



Australian Government
Department of Defence

Reference: [insert objective ID/out number]

Commented [DoD1]: ADM: Use if required or delete

FOI xx/xx/xx STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT

1. I refer to the application by [applicant] under the *Freedom of Information Act 1982* (FOI Act), for access to:

“...quote final scope of the request...”

Commented [DoD2]: Scope to be put in by Case manager before sending the template with the tasking

excluding personal email addresses, signatures, PMKeys numbers and mobile telephone numbers, contained in documents that fall within the scope of the FOI request. In addition, excluding duplicates of documents, and documents sent to and from you. Furthermore, Defence only considers final versions of documents.

Commented [DoD3]: FOI will update/remove at draft stage if applicant disagrees

Commented [VNM4]: FOI will review this statement against the scope of the request.

FOI decision maker

2. I am the authorised officer pursuant to section 23 of the FOI Act to make a decision on this FOI request.

Documents identified

3. I identified **XX** documents as matching the description of the request.

4. The decision in relation to each document is detailed in a schedule of documents.

5. I have added an FOI reference number and Item/Serial number to each of the documents, which corresponds with the schedule.

Decision

6. I have decided to:

- a. release x documents in full;
- b. partially release x documents in accordance with section 22 [access to edited copies with exempt or irrelevant matter deleted] of the FOI Act, on the grounds that the deleted material is considered exempt under section 47F [public interest conditional exemptions-personal privacy] and/or section 33(a)(i) [Documents affecting national security] of the FOI Act;
- c. refuse access to documents of the request under subparagraph 24A(1)(b)(ii)[Requests may be refused if documents cannot be found, do not exist or have not been received] of the FOI Act; and
- d. remove irrelevant material as referred to in the **scope of the request** in accordance with section 22(1)(b)(ii) of the FOI Act.

Commented [DoD5]: If removal under s22 is not related to scope will need to add in more reasoning.

Material taken into account

7. In making my decision, I had regard to:

- a. the terms of the request;
- b. the content of the identified documents in issue;
- c. relevant provisions in the FOI Act;

- d. the Guidelines published by the Office of the Australian Information Commissioner under section 93A of the FOI Act (the Guidelines); **and**
- e. (include any other i.e. advice received from third parties, officers within the department – specify which area provided the advice).

Reasons for decision

(example) Section 47F - Personal privacy

8. Upon examination of the documents, I identified information, specifically...

Sections 47F - Public interest considerations

Factors in favour of disclosure

9. The following factors that may be in favour

Section 22 (where documents are being denied in full)

10. Subsection 22(1) of the FOI Act requires that where a decision maker denies access to a document they must consider releasing the document with exempt matter deleted, where possible. I have considered disclosing the documents to you with deletions, but have decided against this course of action, as the document would be meaningless and of little or no value once the exempt material is removed.

Third party consultation (if required)

11. I decided to consult with third parties regarding their information which was contained in the documents. In response to this consultation, some of the third parties have objected to the release of their business/personal information. I do not agree with all of the objections.

12. The department is required to advise the third parties of my decision. Documents will be provided when all review rights have been exercised.

Further Information (Remove section if redundant)

13. A number of the documents matching the scope of this request were classified. I have declassified the versions of the documents that are approved for release.

or

14. Some of the documents matching the scope of this request contained a dissemination limiting marker, as the documents are approved for public release the marker has been struck through.

Clarification/Context Statement (Remove section if redundant)

15. If the documents require explanation include further details here.

<Name> [electronic signature]

Accredited Decision Maker

Commented [DoD6]: Not necessarily declassifying documents

*** Group

XXX 2017

Commented [VNM7]: Remove the date line if electronic signature is used



Australian Government

Department of Defence

GUIDANCE FOR FREEDOM OF INFORMATION DECISION MAKING

Current as at February 2018

Guidance for Freedom of Information Decision making

Developer

Enterprise Reform Branch

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FOREWORD

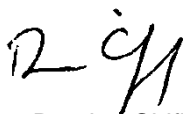
The *Freedom of Information Act 1982* (Cth) (the Act) has been in operation since 1 December 1982. During the intervening time, Defence has gained considerable experience in fulfilling its statutory obligations. In that time, the organisation has responded to thousands of requests.

This Guidance Material sets out how requests are to be processed by Defence under the Act and in accordance with Defence policy. The Guidance Material includes quick reference guides on key topics, highlights '*important tips*' for decision-making and directs officers to other various sources of guidance available to assist with their decision-making.

This Guidance Material should be followed by Defence officers dealing with Freedom of Information and, in particular, accredited decision makers when making decisions in relation to requests for access to documents under the Act.

The Guidance Material also provides details on the role of Defence's Freedom of Information Directorate (The FOI Directorate). The FOI Directorate is the principal source of advice, guidance and support for accredited decision makers when making decisions under the Act. The FOI Directorate is the only point of contact between Defence, Freedom of Information applicants and external entities.

This Guidance Material should be read in conjunction with the relevant statutory provisions. Extracts from, and references to, relevant provisions of the Act are provided throughout the Guidance Material. While every attempt has been made to keep the guidance simple, the subject matter can be complex. In such cases, policy advice and guidance should be sought from the FOI Directorate.



Damien Chifley
Acting Assistant Secretary Ministerial and Information Management

30 June 2014

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CHAPTER 1

POLICY

INTRODUCTION

1.1 The Department of Defence (Defence) must meet specific responsibilities and obligations contained in the *Freedom of Information Act 1982* (the FOI Act), also referred to in this guide as 'the Act'.

1.2 The Defence Freedom of Information (FOI) Guidance Material is the primary source of policy relating to the implementation of the Act in Defence.

POLICY STATEMENT

1.3 Defence supports the objectives of the Act, which includes giving the public access to official documents in the possession of the Australian Government wherever possible, and the right to apply for amendment or annotation of records of personal information about themselves. The introduction of the Information Publication Scheme, under the Act, also requires Defence to publish certain categories of information relating to Defence's activities. In addition the Act requires agencies to publish Freedom of Information disclosures on their websites.

1.4 Defence is committed to ensuring that Freedom of Information decisions are made in a consistent and informed way. To fulfil this commitment, Defence has established a Freedom of Information Accredited Decision Maker Training Program (the Program). Accredited Freedom of Information Decision Makers and other Defence personnel involved in Freedom of Information activities must follow the guidance and procedures described in this Guidance Material, the FOI Act and the Information Commissioner's Guidelines when conducting Freedom of Information related activities.

KEY POLICY ASPECTS

Freedom of Information legislation confers enforceable rights

1.5 The Act gives a right of access to official documents of ministers (refer to paragraph 1.12 below) and documents in the possession of agencies. This right is subject only to exceptions and exemptions provided for in the Act.

1.6 The Australian Information Commissioner (Information Commissioner) has produced written guidelines for the purposes of the Act. These guidelines, titled 'Office of the Australian Information Commissioner, Guidelines under section 93A of the *Freedom of Information Act 1982*', are referred to as 'the Guidelines' throughout this Guidance Material.

1.7 In accordance with section 93A of the Act, Defence personnel must have regard to the Guidelines in performing a function or exercising a power under the Act.

1.8 The Act also gives individuals the right to apply for amendment or annotation of records of personal information about themselves, and access to information published by agencies.

1.9 These rights are enforceable through review processes provided for in the Act. The Information Commissioner can also seek to impose significant fines and/or penalties on agencies which do not comply with the Act. These penalties can include,

in certain extremes, imprisonment of Defence Personnel. However, sections 90, 91 and 92 of the Act contain important provisions which shield persons against certain actions and protect them in respect of certain offences, provided that the necessary conditions have been satisfied.

Defence is an ‘agency’

1.10 Defence is an ‘agency’ within the meaning specified in the Act and, for the purposes of the Act, includes the Australian Defence Force (ADF), the Australian Army Cadet Corps, the Australian Naval Cadets and the Australian Air Force Cadets. The cadet organisations are administered under law by the Chiefs of Army, Navy and Air Force and therefore these officers are responsible for Freedom of Information activities relating to cadets.

1.11 The Secretary of the Department of Defence is the ‘Principal Officer’ of the Department as defined in the Act. Accordingly, the Secretary is responsible for Freedom of Information in all elements of Defence, including the ADF and the Cadets.

1.12 Ministers in the Defence portfolio, including the Parliamentary Secretaries, are subject to the Act for ‘official documents’ in their possession, or deemed to be in their possession, which relate to the affairs of the Department of Defence or of another agency.

DEFINITIONS

1.13 A list of definitions used in this Guidance Material is contained in section 4 of the Act.

ROLES AND RESPONSIBILITIES

Delegations

1.14 As ‘principal officer’ of the Department of Defence for the purposes of the Act, the Secretary is responsible to the ministers for the satisfactory operation of the Act within Defence. The Secretary has certain powers and responsibilities under the Act. For example, the Secretary may approve arrangements for decision-making under the Act and may arrange for the conduct of internal reviews, applied for under section 54 of the Act, of decisions made on Freedom of Information requests.

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Guidance for Freedom of Information Decision-making

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1.15 The current decision-making arrangements authorised by the Secretary on 6 December 2017 are set out in Table 1-1.

Table 1.1: Decision-making arrangements

Item	Position	Decision able to be made
1.	First Assistant Secretary Governance and Reform	All decisions
2.	Assistant Secretary Enterprise Reform	All decisions
3.	Director, Freedom of Information	All decisions
4.	Accredited FOI decision makers	Decisions relating to refusal or grant of access to documents in accordance with a request received under section 15 of the Act and decisions relating to an application for amendment or annotation of personal records under section 48 of the Act
5.	All Executive Level 1 officers in the FOI Directorate	Decision relating to refusal or grant of access to documents in accordance with a request received under section 15 of the FOI Act; decisions relating to an application for amendment or annotation of personal records under section 48 of the FOI Act; decisions relating to charges under section 29 of the FOI Act.

Responsibility for Freedom of Information policy and administration

1.16 Accredited Freedom of Information decision makers will be able to make decisions relating to refusal or granting of access to documents in accordance with a request received under section 15 of the Act, and decisions relating to an application for amendment or annotation of personal records under section 48 of the Act. The Secretary has authorised Assistant Secretary Enterprise Reform (ASER) to certify that a person has successfully completed the Program.

1.17 ASER is responsible for the administration of the Act on behalf of the Secretary of Defence.

STRUCTURE OF THE GUIDANCE FOR FREEDOM OF INFORMATION DECISION-MAKING

Related policy, publications and legislation

1.18 The following documents should be read in conjunction with this Guidance Material.

a. Legislation

(1) *Freedom of Information Act 1982* (Cth)

(2) *Australian Information Commissioner Act 2010* (Cth)

b. Publications

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(1) *Office of the Australian Information Commissioner, Guidelines* issued by *the Australian Information Commissioner* under section 93A of the Freedom of Information Act 1982 (Cth).

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CHAPTER 2

OVERVIEW OF THE FREEDOM OF INFORMATION ACT AND GUIDANCE MATERIAL

AIM OF THIS GUIDANCE MATERIAL

2.1 The aim of this Guidance Material is to assist Defence accredited decision makers in making good decisions under the *Freedom of Information Act 1982* (the Act). The Guidance Material sets out how requests are to be processed by Defence under the Act and in accordance with Defence policy. The Guidance Material includes quick reference guides on key topics, highlights 'important tips' for decision-making and directs officers to other various sources of guidance available, to assist with their decision-making.

2.2 The Guidance Material must be followed by Defence officers dealing with Freedom of Information and, in particular, accredited decision makers when making decisions in relation to requests for access to documents under the Act.

2.3 The Guidance Material also provides details on the role of Defence's FOI Directorate. The FOI Directorate is the principal source of advice, guidance and support for accredited decision makers, when making decisions under the Act. The FOI Directorate is the only point of contact between Defence, Freedom of Information applicants and external entities.

QUICK REFERENCE GUIDE TO THIS GUIDANCE MATERIAL

If you want to know about:

- a. the purpose of the Act, go to [paragraph 2.4](#)
- b. sources of guidance on Freedom of Information, go to [paragraph 2.38](#)
- c. who is authorised and accredited to make Freedom of Information decisions, go to [paragraph 4.4](#)
- d. the role of the FOI Directorate, go to [paragraph 4.14](#)
- e. receiving and acknowledging Freedom of Information requests, go to [Chapter 5](#)
- f. processing Freedom of Information requests, go to [Chapter 6](#)
- g. exemptions under the Act, go to [Chapters 7 - 9](#)
- h. making Freedom of Information decisions and drafting statements of reason, go to [Chapter 10](#)
- i. amendment or annotation of personal information, go to [Chapter 11](#)
- j. Freedom of Information templates, go to [Chapter 12](#) and Annexes A-E
- k. Rights of Review, go to [Chapter 13](#)

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PURPOSE OF THE ACT

2.4 The Act came into effect on 1 December 1982 and was specifically created to facilitate access to information in documentary form in the possession of agencies. It extends the right of every person to access documents in the possession of the Australian Government in three ways:

- a. it requires agencies and ministers to provide access to documents in their possession unless the document is within an exception or exemption specified in the legislation;
- b. it requires agencies to publish, to the world at large, documents which a Freedom of Information applicant has accessed as the result of a Freedom of Information request; and
- c. it requires Commonwealth agencies (both Departments and authorities) to publish information about their operations and powers affecting members of the public as well as their Guidance Materials and other documents used in making decisions and recommendations affecting the public.

2.5 The objects of the Act as set out in section 3 are:

- to give the Australian community access to information held by government, by requiring agencies to publish that information and by providing for a right of access to documents;
- to promote Australia's representative democracy by increasing public participation in government processes, with a view to promoting better-informed decision-making;
- to promote Australia's representative democracy by increasing scrutiny, discussion, comment and review of government activities;
- to increase recognition that information held by government is to be managed for public purposes and is a national resource; and
- to ensure that powers and functions in the Act are performed and exercised, as far as possible, so as to facilitate and promote public access to information promptly, and at the lowest reasonable cost.

2.6 Another important aim of the legislation is to give individuals access to their personal records kept by government and enable them to correct any personal information that is incomplete, incorrect, out of date or misleading.

IMPORTANT TIP

If the documents are sensitive and disclosure could reasonably be expected to cause harm to the government, only then should exemptions be considered.

2.7 The Act should be interpreted in such a way so as to promote these objects. The starting point for an agency or minister dealing with a Freedom of Information request is that an applicant has a right to obtain the requested material. Accredited decision makers must question whether there is any real sensitivity in the documents in the sense that disclosure could reasonably be expected to harm important governmental interests or the personal or business affairs of third parties. It is only

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then that an agency considers the application of the exemptions, if any, or any other provision in the Act, that may impose a limitation on access to documents.

IMPORTANT TIP

The Act is a minimum, not a maximum standard of access.

2.8 The Act does not prevent or discourage the giving of access to any exempt document to which access can lawfully be given other than under the Act. It is a minimum, not a maximum standard of access.

2.9 Accredited decision makers must also note that where documents are disclosed in response to a Freedom of Information request there is no restriction under the Act on what the applicant may do with that information. Defence will publish on its website many of the documents it releases under Freedom of Information, particularly in response to requests from journalists, parliamentarians and researchers. This is a requirement of the Act's Information Publication Scheme (see further paragraph 2.33).

STATUTORY PROTECTIONS FOR PUBLICATION

2.10 Sections 90-92 of the Act give protections from civil and criminal liability for publication and the giving of access under the Act (see sections 90(1)(a) , 92(1)(a); sections 90(1)(c) and 92(1)(c)). These sections provide decision makers with protection against any action for breach of confidence, copyright infringement and defamation or any criminal prosecution where the officer honestly believes the disclosure is required or permitted, whatever the grounds (that is, statutory or otherwise), for so believing.

APPLICATION OF THE ACT AND GENERAL PRINCIPLES

2.11 The access rights in the Act are drawn very broadly. They allow any 'person' to seek access to 'documents' in the 'possession' of the agency.

Person

2.12 'Person' is defined in section 22 of the *Acts Interpretation Act 1901* (Cth) to include a corporation and body politic. Every person means every person everywhere and includes (but is not limited to): a person resident in Australia, whether or not they are an Australian citizen, a person resident abroad, whether or not they are an Australian citizen, a minor, a body corporate and a person serving a sentence in prison.

IMPORTANT TIP

Every person, regardless of age or residence has a right of access to documents of an agency or the official documents of a minister, subject only to the limitations provided in the Act.

2.13 The right of access is not restricted by territorial or citizenship limitations. A person who wishes to make a request for access to a document under the Act need only provide an email address to which notices may be sent.

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Documents

2.14 The Act applies to documents in the possession of an agency or minister. The term document is very broadly defined in section 4 of the Act to include any record of information and:

- each hard copy of a document - including printouts, handwritten notes on envelopes and post-it notes, spiral-bound work books, etc;
- electronic documents - including emails, each electronic version of a document and databases;
- DVDs and video tape or film recordings;
- sound recordings;
- photographs;
- maps and diagrams;
- transcripts of sound recordings or shorthand notes; and
- mobile telephone SMS (text) messages on work-provided phones and mobile devices.

Electronic documents

2.15 The right of access created under the Act is to documents, not information (section 11). The Act does not generally require an agency to make available information which is not in documentary form, nor to collect information to create a new document. Agencies are also not obliged to research information – the obligation is only to provide access to existing documents. However, if information is scattered over a particular database, computer disk or tape, so long as it is possible to bring together a hard copy of this information, this should be done. However, Defence is not required to produce a hard copy of information held in electronically-stored form where that process would substantially and unreasonably divert the resources of Defence (see further paragraph 6.11).

IMPORTANT TIP

Document includes information stored electronically on a computer.

2.16 In some circumstances, an applicant will seek access to an electronic copy of information such as emails. Defence may provide the applicant with a disk in a format which the applicant can read. Applicants may also seek metadata relating to emails. This must be provided, if available, unless an exemption applies.

Exclusions from definition of ‘document’

2.17 The term document does not include the following, which fall outside the scope of the right of access given by the Act:

- documents classed as archival records: that is documents that are within the open access period within the meaning of the *Archives Act 1983* (Cth) (Archives Act), unless they contain personal information.

