PART 5 — EXEMPTIONS

Consultation Draft (v 1.6), June 2023

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Introduction

5.1 Part 5 of the FOI Guidelines sets out the exemptions in Division 2 of Part IV of the FOI Act and explains the criteria that must exist before refusing access to a document in response to an FOI request.

5.2 It is important to recognise that agencies and ministers retain a discretion to provide access to a document where the law permits, even if the document meets the criteria for one of the exemptions in Division 2 of Part IV (s 3A). In each case, agencies and ministers should consider whether an exempt document can be released without causing significant harm, to allow access wherever possible.

5.3 As noted in *'ACV' and Tertiary Education Quality and Standards Agency*,[1] agencies [and ministers] are not legally bound to refuse access if a document is exempt and may consider disclosure of a document if this is not otherwise legally prohibited. Such an approach is consistent with the pro-access parliamentary intention underpinning the FOI Act.

5.4 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)).

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

5.6 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 of the document to the applicant. If it is practicable to delete the exempt material and prepare a meaningful non-exempt copy, an agency or minister must do so (s 22).

5.7 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.

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[1] *'ACV' and Tertiary Education Quality and Standards Agency (Freedom of information)* [2023] AICmr 3 [89] and [90].

5.8 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).

Documents exempt under Part IV

5.9 Exempt documents under Part IV of the FOI Act fall into 2 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)).

5.10 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).

5.11 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.

5.12 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).

5.13 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) and(6), and s 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.[2]

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.[3]

5.18 The mere risk, allegation, possibility, or chance of prejudice does not qualify as a reasonable expectation.[4] There must, based on reasonable grounds, be at least a real, significant or material possibility of prejudice.[5]

Substantial adverse effect

5.19 Several conditional exemptions[6] 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'.[7] The word 'substantial', taken in the context of substantial loss or damage, has been interpreted as including 'loss or damage that is, in the circumstances, real or of substance and not insubstantial or nominal'.[8]

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)).

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2 The test 'would or could reasonably be expected' has been discussed in various decisions. For example see *Bell and Secretary, Department of Health (Freedom of information)* [2015] AATA 494 [37]; *Xenophon and Secretary, Department of Defence (Freedom of information)* [2019] AATA 3667 [98]–[103].

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

4 *Re News Corporation Limited v National Companies and Securities Commission* [1984] FCA 400; (1984) 5 FCR 88; per Fox and Woodward JJ; *Re Maher and Attorney-General's Department* [1985] AATA 180 [41]; (1985) 7 ALD 731 at 742.

5 *Chemical Trustee Limited and Ors and Commissioner of Taxation and Chief Executive Officer, AUSTRAC (Joined Party)* [2013] AATA 623 [79].

6 Sections 47D, 47E(c), 47E(d) and 47J.

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

8 See *Tillmanns Butcheries Pty Ltd v Australasian Meat Employees Union & Ors* [1979] FCA 85 [14]–[15]; (1979) 27 ALR 367 [383]; per Deane J in relation to the meaning of 'substantial loss' in s 45D of the *Trade Practices Act 1974*. Although Deane J noted that it was unnecessary that he form a concluded view, Deane J's interpretation of 'substantial' provides general guidance on the interpretation of this term under the FOI Act. See also for example *Re Marko Ascic v Australian Federal Police* [1986] FCA 260.

Prejudice

5.22 Some exemptions and conditional exemptions[9] 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:

(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. There is no need to establish a 'substantial adverse effect' (see discussion above) and proof of prejudice is sufficient.[10]

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 2 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) would divulge information or matter 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 within the scope of the FOI 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(a)(i)–(iii). 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 [5.45] – [5.46] 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 [5.53] below in relation to information communicated in confidence).[11]

Would, or could reasonably be expected to, cause damage to the Commonwealth's

[9] Sections 37(1)(a), 37(2)(a), 37(2)(c), 47E(a), 47E(b) and 47G(1)(b).

[10] See *Re James and Ors and Australian National University* [1984] AATA 501; (1984) 6 ALD 687, per President Hall on the operation of s 32 of the FOI Act.

[11] *Re Anderson and Department of Special Minister of State* [1984] AATA 478*; Aldred and Department of Foreign Affairs and Trade* [1990] AATA 833.

security, defence or international relations (s 33(a))

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.[12] A mere allegation or possibility of damage is insufficient to meet the 'reasonable expectation' test.[13] Davies J said in *Re Maher and Attorney-General's Department* [1985] AATA 180 that 'there must be a cause and effect that can be reasonably anticipated':

> But if it can be reasonably anticipated that disclosure of the document would lessen the confidence which another country would place on the Government of Australia, that is a sufficient ground for a finding that the disclosure of the document could reasonably be expected to damage international relations. Trust and confidence are intangible aspects of international relations.[14]

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.[15]

5.29 In determining whether damage is likely to result from disclosure of a document it is relevant to consider whether the content of the document is already in the public domain. If the content of a document is already in the public domain, it is unlikely that disclosure under the FOI Act will cause damage. Deputy President Britten-Jones observed in *Patrick and Secretary, Department of Prime Minister and Cabinet (Freedom of information)* that:

> I accept the contention from both parties that it is critical to consider the disclosure of the Disputed Material in the context of … information … that is publicly available. If the information in the Disputed Material is largely similar to the publicly available information then that will be an important factor in my consideration as to whether the Disputed Material would, or could reasonably be expected to, cause damage to the defence of the Commonwealth. It is axiomatic that if the Disputed Material discloses information that is already publicly available then it would not have, or could

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12 *Attorney-General's Department and Australian Iron and Steel Pty Ltd v* Cockcroft [1986] FCA 35; (1986) 10 FCR 180.

13 See *Re O'Donovan and Attorney-General's Department* [1985] AATA 330*; Re Maher and Attorney-General's Department* [1985] AATA 180; *Rex Patrick and Department of Defence (Freedom of information)* [2021] AICmr 39 [30].

14 *Re Maher and Attorney-General's Department* [1985] AATA 180 [41]. Also see *Xenophon and Secretary, Department of Defence (Freedom of information)* [2019] AATA 3667.

15 See the FOI Guidelines applied in *'SA' and Department of Home Affairs (Freedom of information*) [2020] AICmr 17 [13]–[26].

> not reasonably be expected to have, the required causative effect. However, I accept the Secretary's submission that the Disputed Material must be seen in its context and that the information in the Disputed Material is not all of the same character.[16]

5.30 In determining whether damage is likely to result from disclosure of the document(s) in question, a decision maker could have regard to the relationships between individuals representing respective governments.[17] 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.[18]

Security of the Commonwealth (s 33(a)(i))

5.31 To establish an exemption on the basis of s 33(a)(i) a decision maker needs to establish that disclosure of the document:

- would, or could reasonably be expected to, cause damage
- to the security of the Commonwealth.

5.32 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)).

5.33 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.

5.34 The meaning of 'damage' has 3 aspects:

i. that of safety, protection or defence from something that is regarded as a danger. The Administrative Appeals Tribunal (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.[19]

5.35 The claim has been upheld in the following situations:

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16 *Patrick and Secretary, Department of Prime Minister and Cabinet (Freedom of information)* [2020] AATA 4964 [48].

17 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.

18 See *Arnold v Queensland* [1987] FCA 148; (1987) 73 ALR 607.

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

(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.[20]

(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.[21]

(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.[22]

5.36 It is well accepted that securing classified government information forms part of the security of the Commonwealth.[23] 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 that time.[24] Where a request is received for classified government information, the documents must be considered both individually and collectively.

Defence of the Commonwealth (s 33(a)(ii))

5.37 To establish an exemption on the basis of s 33(a)(ii) a decision maker needs to establish that disclosure of the document:

- would, or could reasonably be expected to, cause damage
- to the defence of the Commonwealth.

