law enforcement (ss 37(1)-(2))

- commercially valuable information (s 47(1)(b))
- Commonwealth-State relations (s 47B)
- certain operations of an agency (ss 47E(a)–(d))
- business affairs (ss 47G(1)(a)-(b)).

5.16 The test requires the decision maker to assess the likelihood of the predicted or forecast event, effect or damage occurring after disclosure of a document.[1]

5.17 The use of the word 'could' in this qualification is less stringent than 'would', and requires analysis of the reasonable expectation rather than certainty of an event, effect or damage occurring. It may be a reasonable expectation that an effect has occurred, is presently occurring, or could occur in the future.[2]

5.18 The mere risk, possibility or chance of prejudice does not qualify as a reasonable expectation.[3] There must, based on reasonable grounds, be at least a real, significant or material possibility of prejudice.[4]

Substantial adverse effect

5.19 Several conditional exemptions[5] require the decision maker to assess the impact and scale of an expected effect or event that would follow disclosure of the document. That is, the expected effect needs to be both 'substantial' and 'adverse'.

5.20 The term 'substantial adverse effect' broadly means 'an adverse effect which is sufficiently serious or significant to cause concern to a properly concerned reasonable person'.[6] The word 'substantial', taken in the context of substantial loss or damage, has been interpreted as 'loss or damage that is, in the circumstances, real or of substance and not insubstantial or nominal'.[7]

5.21 A decision maker should clearly describe the expected effect and its impact on the usual operations or activity of the agency in the statement of reasons in order to show their deliberations in determining the extent of the expected effect. Of course, it may sometimes be necessary to use general terms to avoid making the Statement of Reasons itself an 'exempt document' (s 26(2)).

Prejudice

5.22 Some exemptions and conditional exemptions[8] require the decision maker to assess whether the potential disclosure of a document would be *prejudicial*. The FOI Act does not define prejudice. The Macquarie Dictionary definition of 'prejudice' requires:

---

1 The test 'would or could reasonably be expected' has been discussed in various decisions. See, as a recent AAT example, *Bell and Secretary, Department of Health (Freedom of information)* [2015] AATA 494 at [37].

2 *Re Maksimovic and Australian Customs Service* [2009] AATA 28.

3 *Re News Corporation Limited v National Companies and Securities Commission* (1984) 5 FCR 88.

4 *Chemical Trustee Limited and Ors and Commissioner of Taxation and Chief Executive Officer, AUSTRAC (Joined Party)* [2013] AATA 623 [78].

5 Sections 47D, 47E(c), 47E(d), 47J.

6 See *Re Thies and Department of Aviation* [1986] AATA 141 [24].

7 See *Tillmanns Butcheries Pty Ltd v Australasian Meat Employees Union & Ors* (1979) 27 ALR 367 383.

8 Sections 37(1)(a), 37(2)(a), 37(2)(c), 47E(a), 47E(b), 47G(1)(b).

(a) disadvantage resulting from some judgement or action of another

(b) resulting injury or detriment.

5.23 A prejudicial effect is one which would cause a bias or change to the expected results leading to detrimental or disadvantageous outcomes. The expected outcome does not need to have an impact that is 'substantial and adverse'.[9]

Documents affecting national security, defence or international relations (s 33)

5.24 Section 33 exempts documents that affect Australia's national security, defence or international relations. The exemption comprises two distinct categories of documents. A document is exempt if disclosure:

(a) would, or could reasonably be expected to, cause damage to the Commonwealth's security, defence or international relations; or

(b) disclosure would divulge information communicated in confidence to the Commonwealth by a foreign government, an agency of a foreign government or an international organisation.

5.25 In claiming the exemption, decision makers must examine the content of each document that is relevant to a request and come to a conclusion about whether disclosure of that content would cause, or could reasonably be expected to cause, the damage specified in s 33. The context of each document is also relevant because, while the information in the document may not itself cause harm, in combination with other known information it may contribute to a complete picture which results in harm (the 'mosaic theory'). See [5.39] – [5.40] below for more detail on the mosaic theory.

5.26 The classification markings on a document (such as 'secret' or 'confidential') are not of themselves conclusive of whether the exemption applies (see also [5.41] – [5.47] below in relation to information communicated in confidence).

Reasonably expected

5.27 The term 'reasonably expected' is explained in greater detail at [5.15] – [5.18] above. There must be 'real' and 'substantial' grounds for expecting the damage to occur which can be supported by evidence or reasoning.[10] A mere allegation or possibility of damage is insufficient to meet the 'reasonable expectation' test.[11]

Damage

5.28 'Damage' for the purposes of this exemption is not confined to loss or damage in monetary terms. The relevant damage may be intangible, such as inhibiting future negotiations between the Australian Government and a foreign government, or the future flow of confidential information from a foreign government or agency.[12] In determining whether damage is likely to result from disclosure of the document(s) in

9 See *Re James and Ors and Australian National University* (1984) 6 ALD 687.

10 *Attorney-General's Department and Australian Iron and Steel Pty Ltd v Cockcroft* (1986) 10 FCR 180.

11 See *Re O'Donovan and Attorney-General's Department* [1985] AATA 330*; Re Maher and Attorney-General's Department* [1985] AATA 180.

12 See *The Sun-Herald Newspaper and the Australian Federal Police* [2014] AICmr 52.

question, a decision maker could have regard to the relationships between individuals representing respective governments.[13] A dispute between individuals may have sufficient ramifications to affect relations between governments. It is not a necessary consequence in all cases but a matter of degree to be determined on the facts of each particular case.[14]

Security of the Commonwealth

5.29 The term 'security of the Commonwealth' broadly refers to:

(a) the protection of Australia and its population from activities that are hostile to, or subversive of, the Commonwealth's interests

(b) the security of any communications system or cryptographic system of any country used for defence or the conduct of the Commonwealth's international relations (see definition in s 4(5)).

5.30 A decision maker must be satisfied that disclosure of the information under consideration would, or could reasonably be expected to, cause damage to the security of the Commonwealth.

5.31 The meaning of 'damage' has three aspects:

i. that of safety, protection or defence from something that is regarded as a danger. The AAT has given financial difficulty, attack, theft and political or military takeover as examples.

ii. the means that may be employed either to bring about or to protect against danger of that sort. Examples of those means are espionage, theft, infiltration and sabotage.

iii. The organisations or personnel providing safety or protection from the relevant danger are the focus of the third aspect.[15]

5.32 The claim has been upheld in the following situations:

(a) If the release of a document would prevent a security organisation from obtaining information on those engaged in espionage, it could reasonably be expected to cause damage to national security.[16]

(b) The disclosure of a defence instruction on the Army's tactical response to terrorism and procedures for assistance in dealing with terrorism would pose a significant risk to security by revealing Australia's tactics and capabilities.[17]

(c) Documents revealing, or which would assist in revealing, the identity of an ASIO informant were found to be exempt under a similar provision in the Archives Act.[18]

---

13 See *Re Laurence William Maher and Attorney-General's Department* [1985] AATA 180 and *Re Aldred and Department of Foreign affairs and Trade* [1990] AATA 833.

14 See *Arnold v Queensland* (1987) 73 ALR 607.

15 As per Forgie DP in *Prinn and Department of Defence (Freedom of Information)* [2016] AATA 445 [65].

16 *Re Slater and Cox* (*Director-General of Australian Archives)* [1988] AATA 110.

17 *Re Hocking and Department of Defence* [1987] AATA 602.

18 *Re Throssell and Australian Archives* [1987] AATA 453.

5.33 It is well accepted that securing classified government information forms part of the security of the Commonwealth.[19] The assessment that s 33(a)(i) requires must be made at the time the decision is made and in the environment that exists at the time.[20] Where a request is received for classified government information, the documents must be considered both individually and collectively. The Information Commissioner believes that it might be safer for the FOI decision maker to err on the side of non-disclosure provided the interests of other citizens are able to be protected.[21] Where there is doubt, this should be in favour of non-disclosure.[22]

Defence of the Commonwealth

5.34 The FOI Act does not define 'defence of the Commonwealth'. Previous Administrative Appeals Tribunal (AAT) decisions indicate that the term includes:

- meeting Australia's international obligations
- ensuring the proper conduct of international defence relations
- deterring and preventing foreign incursions into Australian territory
- protecting the Defence Force from hindrance or activities which would prejudice its effectiveness.[23]

5.35 Damage to the defence of the Commonwealth is not necessarily confined to monetary damage (see [5.28] above). However, in all cases, there must be evidence that the release of the information in question will be likely to cause the damage claimed.

International relations

5.36 The phrase 'international relations' has been interpreted as meaning the ability of the Australian Government to maintain good working relations with other governments and international organisations and to protect the flow of confidential information between them.[24] The exemption is not confined to relations at the formal diplomatic or ministerial level. It also covers relations between Australian Government agencies and agencies of other countries.[25]

5.37 The mere fact that a government has expressed concern about a disclosure is not enough to satisfy the exemption, but the phrase does encompass intangible or speculative damage, such as loss of trust and confidence in the Australian Government or one of its agencies.[26] The expectation of damage to international relations must be

---

19 *Aldred and Department of Foreign Affairs and Trade* [1990] AATA 833.

20 *Prinn and Department of Defence (Freedom of Information)* [2016] AATA 445 [66].

21 See *Prinn and Department of Defence* [2014] AICmr 84 [23]-[24].

22 *Australian Securities and Investments Commission v P Dawson Nominees Pty Ltd* [2008] FCAFC 123; (2008) 169 FCR 227; 247 ALR 646 [40]; 236; 654 per Heerey, Moore and Tracey JJ, as discussed by Forgie DP in *Prinn and Department of Defence (Freedom of Information)* [2016] AATA 445 [79].

23 See for example, *Re Dunn and the Department of Defence* [2004] AATA 1040.

24 *Re McKnight and Australian Archives* [1992] AATA 225.

25 *Re Haneef and Australian Federal Police* [2009] AATA 51.

26 *Re Maher and Attorney-General's Department* [1985] AATA 180 as applied in *Maksimovic and Attorney-General's Department* [2008] AATA 1089. See also *James O'Neill and the Australian Federal Police* [2015] AICmr 50 [9].

reasonable in all the circumstances, having regard to the nature of the information; the circumstances in which it was communicated; and the nature and extent of the relationship.[27] There must also be real and substantial grounds for the exemption that are supported by evidence.[28] These grounds are not fixed in advance, but vary according to the circumstances of each case.

5.38 For example, the disclosure of a document may diminish the confidence which another country would have in Australia as a reliable recipient of its confidential information, making that country or its agencies less willing to cooperate with Australian agencies in future.[29] On the other hand, the disclosure of ordinary business communications between health regulatory agencies revealing no more than the fact of consultation will not, of itself, destroy trust and confidence between agencies.[30]

The mosaic theory

5.39 When evaluating the potential harmful effects of disclosing documents that affect Australia's national security, defence or international relations, decision makers may take into account not only the contents of the document but also the intelligence technique known as the 'mosaic theory'. This theory holds that individually harmless pieces of information, when combined with other pieces, can generate a composite — a mosaic — that can damage Australia's national security, defence or international relations.[31] Therefore, decision makers may need to consider other sources of information when considering this exemption.