2.18 The open access period should be determined in accordance with the following table (section 3 Archives Act):

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Table 2.1: Open access period for records

Item	If the record came into existence in any of the following years (ending on 31 December):	If the record is in the open access period on and after the following day:
1	a year (the <i>creation year</i>) before 1980.	January in the year that is 31 years after the creation year. Example: A record that came into existence in the year 1979 is in the open access period on and after 1 January 2010.
2	1980 or 1981	1 January 2011
3	1982 or 1983	1 January 2012
4	1984 or 1985	1 January 2013
5	1986 or 1987	1 January 2014
6	1988 or 1989	1 January 2015
7	1990 or 1991	1 January 2016
8	1992 or 1993	1 January 2017
9	1994 or 1995	1 January 2018
10	1996 or 1997	1 January 2019
11	1998 or 1999	1 January 2020
12	2000	1 January 2021
13	a year (the creation year) after 2000.	1 January in the year that is 21 years after the creation year. Example: A record that came into existence in the year 2001 is in the open access period on and after 1 January 2022.

- documents that are open to public access, as part of a public register or otherwise, in accordance with another enactment, where access is subject to a fee or other charge; and
- documents that have been passed to the National Archives of Australia (Archives), the National Library of Australia and the Australian War Memorial by a person who is not subject to the Act, such as privately donated records.

2.19 These documents are set out in sections 12 and 13 of the Act as exceptions to the right of access. However, even though these documents fall outside the scope of the Act, they may still be released by agencies or ministers, if appropriate.

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In the possession of the agency

2.20 A document of an agency is a document in the possession of the agency, whether it was created in the agency or received by the agency from another agency or from a source outside the government.

Documents held on database

2.21 Documents held in electronic form as part of a database are in the possession of the agency that 'owns', or 'hosts', the database, even if another agency has access to the database. Other agencies with access may also be in 'possession' of those records, depending on the arrangements. In most cases, it would be appropriate to consider transferring a request for access to such documents to another agency or to a minister (see further paragraph 6.18 of this guidance material).

Constructive possession of documents

2.22 A document is in the possession of an agency for the purposes of the Act in certain cases even though it may not be in the physical possession of the agency. These cases include:

- where the circumstances are such that Defence has a right to immediate physical possession of the document arising through a contract, such as where a consultant is employed by Defence under a contract to undertake a Code of Conduct investigation, and the contract specifically provides that the contractor must provide to Defence, upon request, certain documents;
- where delivery of a government service to the public is contracted out. Section 6C of the Act requires agencies to take contractual measures to ensure they have access for Freedom of Information purposes to documents relating to the performance of Commonwealth contracts (contracts where the service is provided to the public rather than to the Commonwealth); and
- certain Defence files transferred to Archives or the Australian War Memorial are still considered to be documents in the possession of Defence.

'AN AGENCY OR MINISTER'

Defence as an agency

2.23 Defence is an agency within the meaning of the Act and, for the purposes of the Act, includes the Department of Defence, the Defence Force, the Australian Army Cadets, the Australian Navy Cadets and the Australian Air Force Cadets. Defence is discreet and separate from its Ministers for Freedom of Information purposes.

2.24 In accordance with section 7(1A), the following bodies are not part of Defence for the purposes of the Act:

- Australian Geospatial-Intelligence organisation (AGO); (also known as Defence Imagery and Geospatial Organisation (DIGO));

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- Defence Intelligence Organisation (DIO); and
- Australian Signals Directorate (ASD), (also known as Defence Signals Directorate - DSD).

2.25 Also, section 7(1A)(b) states that AGO, DIO and ASD are not agencies in their own right for the purposes of the Act. This means that a person cannot make a Freedom of Information request either to Defence or to these bodies for access to documents they hold.

2.26 Documents that originated with, or that were received from AGO, DIO and ASD and held elsewhere in Defence are subject to the Act, but are exempt from disclosure in accordance with section 7(2A).

The Act excludes intelligence agencies and documents

2.27 Intelligence agencies listed in Part 1, Division 1 of Schedule 2 of the Act are totally excluded from the operation of the Act, including the Australian Secret Intelligence Service, Australian Security Intelligence Organisation and the Office of National Assessment. All agencies including Defence are exempt in relation to documents that originated with, or were received from, these intelligence agencies (section 7(2A)).

2.28 Defence is also exempt from the operation of the Act in relation to documents containing the following information:

- the collection, reporting or analysis of operational intelligence (this is not defined in the Act); and
- special access programs, under which a foreign government provides restricted access to technologies (section 7(2) and Part II, Schedule 2).

Other excluded bodies

2.29 The Act applies to courts, the Official Secretary to the Governor-General and certain tribunals listed in Schedule 1, but only in respect to matters of an administrative nature. It applies to all other agencies in respect of all documents in their possession, including tribunals which are not listed in Schedule 1.

2.30 The Act does not apply to Parliament or the Governor-General. Other authorities also listed in Schedule 2 of the Act are specifically excluded from the operation of the Act either totally or in respect of defined areas of their functions, including the Australian Government Solicitor.

The Act applies to ministers

2.31 The Act applies to 'official' documents in the possession of a minister i.e. those that relate to the affairs of an agency or of a department of State. The legislation does not apply to documents relating to party matters or to a minister in their capacity as a Member of Parliament.

2.32 The term does not extend to the personal documents of a minister or the minister's staff, documents of a party political nature, or documents held in the minister's capacity as a local member of parliament unless the correspondence concerns an agency within the minister's portfolio.

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2.33 The ministers in the Defence portfolio, including the parliamentary secretaries, are all subject to the Act in respect of 'official documents' in their possession, or deemed to be in their possession, which relate to the affairs of the Department of Defence or of another agency.

PUBLICATION OF DOCUMENTS UNDER THE ACT

2.34 Decision makers will be predominantly concerned with whether to give access to the documents requested by a Freedom of Information applicant. The identity and motives (or perceived motives) of the applicant are not matters which the decision maker can consider, although when a person or a business seeks access to information about themselves, this may affect the operation of some exemption provisions.

2.35 Where an agency or minister provides access to information in a document in response to a Freedom of Information request made in accordance with section 15(2) of the Act, the information must be published to 'the public generally' (see section 11C(3)). The predominant form of publication which is contemplated is via the internet. However, there is no obligation to publish (section 11C(1)(a)-(d)):

- personal information about any person, if it would be unreasonable to publish the information;
- information about the business, commercial, financial or professional affairs of any person, if it would be unreasonable to publish the information;
- other information of a kind determined by the Information Commissioner, if it would be unreasonable to publish the information;
- any information, if it is not reasonably practicable to publish the information under this section because of the extent of any modifications to a document (or documents) necessary to delete information mentioned in paragraphs (a) to (c).

2.36 The Information Commissioner's Guidelines contain some discussion on the way in which these exceptions should be understood and applied.

2.37 Most documents released to Freedom of Information applicants by Defence are published on Defence's online [Disclosure Log](http://www.defence.gov.au/foi/Decisions/DisclosureLog.asp) (<http://www.defence.gov.au/foi/Decisions/DisclosureLog.asp>). Defence has also made the decision to publish accredited decision makers' statements of reasons on the Disclosure Log in order to give context to the decision to release or exempt information contained in the documents.

IMPORTANT TIP

Statements of reasons are published on the Defence's Online Disclosure Log.

SOURCES OF GUIDANCE ON FREEDOM OF INFORMATION

2.38 Accredited decision makers are encouraged to seek help and advice from the FOI Directorate. The FOI Directorate has introduced partnering arrangements to

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assist decision makers, as well as decision support staff, in processing Freedom of Information requests.

2.39 Please do not hesitate to contact the FOI Directorate at any stage during the processing of a request. Other sources of information are set out below.

AUSTRALIAN INFORMATION COMMISSIONER'S GUIDELINES

2.40 Under the Act, the Information Commissioner is charged with issuing Guidelines with respect to the administration of the Act. Agencies and ministers must have regard to the Guidelines when performing functions or exercising powers under the Act - this means they must take into account [the Guidelines](http://www.oaic.gov.au/freedom-of-information/foi-guidelines). (<http://www.oaic.gov.au/freedom-of-information/foi-guidelines>)

DECISIONS OF THE FREEDOM OF INFORMATION COMMISSIONER

2.41 One of the functions of the Office of the Australian Information Commissioner is the review of the decisions made under the Act. The decisions are published on the Information Commissioner's [website](http://www.oaic.gov.au/freedom-of-information/foi-decisions/all/) (<http://www.oaic.gov.au/freedom-of-information/foi-decisions/all/>)

DECISIONS OF THE ADMINISTRATIVE APPEALS TRIBUNAL

2.42 Law reports on decisions of the Administrative Appeals Tribunal and the courts on Freedom of Information matters are available from [Austlii](http://www.austlii.edu.au/databases.html). (<http://www.austlii.edu.au/databases.html>)

2.43 These decisions should be treated with some caution as a number of exemption provisions changed in subtle, but important ways on 1 November 2010.

IMPORTANT TIP

Contact the FOI Directorate if you need Freedom of Information advice or assistance.

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CHAPTER 3

PURPOSE OF THE FREEDOM OF INFORMATION ACT

PURPOSE OF FREEDOM OF INFORMATION IN THE ADMINISTRATIVE LAW CONTEXT

3.1 The notion of the rule of law is fundamental to our system of government and administration. Power can be legitimately exercised only within the framework of rules and checks and balances. Our constitution consists of separate chapters for The Parliament (Chapter I), The Executive Government (Chapter II) and The Judicature (Chapter III).

3.2 Administrative law encompasses the rules about the way in which the Executive Government operates. Administrative law is important for every member of the public because many areas of everyday life are subject to government control or regulation. This includes areas such as aircraft safety; road safety; poisons regulations; controlling who can practise law, dentistry and medicine; regulating imports and exports; social security payments; and of course the range of regulatory measures governing employment and working conditions, and health and safety.

3.3 In the 1970s, the Commonwealth began to legislate to introduce a package of legislation to simplify judicial review and Executive Government accountability generally. A particular objective of the administrative law package was to provide openness in government and accountability by the Executive arm of government. The reforms went beyond the common law and formed part of a strong modern democracy.

3.4 The administrative law package, in addition to the *Freedom of Information Act 1982* (the Act), consists of the following legislation:

- ***Administrative Appeals Tribunal (AAT) Act 1975***. The AAT is an independent body, which reviews decisions of ministers, public officials and authorities on the merits of those decisions. This means it may substitute its decision for the agency's decision. For example, the Tribunal may review and remake most Freedom of Information decisions made by an agency. There is an application fee for an application to the AAT to have a decision reviewed.
- ***Ombudsman Act 1976***. The Ombudsman can investigate (informally and in private) complaints about administrative actions (including Freedom of Information) of Commonwealth departments, most statutory authorities and some government business enterprises and contracted service providers. After investigation of the complaint, if the Ombudsman thinks it necessary, they may recommend to the agency that it take particular action on the matter. The Ombudsman may also report to the Prime Minister and the Parliament. There is no charge for the Ombudsman's services. The Ombudsman has a special 'Defence Force Ombudsman' jurisdiction which is engaged in relation to Defence matters.
- ***Administrative Decisions (Judicial Review) Act 1977 (AD(JR) Act)***. The AD(JR) Act enables easier access to the courts by simplifying the procedures of the common law relating to judicial review of administrative decisions. Under the AD(JR) Act, most decisions made under a federal law by ministers and Commonwealth agencies are subject to judicial review by the Federal Court. An 'aggrieved' person

whose interests are adversely affected either by a decision which is reviewable under the AD(JR) Act, including conduct leading up to a decision, or a failure to make a decision required by law may apply to the Federal Court for review of the decision, conduct or delay. The Federal Court has a discretion whether to review a decision and will generally decline if there is a more convenient avenue of review e.g. by the Administrative Appeals Tribunal.

- **Archives Act 1983.** The Archives Act established the National Archives of Australia (Archives). It is concerned with the preservation of and access to Commonwealth records. Commonwealth agencies are obliged to retain all records of their activities unless disposal of particular records is specifically authorised by the Archives or as part of normal administrative practice. The Archives Act stipulates responsibility for conserving and preserving archival resources of the Commonwealth and for making available Commonwealth records in the open access period. Unlike the Freedom of Information Act, the charges under the Archives Act are minimal, being mainly photocopying and inspection costs. Many of the exemptions found in the Freedom of Information Act can also be found in the Archives Act.
- **Privacy Act 1988.** The purpose of the Privacy Act is to protect the privacy of individuals. It places obligations on agencies and provides protection by means of rules called Australian Privacy Principles (APPs), which govern the collection, storage, security, access, amendment, use and disclosure of personal information. It also provides protection in relation to Tax File Numbers, sets out some of the powers of the Privacy Commissioner, and regulates consumer credit reporting, data matching by agencies and pharmaceutical payment information.

IMPORTANT TIP

Accredited decision makers only need to refer to the Act when making decisions relating to refusal or granting of access to documents under section 15 of the Act.

ROLE OF FREEDOM OF INFORMATION IN DEFENCE CONTEXT

3.5 Defence operates within an extensive legislative framework designed to ensure appropriate behaviours, accountability and transparency. This framework includes the *Public Service Act 1999*, the *Financial Management and Accountability Act 1997* (Cth), (now replaced by the *Public Governance, Performance and Accountability Act 2013*, and the *Auditor-General Act 1997* (Cth). It also includes certain administrative laws such as the AD(JR) Act, the AAT Act, the Ombudsman Act, the Privacy Act and, of course, the Freedom of Information Act.

3.6 The activities of Defence are also scrutinised through a number of mechanisms and statutory bodies, including the Parliament, especially Senate Committees, the Ombudsman and the Australian National Audit Office. Ministerial representations from constituents are another source of Defence's accountability. Freedom of Information should be understood as being just one piece in this broader picture.

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CHAPTER 4

RESPONSIBILITY FOR FREEDOM OF INFORMATION IN DEFENCE

RESPONSIBILITY FOR FREEDOM OF INFORMATION

4.1 For the purposes of the *Freedom of Information Act 1982* (the Act), the Secretary is the principal officer of Defence.

4.2 Assistant Secretary Enterprise Reform (ASER) is responsible for the administration of the Act on behalf of the Secretary of Defence.

4.3 The Director of Freedom of Information (DFOI) manages the FOI operations (inquiries and reports) and FOI Case Management Team (administration of valid requests). The Review and Guidance Team (R&G) to ASER is responsible for the management of all internal and external reviews, complaints, training, and providing advice in relation to more complex FOI policy matters.

IMPORTANT TIP

While the Secretary of Defence is the 'principal officer' of Defence for the purposes of the Act, the Minister for Defence is ultimately responsible to Parliament for the administration of the Act in Defence.

AUTHORISED AND ACCREDITED DECISION MAKERS

4.4 Under section 23 of the Act, officers making decisions on requests directed to agencies must be authorised by the 'principal officer' of the agency.

4.5 In accordance with the Instrument of Authorisation signed by the Secretary, authorised officers (which includes 'Accredited Freedom of Information Decision Makers') are able to make decisions relating to refusal or the granting of access to documents under section 15 of the Act, and decisions relating to applications for amendment or annotation of personal records under section 48 of the Act. An Accredited Decision Maker is a person who ASER has certified as having successfully completed the Program.

DECISIONS ABOUT ACCESS TO DOCUMENTS

4.6 Primary decisions determining rights of access to documents will be made only by authorised officers.

4.7 The Secretary and each minister have standing authority to make a decision on any Freedom of Information request.

4.8 The decision-making power under this system will grant authorised persons the power, and the responsibility, to make decisions:

- granting access to documents sought, including in circumstances where a third party has objected to disclosure;
- refusing access to documents based on the application of the exemption provisions;
- refusing the request on the grounds that, despite an exhaustive search, documents matching the description cannot be found or are believed not to exist (section 24A); and

- refusing the request on the grounds that its fulfilment would require a substantial and unreasonable diversion of resources (section 24). This is not an easy standard for Defence to meet in relation to the requests it routinely processes, but if you think it may be relevant to a Freedom of Information request you are working on you should raise the topic for discussion with the FOI Directorate.

INTERNAL REVIEW

4.9 *Internal review* of FOI decisions will usually be undertaken by ASER, assisted by the Review and Guidance team. The Secretary, FASGR may also make such decisions.

DECISIONS ABOUT FREEDOM OF INFORMATION CHARGES

4.10 Authority to make decisions in relation to Freedom of Information charges is held by FASGR, ASER, DFOI and all Executive Level 1 (EL1) officers in the FOI Directorate.

ACTION AREAS

4.11 'Action area' refers to the office or offices in Defence with jurisdiction over the documents to which access is requested. The action area has specific responsibilities for processing Freedom of Information requests, discussed in paragraph 6.1 of this guidance material.

ROLE OF ASER

4.12 ASER is responsible for:

- developing Freedom of Information policy for Defence; and
- determining which FOI decisions will be published and coordinating Defence's compliance with the requirements of the Information Publication Scheme.

ROLE OF REVIEW AND GUIDANCE TEAM

4.13 Review and Guidance team is responsible for:

- monitoring Defence's compliance with extant Freedom of Information policy, procedures and statutory requirements;
- assist ASER in conducting internal review applications made under the FOI Act;
- managing responses to applications to the Information Commissioner and/or the AAT for review of FOI decisions and complaints to the Information Commissioner or Commonwealth Ombudsman relating to Freedom of Information matters; and
- developing and delivering training and education in relation to Freedom of Information.

ROLE OF DFOI

4.14 The Director of Freedom of Information is responsible for the day-to-day management of the Freedom of Information Directorate, which is the point of contact between Freedom of Information applicants and Defence. The FOI Directorate is also the internal source of advice, guidance and support on Freedom of Information matters within Defence. The responsibilities of the FOI Directorate are:

- providing advice about Freedom of Information to applicants and potential applicants;
- determining whether each request for access to a document is a valid Freedom of Information request under section 15 of the Act and whether each request for amendment or annotation of a record of personal information is a valid request under section 48 of the Act;
- assessing and collecting Freedom of Information charges, and determining applications for re-assessment (if the applicant claims a charge was wrongly assessed), reduction or non-imposition of charges;
- maintaining registers and other records concerning requests made under the Act;
- referring Freedom of Information requests to accredited decision makers for attention and acting as decision maker in certain matters;
- monitoring the progress of Freedom of Information requests and, as required, assisting accredited decision makers and support staff in the decision-making process;
- examining Freedom of Information decisions for conformity with statutory requirements, as well as government and Defence policy, and advising the decision maker if the decision does not conform with statutory requirements;
- notifying applicants in writing of the outcome of their requests; and
- preparing and submitting periodic statistical returns to the Australian Information Commissioner, as required by the Act, and drafting annual and other reports on the operation of the Act within Defence.