5.38 The FOI Act does not define 'defence of the Commonwealth'. Previous 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.[25]

5.39 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 (s 33(a)(iii))

5.40 To establish an exemption on the basis of s 33(a)(iii) a decision maker needs to establish that disclosure of the document:

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20 *Re Slater and Cox* (*Director-General of Australian Archives)* [1988] AATA 110.intangible
21 *Re Hocking and Department of Defence* [1987] AATA 602.
22 *Re Throssell and Australian Archives* [1987] AATA 453.
23 *Aldred and Department of Foreign Affairs and Trade* [1990] AATA 833.
24 *Prinn and Department of Defence (Freedom of Information)* [2016] AATA 445 [66].
25 See for example, *Re Dunn and the Department of Defence* [2004] AATA 1040.

- would, or could reasonably be expected to, cause damage
- to the international relations of the Commonwealth.

5.41 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.[26] 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.[27]

5.42 The mere fact that a government has expressed concern about 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.[28] The expectation of damage to international relations must be 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.[29] There must also be real and substantial grounds for the exemption that are supported by evidence.[30] These grounds are not fixed in advance, but vary according to the circumstances of each case.[31]

5.43 However, the AAT has accepted evidence of a long-standing convention and practice of confidentiality with respect to correspondence between the Australian Government and the Queen.[32] This convention preserves the effective functioning of the relationship between the Commonwealth of Australia and the Monarch, including relations with the Queen personally and members of the Royal Household, including the Queen's private secretary. In these circumstances, the AAT found that disclosure of letters between Australian Prime Ministers and the Queen could reasonably be expected to damage the international relations of the Commonwealth.[33]

5.44 For example, 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

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26 *Re McKnight and Australian Archives* [1992] AATA 225; (1992) 28 ALD 95.

27 *Re Haneef and Australian Federal Police* [2009] AATA 51; (2009) 49 AAR 395.

28 *Re Maher and Attorney-General's Department* [1985] AATA 180 as applied in *Maksimovic and Attorney-General's Department* [2008] AATA 1089. See also *Kellie Tranter and Department of Home Affairs (Freedom of information)* [2019] AICmr 44 [28].

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

30 Whittaker and Secretary, Department of Foreign Affairs and Trade [2004] AATA 817 [48].

31 See, for example, the grounds considered in *Nick Xenophon and Department of Health (Freedom of information)* [2018] AICmr 20 [20]-[24] and *Secretary, Department of Prime Minister and Cabinet and Summers (Freedom of information)* [2019] AATA 5537 in relation to correspondence between the Australian Government and the Queen in which the Tribunal found that disclosure of letters between Australian Prime Ministers and the Queen could reasonably be expected to damage the international relations of the Commonwealth.

32 *Secretary, Department of Prime Minister and Cabinet and Summers (Freedom of information)* [2019] AATA 5537 [100].

33 *Secretary, Department of Prime Minister and Cabinet and Summers (Freedom of information)* [2019] AATA 5537 [97].

Australian agencies in future.[34] 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.[35]

The mosaic theory

5.45 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 of information, can generate a composite — a mosaic — that can damage Australia's national security, defence or international relations.[36] Therefore, decision makers may need to consider other sources of information when considering this exemption.

5.46 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.[37]

Information communicated in confidence (s 33(b))

5.47 Section 33(b) exempts information communicated in confidence to the Australian Government or an Australian Government agency by another government or one of its authorities, or by an international organisation.[38] One example is the confidential exchange of police information or information received in confidence from a foreign defence force agency.[39]

5.48 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 matter of determining whether the information is of itself confidential in nature.[40] 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

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[34] *Re Maksimovic and Attorney-General's Department* [2008] AATA 1089. See also *O'Sullivan and Department of Foreign Affairs and Trade* [2013] AICmr 36 [13]; *'AA' and Bureau of Meteorology* [2013] AICmr 46 [27]–[29] and *Secretary, Department of Prime Minister and Cabinet and Summers (Freedom of information)* [2019] AATA 5537 [116]–[119].

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

[36] *Re McKnight and Australian Archives* [1992] AATA 225; (1992) 28 ALD 95.

[37] 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.

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

[39] *'W' and the Australian Federal Police* [2013] AICmr 39 [17]-[20]. See the application of the FOI Guidelines in *Friends of the Earth Australia and Food Standards Australia New Zealand (Freedom of information)* [2018] AICmr 69 [32]–[65].

[40] *Secretary, Department of the Prime Minister and Cabinet v Haneef* (2010) 52 AAR 360; [2010] FCA 928 [11]; [2010] 52 AAR 360.

understanding that the communication would be kept confidential.[41] Whether the information is, in fact, confidential in character and whether it was communicated in circumstances importing an obligation of confidence are relevant considerations.[42] They may assist the decision maker determine whether, on the balance of probabilities, the information was communicated in confidence.[43]

5.49 The relevant time for the test of confidentiality is the time of communication of the information, not the time of the FOI request.[44] The exemption will still apply even if the document is no longer confidential.[45] However, as noted at [5.2]—[5.3] above, agencies and ministers are not legally bound to refuse access if a document is exempt and may consider disclosure, if this is not otherwise legally prohibited. Such an approach is permitted by s 3A and is consistent with the pro-access parliamentary intention underpinning the FOI Act.[46]

5.50 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.[47]

5.51 Section 4(10) of the FOI Act 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.

5.52 Information communicated by an Australian Government agency to a foreign government may also fall under s 33(b) if it restates information the foreign government previously communicated to the agency in confidence.[48]

Classification markings

5.53 Classification markings on a document (such as secret or confidential) are not in themselves conclusive of a 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

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41 *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.

42 For an example of the application of these considerations, see *Friends of the Earth Australia and Food Standards Australia New Zealand (Freedom of information)* [2018] AICmr 69 [32]–[65].

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

44 *'FM' and Department of Foreign Affairs and Trade* [2015] AICmr 31 [24].

45 *Secretary, Department of Foreign Affairs v Whittaker* [2005] FCAFC 15 [25]; (2005) 143 FCR 15.

46 *'ACV' and Tertiary Education Quality and Standards Agency (Freedom of information)* [2023] AICmr 3 [89] and [90].

47 *Re Maher and Attorney-General's Department* [1986] AATA 16; *Refugee Advice & Casework Service and Department of Foreign Affairs and Trade (Freedom of information)* [2023] AICmr 16 [26]–[28].

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

foreign government or agency has identified a document as secret or confidential, the decision maker is still required to make an independent assessment that the information was communicated in confidence.[49]

Consulting foreign entities

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

5.55 The form of consultation with a foreign government, authority or organisation will depend on the nature of the relationship between the Australian Government entity 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.

5.56 A decision maker should seek information from the foreign entity for the purpose of establishing whether the grounds for an exemption are met. This information may be used to support and explain a claim for exemption in a statement of reasons to the applicant. It will not be appropriate for the agency to suggest to a foreign entity that the exemption applies and for the foreign entity to simply agree with that proposition. The foreign entity must explain, from its perspective, whether the requisite damage would result from disclosure of the requested document. In all cases, the person consulted should have authority to speak for the foreign entity.

Refusal to confirm or deny existence of a document

5.57 In some instances, the act of confirming or denying that 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.

5.58 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 [5.92] – [5.130] below for further guidance on the application of s 37(1), and [5.193] – [5.200] for guidance on s 45A.)

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

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.

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

5.60 Section 26(2) also provides that there is no requirement to include information in a notice that, were it contained in a document, would make that document exempt (see Part 3).[50]

Evidence from Inspector-General of Intelligence and Security

5.61 Where the Information Commissioner is conducting a review of a decision refusing access to a document 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). These provisions are 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 s 33. For more information about Information Commissioner reviews, see Part 10.

Cabinet documents (s 34)

5.62 The Cabinet exemption in s 34 of the FOI Act is designed to protect the confidentiality of Cabinet processes 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.

