

# PART 6 — CONDITIONAL EXEMPTIONS

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## PART 6 — CONDITIONAL EXEMPTIONS

6.1 Certain types of documents are conditionally exempt under Division 3 of Part IV of the FOI Act. This means that access must be given to the document unless in the circumstances access at that time would on balance be contrary to the public interest (s 11A(5)). Conditional exemptions relate to the following categories:

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

6.2 Each of these categories of exemption is discussed below, following discussion of the public interest test.

### The public interest test

6.3 The 2010 reforms included three important changes:

- a single public interest test was introduced to apply to each of the conditional exemptions
- the new public interest test is defined to include certain factors that must be taken into account where relevant, and some factors which must not be taken into account
- the public interest test applies to a greater range of exemptions.

Another relevant reform that commenced in 2009 was the abolition of conclusive certificates.<sup>1</sup> Previously, a conclusive certificate issued by a minister or senior official would establish conclusively that disclosure of an internal working document would be contrary to the public interest.

6.4 The public interest in disclosure, reflected in the objects of the FOI Act (see Part 1 of these Guidelines), remains at the forefront of decision making about giving access. Agencies and ministers must have regard to the Information Commissioner's guidelines when determining whether giving access would be contrary to the public interest (s 11B(5)). These guidelines include references to court and tribunal decisions which may assist in applying the conditional exemptions. However, agencies should note that some of those decisions related to statutory provisions that have since been repealed or amended, and caution is therefore required in adopting some decisions as a precedent in interpreting the FOI Act.

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<sup>1</sup> *Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act 2009.*

6.5 Prior to the 2010 reforms, various FOI exemptions contained a range of different public interest tests. The following table lists the former exemptions that incorporated a concept of public interest and the conditional exemptions that have replaced them. Of note is the fact that the public interest test now applies to documents where issues of personal privacy, business and research are raised. None of these categories previously included a public interest test.

**Table 1: Exemptions subject to a public interest test**

Exemptions prior to 2010 reforms	Conditional exemptions following 2010 reforms
Commonwealth-State relations (s 33A)	Commonwealth-State relations (s 47B)
internal working documents (s 36)	deliberative processes (s 47C)
documents affecting financial or property interests of the Commonwealth (s 39)	financial and property interests of the Commonwealth or Norfolk Island (s 47D)
documents concerning certain operations of agencies (s 40)	documents concerning certain operations of agencies (s 47E)
documents affecting the national economy (s 44)	the economy (s 47J)
-	personal privacy (s 47F)
-	business (s 47G)
-	research (s 47H)

### What does the term ‘public interest’ mean?

6.6 The 1979 Senate Committee on the FOI bill described the concept of ‘public interest’ in the FOI context as:

... a convenient and useful concept for aggregating any number of interests that may bear upon a disputed question that is of general – as opposed to merely private – concern.<sup>2</sup>

6.7 The concept of public interest has also been described as something that is of serious concern or benefit to the public, not merely of individual interest.<sup>3</sup> It has been held that public interest does not mean of interest to the public, but in the interest of the public.<sup>4</sup>

6.8 The term ‘public interest’ was not defined in the FOI Act when it was enacted.<sup>5</sup> This approach encouraged decision makers to analyse what constitutes the public interest in a particular matter, rather than relying on set criteria. Following the 2010 reforms, the term remains largely undefined, although there are some factors which must *not* be taken into

<sup>2</sup> Senate Standing Committee on Constitutional and Legal Affairs, *Report on the Cth Freedom of Information Bill 1978, 1979*, paragraph 5.25.

<sup>3</sup> *British Steel Corporation v Granada Television Ltd* (1980) 3 WLR 780.

<sup>4</sup> *Johansen v City Mutual Life Assurance Society Ltd* (1904) 2 CLR 186.

<sup>5</sup> Senate Standing Committee on Constitutional and Legal Affairs, *Report on the Cth Freedom of Information Bill 1978, 1979*, paragraph 5.28.

account (see paragraph 6.31). The term ‘public interest’ is necessarily broad and non-specific because what constitutes the public interest depends on the particular facts of the matter and the context in which it is being considered. The concept can be applied to a multitude of situations and circumstances. Public interest considerations (such as the administration of justice) may also be simultaneously evoked in favour and against disclosure of a document in a particular case.

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

6.10 It is not necessary for a matter to be in the interest of the public as a whole. It may be sufficient that the matter is in the interest of a section of the public bounded by geography or another characteristic that depends on the particular situation. The public interest relates to matters of common concern or relevance to all members of the public, or a substantial section of the public. A matter of particular interest or benefit to an individual or small group of people may nevertheless be a matter of general public interest. This is recognised in s 11B(3)(c) of the Act, which states that there can be a public interest in allowing a person to access his or her personal information.

### Applying the public interest test

6.11 The FOI Act requires that:

The agency or minister must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.  
(s 11A(5))

6.12 The pro-disclosure principle declared in the objects of the FOI Act is given specific effect in the public interest test, as the test is weighted towards disclosure. If a decision is made that a conditionally exempt document should not be disclosed, the decision maker must include the public interest factors they took into account in their statement of reasons under s 26(1)(aa) (see Part 8 of these Guidelines).

6.13 A document may be conditionally exempt if it falls under one of the eight categories outlined in paragraph 6.1. Before considering where the public interest lies in relation to disclosing a document, the decision maker must first determine whether the document is conditionally exempt.

6.14 A decision maker cannot withhold access to a document simply because it falls under one of the eight conditional exemption categories. Disclosure of conditionally exempt documents is required unless in the particular circumstances, and at the time of the decision, there is on balance countervailing harm which offsets the inherent public interest of giving access. The FOI Act acknowledges in the framing of the conditional exemptions that there are certain harms that could occur if a document is disclosed. The basis of disclosure of those documents is that on balance more good than harm will result.

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

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

6.16 For each of the conditional exemptions, the harm threshold that must be reached is specified in the provision. The various harm thresholds vary in both the extent of the harm that disclosure would cause and the extent to which the decision maker must be satisfied that the harm would result. The only exception is the deliberative processes exemption (s 47C), which does not include any requirement of harm: the threshold requirement is that the document includes deliberative matter. Specific guidance on the criteria to be met in each of the eight conditional exemptions is provided later in this Part.

6.17 A decision maker's initial consideration of the harm that may arise is concerned with whether the document meets the criteria for being a conditionally exempt document. It is not a determination of where on balance the public interest lies, taking into account all relevant considerations.

6.18 For example, s 47D concerns conditional exemptions where documents relate to the financial or property interests of the Commonwealth, Norfolk Island, or an agency. In order to find that s 47D applies, a decision maker would need to be satisfied that if the document were disclosed there would be:

- a substantial adverse effect
- on the financial or property interests of the Commonwealth, Norfolk Island, or an agency.

6.19 These criteria require more than simply asserting that the Commonwealth's, or Norfolk Island's, or an agency's financial interests would be affected. The effect would need to be sufficiently serious or significant to cause a reasonable person to be concerned. The decision maker would need to be able to describe clearly the expected effect on the Commonwealth, Norfolk Island or the agency. At this stage, no other general public interest considerations (such as the likely effect on public debate, scrutiny of government administration or revealing misconduct by an agency officer) are taken into account.

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

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

6.21 Using the previous example of s 47D, the specific harm that must be shown is a 'substantial adverse effect' on the financial or property interests of the Commonwealth, Norfolk Island or an agency.

6.22 While both Steps 1 and 2 involve consideration of harm, there is a distinction in the nature and purpose of this consideration. In Step 1, the consideration relates to whether or

not the harm threshold has been met in order to determine whether the document is conditionally exempt. Step 2 relates to quantifying the harm as a preparatory step to weighing the factors in favour and against disclosure.

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

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

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

6.24 For example, disclosure of a document that is conditionally exempt under s 47D might in the particular circumstances enhance the scrutiny of government decision making, or inform the community of the Australian Government's policies and practices in dealing with the public, or promote effective oversight by revealing the misconduct of an agency officer. These would be factors in favour of disclosure in the public interest.