5.40 The mosaic theory does not relieve decision makers from evaluating whether there are real and substantial grounds for the expectation that the claimed effects will result from disclosure. [32]

Information communicated in confidence

5.41 Section 33(b) exempts information communicated in confidence to the Australian Government or agency by another government or one of its authorities, or by an international organisation.[33] One example is the confidential exchange of police information or information received in confidence from a foreign defence force agency.[34]

5.42 The test is whether information is communicated in confidence between the communicator and the agency to which the communication is made — it is not a

---

27 *Re Slater and Cox (Director-General of Australian Archives)* [1988] AATA 110.

28 *Secretary, Department of Foreign Affairs v Whittaker* (2005) 143 FCR 15.

29 *Re Maksimovic and Attorney-General's Department* [2008] AATA 1089. See also *O'Sullivan and Department of Foreign Affairs and Trade* [2013] AICmr 36 and *'AA' and Bureau of Meteorology* [2013] AICmr 46.

30 *Re Public Interest Advocacy Centre and Department of Community Services and Health and Searle Australia Pty Ltd (No 2)* [1991] AATA 723.

31 *Re McKnight and Australian Archives* [1992] AATA 225.

32 It is a question of fact whether the disclosure of the information, alone or in conjunction with other material, could reasonably be expected to result in the claimed effect, *Re Nitas and Minister for Immigration and Multicultural Affairs* [2001] AATA 392.

33 This exemption is separate from the s 45 material obtained in confidence exemption. Section 33(b) applies only to information communicated to the Commonwealth Government in confidence by, or on behalf of a foreign government, authority of a foreign government or an international organisation.

34 See for example *'W' and the Australian Federal Police* [2013] AICmr 39.

matter of determining whether the information is of itself confidential in nature.[35] Information is communicated in confidence by or on behalf of another government or authority, if it was communicated and received under an express or implied understanding that the communication would be kept confidential.[36] Whether the information is, in fact, confidential in character and whether it was communicated in circumstances importing an obligation of confidence are relevant considerations.[37] They may assist the decision maker to determine whether, on the balance of probabilities, information was communicated in confidence.[38]

5.43 The relevant time for the test of confidentiality is the time of communication of the information, not the time of the request for access. It is irrelevant for the purposes of the exemption that the foreign government or agency may have since reviewed the status of the document and it is no longer confidential. The document will still be an exempt document under the FOI Act,[39] noting however that agencies and ministers have a discretion to provide access to an exempt document where the law permits (see [5.6] above).

5.44 An agreement to treat documents as confidential does not need to be formal. A general understanding that communications of a particular nature will be treated in confidence will suffice. The understanding of confidentiality may be inferred from the circumstances in which the communication occurred, including the relationship between the parties and the nature of the information communicated.[40]

5.45 To avoid doubt, s 4(10) confirms that the exemption applies to any documents communicated pursuant to any treaty or formal instrument on the reciprocal protection of classified information between the Australian Government and a foreign government (and their respective agencies) or an international organisation.

5.46 Information communicated by an Australian Government agency to a foreign government can also fall under s 33(b) if it restates information the foreign government previously communicated to the agency in confidence.[41]

Classification markings

5.47 Classification markings on a document (such as secret or confidential) are not in themselves conclusive of confidential communication. An agency still needs to produce evidence supporting the claim that information was communicated in confidence by a foreign entity. The decision maker must make an independent assessment of that claim in light of the available evidence. Similarly, even where a foreign government or agency has identified a document as secret or confidential, the decision maker is still required

---

35 *Secretary, Department of the Prime Minister and Cabinet v Haneef* (2010) 52 AAR 360.

36 *Re Maher and Attorney-General's Department* [1985] AATA 180. In *Luchanskiy and Secretary, Department of Immigration and Border Protection (Freedom of information)* [2016] AATA 184 at [32], Frost DP accepted that a communication from Interpol was exempt under s 33(b) on the basis that the redacted information was 'the type' of information seen regularly by the experienced FOI decision maker.

37 For examples of the application of these considerations, see *O'Sullivan and Department of Foreign Affairs and Trade* [2013] AICmr 36; *Wake and Australian Broadcasting Corporation* [2013] AICmr 45 and *'AA' and Bureau of Meteorology* [2013] AICmr 46.

38 *Re Environment Centre NT Inc and Department of the Environment, Sport and Territories* [1994] AATA 301.

39 *Secretary, Department of Foreign Affairs v Whittaker* (2005) 143 FCR 15.

40 *Re Maher and Attorney-General's Department* [1986] AATA 16.

41 *Mentink and Australian Federal Police* [2014] AICmr 64 [33]–[34].

to make an independent assessment that the information was communicated in confidence.[42]

Extended processing period for consultation

5.48 The standard statutory timeframe for making a decision on an FOI request is 30 days (see Part 3). Where a document may be exempt under ss 33(a)(iii) or 33(b), a decision maker may decide to extend the timeframe for making a decision by 30 days to consult a foreign government or authority or an international organisation to assist them in deciding whether the document is exempt (ss 15(7)-(8)). This decision must be in writing and must be notified to the applicant as soon as practicable (ss 15(7)-(8)(b)). Although the decision maker should take any views expressed during consultation into account, the final decision on whether to grant access to the document lies with the decision maker.

5.49 The form of consultation with a foreign government, authority or organisation will depend on the nature of the relationship between the Australian agency and the foreign entity. For example, there may be agreed procedures for consultation or informal communication between officers may suffice. If the agency is not the primary point of contact for the matter requiring consultation, it should seek the assistance of the agency with that responsibility. In some cases, the appropriate action may be to transfer the request, either in full or in part to that other agency. A decision maker should seek information relevant to establishing whether the grounds for exemption are met. This information may be used to support and explain a claim for exemption in a statement of reasons to the applicant. In all cases, the person consulted should have authority to speak for the foreign entity.

Refusal to confirm or deny existence of a document

5.50 In some instances, the act of confirming or denying whether a document exists can cause harm. For example, knowing that an agency possesses a copy of a particular document, coupled with the knowledge that the document could originate from only one source, might disclose a confidential source resulting in the effective loss of important information.

5.51 Section 25 of the FOI Act provides that agencies do not need to give information about the existence of documents in another document, such as a s 26 notice, if including that information would cause the latter to be exempt on the grounds set out in ss 33, 37(1) or 45A. (See [5.79] – [5.117] below for further guidance on the application of s 37(1), and see [5.173] – [5.180] for guidance on s 45A.) The agency may instead give the applicant notice in writing that it neither confirms nor denies the existence of the document, but if the document existed, it would be exempt under ss 33, 37(1) or 45A.

5.52 As use of this section has the effect of refusing a request for access to a document without providing reasons, use of s 25 should be reserved strictly for cases where the content of the material requires it.

5.53 Section 26(2) also provides that there is no requirement to include information

[42] *Re Anderson and Department of Special Minister of State* [1984] AATA 478.

in a notice that, were it contained in a document, would make that document exempt (see Part 3).[43]

Evidence from Inspector-General of Intelligence and Security

5.54 Where the Information Commissioner is conducting a review of a decision refusing access to a document on the grounds of exemption under s 33, before deciding that the document is not exempt, the Information Commissioner must ask the Inspector-General of Intelligence and Security (IGIS) to give evidence on the criteria under s 33 (ss 55ZA–55ZD). This provision is designed to assist the Information Commissioner by giving access to independent expert advice from the IGIS to determine whether damage could result from disclosure of a document which is claimed to be exempt under the national security exemption, or whether giving access would divulge information communicated in confidence. For more information on Information Commissioner reviews, see Part 10.

Cabinet documents (s 34)

5.55 The Cabinet exemption in s 34 of the FOI Act is designed to protect the confidentiality of the Cabinet process and to ensure that the principle of collective ministerial responsibility (fundamental to the Cabinet system) is not undermined. Like the other exemptions in Division 2 of Part IV, this exemption is not subject to the public interest test. The public interest is implicit in the purpose of the exemption itself.

5.56 'Cabinet' for s 34 purposes means the Cabinet and Cabinet committees (see the definition of Cabinet in s 4(1)). It does not include informal meetings of ministers outside the Cabinet. In any case of doubt as to whether a body is a Cabinet committee, agencies should consult the Department of the Prime Minister and Cabinet (DPMC).

5.57 Agencies should refer to the *Cabinet Handbook* issued by DPMC for guidance about Cabinet processes and the underlying principles of the Cabinet system.[44] DPMC asks that agencies consult the DPMC FOI Coordinator on any Cabinet-related material identified as being within the scope of an FOI request.

5.58 Cabinet notebooks are expressly excluded from the operation of the FOI Act (see definition of 'document' in s 4(1)).

Documents included in exemption

5.59 The Cabinet exemption applies to the following classes of documents:

(a) Cabinet submissions that:

(i) have been submitted to Cabinet; or

(ii) are proposed for submission to Cabinet; or

(iii) were proposed to be submitted but were in fact never submitted and were

[43] See also *Secretary Department of Health and Ageing v iNova Pharmaceuticals (Australia) Pty Limited* [2010] FCA 1442 for discussion of ss 25 and 26 in relation to decisions that do not provide information as to the existence of documents.

[44] Available at www.dpmc.gov.au.

brought into existence for the dominant purpose of submission for the consideration of Cabinet (s 34(1)(a))

(b) official records of the Cabinet (s 34(1)(b))

(c) documents prepared for the dominant purpose of briefing a minister on a Cabinet submission (s 34(1)(c))

(d) drafts of a Cabinet submission, official records of the Cabinet or a briefing prepared for a minister on a Cabinet submission (s 34(1)(d)).

5.60 The exemption also applies to full or partial copies of the categories of documents listed at [5.59] above as well as a document that contains an extract from those categories (s 34(2)).

5.61 Any document containing information which, if disclosed, would reveal Cabinet deliberations or a decision is exempt unless the deliberation or decision has been officially disclosed (s 34(3)). The words 'officially disclosed' are not defined in the FOI Act and should be given their ordinary meaning. A key element is the official character of the disclosure. Disclosure will commonly be as a result of specific authorisation by the Cabinet itself, and may be undertaken by the Prime Minister, the Cabinet Secretary or a responsible minister. An announcement made in confidence to a limited audience is not an official disclosure for this purpose. The AAT has explained that the qualification in s 34(3) does not come into play if the deliberation or decision has been officially disclosed. Rather, it comes into play when the existence of the deliberation or decision has been officially disclosed.[45]

5.62 Agencies should also be aware that there is no requirement to provide access to an edited copy of a document that is exempt under s 34(1). Such a document is exempt because of what it is: a Cabinet submission, an official record of the Cabinet, or one of the other prescribed document types in s 34(1). The edited copy would still be of the same type as the original document, and still exempt.[46] However, the exemptions under ss 34(2) and 34(3) are different. For those exemptions, the document is exempt only 'to the extent that' it satisfies the requirements of the provision. This means that it will often be possible to edit a copy of the document so that access to that edited copy would be required to be given.[47]

Documents excluded from exemption

5.63 There are three exceptions or qualifications to the Cabinet exemption under s 34:

- a document is not exempt merely because it is attached to a Cabinet submission, record or briefing (s 34(4))
- the document by which a Cabinet decision is officially published is not itself

[45] As per Forgie DP in *Secretary, Department of Prime Minister and Cabinet and Secretary, Department of Infrastructure and Regional Development and Sanderson (Party Joined)* [2015] AATA 361 [77]. Disclosing the substance of the deliberation or decision discloses its existence. Disclosure of its existence, however, does not require disclosure of the substance (per *Sanderson* at [77]). A media release can constitute an official disclosure of the existence of Cabinet's deliberations where the media release discloses the 'existence' of Cabinet deliberation (per *Sanderson* at [80]).