5.63 'Cabinet' for the purposes of s 34 means the Cabinet and includes a committee of the Cabinet as set out in s 4(1) of the FOI Act. A 'committee of the Cabinet' is not defined in the FOI Act. Cabinet does not include informal meetings of ministers outside the Cabinet.

5.64 In *Patrick and Secretary, Department of Prime Minister and Cabinet (Freedom of Information)* [2021] AATA 2719 ('Patrick'), White J set out the factors his Honour considered in deciding whether Minutes and notes of the 'National Cabinet', established in March 2020, were exempt under s 34 of the FOI Act on the basis that National Cabinet was a 'committee of the Cabinet'. The factors considered include the way National Cabinet was established, its composition, historical precedent, the discretion and control available to the Prime Minister with respect to National Cabinet, the way National Cabinet operated and its relationship with the Cabinet, as

[50] See also *Secretary Department of Health and Ageing v iNova Pharmaceuticals (Australia) Pty Limited* [2010] FCA 1442; (2010) 191 FCR 573; 276 ALR 712; 120 ALD 439 for discussion of ss 25 and 26 in relation to decisions that do not provide information as to the existence of documents.

well as collective responsibility and solidarity within the National Cabinet. In Patrick , his Honour found that the National Cabinet, which consists of the Prime Minister and State and Territory Premiers and Chief Ministers, did not constitute 'a committee of the Cabinet' for the purpose of s 34 of the FOI Act.

5.65 The Department of the Prime Minister and Cabinet (PM&C) asks that agencies and ministers consult the PM&C FOI Coordinator on any Cabinet-related material identified within the scope of an FOI request.[51]

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

Documents included in exemption

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

(a) Cabinet submissions that:

(i) have been submitted to Cabinet

(ii) are or were proposed by a minister to be submitted to Cabinet

(iii) were proposed to be submitted but were not submitted to Cabinet and were 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)).

5.68 The exemption also applies to full or partial copies of the categories of documents listed at [5.67] above as well as a document that contains an extract from those categories (s 34(2)).

5.69 Any document containing information which, if disclosed, would reveal a Cabinet deliberation or 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.[52]

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51 See the 'Cabinet Handbook' on the PM&C website: www.pmc.gov.au.

52 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

5.70 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 would still be exempt.[53] 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.[54]

Documents created for the dominant purpose of submission to Cabinet (s 34(1)(a))

5.71 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
- have been submitted to Cabinet for its consideration or have been proposed by a sponsoring minister to be submitted.

Documents in this class may be Cabinet submissions or attachments to Cabinet submissions.

5.72 For example, if, at the time a report is brought into existence there was no intention 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 being submitted to the Cabinet. It may, however, still be exempt under s 34(3) if its disclosure would reveal a Cabinet deliberation or decision.

5.73 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.[55]

5.74 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.[56] The purpose will ordinarily be that of the maker of the document, except where it was commissioned by another

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the substance of the deliberation or decision discloses its existence. Forgie DP noted at [77] that disclosure of its existence, however, does not require disclosure of the substance. Forgie DP also noted at [80] that a media release can constitute an official disclosure of the existence of Cabinet's deliberations when the media release discloses the 'existence' of Cabinet deliberation.

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

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

55 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; (2003) 78 ALD 645.

56 *Re Fisse and Secretary, Department of the Treasury* [2008] AATA 288; (2008) 101 ALD 424; 48 AAR 131. See application of the FOI Guidelines in *Justin Warren and Services Australia (Freedom of information)* [2019] AICmr70 [29]–[38].

individual.[57]

5.75 A 'dominant purpose' is a purpose 'which was the ruling, prevailing, or most influential purpose.'[58]

5.76 Relevant considerations when determining whether the 'dominant purpose' test has been satisfied include:

(a) submissions or evidence from the agency or minister about the circumstances surrounding the creation of the document[59]

(b) examination of the contents of the document over which the exemption is claimed,[60] including consideration of to whom the document is addressed and whether it references a particular Cabinet submission or matters considered by Cabinet[61] and

(c) any other available information relating to the purpose of the creation of the document.[62]

Official record of the Cabinet (s 34(1)(b))

5.77 A document will be exempt from disclosure under s 34(b) if it is an official record of the Cabinet.

5.78 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.[63] DPMC asks that agencies consult the DPMC FOI Coordinator when deciding whether a document is an official record of the Cabinet (see [5.56] above).

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57 *Rex Patrick and Department of the Prime Minister and Cabinet (No. 2) (Freedom of information)* [2022] AICmr 66 [6]; *Michael Sergent and Department of the Prime Minister and Cabinet (Freedom of information)* [2022] AICmr 67 [7]; *William Summers and Department of the Prime Minister and Cabinet (No. 2) (Freedom of information)* [2022] AICmr 68 [6]; *'ACD' and Department of the Prime Minister and Cabinet (Freedom of information)* [2022] AICmr 69 [6].

58 *Secretary, Department of Prime Minister and Cabinet and Secretary, Department of Infrastructure and Regional Development and Sanderson (Party Joined)* [2015] AATA 361 [62]; *Justin Warren and Services Australia (Freedom of information)* [2019] AICmr 70 [31].

59 *Nick Xenophon and Department of Defence* [2016] AICmr 14 [22]–[23]; *Secretary, Department of Prime Minister and Cabinet and Secretary, Department of Infrastructure and Regional Development and Sanderson (Party Joined)* [2015] AATA 361.

60 Section 55U(3) of the FOI Act provides that if the Information Commissioner is not satisfied by evidence on affidavit or otherwise that the document is an exempt document under s 34, the information Commissioner may require the document to be produced for inspection.

61 *'JZ' and Department of the Prime Minister and Cabinet* [2016] AICmr 78 [23]; *Nick Xenophon and Department of Defence* [2016] AICmr 14 [26] and *Philip Morris Ltd and IP Australia* [2014] AICmr 28 [12].

62 For example, in *Nick Xenophon and Department of Defence* [2016] AICmr 14 [15]–[16] regard was had to media statements relating to the document at issue. See also *Justin Warren and Services Australia (Freedom of information)* [2019] AICmr 70 [32].

63 *Re Toomer and Department of Agriculture, Fisheries and Forestry and Ors* [2003] AATA 1301 [74]

Cabinet briefings (s 34(1)(c))

5.79 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 (see [5.74] – [5.76] for further information about the dominant purpose test).

Draft Cabinet documents (s 34(1)(d))

5.80 Section 34(1)(d) provides that a draft of a Cabinet submission, an official record of the Cabinet or a Cabinet briefing is exempt.

5.81 Relevant considerations in determining whether s 34(1)(d) applies include examination of the contents of the document at issue, consideration of how the document at issue relates to the document claimed to be exempt under ss 34(1)(a), (b) or (c),[64] and consideration of submissions from the agency or minister about the role of the document in the Cabinet process.[65]

Copies and extracts (s 34(2))

5.82 A document is exempt from disclosure to the extent that it is a copy or part of, or contains 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, or part of, an extract from a Cabinet submission, a Cabinet briefing or an official record of the Cabinet is exempt from disclosure. A copy or extract should be a quotation or exact reproduction of, the Cabinet submission, official record of the Cabinet or the Cabinet briefing.

5.83 A document that refers to a Cabinet meeting date or Cabinet document reference number could be considered to contain an extract from a Cabinet document for the purposes for s 34(2) in certain circumstances.[66] 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

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64 See *'JZ' and Department of the Prime Minister and Cabinet* [2016] AICmr 78 [17]-[19]; *Philip Morris Ltd and IP Australia* [2014] AICmr 28 [14]-[19]; *Philip Morris Ltd and Department of Finance* [2014] AICmr 27 [17]–[18].

