

PROCEDURAL GUIDE –

Requests for Information under the Freedom of Information Act 1982

What is the *Freedom of Information Act 1982*?

The *Freedom of Information Act 1982* (the Act) provides for access to information in the possession of the Government of the Commonwealth. Section 11(1) of the Act creates a legally enforceable right to obtain access to a document of an agency or an official document of a Minister in accordance with the Act but does not give rise to an automatic statutory right of access, in particular, it does not extend to exempt documents.

An applicant is not required to demonstrate a need to know in order to exercise the general right of access and access is not affected by the applicant's motives or the reasons they give for seeking access or the agency's or Minister's belief as to what their reasons are. Also the interests of the applicant are immaterial and cannot be taken into account in deciding whether or not access should be granted.

What's changed in FOI?

On 1 November 2010, the Act is amended by the FOI Reform Act. The effect of these changes which is reflected in the objects clause (s3) includes:

- Pro-disclosure culture, including publication of information
- Establishment of the Office of the Australian Information Commissioner
- Public interest test
- Changes to the charges, abolition of fees
- Changes to the review and complaints processes.

Further information regarding these changes can be found in the AFP National Guidelines on Freedom of Information Release as well as on the AFP HUB, however, the effect of these changes will increase public scrutiny on Departments to release information within the prescribed timeframes.

Freedom of Information (FOI) Requests/Consultations

The AFP receives a number of requests for information each year from numerous applicants, including journalists, the public, including prison inmates and members of Parliament.

The AFP also receives numerous requests for consultation about the release of information from State and Commonwealth agencies. Generally, the agency may hold information or documents which have

originated from the AFP and are seeking the views of the AFP about the release of that information.

What should you do?

If the FOI Team receives a FOI request relevant to you they will contact you and seek your assistance to identify and assess the documents you may hold. The FOI Team will provide you with a covering Minute, Searches Checklist and a copy of this Practical Guide to assist you.

If you are contacted in relation to a FOI request you will need to:

1. Undertake all relevant searches for documents;
 - A document includes –
 - any paper or other material on which there is writing
 - a map, plan, drawing or photograph
 - any paper or other material on which the markings have a meaning for persons qualified to interpret them
 - sounds, images or writings capable of being produced on to CD, DVD etc
 - any article on which information has been stored or recorded, either mechanically or electronically
 - any other record of information.
2. Mark the documents with any relevant exemptions;
3. Make your recommendations about the release of the documents;
4. Complete the Searches Checklist and Recommendation Form;
5. Clear the material with your local management team; and
6. Forward all documentation to the FOI Team.

When making your recommendations about the release of the documents you should mark the documents with a **yellow highlighter**. DO NOT delete or edit the documents by using a permanent marker.

The mere assertion that release of the documents would be unreasonable is not sufficient to sustain exemption of the documents from disclosure under the FOI Act. Evidence is needed to support the claim.

Please give careful consideration to your reasons for claiming exemptions as you may be required to provide affidavit evidence to support your claims should the exemptions be challenged in the Office of the Australian Information Commissioner.

In relation to a consultation request from an external agency, the documents will be forwarded to either the line area or a designated person, usually by email, who will then review the documents and provide their recommendations about the release of the information to the FOI Team. The FOI Team will coordinate a response back to the external agency following any clearance requirements if applicable.

Are there any limits on disclosure?

Part IV of the FOI Act contains a number of provisions that provide an exemption from release of documents under a range of circumstances. A guide to the exemption provisions can be found at Annexure B.

The following points may help you in your considerations:

- Is the information already in the public domain?
- Whether the information has any current relevance?
- Is there anything about the nature of the information which makes it particularly sensitive or private?
- Would any serious adverse consequences flow from disclosure?

What will the AFP do?

The FOI Team will assess the documents and any exemption claims sought by the line area. If the FOI Team is of the view that an incorrect exemption is claimed or that no exemption claims can be applied to the document, they will confer with the line area to ensure all parties have an agreed position. The FOI Team will then markup and redact the documents using specific software. A decision letter, schedule of documents and prepared documents are then sent to the applicant.

In relation to sensitive matters, the FOI Team will seek line area and functional management clearance and in some cases the Minister's approval prior to a decision being made to the applicant.

How quickly should you respond and what will happen if you do not respond?

FOI requests are governed by legislated timeframes, therefore, it is important that the FOI Team receive your comments about the release of the documents within **10 working days** of receiving the request. If a response is not provided to the applicant within the statutory timeframe they may apply to the Office of the Australian Information Commissioner (IC) on a deemed refusal. The applicant may also complain to the IC and the Commonwealth Ombudsman if there are unduly delays which may result in an Administrative Deficiency noted against the AFP.

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EXEMPTIONS GUIDE

Please find below an explanation of the exemptions contained within the FOI Act and points for consideration when applying the exemption.

Section 7 - Exemption of certain agencies from the operation of the FOI Act

1. An agency is exempt from the operation of the Act in relation to a document which has originated with, or has been received from ASIS, ASIO, ANAO, DIO, DSD.