[46] *Philip Morris Ltd and Department of Finance* [2014] AICmr 27 [34].

[47] *Philip Morris Ltd and Department of Finance* [2014] AICmr 27 [36].

exempt (s 34(5))

- purely factual material in a Cabinet submission, record or briefing is not exempt unless its disclosure would reveal a Cabinet deliberation or decision and the decision has not been officially disclosed (s 34(6)).

Documents created for the dominant purpose of submission to Cabinet

5.64 To be exempt under s 34(1)(a), a document must have been created for the dominant purpose of being submitted for Cabinet's consideration and must have actually been submitted or have been proposed by a sponsoring minister to be submitted. Documents in this class may be Cabinet submissions or attachments to Cabinet submissions.

5.65 For example, if, at the time a report is brought into existence there was no purpose of submitting it to Cabinet, but it is later decided to submit it to Cabinet, the report will not be covered by s 34(1)(a) because it will not have been brought into existence for the dominant purpose of submission to the Cabinet. It may, however, still be exempt under s 34(3) if its disclosure would reveal a Cabinet deliberation or decision.

5.66 The use of the word 'consideration' rather than 'deliberation' in s 34(1)(a) indicates that the Cabinet exemption extends to a document prepared simply to inform Cabinet, the contents of which are intended merely to be noted by Cabinet.[48]

5.67 Whether a document has been prepared for the dominant purpose of submission to Cabinet is a question of fact. The relevant time for determining the purpose is the time the document was created.[49]

Official record of the Cabinet

5.68 The term 'official record of the Cabinet' in s 34(1)(b) is not defined. The document must be an official record of the Cabinet itself, such as a Cabinet Minute. A document must relate, tell or set down matters concerning Cabinet and its functions in a form that is meant to preserve that relating, telling or setting down for an appreciable time.[50] DPMC asks that agencies consult the DPMC FOI Coordinator when deciding whether a document is an official record of the Cabinet (see [5.57] above).

Cabinet briefings

5.69 A document that is brought into existence for the dominant purpose of briefing a minister on a submission to Cabinet within the meaning of s 34(1)(a) is an exempt document (s 34(1)(c)). The briefing purpose must have been the dominant purpose at the time of the document's creation.

Draft Cabinet documents

5.70 Section 34(1)(d) provides that a draft of a Cabinet submission, an official

---

48 See *Secretary, Department of Prime Minister and Cabinet and Secretary, Department of Infrastructure and Regional Development and Sanderson (Party Joined)* [2015] AATA 361 [54]-[56], citing *Re Toomer and Department of Agriculture, Fisheries and Forestry and Ors* [2003] AATA 1301.

49 *Re Fisse and Secretary, Department of the Treasury* [2008] AATA 288; *Nick Xenophon and Department of Defence* [2016] AICmr 14.

50 *Re Toomer and Department of Agriculture, Fisheries and Forestry and Ors* [2003] AATA 1301.

record of the Cabinet or a Cabinet briefing is exempt.

Copies and extracts

5.71 A document is exempt from disclosure to the extent that it contains a copy or part of or an extract from a document that is, itself, exempt from disclosure for one of the reasons specified in s 34(1) (see s 34(2)). In practice, this means a document that comprises or contains a copy of, part of, or an extract from a Cabinet submission, a Cabinet briefing or an official record of the Cabinet. A copy or extract should be a quotation from, or exact reproduction of, the Cabinet submission, official record of the Cabinet or the Cabinet briefing.

5.72 A document that refers to a Cabinet meeting date or Cabinet document reference number contains an extract from a Cabinet document for the purposes for s 34(2). It may therefore be deleted from an edited copy of the document where this is reasonably practicable (s 22). Although such information is generally not sensitive, s 34 does not require that the decision maker be satisfied that disclosure would cause damage. It is enough that the document in question quotes any information from a document described in s 34(1).[51]

5.73 It is important to note that coordination comments merit special attention. Normal practice is that such comments are drafted separately from the submission to which they relate, by the agencies making the comments. Agencies' coordination comments are then incorporated into the submission which is submitted to Cabinet for consideration. The AAT has held that a document comprising a copy of coordination comments which were later incorporated into a Cabinet submission was exempt under the previous version of s34(2) on the basis that it was an extract from the minister's Cabinet submission.[52]

Documents disclosing a deliberation or decision of Cabinet

5.74 Section 34(3) exempts documents to the extent that their disclosure would reveal any deliberation or decision of the Cabinet unless the existence of the deliberation or decision has been officially disclosed ('officially disclosed' is discussed below at [5.78]).

5.75 'Deliberation' in this context has been interpreted as active debate in Cabinet, or its weighing up of alternatives, with a view to reaching a decision on a matter (but not necessarily arriving at one). In *Re Toomer*, Deputy President Forgie analysed earlier consideration of 'deliberation' and concluded:

> Taking its [Cabinet's] deliberations first, this means that information that is in documentary form and that discloses that Cabinet has considered or discussed a matter, exchanged information about a matter or discussed strategies. In short, its deliberations are its thinking processes, be they directed to gathering information, analysing information or discussing strategies. They remain its deliberations whether or not a decision is reached. [Cabinet's] decisions are its conclusions as to the courses of action that it adopts be they conclusions as to its final strategy on a matter or its

[51] See *Philip Morris Ltd and Department of Finance* [2014] AICmr 27 [54]–[57]; and *Philip Morris Ltd and IP Australia* [2014] AICmr 28 [22].

[52] *Re McKinnon and Department of Prime Minister and Cabinet* [2007] AATA 1969.

conclusions as to the manner in which a matter is to proceed.[53]

Purely factual material

5.76 Section 34(6) provides that, in a document to which ss 34(1), 34(2) or 34(3) applies, information is not exempt if it is purely factual material unless:

(a) the disclosure of the information would reveal any deliberation or decision of the Cabinet, and

(b) the fact of that deliberation or decision has not been officially disclosed.

5.77 Purely factual material includes material such as statistical data, surveys and factual studies. A conclusion involving opinion or judgement is not purely factual material. For example, a projection or prediction of a future event would not usually be considered purely factual.[54]

'Officially disclosed'

5.78 The Cabinet exemption twice refers to a deliberation or decision of the Cabinet being 'officially disclosed': ss 34(3) and 34(6)(b). This can refer to disclosure by an oral as well as a written statement — for example, an oral announcement by a minister about a Cabinet decision.[55] The disclosure may be a general public disclosure (for example, a statement in a consultation paper published on a Departmental website)[56] or a disclosure to a limited audience on the understanding that it is not a confidential communication.[57] The disclosure must be 'official' — for example, authorised by Cabinet or made by a person (such as a minister) acting within the scope of their role or functions.

Documents affecting law enforcement and public safety (s 37)

5.79 This exemption applies to documents which, if released, would or could reasonably be expected to affect law enforcement or public safety in any of the following ways:

- prejudice the conduct of an investigation of a breach, or possible breach, of the law
- prejudice the conduct of an investigation of a failure, or possible failure, to comply with a taxation law
- prejudice the enforcement, or the proper administration, of the law in a particular instance
- reveal the existence or identity of a confidential source of information, or the non-existence of a confidential source of information, in relation to the enforcement or administration of the law

---

53 *Re Toomer and Department of Agriculture, Fisheries and Forestry and Ors* [2003] AATA 1301 [88].

54 'Purely factual matter' and 'deliberative matter' are also referred to in s 47C (see Part 6).

55 The phrase used prior to the 2010 FOI Act amendments was 'officially published'. This was taken to mean publication by a written document in *Re Toomer and Department of Agriculture, Fisheries and Forestry* [2003] AATA 1301 [101].

56 *Philip Morris Ltd and Department of Finance* [2014] AICmr 27 [30].

57 *Re Toomer and Department of Agriculture, Fisheries and Forestry* [2003] AATA 1301 [101].

- endanger the life or physical safety of any person
- prejudice the fair trial of a person, or the impartial adjudication of a particular case
- disclose lawful methods or procedures for investigating, preventing, detecting or dealing with breaches of the law where disclosure of those methods would be reasonably likely to reduce their effectiveness
- prejudice the maintenance or enforcement of lawful methods for the protection of public safety (see ss 37(1)-(2)).

5.80 For the purposes of the exemption, 'law' means a law of the Commonwealth or of a State or a Territory (s 37(3)). It encompasses both criminal and civil law.

5.81 Section 37 concerns the investigative or compliance activities of an agency and the enforcement or administration of the law, including the protection of public safety. It is not concerned with an agency's own obligations to comply with the law. The exemption applies, therefore, where an agency has a function connected with investigating breaches of the law, its enforcement or administration.

5.82 To be exempt under ss 37(1)(a) or 37(1)(b), the document in question should have a connection with the criminal law or the processes of upholding or enforcing civil law or administering a law.[58] This is not confined to court action or court processes, but extends to the work of agencies in administering legislative schemes and requirements, monitoring compliance, and investigating breaches. The exemption does not depend on the nature of the document or the purpose for which it was brought into existence. A document will be exempt if its disclosure would or could reasonably be expected to have one or more of the consequences set out in the categories listed above at [5.79].

5.83 In applying this exemption, a decision maker should examine the circumstances surrounding the creation of the document and the possible consequences of its release. The adverse consequences need not result only from disclosure of a particular document. The decision maker may also consider whether disclosure, in combination with information already available to the applicant, would result in any of the specified consequences.

Withholding information about the existence of documents

5.84 Section 25 permits an agency to give to an FOI applicant a notice that neither confirms nor denies the existence of a document if information as to its existence would, if it were included in a document, make the document exempt under s 37(1) (see [5.50] – [5.53] above).

Reasonable expectation

5.85 In the context of s 37, as elsewhere in the FOI Act, the mere risk or possibility of prejudice to an investigation is not a sufficient basis for a reasonable expectation of prejudice. However, the use of the word 'could' in the reasonable expectation qualification, as distinct from 'would', is less stringent. The reasonable expectation

[58] *Re Gold and Australian Federal Police and National Crime Authority* [1994] AATA 382, citing Young CJ in *Accident Compensation Commission v Croom* (1991) 2 VR 322 324.

refers to activities that might reasonably be expected to have occurred, be presently occurring, or could occur in the future (see [5.16] – [5.19] above).[59]

Investigation of a breach of law

5.86 Section 37(1)(a) applies to documents only where there is a current or pending investigation and release of the document would, or could reasonably be expected to, prejudice the conduct of that investigation. Because of the phrase 'in a particular instance', it is not sufficient that prejudice will occur to other or future investigations: it must relate to the particular investigation at hand.[60] In other words, the exemption does not apply if the prejudice is about investigations in general.

5.87 The exemption is concerned with the conduct of an investigation. For example, it would apply where disclosure would forewarn the applicant about the direction of the investigation, as well as the evidence and resources available to the investigating body — putting the investigation in jeopardy.[61] The section will not apply if the investigation is closed or if it is being conducted by an overseas agency.[62]

5.88 Where the investigation is merely suspended or dormant rather than permanently closed, or where new information may revive an investigation, the Information Commissioner considers the exemption should apply. However, the expectation that an investigation may revive should be more than speculative or theoretical and be supported by evidence.[63]

5.89 Whether prejudice will occur is a question of fact to be determined on the evidence. The fact that a document is relevant to an investigation is not, however, sufficient.