65 *Greenpeace Australia Pacific and Department of Industry* [2014] AICmr 140 [35]-[36]; *Philip Morris Ltd and Department of Finance* [2014] AICmr 27 [15]–[16].

66 For example, the context of the reference to the Cabinet meeting date is relevant. In *Dreyfus and Attorney-General (Commonwealth of Australia) (Freedom of information)* [2015] AATA 995; (2015) 68 AAR 207 [55] Jagot J was of the view that without additional information, details that a meeting had been scheduled between the Attorney-General and the Prime Minister 'cannot, on any view, amount to a Cabinet document as defined in s 34. It cannot "reveal a Cabinet deliberation or decision" even by any process of the building of a mosaic by reference to date and published announcements.' See also, *Rex Patrick and Department of Defence (Freedom of Information)* [2019] AICmr 19 [19]–[20].

described in s 34(1).[67] However, agencies and ministers should be mindful of the exceptions under ss 34(4)-(6) that may apply (see [5.88] and [5.89] – [5.91] for further information about the exceptions to s 34). Even though a document is found to contain an extract from a Cabinet document, if the information contained in the document is purely factual, unless disclosure of the information would reveal a Cabinet deliberation or decision that has not been officially disclosed, the document cannot be exempt under s 34(2).[68]

5.84 Decision makers will need to give detailed consideration to whether coordination comments come within the scope of the exemption in s 34 of the FOI Act. 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 s 34(2) on the basis that it was an extract from the minister's Cabinet submission.[69]

Documents disclosing a deliberation or decision of Cabinet (s 34(3))

5.85 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 [5.91]).

5.86 'Deliberation' in this context has been interpreted as active debate in Cabinet, or the 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 conclusions as to the manner in which a matter is to proceed.[70]

5.87 Consideration must be given to whether the information in the documents would reveal 'any deliberation or decision of the Cabinet'. An agency or minister cannot contend that s 34(3) applies simply because the information in the documents reveals

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

68 For example, see *Rex Patrick and Department of Defence (Freedom of information)* [2019] AICmr 19 [19]–[24] in the context of electronic calendars.

69 *Re McKinnon and Department of Prime Minister and Cabinet* [2007] AATA 1969; 46 AAR 136.

70 *Re Toomer and Department of Agriculture, Fisheries and Forestry and Ors* [2003] AATA 1301; (2003) 78 ALD 645 [88].

the subject matter of Cabinet discussions.[71]

Documents excluded from exemption (s 34)

5.88 There are 3 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 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)).

Purely factual material (s 34(6))

5.89 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.

5.90 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.[72]

Officially disclosed (ss 34(3), 34(6))

5.91 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 by a written statement — for example, an oral announcement by a minister about a Cabinet decision.[73] The disclosure may be a general public disclosure (for example, a statement in a consultation paper published on a Departmental website)[74] or a disclosure to a limited audience on the understanding that it is not a confidential communication.[75] 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.

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71 *Justin Warren and Services Australia (Freedom of information)* [2019] AICmr 70 [61] and [65] and *Josh Taylor and Minister for Communications and the Arts (Freedom of information)* [2017] AICmr 9 [43] – [48].

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

73 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; (2003) 78 ALD 645 [101].

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

75 *Re Toomer and Department of Agriculture, Fisheries and Forestry* [2003] AATA 1301; (2003) 78 ALD 645 [101].

Documents affecting law enforcement and public safety (s 37)

5.92 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, o0r 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
- 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)).

5.93 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.

5.94 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.

5.95 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.[76] 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 [5.92].

[76] *Re Gold and Australian Federal Police and National Crime Authority* [1994] AATA 382; (1994) 37 ALD 168, citing Young CJ in *Accident Compensation Commission v Croom* (1991) 2 VR 322 [324].

5.96 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

5.97 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 [5.57] – [5.60] above).

Reasonable expectation

5.98 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 refers to activities that might reasonably be expected to have occurred, be presently occurring, or could occur in the future (see [5.166] – [5.19] above).[77]

Investigation of a breach of law

5.99 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.[78] In other words, the exemption does not apply if the prejudice is about investigations in general.

5.100 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.[79] The section will not apply if the investigation is being conducted by an overseas agency and does not relate to a breach of Australian law.[80]

5.101 Where the investigation is merely suspended or dormant rather than permanently closed, or where new information may revive an investigation, the exemption may apply. However, the expectation that an investigation may revive

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

78 *Re Murtagh and Federal Commissioner of Taxation* [1984] AATA 249; (1984) 54 ALR 313; (1984) 6 ALD 112; (1984) 1 AAR 419; 15 ATR 787.

79 *News Corporation v National Companies and Securities Commission* [1984] 5 FCR 88; [1984] FCA 400.

80 *Re Rees and Australian Federal Police* [1999] AATA 252 [89]; (1999) 57 ALD 686. See also *Linton Besser and Department of Employment* [2015] AICmr 67 [13]-[17].

should be more than speculative or theoretical and be supported by evidence.[81]

5.102 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.

5.103 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

5.104 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.[82] 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).

5.105 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 their identity to be known only to those who need to know it for the purpose of enforcing or administering the law[83]
- the information was supplied on the understanding, express or implied, that the source's identity would remain confidential.[84]

5.106 Where a document contains information known only to a limited number of people and the confidential source is known to the applicant, and/or where the document has identifying features such as handwriting, disclosure is more likely to identify the confidential source.[85]

5.107 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.[86]

5.108 The 'mosaic theory' might apply in some cases (see [5.45] – [5.46] above).[87]

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

82 For an example of the application of this part of the FOI Guidelines, see *'PD' and Australian Skills Quality Authority (Freedom of information)* [2018] AICmr 57 [10]–[21].

83 *Department of Health v Jephcott* [1985] FCA 370 [4]; (1985) 8 FCR 85.

84 See for example '*HC' and Department of Human Services (Freedom of Information)* [2015] AICmr 61 in which the Information Commissioner accepted that information was provided on the understanding that the source's identity would remain confidential and that the third party would have an expectation that their identity would not be disclosed. See also '*HP' and Department of Immigration and Border Protection (Freedom of Information)* [2015] AICmr 77; and *The Guardian Australia and Department of Climate Change, Energy, the Environment and Water (Freedom of information)* [2022] AICmr 70.

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

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

87 For an example, see *Besser and Attorney-General's Department* [2013] AICmr 12 [16].

That is, the disclosure of the information in question will lead to it being linked to already available information and thus disclose the identity of the confidential source.[88]

5.109 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.[89]

Scope of confidentiality

5.110 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.

5.111 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.[90]

5.112 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.[91] 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.[92] Two examples are a telephone hotline set up to receive certain types of information from 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.[93] Nevertheless, the understanding or representation that information will be received confidentially must not be vague or devoid of context.

5.113 The exemption applies independently of whether it was objectively reasonable or in the public interest for the person to supply information on a

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88 *Re Petroulias and Others v Commissioner of Taxation* [2006] AATA 333; (2006) 62 ATR 1175.

89 See *Jorgensen v Australian Securities & Investments Commission* (2004) 208 ALR 73; [2004] FCA 143 [67]-[68] and the Explanatory Memorandum to the *Law and Justice Legislation Amendment Bill 1994* at 148.

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

91 *Department of Health v Jephcott* [1985] FCA 370 [11]; (1985) 8 FCR 85.

92 See for example, The Guardian Australia and Department of Climate Change, Energy, the Environment and Water (Freedom of information) [2022] AICmr 70 [81]–[83].

93 *'X' and Australian Federal Police* [2013] AICmr 40 [20]-[23].

confidential basis. It is sufficient that the person supplied the information on the basis that their identity would be confidential.[94]

Enforcement or administration of the law

5.114 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.[95]

Disclosure of identity

5.115 There must be a reasonable expectation that the contents of the documents in question will disclose the identity of the confidential source.[96] Where a person's identity is not apparent and the information is so general that it is unlikely to lead to identification of the confidential source, or it could have come from any one of several sources, this element of the exemption is not satisfied.

