

Dear FOI Commissioner,

By way of submission, I am writing to provide feedback on the Consultation Draft of 'Part 5 of the FOI Act - Exemptions'.

As a significant user of the FOI Act over a number of years, there are some aspects of Part 5 which could be better explained in the FOI Guidelines.

5.92 This paragraph breaks s 37(1)(a) succinctly into the 3 categories. Is there any chance of lobbying Parliament to have s37(1)(a) split up into 37(1)(a)(i), 37(1)(a)(ii) and 37(1)(a)(iii)? It would make life much easier.

Also, in respect to s 37(1)(a), can the FOI Guidelines please properly define "proper administration". This seems to stump many a lawyer, or even Tribunal member (even 5.114 provides little explanation). And what is meant by the term "proper"? Does it mean that if there is an improper administration, then there can no prejudice? (Noting that the word "proper" is absent in 37(1)(b) "in relation to the enforcement or administration of the law.") Is it possible to lobby Parliament to define "proper administration"?

And again, many users misinterpret s 37(1)(a) where applied to arguments regarding the "proper administration" component. The punctuation is not strong enough and many users truncate the wording to: "prejudice the ... proper administration of the law", leaving out the very important "in a particular instance" and thus changing the context of the exemption.

It would be appreciated if "enforcement of the law" was defined to be constrained to criminal law and "proper administration of the law" was defined to be constrained to civil law.

It is also noted that there is no discussion regarding "proper administration of the law in a particular instance", following 5.103 (investigation of a breach of law).

I would also appreciate more examples of applied decisions which illustrate the topic being discussed. And if possible, examples of for and against.

"Would, or could reasonably be expected to cause ..."

This particularly phrase is well examined under FOI law. However, I personally feel that it doesn't really capture what it is trying to do. Essentially, it is trying to define risk of disclosure by way of likelihood and consequences: that is, the risk of disclosure by examining the consequence of disclosure and the likelihood of any harm.

Risk assessment using likelihood and consequence analysis is readily used in the mining and construction industries as a Risk Assessment Matrix. I have attached this for your consultation and deliberation. Please print this out when making a collection of submissions.

Whilst I have the opportunity to provide feedback to you, I would like to step just outside of Part 5 for a moment (as it is unlikely that I will provide feedback on other Drafts).

s 3A sets out Parliament's intention that "information" and "documents" are different articles. The FOI Act well defines what a document is and the process of obtaining access to a document is well enshrined in the FOI Act. That is all very well for those who seek access to documents. But I wish to seek access to information. If Parliament's intention is that information and documents are not one and the same, then how does a user get access to information? An excellent comparative example is New Zealand's Official Information Act where a contact of mine twice requested information (not a document) and both times, within 2 weeks, a letter was furnished specifying the information requested. In Australia, under the FOI Act, I am forced to pursue access to documents, where on many occasions the entire process can take years.

I am happy to discuss this submission further if necessary. But if I can provide one last piece of feedback, it is that the Consultation of this Draft was not at all well advertised. I only came across it by way of stumbling onto the OAIC website. Surely the OAIC has a massive database of email addresses which could be used to invite users to provide feedback.

Kind regards,

Dr Adrian Bradford

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## Risk Assessment Matrix

1. During a recent and significant FOI campaign, multiple FOI applications resulted in the same documents being responsive to the requests but different decision-makers applied different exemptions. This inconsistency resulted in material which was exempt from disclosure by one decision-maker being released in full by another and sometimes vice versa; it also results in confusing reasons as to why exemptions were applied. A risk assessment matrix, if applied properly, will eliminate these inconsistencies and be highly effective in guiding different decision-makers to make similar decisions applied to the same set of documents.
2. A risk assessment matrix (see page 3) neatly and succinctly describes what the FOI Guidelines and the FCA in *Cockcroft* have put in words, as summarised in *Cordova and Australian Electoral Commission*. The judgment in *Cockcroft* is still widely cited in cases related to “*would, or could reasonably be expected to*”, however, this judgment was made in the year 1986 when the understanding, knowledge and prevalence of risk assessments used by Australian industries was in its infancy. In the year 2023, Australian mining and construction industries widely practice applying risk assessment matrices when assessing risk. It appears that such practice has not yet caught up to the deliberating process used in the FOI community. There appears to be no reference to the use of a risk assessment matrix as applied to the FOI Act or any decision by the IC, AAT, or FCA. As per the FOI guidelines at paragraph [3.11] (and the accompanying footnote) the FOI Guidelines have no binding force but decision-makers should ‘apply the Guidelines *unless there is a cogent reason to do otherwise*’.
3. There are cogent reasons for a risk assessment matrix to be consulted by decision makers when applying the exemptions in the FOI Act where there is a need to adjudicate the consequences of releasing a document when considering the term “*would, or could reasonably be expected to*”.
4. As remarked in the FOI Guidelines at paragraph [5.17] and well observed by many adjudicators applying the FOI Act, ‘could’ is less stringent than ‘would’. This is observed in the Risk Assessment Matrix, where ‘*would*’ has qualities of ‘*likely*’ and ‘*almost certain*’, and ‘could’ has qualities of ‘*possible*’ and also ‘*unlikely*’.  
  