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

#### **Public interest factors favouring disclosure**

- (a) FOI Act promotes disclosure
  - i. inform the community of the Government's operations, including, in particular, the policies, rules, guidelines, practices and codes of conduct followed by the Government in its dealings with members of the community
  - ii. allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official<sup>6</sup>
  - iii. reveal or substantiate that an agency or official has engaged in misconduct or negligent, improper or unlawful conduct
  - iv. reveal the reason for a government decision and any background or contextual information that informed the decision
  - v. enhance the scrutiny of government decision making
- (b) inform debate on a matter of public importance
- (c) promote effective oversight of public expenditure
- (d) allow a person to access his or her personal information, or
  - i. the personal information of a child, where the applicant is the child's parent and disclosure of the information is reasonably considered to be in the child's best interests

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<sup>6</sup> See also *Carver and Fair Work Ombudsman* [2011] AICmr 5.

- ii. the personal information of a deceased individual where the applicant is a close family member (a close family member is generally a spouse or partner, adult child or parent of the deceased, or other person who was ordinarily a member of the person's household)
- (e) contribute to the maintenance of peace and order
- (f) contribute to the administration of justice generally, including procedural fairness<sup>7</sup>
- (g) contribute to the enforcement of the criminal law
- (h) contribute to the administration of justice for a person
- (i) advance the fair treatment of individuals and other entities in accordance with the law in their dealings with agencies
- (j) reveal environmental or health risks of measures relating to public health and safety and contribute to the protection of the environment
- (k) contribute to innovation and the facilitation of research.

#### ***Step 4: Identify the factors against disclosure***

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

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

6.28 For example, a factor against disclosure of a document that is conditionally exempt under s 47D would be the expected substantial adverse effect on the Commonwealth's financial interests. This factor would have been explored when the decision maker considered whether the conditional exemption applied. Other factors against disclosure might be a reasonable expectation that disclosure could be reasonably expected to prejudice the Commonwealth's ability to obtain similar information from third parties in the future, or that disclosure would harm the interests of an individual or group of individuals who would be affected.

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<sup>7</sup> This refers to administration of justice in a more general sense. Access to documents through FOI is not intended to replace the discovery process in particular proceedings in courts and tribunals, which supervise the provision of documents to parties in matters before them: *'Q' and Department of Human Services* [2012] AICmr 30, [17].

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

**Public interest factors against disclosure**

- (a) could reasonably be expected to prejudice the protection of an individual's right to privacy, including where:
  - i. the personal information is that of a child, where the applicant is the child's parent, and disclosure of the information is reasonably considered not to be in the child's best interests
  - ii. the personal information is that of a deceased individual where the applicant is a close family member (a close family member is generally a spouse or partner, adult child or parent of the deceased, or other person who was ordinarily a member of the person's household) and the disclosure of the information could reasonably be expected to affect the deceased person's privacy if that person were alive.
- (b) could reasonably be expected to prejudice the fair treatment of individuals and the information is about unsubstantiated allegations of misconduct or unlawful, negligent or improper conduct
- (c) could reasonably be expected to prejudice security, law enforcement, public health or public safety
- (d) could reasonably be expected to impede the administration of justice generally, including procedural fairness
- (e) could reasonably be expected to impede the administration of justice for an individual
- (f) could reasonably be expected to impede the protection of the environment
- (g) could reasonably be expected to impede the flow of information to the police or another law enforcement or regulatory agency
- (h) could reasonably be expected to prejudice an agency's ability to obtain confidential information
- (i) could reasonably be expected to prejudice an agency's ability to obtain similar information in the future
- (j) could reasonably be expected to prejudice the competitive commercial activities of an agency
- (k) could reasonably be expected to harm the interests of an individual or group of individuals
- (l) could reasonably be expected to prejudice the conduct of investigations, audits or reviews by the Ombudsman or Auditor-General<sup>8</sup>
- (m) could reasonably be expected to prejudice the management function of an agency
- (n) could reasonably be expected to prejudice the effectiveness of testing or auditing procedures

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<sup>8</sup> See *Australian Broadcasting Corporation and Commonwealth Ombudsman* [2012] AICmr 11.

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

6.30 The decision maker must take care not to consider factors that are not relevant in the particular circumstances. The FOI Act also nominates certain factors which must not be taken into account, as explained in paragraph 6.77 below. Some of these factors were commonly applied prior to the 2010 amendments to the Act.

6.31 The irrelevant factors are:

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

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

6.32 The decision maker must determine whether access to a conditionally exempt document is, at the time of the decision, contrary to the public interest, taking into account the factors for and against disclosure. The timing is important: it is possible that certain factors may be relevant when the decision is made, but would not be relevant if the request were to reconsidered some time later. In such circumstances a new and different decision could be made.<sup>9</sup>

6.33 In weighing the factors for and against release of a document, it is not sufficient simply to list the factors. The decision maker must explain the relevance of the factors and the relative weights given to those factors in their statement of reasons under s 26(1) (see Part 8 of these Guidelines).

**Commonwealth-State relations**

6.34 Section 47B creates a conditional exemption where disclosure of a document either:

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

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<sup>9</sup> See *Washington and Australian Prudential Regulation Authority* [2011] AICmr 11.

person receiving the communication on behalf of the Commonwealth or an authority of the Commonwealth (s 47B(d)), or

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

6.35 For the purposes of this exemption, a State includes the Australian Capital Territory and the Northern Territory (s 4(1)) (see Part 1 of these Guidelines). One or more of the provisions may apply to a document requested by the FOI applicant.

6.36 The 2010 reforms did not substantially change this exemption (formerly in s 33A), apart from redrafting to insert terminology that is consistent with the new public interest test in s 11A(5). Another change removed an agency's option to respond to a request for access to documents affecting Commonwealth-State relations by neither confirming nor denying the existence or non-existence of such a document under s 25.<sup>10</sup>

#### ***Author of the document irrelevant***

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

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

6.38 A decision maker may consider that disclosure would, or could reasonably be expected to damage the working relations of the Commonwealth and one or more States (s 47B(a)). 'Working relations' encompass all interactions of the Commonwealth and the States,<sup>11</sup> from formal Commonwealth-State consultation processes such as the Council of Australian Governments through to any working arrangements between agencies undertaken as part of their day to day functions.

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

- interrupting or creating difficulty in negotiations or discussions that are underway, including in the development of joint or parallel policy<sup>12</sup>
- adversely affecting the administration of a continuing Commonwealth-State project
- substantially impairing (but not merely modifying) Commonwealth-State programs<sup>13</sup>

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<sup>10</sup> As recommended in Australian Law Reform Commission and Administrative Review Council, *Open government: A review of the federal Freedom of Information Act 1982*, Report No 77, 1995.

<sup>11</sup> See *Arnold (on behalf of Australians for Animals) v Queensland* (1987) 73 ALR 607.

<sup>12</sup> See *Arnold (on behalf of Australians for Animals) v Queensland* (1987) 73 ALR 607.

<sup>13</sup> See *Re Cosco Holdings Pty Limited and Department of Treasury* [1998] AATA 124.

- adversely affecting the continued level of trust or co-operation in existing inter-office relationships<sup>14</sup>
- impairing or prejudicing the flow of information to and from the Commonwealth.<sup>15</sup>

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

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

6.41 The potential damage need not be quantified,<sup>16</sup> but the effect on relations arising from the disclosure must be adverse. A potentially positive effect on Commonwealth-State relations would not fall within the conditional exemption.

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

6.42 The term ‘could be reasonably expected’ is explained in greater detail in Part 5 of these Guidelines. There must be real and substantial grounds for expecting the damage to occur which can be supported by evidence or reasoning.<sup>17</sup> There cannot be merely an assumption or allegation that damage may occur if the document were released. For example, when consulting a State agency or authority as required under s 26A, the agency should ask the agency or authority for its reasons for expecting damage, as an unsubstantiated concern would not satisfy the s 47B(a) threshold.

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

6.43 Section 47B(b) conditionally exempts ‘information communicated in confidence’ to the Commonwealth Government or an agency by a State or an authority of a State. It is not necessary for the decision maker to find that disclosure may found an action for breach of confidence for this element to apply.<sup>18</sup>

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

- whether the communication was ad hoc, routine or required<sup>19</sup>

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<sup>14</sup> See *Arnold (on behalf of Australians for Animals) v Queensland* (1987) 73 ALR 607.