5.116 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.[97] On the other hand, the inadvertent or unauthorised leaking of a document does not diminish the quality of confidence attaching to it.[98]

5.117 A person's identity can sometimes be ascertained from a document even if they are not expressly mentioned in that document. For example, a person may be identified by 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.[99]

Endanger the life or physical safety of any person

5.118 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.[100] This 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 into threats made by the applicant will not be sufficient.[101] A reasonable apprehension does not mean the risk has to be substantial, but evidence is necessary. For instance, intemperate language and

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94 *Besser and Attorney-General's Department* [2013] AICmr 12 [12].

95 *Re Gold and Australian Federal Police and National Crime Authority* [1994] AATA 382; (1994) 37 ALD 168, citing Young CJ in *Accident Compensation Commission* v *Croom* (1991) 2 VR 322, 324.

96 *Re Rees and Australian Federal* Police (1999) 57 ALD 686; [1999] AATA 252.

97 *Re Chandra and Minister for Immigration and Ethnic Affairs* [1984] AATA 437; (1984) 6 ALN N257.

98 *Re Cullen and Australian Federal Police* [1991] AATA 671.

99 See *'X' and Australian Federal Police* [2013] AICmr 40 [22]; *'HR' and Department of Immigration and Border Protection* [2015] AICmr 80.

100 *'I' and Australian National University* [2012] AICmr 12 [15].

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

previous bad behaviour, without more, does not necessarily support a reasonable apprehension.[102]

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

- If release of the document might lead to abusive behavior in the form of insulting and offensive communications this will not be enough to make the documents exempt. However, if the applicant has a documented history of abusing and threatening departmental staff including threats of serious physical harm this may be sufficient to make the documents exempt.[103]
- A reasonable apprehension was shown in *Re Ford and Child Support Registrar.*[104] In that case, a third party gave extensive evidence about her fear of what would happen 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 they were still in jail. She said he had written threatening letters to her and her friends and she was scared of him. The AAT found 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*,[105] found that a threat of litigation against a person is not harassment which endangers a person's life or physical safety.[106]
- In considering a similar provision in Queensland's *Right to Information Act 2009*, the Queensland Information Commissioner found, based on evidence and subsequent reporting, that releasing information about suicides at specific locations would lead to an increase in the number of people attempting or completing acts of suicide at those locations.[107]
- Access to psychiatric reports provided to the Supreme Court was refused on the basis that disclosure could reasonably be expected to endanger the life or physical safety of other persons. In deciding to refuse access, the Queensland Information Commissioner considered factors such as the applicant's history of violence and criminal activity, the fact the applicant had been the subject of a forensic order which resulted in detention as an inpatient of a high security mental health unit and ongoing mental health issues as relevant in deciding that the applicant's current state of mind was such that disclosure could reasonably be expected to endanger the life or physical safety of other people.
- The exemption was not satisfied under the corresponding provision in the

[102] *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).

[103] *'MM' and Department of Human Services (Freedom of information*) [2017] AICmr 92 [19]-[35]

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

[105] Now replaced by the *Right to Information Act 2009.*

[106] *Re Murphy and Queensland Treasury* [1995] QICmr 23; (1995) 2 QAR 744.

[107] *Courier-Mail and Queensland Police Service* (Unreported, Queensland Information Commissioner, 15 Feb 2013).

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.[108]

Prejudice to a fair or impartial trial

5.120 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.[109] 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 impartial adjudication of the matter.[110] 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

5.121 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.[111]

5.122 '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.

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

5.124 This exemption requires satisfaction of 2 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.[112] If the only result of disclosing the methods would be that those methods were no surprise to anyone, there could be no

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

109 See Federal Court of Australia, *Glossary of Legal Terms* www.fedcourt.gov.au/digital-law-library/glossary-of-legal-terms.

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

111 For an example of the application of this part of the FOI Guidelines, see *'RI' and Department of Home Affairs (Freedom of information)* [2019] AICmr 71 [12]–[25].

112 *Re Anderson and Australian Federal Police* [1986] AATA 79; (1986) 4 AAR 414; (1986) 11 ALD 355; (1986) 11 ALN N239.

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.[113]

5.125 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 priority 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.[114] 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.[115] 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.[116]

5.126 The exemption may apply to methods and procedures that are neither obvious nor a matter of public notoriety, even if evidence of a particular method or procedure has been given in a proceeding before the courts.[117] 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.[118] The exemption is more likely to apply where disclosure of a document would disclose covert, as opposed to overt or routine methods or procedures.[119]

Protection of public safety

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

5.128 The terms 'lawful' and 'prejudice' apply to s 37(2)(c) in the same manner as described for s 37(2)(b) at [5.121] – [5.126] above.

5.129 The words 'public safety' do not extend beyond safety from violations of the law and breaches of the peace.[120] 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.

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113 See *Hunt and Australian Federal Police* [2013] AICmr 66 [28].

114 *Re Russo v Australian Securities Commission* [1992] AATA 228; (1992) 28 ALD 354.

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

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

117 *Re T and Queensland Health* (1994) 1 QAR 386.

118 *Re Murphy and Australian Electoral Commission* [1994] AATA 149; (1994) 33 ALD 718.

119 *Re Anderson and Australian Federal Police* [1986] AATA 79; (1986) 4 AAR 414; (1986) 11 ALD 355; (1986) 11 ALN N239.

120 *Re Thies and Department of Aviation* [1986] AATA 141; (1986) 9 ALD 454; (1986) 5 AAR 27.

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.[121]

5.130 *Re Hocking and Department of Defence* provides an example of the operation of s 37(2)(c).[122] 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.

Documents to which secrecy provisions apply (s 38)

5.131 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)).

5.132 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 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.[123]

5.133 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.[124] Contrary to usual 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.[125]

5.134 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

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121 *Re Parisi and Australian Federal Police* (*Qld*) [1987] AATA 395.

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

123 For an example of the application of this part of the FOI Guidelines, see *John Mullen and Aged Care Complaints Commissioner (Freedom of information)* [2017] AICmr 34 [11]–[27].

124 *NAAO v Secretary, Department of Immigration and Multicultural Affairs* [2002] FCA 292 [24]–[25]; (2002) 117 FCR 401; (2002) FCAFC 64.

125 *Re Young and Commissioner of Taxation* [2008] AATA 155; (2008) 100 ALD 372; 71 ATR 284 see also '*A' and Department of Health and Ageing* [2011] AICmr 4 [13]-[16].

personal information about another individual. If the FOI applicant's personal information can be separated from any third-party personal information, the FOI applicant's personal 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).

5.135 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.

5.136 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[126] but would generally not encompass the release of information under the FOI Act.

5.137 For example, in *Walker and Secretary, Department of Health (Freedom of information)* the AAT considered the application of s 38 to information relating to the status of medical General Practitioners. Subject to certain exceptions, s 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. Section 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'.[127]

5.138 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 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.

5.139 It may be that consent by a person or entity to disclosure of information protected by a secrecy provision is not a defence to the offence of disclosure. For example, in *'ADN' and the Australian Taxation Office* the acting FOI Commissioner Toni Pirani found that although a third party had consented to disclosure of their taxation information to the FOI applicant, that information remained protected information because consent is not a defence to the offence of disclosure in the *Taxation Administration Act 1953*.[128]

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126 *Canadian Pacific Tobacco Co Ltd v Stapleton* [1952] HCA 32 [20]; (1952) 86 CLR 1, on the interpretation of 'course of duty' in the context of Commonwealth income tax law.

127 *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 was exempt information.

128 *'ADN' and the Australian Taxation Office (Freedom of information)* [2023] AICmr 44 [66].