IMPORTANT TIP

The FOI Directorate is authorised as the only point of contact between Defence, the Freedom of Information applicant and external entities.

CONTACTS WITHIN THE FREEDOM OF INFORMATION DIRECTORATE

4.15 Accredited decision makers and support staff are encouraged to contact a member of the FOI Directorate if they require any assistance in, or advice about, processing a Freedom of Information request.

4.16 A Case Manager is assigned to each Freedom of Information request and will be identified by the FOI Directorate in the materials that accompany the request.

4.17 The FOI Directorate is located in Building 1, Level 6, Campbell Park Offices, Campbell, ACT. The mailing address is:

The FOI Directorate
Department of Defence
CP1-6-001
PO Box 7910
CANBERRA BC ACT 2610
Phone: (02) 6266 2200
Fax: (02) 6266 2112

Email contact with the FOI Directorate should be addressed to: FOI@defence.gov.au

The FOI Directorate's site on the Defence Restricted intranet is available from the [FOI Webpage](http://intranet.defence.gov.au/oscdfweb/sites/FOI) (<http://intranet.defence.gov.au/oscdfweb/sites/FOI>). The FOI Directorate's contact details are also available externally from the FOI contacts page (<http://www.defence.gov.au/foi/contacts.asp#Contacts>)

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CHAPTER 5

RECEIVING AND ACKNOWLEDGING FREEDOM OF INFORMATION REQUESTS

IMPORTANT TIP

The FOI Directorate is responsible for determining if a request is a valid request under the Act.

WHO MAY MAKE A FREEDOM OF INFORMATION REQUEST?

5.1 Under section 11 of the *Freedom of Information Act 1982* (the Act) 'every person', including non-Australian residents, has a legally enforceable right to obtain access to a document of an agency or an official document of a minister, other than an exempt document (see further chapter 6 of this Guidance Material).

APPLICANT'S MOTIVES OR REASONS

5.2 An applicant is not required to demonstrate a need to know in order to exercise the right of access contained in subsection 11(1) of the Act. Subsection 11(2) states that a person's right of access is not affected by the applicant's motives or the reasons the applicant gives for seeking access or the agency's or minister's belief as to what those reasons are.

REQUIREMENTS OF A REQUEST

5.3 The requirements for requesting access to documents include:

- a request for access to a document must be made in writing and state that the request is an application for the purposes of the Act;
- the applicant must give details of how notices under the Act may be sent to the applicant (for example, by providing an electronic address to which notices may be sent by electronic communication);
- the request may be sent by email to an address specified by the agency, by post or by delivery to the agency or minister at the address in the current telephone directory; and
- the request must contain sufficient information to enable the agency to identify the relevant documents.

5.4 The purpose of these formal requirements is to enable agencies to identify specific Freedom of Information requests and to handle them accordingly. If an email or letter seeking access to documents lacks one of the elements above, it will not be a valid request in accordance with the Act. The FOI Directorate is responsible for determining if a request complies with the relevant provisions of the Act and whether it is a valid request.

5.5 An agency is obliged to give an applicant who makes a defective request for access to a document under the Act an opportunity to correct the defect (see section 15(3)). Similarly, where a decision maker proposes to refuse a request under section 24 because the work involved would unreasonably divert the agency's resources from its other operations, a request consultation process must be undertaken (see further paragraph 6.16).

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5.6 Although applicants are required by the Act to provide sufficient information about the documents to which they seek access, to enable the documents to be identified and located, the scope of requests should be construed in a common sense way and not in a narrow or overly legalistic way.

RECEIPT AND REFERRAL OF REQUESTS TO THE FOI DIRECTORATE

5.7 Most requests made to Defence under the Act are lodged with the FOI Directorate. However, requests are sometimes sent elsewhere in Defence. It is imperative that all Freedom of Information requests and intended Freedom of Information requests are referred to the FOI Directorate in the first instance. The exception to this relates to requests for personal information or personnel records (see paragraph 5.8 below). In some cases, the applicant may not state explicitly that the request is made under the Act but, if it is apparent from the circumstances that the request was for the purposes of the Act, the request should be referred to the FOI Directorate.

IMPORTANT TIP

All new Freedom of Information applications must be referred to the FOI Directorate immediately upon receipt.

5.8 The only exceptions to the rule set out in the preceding paragraph are requests made by, or on behalf of, members or former members of the ADF or current or former civilian employees of Defence seeking access to their personnel records. 'Personnel records' are documents containing personal information about an employee or former employee that are, or have been, kept by Defence for personnel management purposes. These requests are administered outside the FOI Act, in accordance with section 15A of the Act.

5.9 Section 15A provides that a person who was or is an employee must not apply under section 15 for access, unless they have made a request outside of Freedom of Information and access was refused or they have not received a response within 30 days of making the request. For the purposes of section 15A, ADF members and former members are regarded as employees and former employees of Defence.

5.10 Defence has established procedures in place to deal with requests for access to personnel records.

REGISTRATION OF FREEDOM OF INFORMATION REQUESTS

5.11 The FOI Directorate registers each new Freedom of Information request and allocates it an identifying number in the following format: FOI (sequential number)/financial year, for example FOI 053/17/18.

ACKNOWLEDGING REQUESTS

5.12 Requests by email or fax must be sent to the Freedom of Information address specified at 4.17. A request will not meet the requirements of the Act if it is sent to another address or number (for example, the email address of an agency staff member).

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5.13 The Act requires agencies to notify the applicant within 14 days of receipt of the request being received by the agency (section 15(5)).

IMPORTANT TIP

All new Freedom of Information applications are acknowledged by the FOI Directorate.

5.14 Acknowledgement of receipt of requests is the responsibility of the FOI Directorate.

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CHAPTER 6

PROCESSING FREEDOM OF INFORMATION REQUESTS

INTRODUCTION

6.1 In processing a Freedom of Information request for access to a document (or documents) received by Defence, the decision support staff and the accredited decision maker are responsible for:

- establishing that the terms of the request are clear (see paragraph 6.3);
- considering whether processing the request would amount to a substantial and unreasonable diversion of Defence's resources (see paragraph 6.5);
- informing the FOI Directorate that a request may need to be transferred, where the subject matter of the request is more closely connected to the function of another agency or relates to an exempt agency (see paragraph 6.18);
- providing the FOI Directorate with information associated with the assessment of charges payable by the applicant (see paragraph 6.21);
- identifying, locating and retrieving the document/s to which the applicant seeks access (see paragraph 6.29);
- complying with time limits, or consulting with the FOI Directorate if an extension of time is required (see paragraph 6.43-6.44);
- liaising with the FOI Directorate about the need for consultation, including the need for any consultation with ministers, former ministers or the parliamentary secretaries (see paragraph 6.45);
- writing the decision on release; and
- writing the statement of reasons, where their decision is to refuse or defer access to documents or parts of documents.

6.2 Upon receipt of a valid Freedom of Information request, the FOI Directorate will refer the request to the relevant Group Coordinator for either tasking or a preliminary assessment of charges. If the request involves more than one Group, a copy of the request will be sent to each relevant Group Coordinator for consideration. Once the tasking document has been sent to the relevant area, ASER will select the accredited decision maker to action the request in accordance with the Freedom of Information Standard 30-day Timeline. The Freedom of Information 30 day timeline Roles and Responsibilities chart is available from the [FOI intranet page \(http://drnet/AssociateSecretary/HRCs/MIM/FOI/Pages/Guidance%20for%20Decision%20Makers.aspx\)](http://drnet/AssociateSecretary/HRCs/MIM/FOI/Pages/Guidance%20for%20Decision%20Makers.aspx)

IMPORTANT TIP

The FOI Directorate will forward Freedom of Information requests to Group Coordinators by email. Roles and responsibilities for processing Freedom of Information requests are set out in the Freedom of Information Standard 30-day Timeline chart.

INTERPRETATION OF REQUESTS

6.3 The AAT has said that a request for access should be construed in a broad common sense way and not by rules of construction developed for the interpretation of legal documents (*Russell Island Development Association Inc and Department Of Primary Industries (1994) 33 ALD 683*). An applicant does not know the content of documents and it may be that the best the applicant can do is to identify a document that may be described only by a genus or class.

IMPORTANT TIP

Freedom of Information requests are to be construed fairly and in a common sense manner. If the scope of the request is unclear, contact the FOI Directorate, who will in turn contact the applicant to clarify their request.

6.4 A request must be read fairly and extend to any documents which might reasonably take to be comprised within the description used by the applicant. If the request is very broad or you are having difficulty determining what the applicant requires access to, you should contact the FOI Directorate. The FOI Directorate will contact the applicant to discuss and clarify the terms of their request.

CONSIDERING RESOURCE BURDENS

6.5 Under section 24(1) and 24AA(1)(a) of the *Freedom of Information Act 1982* (the Act), a request may be refused on the ground that compliance 'would substantially and unreasonably divert the resources of the agency from its other operations'. Under section 17(2), the same test can apply to a request usually met by producing a print-out from a computer or word processor, or by transcribing a sound recording. Such a decision is known as a 'practical refusal reason'.

MEANING OF 'SUBSTANTIAL AND UNREASONABLE DIVERSION OF RESOURCES'

6.6 Parliament intended that this test provide a balance between the public interest in access to information and the level of resources required to provide that access. Only where the diversion of resources is both substantial and unreasonable does section 24(1) apply. Freedom of Information processing is an inevitable part of Defence's functions, and may require reallocation of resources within Defence.

6.7 'Resources' include the resources available to an agency at any particular time for dealing with Freedom of Information requests. This may sometimes require the redeployment of staff from other areas. An agency's 'resources' extend beyond those staff who have designated Freedom of Information duties. Freedom of Information requests are usually dealt with by line areas of an agency. 'Resources' can therefore include staff in line areas who are available for dealing with requests in

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those areas. ‘Resources’ include not only staff resources, but also finance and equipment.

6.8 Section 24AA(2) provides that, in applying section 24(1), an agency is to have regard to the resources necessary for processing a request, including:

- identifying, locating or collating the documents within the filing system of the agency or email account of an individual;
- deciding whether to grant, refuse or defer access to documents;
- examining the documents;
- liaising with the FOI Directorate when required to consult with any person or body;
- making a copy or an edited copy; and
- notifying of any interim or final decision.

WHEN SHOULD SECTION 24 BE USED?

6.9 Section 24(1) should be used only where there is a genuine case that there would be such a diversion of resources. Section 24(1) refusals are subject to external review by the Information Commissioner.

6.10 An applicant’s reasons for seeking access cannot be taken into account in decisions under section 24(1). In addition, section 24AA(3) provides that any maximum amount of charges payable under the regulations (when compared to the cost to the agency of processing the request) is not to be taken into account in determining whether section 24AA(1) applies.

DOCUMENTS FROM ELECTRONIC SOURCES – INTERACTION BETWEEN SECTION 17 AND 24(1)

6.11 An applicant may request access directly to information on a computer database including the information on a computer disk or tape. The information sought may be the whole of the information stored on the database, disk or tape, or it may be only part or parts of the stored information.

6.12 The result is that a request for information held in electronically–stored form would apply to bits of information scattered over a particular database, computer disk or tape, so long as it is possible to copy or view that information, or produce a hard copy of it under section 17(1), without substantially and unreasonably diverting the resources of the agency (section 17(2) and 24AA(1)).

6.13 Whether compliance with a request that comes within section 17 would constitute a substantial and unreasonable diversion of an agency’s resources from its other operations, is an issue to be decided having regard to all the circumstances of a particular request, including:

- the amount of machine time and personnel hours required to produce the document containing the information requested;
- the availability of machine time and personnel;
- the amount of other work required to be processed on the machine for the purposes of the agency’s other operations; and
- any modification of programs required to enable access to the information in the form requested.

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6.14 Subsection 17(2) only relates to substantial and unreasonable diversion of resources in producing a written document under section 17(1). It does not apply to the process of decision-making in relation to such a document, this being a matter for consideration under section 24(1).

6.15 The obligations under section 17 to produce a computer print-out containing the desired information may not apply where this would require extensive modification of an existing program (see paragraph 8.33 of the 1979 Senate Committee Report). Writing a new program may be so resource intensive that it could meet the test of a substantial and unreasonable diversion of resources. Whether it does or not will depend on the circumstances of each case. If in doubt, contact the FOI Directorate to discuss.

NOTIFICATION PROCESS

6.16 Section 24AB describes the 'request consultation process' which must be followed before refusing a request under section 24. Section 24(9) specifies that Defence is only required to undertake this consultation period once for any particular request (although there is discretion to undertake multiple consultations where this is appropriate). Key elements of the process are:

- the FOI Directorate writes to the applicant notifying of the intention to refuse the request on resource grounds;
- the applicant has 14 days, or longer if agreed, to respond;
- the FOI Directorate, in consultation with the action area, must take reasonable steps to assist the applicant to revise the request;
- the applicant must, within the consultation period, either withdraw the request, make a revised request or indicate that they will not revise it, and default by the applicant means the request is taken to have been withdrawn; and
- where the applicant responds to the FOI Directorate, but an action area is satisfied that the practical refusal reason exists, then a decision maker may make a decision refusing to process the request.

6.17 As outlined above, the FOI Directorate undertakes consultation under section 24AB on behalf of action areas. Importantly, the processing clock pauses during the consultation period. Therefore, if you are concerned that processing a Freedom of Information request may substantially and unreasonably divert the resources of Defence or your action area, you should contact the FOI Directorate immediately.

TRANSFERRING REQUESTS

6.18 The Act provides that an agency (including in this context a minister) may transfer a request where the document requested is held by another agency or the subject matter of the request is more closely connected to the functions of another agency, subject to the agreement of the other agency (sections 16(1)(a) and 16(1)(b)). A request received by a minister may be transferred to their agency, and vice versa.

6.19 Should you receive a request for access to documents and you are of a view that the documents are more closely connected with the functions of another agency or minister, please contact the FOI Directorate immediately.

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6.20 It is important that all transfers be undertaken by the FOI Directorate as soon as possible, as the request is deemed to have been made to the agency accepting the transfer. The 30-day time limit starts from the date the initial agency received the request. When transferring requests it is a good idea to consider sending an advance copy of the request to the other agency if there is likely to be any delay in preparing the formal transfer documentation.

IMPORTANT TIP

You must contact the FOI Directorate as soon as possible if:

the subject matter of a Freedom of Information request is more closely connected to the functions of another agency; or the documents originate from an exempt agency such as DIGO, DIO or DSD.

CHARGES

6.21 An authorised officer within the FOI Directorate will determine whether or not the applicant is liable to pay charges in respect of each request.

6.22 If the applicant is liable to pay charges, the FOI Directorate will send an email to the action area(s). The purpose of the email is to seek a preliminary assessment of the charges. The FOI Directorate will attach Web [Form: AD 850](#)—*Request for Access to Documents Statistical and Charges Collection*, as required by section 29 of the Act.

6.23 Once compiled, the applicant is notified of the preliminary assessment of charges. The applicant then has 30 days to agree to pay the charges or seek their reduction or waiver. If the applicant does not respond before the 30-day period expires, the request is taken to have been withdrawn.

IMPORTANT TIP

Any information requested by the FOI Directorate to enable the preparation of the preliminary assessment of charges must be provided as soon as possible as the Freedom of Information ‘clock’ is ‘ticking’.

6.24 The time taken to prepare and send the applicant notice of the preliminary assessment of charges is counted as part of the time allowed to process the Freedom of Information request (30 days in most cases – see paragraph 6.37). It is essential, therefore, that information sought by the FOI Directorate to enable it to make its preliminary assessment is provided promptly; certainly within 48 hours.

6.25 Search and retrieval time is to be calculated on the basis that a document will be found in the place indicated in the agency or minister’s filing or system or, if no such indication is given, in the place that reasonably should have been indicated in the filing system. Applicants cannot be disadvantaged by poor or inefficient record keeping. Time wasted by officers in searching for a document that is not where it ought to be, or that is not listed in the official filing system, cannot be charged to an applicant.

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FREEDOM OF INFORMATION STATISTICS

6.26 When decision support staff (action area and subject matter expert) have completed their tasks in relation to a request for which charges are payable by the applicant, the officer who has dealt with the matter is to complete the 'Actual Time' column of the accompanying Web [Form: AD 850—Request for Access to Documents Statistical and Charges Collection](#), adjacent to Items A to C and return it to the FOI Directorate along with the notification of the decision and a copy of any disclosed matter, etc.

6.27 This data is required for the preparation of statistical returns and reports which must be submitted periodically, in accordance with section 30 of the *Australian Information Commissioner Act 2010 (Cth)*.

SEARCHING FOR DOCUMENTS

6.28 A person requesting access to a document is entitled to expect that Defence will undertake proper searches to identify all relevant documents. In many cases the action area will be able to readily locate all documents to which access is sought. However, sometimes it may be necessary for a range of searches to be undertaken, including not only checking physical files but also electronic databases and emails. Some practical tips for searching for documents can be found in Chapter 8 of the FOI Better Practice Guide.

See <http://www.ag.gov.au/consultations/pages/reviewoffoilaws.aspx>

6.29 The action area must arrange for the identification, location and retrieval of all the relevant documents which have been requested, wherever held. The search should not be confined only to documents within the immediate reach of the action area but must extend to all documents which fall within the terms of the request, and include documents held in electronic form. In some cases, it may be necessary for the request to be referred to more than one action area. Such referral is to occur through the FOI Directorate so that accurate processing records can be maintained.

DOCUMENTS THAT DO NOT EXIST AT THE TIME THE REQUEST IS RECEIVED

6.30 The Act gives an applicant a right of access only to documents in existence at the time a request is lodged with an agency. An applicant cannot insist that the request covers documents created after the request is received. On *internal review* under section 54C, the date of receipt of the original request is still considered the cut-off date, for determining which documents are the subject of the request.