<sup>15</sup> See *Re Shopping Centre Council and Australian Competition and Consumer Commission* [2004] AATA 119.

<sup>16</sup> See *Re Jeffrey Samuel Angel and the Department of Arts, Heritage and Environment; HC Sleigh Resources Ltd and Tasmania* [1985] AATA 314.

<sup>17</sup> See *Attorney-General's Department and Australian Iron and Steel Pty Ltd v Cockcroft* (1986) 10 FCR 180.

<sup>18</sup> See *Re Mann and Australian Tax Office* [1985] AATA 144.

<sup>19</sup> See *Re Maher and Attorney-General's Department* [1986] AATA 16.

- whether there were any existing, implied or assumed arrangements or understandings between the Commonwealth and State concerning the exchange or supply of information<sup>20</sup>
- how the information was subsequently handled, disclosed or otherwise published.<sup>21</sup>

6.45 See also the discussion on s 33(b) (international relations) in Part 5 as that provision uses the same term.

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

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

6.47 An ‘authority of a State’ is an entity that has been established by the State for a public purpose, given the power to direct or control the affairs of others on the State’s behalf, reports to and is under some control of the State.<sup>22</sup> Where there is doubt as to whether an entity is an ‘authority of a State’, the agency should consult the entity. The entity can confirm whether it is a State authority, or a business, contractor or private organisation (in which case an agency may need to consider whether an exemption under s 47G (business affairs) applies). The view of the State Government or the entity as to its status would be an influential but not decisive factor.

### ***Consultation with a State or State authority, and Norfolk Island consultation with the Commonwealth or a State***

6.48 Agencies and ministers are required under s 26A to consult a State, and Norfolk Island authorities and ministers are required under s 26AA to consult the Commonwealth or a State (where arrangements to do so are in place), before deciding to release a document where the State or the Commonwealth may reasonably contend that the document is conditionally exempt and that disclosure of the document would be contrary to the public interest.

6.49 Part 8 of these Guidelines provides further details on consultation with a State or an authority of a State, or the Commonwealth or a State in terms of Norfolk Island, including advising the State, the State authority or the Commonwealth of the decision and the available review rights and the applicable timeframes. The State, or the Commonwealth or the State in terms of Norfolk Island, may apply for internal review or IC review when it disagrees with the agency’s access grant decision (ss 54A, 54M).

6.50 Formal consultation under ss 26A and 26AA grants agencies an additional 30 days in which to provide an access decision (s 15(6)). The Information Commissioner recommends that consultation be undertaken at an early stage in processing a request, that is, when the

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<sup>20</sup> See *Re Maher and Attorney-General’s Department* [1986] AATA 16 for agreements and *Re Queensland and Australian National Parks and Wildlife Service (Australians for Animals, party joined)* [1986] AATA 224 for assumed arrangements.

<sup>21</sup> See *James Edward McGarvin and Australian Prudential Regulation Authority* [1998] AATA 585.

<sup>22</sup> See *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125, *Committee of Direction of Fruit Marketing v Delegate of the Australian Postal Commission* (1980) 144 CLR 577.

agency is gathering the information that would show whether or not the documents were conditionally exempt under one or both elements of s 47B.

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

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

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

***Consultation comments to be considered when assessing the public interest test***

6.53 Where it has been found that disclosure may, or be reasonably expected to, damage Commonwealth-State relations, those findings could also be relevant public interest factors against disclosure.

6.54 Conversely, where the disclosure of the document may reasonably be expected to have a positive or neutral effect on Commonwealth-State relations, then that may be a public interest factor in favour of disclosure.

***Applying the public interest test***

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

**Deliberative processes**

6.56 A document may be conditionally exempt if it includes deliberative matter. Deliberative matter is content that is in the nature of, or relating to either:

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

6.57 Deliberative matter does not include operational information or purely factual material (s 47C(2)). 'Operational information' is defined in s 8A and is information that an agency must publish under the Information Publication Scheme.<sup>23</sup>

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<sup>23</sup> Note that s 8A came into effect on 1 May 2011.

6.58 The conditional exemption does not apply to:

- (a) reports (including reports concerning the results of studies, surveys or tests) of scientific or technical experts, whether employed within an agency or not, including reports expressing the opinions of such experts on scientific or technical matters (see paragraph 6.74 below)
- (b) reports of a body or organisation, prescribed by the regulations, that is established within an agency (currently none are prescribed)
- (c) the record of, or a formal statement of the reasons for, a final decision given in the exercise of a power or of an adjudicative function (s 47C(3)).

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

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

6.61 This conditional exemption has a potentially broad reach. The Information Commissioner expects, however, that agencies will claim this conditional exemption only in clearly applicable circumstances. Not every document generated or held by a policy area of an agency is ‘deliberative’ in the sense used in this provision, even if it appears to deal with the development or implementation of a policy. A decision maker should ensure that the content of a document strictly conforms with the criteria for identifying ‘deliberative matter’ before claiming this conditional exemption (see paragraph 6.56 above and paragraphs 6.66–6.69 below).

### ***Deliberative process***

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

The action of deliberating, in common understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing upon one's course of action. In short, the deliberative processes involved in the functions of an agency are its thinking processes – the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.<sup>24</sup>

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<sup>24</sup> See *Re JE Waterford and Department of Treasury (No 2)* [1984] AATA 67. See *British American Tobacco Australia Ltd and Australian Competition and Consumer Commission* [2012] AICmr 19, [15]–[22]. See also *Carver and Fair Work Ombudsman* [2011] AICmr 5 in relation to code of conduct investigations.

6.63 The deliberative process must relate to the functions of an agency, minister or the government of the Commonwealth. The functions of an agency are usually found in the Administrative Arrangements Orders or the instrument or Act that established the agency. For the purposes of the FOI Act, the functions include both policy making and the processes undertaken in administering or implementing a policy. The functions also extend to the development of policies in respect of matters that arise in the course of administering a program. The non-policy decision making processes required when carrying out agency, ministerial or governmental functions, such as code of conduct investigations, may also be deliberative processes.<sup>25</sup>

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

- opinions
- advice
- recommendations
- a collection of facts or opinions, including the pattern of facts or opinions considered<sup>26</sup>
- interim decisions or deliberations.

6.65 An opinion or recommendation does not need to be prepared for the sole purpose of a deliberative process.

### **Assessing deliberative matter**

6.66 The agency must assess all the material to decide if it is deliberative matter that relates to, or is in the nature of, the deliberative processes of the agency or minister.<sup>27</sup>

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

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

- content that is merely descriptive
- incidental administrative content<sup>28</sup>
- procedural or day to day content<sup>29</sup>

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<sup>25</sup> See *Re Murtagh and Commissioner of Taxation* [1984] AATA 249, *Re Reith and Attorney-General's Department* [1986] AATA 437, *Re Zacek and Australian Postal Corporation* [2002] AATA 473.

<sup>26</sup> See *Chapman and Minister for Aboriginal and Torres Strait Islander Affairs* [1996] AATA 210.

<sup>27</sup> See *Secretary, Department of Employment, Workplace Relations and Small Business and Staff Development Centre* (2001) 114 FCR 301.

<sup>28</sup> See *Re VXF and Human Rights and Equal Opportunity Commission* [1989] AATA 107.

<sup>29</sup> See *Subramanian and Refugee Review Tribunal* [1997] AATA 31.

- the decision or conclusion reached at the end of the deliberative process<sup>30</sup>
- matter that was not obtained, prepared or recorded in the course of, or for the purposes of, a deliberative process.

6.69 Where material was gathered as a basis for intended deliberations, it may be deliberative matter.<sup>31</sup> However, if the material was obtained before there was a known requirement that the material would be considered during a deliberative process, that material would not be deliberative matter.<sup>32</sup>

### Consultation

6.70 A consultation undertaken for the purposes of, or in the course of, a deliberative process includes any discussion between the agency, minister or government and another person in relation to the decision that is the object of the deliberative process.<sup>33</sup>

6.71 The agency should create the consultation document with the intention of initiating a two way exchange between at least two parties. If the other person does not respond or participate, the consultation document will still be deliberative matter.