Documents subject to legal professional privilege (s 42)

5.140 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.

5.141 The FOI Act does not define legal professional privilege for the purposes of the exemption. To determine the application of this exemption, the decision maker needs to turn to common law concepts of privilege. The statutory test of client legal privilege under the *Evidence Act 1995* is not applicable and should not be taken into account.[129] 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

5.142 Legal professional privilege applies to some, but not all, communications between legal advisers and clients. The underlying policy basis for legal professional privilege is to promote 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.[130] Legal professional privilege protects documents which would reveal communications between a client and their lawyer made for the dominant purpose of giving or obtaining legal advice.[131] 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.

5.143 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 dominant purpose of giving or receiving legal advice, or for use in connection with actual or anticipated litigation
- whether the advice given is independent
- whether the advice given is confidential.[132]

Legal adviser-client relationship, independence and in-house lawyers

5.144 A legal adviser-client relationship exists where a client retains the services

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129 *Commonwealth of Australia v Dutton* [2000] FCA 1466 [2]; (2000) 102 FCR 168.

130 *Comcare v Foster* [2006] FCA 6 [22]–[40]; (2006) 42 AAR 434.

131 *Esso Australia Resources Ltd v Federal Commissioner of Taxation* [1999] HCA 67 [80]; (1999) 201 CLR 49 at 73; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* [2002] HCA 49 [9]–[10].

132 *Grant v Downs* [1976] HCA 63; (1976) 135 CLR 674; *Waterford v Commonwealth of Australia* [1987] HCA 25; (1987) 163 CLR 54; and *Esso Australia Resources Ltd v Federal Commissioner of Taxation* [1999] HCA 67; (1999) 201 CLR 49. For examples of the application of these considerations see *'VO' and Northern Australia Infrastructure Facility (Freedom of information)* [2020] AICmr 47 [24]–[39]; *'VH' and Australian Taxation Office (Freedom of information*) [2020] AICmr 43 [22]–[36]; *and Clifford Chance Lawyers and National Competition Council (Freedom of information)* [2020] AICmr 26 [49]–[76].

of a lawyer for the purpose of obtaining professional advice. If the advice is received from an independent external legal adviser then establishing the existence of the relationship is usually straightforward. 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).

5.145 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 based on the circumstances in which the advice 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 their capacity as a professional legal adviser
- the dominant purpose test must be satisfied
- the giving of the advice must be attended by the necessary degree of independence[133]
- the advice must be confidential
- the fact that the advice arose out of a statutory duty does not preclude the privilege from applying[134]
- whether the lawyer is subject to professional standards can be relevant.[135]

5.146 Having legal qualifications does 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 decisive, factor.[136] Alternatively, a right to practise may be conferred by an Act (for example, ss 55B and 55E of the *Judiciary Act 1903*).

5.147 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 [5.145] 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

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133 Generally, legal professional privilege 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]. For a discussion of in-house lawyers in government agencies, see also *Bell and Secretary, Department of Health (Freedom of Information)* [2020] AATA 1436 [47]–[70].

134 *Waterford v Commonwealth of Australia* [1987] HCA 25 [9]; (1987) 163 CLR 54.

135 *Re Proudfoot and Human Rights and Equal Opportunity Commission* [1992] AATA 317 [14] which restates the principles of *Waterford v Commonwealth of Australia* [1987] HCA 25; (1987) 163 CLR 54.

136 *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 [51], referring to *Australian Hospital Care Pty Ltd v Duggan* (No. 2) [1999] VSC 131. 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.

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 the employee is acting independently in giving the advice.'[137]

5.148 An in-house lawyer has the necessary degree of independence as long as their personal loyalties, duties or interests do not influence the professional legal advice they give.[138]

5.149 In-house lawyers may perform a range of functions within an agency. The mere fact that advice is given by a lawyer is not sufficient to establish a legal adviser-client relationship.[139] In *'ACV' and Tertiary Education Quality and Standards Agency (Freedom of information)* [2023] AICmr 3, Freedom of Information Commissioner Hardiman considered whether an in-house legal adviser gave advice in their professional capacity as a legal adviser, or in some other capacity, in circumstances in which the agency's Legal Group was responsible for the management of all complaints about the agency. Commissioner Hardiman concluded that while some complaints may involve legal issues requiring legal advice (for example, complaints about the exercise of a statutory power or the performance of a statutory duty or function, or complaints involving potential legal liability), not all complaints about an agency will raise legal issues and the role of the Legal Group in such circumstances will generally be of an administrative nature.[140]

5.150 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.[141] 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

5.151 Whether legal professional privilege 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.[142] The communication may have been brought into existence for more than one purpose but will be privileged if the main purpose for its creation was for giving or receiving legal advice or for use in actual or anticipated litigation.

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

138 *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].

139 *'ACV' and Tertiary Education Quality and Standards Agency (Freedom of information)* [2023] AICmr 3 [66].

140 *'ACV' and Tertiary Education Quality and Standards Agency (Freedom of information)* [2023] AICmr 3 [65]–[68].

141 *AWB Limited v Honourable Terence Rhoderic Hudson Cole (No 5)* [2006] FCA 1237 [7].

142 *Esso Australia Resources Ltd v Commissioner for Taxation* [1999] HCA 67; (1999) 201 CLR 49.

Legal advice privilege

5.152 The AAT has observed that 'a broad approach is to be taken as to what is included in the scope of the privilege' and that '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.'[143]

5.153 The concept of legal advice, while broad, does not extend to advice that is purely commercial or of a public relations character.[144]

Litigation privilege

5.154 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'.[145]

5.155 The question of whether litigation privilege extends beyond the Courts to include Tribunals is unsettled.[146]

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

5.156 In light of AAT authority agencies and ministers should consider whether the entire contents of a document meets the dominant purpose test. If the entire contents of the document does not meet the test, agencies and ministers should, if reasonably practicable, consider giving the applicant access to material that is not of itself privileged (while remaining mindful of the consequence of unintended waiver of privilege (see below at [5.159] – [5.166]).[147] 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 does 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

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

144 *AWB Limited v Honourable Terence Rhoderic Hudson Cole (No 5)* [2006] FCA 1234 [44](7).

145 *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] FCAFC 147 [30]–[33];(2007) 161 FCR 122 [30].

146 In *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd* [2006] NSWSC 530 [55], Bergin J held that litigation privilege did not apply in the AAT because AAT proceedings are not adversarial. In *'GF' 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. However, the following cases have held that the legal advice privilege is available in the AAT: *Waterford v Commonwealth* [1987] HCA 25; (1987) 163 CLR 54; *Farnaby and Military Rehabilitation and Compensation Commission* [2007] AATA 1792 [29], [31]*;* (2007) 97 ALD 788*; Re VCA and Australian Prudential Regulation Authority* [2008] AATA 580 [205].

147 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.

purpose of the FOI Act may not be served by disclosing an edited copy and the document should be exempt in full (see Part 3).

Confidentiality

5.157 Legal professional privilege applies to confidential communications — that is, communications known only to the client or to a select class of persons with a common interest in the matter.

5.158 Legal professional privilege 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.[148]

Waiver of privilege

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

5.160 Legal professional privilege is the client's privilege to assert or to waive, and the legal adviser cannot waive it except with the authority of the client.[149] In the context of an FOI request, the agency receiving the advice will usually be the 'client' who needs to decide whether to assert or waive legal professional privilege. If the privilege is asserted, the 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.

5.161 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.

5.162 The High Court has held that waiver of legal professional privilege will occur where the earlier disclosure is inconsistent with the confidentiality protected by the privilege.[150] This inconsistency test has been affirmed by the High Court as the appropriate test for determining whether privilege has been waived.[151] It is immaterial that the client did not intend to waive privilege.[152]

5.163 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

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148 *Comcare v Foster* [2006] FCA 6 [29]; (2006) 150 FCR 301.