DOCUMENTS THAT CANNOT BE FOUND OR THAT DO NOT EXIST

6.31 Where a document sought under Freedom of Information is known or believed to exist as a document in the possession of Defence but cannot be found, or where the document is known not to be in the possession of Defence (for example, where the document is known to have been destroyed), the request may be refused in accordance with section 24A of the Act.

6.32 Section 24A could be applied in the following scenarios:

- where a document or documents have been requested but cannot be found in Defence's records;

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- where a request seeks several documents, some of which are located and some of which are believed to be held by Defence but cannot be found (for example, because they have been archived but no record of their location within the archives was retained); and
- where a decision maker is satisfied they have found all documents in Defence's possession which satisfy the applicant's request, but the applicant is not satisfied that Defence has located all relevant documents.

6.33 Under section 24A a decision maker may only refuse a request on the basis that a document exists but cannot be found or does not exist once 'all reasonable steps' have been taken to find the document. This issue arose in *'F' and Department of Defence [2013]* AICmr 15 (28 February 2013). In this case, the applicant sought access to 'all *Defence Force Discipline Act 1982* Disciplinary KPI Reports' for a former serving member of the ADF.

6.34 The Acting Freedom of Information Commissioner found that Defence had taken all reasonable steps to find and locate the requested documents by conducting a search of Defence's Personnel Management Keying system (PMKeyS). The Acting Freedom of Information Commissioner accepted Defence's submissions that all ADF and civilian personnel management details would be recorded on PMKeyS and either no documents were found or the documents did not exist.

6.35 A copy of *'F' and the Department of Defence [2013]* AICmr 15 (28 Feb 13) is available from Austlii (<http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/AICmr/2013/15.html?stem=0&synonyms=0&query=F%20and%20the%20Department%20of%20Defence>)

6.36 Sections 55V and 58A give the Information Commissioner and the AAT respectively the power to require an agency or minister to conduct further searches for a document if it is not satisfied with the agency's efforts. Separately, the Information Commissioner and Ombudsman may use their powers to investigate and examine an agency's records and record system, and may make related recommendations.

6.37 Therefore, if a document cannot be found, a decision maker must provide a complete explanation to the FOI Directorate, including:

- the full details of searches carried out, including where and by whom, in an attempt to locate the missing document;
- whether the document ever did exist;
- whether it still exists;
- why the document is not available; and
- if the document was destroyed, the authority under which such destruction took place. If the document was destroyed in accordance with a Records Disposal Authority or Schedule approved by the National Archives of Australia, the authority should be cited and a copy of the 'Control Record for Disposal' form should be provided (contact DRMP.policy@defence.gov.au for further information regarding control records).

6.38 The FOI Directorate will provide a decision maker with advice on drafting a 'technical refusal' to grant access to documents under the Act. Under the Act, the applicant has a right of appeal, on the grounds that Defence has not been sufficiently thorough in its efforts to locate the document or documents.

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IMPORTANT TIP

Accredited decision makers are responsible for ensuring that all reasonable steps have been taken by the action area to identify relevant documents.

TIME LIMITS

6.39 The Act imposes certain time limits in respect of requests. Requests must be acknowledged within 14 days of receipt, and a decision on access notified within 30 days. All time limits are calendar days, not working days. As discussed above, the FOI Directorate is responsible for acknowledging receipt of requests. The FOI Directorate is also responsible for providing an accredited decision maker's decision on access to an applicant.

6.40 The time limit for responding to a request can be extended by 30 days where consultations with state or territory governments, commercial organisations or an individual, other than the applicant, under section 26A, 27 and 27A respectively are undertaken (section 15(6)). The initial statutory decision-making period can also be extended by 30 days where the agency undertakes consultation with a foreign government, an authority of a foreign government or an international organisation (see section 15(7) and (8)). In all cases of extension, the FOI Directorate must advise the applicant of the extension in writing during the first 30 days.

6.41 Where the FOI Directorate decides that an applicant is liable to pay a charge in accordance with section 29, the clock stops on the day the applicant receives a written notice of the preliminary estimate of the charges from the agency (see section 31(2)). The time will be suspended only if the assessment of charges is notified within the time limit for decision-making (section 31(1)(b)).

6.42 While the 30-day limit applies only to the notification of the decision on the request, and not to the actual provision of access to the documents sought, access should be provided as soon as practicable after the decision to grant access has been made and any charge has been paid.

IMPORTANT TIP

Failure to comply with time limits can result in unnecessary complaints and applications for review, and any charges payable by the applicant are waived.

6.43 A failure by Defence to comply with specified time periods is likely to result in the following actions by the applicant:

- an application to the Information Commissioner for a review on the basis of a deemed refusal; and
- a complaint being made to the Information Commissioner concerning the delay.

6.44 A failure by Defence to comply with time periods will also result in a waiver of any charges payable by the applicant.

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REQUESTS FOR EXTENSION OF TIME

6.45 The FOI Directorate is able to negotiate extensions of up to 30 days with the applicant (section 15AA). The FOI Directorate must give the Information Commissioner written notice of the extension.

IMPORTANT TIP

If a request is complex or voluminous, contact the FOI Directorate immediately. They can negotiate an extension of time with the Information Commissioner.

6.46 Where a request is complex or voluminous and 30 (or, where relevant, 60) days is insufficient time to process and make a decision in response to the request, the FOI Directorate may ask the Information Commissioner to grant an extension of time (section 15AB).

CONSULTATION

6.47 The FOI Directorate will undertake all consultation with the Information Commissioner, Freedom of Information applicants, third parties and external entities, on behalf of action areas. The FOI Directorate can provide advice and guidance on the consultation process to decision makers, subject matter experts and action areas.

IMPORTANT TIP

All external consultation must be undertaken by the FOI Directorate.

WITH THE APPLICANT

6.48 Where a request is broad or vague, the FOI Directorate will make contact with the applicant to discuss the request and clarify the terms of the request.

6.49 Freedom of Information applicants should be notified in advance if Defence will not meet a statutory deadline in relation to their request. They should receive written notification of the decision on their request as and when required by the Act or, failing that, should receive written advice that notification cannot be provided within the statutory time limit, advised why, and, if possible, be given an estimate of when it will be provided.

6.50 Accordingly, in the interests of sound administration, to maximise compliance with statutory obligations under the Act and to minimise the risk of unnecessary complaints and disputation, all persons involved in the administration of Freedom of Information requests are to monitor the progress of the requests for which they are responsible and inform the FOI Directorate if the decision on the request is not able to be notified within the applicable deadlines, as per the tasking documents from the FOI Directorate.

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IMPORTANT TIP

An applicant must be kept informed about the progress of their request.

All contact with an applicant must be through the FOI Directorate. Action areas must not contact an applicant directly to discuss their request unless approved by the FOI Directorate.

6.51 In the event that the deadline for notifying the decision on a request has passed, and the decision has not been notified, it is important to inform the applicant about their rights to seek a review by the Information Commissioner, and periodically about the progress of their request. The frequency of contact with the applicant will depend on the circumstances of the case and will require careful judgment. Defence may be called upon to explain and justify to the Information Commissioner the reasons for delay in making and notifying the decision on the request and any failure to keep the applicant informed in an appropriate manner.

WITHIN DEFENCE

6.52 A Freedom of Information decision maker must ensure appropriate consultation within Defence in relation to the request. It may be, for instance, that other areas within the agency should be consulted to determine whether they hold documents relevant to a request, or as to whether they may have concerns about release of a particular document.

IMPORTANT TIP

It is the responsibility of the decision maker to ensure all appropriate consultation has been undertaken with other areas of Defence.

WITH THE MINISTER

6.53 Consultation about documents may be required as a matter of courtesy or to accord with sound administrative practice where the documents are related to:

- a serving or former Defence portfolio minister or parliamentary secretary;
or
- other Australian government ministers (or former ministers) or agencies.

6.54 Responsibility for deciding whether or not to consult, rests with an accredited decision maker in consultation with the FOI Directorate.

6.55 Responsibility for making a Freedom of Information decision rests with the accredited decision maker, even though a minister may be consulted. A decision maker cannot be directed to make a particular decision.

WITH OTHER COMMONWEALTH GOVERNMENT AGENCIES

6.56 Consultation with other agencies may be necessary in the following circumstances:

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- to determine whether they object to the release of copies of their documents held by Defence;
- to obtain their assistance in forming a view as to whether the documents in issue ought to be released;
- to determine whether they hold any relevant documents;
- to transfer a Freedom of Information request; or
- to establish whether they hold a similar request.

6.57 Where a request relates to a Cabinet document, consultation with the Department of the Prime Minister and Cabinet (PM&C) is required. For more information regarding consultation in relation to Cabinet documents, see PM&C FOI Guidance Notes (July 2011) <https://www.pmc.gov.au/resource-centre/regulation/best-practice-consultation-guidance-note>

6.58 Any consultation with other Commonwealth government agencies is to be undertaken by the FOI Directorate. This is known as a ‘courtesy’ consultation and note that no extra time is available under the Act for consultation within the Commonwealth Government. The FOI Better Practice Guide contains some practical guidance in circumstances where agencies do not agree on an approach to an FOI request, but ultimately the obligation to make a decision rests with the agency to which the request has been made, unless the request is formally transferred. A copy of the FOI Better Practice Guide can be found at: <https://www.ag.gov.au/Consultations/Pages/ReviewofFOIlaws.aspx>

WITH FOREIGN ENTITIES

6.59 Because of the nature of its operations, Defence has possession of a range of documents that relate to, or are sourced from, foreign governments or international organisations (such as the United Nations or the International Red Cross). Sections 15(7) and (8) of the Act allow agencies to extend by 30 days the time for processing a request where consultation with one of these entities would be appropriate.

6.60 The consultation needs to be directed at determining whether the document would be exempt under sections 33(a)(iii) (damage to international relations) or 33(b) (material obtained in confidence from foreign entity). Consideration of other exemptions in section 33 (defence and security) do not trigger the extension of time provision but, if a decision maker were considering these in conjunction with international relations or confidences, it would be triggered.

6.61 In practice, decision makers will usually be considering all elements of section 33. For example, if the documents relate to the conduct of coalition military operations, then any element of section 33 is potentially available, and consultation would be appropriate.

STATUTORY CONSULTATION WITH STATE AND TERRITORY GOVERNMENTS, BUSINESSES AND INDIVIDUALS

6.62 The Act provides for consultation with state and territory governments, businesses and individuals (‘third parties’) where a request is made for access to a document containing information, as to the disclosure of which:

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- a state or territory government may reasonably wish to contend is exempt (section 26A, re 'State-originated information' and the section 47B exemption), including Norfolk Island (section 26AA); or
- 'the person or organisation concerned' might reasonably wish to contend is exempt (section 27, re 'business information' and sections 47 and 47G exemptions); or
- 'the person concerned' might reasonably wish to contend is exempt (section 27A, re 'personal information' and the section 47F exemption)

6.63 It is the role of the decision maker when considering the request to decide whether consultation with third parties under sections 26A, 27 or 27A is required. The FOI Better Practice Guide suggests that one way of approaching this kind of consultation is to ask 'would the third party have any proper basis for objecting to disclosure? Section 15(6) of the Act also allows accredited decision makers to extend, by 30 days, the initial 30-day period the Act allows for notification of the decision on a request, when consultation occurs under sections 26A, 27 or 27A.

6.64 The FOI Directorate is responsible for coordinating any consultation and communication with third parties. Therefore, if an accredited decision maker is of the view that consultation is required under sections 26A, 27 or 27A, the decision maker must contact the FOI Directorate and:

- advise the FOI Directorate in writing that they have decided to consult with a third party;
- specify who is to be consulted by the FOI Directorate, with contact details; and
- provide immediately, copies of documents (or parts of documents) in the form proposed for consultation.

IMPORTANT TIP

When consulting, a third party should only be provided with the documents, or parts of documents, that relate to them. It is unnecessary and potentially inappropriate to provide anything further.

6.65 The overall purpose of these third-party provisions is to provide a process for balancing applicant and third-party interests regarding access, to allow the third-party to provide relevant evidence and submissions to the decision maker, and to permit a third party to appeal the access decision. That appeal may be by means of an *internal review*, or an external review to the Information Commissioner.

PERSONAL INFORMATION

6.66 Where a document contains personal information about a person (including a deceased person), the accredited decision maker must consult the person (or, if the person is deceased, the legal representative of that person) if:

- it is reasonably practicable to do so;
- it appears that the person (or the representative) might reasonably wish to contend that the document is conditionally exempt from disclosure under section 47F (personal privacy); and
- it appears that the person (or the representative) might reasonably wish to contend that access to the document would, on balance, be contrary to the public interest for the purpose of section 11A(5).

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6.67 Although section 27A enables decision makers to exercise some discretion as to whether they consult the person or their representative, it is strongly preferable that this be done, except in the clearest of cases (where it is not possible to consult).

IMPORTANT TIP

In the event that a document contains personal information about a former employee who has died in a work-related incident, you must contact the FOI Directorate immediately.

There are specific procedures in place relating to the release of this information.

BUSINESS, COMMERCIAL AND FINANCIAL INFORMATION

6.68 Where a document contains information concerning the business or professional affairs of a person, or the business, commercial or financial affairs of an organisation or undertaking, the accredited decision maker must consult the person, organisation or undertaking if:

- it is reasonably practicable to do so;
- it appears that the person, organisation or proprietor of the undertaking might reasonably wish to contend that the document is exempt under section 47 (trade secrets); and
- it appears that the person, organisation or proprietor of the undertaking might reasonably wish to contend that:
 - i the document is conditionally exempt under section 47G (business information); and
 - ii access to the document would, on balance, be contrary to the public interest for the purpose of section 11A(5).

6.69 Although section 27 enables decision makers to exercise some discretion as to whether they consult the person or their representative, it is strongly preferable that this be done, except in the clearest of cases where it is not possible to consult.

OUTCOME OF CONSULTATION

6.70 Where the third party submits in writing to the FOI Directorate that the document which was the subject of consultation under section 26A, 27 or 27A is exempt and should not be disclosed, the FOI Directorate will refer the submission to the responsible accredited decision maker for consideration and decision. If the party does not contend that the document is exempt, the decision maker will be informed accordingly.

IMPORTANT TIP

The parties consulted under section 26A, 27 and 27A do not have a power of veto on the decision whether to release documents, but they do have a right to seek review of the decision. This is referred to as 'Reverse-Freedom of Information'.

6.71 The decision maker is to decide whether or not to disclose the document in light of the third party's submission and to provide the FOI Directorate with a written

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notice of their findings, decision and reasons for the decision. Where the decision maker does not accept a third party's submission contending that a document is exempt and decides to disclose the document, the FOI Directorate will notify that party and the applicant of the decision, in writing, and inform them about their review rights. Access to the document will not be effected pending application by the party consulted for review of the decision and resolution of any such application.

6.72 The Office of the Australian Information Commissioner has informally expressed the view on a number of occasions that only those parties who have been formally consulted under subsections 26A, 26AA, 27 or 27A of the Act are required to be notified of an application for Information Commissioner review under section 54P of the Act (and therefore automatically a party to the review). For this reason, where a Freedom of Information request captures documents containing material for which it would be open to Defence to consult under subsections 26A, 26AA, 27 or 27A, decision makers should consider consulting the relevant third party even if they are considering exempting the relevant material. Consultation at the original decision stage will ensure that the third party is notified in the event of an application to the Information Commissioner, and has the opportunity to be heard in respect of the review. For example, see *Diamond and Australian Curriculum, Assessment and Reporting Authority* [2013] AICmr 57 (22 May 2013)."

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CHAPTER 7

UNDERSTANDING EXEMPTIONS

7.1 The general right of access provided under the *Freedom of Information Act 1982* (the Act) does not extend to documents which are considered to be subject to an exemption in the Act.

TWO KINDS OF EXEMPTIONS

7.2 Broadly speaking, exemptions in the Act are of two basic kinds:

- those which stand-alone (see chapter 8); and
- those which are subject to a public interest test. These are referred to as 'public interest conditional exemptions' (see chapter 9).

INTERPRETATION OF EXEMPTIONS

General presumptions

7.3 The exemptions are designed to provide a balance between the rights of applicants to disclosure of government-held documents and the need to protect the legitimate interests of government and third parties who deal with government.

7.4 The Act is a mechanism of last resort and all areas in Defence are encouraged to develop procedures that enable the release of information as a matter of course whilst ensuring that appropriate safeguards are in place to protect information that contains personal information.

7.5 Section 11A(3) requires agencies and ministers to provide access to documents where a request is made in accordance with section 15(2) of the Act, subject to the operation of section 11A. Exemptions are to be claimed by accredited decision makers only where the relevant information is genuinely sensitive and real harm will be caused by its disclosure. They should not be claimed simply because they are technically available.

7.6 Section 32 of the Act provides that each exemption stands alone and must not be interpreted as limited in its scope or operation by the provisions of any other exemption. Each exemption should be given its full meaning and no inferences should be drawn from the terms of the other exemptions. Section 32 also provides that more than one exemption may apply to the same document or part of a document. However, while accredited decision makers need to keep in mind the possible availability of other exemptions, only supportable claims should be made.

IMPORTANT TIP

More than one exemption can apply to a document.

7.7 The capacity to claim an exemption in relation to particular information may change over time. The passage of time and changed circumstances may result in disclosure of information which is no longer sensitive. It is always a question of fact whether or not there has been a change in the sensitivity of a document.

SECURITY CLASSIFICATION OF DOCUMENTS

7.8 A document that is properly classified 'Confidential' or higher may be exempt under section 33 of the Act (where disclosure would, or could reasonably be expected to, cause damage to the security, defence or the international relations of the Commonwealth).

7.9 However, the fact that a document is marked 'Confidential' (or higher) does not necessarily mean that it is an exempt document under section 33. That a document bears a classification marking will indicate that consideration should be given to the question whether it is exempt under section 33.

7.10 When a request is made for access under the Act to a security classified document, the critical question for the accredited decision maker is whether the classification remains current, as the sensitivity of the document may have changed over time. If it is found that the security classification is justified, then the document may be exempt under section 33 (or another exemption provision). However, it is the reason why the document is classified that provides the ground for the claiming of the exemption, not the classification itself.