### Purely factual material

6.72 The exclusion of purely factual material under s 47C(2)(b) is intended to allow disclosure of material used by the person who made the conclusion or decision following the deliberative process. A conclusion involving opinion or judgement is not purely factual material. For example, an assertion by the author of a document that something is a fact may be an opinion and not conclusive that the thing is a fact.

6.73 Where a decision maker finds it difficult to separate the purely factual material from the deliberative matter, both the elements may be exempt.<sup>34</sup> If the two elements can be separated, the decision maker should consider giving the applicant a copy with deletions under s 22 to provide access to the purely factual material.<sup>35</sup>

### Reports on scientific or technical matters

6.74 As noted in paragraph 6.58 above, the s 47C conditional exemption does not apply to reports (including reports concerning the results of studies, surveys or tests) of scientific or

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<sup>30</sup> See *Thomas Lincoln Chapman and Wendy Jennifer Chapman and Minister of Aboriginal and Torres Strait Islander Affairs* [1996] AATA 210; *British American Tobacco Australia Ltd and Australian Competition and Consumer Commission* [2012] AICmr 19; *Briggs and the Department of the Treasury (No. 3)* [2012] AICmr 22.

<sup>31</sup> See *Secretary, Department of Employment, Workplace Relations and Small Business and Staff Development Centre* (2001) 114 FCR 301.

<sup>32</sup> See *Re Susic and Australian Institute of Marine Science* No Q89/580 AAT [6189], *Re Booker and Department of Social Security* No Q89/193 AAT NO 6189.

<sup>33</sup> *James Edward McGarvin and Australian Prudential Regulation Authority* [1998] AATA 585.

<sup>34</sup> See *Eccleston and Department of Family Services and Aboriginal and Islander Affairs*, unreported decision of the Queensland Information Commissioner, Decision No 93002, 30 June 1993; *Chapman and Minister of Aboriginal and Torres Strait Islander Affairs* [1996] AATA 210.

<sup>35</sup> See *Re Jennifer May Mcdonald Harris v Australian Broadcasting Corporation and Keith Cameron Mackriell and Michael H Cosby* (1983) 78 FLR 236.

technical experts, including reports expressing experts' opinions on scientific or technical matters (s 47C(3)(a)).

6.75 The sciences include the natural sciences of physics, chemistry, astronomy, biology (such as botany, zoology and medicine<sup>36</sup>) and the earth sciences (which include geology, geophysics, hydrology, meteorology, physical geography, oceanography, and soil science). Technical matters involve the application of science, and include engineering.<sup>37</sup>

6.76 The social sciences, or the study of an aspect of human society, are not scientific for the purposes of this exception (for example, anthropology, archaeology, economics,<sup>38</sup> geography, history, linguistics, political science, sociology and psychology).

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

6.77 There is considerable case law on the former exemption provision (formerly s 36) as to whether disclosure of an internal working document would be contrary to the public interest, and whether reasonable grounds exist for a conclusive certificate claim to that effect. Agencies should be cautious in applying those precedents in light of the changes to the FOI Act in 2009 and 2010. Many earlier decisions applied or referred to the AAT's decision in *Re Howard and the Treasurer*,<sup>39</sup> which listed five factors that could support a claim that disclosure would be contrary to the public interest. Three of those factors are now declared to be irrelevant considerations by s 11B(4) of the Act (the high seniority of the author of the document in the agency to which the request for access to the document was made, misinterpretation or misunderstanding of a document, and confusion or unnecessary debate following disclosure). The other two Howard factors (disclosure of policy development, and inhibition of frankness and candour) are not, in those terms, consistent with the new objects clause of the FOI Act (s 3) and the list of public interest factors favouring access in s 11B(3)). It is important that agencies now have regard to the more extensive range of public interest factors that may favour or be against disclosure (see paragraphs 6.23–6.29 above).

### **Documents affecting financial or property interests of the Commonwealth**

6.78 Section 47D conditionally exempts a document where disclosure would have a substantial adverse effect on the financial or property interests of the Commonwealth, Norfolk Island or an agency.<sup>40</sup>

6.79 The 2010 reforms have not substantially changed this exemption, other than by making the exemption conditional.

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<sup>36</sup> See *Re Eleanor S Wertheim and the Department of Health* [1984] AATA 537.

<sup>37</sup> See *Re Jennifer May McDonald Harris v Australian Broadcasting Corporation and Keith Cameron Mackriell and Michael H Cosby* (1983) 78 FLR 236 per Beaumont J.

<sup>38</sup> See *Re John Edward O'Brien Waterford and the Treasurer of the Commonwealth of Australia* [1985] AATA 114.

<sup>39</sup> *Re Howard and the Treasurer* [1985] AATA 100.

<sup>40</sup> For an example of the application of this exemption see *Briggs and the Department of the Treasury* (No. 3) [2012] AICmr 22.

**Financial or property interests**

6.80 The financial or property interests of the Commonwealth, Norfolk Island or an agency relate to both expenditure and revenue-generating activities. An agency's property interests may be broader than merely buildings and land, such as intellectual property or the Crown's interest in natural resources.<sup>41</sup>

6.81 The financial interests of the Commonwealth may encompass indirect effect. For example, where disclosure of documents would provide the criteria by which an agency is to assess tenders, the agency's financial interest in seeking to obtain best value for money through a competitive tendering process may be compromised.<sup>42</sup>

**Substantial adverse effect**

6.82 For the conditional exemption to apply, the potential effect that would be expected to occur following disclosure must be both substantial<sup>43</sup> and adverse. This standard is discussed further in Part 5 of these Guidelines.

6.83 An agency cannot merely assert that its financial or property interests would be adversely affected following disclosure. The agency should consider and provide reasons supporting its conclusion for both elements of the conditional exemption. A comprehensive description would also indicate whether the effect could reasonably be expected to occur and why.

6.84 A detailed description of the predicted effect would enable a comprehensive, evidence-based comparison of the predicted effect against the status quo. The comparison would indicate whether the effect would be adverse, substantial or both. It would be best practice for the comparison, where it would not include exempt material, to be included in the statement of reasons (s 26) if the exemption is relied upon (see Part 8 of these Guidelines for guidance on preparing statements of reasons).

6.85 The effect must bear on the actual financial or property interest of the Commonwealth, Norfolk Island or agency. If the effect were, say, to reduce the amount of revenue that may be generated, the test would not be satisfied, particularly where the process for the collection is not affected, or required under legislation.<sup>44</sup>

**Certain operations of agencies**

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

6.87 There are four separate grounds for the conditional exemption, one or more of which may be relevant in a particular case. A document is conditionally exempt if its

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<sup>41</sup> See *Re Connolly and Department of Finance* [1994] AATA 167, in which the Commonwealth property was the uranium stockpile.

<sup>42</sup> See *The Staff Development & Training Centre Pty Ltd and Secretary, Department of Employment, Workplace Relations and Small Business* (2001) 114 FCR 301.

<sup>43</sup> See *Harris v Australian Broadcasting Corporation* (1983) 78 FLR 236.

<sup>44</sup> See *Re Hart and Deputy Commissioner of Taxation* [2002] AATA 1190.

disclosure under this Act would, or could reasonably be expected to, do any of the following:

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

6.88 The 2010 reforms repealed the provision relating to an agency's ability to conduct industrial relations (former s 40(1)(e)), implementing a recommendation of the *Open government* report.<sup>45</sup> Where an agency is considering documents relating to its industrial relations activities, conditional exemptions such as s 47E(c) (management of personnel), s 47E(d) (effective operations of the agency) or s 47F (personal privacy) may be relevant.

6.89 Various terms in the conditional exemption are explained below.

### ***Prejudice***

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

6.91 In the context of this exemption, a prejudicial effect could be regarded as one which would cause a bias or change to the expected results leading to detrimental or disadvantageous outcomes. The expected change does not need to have an impact that is 'substantial and adverse', which is a stricter test.<sup>46</sup>

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

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

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

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<sup>45</sup> Australian Law Reform Commission and Administrative Review Council, *Open government: A review of the federal Freedom of Information Act 1982*, Report No 77, 1995.

<sup>46</sup> See *James and Australian National University* [1984] AATA 18.