5.90 It is clear from its terms that the exemption in s 37(1)(a) will not apply if disclosure would benefit rather than prejudice an investigation.

Disclosure of a confidential source

5.91 Section 37(1)(b) is intended to protect the identity of a confidential source of information connected with the administration or the enforcement of the law. It is the source, rather than the information, which is confidential. The exemption is not limited to particular instances in the same way as s 37(1)(a).

5.92 The exemption applies where:

- the information in question may enable the agency responsible for enforcing or administering a law to enforce or administer it properly
- the person who supplies that information wishes his or her identity to be known only to those who need to know it for the purpose of enforcing or administering the law[64]

---

59 *Re Maksimovic and Australian Customs Service* [2009] AATA 28.

60 *Re Murtagh and Federal Commissioner of Taxation* [1984] AATA 249.

61 *News Corporation v National Companies and Securities Commission* [1984] 5 FCR 88.

62 *Re Rees and Australian Federal Police* (1999) ALD 686.

63 *Re Doulman and CEO of Customs* [2003] AATA 883 and *Noonan and Australian Securities and Investments Commission* [2000] AATA 495.

64 *Department of Health v Jephcott* (1985) 8 FCR 85.

- the information was supplied on the understanding, express or implied, that the source's identity would remain confidential.

5.93 Where a document contains information known only to a limited number of people and they are known to the confidential source, and/or where the document has identifying features such as handwriting, disclosure is more likely to identify the confidential source.[65]

5.94 Section 37(1)(b) can also apply to protect information which would allow the applicant to ascertain the existence or non-existence (rather than the identity) of a confidential source of information.[66]

5.95 The 'mosaic theory' might apply in some cases (see [5.39] – [5.40] above).[67] That is, the disclosure of the information in question will lead to its being linked to already available information and thus disclose the identity of the confidential source.[68]

5.96 Section 37(2A) confirms that a person is a confidential source of information in relation to the enforcement or administration of the law if that person is receiving or has received, protection under a program conducted under the auspices of the Australian Federal Police, or the police force of a State or Territory. This provision does not limit the operation of s 37(1)(b) in relation to any other persons.[69]

Scope of confidentiality

5.97 Section 37(1)(b) protects the identity of a person who has supplied information on the understanding that their identity would remain confidential. The scope of confidentiality depends on the facts of each case.

5.98 This exemption does not apply if the FOI applicant is aware of the relationship between the agency and the person who supplied the information to the agency, and the applicant is included in the understanding of confidence between the agency and the other person. For example, the exemption did not apply to information disclosed to an agency by an FOI applicant's financial broker who was interviewed by the agency. The applicant was considered to be included in the relationship of confidence between the broker and the agency. The AAT stated that if the applicant was not privy to the confidence, he was entitled to be.[70]

5.99 It is not essential that the confidential source provide the information under an express agreement. Often an implied undertaking of confidentiality can be made out from the circumstances of a particular case.[71] For example, the source may have supplied the information under the reasonable expectation that his or her identity would be kept confidential. In some cases, confidentiality can be inferred from the practice of the agency to receive similar types of information in confidence. Two examples are a telephone hotline set up to receive certain types of information from

---

65 See *'HR' and Department of Immigration and Border Protection* [2015] AICmr 80 [13].

66 *Re Jephcott and Department of Community Services* [1986] AATA 248; *The Sun-Herald Newspaper and the Australian Federal Police* [2014] AICmr 52 [24]

67 For an example, see *Besser and Attorney-General's Department* [2013] AICmr 12.

68 *Re Petroulias and Others v Commissioner of Taxation* [2006] AATA 333.

69 See Explanatory Memorandum to the *Law and Justice Legislation Amendment Bill 1994* at 163.

70 *Re Lander and Australian Taxation Office* [1985] AATA 296.

71 *Department of Health v Jephcott* (1985) 8 FCR 85.

members of the public and expressly promoted as confidential; or information received from a person who could reasonably expect that their identity will not be made known to anyone other than those involved in administering and enforcing the law.[72] Nevertheless, the understanding or representation that information will be received confidentially must not be vague or devoid of context.

5.100 The exemption applies independently of whether it was objectively reasonable or in the public interest for the person to supply information on a confidential basis. It is sufficient that the person supplied the information on the basis that their identity would be confidential.[73]

Enforcement or administration of the law

5.101 The phrase 'the enforcement or the proper administration of the law' is not confined to the enforcement or administration of statutory provisions or of the criminal law. It requires only that a document should have a connection with the criminal law or with the processes of upholding or enforcing civil law.[74]

Disclosure of identity

5.102 There must be a reasonable expectation that the contents of the documents in question will disclose the identity of the confidential source.[75] Where a person's identity is not apparent and the information is so general that it is unlikely to lead to the identification of the source, or it could have come from any one of several sources, this element of the exemption is not satisfied.

5.103 If other disclosures already make it possible to determine who the source is, an agency or minister cannot claim this exemption. This is because the necessary quality of confidence is already lost.[76] On the other hand, the inadvertent or unauthorised leaking of a document does not diminish the quality of confidence attaching to it.[77]

5.104 The identity of a person can sometimes be ascertained from sources other than express mention in the document in question. For example, distinctive handwriting in a handwritten letter, the letterhead or the nature of the information which may only be known to a limited number of people.[78]

Endanger the life or physical safety of any person

5.105 Under s 37(1)(c) a document is exempt if its disclosure would, or could reasonably be expected to, make a person a potential target of violence by another individual or group. That is, whether release of the documents could be expected to create the risk, not whether the documents reflect an existing credible threat.[79] This

---

72 *'X' and Australian Federal Police* [2013] AICmr 40.
73 *Besser and Attorney-General's Department* [2013] AICmr 12.
74 *Re Gold and Australian Federal Police and National Crime Authority* [1994] AATA 382, citing Young CJ in *Accident Compensation Commission* v *Croom* (1991) 2 VR 322, 324.
75 *Re Rees and Australian Federal* Police [1999] AATA 252.
76 *Re Chandra and Minister for Immigration and Ethnic Affairs* [1984] AATA 437.
77 *Re Cullen and Australian Federal Police* [1991] AATA 671.
78 See *'X' and Australian Federal Police* [2013] AICmr 40 [22]; *'HR' and Department of Immigration and Border Protection* [2015] AICmr 80.
79 *'I' and Australian National University* [2012] AICmr 12.

exemption requires a reasonable apprehension of danger which will turn on the facts of each particular case. For example, the disclosure of the name of an officer connected with an investigation about threats made by the applicant will not be sufficient.[80] A reasonable apprehension does not mean the risk has to be substantial, but evidence is necessary. For instance, intemperate language and previous bad behaviour, without more, does not necessarily support a reasonable apprehension.[81]

5.106 Some illustrations of the application of the exemption in the Commonwealth, Queensland and Victoria include the following:

- A reasonable apprehension was shown in *Re Ford and Child Support Registrar*.[82] In this case, a third party gave extensive evidence about her fear if the FOI applicant was given access to documents. The third party had been the main prosecution witness during the FOI applicant's criminal trial for which he was still in jail. She said he had written threatening letters to her and her friends and she was scared of him. The AAT found that there was a real and objective apprehension of harm and upheld the exemption.
- The Queensland Information Commissioner, in considering a similar provision in Queensland's former *Freedom of Information Act 1992*,[83] found that a threat of litigation against a person is not harassment which endangers a person's life or physical safety.[84]
- The exemption was not satisfied under the corresponding provision in the Victorian *Freedom of Information Act 1982,* where evidence was produced that one of several institutions where animal experiments were conducted had received a bomb threat. It was held that danger to lives or physical safety was only considered to be a possibility, not a real chance.[85]

Prejudice to a fair or impartial trial

5.107 A document which, if disclosed would, or could, reasonably be expected to, prejudice the fair trial of a person or the impartial adjudication of a particular case (s 37(2)(a)) is exempt. This aspect of the exemption operates in specific circumstances. It is necessary to identify which persons would be affected. 'Trial' refers to the judicial examination and determination of issues between parties with or without a jury.[86] The term 'prejudice' implies some adverse effect from disclosure. For example, the AAT refused to accept a claim under this section where, on the facts, disclosure of the documents in question to the applicant could have actually facilitated the adjudication of the matter.[87]

---

80 *Re Ervin Lajos Boehm and Department of Industry Technology and Commerce* [1985] AATA 60.

81 *Re Dykstra and Centrelink* [2002] AATA 659. On appeal to the Federal Court, the matter was remitted to the AAT. After considering further evidence, the AAT upheld the exemption (Re *Dykstra and Centrelink* [2003] AATA 202).

82 *Re Ford and Child Support Registrar* [2006] AATA 283.

83 Now replaced by the *Right to Information Act 2009.*

84 *Re Murphy and Queensland Treasury* [1995] QICmr 23.

85 *Re Binnie and Department of Agriculture and Rural Affairs* (1987) VAR 361.

86 See Federal Court of Australia, *Glossary of Legal Terms* http://www.fedcourt.gov.au/attending-court/glossary-of-legal-terms.

87 *Re O'Grady v Australian Federal Police* [1983] AATA 390.

The fact that documents are relevant to a case is not of itself sufficient to justify exemption. Some causal link between the disclosure and the prejudice must be demonstrated.

Prejudice to law enforcement methods and procedures

5.108 Section 37(2)(b) exempts documents which, if released would, or could reasonably be expected to:

- disclose lawful methods or procedures for preventing, detecting, investigating or dealing with matters arising out of breaches of the law
- prejudice the effectiveness of those methods or procedures.

5.109 'Lawful methods and procedures' are not confined to criminal investigations and can, for example, extend to taxation investigations. The exemption focuses on an agency's methods and procedures for dealing with breaches of the law, where disclosure would, or could reasonably be expected to, adversely affect the effectiveness of those methods and procedures.

5.110 The word 'lawful' is intended to exclude unlawful methods and procedures, for example, methods involving illegal telephone interception or entrapment.

5.111 This exemption requires satisfaction of two factors. There must be a reasonable expectation that a document will disclose a method or procedure and a reasonable expectation or a real risk of prejudice to the effectiveness of that investigative method or procedure.[88] If the only result of disclosing the methods would be that those methods were no surprise to anyone, there could be no reasonable expectation of prejudice. However, where a method might be described as 'routine', but the way in which it is employed can reasonably be said to be 'unexpected', disclosure could prejudice the effectiveness of the method.[89]

5.112 The exemption will not apply to routine techniques and procedures that are already well known to the public or documents containing general information. For example, in *Re Russo v Australian Securities Commission*, the AAT rejected a s 37(2)(b) claim about the (then) Australian Securities Commission's method of allocating priorities to matters, with the observation that disclosing such a method is on par with disclosing that the respondent uses pens, pencils, desks, chairs and filing cabinets in the investigation of possible breaches of the Corporations Law.[90] On the other hand, the AAT has held that authoritative knowledge of the particular law enforcement methods used (as opposed to the applicant's suspicion or deduction) would assist endeavours to evade them.[91] Where a method or procedure is legislatively prescribed, disclosure of the document would not disclose the method or procedure as it has already been disclosed by the legislation.[92]

5.113 The exemption may apply to methods and procedures that are neither obvious

---

88 *Re Anderson and Australian Federal Police* [1986] AATA 79.