7.11 In addition, sometimes only small parts of a large document contain the material that warrants the attachment of the security classification. For example, a ten-page sitrep may contain a codeword and the location of a base of an overseas area of operation. While the whole document might be classified, it is only those two words that have a national security impact if disclosed. In those circumstances it is only those small parts, rather than the whole document, which would be exempt from disclosure for that reason.

IMPORTANT TIP

A document marked with a security classification is not necessarily exempt.

7.12 A document which bears a security classification marking should, at the time of release under the Act, be managed in accordance with Defence's established procedure of declassification.

7.13 The fact that a document is not classified does not mean that the document may not be exempt under the Act. It may be that the document ought to have been classified at the time of its creation or, as a result of changing circumstances, ought to have been reclassified to a higher level but has not yet been reclassified.

Partial exemption of documents

7.14 Section 22 of the Act requires the deletion of exempt matter wherever possible so that access can be given to the remaining non-exempt portions of the document. Similarly, a document may be released with irrelevant material deleted.

IMPORTANT TIP

Irrelevant material may be deleted from a document under section 22 of the Act.

NEITHER CONFIRMING NOR DENYING THE EXISTENCE OF A DOCUMENT

7.15 Section 25 of the Act enables decision makers to neither confirm nor deny the existence of a document to which access has been requested. To apply the section, imagine there is a document (document B) which provides information about the existence or non-existence of the document the applicant is seeking (document A). You then ask whether the information about document A that is in document B would be exempt under any of the following sections of the Act:

- section 33 (national security, defence and international relations); and
- section 37 (law enforcement).

7.16 In circumstances where section 25 is available, Defence may give notice in writing to the applicant that neither confirms nor denies the existence of the document (document B), but informing the applicant that, assuming the existence of the document, it would be exempt under one of the relevant sections noted above. As use of this section has the effect of preventing the applicant from knowing that access to a document has been denied, resorting to section 25 should be strictly reserved for cases where the circumstances of the request require it.

INFORMATION COMMISSIONER'S GUIDELINES

7.17 The Guidelines provide further information about each of the exemption provisions. The Guidelines are compulsory reading as decision makers must 'have regard to' them (section 93A Act). While this does not mean accredited decision makers should follow them slavishly, the Guidelines must be given due weight in the circumstances. See: <https://www.oaic.gov.au/freedom-of-information/foi-guidelines/>

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CHAPTER 8

STAND ALONE EXEMPTIONS

INTRODUCTION

11.1 The exemptions listed below are not subject to a public interest test. Satisfying the test in the provisions described below results in an exemption.

NATIONAL SECURITY, DEFENCE OR INTERNATIONAL RELATIONS EXEMPTION - SECTION 33

11.2 Section 33 applies to documents where release would or could reasonably be expected to cause damage to security, defence or international relations of the Commonwealth; or would divulge information or matter communicated in confidence by or on behalf of a foreign government or international organisation to the Commonwealth.

11.3 Relevantly, section 4(5) of the *Freedom of Information Act 1982* (the Act) provides that:

‘Without limiting the generality of the expression security of the Commonwealth, that expression shall be taken to extend to:

11.4 matters relating to the detection, prevention or suppression of activities, whether within Australia or outside Australia, subversive of, or hostile to, the interests of the Commonwealth or of any country allied or associated with the Commonwealth; and

11.5 the security of any communications system or cryptographic system of the Commonwealth or of another country used for:

11.6 the defence of the Commonwealth or of any country allied or associated with the Commonwealth; or

11.7 the conduct of the international relations of the Commonwealth.’

11.8 Furthermore, section 4(10) of the Act states:

‘To avoid doubt, information or matter communicated in the way mentioned in paragraph 33(b) includes information or matter so communicated pursuant to any treaty or formal instrument on the reciprocal protection of classified information between the Government of the Commonwealth, or an authority of the Commonwealth, and:

- a foreign government or an authority of a foreign government; or
- an international organisation.’

11.9 More information about section 33 is available in paragraphs 5.24 – 5.54 of [the Guidelines](https://www.oaic.gov.au/freedom-of-information/foi-guidelines/) (<https://www.oaic.gov.au/freedom-of-information/foi-guidelines/>)

CABINET EXEMPTION - SECTION 34

11.10 Under section 34, a document is an exempt document if:

- it has been submitted to Cabinet for its consideration (including documents that were prepared for the dominant purpose of submission to Cabinet, and were

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approved by the sponsoring minister for submission, but which were never actually submitted);

- it is an official record of Cabinet;
- it was brought into existence for the dominant purpose of briefing a minister on a document submitted to Cabinet for its consideration (again, including documents that were prepared for the dominant purpose of submission to Cabinet, and were approved by the sponsoring minister for submission, but which were never actually submitted); or
- any drafts of those documents described above.

11.11 Other documents revealing Cabinet's deliberations or decisions (that is, what was said in Cabinet) are also protected by section 34, unless the existence of the deliberations or decision has been officially disclosed.

11.12 However, a document will not be exempt merely because it is attached to a document falling within one of the above-listed categories.

11.13 In addition, purely factual material cannot be exempted under section 34, unless:

- the disclosure of the information would reveal a Cabinet deliberation or decision; and
- the existence of the deliberation or decision has not been officially disclosed.

11.14 Of course, a document by which a decision of the Cabinet is officially published is not an exempt document.

IMPORTANT TIP

The Cabinet office must be consulted on any document containing cabinet material regardless of whether or not that material is exempted. The Cabinet office requires 10 working days to consider such material, therefore the FOI Directorate must be notified immediately such material is found.

11.15 More information about section 34 can be found in paragraphs 5.55-5.78 of the Guidelines

See [http: https://www.oaic.gov.au/freedom-of-information/foi-guidelines/](https://www.oaic.gov.au/freedom-of-information/foi-guidelines/)

LAW AND PROTECTION OF PUBLIC SAFETY EXEMPTION - SECTION 37

11.16 For further information on Cabinet documents, see PM&C FOI Guidance Notes (July 2011).

See: <https://www.pmc.gov.au/resource-centre/regulation/best-practice-consultation-guidance-note>

11.17 A document will be exempt under section 37 if disclosure would or could reasonably be expected to:

- prejudice a current investigation or proper administration of the law (s37(1)(a));
- reveal the existence or identity of a confidential informant (section 37(1)(b));p
- endanger life or physical safety (section 37(1)(c));

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- prejudice fair trial (section 37(2)(a));
- disclose methods of law enforcement (section 37(2)(b)); or
- prejudice methods of protection of the public (section 37(2)(c)).

11.18 More information about section 37 can be found in paragraphs 5.79-5.117 of the Guidelines. See: <https://www.oaic.gov.au/freedom-of-information/foi-guidelines/>

SECURITY PROVISION EXEMPTION - SECTION 38

11.19 Section 38 applies to documents where disclosure is prohibited under another enactment and that enactment is listed in Schedule 3, or the enactment expressly applies this section. This exemption does not apply to an individual's own personal information, except for some immigration information. The Defence (Inquiry) Regulations are listed in Schedule 3.

11.20 More information about section 38 can be found in paragraphs 5.118-5.125 of the Guidelines.

See: <https://www.oaic.gov.au/freedom-of-information/foi-guidelines/>

LEGAL PROFESSIONAL PRIVILEGE EXEMPTION - SECTION 42

11.21 Section 42 exempts documents 'of a kind that would be privileged from production in legal proceedings on the ground of legal professional privilege'. It picks up and incorporates into the Act the existing common law of legal professional privilege. Section 42(2) further provides that:

'A document is not an exempt document because of subsection 42(1) if the person entitled to claim legal professional privilege in relation to the production of the document in legal proceedings waives that claim.'

11.22 Waiver is generally understood to occur when the holder of the privilege (i.e. the client who received the legal advice or assistance) acts in a manner inconsistent with maintaining the privilege (usually by disclosing the advice).

11.23 Section 42(3) provides that section 42 does not apply to an agency's operational information, which is information that is to be required to be published by the agency.

11.24 More information about section 42 can be found in paragraphs 5.126-5.154 of the Guidelines.

See: <https://www.oaic.gov.au/freedom-of-information/foi-guidelines/>

11.25 In April 2013, the Head of Defence Legal (HDL) and the Director General of the Australia Defence Force Legal Service (DGADFLS) issued Joint Directive 5/2013 Legal Professional Privilege. The purpose of this Directive is to ensure that all Defence Legal Officers, when providing legal advice, follow a common procedure and advise clients about legal professional privilege.

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MATERIAL OBTAINED IN CONFIDENCE EXEMPTION - SECTION 45

11.26 Section 45 applies where disclosure would found an action (not by the Commonwealth) for breach of confidence. This provision is generally understood to pick up the pre-existing law of breach of confidence. In general terms, where Defence promises to keep certain confidential information a secret, and the discloser provides the information on the understanding that the promise of confidentiality covers the disclosure, section 45 may apply. The information itself must be confidential in nature.

11.27 More information about section 45 can be found in paragraphs 5.155-5.172 of the Guidelines.

PARLIAMENTARY BUDGET OFFICE EXEMPTION – SECTION 45A

11.28 While both the Parliamentary Budget Officer and the Parliamentary Budget Office are exempt under the FOI Act (section 7(1) and Division 1 of Part 1 of Schedule 2, and section 68A of the *Parliamentary Service Act 1999*, documents related to Parliamentary Budget Office exemption in section 45A is designed to protect the confidentiality of requests made by senators and members of the House of Representatives in relation to the budget or for policy costings outside of the caretaker period of a general election.

11.29 More information about section 45 can be found in paragraphs 5.173-5.180 of the Guidelines.

See: <https://www.oaic.gov.au/freedom-of-information/foi-guidelines/>

CONTEMPT OF PARLIAMENT OR COURT EXEMPTION - SECTION 46

11.30 A document is exempt under section 46 if its public disclosure of the document would (apart from the Act and any immunity of the Crown) result in any of the circumstances provided by section 46(a)-(c).

11.31 More information about section 46 can be found in paragraphs 5.181-5.193 of the Guidelines.

See: <https://www.oaic.gov.au/freedom-of-information/foi-guidelines/>

TRADE SECRETS OR COMMERCIALLY VALUABLE INFORMATION EXEMPTION - SECTION 47

11.32 Section 47 applies to trade secrets or information of a commercial value if its disclosure could reasonably be expected to destroy or diminish the commercial value of the information. Detailed tender information may, for example, give rise to an exemption claim under section 47, if it reveals research and development methodologies or outcomes that give a business a competitive edge in the supply of Defence materiel.

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11.33 More information about section 47 can be found in paragraphs 5.194-5.206 of the Guidelines.

See: <https://www.oaic.gov.au/freedom-of-information/foi-guidelines/>

11.34 See also the discussion at paragraph 5.206 and following of this Guidance Material, regarding consultation with relevant third parties where a decision maker is considering the application of this exemption.

ELECTORAL ROLLS EXEMPTION - SECTION 47A

11.35 A document is exempt under section 47A if it is an electoral roll or related document as provided by section 47A(2)(a)-(g).

11.36 More information about section 47A can be found in paragraph 5.207-5.209 of the Guidelines.

See: <https://www.oaic.gov.au/freedom-of-information/foi-guidelines/>

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CHAPTER 9

CONDITIONAL EXEMPTIONS

INTRODUCTION

9.1 The conditional exemptions are those which require satisfaction of the public interest test in section 11A(5) of the *Freedom of Information Act 1982* (the Act). Satisfying the exemption at, for example, section 47B only meets the threshold requirement. According to section 11A, the document must still be released unless its disclosure would also be contrary to the public interest as per the test.

THE PUBLIC INTEREST TEST

9.2 A standard public interest test applies to all public interest conditional exemption provisions. Under section 11A(5) disclosure of conditionally exempt documents is required, unless:

‘in the circumstances access to the document at that time would, on balance, be contrary to the public interest.’

9.3 While the term ‘the public interest’ is not defined in the Act, there is guidance for decision makers on what should be considered and what must not be considered in weighing ‘the public interest’. Under section 11B(4), the following factors are not able to be taken into account by an accredited decision maker in determining whether access to a document would be contrary to the public interest:

- that disclosure could result in embarrassment to or cause a loss of confidence in the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government;
- access to the document could result in embarrassment to the Government of Norfolk Island or cause a loss of confidence in the Government of Norfolk Island;
- that access to the document could result in any person misinterpreting or misunderstanding it;
- the seniority of the author of the document;
- that access to the document could result in confusion or unnecessary debate.

9.4 Section 11B(3) contains a non-exhaustive list of factors which would favour access being provided to documents. These factors focus on the consequences of giving access to a document and include whether giving access to the document would do any of the following:

- promote the objects of the Act (refer to sections 3 and 3A);
- inform debate on a matter of public importance;
- promote effective oversight of public expenditure;
- allow a person to access his or her own personal information.

9.5 While these factors are not expressed as being mandatory, their inclusion in section 11B suggests they are relevant considerations which decision makers must take into account, or at least turn their minds to, when weighing the public interest in respect of a conditional exemption provision.

9.6 The Act does not set out a list of suggested public interest factors against disclosure. However, [the Guidelines](#) provide some examples at paragraph 6.29. As a

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general rule, public interest factors that relate closely to the subject matter of the documents (e.g. the public interest in maintaining effective collaboration with military allies in combat zones) will be more persuasive than public interest factors of a generic nature (e.g. the public interest in free and frank exchanges of opinion).

DOCUMENTS AFFECTING COMMONWEALTH-STATE RELATIONS - SECTION 47B

9.7 Section 47B provides that a document is conditionally exempt if disclosure of the document would, or could reasonably be expected to, cause damage to:

- relations between the Commonwealth and a State;
- relations between the Commonwealth and Norfolk Island; or
- relations between Norfolk Island and a State.

9.8 Section 47B also provides that a document is conditionally exempt if disclosure of the document would divulge information or matter communicated in confidence:

- by or on behalf of a State to the Commonwealth;
- by or on behalf of Norfolk Island to the Commonwealth; or
- by or on behalf of a State to Norfolk Island.

9.9 More information about section 47B can be found in paragraphs 6.29 - 6.51 of the Guidelines:

See: <https://www.oaic.gov.au/freedom-of-information/foi-guidelines/>

9.10 See also the discussion at paragraph 6.48 and following of this Guidance Material, regarding consultation with relevant third parties where a decision maker is considering the application of this exemption.

DELIBERATIVE MATTER - SECTION 47C

9.11 Section 47C provides that a document is conditionally exempt if its disclosure would disclose 'deliberative matter'. This deliberative material is described in section 47C as information in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of:

- an agency;
- a minister;
- the Government of the Commonwealth; or
- the Government of Norfolk Island.

9.12 However, deliberative matter specifically excludes 'purely factual material' and 'operational information'. As discussed above, 'operational information' is defined in section 8AA to be information held by an agency to assist in making decisions or recommendations affecting members of the public. In other words, agencies' rules, guidelines, practices and precedent documents relating to decisions or recommendations (this Guidance Material is an example) will generally not fall under this exemption. Defence is required to publish all operational information under section 8(2).

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9.13 Section 47C expressly states that 'deliberative matter' excludes the following kinds of documents:

- 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;
- reports of a body or organisation, prescribed by the regulations, that is established within an;
- agency; and
- 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.

9.14 More information about section 47C can be found in paragraphs 6.52 - 6.88 of the Guidelines:

See: <https://www.oaic.gov.au/freedom-of-information/foi-guidelines/>

9.15

9.16 Section 47C is sometimes used in respect of documents containing Cabinet material but which are not covered by the Cabinet exemption in section 34 of the Act. Further information regarding the application of section 47C to Cabinet material can be found in the 'FOI Guidance Notes', July 2011 (prepared by PM&C).

FINANCIAL OR PROPERTY INTERESTS - SECTION 47D

9.17 Section 47D provides that a document is conditionally exempt if its disclosure would have a substantial adverse effect on the financial or property interests of the Commonwealth, Norfolk Island or of an agency.

9.18 See paragraphs 6.89 - 6.94 of the Guidelines.

OPERATIONS OF AGENCIES - SECTION 47E

9.19 Section 47E provides that a document is conditionally exempt if its disclosure would, or could reasonably be expected to, do any of the following:

- prejudice the effectiveness of procedures or methods for the conduct of tests, examinations or audits by an agency (for example, methodology for the testing of infantry equipment);
- prejudice the attainment of the objects of particular tests, examinations or audits conducted or to be conducted by an agency (for example, the answers to a particular test to be administered by ADFA);
- have a substantial adverse effect on the management or assessment of personnel by the Commonwealth, by Norfolk Island or by an agency (for example, information that would interfere with the integrity of a bullying and harassment complaint investigation process if disclosed); or
- have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

9.20 This provision is often used by regulatory agencies to good effect in preserving the integrity of their investigative and enforcement functions.

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9.21 More information about section 47E can be found in paragraphs 6.95 - 6.123 of the Guidelines: <https://www.oaic.gov.au/freedom-of-information/foi-guidelines/>

PERSONAL PRIVACY - SECTION 47F

9.22 Section 47F provides that a document is conditionally exempt if its disclosure would involve the unreasonable disclosure of personal information about any person (including a deceased person).

9.23 Section 47F(2) states that determining whether the disclosure of the document would involve the unreasonable disclosure of personal information, an accredited decision maker must have regard to the following matters:

- 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; and
- any other relevant matters.

9.24 Consideration of what amounts to an 'unreasonable' disclosure of information occurred in *Colakovski v Australian Telecommunications Corporation* (1991) 100 ALR 111, where it was found that public interest considerations were at the core of the term 'unreasonable'.

9.25 The test of unreasonableness therefore involves the consideration of all factors relevant in a particular case and the balancing of all legitimate interests, including the public interest. Disclosure may more readily be found to be unreasonable where disclosure of the personal information sheds no light on the proper functioning of government, but instead merely satisfies curiosity about an individual.

9.26 The role that the public interest plays in determining whether disclosure is 'unreasonable' in the context of section 11A(5) is complicated. The Information Commissioner's Guidelines allow for a role in considering the public interest dimension as part of the assessment of 'unreasonableness' notwithstanding its separate and additional role as a stand-alone test. In the context of that stand-alone public interest test in section 11A(5), the public interest may become a much more determinative factor in relation to section 47F.

9.27 Section 47F also expressly deals with documents provided to agencies by 'qualified persons', who are defined as persons carrying on occupations that involve the provision of care for physical and mental well-being, including medical practitioners, psychiatrists, psychologists, counsellors and social workers.