**Reasons behind predicted effect**

6.94 An agency cannot merely assert that an effect would occur following disclosure. The particulars of the predicted effect and the reasons behind the identification of those particulars should be articulated during the decision making process. Those particulars should also indicate whether the effect could reasonably be expected to occur. Where the conditional exemption is relied upon, the relevant particulars and reasons should form part of the decision maker's statement of reasons, if they can be included without disclosing exempt material (see Part 8 of these Guidelines).

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

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

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

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

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

6.98 Examples of testing methods considered by the AAT include:

- safety audits and testing regimes<sup>47</sup>
- licensing board examinations
- risk assessment matrices<sup>48</sup>
- compliance audit indicators and any comparative weighting of the indicators
- accident investigation techniques<sup>49</sup>
- tests or examinations leading to qualifications<sup>50</sup>
- potential fraud case assessment and analysis tools.<sup>51</sup>

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<sup>47</sup> See *Vasta and McKinnon and Civil Aviation Safety Authority* [2010] AATA 499.

<sup>48</sup> See *Lobo and Secretary, Department of Education, Science and Training* [2007] AATA 1891.

<sup>49</sup> See *Vasta and McKinnon and Civil Aviation Safety Authority* [2010] AATA 499.

<sup>50</sup> See *James and Australian National University* [1984] AATA 18.

<sup>51</sup> See *Splann and Centrelink* [2009] AATA 320.

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

- providing forewarning of the usual manner of audits
- permitting analysis of responses to tests or examinations or information gathered during an audit
- facilitating cheating, fraudulent or deceptive conduct by those being tested or audited<sup>52</sup>
- permitting pre-prepared responses which would compromise the integrity of the testing process.<sup>53</sup>

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

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

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

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

6.102 Some examples of test objectives include:

- ensuring only properly qualified people are flying aircraft
- ensuring the selection of the most competent and best candidates for promotion<sup>54</sup>
- ensuring that an agency's expenditure is being lawfully spent through proper acquittal.

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

- allow for plagiarism or circulation of questions or examination papers that would lead to a breach of the integrity of the examination system<sup>55</sup>
- allow for examiners to be inhibited in future marking by the threat of challenge to their marking<sup>56</sup>

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<sup>52</sup> See *Ascic and Australian Federal Police* [1986] AATA 108.

<sup>53</sup> See *Re Crawley and Centrelink* [2006] AATA 572.

<sup>54</sup> See *Ascic and Australian Federal Police* [1986] AATA 108.

<sup>55</sup> See *Ascic and Australian Federal Police* [1986] AATA 108.

<sup>56</sup> See *Ascic and Australian Federal Police* [1986] AATA 108.

- allow scrutiny of past test results or questions for the pre-preparation of expected/acceptable responses, rather than honest or true responses, for example in psychometric testing to ascertain an applicant's eligibility for a certain pension<sup>57</sup> or patent examiner examinations.<sup>58</sup>

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

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

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

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

- the management of personnel – including the broader human resources policies and activities, recruitment,<sup>59</sup> promotion, compensation, discipline, harassment and occupational health and safety
- the assessment of personnel – including the broader performance management policies and activities concerning competency, in-house training requirements, appraisals and underperformance, counselling, feedback, assessment for bonus or eligibility for progression.

6.106 The terms 'would reasonably be expected' and 'substantial adverse' have the same meanings as explained in Part 5 of these Guidelines. If the predicted effect would be substantial but not adverse or maybe even beneficial, the conditional exemption does not apply.<sup>60</sup> It would be unlikely for the potential embarrassment of an employee to be considered to be an effect on an agency.<sup>61</sup>

6.107 The predicted effect must arise from the disclosure of the documents that are being assessed.<sup>62</sup> The decision maker may also need to consider the context of the document and the integrity of a system that may require those documents, such as witness statements that are required to investigate a workplace complaint,<sup>63</sup> or referee reports to assess job applicants.<sup>64</sup>

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

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<sup>57</sup> See *Re Crawley and Centrelink* [2006] AATA 572.

<sup>58</sup> See *Re Watermark and Australian Industrial Property Organisation* (1995) 70 FOIR 61.

<sup>59</sup> See *Re Dyrenfurth and Department of Social Security* [1987] AATA 140.

<sup>60</sup> See *Albanese and CEO Australian Customs Service* [2006] AATA 900.

<sup>61</sup> See *Wilson and Australian Postal Corporation* [1994] AATA 189.

<sup>62</sup> See *Re Dyrenfurth and Department of Social Security* [1987] AATA 140.

<sup>63</sup> See *Albanese and CEO Australian Customs Service* [2006] AATA 900, *Wilson and Australian Postal Corporation* [1994] AATA 189.

<sup>64</sup> See *Re Department of Social Security v Eric Bernard Dyrenfurth* (1988) 8 AAR 544.

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

6.109 An agency's operations may not be substantially adversely affected if the disclosure would, or could reasonably be expected to lead to a change in the agency's processes that would enable those processes to be more efficient.<sup>65</sup>

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

- disclosure of the Australian Electoral Commission policies in relation to the accepted reasons for a person's failure to vote in a Federal election would result in substantial changes to their procedures to avoid jeopardising the effectiveness of methods and procedures used by investigators<sup>66</sup>
- disclosure of information provided by industry participants could prejudice the Australian Competition and Consumer Commission's ability to investigate anti-competitive behaviour and its ability to perform its statutory functions<sup>67</sup>
- disclosure of the Universal Resource Locators (URLs) and Internet Protocols (IPs) of internet content that is either prohibited or potentially prohibited content under Schedule 5 to the *Broadcasting Services Act 1992* could reasonably be expected to affect the Australian Broadcasting Authority's ability to administer a statutory regulatory scheme for internet content to be displayed.<sup>68</sup>

6.111 The exemption may also apply to documents that relate to a complaint made to an investigative body. The disclosure of this type of information could reasonably affect the willingness of people to make complaints to the investigative body, which would have a substantial adverse effect on the proper and efficient conduct of the investigative body's operations.<sup>69</sup>

6.112 The predicted effect must bear on the agency's 'proper and efficient' operations, that is, the agency is undertaking its expected activities in an expected manner. Where disclosure of the documents reveals unlawful activities or inefficiencies, this element of the conditional exemption will not be met and the public interest factors of accountability and transparency are further weighted towards disclosure.

**Personal privacy**

6.113 Section 47F protects personal privacy by providing that a document is conditionally exempt if its disclosure under FOI would involve the unreasonable disclosure of personal information of any person (including a deceased person).

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<sup>65</sup> For example, in *Re Scholes and Australian Federal Police* [1996] AATA 347, the AAT found that the disclosure of particular documents could enhance the efficiency of the Australian Federal Police as it could lead to an improvement of its investigation process.

<sup>66</sup> *Re Murphy and Australian Electoral Commission* [1994] AATA 149.

<sup>67</sup> *Re Telstra Australia Limited and Australian Competition and Consumer Commission* [2000] AATA 71.

<sup>68</sup> *Re Electronic Frontiers Australia and the Australian Broadcasting Authority* [2002] AATA 449.

<sup>69</sup> For examples of the application of the exemption to complaints processes see *Australian Broadcasting Corporation and Commonwealth Ombudsman* [2012] AICmr 11; *British American Tobacco Australia Ltd and Australian Competition and Consumer Commission* [2012] AICmr 19.

6.114 This exemption does not apply if the personal information is only about the applicant (s 47F(3)). Where the information is joint personal information, however, the exemption may apply. For more information about joint personal information see paragraph 6.136 below.

6.115 In some cases, providing indirect access to certain personal information via a qualified person may be appropriate (s 47F(5) – see paragraph 6.153 below).

### **Personal information**

6.116 Personal information means information or an opinion (including information forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion (s 4(1)). In other words, personal information:

- identifies, or could identify, a person
- says something about a person
- may be opinion
- may form part of a database
- may be true or untrue
- relates to a natural person.<sup>70</sup>

6.117 Personal information can include a person's name, address, telephone number,<sup>71</sup> date of birth, medical records, bank account details, taxation information<sup>72</sup> and signature.<sup>73</sup> For more information about personal information, see privacy material on the [OAIC website](http://www.oaic.gov.au) at [www.oaic.gov.au](http://www.oaic.gov.au).