The term “*could reasonably be expected to*” is demonstrated in the risk assessment matrix where the consequence having a *reasonable expectation* is either *medium, high, or major*. Where the consequence is *minor or low*, the perceived risk of damage has no reasonable expectation, as provided in the explanation of the FOI Guidelines at paragraphs [5.16 to 5.18].
5. Each block in the risk matrix carries a grade of *low, medium, high* or *extreme*. These are broad grades to avoid agonising over compartmentalising. The Decision maker has to consider what the likelihood of the unwanted event occurring will be and then decides what the consequence is of that event occurring. Each block has its own risk score, ranging from Low (1) to Extreme (25). The higher the risk score the more risk that event is perceived to have. Typically, a score of 13 or higher attracts warranted attention and fits with the notion that an event has to be significant.

For example:

**Substantial adverse effect:** Several conditional exemptions require an assessment of whether there is risk that disclosure of a document will have an *effect* on: the financial or property interests of the Commonwealth; the economy; or operation of certain agencies. But it is more than having an effect on those categories – it must be an *adverse effect*. Again, it is more than an adverse effect, it must be a *substantial adverse effect*. In the Risk Assessment Matrix, an *adverse effect* has a score of 13 or higher with a likelihood of ‘possible’, ‘likely’, or ‘almost certain’. But a *substantial adverse effect* has even greater severity with a likelihood of ‘likely’, or ‘almost certain’ with a risk rating of 18 or more.

This is in line with the FOI Guidelines at paragraph [5.20] where 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*’. It is also why the term *substantial adverse effect* is applied to those categories which are conditionally exempt as a conditionally exempt document is subject to the public interest test and requires greater scrutiny that disclosure would not be in the public interest. This requires a risk rating higher than 13 in the Risk Matrix.

**Prejudice:** The FOI Guidelines at paragraph [5.23] state that “*a prejudicial effect is one which would cause a bias or change to the expected results leading to detrimental or disadvantageous outcomes*”. This is in line with a score of 13 or higher in the Risk Matrix.

Paragraph [5.23] also states that “*the expected outcome does not need to have an impact that is ‘substantial and adverse’*”. This provides that the risk score does not have to be 18 or higher, as per the discussion above in ‘substantial adverse effect’.

**Damage:** the FOI Guidelines at paragraph [5.27] state that “there must be ‘*real*’ or ‘*substantive*’ grounds for expecting the damage to occur which can be supported by evidence or reasoning.” This is in line with a score of 13 or higher in the Risk Matrix.

Also, “*a mere allegation or possibility of damage is insufficient to meet the ‘reasonable expectation’ test.*” This is in line with a score of less than 13 and a likelihood of ‘*rare*’.

**Unreasonably affect:** This term appears only in s 47G(1)(a) of the FOI Act where disclosure of a document *would, or could reasonably be expected to, unreasonably affect that person adversely ...*”. This has the same risk rating as ‘substantial adverse effect’ and for similar reasons this exemption should only be applied if the risk assessment for the disclosure of the document would score a rating of High (18) or higher with a consequence of ‘*likely*’ or ‘*almost certain*’.

# Risk Assessment Matrix

Consequence	Major	Medium 11	High 16	High 20	Extreme 23	Extreme 25
	High	Medium 7	Medium 12	High 17	Extreme 21	Extreme 24
	Medium	Low 4	Medium 8	High 13	High 18	Extreme 22
	Low	Low 2	Low 5	Medium 9	High 14	High 19
	Minor	Low 1	Low 3	Medium 6	Medium 10	High 15
		Rare	Unlikely	Possible	Likely	Almost certain
		←—————↑			↑—————↑	
			Could		Would	
		Likelihood				

As a footnote, I am not seeking that this specific Risk Assessment Matrix be adopted by the FOI community, but rather one that works best for applying to the FOI Act. Should other people like this idea, but wish to enhance it to make it stronger or more useable, then they are more than welcome to modify it.