149 *Re Haneef and the Australian Federal Police* [2009] AATA 51 [76]; (2009) 49 AAR 395, citing *Mann v Carnell* [1999] HCA 66; (1999) 201 CLR 1.

150 *Mann v Carnell* [1999] HCA 66; (1999) 201 CLR 1.

151 *Osland v Secretary to the Department of Justice* [2008] HCA 37; (2008) 234 CLR 275; 249 ALR 1; 82 ALJR 1288.

152 See *Michael Leichsenring and Department of Defence (Freedom of information)* [2019] AICmr 51 [30]–[31].

contents of the document, it may not be inconsistent to continue to claim that the document is confidential and privileged. For example, the Federal Court (Collier J) has found that the provision of an in-house legal advice to the Australian Information Commissioner to support a claim that a document is exempt from disclosure did not waive privilege with respect to that legal advice.[153] This was because the disclosure was to a statutory officer-holder in the context of an IC review and the document was disclosed on the express basis that it was to remain confidential and not be disclosed to the applicant. Further, the advice was conveyed in an email marked 'Sensitive: Legal'.

5.164 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 effect of legal advice could be consistent with maintaining confidentiality in the actual terms of the advice. The Legal Services Directions 2017 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.[154]

5.165 Whether a disclosure is inconsistent with maintaining confidentiality will depend on the particular context and circumstances of the matter, and will involve matters of fact and degree.[155] Relevant considerations include:

- the purpose of the disclosure
- whether the substance or effect of legal advice has been used for forensic or commercial purposes[156] or to disadvantage another person[157]
- the legal and practical consequences of a limited rather than complete disclosure[158]
- whether the communication merely refers to a person having taken and considered legal advice[159] or whether it discloses the gist or conclusion of legal advice[160]

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153 *Alpert v Secretary, Department of Defence* [2022] FCA 54.

154 *Judiciary Act 1903* s 55ZH(4). The Legal Services Directions are available at www.legislation.gov.au.

155 *Osland v Secretary to the Department of Justice* [2008] HCA 37; *Doney and Department of Finance and Deregulation* [2012] AICmr 25 [23]–[27]; *Alpert v Secretary, Department of Defence* [2022] FCA 54 [82]–[91].

156 *Bennett v Chief Executive Officer, Australian Customs Service* [2004] FCAFC 237; [2004] 140 FCR 101 per Gyles J (at [68]), Tamberlin J agreeing.

157 *College of Law Limited v Australian National University* [2013] FCA 492 [24].

158 *Secretary, Department of Justice v Osland* [2007] VSCA 96; (2007) 26 VAR 425 [45]–[49].

159 *Ampolex Limited v Perpetual Trustee Co (Canberra) Ltd* [1996] HCA 15 per Kirby J [34].

160 *Bennett v Chief Executive Officer, Australian Customs Service* [2004] FCAFC 237 per Gyles J (at [65]); *Goldberg v Ng* [1995] HCA 39; *Michael Leichsenring and Department of Defence (Freedom of information)* [2019] AICmr 51 [37] applying *Bennett v Chief Executive Officer of the Australian Customs Service* [2004] FCAFC 237 per Tamberlin J at [14]. Disclosure of the gist, conclusion, substance or effect of a privileged communication does not necessarily effect a waiver of legal professional privilege in respect of the advice as a whole. Whether it does or not in a particular case depends on whether, in the circumstances of that case, the requisite inconsistency exists between the disclosure on the one hand and the maintenance of confidentiality on the other.

- the nature of the matter in which the advice was sought.[161]

5.166 Agencies should take special care in dealing with documents for which they may wish to claim legal professional privilege to avoid unintentionally waiving that privilege.

The 'real harm' test

5.167 Agencies are advised not to claim an 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 legal professional privilege , but has been acknowledged within government as a relevant discretionary test to apply in FOI administration.[162] The phrase 'real harm' distinguishes between substantial prejudice to the agency's affairs and mere irritation, embarrassment or inconvenience to the agency.

5.168 In the IC review decision of *'ACV' and Tertiary Education Quality and Standards Agency (Freedom of information)* [2023] AICmr 3 [89]–[90] ('ACV'), the FOI Commissioner observed that agencies are not legally bound to refuse access to documents if they are exempt under the FOI Act (see s 3A). In *ACV* the contents of the relevant document were said to be 'anodyne' and disclose little more than what was disclosed to the applicant in the final version of correspondence sent to them. In such circumstances, the FOI Commissioner advised the agency to consider providing access to the document.

5.169 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.[163]

Copies or summary records

5.170 Records made by agency officers 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 obtaining legal advice or for use in legal proceedings.[164]

Exception for operational information

5.171 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)).

5.172 Agencies must publish their operational information under the information publication scheme established by Part II, s 8 of the FOI Act. 'Operational

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161 *College of Law Limited v Australian National University* [2013] FCA 492 [24].

162 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.

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

164 *Re Haneef and Australian Federal Police and Commonwealth Director of Public Prosecutions* [2010] AATA 514 [77].

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.[165] For further information about the definition of 'operational information' see Part 13.

Documents containing material obtained in confidence (s 45)

5.173 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.[166]

5.174 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.

5.175 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).[167]

Breach of confidence

5.176 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.[168] The FOI Act expressly preserves confidentiality where that confidentiality would be actionable at common law or in equity.

5.177 The exemption in s 45 is restricted in scope to the disclosure of information that would found an action for breach of confidence. It does not apply to confidential information per se or to the disclosure of confidential information that would found another type of action, such as an action based on the tort of negligence or a breach of statutory duty.[169]

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

166 See the Explanatory Memorandum, *Freedom of Information Bill 1992*; and *Re Kamminga and Australian National University* [1992] AATA 84; [1992] AATA 84 [22]–[23].

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

168 *Coco v AN Clark (Engineers) Ltd* [1969] 86 RPC 41 (on the test for breach of confidence).

169 *Francis and Australian Sports Anti-Doping Authority (Freedom of information)* [2019] AATA 12 [101]. See also, *Re Petroulias and Others and Commissioner of Taxation* [2006] AATA 333. *Johns v Australian Securities Commission* [1993] HCA 56 [14]; (1993) 178 CLR 408 [424] discusses the obligation of confidence in

5.178 While the existence of either a statutory or contractual obligation of confidence may support the existence of an equitable obligation of confidence for the purpose of s 45, it is not of itself determinative. All 5 criteria (see [5.179] below) must also apply to the information. The existence of either a statutory or a contractual obligation of confidentiality should be considered in the context of those 5 criteria.[170]

5.179 To found an action for breach of confidence (which means s 45 may be applied by an agency or minister), the following 5 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[171]
- it must have been disclosed or threatened to be disclosed, without authority
- unauthorised disclosure of the information has or will cause detriment.[172]

5.180 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.[173]

Specifically identified

5.181 The alleged confidential information must be identified specifically. It is not sufficient for the information to be identified in global terms.[174]

circumstances in which an agency obtains information in the exercise of compulsory powers. In such cases, the agency will generally be under a statutory duty to protect the confidentiality of that information. This is because a law that confers a power to obtain information for a purpose defines, expressly or impliedly, the purpose for which the information, once obtained, can be used or disclosed. The law imposes a duty not to disclose the information except for that purpose. The person obtaining the information in exercise of the statutory power must therefore treat the information obtained as confidential whether or not the information is otherwise of a confidential nature.

170 *Patrick; Secretary, Department of Defence and* [2021] AATA 4627 [43]*;* see also *Francis and Australian Sports Anti-Doping Authority (Freedom of information)* [2019] AATA 12.

171 *'FT' and Civil Aviation Safety Authority* [2015] AICmr 37 [15]–[18].