### **A person's identity is apparent or reasonably ascertainable**

6.118 For information or opinion to be personal information, the individual's identity needs to be apparent, or reasonably ascertainable. The question of whether the individual's identity needs to be ascertainable by the applicant or the world at large has not been settled.

6.119 The issue has been considered by State jurisdictions, including the Victorian Court of Appeal in *Victoria Police v Marke*.<sup>74</sup> The Court of Appeal considered whether disclosure under FOI was disclosure to the world at large. The majority in that case held that disclosure under FOI was not necessarily disclosure to all the world. Weinberg JA held the Tribunal was 'entitled to assume that once a document is made available, it has the potential to be disseminated widely' and that this assumption would be true in most cases.<sup>75</sup> To require consideration of the likely extent of dissemination would be 'a burdensome, and indeed

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<sup>70</sup> See s 4 of the *Freedom of Information Act 1982* and s 6 of the *Privacy Act 1988*.

<sup>71</sup> See *Re Green and Australian and Overseas Telecommunications Corporation* [1992] AATA 252.

<sup>72</sup> See *Re Murtagh and Commissioner of Taxation* [1984] AATA 249 and *Re Jones and Commissioner of Taxation* [2008] AATA 834.

<sup>73</sup> See *Re Corkin and Department of Immigration & Ethnic Affairs* [1984] AATA 448.

<sup>74</sup> *Victoria Police v Marke* [2008] VSCA 218.

<sup>75</sup> *Victoria Police v Marke* [2008] VSCA 218 at 68.

pointless, exercise, which in the vast majority of cases will be of no relevance.’<sup>76</sup> However, where a person seeking access to information puts the issue of dissemination ‘squarely in issue’, the Tribunal is bound to consider the matter.<sup>77</sup>

6.120 In *Re West Australian Newspapers Limited and Department of the Premier and Cabinet* the Western Australian Information Commissioner took the broader view and stated that:

... if any person, even if only a person having some additional knowledge, could reasonably ascertain the identity of a particular individual from particular information about that individual, that information will be personal information for the purposes of the FOI Act.<sup>78</sup>

6.121 In the Commonwealth FOI jurisdiction, the Information Commissioner suggests that generally, the individual’s identity needs to be reasonably ascertainable by the applicant. The ability of an applicant to reasonably ascertain an individual’s identity will depend on the context and circumstances.<sup>79</sup>

6.122 In other words, it depends on whether it is practically possible for an applicant to link pieces of information to identify an individual. If the agency or minister is aware of relevant information that the applicant has (or could easily obtain) to ascertain the individual’s identity, this is to be taken into consideration. An agency or minister must not, however, seek information from the applicant about what other information they have or could obtain.

6.123 The Information Commissioner suggests that, where an agency or minister is unaware of the other information the applicant may have, the question to be asked is what other information a reasonable member of the public would be able to access.

6.124 In certain circumstances, however, it may be appropriate to consider whether the individual’s identity may be ascertainable by the world at large. This may be appropriate where the applicant is a journalist or interest group, for example. This issue is discussed further in relation to ‘unreasonableness’ in paragraph 6.127 below.

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

6.125 The information needs to convey or say something about a person, rather than just identify them. The mere mention of a person’s name or signature may, however, reveal personal information about them depending on the context.<sup>80</sup> For example, a person’s name may appear in a list of benefit recipients, and given that context, the information would be personal information.

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<sup>76</sup> *Victoria Police v Marke* [2008] VSCA 218 at 69.

<sup>77</sup> *Victoria Police v Marke* [2008] VSCA 218 at 85. See also *XYZ v Victoria Police* [2010] VCAT 255 at 181.

<sup>78</sup> *Re West Australian Newspapers Limited and Department of the Premier and Cabinet* [2006] WAICmr 23.

<sup>79</sup> See Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108, 2008, paragraph 6.54. See also *Autism Aspergers Advocacy Australia and Department of Families, Housing, Community Services and Indigenous Affairs* [2012] AICmr 28.

<sup>80</sup> See *Re Veale and Town of Bassendean* [1994] WAICmr 4.

**Natural person**

6.126 An individual is a natural person and does not include a corporation, trust, body politic or incorporated association.<sup>81</sup> The FOI Act provides for the extension of the term ‘individual’ to include a deceased person. This differs from the Privacy Act definition, which does not include such an extension.

**Unreasonable disclosure**

6.127 The personal privacy exemption is designed to prevent the unreasonable invasion of third parties’ privacy.<sup>82</sup> The test of ‘unreasonableness’ implies a need to balance the public interest in disclosure of government-held information and the private interest in the privacy of individuals. The test does not however amount to the public interest test of s 11A(5), which follows later in the decision making process. It is possible that the decision maker may need to consider one or more factors twice, once to determine if a projected effect is unreasonable and again when assessing the public interest balance.

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

- (a) the extent to which the information is well known
- (b) whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document
- (c) the availability of the information from publicly accessible sources<sup>83</sup>
- (d) any other matters that the agency or minister considers relevant (s 47F(2)).<sup>84</sup>

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

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

... whether a disclosure is ‘unreasonable’ requires ... a consideration of all the circumstances, including the nature of the information that would be disclosed, the circumstances in which the information was obtained, the likelihood of the information being information that the person concerned would not wish to have

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<sup>81</sup> See s 22 of the *Acts Interpretation Act 1901*.

<sup>82</sup> See *Re Chandra and Minister for Immigration and Ethnic Affairs* [1984] AATA 437; *Parnell and Department of the Prime Minister and Cabinet* [2012] AICmr 31; *‘R’ and Department of Immigration and Citizenship* [2012] AICmr 32.

<sup>83</sup> See *Re Jones and Federal Commissioner of Taxation* [2008] AATA 413; *‘Q’ and Department of Human Services* [2012] AICmr 30.

<sup>84</sup> For example, where a ‘care leaver’ requests access to third party personal information, decision makers should note that it is government policy that a care leaver have such access. A ‘care leaver’ is a child in Australia in the 20<sup>th</sup> century who was brought up ‘in care’ as a state ward, foster child, or in an orphanage. See the government response to recommendation 12 of the report of the Senate Community Affairs References Committee (2009) *Lost innocents and Forgotten Australians revisited report on the progress with the implementation of the recommendations of the Lost Innocents and Forgotten Australians reports*, Commonwealth of Australia, Canberra.

disclosed without consent, and whether the information has any current relevance ... it is also necessary in my view to take into consideration the public interest recognised by the Act in the disclosure of information ... and to weigh that interest in the balance against the public interest in protection the personal privacy of a third party ...<sup>85</sup>

6.131 The Federal Court affirmed the approach provided in *Re Chandra* and stated that there are four factors for determining whether disclosure is unreasonable in all the circumstances. The four factors are whether:

- (a) the author of the document is identifiable<sup>86</sup>
- (b) the documents contain third party personal information
- (c) release of the documents would cause stress on the third party
- (d) no public purpose would be achieved through release.<sup>87</sup>

6.132 Other factors considered to be relevant include:

- the nature of the information, that is, whether it is common or disclosure would result in serious consequences<sup>88</sup>
- how the information was obtained, that is, covertly, in confidence or using information gathering powers<sup>89</sup>
- the current relevance or age of the information<sup>90</sup>
- whether it would shed light on the workings of government.<sup>91</sup>

6.133 For example, in *Colakovski v Australian Telecommunications Corp*, Heerey J considered that ‘... if the information disclosure were of no demonstrable relevance to the affairs of government and was likely to do no more than excite or satisfy the curiosity of people about the person whose personal affairs were disclosed ... disclosure would be unreasonable’.<sup>92</sup>

6.134 Whether the motives and identity of the applicant are relevant when considering unreasonableness is not settled.<sup>93</sup> The FOI Act provides that a person’s right of access is not affected by any reasons they give for seeking access, or what beliefs the agency or minister

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<sup>85</sup> See *Re Chandra and Minister for Immigration and Ethnic Affairs* [1984] AATA 437 at 259.

<sup>86</sup> Note: s 11B(4)(c) provides that when the public interest test is considered, the fact that the author of the document was (or is) of high seniority in the agency is not to be taken into account (see paragraph 6.31).

<sup>87</sup> *Re McCallin and Department of Immigration* [2008] AATA 477.