89 See *Hunt and Australian Federal Police* [2013] AICmr 66.

90 *Re Russo v Australian Securities Commission* [1992] AATA 228.

91 *Re Edelsten and Australian Federal Police* [1985] AATA 350, citing *Re Mickelberg and Australian Federal Police* (1984) 6 ALN N176.

92 *Stephen Waller and Department of Environment* [2014] AICmr 133 [17]-[18].

nor a matter of public notoriety, even if evidence of a particular method or procedure has been given in a proceeding before the courts.[93] For example, the AAT held that disclosure of examples of acceptable reasons for refusing to vote in a compulsory election from the Australian Electoral Commission's internal manual would reasonably be expected to prejudice the effectiveness of law enforcement procedures because people who failed to vote would be able to circumvent the procedures by submitting one of the acceptable reasons.[94] The exemption is more likely to apply where disclosure of a document would disclose covert, as opposed to overt or routine methods or procedures.[95]

Protection of public safety

5.114 Section 37(2)(c) exempts documents if disclosure would prejudice the maintenance or enforcement of lawful methods for the protection of public safety.

5.115 The terms 'lawful' and 'prejudice' apply to s 37(2)(c) in the same manner as described for s 37(2)(b) at [5.108] – [5.113] above.

5.116 The words 'public safety' do not extend beyond safety from violations of the law and breaches of the peace.[96] The AAT has observed that 'public safety' should not be confined to any particular situation, such as civil emergencies (bushfires, floods and the like) or court cases involving the enforcement of the law. The AAT also noted that considerations of public safety and lawful methods will be given much wider scope in times of war than in times of peace.[97]

5.117 *Re Hocking and Department of Defence* provides an example of the operation of s 37(2)(c).[98] The applicant was denied access to a portion of an army manual dealing with the tactical response to terrorism and to Army procedures to meet requests for assistance in dealing with terrorism because if the relevant section of the manual were made public, there would be a significant risk to the security of the Commonwealth.[99]

Documents to which secrecy provisions apply (s 38)

5.118 A document is exempt if its disclosure is prohibited under a provision of another Act (s 38(1)(a)) and either:

- that provision is specified in Schedule 3 to the FOI Act (s 38(1)(b)(i)), or
- s 38 prohibits disclosure of the document or information contained in the document, where s 38 is expressly applied to the document, or information by that provision, or by another provision of that or other legislation (s 38(1)(b)(ii)).

5.119 Section 38 is intended to preserve the operation of specific secrecy provisions in other legislation, including in cases where no other exemption or conditional exemption

93 *Re T and Queensland Health* (1994) 1 QAR 386.
94 *Re Murphy and Australian Electoral Commission* [1994] AATA 149.
95 *Re Anderson and Australian Federal Police* [1986] AATA 79.
96 *Re Thies and Department of Aviation* [1986] AATA 141.
97 *Re Parisi and Australian Federal Police* (*Qld*) [1987] AATA 395.
98 *Re Hocking and Department of Defence* [1987] AATA 602.
99 *Re Hocking and Department of Defence* [1987] AATA 602.

is available under the FOI Act. The primary purpose of secrecy provisions in legislation is to prohibit unauthorised disclosure of client information. Most secrecy provisions allow disclosure in certain circumstances, such as with the applicant's consent where the information relates to them, or where it is in the course of an officer's duty or performance of duties, or exercise of powers or functions, to disclose the information.

5.120 The effect of s 38(1A) is to limit the use of s 38 to the terms of the particular secrecy provision involved, and the exemption is only available to the extent that the secrecy provision prohibits disclosure.[100] Contrary to normal FOI practice, a decision maker contemplating an exemption under s 38 must consider the identity of the FOI applicant in relation to the document. This is because s 38(1A) permits disclosure of a document in cases where the prescribed secrecy provision does not prohibit disclosure to that person.[101]

5.121 Section 38 does not apply to documents in so far as they contain personal information about the applicant (s 38(2)). The exception applies only to personal information about the applicant and not to 'mixed personal information', that is, personal information about the applicant which, if disclosed, would also reveal personal information about another individual. If the FOI applicant's information can be separated from any third party personal information, the FOI applicant's information will not be exempt under s 38(1) and can be disclosed. The decision maker may consider providing access to an edited copy (s 22).

5.122 Section 38(3) contains a limited exception to s 38(2). Section 38 continues to apply in relation to a person's own personal information where that person requests access to a document of which the disclosure is prohibited under s 503A of the *Migration Act 1958*, as affected by s 503D of that Act.

5.123 A number of secrecy provisions allow disclosure where it is in the course of an officer's duty or performance of duties, or exercise of powers or functions. What is in the course of an officer's duties should be interpreted broadly as to any routine disclosures that may be linked to those duties or functions[102] but would generally not encompass the release of information under the FOI Act.

5.124 For example, in *Walker and Secretary, Department of Health (Freedom of information)* [2015] AATA 606 the AAT considered the application of s 38 to information relating to the status of medical General Practitioners. Subject to certain exceptions, subsection 130(1) of the *Health Insurance Act 1973* prohibits disclosure of information acquired in the performance or exercise of powers or functions under the Act. Subsection 130(1) of the *Health Insurance Act 1973* is listed in Schedule 3 of the FOI Act as a secrecy provision. The AAT explained that 38(1) makes the information exempt and 'no further enquiry is required or permissible'.[103]

5.125 Similarly, s 355-25 of Schedule 1 to the *Tax Administration Act 1953*, makes it an offence for a taxation officer to record or disclose 'protected information'. 'Protected

---

100 *NAAO v Secretary, Department of Immigration and Multicultural Affairs* (2002) 117 FCR 401.

101 *Re Young and Commissioner of Taxation* [2008] AATA 155; see also '*A' and Department of Health and Ageing* [2011] AICmr 4, 13–16.

102 *Canadian Pacific Tobacco Co Ltd v Stapleton* (1952) 86 CLR 1.

103 *Walker and Secretary, Department of Health (Freedom of information)* [2015] AATA 606 [32]. Constance DP did not accept Dr Walker's arguments that she must assess the information contained in the proposed document to determine whether it is exempt information.

information' is information relating to and identifying an entity acquired for a taxation law purpose. The effect of this tax provision on a request for documents is to make a document containing the protected information of a person or entity other than the person making the request, an exempt document under s 38.

Documents subject to legal professional privilege (s 42)

5.126 Section 42(1) exempts a document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege (LPP).

5.127 The FOI Act does not define LPP for the purposes of the exemption. To determine the application of this exemption, the decision maker needs to turn to common law concepts of LPP. The statutory test of client legal privilege under the *Evidence Act 1995* is not applicable and should not be taken into account.[104] It is important that each aspect of the privilege, as discussed below, be addressed in the decision maker's statement of reasons.

Whether a document attracts legal professional privilege

5.128 LPP applies to some but not all communications between legal advisers and clients. The underlying policy basis for LPP is to promote the full and frank disclosure between a lawyer and client to the benefit of the effective administration of justice. It is the purpose of the communication that is determinative.[105] The information in a document is relevant and may assist in determining the purpose of the communication, but the information in itself is not determinative.

5.129 At common law, determining whether a communication is privileged requires a consideration of:

- whether there is a legal adviser-client relationship
- whether the communication was for the purpose of giving or receiving legal advice, or use in connection with actual or anticipated litigation
- whether the advice given is independent
- whether the advice given is confidential.[106]

Legal adviser-client relationship, independence and in house lawyers

5.130 A legal adviser-client relationship exists where a client retains the services of a lawyer for the purposes of obtaining professional advice. The existence of the relationship is usually straightforward to establish where advice is received from an independent external legal adviser. A typical example in a government context is advice received by an agency from a law firm that is on an authorised list of panel firms (including the Australian Government Solicitor).

---

104 *Commonwealth of Australia v Dutton* (2000) 102 FCR 168.

105 *Mann v Carnell* as restated in *Comcare v Foster* (2006) 42 AAR 434.

106 *Grant v Downs* (1976) 135 CLR 674; *Waterford v Commonwealth of Australia* (1987) 163 CLR 54. For examples of the application of these considerations see *Hamden and Department of Human Services* [2013] AICmr 41; *'AF' and Department of Immigration and Citizenship* [2013] AICmr 54 and *Rudd and Civil Aviation Safety Authority* [2013] AICmr 56.

5.131 A legal adviser-client relationship can exist but may not be as readily established when advice is received from a lawyer who works within the agency, whether as an ongoing staff member of the agency or as a lawyer contracted to work within the agency to provide advice. Whether a true adviser-client relationship exists will be a question of fact to be determined on the circumstances applying to the particular advice that was given. That is, there may be a privileged relationship applying to some but not all advice. The following factors are relevant to establishing whether a legal adviser-client relationship exists:

- the legal adviser must be acting in his/her capacity as a professional legal adviser
- the giving of the advice must be attended by the necessary degree of independence[107]
- the dominant purpose test must be satisfied
- the advice must be confidential
- the fact that the advice arose out of a statutory duty does not preclude the privilege from applying[108]
- whether the lawyer is subject to professional standards can be relevant.[109]

5.132 An in-house lawyer has the necessary degree of independence so long as their personal loyalties, duties or interests do not influence the professional legal advice they give.[110]

5.133 Having legal qualifications will not suffice in itself to establish that a privileged adviser-client relationship exists. The authorities to date prefer the view that whether an adviser holds a practising certificate is a relevant but not a decisive factor.[111] Alternatively, a right to practise may be conferred by an Act (for example, ss 55B and 55E of the *Judiciary Act 1903*).

5.134 In the AAT case of *Ransley and Commissioner of Taxation (Freedom of information)* [2015] AATA 728, Tamberlin DP summarised the principles set out above at [5.131] and discussed that 'communications and information between an agency and its qualified legal advisers for the purpose of giving or receiving advice will be privileged whether the legal advisers are salaried officers [or not], provided that they are consulted in a professional capacity in relation to a professional matter and the communications arise from the relationship of lawyer client. There is no requirement that an in-house lawyer hold a practicing certificate provided that the

---

107 Generally, LPP may be claimed in legal proceedings in relation to advice sought from and given by an in-house lawyer, where the professional relationship between the lawyer and the agency seeking advice has the necessary quality of independence, see *Taggart and Civil Aviation Safety Authority (Freedom of information)* [2016] AATA 327 [32].

108 *Waterford v Commonwealth of Australia* (1987) 163 CLR 54.

109 *Re Proudfoot and Human Rights and Equal Opportunity Commission* [1992] AATA 317 which restates the principles of *Waterford v Commonwealth of Australia* (1987) 163 CLR 54.

110 *Aquila Coal Pty Ltd v Bowen Central Coal Pty Ltd* [2013] QSC 82 [10], referring to *Telstra Corporation Ltd v Minister for Communications, Information Technology and the Arts (No 2)* [2007] FCA 1445 [35].