172 *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* [1987] FCA 266 [14]; (1987) 14 FCR 434; *Coco v AN Clark (Engineers) Ltd* [1969] 86 RPC 41; *Commonwealth v John Fairfax and Sons Ltd* [1980] HCA 44; (1980) 147 CLR 39; 32 ALR 485 (on the test for confidence in equity). For examples of the application of these criteria see *'VO' and Northern Australia Infrastructure Facility (Freedom of information)* [2020] AICmr 47 [40]–[72]; *'RG' and Department of the Prime Minister and Cabinet (Freedom of information)* [2019] AICmr 69 [12]–[48]; *Paul Farrell and Department of Home Affairs (No 4) (Freedom of information)* [2019] AICmr 40 [22]–[35]; *Paul Farrell and Department of Home Affairs (No.2) (Freedom of information)* [2019] AICmr 37 [9]–[32] and *Secretary Department of Veterans' Affairs and Burgess (Freedom of Information)* [2018] AATA 2897 [11]–[12].

173 *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* [1987] FCA 266 [41]–[57]; (1987) 14 FCR 434.

174 *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* [1987] FCA 266; (1987) 14 FCR 434.

Quality of confidentiality

5.182 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.[175] 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.

5.183 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. However, even if information has entered the public domain it may not have lost its confidential character unless it has become public knowledge such that, as a matter of common sense, the confidential character of the information has disappeared.[176] The obligation of confidence may also only relate to a limited time period.

Mutual understanding of confidence

5.184 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.[177] The mutual understanding must have existed at the time of the communication. For example, when a person gives information to an agency they may ask that it be kept confidential and the agency accepts the information on that basis.

5.185 A mutual understanding of confidence can exist even if a person is legally obliged to provide the information to the agency.[178] 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 is inconsistent with any mutual understanding of confidence.[179]

5.186 It may be clear from an agency's actions whether the agency accepted an obligation of confidence and is maintaining that obligation.[180] 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.

5.187 An obligation of confidentiality may be express or implied.[181] 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

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175 *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* [1987] FCA 266 [14]; (1987) 14 FCR 434.
176 *Francis and Australian Sports Anti-Doping Authority (Freedom of information)* [2019] AATA 12 [124].
177 *Re Harts Pty Ltd and Tax Agents' Board (Qld)* [1994] AATA 349.
178 *National Australia Bank Ltd and Australian Competition and Consumer Commission* [2013] AICmr 84 [23].
179 *Maritime Union of Australia and Department of Infrastructure and Regional Development* [2014] AICmr 35 [28]-[40].
180 *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* [1987] FCA 266 [11]; (1987) 14 FCR 434.
181 See *Re Bunting and Minister Immigration and Multicultural and Indigenous Affairs* [2006] AATA 145.

community, it may be implied that when a business provides such information to that agency it will be on the basis of confidentiality.[182]

Unauthorised disclosure or threatened disclosure

5.188 The information must have been disclosed 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.

5.189 For example, the agency may have told the person providing the information about the people to whom the agency will 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 or disclosure. Similarly, a person providing confidential information to an agency may specifically permit the agency to divulge the information to a limited group of people.

5.190 Compliance with a statutory requirement for disclosure of confidential information will not amount to an unauthorised use and will not breach confidentiality.[183]

Detriment

5.191 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.184 Detriment takes many forms, such as threat to health or safety, financial loss, embarrassment, exposure to ridicule or public criticism. The last 3 are applicable only to private persons and entities, not to government.

5.192 The AAT has applied this element in numerous cases, but whether it must be established is uncertain.[185] 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.[186] Despite the uncertainty, it would be prudent to assume that establishing detriment is necessary.[187]

Parliamentary Budget Office documents (s 45A)

5.193 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

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

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

184 *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* [1987] FCA 266; (1987) 14 FCR 434, referring to *Commonwealth v John Fairfax and Sons Ltd* [1980] HCA 44; (1980) 147 CLR 39; 32 ALR 485.

185 *Burgess; Secretary Department of Veterans' Affairs and (Freedom of Information)* [2018] AATA 2897; *Re Callejo and Department of Immigration and Citizenship* [2010] AATA 244; (2010) 51 AAR 308; *Petroulias and Others and Commissioner of Taxation* [2006] AATA 333; (2006) 62 ATR 1175.

186 *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] FCA 384; (1989) 89 ALR 366.

187 *Re B and Brisbane North Regional Health Authority* [1994] QICmr 1 [109], [111]; (1994) 1 QAR 279.

Schedule 2, and s 68A of the *Parliamentary Service Act 1999* (PS Act)), documents related to PBO FOI requests may be held by other agencies. The PBO exemption in s 45A is designed to protect the confidentiality of documents in the context of FOI 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

5.194 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)).

5.195 The exemption also applies to a full or partial copy of a document of a category listed at [5.194] 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 [5.70]).

5.196 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.

5.197 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 the exemption

5.198 There are 4 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)).

5.199 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)*[188] 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*.[189]

Withholding information about the existence of documents

5.200 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 [5.57] – [5.60] above).

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

5.201 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.

5.202 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.

5.203 This provision takes its scope from the principles of privilege and the general

[188] Available at www.aph.gov.au.
[189] Available at www.aph.gov.au.

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

5.204 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

5.205 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[190] 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.

5.206 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.

Contrary to an order or direction

5.207 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.[191] Royal Commissions are established for a fixed time period. However any confidentiality orders continue in effect past this period.[192]

Infringe the privileges of Parliament

5.208 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

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190 *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.

191 For examples of the application of this part of the FOI Guidelines *see 'KZ' and Australian Federal Police (Freedom of information)* [2017] AICmr 24 [23]–[28] and *'ABY' and Department of Defence (Freedom of Information)* [2022] AICmr 61 (23 August 2022) [23]–[29].

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

their processes.[193]

5.209 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.

5.210 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).[194]

5.211 Section 4 of the Privileges Act 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.

5.212 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.

5.213 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 a member of Parliament's free performance of their duties as a member.

5.214 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 them respond 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.

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

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

5.215 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)

5.216 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.

5.217 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)).

5.218 These exceptions to the exemption capture situations in which no harm would result from disclosure of documents because they are being provided 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

5.219 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.[195]

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

- 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

[195] *Department of Employment, Workplace Relations and Small Business v Staff Development and Training Company* [2001] FCA 1375 [14]; (2001) 114 FCR 301.

real or significant harm to the owner of the information.[196]

5.221 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[197]
- 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.[198]

5.222 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.[199]

5.223 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.[200]

Information having a commercial value

5.224 To be exempt under s 47(1)(b) a document must satisfy 2 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.[201]

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

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196 *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] FCA 241 [34]; (1992) 108 ALR 163.

197 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.

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

199 *Australian Broadcasting Corporation and Australian Fisheries Management Authority* [2016] AICmr 43 [30].

200 *Searle Australia Pty Ltd and Public Interest Advocacy Centre and Department of Community Services and Health* [1992] FCA 241 [38]; (1992) 36 FCR 111; (1992) 108 ALR 163.

201 See *Rex Patrick and Department of Defence (No 2) (Freedom of information)* [2020] AICmr 40 [10]–[38].

or commercial activity in which an agency or person is involved.[202] The information need not necessarily have 'exchange value', in the sense that it can be sold as a trade secret or intellectual property.[203] 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[204]
- whether the information is still current or out of date (out of date information may no longer have any value)[205]
- whether disclosing the information would reduce the value of a business operation or commercial activity — reflected, perhaps, in a lower share price.

5.226 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.[206]

5.227 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.[207] 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.[208]

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

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

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

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

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

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

208 *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 had commercial value such that a competitor would be willing to pay for it, and that value would be diminished by disclosure. See also, *Rex Patrick and Department of Defence (No 2) (Freedom of information)* [2020] AICmr 40 [27]–[38].

Consultation

5.228 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)

5.229 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.

5.230 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)).

5.231 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)).