9.28 See also the discussion at paragraph 6.45 regarding consultation with relevant third parties where a decision maker is considering the application of this exemption.

9.29 Where a request is made for access to a document that:

- contains information concerning the applicant, being information that was provided by a qualified person acting in his or her capacity as a qualified person; and

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- it appears that the disclosure of the information to the applicant might be detrimental to the applicant's physical or mental health, or well-being.

9.30 Section 47F(4) and (5) permits an accredited decision maker to direct access to that document to a qualified person who is carrying on the same occupation as the person who provided the document. The qualified person to whom access is directed is to be nominated by the Freedom of Information applicant.

9.31 More information about section 47F can be found in paragraphs 6.124 - 6.179 of the Guidelines: <https://www.oaic.gov.au/freedom-of-information/foi-guidelines/>

BUSINESS AFFAIRS EXEMPTION - SECTION 47G

9.32 Section 47G provides that a document is conditionally exempt if it would disclose information concerning:

- a person in respect of his or her business or professional affairs, and that disclosure would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his or her lawful business or professional affairs; or
- the business; commercial or financial affairs of an organisation or undertaking, and that disclosure would, or could reasonably be expected to, unreasonably affect that organisation or undertaking in respect of its lawful business, commercial or financial affairs.

9.33 Section 47G also provides that a document is conditionally exempt if 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.

9.34 Section 47G does not, however, have effect in relation to a request by a person for their own information, i.e. information concerning their business or professional affairs. Nor does it apply where the person requesting access is acting on behalf of an undertaking or organisation, where the information requested relates to the business, commercial or financial affairs of that undertaking or organisation.

9.35 Furthermore, section 47G does not apply to information concerning a person's status as a member of a profession, or to trade secrets to which section 47 applies.

More information about section 47G can be found in paragraphs 6.180 - 6.213 of the Guidelines.

9.36 See also the discussion at paragraph 6.45 regarding consultation with relevant third parties where a decision maker is considering the application of this exemption.

DOCUMENTS CONTAINING INFORMATION RELATING TO RESEARCH - SECTION 47H

9.37 Section 47H provides that a document is conditionally exempt if it contains information relating to research that is being, or is to be, undertaken by an agency specified in Schedule 4, and disclosure of the information would cause the agency disadvantage. At this stage, only the CSIRO and the Australian National University are listed in Schedule 4.

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9.38 More information about section 47H can be found in paragraphs 6.214-6.215 of the Guidelines: <https://www.oaic.gov.au/freedom-of-information/foi-guidelines/>

THE ECONOMY - SECTION 47J

9.39 Under section 47J, a document will be conditionally exempt if it would, or could reasonably be expected to, have a substantial adverse effect on Australia's economy by:

- influencing a decision or action of a person or entity; or
- by giving a business an undue benefit or detriment by providing premature knowledge of a proposed or possible action or inaction by a person or entity.

9.40 In determining whether disclosure might have a substantial adverse effect on Australia's economy, section 47J(2) provides that disclosure can have a substantial adverse effect on a particular sector of the economy or the economy of a particular region of Australia.

9.41 In addition, section 47J(3) sets out a list of documents that might be considered conditionally exempt, including:

- 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; and
- borrowings by the Commonwealth, Norfolk Island, a State or an authority of the Commonwealth, of Norfolk Island or of a State.

9.42 More information about section 47J can be found in paragraphs 6.216-6.222 of the Guidelines: <https://www.oaic.gov.au/freedom-of-information/foi-guidelines/>

CHAPTER 10

MAKING DECISIONS AND GIVING REASONS FOR DECISIONS

NOTIFYING APPLICANT OF DECISION

10.1 A Freedom of Information applicant must be notified of a decision in writing. Where an accredited decision maker decides to refuse access in accordance with a request, a statement of reasons for that decision must also be given to the applicant (section 26).

10.2 Decision makers are responsible for drafting statements of reasons for their decisions. Those decisions are then provided to the FOI Directorate. The FOI Directorate will then deal with any outstanding issues such as charges before providing the decision to the applicant. Defence publishes statements of reasons as part of its proactive disclosure obligations.

IMPORTANT TIP

Decisions about Freedom of Information requests and, if applicable, reasons for decisions must be recorded in writing.

WHEN MUST A STATEMENT OF REASONS BE PROVIDED?

10.3 The requirement for a statement of reasons applies where a decision is made that:

- the giving of access is to be deferred;
- the document is not a document of the agency;
- the document is an exempt document;
- the document is available by other means (such as under the Archives Act), in accordance with another enactment, or available for purchase;
- the documents do not exist or cannot be located;
- processing the request would be an unreasonable diversion of resources; or
- access will be given in a different form to that which the applicant requested.

10.4 A statement of reasons is also required when rejecting a contention by an applicant that a charge had been wrongly assessed, should be reduced or not imposed. These decisions are made by the FOI Directorate, which, also drafts the accompanying statements of reasons.

10.5 A notice of decision is not required for a decision to transfer the Freedom of Information request to another agency for processing.

MAKING A DECISION

10.6 Before an accredited decision maker can begin to write a statement of reasons, they must first make the decision. There is no specific format at law with which statements of reasons must comply, however it is good administrative practice to apply a three-step decision-making process to any decision. Accredited decision makers may start with a suggested statement of reasons format at Annex A, and then adapt the statement of reasons to suit their own situation.

10.7 In order to satisfy the three-step decision-making process, an accredited decision maker must consider each of the elements in a logical sequence:

- the material on which the findings were based: these will include the content of the documents in issue, the Guidelines and any submissions provided by the applicant or an affected third party. See <http://www.oaic.gov.au/freedom-of-information/applying-the-foi-act/foi-guidelines>
- the findings on any material questions of fact: these are the elements of each exemption. For example, in relation to section 47F of the *Freedom of Information Act 1982* (the Act), a finding that the information is personal information; a finding that its disclosure would be unreasonable; and a finding that disclosure would be contrary to the public interest.
- the reasons for the decision: this is the detailed explanation of how the evidence (the material considered) led to the findings.

IMPORTANCE OF STATEMENT OF REASONS

10.8 Statements of reasons are not an after thought designed to obscure what has really been done. They are required to show the true basis of an accredited decision maker's decision, and the need to prepare them acts as a discipline in correct and proper decision-making. If an accredited decision maker does not write a good statement of reasons, they are both failing in their obligation to the applicant and risking unnecessary appeals as well as ensuring difficulty in responding to them.

10.9 A good statement of reasons is important because:

- the applicant will fully understand why the decision was made (even though they may not be happy with the final outcome) and therefore be less likely to seek review;
- in the event *internal review* is sought, the secondary decision maker will have the benefit of seeing exactly what was taken into account by the decision maker and why (a more senior decision maker undertaking *internal review* would ordinarily not appreciate having to deal with a decision which is unclear and unexplained); and
- as the basis of the accredited decision maker's statement to the external reviewer (the Freedom of Information Commissioner or Information Commissioner).

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10.10 A statement of reasons must therefore do more than simply quote the relevant sections of the Act containing the exemption claimed. Stating the fact that a document is exempt is not sufficient reason for refusing access.

IMPORTANT TIP

A statement of reasons must actually disclose reasons.

10.11 Every statement of reasons supporting a decision to refuse access to an exempt document should make it clear why the document is considered to be an exempt document and that the accredited decision maker has decided to deny access to it for reasons that are then explained as fully as practicable (but excluding exempt material, discussed below).

10.12 An accredited decision maker must give full reasons for claiming the exemption. Section 26 requires an accredited decision maker to 'state the findings on any material questions of fact, referring to the material on which those findings were based, and state the reasons for the decision'. A statement which fails to provide full reasons will probably prompt an application for review.

INADVISABILITY OF ADOPTING ANOTHER PERSON'S REASONS

10.13 Difficulty arises where a submission of an action area or subject matter expert makes particular findings of fact, which are then adopted by the accredited decision maker without the decision maker separately considering those facts for themselves. This is not a desirable practice. Making findings of fact is a necessary process in forming the reasons for a decision, a task which the accredited decision maker should be performing.

10.14 The risk is illustrated in *Stuart v Chief of Army (2003)* FCA 1291, a case involving a challenge to the validity of a decision under the *Defence (Personnel) Regulations 2002* to terminate the enlistment of an ADF member. The applicant argued that the decision maker had improperly exercised his power by simply adopting a report that had been prepared for him by another person, and thus had made a decision without regard to the merits of the case. In rejecting this submission, Justice Wilcox noted:

‘...[an improper exercise of power is not established] simply because a decision maker adopts a recommendation made by someone else, provided – and this is important – the decision maker approaches his or her task with an open mind and a readiness to make whatever decision he or she thinks to be proper in the circumstances.’

10.15 While it is acceptable for accredited decision makers to take advice and use materials prepared with the assistance of others, they must also be actively involved in every aspect of decision-making.

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IMPORTANT TIP

A statement of reasons should not blindly adopt another's reasons.

CONTENT OF A STATEMENT OF REASONS

10.16 The statement of reasons must contain:

- the day on which the decision was made;
- the name and designation of the decision maker;
- findings on any material questions of fact;
- reference to the material on which the findings of fact were based; and
- information about review rights.

10.17 The Act provides exemptions in cases where documents contain information the disclosure of which would be contrary to the 'protection of essential public interests and private and business affairs' of third parties. At the same time, the legislation provides that the decision-making process should be as transparent as possible without revealing exempt material. This is particularly important as the applicant usually does not know what documents are held or what those documents contain. Because of this, the decision maker needs to tell the applicant:

- why the documents are sensitive;
- what exemptions are claimed for which documents or parts of documents;
- why those exemptions are relevant to specific documents;
- what the expected factual consequences of their release are expected to be (where this is relevant to exemption(s) claimed);
- why it is reasonable to expect those consequences; and
- why those consequences are so substantially adverse to important public or third party interests as to warrant a refusal of access to the documents.

10.18 The statement must make sense to the applicant and tell them all that is needed to understand the real basis of the decision. The applicant must be able to understand all the elements involved in claiming an exemption and why that particular exemption applies to this document. Only a detailed and complete explanation will give an applicant a genuine opportunity to decide whether to accept a decision or test it on appeal.

10.19 However, section 26(2) provides that a statement of reasons is not required to include any matter that is of such a nature that its inclusion in a document of an agency would cause that document to be an exempt document. Effectively, the statement is not required to, and must not, disclose the very information which forms

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the basis for the decision to refuse access (see, e.g. *News Corporation Ltd v National Companies and Security Commission* (1984) 5 FCR 88, *Secretary, Department of Health and Ageing v iNova Pharmaceuticals (Australia) Pty Limited* (2010) FCA 1442).

DEFERMENT OF ACCESS TO CERTAIN DOCUMENTS

10.20 Access, though granted, may be deferred in certain specified circumstances, but strictly in accordance with section 21 of the Act.

10.21 Section 21 of the Act permits deferment in the following circumstances:

- if the publication of the document concerned is required by law - until the expiration of the period within which the document is required to be published;
- if the document concerned has been prepared for presentation to Parliament or for the purpose of being made available to a particular person or body or with the intention that it should be so made available - until the expiration of a reasonable period after its preparation for it to be so presented or made available;
- if the premature release of the document concerned would be contrary to the public interest - until the occurrence of any event after which or the expiration of any period of time beyond which the release of the document would not be contrary to the public interest; or
- if a minister considers that the document concerned is of such general public interest that the Parliament should be informed of the contents of the document before the document is otherwise made public - until the expiration of 5 sitting days of either House of Parliament.

10.22 Although section 21 of the Act provides for access to a document to be deferred, a decision to disclose must firstly have been made. It is the implementation of the decision to disclose the document, not the making of the decision, which may be deferred under section 21.

IMPORTANT TIP

A decision to disclose a document intact must firstly have been taken before deferral of access.

10.23 A decision by an agency to defer the giving of access to a document is subject to internal and external review. This procedure can attract some risk. Accredited decision makers considering using this mechanism must consult the FOI Directorate in the first instance.

ACCREDITED DECISION MAKER'S NOTIFICATION OF DECISION TO DIRECTORATE

10.24 The FOI Directorate notifies applicants of the decisions that are made on their requests. Accredited decision makers draft and sign their decisions and statements of reasons and provide them to the FOI Directorate, which then communicates the decisions to applicants.

10.25 To help accredited decision makers avoid having their decisions on Freedom of Information matters overturned by the Information Commissioner or the AAT, the FOI Directorate monitors closely any decisions refusing access to documents. Although accredited decision makers are ultimately accountable for their

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decisions and for discharging the onus of justifying their decisions if they are subjected to review, the FOI Directorate is well placed to provide advice on the correctness or appropriateness of Freedom of Information decisions in the light of legal and policy requirements.

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CHAPTER 11

REQUEST FOR AMENDMENT OR ANNOTATION OF RECORDS OF PERSONAL INFORMATION

INTRODUCTION

11.37 A person who claims that a document containing personal information about him or her, is incomplete, incorrect, out of date or misleading and has been used, is being used or is available for use by an agency or minister for an administrative purpose, may apply for amendment or annotation of the record of that information under section 48 of the *Freedom of Information Act 1982* (the Act). Section 50 of the Act gives agencies a discretionary power to amend a record of personal information.

11.38 If a person seeks annotation of a record (rather than amendment), or if an application for amendment is unsuccessful, Defence is required to add to the record any statement submitted by the applicant if the record of personal information to which the application relates is contained in a document in Defence's possession and if the statement is not considered to be irrelevant, defamatory or unnecessarily voluminous. (Sections 51 and 51B of the Act refer.)

11.39 'Personal information' is defined as any 'information or an opinion about an identified individual, or an individual who is reasonably identifiable:

- (a) whether the information or opinion is true or not, and
- (b) whether the information or opinion is recorded in a material form or not.
(Section 4 of the FOI Act refers to the definition contained within section 6(1) of the Privacy Act).

(b) whether the information or opinion is recorded in a material form or not. (Section 4 of the FOI Act refers to the definition contained within section 6 (1) of the Privacy Act.)

REGISTRATION AND REFERRAL OF REQUESTS TO DECISION MAKER

11.40 Requests, under the Act, for amendment or annotation of records of personal information are registered by the FOI Directorate and referred to an authorised decision maker for consideration.

11.41 When the decision maker has completed action on the request, the decision is referred to the FOI Directorate for notification to the applicant.

11.42 The decision maker is responsible for directing appropriate action, as necessary, to implement the decision, whether or not to grant a request for amendment or annotation of a record of personal information.

11.43 The substantive questions to be decided in respect of each request which falls within the amendment/annotation provisions of the Act are:

- is the information which is the subject of a request for amendment incomplete, incorrect, out of date or misleading and, if so, what amendments are appropriate: or

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- do the proposed annotations in a request for annotation of a record of personal information, provide such information as would result in the record being complete, correct, up to date and not misleading and, if so, are they irrelevant, defamatory or unnecessarily voluminous.

11.44 Section 50 of the Act gives agencies and ministers a discretionary power to amend a record of personal information provided that the agency or minister is satisfied that:

- the record of personal information to which the request relates is contained in a document of the agency or an official document of the minister, as the case may be; and
- the information is incomplete, incorrect, out of date or misleading; and
- the information has been used, is being used or is available for use by the agency or minister for an administrative purpose.

11.45 If a decision maker determines that the applicant's claim is true, all copies of the record of the information must be amended either:

- by altering the document to make the information complete, correct, up to date or not misleading; or
- by adding to that document a note specifying the reasons which the decision maker is satisfied that the information is incomplete, incorrect, out of date or misleading.

Note: Where the decision maker is satisfied that the information is out of date, such information must be included in the note as is required to bring the information up to date.

11.46 The form an amendment takes will depend on the nature of the document in which the information is recorded. However, section 50(3) of the Act requires that, wherever practicable, the record of information is not altered in such a way that the original text of the record is not obliterated. Accordingly, the alteration should normally take the form of a thin straight line through the information, with the revised information written somewhere nearby on the document.

11.47 If a decision maker determines that an applicant's request for *amendment* is unsupported, he or she is required to:

- formally refuse the request and notify the FOI Directorate in writing of the reasons for the decision;
- take such steps as are reasonable in the circumstances to enable the applicant to provide a statement of the kind required to accompany a request for annotation of a record of personal information; and
- add the applicant's statement to the document – unless the decision maker considers the statement to be irrelevant, defamatory or unnecessarily voluminous.

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11.48 When an applicant is invited to submit a statement for attachment to the document, having had his or her request for amendment of a record of personal information refused, the provision of the statement is taken to constitute a request under section 48(d) of the Act for annotation of that record and takes effect on the day it is received by Defence.

11.49 Section 51B requires agencies and ministers to annotate a record of personal information by adding to the record a statement submitted by the applicant provided that:

- the agency or minister is satisfied that the record of personal information to which the request relates is contained in a document of an agency or an official document of the minister; and that
- the statement is not irrelevant, defamatory or unnecessarily voluminous.

11.50 Should the decision maker find that a proposed annotation is irrelevant, defamatory or unnecessarily voluminous, or that essential eligibility criteria have not been satisfied (e.g. the document does not contain personal information about the applicant), the decision maker is to formally refuse the request and to notify the FOI Directorate in writing of the reasons for the decision.

STATUTORY DEADLINE

11.51 Defence is required under the Act to notify an applicant of its decisions about his or her request for amendment or annotation of personal information, within 30 calendar days of its receipt.

DECISIONS TO RECORDED AND REASONS STATED IF REQUEST REFUSED

11.52 Decision makers are required to record their decisions in writing and, where they refuse any part of a request for amendment or annotation, provide reasons (including findings of material facts) why they refuse. Decisions and reasons should be recorded and sent to the FOI Directorate. In the case of multiple part requests, each component should be identified in the record of the decision on each part separately recorded.

ADDITIONAL SOURCES OF INFORMATION AND GUIDANCE

11.53 The foregoing is only a brief guide to processing requests for amendment or annotation of records of personal information. Further guidance is available from the sources referred to below.