111 *Aquila Coal Pty Ltd v Bowen Central Coal Pty Ltd* [2013] QSC 82 [23]. See also *Re McKinnon and Department of Foreign Affairs* [2004] AATA 1365, referring to *Australian Hospital Care Pty Ltd v Duggan* [1999] VSC 134. Note a contrary ruling by Crispin J in *Vance v McCormack and the Commonwealth* [2004] ACTSC 78, reversed on appeal but on a different point.

employee is acting independently in giving the advice.'[112]

5.135 For the purpose of the privilege, 'advice' extends to professional advice as to what a party should prudently or sensibly do in the relevant legal context.[113] However, it does not apply to internal communication that is a routine part of an agency's administrative functions. The communication must relate to activities generally regarded as falling within a lawyer's professional functions.

For the dominant purpose of giving or receiving legal advice, or use in actual or anticipated litigation

5.136 Whether LPP attaches to a document depends on the purpose for which the communication in the document was created. The High Court has confirmed that the common law requires a dominant purpose test rather than a sole purpose test.[114] The communication may have been brought into existence for more than one purpose but will be privileged if the main purpose of its creation was for giving or receiving legal advice or for use in actual or anticipated litigation.

Legal advice privilege

5.137 The AAT has observed that a broad approach is to be taken as to what is included in the scope of the privilege; and the obligation of the lawyer to advise, once retained, is pervasive' and that it would be rarely that one could, in any particular case with a degree of confidence, say that communication between client and lawyer, where there is a retainer requiring legal advice and the directing of the legal advice, was not connected with the provision or requesting of legal advice.[115]

5.138 The concept of legal advice, while broad, does not extend to advice that is purely commercial or of a public relations character.[116]

Litigation privilege

5.139 Litigation is 'anticipated' where there is 'a real prospect of litigation, as distinct from a mere possibility, but it does not have to be more likely than not'.[117]

5.140 The question of whether litigation privilege extends beyond the Courts to include Tribunals is unsettled.[118]

---

112 *Ransley and Commissioner of Taxation (Freedom of information)* [2015] AATA 728 [13].

113 *AWB Limited v Cole* (2006) 235 ALR 307.

114 *Esso Australia Resources Ltd v Commissioner for Taxation* (1999) 201 CLR 49.

115 As per Tamberlin DP QC in *Ransley and Commissioner of Taxation (Freedom of information)* [2015] AATA 728 [14].

116 *College of Law Limited v Australian National University* [2013] FCA 492 [23], summarising principles set out by various authorities including: *Mann v Carnell* [1999] HCA 66; (1999) 201 CLR 1; *Bennett v Chief Executive Officer, Australian Customs Service* [2004] FCAFC 237; (2004) 140 FCR 101; *AWB Limited v Cole (No 5)* [2006] FCA 1234; (2006) 155 FCR 30; *Osland v Secretary, Department of Justice* [2008] HCA 37; (2008) 234 CLR 275; *British American Tobacco Australia Ltd v Secretary, Department of Health and Ageing* [2011] FCAFC 107; (2011) 195 FCR 123 and *Cooper v Hobbs* [2013] NSWCA 70.

117 *Mitsubishi Electric Australia Pty Ltd v Victorian WorkCover Authority* [2002] VSCA 59 [17]–[20]; *Visy Industries Holdings Pty Limited v Australian Competition and Consumer Commission* (2007) 161 FCR 122 [30].

118 In *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd* [2006] NSWSC 530, Bergin J held that litigation privilege did not apply in the AAT because AAT proceedings are not adversarial. In *'GF'*

The scope of a claim of legal professional privilege over a document

5.141 In light of recent AAT authority, the Information Commissioner recommends that agencies and ministers consider whether or not the entire contents of a document meets the dominant purpose test, and where not, and reasonably practicable to do so consider giving the applicant access to non-substantive material that is not of itself privileged while remaining mindful of the consequence of unintended waiver of privilege (see below at [5.144] – [5.149]).[119] In considering whether it is reasonably practicable to prepare an edited copy of a privileged document under s 22 of the FOI Act so the edited document would not disclose exempt material, the decision maker should consider whether editing would leave only a skeleton of the former document that would convey little content or substance. In which case, the purpose of the FOI Act may not be served by disclosing an edited copy and the document should be exempted in full (see Part 3).

Confidentiality

5.142 LPP does not apply to a communication that is not confidential — that is, known only to the client or to a select class of persons with a common interest in the matter.

5.143 LPP can extend to documents containing information that is on the public record if disclosure would reveal confidential communications made for the dominant purpose of giving or receiving legal advice on the various issues covered by those documents.[120]

Waiver of privilege

5.144 Section 42(2) confirms that a document is not exempt if the person entitled to claim LPP waives the privilege.

5.145 LPP is the client's privilege to assert or to waive, and the legal adviser cannot waive it except with the authority of the client.[121] In the context of an FOI request, the agency receiving the advice will usually be the 'client' agency that will need to decide whether to assert or waive LPP. If the privilege is asserted, that agency will need to provide evidence to establish that the document is exempt from disclosure under s 42. This will be so even if the relevant FOI request is made to a different agency.

5.146 Waiver of privilege may be express or implied. For example, privilege may be waived in circumstances where:

- the communication in question has been widely distributed,
- the content of the legal advice in question has been disclosed or
- a person has publicly announced their reliance on the legal advice in question in a manner that discloses the substance of the legal advice.

---

and Department of the Treasury [2015] AICmr 47 [19], the Privacy Commissioner did not accept that proceedings in the Superannuation Complaints Tribunal could attract litigation privilege.

119 In *Taggart and Civil Aviation Safety Authority (Freedom of information)* [2016] AATA 327, Forgie DP decided that additional material that was not the substantive content of privileged emails, such as the email subject line, address block, salutation, classification, closing words and signature block was not privileged material and therefore not exempt under s 42.

120 *Comcare v Foster* (2006) 150 FCR 301.

121 *Re Haneef and the Australian Federal Police* [2009] AATA 51, citing *Mann v Carnell* (1999) 201 CLR 1.

5.147 The High Court has held that waiver of LPP will occur where the earlier disclosure is inconsistent with the confidentiality protected by the privilege.[122] This inconsistency test has been more recently affirmed by the High Court as the appropriate test for determining whether privilege has been waived.[123] It is immaterial that the client did not intend to waive privilege.

5.148 Not all disclosures to a wider group necessarily imply a waiver. If the document has been disclosed to a limited audience with a mutual interest in the contents of the document, it may not be inconsistent to continue to claim that the document is confidential and privileged. Modern organisations often work in teams and several people may need to know about privileged communications, both in the requesting client organisation and in the firm of legal advisers. Similarly, a limited disclosure of the existence and the effect of legal advice could be consistent with maintaining confidentiality in the actual terms of the advice. Whether the disclosure is inconsistent with maintaining confidentiality will depend on the circumstances of the case.[124] The *Legal Services Directions 2005* issued by the Attorney-General require legal advices obtained by Australian Government agencies to be shared in particular circumstances, and complying with this requirement does not waive privilege.[125] The Legal Services Directions are available at www.ag.gov.au.

5.149 The Information Commissioner suggests that agencies should take special care in dealing with documents for which they may wish to claim LPP to avoid unintentionally waiving that privilege.

The 'real harm' test

5.150 Agencies are advised not to claim exemption for a document under s 42 unless it is considered that 'real harm' would result from releasing the document. A 'real harm' criterion is not an element of the common law doctrine of LPP, but has been acknowledged within government as a relevant discretionary test to apply in FOI administration.[126] The phrase 'real harm' distinguishes between substantial prejudice to the agency's affairs and mere irritation, embarrassment or inconvenience to the agency.

5.151 An agency's decision on the 'real harm' criterion is not an issue that can be addressed in an IC review for the reason that the Information Commissioner cannot decide that access is to be given to a document, so far as it contains exempt matter.[127]

Copies or summary records

5.152 Records made by officers of an agency summarising communications which are themselves privileged also attract the privilege. Privilege may also attach to a copy of an unprivileged document if the copy was made for the dominant purpose of

---

122 *Mann v Carnell* (1999) 201 CLR 1.

123 *Osland v Secretary to the Department of Justice* [2008] HCA 37.

124 *Osland v Secretary to the Department of Justice* [2008] HCA 37; *Doney and Department of Finance and Deregulation* [2012] AICmr 25.

125 *Judiciary Act 1903* s 55ZH(4).

126 This view is in line with the advisory notice issued by the then Secretary of the Attorney-General's Department dated 2 March 1986 (the 'Brazil Direction'), following a Cabinet decision in June 1985.

127 Section 55L(2) of the FOI Act.

obtaining legal advice or for use in legal proceedings.[128]

Exception for operational information

5.153 A document is not exempt under s 42(1) by reason only of the inclusion in that document of operational information of an agency (s 42(3)).

5.154 Agencies must publish their operational information under the information publication scheme established by Part II, s 8 of the FOI Act. 'Operational information' is information held by an agency to assist the agency to perform or exercise its functions or powers in making decisions or recommendations affecting members of the public or any particular person or entity or class of persons or entities (s 8A). A document is not operational information if it is legal advice prepared for a specific case and not for wider or general use in the agency.[129] For further information about the definition of 'operational information' see Part 13.

Documents containing material obtained in confidence (s 45)

5.155 Section 45(1) provides that a document is an exempt document if its disclosure would found an action by a person (other than an agency or the Commonwealth) for breach of confidence. In other words, the exemption is available where the person who provided the confidential information would be able to bring an action under the general law for breach of confidence to prevent disclosure, or to seek compensation for loss or damage arising from disclosure.[130]

5.156 The exemption in s 45(1) does not apply to a document that is conditionally exempt under s 47C(1) (deliberative matter), or would be conditionally exempt but for s 47C(2) or 47C(3) and that is prepared by a minister, ministerial staff or agency officers unless the obligation of confidence is owed to persons other than the minister, ministerial staff or agency officers. For more information about the s 47C conditional exemption see Part 6.

5.157 The exemption operates as a separate and independent protection for confidential relationships which may, but need not necessarily, also fall within the scope of other specific exemptions, for example, ss 47F (personal privacy) and 47G (business documents).[131]

Breach of confidence

5.158 A breach of confidence is the failure of a recipient to keep confidential, information which has been communicated in circumstances giving rise to an obligation of confidence.[132] The FOI Act expressly preserves confidentiality where

---

128 *Re Haneef and Australian Federal Police and Commonwealth Director of Public Prosecutions* [2010] AATA 514.

129 See *'AL' and Department of Defence* [2013] AICmr 72 [33]–[36] and *Hamden and Department of Human Services* [2013] AICmr 41 [19]–[21].

130 See the Explanatory Memorandum, *Freedom of Information Bill 1992*; *Re Kamminga and Australian National University* [1992] AATA 84; dissenting judgment of Gummow J in *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434 [443].

131 See the Explanatory Memorandum, *Freedom of Information Bill 1981.*

132 *Coco v AN Clark (Engineers) Ltd* (1969) 86 RPC 41.

that confidentiality would be actionable at common law or in equity.[133]

5.159 To found an action for breach of confidence (which means s 45 would apply), the following five criteria must be satisfied in relation to the information:

- it must be specifically identified
- it must have the necessary quality of confidentiality
- it must have been communicated and received on the basis of a mutual understanding of confidence
- it must have been disclosed or threatened to be disclosed, without authority
- unauthorised disclosure of the information has or will cause detriment.[134]

5.160 A breach of confidence will not arise, and the exemption will not apply, if the information to be disclosed is an 'iniquity' in the sense of a crime, civil wrong, or serious misdeed of public importance which ought to be disclosed to a third party with a real and direct interest in redressing such crime, wrong, or misdeed.[135]

Specifically identified

5.161 The alleged confidential information must be identified specifically. It is not sufficient for the information to be identified in global terms.[136]

Quality of confidentiality

5.162 For the information to have the quality of confidentiality it must be secret or only known to a limited group. Information that is common knowledge or in the public domain will not have the quality of confidentiality.[137] For example, information that is provided to an agency and copied to other organisations on a non-confidential or open basis may not be considered confidential.