Section 22 - Irrelevance

2. Exempted material would disclose information that would reasonably be regarded as irrelevant to the request.
 - **for example, diary notes may contain information about other events/investigations not related to the request, these parts should be highlighted for exemption with a yellow highlighter.**

CONDITIONALLY EXEMPT DOCUMENTS – ACCESS SHOULD BE GRANTED UNLESS IT WOULD BE CONTRARY TO THE PUBLIC INTEREST

Section 47B - Documents affecting relations between the Commonwealth and the States

3. Exempted material is information detailing information exchanged between the State police forces and the Commonwealth Government in confidence. Deletions to this material are made on the grounds that it is important that information between these agencies remain confidential, otherwise, the state police forces will become hesitant about transmitting information. The release of the information would affect the relations between the Commonwealth and the State. Disclosure would, on balance, not be in the public interest.

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- **The mere fact of disclosure, provided it would cause, or could reasonably be expected to cause damage to relations, is sufficient.**
 - **Damage might include:**
 - i. **The conduct of Cth/State negotiations being more difficult;**
 - ii. **Substantial impairment of good working relations;**

- iii. **Hindering of cooperation;**
- iv. **Prejudice to the flow of information;**
- v. **Impairment to Cth/State law or programs.**
- **In relation to information communicated in confidence – an agency need only show that at the time the information was communicated it was given with an express or implied understanding that the information would be kept confidential.**

Section 47C - Deliberative documents

4. To grant access to the document would disclose information in the nature of, or relating to opinion, advice or recommendation obtained/prepared in the course of the deliberative processes of an agency. Disclosure of these documents would be contrary to the public interest.
 - **This applies to documents produced within the agency, received from another agency or received from some outside person or body, provided the elements of the section are satisfied.**
 - **Deliberative processes require the thinking, reflecting, deliberating, consultation and recommendation that occur prior to a decision.**
 - **Section 47C does not apply to purely factual material.**
 - **Does not apply to operational material.**
 - **Public interest factors have to be weighed up – what harm would flow from disclosure?**
 - **Draft documents – the fact that a document is a draft which differs from the final version is not sufficient in itself to satisfy the public interest test – it will depend on the content of the document.**

Section 47D - Documents affecting financial or property interests of the Commonwealth

5. Deletions are made on the grounds that release would have a substantial adverse effect on the financial or property interest of the Commonwealth or of an agency.

Section 47E - Certain operations of agencies

6. 47E(d) Exempted material would disclose information that would have a substantial adverse effect on the proper and efficient conduct of the operations of the AFP and would be contrary to the public interest

7. 47E(c) Exempted material would disclose the methods used by the AFP for assessment of its personnel. Provision of this information would prejudice the effectiveness of those methods and have a substantial adverse effect on the assessment of personnel by the AFP.
- **The test is whether disclosure would have a “substantial adverse effect” ie. a degree of gravity must exist and whether disclosure would be contrary to the public interest.**
 - **There must be a reasonable expectation that a substantial and adverse effect will affect the way in which the agency carries out its functions that would result in it changing its function to its disadvantage.**

Section 47F - Documents affecting personal privacy

8. Deletions are made on the grounds that disclosure would involve the unreasonable provision of personal details of people other than the FOI applicant.
9. s47F(4) Exempted material contains information of a medical or psychiatric nature in relation to the applicant.

In determining whether disclosure of the document would involve the unreasonable disclosure of personal information the following matters must be considered:

- **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 document;**
- **The availability of the information from publicly accessible sources;**
- **Any other matters that the agency or Minister considers relevant.**

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Section 47G - Business affairs

10. 47G(a) Deletions are made on the grounds that disclosure would reasonably be expected to affect that person adversely in respect of his or her lawful business or professional affairs.
11. 47G(b) Deletions are made on the grounds that disclosure would prejudice the business, commercial or financial affairs of an organisation, being information that if disclosed would reasonably be expected to prejudice the future supply of information to the Commonwealth.

- To satisfy the several exemptions in this section it is necessary to demonstrate that the documents relate to a business or commercial activity.
- Where the document contains only the business or professional information of the applicant, the exemptions in section 47G cannot be applied.
- Consider whether the document contains information of commercial value and whether there is a reasonable likelihood that value would reasonably be destroyed or diminished through disclosure.
- Consider whether there is a reasonable likelihood that disclosure would result in a reduction both the quality and the quantity of business affairs information flowing from the private sector to government.