- a. Current decision-making arrangements for Freedom of Information – <http://intranet.defence.gov.au/oscdfweb/sites/FOI/comweb.asp?page=38706&Title=Decision%20Makers>
- b. Guidelines issued by the Australian Information Commissioner – <http://www.oaic.gov.au/>
- c. Chapter 13 of the FOI Better Practice Guide – <http://www.ag.gov.au/consultations/pages/reviewoffoilaws.aspx>

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CHAPTER 12

FREEDOM OF INFORMATION SUGGESTED TEXTS

11.54 The following suggested text documents are available from the [FOI Directorate](http://intranet.defence.gov.au/oscdfweb/sites/FOI/comweb.asp?page=38706&Title=DecisionMakers) (the FOI Directorate) <http://intranet.defence.gov.au/oscdfweb/sites/FOI/comweb.asp?page=38706&Title=DecisionMakers> to assist decision makers to make decisions).

ANNEXES

Annex A – Suggested statement of reasons format

Annex B - Suggested text for decision to release documents in full.

Annex C - Suggested example of schedule for identifying documents and decisions.

Annex D - Suggested text requesting the FOI Directorate to undertake consultation.

Annex E - Suggested text and considerations where documents cannot be found or that do not exist.

Annex F – Example of the Web Form: AD 850—*Request for Access to Documents Statistical and Charges Collection*

ANNEX A

SUGGESTED STATEMENT OF REASONS FORMAT

DIA CP1-6-001

[Reference: [insert objective ID/out number]]

FOI xx/xx/xx STATEMENT OF REASONS UNDER THE FREEDOM OF INFORMATION ACT

1. I refer to the application by [applicant] under the *Freedom of Information Act 1982* (FOI Act), for access to:

“... quote final scope of the request...”

Excluding personal email addresses, signatures, PMKeys numbers and mobile telephone numbers, contained in documents that fall within the scope of the FOI request. In addition, excluding duplicates of documents.

FOI decision maker

2. I am the accredited officer pursuant to section 23 of the FOI Act to make a decision on this FOI request.

Documents identified

3. I identified XX documents as matching the description of the request.
4. The decision in relation to each document is detailed in a schedule of documents.
5. I have added an FOI reference number and Item/serial number to each of the documents, which corresponds with the schedule.

Decision

6. I have decided to:
 - a. Release x documents in full;
 - b. Partially release x documents in accordance with section 22 [access to edited copies with exempt or irrelevant matter deleted] of the FOI Act, on the grounds that the deleted material is considered exempt under section 47F [public interest consideration exemptions – personal privacy] and/or section 33(a)(i) [Documents affecting national security] of the FOI Act;
 - c. Refuse access to documents of the request under subparagraph 24A(1)(b)(ii)[Requests may be refused if documents cannot be found, do not exist or have not been received] of the FOI Act.
 - d. Remove irrelevant material as referred to in the scope of the request in accordance with section 22(1)(b)(ii) of the FOI Act.

Material taken into account

7. In making my decision, I had regard to:
 - a. the terms of the request;
 - b. the content of the identified documents in issue;
 - c. relevant provisions in the FOI Act;

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Guidance for Freedom of Information Decision-making

12A-3

- d. the Guidelines published by the Office of the Australian Information Commissioner under section 93A of the FOI Act (the Guidelines); and
- e. (include any other i.e. advice received from third parties, officers within the department – specify which area provided the advice).

Reasons for decision

Reasons for decision – Section 42

- 8. Explain why you consider the document or parts of the document are exempt. Upon examination of the documents, I found that the documents contained
- 9. Take into account (and include as appropriate) guidelines promulgated by the OAIC in relation to each specific exemption claim.
- 10. For 'conditionally exempt' documents, consideration must also be given to section 11B of the Act. This Minute should document the arguments relied upon in weighing up the public interest. (See below)

Reasons for decision – Section 47

- 11. Repeat the above for each exemption relied upon.

Section 47C – deliberative processes

- 12. In assessing whether disclosure of the conditionally exempt material is, on balance, contrary to the public interest, I considered the range of relevant factors that favours access to a document set out in section 11B(3) [public interest exemptions – factors favouring access] of the FOI Act. I noted that disclosure may promote some of the objects of the Act, as information held by the Government is a national resource....

Public interest conditional exemptions

(example) Section 47F – Personal privacy

- 13. Upon examination of the documents, I identified information, specifically....
- 14. In balancing the public interest in this case, I have considered the following factors in favour of disclosure:
 - a. The objects of the Act etc
 - b. XX
 - c. XX
- 15. I have considered the following factors against disclosure:
 - d. XX
 - e. XX
 - f. XX
- 16. I have formed the view that the disclosure of the information contained in the document would XXXXXXXXXXXXXXXX. On balance, I have concluded that disclosure would be contrary to the public interest.

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Guidance for Freedom of Information Decision-making

12A-4

Sections 47F – Public interest considerations

Sections 11A & 11B – Must be considered as part of the decision, paragraphs should indicate a clear weighing process and the outcome.

17. Subsection 11A(5) of the FOI Act requires Defence to allow access to a conditionally exempt document unless, in the circumstances, access to the document would, on balance, be contrary to the public interest.

18. 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...

19. 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.

Third party consultation (if required)

20. I decided to consult with third parties regarding their information which was contained in the documents. In response to this consultation, some of the third parties have objected to the release of their business/personal information. I do not agree with all of the objections.

21. The department is required to advise the third parties of my decision. Documents will be provided when all review rights have been exercised.

Section 22 (where documents are being denied in full)

22. Subsection 22(1) of the FOI Act requires that where a decision maker denies access to a document they must consider releasing the document with exempt matter deleted, where possible. I have considered disclosing the documents to you with deletions, but have decided against this course of action, as the document would be meaningless and of little or no value once the exempt material is removed.

Further Information (Remove section if redundant)

23. A number of the documents matching the scope of this request were classified. I have declassified the versions of the documents that are approved for release.

or

24. Some of the documents matching the scope of this request contained a dissemination limiting marker, as the documents are approved for public release the marker has been struck through.

Clarification/Context Statement (Remove section if redundant)

25. If the documents require explanation include further details here.

<Name> [electronic signature]
Accredited Decision Maker

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Guidance for Freedom of Information Decision-making

12A-5

Examples of exemption claim(s)

Reasons for decision – Section 47E – certain operations of agencies

26. Repeat the above for each exemption relied upon.

Reasons for decision – Section 22

27. If you decide to deny access to the identified documents, you must consider section 22 and document your thought process regarding release of the documents with exempt material removed or not.

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ANNEX B

SUGGESTED TEXT FOR DECISION TO RELEASE DOCUMENTS IN FULL

<use decision maker's Minute paper>

DIA (CP1-6-001)

FREEDOM OF INFORMATION REQUEST NUMBER FOI .../.../... – REQUEST BY A. B. SMITH

1. I refer to the request, under the *Freedom of Information Act 1982* (the Act), by A.B. Smith, of . . . , for access to:

<quote the terms of the applicant's request>.

2. I have identified the following document as matching the description of the document to which the applicant has requested access:

<describe/name the document identified>.

3. I am authorised to decide whether or not to grant requests for access to documents under the Act and have decided to release the document identified in the preceding paragraph, in full, to Mr Smith.

4. A copy of the document is enclosed for release to Mr Smith. Details of the time spent in processing this request have been entered in the enclosed Freedom of Information "Statistical and Charges Information Collection Sheet". The number of pages of photocopying of the material for release is included.

5. A completed Freedom of Information Check List is also enclosed.

6. Please inform Mr Smith of my decision.

Name and signature of Freedom of Information decision maker

Contact details

Date

* Attach a list if a number of documents need to be identified and inclusion of the list in the Minute is inconvenient

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ANNEX C to
CHAPTER 12

ANNEX C

SUGGESTED EXAMPLE OF SCHEDULE FOR IDENTIFYING DOCUMENTS AND DECISIONS

FREEDOM OF INFORMATION REQUEST 000 /17/18

SCHEDULE OF DOCUMENTS

Item	Serial	Date	Document title	Author	Addressee	Number of pages	Document description	Decision under the Act	Reasons for decision
1	1	4/6/93					FOI Letter	Partial access	Deletions made in accordance with section 22 of the FOI Act, on the grounds that the deleted material is exempt, under section 47F [Personal Privacy conditional exemption] of the FOI Act
2	1	7/1/04					FOI Facsimile		
2	2	20/11/99					FOI Minute		
3	1								
3	2								

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ANNEX D

SUGGESTED TEXT REQUESTING THE FREEDOM OF INFORMATION DIRECTORATE
TO UNDERTAKE CONSULTATION

<use decision maker's Minute paper¹>

DIA (CP1-6-001)

FREEDOM OF INFORMATION REQUEST NO. FOI .../.../... –
REQUEST BY MR G. JONES OF BIG MACHINES PTY LTD

Request

1. I refer to the request, under the *Freedom of Information Act 1982* (the Act), by Mr G. Jones, of Big Machines Pty Ltd, for access to documents relating to the award of Contract Number XYZ for the supply of chrome widgets to the Department of Defence. Big Machines submitted an unsuccessful bid in response to Request for Tender Number 123 for the supply of chrome widgets and Mr Jones wishes to have access to the report of the tender evaluation committee that recommended the award of the contract to the successful tenderer.

Document identified

2. The document to which Mr Jones has requested access has been identified as:

Report of Tender Evaluation Committee – Tender Number 123, Supply of Chrome Widgets to the Department of Defence, 19 December 2008.

Authority and decision to undertake consultation

3. In accordance with arrangements approved by the Secretary on 8 February 2000, I am authorised to direct that third parties be consulted pursuant to section 27 of the Act. Also, I am authorised to determine that, in accordance with subsection 15(6) of the Act, the time limit for notifying Mr Jones of the decision whether to grant his request is to be extended by 30 days.

4. I have examined the report of the Tender Evaluation Committee on bids received in response to Tender Number 123. I noted that, in addition to containing information supplied by, or concerning, Big Machines Pty Ltd, the document contains information of a commercial nature provided by other tenderers, including the successful tenderer, and information about those tenderers' businesses. The report includes assessments of the quality of bids and detailed analyses of the extent to which bids comply with the Statement of Requirement contained in the request for tender.

5. In accordance with section 27 of the Act, I direct that the tenderers, other than Big Machines Pty Ltd, that submitted bids in response to Request for Tender Number 123 be consulted and given an opportunity to contend that the report of the Tender Evaluation Committee is an exempt document under section 47G of the Act.

F_____

1 NOTE: If this information is provided by way of an email from the Accredited Decision Maker to DFOI, a signed Minute is not required and an email will be sufficient

Extension of time limit

6. I have decided, in accordance with subsection 15(6) of the Act, to extend by 30 days the time limit for notifying Mr Jones of the decision on his request.

Implementation of decision

7. Would you please consult the tenderers concerned in accordance with my decision and inform me of their responses, if any.

8. Copies of the tender evaluation report are attached for referral to the tenderers who are to be consulted. In each case, information provided by, or relating to, the other tenderers has been deleted.

9. Please inform Mr Jones of my direction that consultations be undertaken in accordance with section 27 of the Act and of my decision to extend, by 30 days, the time limit for providing him with the decision whether or not to grant his request.

Name and signature of Freedom of Information decision maker

Contact details

Date

NOTE: a similar approach may be taken in the case of consultations to be undertaken in accordance with section 26A or 27A of the Act.

NOTE: If this information is provided by way of an email from the Accredited Decision Maker to DFOI, a signed Minute is not required and an email will be sufficient.

ANNEX E

SUGGESTED TEXT AND CONSIDERATIONS WHERE DOCUMENTS CANNOT BE
FOUND OR THAT DO NOT EXIST

1. **Statutory provision.** Section 24A of the *Freedom of Information Act 1982* (the Act) provides for requests for access to a document to be refused if the document cannot be found or does not exist. Section 24A provides as follows:

24A. An agency or minister may refuse a request for access to a document if:

- a. all reasonable steps have been taken to find the document; and
- b. the agency or minister is satisfied that the document:
 - i is in the agency's or minister's possession but cannot be found; or
 - ii does not exist.

2. **Decision-making authority.** Where a document sought under Freedom of Information is known or believed to exist as a document in the possession of Defence but cannot be found, or where the document is known not to be in the possession of Defence (for example, where the document is known to have been destroyed), the request may be refused in accordance with section 24A of the Act. Authority to refuse a request in these circumstances is held by all officers who are authorised to disclose documents.

3. **Necessity to state all the relevant facts.** In providing the FOI Directorate with the input for a reply to a request for access to a document which cannot be found, it is important to provide a complete explanation. It is not sufficient merely to state that the document cannot be located; the decision maker is required to address the questions of whether the document ever did exist, and, if so, whether it still exists. Then an explanation needs to be provided as to why the document is not available. If the document has been destroyed, then the authority under which such destruction took place should be stated. If the document was destroyed in accordance with a Records Disposal Authority or Schedule approved by National Archives of Australia, the authority should be cited and a copy of the Notification of Records Destruction (National Archives of Australia Form NA 45) listing the document should be provided. (Note: it is an offence under section 24 of the Archives Act 1983 to destroy a Commonwealth record without proper authority.)

4. **Details of search.** Full details of searches carried out, that is, where and by whom, in an attempt to locate missing documents is required to be provided to the FOI Directorate for inclusion in the notification to the applicant of the decision.

5. **Technical refusal.** Where a document cannot be located, because the document does not exist and has never existed, or no longer exists, or simply because a thorough search for it has been unsuccessful, certification to that effect by a decision maker constitutes a so-called 'technical refusal' (to grant access in accordance with a request). Under the Act the applicant has a right of appeal in such circumstances. In such situations, it is sometimes asked how a 'decision' can be made that a document does not exist, or how an applicant can appeal against non-disclosure of such a document. The answer to the first question is that 'decision' in this context means the decision maker's findings or, to put it more broadly, the outcome of the request. As such, in a case where the documents do not exist, the decision maker is certifying, rather than making a decision that the documents do not exist. The answer to the second question is that the applicant has the right to challenge the finding of the decision maker, eg on the grounds that Defence has not been sufficiently thorough in its efforts to locate the document. (If the applicant believed that the document had been

destroyed unlawfully, ultimately this would be a matter for the Director-General of the National Archives of Australia who is responsible for administering the Archives Act 1983.)

6. **Mode of certification.** An appropriate statement by a decision maker in the case of a document which cannot be located would include words along the following lines:

“Document X is not available for disclosure under the Act, because....

notwithstanding that a thorough and diligent search has been conducted, it cannot be located

[INCLUDE DETAILS OF SEARCH]

or

it does not exist, nor is there any evidence that it has ever existed.

or

it has been destroyed lawfully in accordance with National Archives of Australia Disposal Authority/Schedule Number.... A copy of the Notification of Records Destruction (Form NA 45) pertaining to the document is enclosed.

I am unable therefore to accede to your request for access to this document.”

7. **Further guidance.** Further guidance is contained in Part 8 of the [Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act](http://www.oaic.gov.au/publications/guidelines/htm) (<http://www.oaic.gov.au/publications/guidelines/htm>)

ANNEX F

REQUEST FOR ACCESS TO DOCUMENTS STATISTICAL AND CHARGES
INFORMATION COLLECTION FORM

Save data	Add record	Print form	Email this form	< Previous record Next record >
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AD 850
Revised 24 Jul 17

Department of Defence

Request for Access to Documents Statistical and Charges Information Collection

Information provided in this form will be used by the FOI Directorate for assessing charges that may be payable by the applicant and for input into Annual FOI Reporting. Please see 'Instructions for use' for more information about charges.

FOI request number (Mandatory)

/ 17 / 18

[Click here for final costings](#)

[Go to guidelines](#)
[Go to instructions](#)

Part A - Preliminary assessment costings

Are documents being sought considered to be:

☐ Personal
 ☐ Other
 ☐ Both

Click on the yellow buttons to waive fees

Time spent	Estimated time		Estimated cost \$	Actual time		Actual cost \$
	Hrs	Mins		Hrs	Mins	
Identifying, locating and retrieving the requested documents (Charged at \$15.00 per hour)	:			:		
On decision making tasks (Charged at \$20.00 per hour) namely:						
Examining the documents	:			:		
Consulting persons or bodies outside Defence	:			:		
Making copies with exempt or irrelevant matter deleted	:			:		
Preparing notification of the decision on the request	:			:		
Other decision making tasks	:			:		
<div style="border: 1px solid black; padding: 5px; margin-top: 5px;">Please describe other tasks</div>						
For further advice refer to Office of the Australian Information Commissioner Guidelines at: http://www.oaic.gov.au/publications/guidelines.html						
Decision making tasks total	:			:		
Number of pages of photocopying (Charged at 10 cents per page)						
Other (eg The actual cost of using a computer to produce documents in response to the request or the cost of making a transcript)						
<div style="border: 1px solid black; padding: 5px; margin-top: 5px;">Please describe other costs</div>						
Estimated total costs				Actual total costs		

Part B - Non staff related costs

Number of phone calls made (Charged at 50 cents per call)		
Travel expenses		
Legal fees		

Part C - Time spent by level

Time spent by staff involved in processing request by level:

SES officers	
EL1, EL2 and APS6	
APS1 - APS5	

Part D - Prepared by

Printed name	Group	Phone number	Date

[Click here to email this request](#)

AD 850 - Page 1 of 3

Save data	Add record	Print instructions	Email this form	Previous record	Next record
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AD 350
Revised 24 Jul 17

Department of Defence

Request for Access to Documents Statistical and Charges Information Collection

Instructions for use

[Go to form](#)

This form is to be used for the Preliminary Assessment (PA) of charges for Freedom of Information requests and the final charges once request is complete.

Initial PA - Complete Part A and Part D.

Final costings - Complete all parts.

Part A - Preliminary assessment costing
Complete the following for initial PA:
FOI request number (*This is a mandatory field and MUST be completed*).
Select the type of documents being sought (*Personal Other or Both*).

Time spent
For initial PA complete 'Estimated time' column hours and minutes as appropriate. 'Estimated cost' will calculate automatically.
Complete 'Number of pages for photocopying' if required.
For final costings click on the 'Final costings' button at the top of the page. Estimated costs should already be completed from conducting the initial PA. Complete the 'Actual time' column as applicable. 'Actual costs' will calculate automatically. Click on the yellow button adjacent to each charge if the charge is to be waived.

Part B - Non staff related costs
The information collected in this part will be used to inform the FOI Annual Report compiled by [Office of the Australian Information Commissioner](#) (OAIC).
This part is to be completed during final costings.