<sup>88</sup> See *Re Timmins and National Media Liaison Service* [1986] AATA 23, *Re Z and Australian Taxation Office* [1984] AATA 458.

<sup>89</sup> See *Re Timmins and National Media Liaison Service* [1986] AATA 23, *Re Lianos and Department of Social Security* [1985] AATA 38.

<sup>90</sup> See *Re Wiseman and Defence Service Homes Corp* [1987] AATA 895, *Haneef and Australian Federal Police and Commonwealth Director of Public Prosecutions* [2010] AATA 514.

<sup>91</sup> See *Colakovski v Australian Telecommunications Corporation* (1991) 29 FCR 429.

<sup>92</sup> *Colakovski v Australian Telecommunications Corporation* (1991) 29 FCR 429.

<sup>93</sup> See *Re Carter and Department of Health (ACT)* [1995] AAT 101, *Re Williams and Registrar of Federal Court of Australia* [1985] AATA 226.

have about the person's reasons (s 11(2)). This leads to the position that an objective test of balancing public interests should be taken.

6.135 In the Victorian case of *Re Lapidos and Office of Corrections*, however, Fricke DP said that given the exemption turns on unreasonableness:

... one is driven to consider the purpose of the application. Disclosure to one applicant ... might not be unreasonable, but it might be unreasonable vis-à-vis another applicant. The very words 'unreasonable disclosure' compel one to engage in a balancing exercise, weighing on the one hand, the strength of the applicant's claim to access, and, on the other hand, the interests of other persons ...<sup>94</sup>

### Joint personal information

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

6.137 Intertwined personal information should be separated where possible, without diminishing or impairing the quality or completeness of the applicant's personal information.<sup>95</sup> Where it is not possible to separate an applicant's personal information from a third party's personal information, the exemption may be claimed if it is unreasonable to release the information.

6.138 Whether it is unreasonable to release the information will depend on the relationship between the individuals. Decisions about the release of joint personal information should only be made after consultation with the third party where such consultation is reasonably practical. For more information about consultation see paragraph 6.143 below.

### Information about agency employees

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

6.140 Where public servants' personal information is included in a document because of their usual duties or responsibilities, it would not be unreasonable to disclose unless special circumstances existed. This is because the information would reveal only that the public servant was performing their public duties.<sup>96</sup> Such information may often also be publicly available, such as on an agency website.

6.141 A document may, however, be exempt for another reason, for example, where disclosure would, or could reasonably be expected to, endanger the life or physical safety of

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<sup>94</sup> *Re Lapidos and Office of Corrections (Vic) [No 3]* (1990) 4 VAR 150 at 154.

<sup>95</sup> *Re Anderson and Australian Federal Police* [1986] AATA 79 and *Re McKinnon and Department of Immigration and Ethnic Affairs* [1995] AATA 364.

<sup>96</sup> See *Commissioner of Police v District Court of NSW* (1993) 31 NSWLR 606.

any person (s 37(1)(c)). In addition, where an individual has a propensity to pursue matters obsessively and there is no need for them to contact a particular public servant in the future, disclosure of the public servant's name may be unreasonable.<sup>97</sup>

6.142 There needs to be careful consideration of the exemption where the personal information does not relate to the public servant's usual duties and responsibilities. For example, if a document included information about an individual's disposition or private characteristics, disclosure is likely to be unreasonable.<sup>98</sup> This would generally include the reasons a public servant has applied for personal leave, information about their performance management or whether they were unsuccessful during a recruitment process.

### **Consultation**

6.143 Where a document includes personal information relating to a person who is not the applicant, an agency or minister should give that individual (the third party) a reasonable opportunity to make a submission that the document should be exempt from disclosure before making a decision to give access (s 27A). If the third party is deceased, their legal representative should be given this opportunity.

6.144 Such consultation should occur where:

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

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

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

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<sup>97</sup> *Re Bartucciottto and Commonwealth Ombudsman* [2005] AATA 1109.

<sup>98</sup> *Re Toomer & Department of Primary Industries and Energy* [1990] AATA 85 and *Re Dyki & Commissioner of Taxation* (1990) 12 AAR 554.

**Submissions**

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

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

They should be asked to provide reasons and evidence for their submission.

6.148 To assist the third party to make a submission it may be necessary to give them a copy of the information. This could be done by providing an edited copy of the document, for example, by deleting any material that may be exempt under another provision. An agency should also take care not to breach any of its obligations under the Privacy Act during consultation, for example, by identifying the applicant without consent. For more information about an agency's obligations regarding the disclosure of personal information, see the guidelines to Information Privacy Principle 11 at [www.oaic.gov.au](http://www.oaic.gov.au).

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

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

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

**General information about consultation**

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

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

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

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

6.154 A broad approach should be taken in considering an applicant's physical or mental health or wellbeing. The possibility of detriment must appear to be real or tangible.<sup>99</sup>

6.155 Where indirect access is to be provided, the applicant is to nominate a qualified person (s 47F(5)(b)). The nominated qualified person must carry on the same occupation as the qualified person who provided the document (s 47F(5)(a)). A qualified person means a person who carries on (and is entitled to carry on) an occupation that involves providing care for a person's physical, mental health or wellbeing, including:

- a medical practitioner
- a psychiatrist
- a psychologist
- a counsellor<sup>100</sup>
- a social worker (s 47F(7)).

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

### Business information

6.157 A document is conditionally exempt if it discloses information (business information) concerning a person in respect of his or her business or professional affairs, or concerning the business, commercial or financial affairs of an organisation or undertaking, where the disclosure of the information:

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

6.158 If a decision maker finds that the document is conditionally exempt, the decision maker must then apply the public interest test before concluding that the document is exempt from disclosure (see paragraphs 6.3–6.33 above).

6.159 If the business information concerns a person, organisation or undertaking other than the applicant, the decision maker may be required to consult that third party (see paragraphs 6.178–6.187 below).

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<sup>99</sup> *Re K and Director-General of Social Security* [1984] AATA 252.

<sup>100</sup> The *Freedom of Information (Amendment) Reform Act 2010* replaced the previous reference to 'marriage guidance counsellor' with a reference to 'counsellor'.

**Exemption does not apply in certain circumstances**

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

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

**Elements of the exemption**

6.162 The operation of the business information exemption depends on the effect of disclosure rather than the precise nature of the information itself. Nevertheless, the information in question must have some relevance to a person in respect of his or her business or professional affairs or to the business, commercial or financial affairs of an organisation or undertaking (s 47G(1)(a)). For the purposes of this conditional exemption, an undertaking includes an undertaking carried on by, or by an authority of, a Commonwealth, Norfolk Island or a state or territory government (s 47G(4)). However, it has been held that the business affairs exemption is not available to a person within a government agency or undertaking, nor to the agency or undertaking itself.<sup>101</sup> In other words, it is intended to protect the interests of third parties dealing with the government. The exemption has not materially changed since the Federal Court considered it in 1983. Therefore, decision makers should be aware that the application of this conditional exemption to an agency's own business information is uncertain and should avoid relying on it, even if the agency is engaged in competitive business activities.<sup>102</sup> As an alternative, one of the specific exemptions for agencies in respect of particular documents in Part II of Schedule 2 may be available.

6.163 To be conditionally exempt, the disclosure of business information in a document must reasonably be expected to have either of the following outcomes:

- an unreasonable and adverse effect on the business or professional affairs of a person or on the business, commercial or financial affairs or an organisation or undertaking, or
- prejudice the future supply of information to the Commonwealth or an agency for the purpose of the administration of a law of the Commonwealth or of a Territory or the administration of matters administered by an agency.

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<sup>101</sup> *Harris v Australian Broadcasting Corporation* (1983) 78 FLR 236.

<sup>102</sup> In *Secretary, Department of Employment, Workplace Relations and Small Business v The Staff Development and Training Centre* (2001) 114 FCR 301 the Full Federal Court seemed to accept (without referring to the *Harris* case) that a government agency could claim this conditional exemption, although it did not decide the case on this point. The question therefore remains uncertain.