EXEMPT DOCUMENTS

Section 33 – Documents affecting national security, defence and international relations and communications in confidence from foreign governments or international agencies

12. s33(1)(a)(i) Deletions are made on the grounds that disclosure would, or could reasonably be expected to cause damage to the security of the Commonwealth.
13. s33(1)(a)(iii) Deletions are made on the grounds that disclosure would, or could reasonably be expected to cause damage to the international relations of the Commonwealth.
14. s33(1)(b) Deletions are made on the grounds that disclosure would divulge information communicated in confidence by the authority of a foreign government.
 - **Reasonable expectation that damage will be caused by disclosure – the mere allegation or possibility is insufficient to meet the reasonable expectation requirement.**
 - **damage to international relations includes such things as intangible damage to Australia’s reputation or relationships between government officials or loss of confidence or trust in the Government of Australia by an overseas government as well as loss or damage in monetary terms.**

- Lessening the confidence which another country would place on the government of Australia would satisfy the exemption as would an expected reduction in the quality and quantity of information provided by a foreign government.
- The so-called mosaic approach refers to the effect of disclosure of specific pieces of information, which are not necessarily themselves sensitive, but may, when put together with other separate information, cumulatively disclose information of a sensitive character.
- It is necessary only that the information contained in the document be communicated in confidence by or on behalf of a relevant body; there is no requirement to show that the foreign government continues to maintain confidentiality, simply whether the document was communicated in confidence at that time.

Section 34 - Cabinet documents

15. Deletions are made on the grounds that disclosure would divulge information submitted to the Cabinet for its consideration or is proposed by a Minister to be so submitted, being a document that was brought into existence for the purpose of submissions for consideration by the Cabinet.
- Has been submitted to Cabinet or it is proposed by a Minister to be submitted to Cabinet for consideration;
 - It was brought into existence for the dominant purpose of submission for consideration by the Cabinet;
 - Is an official record of Cabinet;
 - Is a copy of, or part of, or contains an extract from documents submitted to Cabinet;
 - Is a draft of a document to which the above applies;
 - The release of which would involve the disclosure of any deliberation or decision of Cabinet.
 - The exemptions do not apply to purely factual material in Cabinet documents.

Section 37 - Law enforcement and public safety

16. s37(1)(a) Provision of this document would disclose matter that would reasonably be expected to prejudice the conduct of an investigation of a breach, or possible breach, of the law, or prejudice the enforcement or proper administration of the law in a particular instance.
- This exemption is concerned with the conduct of a current investigation and not the eventual outcome.

- **If an investigation is suspended or dormant pending further new information which may revive an investigation, this exemption may be claimed.**
17. s37(1)(b) Deletions are made on the grounds that disclosure would enable a third party to ascertain the identity of a confidential source of information.
- **This exemption is intended to protect the identify of a confidential source of information rather than the information itself.**
18. s37(1)(c) Deletions are made on the grounds that disclosure would endanger the life or physical safety of people other than the FOI applicant.
- **There must be a reasonable apprehension of danger to exist for this exemption to be claimed. An angry phone call would not suffice, however, evidence of a long and documented history of physical violence towards persons would.**
19. s37(2)(a) Deletions are made on the grounds that disclosure could prejudice the fair trial of a person or the impartial adjudication of a particular case.
- **It will be necessary to establish which persons would be affected.**
20. s37(2)(b) Deletions are made on the grounds that release would disclose lawful methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures.
- **There must be a reasonable expectation that the document will disclose a method or procedure and to disclose this would prejudice the effectiveness of those methods/procedures.**
 - **If the only result of disclosure of the methods would be that those methods were no surprise to anyone, there could be no surprise to anyone, there could be no reasonable expectation of prejudice.**
 - **The exemption will not apply to routine techniques and procedures already well know to the public.**
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21. s37(2)(c) Deletions are made on the grounds that release would prejudice the enforcement of lawful methods in the protection of public safety.

Section 38 - Documents to which secrecy provisions of enactments apply

22. Material is exempt if disclosure of the document is prohibited under a provision of an enactment or specified in Schedule 3 of the Act.
- **Government policy is that s38 should apply only where the secrecy enactment concerned, specifically and directly identifies the nature of the information not to be disclosed.**
 - **The primary purpose of secrecy provisions in legislation is the prohibition against unauthorised disclosure of client information.**

Section 42 - Legal Professional Privilege

23. Material is considered exempt on the grounds that it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.
- **The common law test is applied, that is whether the document was created for the purpose of giving or receiving legal advice or for use or in connection with actual or anticipated litigation, whether the advice given is independent and whether the advice given is confidential.**
 - **The availability of LPP depends on whether there has been waiver of privilege which may occur in circumstances where the document in question has been widely distributed or the content of the legal advice has been disclosed or acted upon.**

Section 45 - Breach of confidence

24. Deletions are made on the grounds that disclosure of the material would be a breach of confidence.
- **This section applies where a person who has provided confidential material to an agency could succeed in a breach of confidence action against that agency should the agency disclose the material.**
 - **The information at issue must be identified with specificity and not merely in global terms as confidential.**

- **The information must be inherently confidential, known only to limited parties and not more broadly.**
- **The information must have been communication and received on the basis of a mutual understanding of confidence.**
- **Disclosure of the information, were it to occur, must be an unauthorised use of the information.**
- **Disclosure would cause the confider to suffer a detriment.**

Section 46 - Documents that would be in contempt of Parliament, court or other body if disclosed

26. Deletions are made on the grounds that disclosure would be in contempt of court.

Section 47 – Documents disclosing trade secrets or commercially valuable information.

27. Deletions are made on the grounds that disclosure would reveal trade secrets or any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed.

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