5.163 The quality of confidentiality may be lost over time if confidentiality is waived or the information enters the public domain. This can occur if the person whose confidential information it is discloses it. The obligation of confidence may also only relate to a limited time period.

Mutual understanding of confidence

5.164 The information must have been communicated and received on the basis of a mutual understanding of confidence. In other words, the agency needs to have understood and accepted an obligation of confidence.[138] The mutual understanding

---

133 *Re Petroulias and Others and Commissioner of Taxation* [2006] AATA 333.

134 *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434 [443] referring to *Commonwealth v John Fairfax & Sons Ltd* (1980) 32 ALR 485. For examples of the application of these criteria see *Australian Broadcasting Corporation and Commonwealth Ombudsman* [2012] AICmr 11; *'B' and Department of Immigration and Citizenship* [2013] AICmr 9; *ACP Magazines Limited and IP Australia* [2013] AICmr 20; *Upper Dumaresq Action Group and Australian Competition and Consumer Commission* [2013] AICmr 47; and *'AF' and Department of Immigration and Citizenship* [2013] AICmr 54.

135 *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434.

136 *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434.

137 *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434.

138 *Re Harts Pty Ltd and Tax Agents' Board (Qld)* [1994] AATA 349.

must have existed at the time of the communication. The most obvious example is a contractual obligation of confidence. Confidence may arise in other circumstances. For example, when a person gives information to an agency they may ask that it be kept confidential and the agency could accept the information on that basis.

5.165 A mutual understanding of confidence can exist even if a person is legally obliged to provide the information to the agency.[139] On the other hand, if an agency has a statutory obligation to publish or release specified information, that obligation will outweigh any undertaking by the agency to treat the information confidentially, and therefore any mutual understanding of confidence.[140]

5.166 It may be clear from an agency's actions whether the agency accepted an obligation of confidence and is maintaining that obligation.[141] For example, an agency may mark a document as confidential, keep it separate from documents that are not confidential and ensure that the material is not disclosed to third parties without consent.

5.167 An obligation of confidentiality may be express or implied.[142] An express mutual understanding may occur where the person providing the information asks the agency to keep the information confidential and the agency assures them that they will. Agency practices may illustrate how an implied mutual understanding may arise. For example, if an agency has policies and procedures in place for dealing with commercial-in-confidence information and those policies and procedures are known by the business community, it may be implied that when a business provides such information to that agency it will be on the basis of confidentiality.[143]

Unauthorised disclosure or threatened disclosure

5.168 The information must have been or been threatened to be disclosed without authority. The scope of the confidential relationship will often need to be considered to ascertain whether disclosure is authorised.

5.169 For example, the agency may have told the person providing the information about the people to whom the agency would usually disclose such information. The law may require disclosure to third parties in the performance of an agency's functions, which will amount to authorised use and/or disclosure. Similarly, a person providing confidential information to an agency may specifically permit the agency to divulge the information to a limited group.

5.170 Compliance with a statutory requirement for disclosure of confidential information will not amount to an unauthorised use and will not breach confidentiality.[144]

---

139 *National Australia Bank Ltd and Australian Competition and Consumer Commission* [2013] AICmr 84 [23].

140 *Maritime Union of Australia and Department of Infrastructure and Regional Development* [2014] AICmr 35 [28]–[40].

141 *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434.

142 See *Re Bunting and Minister Immigration and Multicultural and Indigenous Affairs* [2006] AATA 145.

143 See *Re Bunting and Minister Immigration and Multicultural and Indigenous Affairs* [2006] AATA 145; *Re Minter Ellison and Australian Customs Service* [1989] AATA 66.

144 *Re Drabsch and Collector of Customs and Anor* [1990] AATA 265.

Detriment

5.171 The fifth element for a breach of confidence action is that unauthorised disclosure of the information has, or will, cause detriment to the person who provided the confidential information.[145] Detriment takes many forms, such as threat to health or safety, financial loss, embarrassment, exposure to ridicule or public criticism. The last three are applicable only to private persons and entities, but not to government.

5.172 The AAT has applied this element in numerous cases, but whether it must be established is uncertain.[146] The uncertainty arises because of an argument that an equitable breach of confidence operates upon the conscience (to respect the confidence) and not on the basis of damage caused.[147] Despite the uncertainty, it would be prudent to assume that establishing detriment is necessary.[148]

Parliamentary Budget Office documents (s 45A)

5.173 While both the Parliamentary Budget Officer and the Parliamentary Budget Office (PBO) are exempt agencies under the FOI Act (s 7(1) and Division 1 of Part I of Schedule 2, and s 68A of the *Parliamentary Service Act 1999* (PS Act)), documents related to PBO requests may be held by other agencies. The PBO exemption in s 45A is designed to protect the confidentiality of requests made by Senators and Members of the House of Representatives in relation to the budget or for policy costings outside of the caretaker period of a general election.

Documents included in exemption

5.174 The PBO exemption applies to documents that:

(a) originate from the Parliamentary Budget Officer or the PBO and the document was prepared in response to, or otherwise relates to, a confidential request (s 45A(1)(a))

(b) are brought into existence for the dominant purpose of providing information to the Parliamentary Budget Officer or the PBO in relation to a confidential request (s 45A(1)(b))

(c) are provided to the Parliamentary Budget Officer or the PBO in response to a request for more information in relation to a confidential request (s 45A(1)(c))

(d) are drafts of any of the above type of documents (s 45A(1)(d)).

5.175 The exemption also applies to a full or partial copy of a document of a category listed at [5.174] above, as well as a document that contains an extract from a document of such a category (s 45A(2)). Like the exemption applying to Cabinet documents, documents exempt under s 45A(1) are not subject to s 22. That is, there is no requirement to provide access to an edited copy (see 5.62).

---

145 *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434 [443] referring to *Commonwealth v John Fairfax & Sons Ltd* (1980) 32 ALR 485.

146 *Re Callejo and Department of Immigration and Citizenship* [2010] AATA 244; *Petroulias and Others and Commissioner of Taxation* [2006] AATA 333.

147 *Re Callejo and Department of Immigration and Citizenship* [2010] AATA 244 discussing *Smith Kline & French Laboratories (Aust) Limited v Department of Community Services & Health* (1989) 89 ALR 366.

148 *Re B and Brisbane North Regional Health Authority* (1994) 1 QAR 279.

5.176 A confidential request is defined in s 45A(8) to be a request made by a Senator or Member under s 64E(1)(a) or (c) of the PS Act that includes a direction to treat the request or any other information relating to the request as confidential. This includes confidential requests to prepare a costing of a policy or a proposed policy under s 64H of the PS Act and confidential requests for information relating to the budget under s 64M of the PS Act.

5.177 Any document containing information which, if disclosed, would reveal that a confidential request has been made is exempt unless the confidential request has been disclosed by the Senator or Member who made the request (s 45A(3)).

Documents excluded from exemption

5.178 There are four exceptions or qualifications to the general PBO document exemption rules:

- a document is not exempt merely because it is attached to a document that would be covered by the exemption (s 45A(4))
- information that has been made publicly available by the Parliamentary Budget Officer in accordance with the PS Act is not exempt (s 45A(5))
- a document is not exempt if the information has been made publicly available by the Senator or Member who made the confidential request to which the document relates (s 45A(6))
- information in PBO documents which is purely factual material is not exempt unless its disclosure would reveal the existence of a confidential request and the existence of the confidential request has not been disclosed by the Senator or Member (s 45A(7)).

5.179 The exemption applies to documents prepared by agencies for the 'dominant purpose' of providing information to the PBO relating to a confidential request. It does not apply to documents prepared or held by those agencies in the ordinary course of their business or activities. Agencies are reminded of their obligations under the *Australian Government Protocols Governing the Engagement between Commonwealth Bodies and the Parliamentary Budget Officer (Protocols) and the Memorandum of Understanding (MOU) between the Parliamentary Budget Office and the Heads of Commonwealth Bodies in relation to the Provision of Information and Documents*.[149]

Withholding information about the existence of documents

5.180 Section 25 permits an agency to give to an FOI applicant a notice that neither confirms nor denies the existence of a document if information as to its existence would, if it were included in a document, make the document exempt under s 45A (see [5.50] – [5.53] above).

Documents whose disclosure would be in contempt of the Parliament or in contempt of court (s 46)

[149] Available at www.finance.gov.au.

5.181 Section 46 provides that a document is exempt if public disclosure of the document would, apart from the FOI Act and any immunity of the Crown:

(a) be in contempt of court

(b) be contrary to an order or direction by a Royal Commission or by a tribunal or other person or body having power to take evidence on oath

(c) infringe the privileges of the Parliament of the Commonwealth or a State, or of a House of such a Parliament or of the Legislative Assembly of the Northern Territory.

5.182 Both the Parliament and courts have powers to regulate their own proceedings which have traditionally been regarded as a necessary incident to their functions as organs of the state. The protection of the privileges of Parliament and the law of contempt of court are designed to allow these institutions to regulate their proceedings and to operate effectively without interference or obstruction. Over the years Royal Commissions and tribunals have assumed similar but more limited powers.

5.183 This provision takes its scope from the principles of privilege and the general law of contempt of court. While these powers have a wide application, FOI decision makers will usually encounter them in connection with the disclosure of documents that may have been prepared for or are relevant to parliamentary or court proceedings.

Apart from this Act

5.184 The effect of the words 'apart from this Act and any immunity of the Crown' is to preserve the principles of parliamentary privilege and the law of contempt of court within the operation of the FOI Act. This is achieved by ensuring that the grounds for exemption (that is if disclosure of a document would have any of the effects in ss 46(a)-(c) may be met not withstanding that there may be protection from certain actions under the FOI Act (see ss 90–92), or under the protections afforded by the common law to the immunities of the Crown.

Contempt of court

5.185 A contempt of court is an action which interferes with the due administration of justice. It includes, but is not limited to, a deliberate breach of a court order. Other actions that have been found to be contempt of court include an attempt to put improper pressure on a party to court proceedings[150] or prejudging the results of proceedings, failing to produce documents as ordered by a court or destroying documents that are likely to be required for proceedings.[151]

5.186 Documents protected under s 46(a) include documents which are protected by the courts as part of their power to regulate their own proceedings. For example, a court may prohibit or limit publication of the names of parties or witnesses in litigation, or statements and evidence presented to the court. Because public disclosure of such documents would be a contempt of court, the documents would be exempt.

---

[150] *Attorney-General v Times Newspapers Ltd* [1973] 3 All ER 54 in which an article criticising the small size of an offer of settlement of a negligence claim was found to be in contempt because it improperly applied pressure to induce a litigant to settle.

[151] For further information on contempt of court see AGS Legal Briefing # 56, available at www.ags.gov.au.