***Could reasonably be expected***

6.164 This term is explained in Part 5 of these Guidelines. As in other applications, it refers to an expectation that is based on reason. Mere assertion or speculative possibility is not enough.<sup>103</sup>

***Unreasonable adverse effect of disclosure***

6.165 The presence of ‘unreasonably’ in s 47G(1) implies a need to balance public and private interests, but this does not amount to the public interest test of s 11A(5) which follows later in the decision process. It is possible that the decision maker may need to consider one or more factors twice, once to determine if a projected effect is unreasonable and again in assessing the public interest balance. This is inherent in the structure of the business information exemption.

6.166 The test of reasonableness applies not to the claim of harm but to the objective assessment of the expected adverse effect. For example, the disclosure of information that a business’s activities pose a threat to public safety may have a substantial adverse effect on that business but it may be reasonable in the circumstances to disclose it. Similarly, it would not be unreasonable to disclose information about a business that revealed serious criminality.<sup>104</sup> These considerations necessitate a weighing of a public interest (public safety) against a private interest (preserving the profitability of a business) but at this stage it bears only on the threshold question of whether the disclosure would be unreasonable.<sup>105</sup>

6.167 The AAT has distinguished between ‘truly government documents’ and other business information collected under statutory authority. The first category includes documents that have been created by the administration or that form part of a flow of correspondence and other documents between the administration and business. The AAT concluded that such documents inclined more to arguments favouring scrutiny of government activities when considering whether disclosure would be unreasonable.<sup>106</sup> By implication, the exemption is more likely to protect documents obtained from third party businesses.

6.168 Where disclosure would result in the release of facts already in the public domain, that disclosure would not amount to an unreasonable adverse effect on business affairs.<sup>107</sup>

***Business or professional affairs***

6.169 The use of the term ‘business or professional affairs’ distinguishes an individual’s personal or private affairs and an organisation’s internal affairs. The term ‘business affairs’

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<sup>103</sup> *Re Actors’ Equity Association (Aust) and Australian Broadcasting Tribunal (No 2)* [1985] AATA 69.

<sup>104</sup> *Searle Australia Pty Ltd v Public Interest Advocacy Centre and Department of Community Services and Health* (1992) 108 ALR 163.

<sup>105</sup> In relation to the test of reasonableness, see ‘E’ and *National Offshore Petroleum Safety and Environmental Management Authority* [2012] AICmr 3.

<sup>106</sup> *Re Actors’ Equity Association (Aust) and Australian Broadcasting Tribunal (No 2)* [1985] AATA 69.

<sup>107</sup> *Re Daws and Department of Agriculture Fisheries and Forestry* [2008] AATA 1075.

has been interpreted to mean ‘the totality of the money-making affairs of an organisation or undertaking as distinct from its private or internal affairs’.<sup>108</sup>

6.170 In the absence of a definition in the FOI Act, ‘professional’ bears its usual meaning. The Shorter Oxford Dictionary defines ‘professional’ as relating to a vocation in which a professed knowledge of some department of learning is used in its application to the affairs of others, especially one of the three learned professions of divinity, law and medicine. For FOI purposes, ‘profession’ is not static and may extend beyond the occupations that have traditionally been recognised as professions, reflecting changes in community acceptance of these matters.<sup>109</sup> The word ‘profession’ is clearly intended to cover the work activities of a person who is admitted to a recognised profession and who ordinarily offers professional services to the public for a fee. In addition, s 47G(5) makes it clear that the conditional exemption does not apply merely because the information refers to a person’s professional status.

6.171 Any extension of the normal meaning of ‘profession’ will require evidence of community acceptance that the occupation in question should be regarded as a profession. For example, the absence of any evidence indicating community acceptance that the audit activities of officers of the Australian Taxation Office constituted ‘professional affairs’ led the AAT to refuse to extend the ordinary meaning of the expression in that case.<sup>110</sup>

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

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

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

6.173 A document that discloses the kind of information described in paragraph 6.157 above will be conditionally exempt if the disclosure could reasonably be expected to prejudice the future supply of information to the Commonwealth, Norfolk Island or an agency for the purpose of the administration of a law of the Commonwealth or of a Territory or the administration of matters administered by an agency (s 47G(1)(b)).

6.174 This limb of the conditional exemption comprises two parts:

- a reasonable expectation of a reduction in the quantity or quality of business affairs information to the government
- the reduction will prejudice the operations of the agency.<sup>111</sup>

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<sup>108</sup> *Re Mangan and The Treasury* [2005] AATA 898.

<sup>109</sup> *Re Fogarty and Chief Executive Officer, Cultural Facilities Corporation* [2005] ACTAAT 14.

<sup>110</sup> *Re Dyki and Commissioner of Taxation* (1990) 12 AAR 554.

<sup>111</sup> *Re Angel and the Department of the Arts, Heritage and the Environment* [1985] AATA 314.

6.175 There must be a reasonable likelihood that disclosure would result in a reduction in both the quantity and quality of business information flowing to the government.<sup>112</sup> In some cases, disclosing the identity of the person providing the business information may be sufficient to prejudice the future supply of information.<sup>113</sup> Disclosure of the person's identity may also be conditionally exempt under s 47F (personal privacy). In these cases, consideration should be given to whether the information may be disclosed without also disclosing the identity of the person supplying the information.

6.176 Where the business information in question can be obtained compulsorily, or is required for some benefit or grant, no claim of prejudice can be made. No prejudice will occur if the information in issue is routine or administrative (that is, generated as a matter of practice).<sup>114</sup>

6.177 Unlike the other limb of this conditional exemption, s 47G(1)(b) does not require that the prejudice to the future supply of business information be unreasonable. The unreasonableness of the prejudice may be considered in applying the public interest test under s 11A(5).

### **Consultation**

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

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

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

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

6.181 Consultation should occur where:

- (a) it is reasonably practicable. This will depend on all the circumstances including the time limits for processing the request (s 27(5)). For example, it may not be reasonably practicable if the agency cannot locate the third party in a timely and effective way.

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<sup>112</sup> *Re Maher and the Attorney-General's Department* [1986] AATA 16, *Re Telstra and Australian Competition and Consumer Commission* [2000] AATA 71.

<sup>113</sup> *Re Caruth and Department of Health, Housing, Local Government and Community Services* (1993) 53 FOIR 65.

<sup>114</sup> *Re Kobelke and Minister for Planning* [1994] WAICmr 5.

- (b) it appears to the agency or minister that the third party might reasonably wish to make a submission that the document should be exempt from disclosure under either s 47 or s 47G having regard to:
- the extent to which the information is well known
  - whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the information
  - whether the information is publicly available, and
  - any other relevant matters (s 27(3)).

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

6.183 From a practical perspective, a decision maker should identify early any need to undertake consultation to benefit from the 30-day extension to the timeframe for making a decision (s 15(6)). This is because the extension only applies when consultation starts within the initial decision making period (that is, in the first 30 days).

### Submissions

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

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

They should be asked to provide reasons and evidence for their submission. An affected third party who is consulted under s 27 cannot contend that exemptions other than ss 47 or 47G should apply.<sup>115</sup>

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

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

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

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<sup>115</sup> See 'E' and *National Offshore Petroleum Safety and Environmental Management Authority* [2012] AICmr 3.

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

### General information about consultation

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

### Research

6.188 A document is conditionally exempt under s 47H if it meets two criteria:

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

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

### The Australian economy

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

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

6.191 The economy exemption reflects the need for the government to be able to maintain the confidentiality of certain information if it is to carry out its economic policy responsibilities, including the development and implementation of economic policy in a timely and effective manner. Section 47J differs significantly from its predecessor (the former s 44 of the FOI Act) by:

- (a) requiring a decision maker to focus on the consequences of disclosure, namely the expected adverse effect on Australia's economy
- (b) being subject to the public interest test.

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

adversely affect the Government's ability to develop and implement economic policies more generally.

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

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

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

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

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

- premature disclosure of information could compromise the Government's ability to obtain access to information
- disclosure of information could undermine confidence in markets, financial frameworks or institutions
- disclosure of information could distort the Australian economy by influencing investment decisions or giving particular individuals or businesses a competitive advantage.<sup>116</sup>

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<sup>116</sup> See Explanatory Memorandum, pp. 21–22. For an example of the application of this exemption see *Washington and Australian Prudential Regulation Authority* [2011] AICmr 11.