Contrary to an order or direction

5.187 Documents protected by s 46(b) are documents subject to an order prohibiting their publication, made by a Royal Commission, tribunal or other body having power to take evidence on oath. Royal Commissions are established for a fixed time period. However any confidentiality orders continue in effect past this period.[152]

Infringe the privileges of Parliament

5.188 The term 'parliamentary privilege' refers to the privileges or immunities of the Houses of the Parliament and the powers of the Houses to protect the integrity of their processes.[153]

5.189 Section 49 of the Australian Constitution gives the Australian Parliament the power to declare the 'powers, privileges and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House', and provides for the powers, privileges and immunities of the UK House of Commons to apply until a declaration by the Australian Parliament. The *Parliamentary Privileges Act 1987* (the Privileges Act) is such a law, addressing some (but not all) aspects of parliamentary privilege as it applies to the Commonwealth Parliament.

5.190 Section 50 of the Australian Constitution provides that each House of the Parliament may make rules and orders with respect to the mode in which its powers, privileges and immunities may be exercised and upheld. The rules and orders most relevant to FOI decision makers are those which restrict publication or restrict publication without authority. Publication contrary to such rules may amount to an infringement of privilege, providing a basis for claiming the exemption under s 46(c).[154]

5.191 Section 4 of the Parliamentary Privileges Act 1987 contains what amounts to a definition of 'contempt of Parliament':

> Conduct (including the use of words) does not constitute an offence against a House unless it amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member.

5.192 Accordingly, conduct that improperly interferes with the free exercise by a House of Parliament of its authority or functions, such as the contravention of a rule or order of a House of Parliament, may constitute contempt of the Parliament and infringe the privileges of the Parliament.

5.193 For s 46(c) to apply where there is no rule or order preventing publication, there must be a close connection between a document and some parliamentary purpose to which it relates which could be prejudiced by disclosure. Section 46(c) is concerned with circumstances where information provided to a House or committee of Parliament has been disclosed without authority or the disclosure otherwise improperly interferes with

---

152 *Re KJ Aldred and Department of Prime Minister and Cabinet* [1989] AATA 148.

153 See Senate Brief No 11, available at www.aph.gov.au.

154 See *Seven Network (Operations) Limited and Australian Federal Police (Freedom of information)* [2019] AICmr 32.

a member of Parliament's free performance of his or her duties as a member.

5.194 Disclosure of briefings to assist ministers in parliament — namely, question time briefs or possible parliamentary questions — would not ordinarily be expected to breach a privilege of Parliament. A document of this kind, while prepared for a minister to assist him or her in responding to potential questions raised in Parliament, is nevertheless an executive document. Unless some clear prejudice to parliamentary proceedings can be demonstrated, s 46(c) should not be claimed for briefings of this kind. Depending on the content of the briefings, other exemptions may apply.

5.195 When assessing documents that may be exempt for a limited time — for example, until a parliamentary committee either publishes or authorises publication of documentary evidence — a decision maker should consider deferring access under s 21(1)(b). For further guidance on deferring access see Part 3.

Documents disclosing trade secrets or commercially valuable information (s 47)

5.196 Section 47 provides that a document is an exempt document if its disclosure would disclose:

(a) trade secrets, or

(b) any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed.

5.197 The exemption does not apply if the information in the document is:

(a) in respect of the applicant's business or professional affairs

(b) in respect of an undertaking and the applicant is the proprietor of the undertaking or a person acting on behalf of the proprietor

(c) in respect of an organisation and the applicant is the organisation or a person acting on behalf of the organisation (s 47(2)).

5.198 These exceptions reflect that no harm would result from disclosure of documents to the individual or entity that they concern. But the exemption may apply if the information jointly concerns the trade secrets or valuable commercial information of another individual or organisation or another person's undertaking and that information is not severable from the document.

Trade secrets

5.199 The term 'trade secret' is not defined in the FOI Act. The Federal Court has interpreted a trade secret as information possessed by one trader which gives that trader an advantage over its competitors while the information remains generally unknown.[155]

5.200 The Federal Court referred to the following test in considering whether information amounts to a trade secret:

[155] *Department of Employment, Workplace Relations and Small Business v Staff Development and Training Company* (2001) 114 FCR 301.

- the information is used in a trade or business
- the owner of the information must limit its dissemination or at least not encourage or permit its widespread publication
- if disclosed to a competitor, the information would be liable to cause real or significant harm to the owner of the information.[156]

5.201 Factors that a decision maker might regard as useful guidance but not an exhaustive list of matters to be considered include:

- the extent to which the information is known outside the business of the owner of that information
- the extent to which the information is known by persons engaged in the owner's business
- measures taken by the owner to guard the secrecy of the information[157]
- the value of the information to the owner and to his or her competitors
- the effort and money spent by the owner in developing the information
- the ease or difficulty with which others might acquire or duplicate the secret.[158]

5.202 Where the information is 'observable', such as the design features of a fishing net, the Information Commissioner has found that the information is not a trade secret.[159]

5.203 Information of a non-technical character may also amount to a trade secret. To be a trade secret, information must be capable of being put to advantageous use by someone involved in an identifiable trade.[160]

Information having a commercial value

5.204 To be exempt under s 47(1)(b) a document must satisfy two criteria:

- the document must contain information that has a commercial value either to an agency or to another person or body, and
- the commercial value of the information would be, or could reasonably be expected to be, destroyed or diminished if it were disclosed.[161]

5.205 It is a question of fact whether information has commercial value, and

---

156 *Lansing Linde Ltd v Kerr* (1990) 21 IPR 529 per Staughton LJ [536], cited in *Searle Australia Pty Ltd and Public Interest Advocacy Centre and Department of Community Services and Health* (1992) 108 ALR 163.

157 See *Cordover and Australian Electoral Commission (AEC)* [2015] AATA 956, a case involving electoral software 'source code' where the AAT considered that the software supplier had taken precautions to limit dissemination of the source code and the source code has a commercial value to find that the source code is trade secret; and *'HN' and Department of the Environment* [2015] AICmr 76 [16]-[18] where the Information Commissioner considered that information relating to oil flow modelling is BP's trade secret.

158 *Re Organon (Aust) Pty Ltd and Department of Community Services and Health* [1987] AATA 396.

159 *Australian Broadcasting Corporation and Australian Fisheries Management Authority* [2016] AICmr 43 [30]. (However, note that as at August 2016 this decision is on appeal to the AAT).

160 *Searle Australia Pty Ltd and Public Interest Advocacy Centre and Department of Community Services and Health* (1992) 108 ALR 163.

161 See *McKinnon and Department of Immigration and Citizenship* [2012] AICmr 34.

whether disclosure would destroy or diminish that value. The commercial value may relate, for example, to the profitability or viability of a continuing business operation or commercial activity in which an agency or person is involved.[162] The information need not necessarily have 'exchange value', in the sense that it can be sold as a trade secret or intellectual property.[163] The following factors may assist in deciding in a particular case whether information has commercial value:

- whether the information is known only to the agency or person for whom it has value or, if it is known to others, to what extent that detracts from its intrinsic commercial value
- whether the information confers a competitive advantage on the agency or person to whom it relates — for example, if it lowers the cost of production or allows access to markets not available to competitors
- whether a genuine 'arm's-length' buyer would be prepared to pay to obtain that information[164]
- whether the information is still current or out of date (out of date information may no longer have any value)[165]
- whether disclosing the information would reduce the value of a business operation or commercial activity — reflected, perhaps, in a lower share price.

5.206 The time and money invested in generating information will not necessarily mean that it has commercial value. Information that is costly to produce will not necessarily have intrinsic commercial value.[166]

5.207 The second requirement of s 47(1)(b) — that it could reasonably be expected that disclosure of the information would destroy or diminish its value — must be established separately by satisfactory evidence. It should not be assumed that confidential commercial information will necessarily lose some of its value if it becomes more widely known.[167] Nor is it sufficient to establish that an agency or person would be adversely affected by disclosure; for example, by encountering criticism or embarrassment. It must be established that the disclosure would destroy or diminish the commercial value of the information.[168]

---

[162] *Re Mangan and The Treasury* [2005] AATA 898; *Re Metcalf Pty Ltd and Western Power Corporation* [1996] WAICmr 23.

[163] *McKinnon and Department of Immigration and Citizenship* [2012] AICmr 34 [42].

[164] *Re Cannon and Australian Quality Egg Farms* (1994) 1 QAR 491 and *Re Hassell and Department of Health of Western Australia* [1994] WAICmr 25.

[165] *Re Angel and the Department of the Arts, Heritage and the Environment; HC Sleigh Resources Ltd and Tasmania* [1985] AATA 314.

[166] *Re Hassell and Department of Health Western Australia* [1994] WAICmr 25.

[167] See for example *'D' and Civil Aviation Safety Authority* [2013] AICmr 13.

[168] *McKinnon and Department of Immigration and Citizenship* [2012] AICmr 34 [45]. In *Australian Broadcasting Corporation and Australian Fisheries Management Authority* [2016] AICmr 43 [38]-[39], information relating to the design and performance of a fishing net was found to be commercially valuable information. The information was specific technical information that has commercial value such that a competitor would be willing to pay for it, and that value would be diminished by disclosure. However, as at August 2016 this decision is on appeal to the AAT.

Consultation

5.208 Where release of a document may disclose a trade secret or commercially valuable information belonging to an individual, organisation or undertaking other than the applicant, the decision maker should consult the relevant parties. Section 27 requires an agency or minister to consider whether that individual, organisation or undertaking might reasonably wish to make a submission that the document should be exempt from disclosure. If the decision maker's view is that the third party would wish to make a submission, they must consult them before giving access if it is reasonably practicable to do so. For further guidance on third party consultation see Parts 3 and 6.

Electoral rolls and related documents (s 47A)

5.209 A document is an exempt document under s 47A(2) if it is:

(a) an electoral roll

(b) a print, or a copy of a print, of an electoral roll

(c) a microfiche of an electoral roll

(d) a copy on tape or disc of an electoral roll

(e) a document that sets out particulars of only one elector and was used to prepare an electoral roll

(f) a document that is a copy of a document that sets out particulars of only one elector and was used to prepare an electoral roll

(g) a document that contains only copies of a document that sets out particulars of only one elector and was used to prepare an electoral roll

(h) a document (including a habitation index within the meaning of the *Commonwealth Electoral Act 1918*) that sets out particulars of electors and was derived from an electoral roll.

5.210 The exemption extends to electoral rolls (or part of an electoral roll) of a State or Territory or a Division or Subdivision (within the meaning of the Commonwealth Electoral Act) prepared under that Act (s 47A(1)).

5.211 The exemption does not apply where an individual is seeking access to their own electoral records. That is:

- the part of the electoral roll that sets out the particulars of the elector applying for access (s 47A(3))
- any print, copy of a print, microfiche, tape or disk that sets out or reproduces only the particulars entered on an electoral roll in respect of the elector (s 47A(4))
- a document that sets out only the particulars of the elector and was used to prepare an electoral roll (s 47A(5)(a))
- a copy, with deletions, of a document that sets out particulars of only one elector and was used to prepare an electoral roll (or a copy of such a document) (s 47A(5)(b))

- a copy, with deletions, of a document (including a habitation index within the meaning of the Commonwealth Electoral Act) that sets out particulars of electors and was derived from an electoral roll (s 47A(5)(b)).