Part C - Time spent by level
The information collected in this part will be used to inform the FOI Annual Report compiled by [Office of the Australian Information Commissioner](#) (OAIC).
This part is to be completed during final costings.

Part D - Prepared by
This part is to be completed for both the initial PA and the final costings.

When you have completed the form in its entirety, click on the email button to send the request to the appropriate email addresses.

CHAPTER 13

RIGHTS OF REVIEW

13.1 The following rights of review are available to an applicant if they are dissatisfied with a decision made under the *Freedom of Information Act 1982* (the Act):

- internal review;
- review by the Australian Information Commissioner;
- review by the Administrative Appeals Tribunal (AAT); and
- complaint to the Information Commissioner and/or Ombudsman.

IMPORTANT TIP

Accredited decision makers may be called upon to give evidence in review proceedings before the Australian Information Commissioner and the Administrative Appeals Tribunal.

13.2 The Directorate of Freedom of Information is responsible for managing the review and complaint processes outlined above. However, accredited decision makers and other officers in Defence will, as necessary, be asked to assist in responding to applications for review or complaints made to the Ombudsman.

13.3 In the case of an application to the Information Commissioner or the AAT, the accredited decision maker, subject matter expert or other expert witness may be required to provide evidence by way of affidavit and be available to give oral evidence at the hearing of the application.

13.4 Certain provisions in the Act and *Administrative Appeals Tribunal Act 1975* (AAT Act) compel accredited decision makers to assist the Information Commissioner and AAT in making their decisions on review. For example, by producing documents as requested. A failure to do so has serious consequences, including penalties of up to 6 months' imprisonment.



Your review rights

Client fact sheet

If you disagree with the decision made by the Department of Defence or the Minister under the *Freedom of Information Act 1982* (the FOI Act), you can ask for the decision to be reviewed. You may want to seek review if you sought certain documents and were not given full access, if you have been informed that there will be a charge for processing your request, if your application to have your personal information amended was not accepted or your comments in response to formal consultation were not accepted.

There are two ways you can ask for review of a decision: **internal review** by Defence, or **external review** by the Australian Information Commissioner.

Internal review

If Defence makes an FOI decision that you disagree with, you can ask Defence to review its decision. The review will be conducted independently to FOI Case Management. There is **NO** charge for internal review.

You must apply within **30 days** of being notified of the decision, unless you have sought an extension from Defence. An extension may be granted if adequate reasons for the extension are supplied.

Defence **must** make a review decision within **30 days**. Where Defence has not met its review obligation, you may then approach the Information Commissioner.

Internal review is not available if the Minister or the principal officer of the agency made the decision personally.

How to apply for an internal review

You must apply in writing and should include a copy of the notice of the decision provided and the points to which you are objecting and why.

You can lodge your application in one of the following ways:

Email: <mailto:FOIReview@defence.gov.au>
Post: FOI Directorate
Department of Defence
CP1-6-008
PO Box 7910
CANBERRA BC ACT 2610

External review

Do I have to go through the Defence's internal review process first?

No. You may apply directly to the Information Commissioner, within **60 days** of receiving your decision. However, going through the Defence internal review process gives Defence the opportunity to reconsider its initial decision and your concerns will most likely be addressed more quickly, without undergoing an external review process.

When can I go to the Administrative Appeals Tribunal (AAT)?

Under the revised FOI Act, you must seek external review through the Information Commissioner prior to applying to the AAT for such a review.

Making a complaint

You may make a complaint to Defence or the Office of the Information Commissioner about actions taken by Defence in relation to your application. The complaint needs to be in writing.

Information Commissioner contact

Further information about the external review process or how to make a complaint to the Information Commissioner is available:

Online: www.oaic.gov.au
Post: GPO Box 5218 Sydney NSW 2000
Fax: +61 2 9284 9666
Email: enquiries@oaic.gov.au





Third party consultation

Client fact sheet

Consultation under section 27A (personal information) of the FOI Act

This fact sheet provides general guidance about consultation to individuals when their personal information appears in documents that have been requested under the *Freedom of Information Act 1982* (FOI Act).

Frequently asked questions

What is the purpose of the FOI Act?

The FOI Act provides the public with a general right of access to documents held by Australian government agencies (with certain exceptions).

Why am I being consulted?

You are being invited to advise whether you object to the release of your personal information in the enclosed documents, and if so, to provide reasons why you believe the material should be considered exempt under section 47F [public interest conditional exemptions – personal privacy] of the FOI Act.

If the material intended for release is personal information of someone other than the applicant, and that person (third party) might reasonably object to the material being released under FOI, the decision maker will direct FOI Directorate to consult the third party.

When Defence receives a request for access to documents under FOI, an FOI decision maker considers the documents with regard to relevant sections of the FOI Act, and forms a view as to what material may be released.

What does exemption under section 47F mean?

According to section 47F of the FOI Act, material is exempt (may not be released) if it:

- is personal information; and
- would be unreasonable to release; and
- is not in the public interest to release

For material to be exempt under section 47F of the FOI Act, the decision maker must balance whether release of the material is in favour of or against the public interest.

What is public release?

The purpose of the FOI Act is to release information to the public. This means when a document is released to a person, it is considered to be a release to the world at large (although other legal restrictions, such as copyright, will still apply).



Who is the applicant?

While the purpose of consultation is to afford you the right to protect your personal information, the applicant also has a right to privacy. When third parties are consulted, Defence will almost always ask the applicant whether they consent to being identified as the applicant for the purposes of consultation. We will tell you who the applicant is if they consent to being identified.

What is personal information?

The term 'personal information' is defined in the FOI Act to mean:

information or an opinion about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.

Personal information:

- identifies, or could identify, a person or a deceased person
- says something about the person
- may be an opinion
- may form part of a database
- may be true or untrue
- relates to a natural person (not a corporation or trust).

This means that 'personal information' is not just your name, it must identify you. It can include things that you say, things said about you, references to events that you participated in, or any other information related to you, provided that you can be identified.

What does 'unreasonable to release' mean?

A decision maker may take into account a broad range of factors in considering whether personal information is unreasonable to release. Generally, information that is already widely known would not be unreasonable to release. Where public servants' personal information is included in a document because of their usual duties of 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.

Information about an individual's personal characteristics, emotional state, medical conditions, reasons for taking personal leave, information about management of their performance, or unproven allegations of misconduct would be examples of personal information commonly considered unreasonable to release.

Do I have to respond in a particular form?

No. You are not required to reply in any particular way. If you object to the release of some or all of your personal information, you should clearly explain why you object. If possible, you should identify which material you consider is exempt and which material you would be happy to see released, if any. This will assist to highlight the parts of the document which you think should be protected.

Is this what the document will look like when it is released?

Not necessarily. The information you have been provided, may only be a part of a larger document. There may be additional material you are not being consulted over, because it does not contain your personal information.

Should I comment on the release of anyone else's personal information?

No. Defence will consult all third parties who might reasonably wish to object to the release of their personal information in the documents. You should focus on concerns you may have about your own personal information in the documents.

Should I discuss this consultation with my lawyer, my supervisor/chain of command or other individuals?

You are being consulted in your personal capacity as a private citizen, and as such you have no obligation to speak with anyone else in relation to the release of the material. Your supervisor or chain of command cannot direct you to respond in a particular way.

If you wish to speak to a trusted friend or seek professional advice you are entitled to do so. You should also feel free to contact the FOI Directorate, which has a role in providing impartial advice relating to the FOI Act to applicants, third parties and the Department.

What if I raise no objections to the release of my personal information?

The decision maker will take this into account, along with any other relevant factors, when deciding whether further material should be considered exempt in the documents.

What happens if I object to the release of my personal information?

The decision maker will consider your objections but is not obliged to agree to them. The decision maker will also take into account the context of the information, the provisions of the FOI Act, Information Commissioner Guidelines and precedent.

If the decision maker does not agree with all your objections, you will have the opportunity to request a review of the decision (appeal) before the contested documents are released to the applicant.

What happens if I don't respond?

If you do not respond within the specified timeframe, the decision maker will be obliged to make a decision on the release of the information in the absence of your input.

What if I need more time?

If you need more time, please contact the FOI Directorate to discuss a possible extension. We will consider such requests on a case-by-case basis, noting that Defence needs to comply with strict, statutory timeframes for the completion of FOI requests.

Who can I contact for further information?

If you have any questions or issues please contact foi@defence.gov.au.



Making a Freedom of Information request

Client fact sheet

This fact sheet contains information about how to make a request to Defence, under section 15 of the *Freedom of Information Act 1982* (FOI Act), for access to a document.

Before you begin, **confirm** that:

- you are contacting the **correct agency** for the document you seek; and
- the document is not **available by other means**.

Other useful contacts:

- Service and personnel records – <http://www.defence.gov.au/Records/>
- The Department of Veterans Affairs – <https://www.dva.gov.au/>
- The Australian War Memorial – <https://www.awm.gov.au>
- The National Archives of Australia – <http://www.naa.gov.au/collection/askquestion/index.aspx>

How to make a Freedom of Information request?

1

Prepare your request.

A request to Defence for access to a document under the FOI Act **must**:

- be in writing; and
- state that the request is an application for the purposes of the Act; and
- provide such information concerning the document as is reasonably necessary to enable a responsible officer of the agency, or the Minister, to identify it; and
- give details of how notices under the Act may be sent to the applicant (this can include an email address).

2

Send your request to Defence:

- By e-mail: FOI@defence.gov.au
- By post: Freedom of Information Directorate
CP1-6-001
Department of Defence
CANBERRA ACT 2600

Do charges apply

There is no application fee to make an FOI request, or for requests for access to documents containing only personal information about you. However, processing charges may apply to other requests. The most common charges are:

• Search and retrieval: time spent searching for or retrieving a document	\$15.00 per hour
• Decision making: time we spend in deciding to grant or refuse a request, including examining documents, consulting with other parties, and making deletions	First five hours: Nil Subsequent hours: \$20 per hour

If processing charges apply to your FOI request, the FOI Directorate will advise you in writing before formally proceeding with your FOI request. An address is required to process any payments.



Additional information

The Department of Defence

The Department of Defence is an 'agency' within the meaning of the FOI Act and, for the purposes of the FOI Act, includes the Australian Defence Force (ADF), the Australian Cadet Corps, the Naval Reserve Cadets and the Air Training Corps. [Accordingly, in the context of this Instruction, 'Department of Defence' means the Department, the ADF, the Australian Cadet Corps, the Naval Reserve Cadets and the Air Training Corps].

The Australian Geospatial-Intelligence Organisation (AGO), the Australian Signals Directorate (ASD) and the Defence Intelligence Organisation (DIO) are exempt bodies from the FOI Act.

FOI contact details

You can inquire about making a FOI request or seek further information:

By e-mail:	FOI@defence.gov.au
By post:	Freedom of Information Directorate CP1-6-001 Department of Defence CANBERRA ACT 2600

Links to legislation and guidance about FOI

- Office of the Australian Information Commissioner (OAIC)
<https://www.oaic.gov.au/freedom-of-information/>
- *Freedom of Information Act 1982* (FOI Act)
<https://www.legislation.gov.au/Series/C2004A02562>
- FOI Guidelines
<https://www.oaic.gov.au/freedom-of-information/foi-guidelines/>

Request for access to personnel records

Members and former members of the ADF, or current and former employees of the Department, who wish to have access to their personnel records are prevented by section 15A of the FOI Act from applying under the Act unless they have first requested access through normal administrative channels.

These may be your personal, health or psychology records.

You may apply under the FOI Act if you are not satisfied with the outcome of a request after it has been processed through administrative channels or if you have not been informed of the outcome within 30 days after the request was made.

Requests for access to personnel records through administrative channels should be sent to the relevant Service personnel office or civilian personnel authority.

More information can be found here <http://www.defence.gov.au/Records/>

Accessing documents – National Archives of Australia (NAA)

You are able to access Commonwealth archival records in the OPEN period (more than 20 – 30 years old).

If the records you are seeking were created by a Commonwealth Department or Agency and are more than 20 years old, you can request access to them under the *Archives Act 1983* (Cth) by emailing ref@naa.gov.au or at the NAA webpage <http://www.naa.gov.au/collection/askquestion/index.aspx>

Amendment and annotation of personal records

Section 48 Application for amendment or annotation of personal records

Under section 48 of the FOI Act, an individual can apply for amendment or annotation of documents held by Defence where personal information about the individual is:

- (a) incomplete, incorrect, out of date or misleading; and
- (b) being used (or has been used) by Defence for an administration purpose.

Please note that only a living person can request an amendment to their records under section 48 of the FOI Act.

Prerequisites for amendment or annotation

Applicants must have lawful access to documents they wish to amend or annotate (for example their own personal records). To request an amendment an applicant **must** specify in writing:

- (i) the document for amendment; and
- (ii) the information claimed to be incomplete/incorrect; and
- (iii) whether information is incomplete, out of date, or misleading; and
- (iv) their reasons for so claiming; and
- (v) (*for amendment*) the actual amendment to be made, or (*for annotation*) such other information that would make the information complete, correct, up to date or not misleading.

Section 51 Annotation of records etc. following unsuccessful applications for amendments of records

Where a request for amendment has been refused (wholly or partially), a statement will be added to the document through means of annotation, *unless* Defence considers the statement to be:

- (a) irrelevant;
- (b) defamatory; or
- (c) unnecessarily voluminous

Exempt documents under section 38 of the FOI Act

The exemptions under section 38 of the FOI Act relating to records of inquiries under the Defence (Inquiry) Regulations 1985 and Defence (Inquiry) Regulations 2018 are as follows:

- Records of Commissions of Inquiry under section 42 of the 2018 regulations.
- Records of Inquiry Officer Inquiries under section 71 of the 2018 regulations.
- Records of Inquiries under the section 63 of the 1985 regulations which were still open on 25 Mar 18, as applied by section 75 of the 2018 regulations.
- Records of courts of inquiry under section 63 of the 1985 regulations, including IGADF inquiries appointed on or before 30 Sep 16, boards of inquiry, and CDF Commissions of Inquiry, as applied by section 78 of the 2018 regulations.
- Records of inquiry officer inquiries under regulations 63 and 78 of the 1985 regulations, as applied by section 79 of the 2018 regulations.
- Records of IGADF inquiries appointed under regulation 63 of the 1985 regulations on or after 1 Oct 16 and which were not completed on or before 25 Mar 18, as applied by section 84 of the 2018 regulations.

Exempt documents under section 7 of the FOI Act

Under section 7 Exemption of certain persons and bodies of the FOI Act, agencies exempt from the operations of the FOI Act are identified.

These include:

- the Australian Geospatial-Intelligence Organisation (AGO)
- the Defence Intelligence Organisation (DIO)
- the Australian Signals Directorate (ASD)



Third party review rights

Client fact sheet

If you disagree with the decision made by the Department of Defence or the Minister under the *Freedom of Information Act 1982* (the FOI Act) as your comments in response to formal consultation were not accepted, you are entitled to seek a review of the decision.

There are two ways you can ask for review of a decision: **internal review** by Defence, or **external review** by the Australian Information Commissioner.

Internal review

If Defence makes an FOI decision that you disagree with, you can ask Defence to review its decision. The review will be conducted independently to FOI Case Management. There is **NO** charge for internal review.

You must apply within **30 days** of being notified of the decision, unless you have sought an extension from Defence. An extension may be granted if adequate reasons for the extension are supplied.

Defence **must** make a review decision within **30 days**. Where Defence has not met its review obligation, you may then approach the Information Commissioner.

Internal review is not available if the Minister or the principal officer of the agency made the decision personally.

How to apply for an internal review

You must apply in writing and should include a copy of the notice of the decision provided and the points to which you are objecting and why.

You can lodge your application in one of the following ways:

Email: <mailto:FOIReview@defence.gov.au>
Post: FOI Directorate
Department of Defence
CP1-6-008
PO Box 7910
CANBERRA BC ACT 2610

External review

Do I have to go through the Defence's internal review process first?

No. You may apply directly to the Information Commissioner, within **30 days** of receiving your decision. However, going through the Defence internal review process gives Defence the opportunity to reconsider its initial decision and your concerns will most likely be addressed more quickly, without undergoing an external review process.

When can I go to the Administrative Appeals Tribunal (AAT)?

Under the revised FOI Act, you must seek external review through the Information Commissioner prior to applying to the AAT for such a review.

Making a complaint

You may make a complaint to Defence or the Office of the Information Commissioner about actions taken by Defence in relation to your application. The complaint needs to be in writing.

Information Commissioner contact

Further information about the external review process or how to make a complaint to the Information Commissioner is available:

Online: www.oaic.gov.au
Post: GPO Box 5218 Sydney NSW 2000
Fax: +61 2 9284 9666
Email: enquiries@oaic.gov.au





FREEDOM OF INFORMATION – PROCESSING TIMELINE

Day 0-7 Search Retrieve and review	FOI	FOI application received at the Department
		Refine scope with applicant if applicable
		Distribute an ALERT to relevant Group/Service if request is media or sensitive
		Task request to relevant Group/Service providing known internal deadline dates, blank schedule of documents and an Authorised Decision Maker is assigned applicable to Group/Service requirements
	Coord	Organise search for documents and relay responses to FOI if advised the request is unclear or is likely to be voluminous, or if it requires tasking to other areas of the Department to undergo a document search
		Retrieve all documents in scope (DPN and DSN), convert to PDF format, rename each document to reflect the relevant Item/Serial number and provide to FOI to determine charges
	FOI	Calculate if charges payable and send a preliminary assessment of charges to the applicant if applicable *** If not charges apply continue process below ***

Processing timeline stops until charges are accepted and paid

Days 8 – 17 Examine Prepare Review	FOI	Advise Group/Service when deposit received and provide known internal processing deadline dates for the request
	ADM	Review documents for sensitivities and advise FOI if consultation required ***If third party consultation required skip to the 60 day timeline ***
		Mark proposed redactions to documents in Adobe using exemption codes, draft a statement of reasons and provide to FOI for review
	FOI	Review statement and marked up documents and provide ADM advice on FOI legislation, guidelines and application of exemptions if required and return

Day 18 – 25 Quality Assurance	ADM	Review decision package comments and seek further guidance from FOI if required (If significant comments, provide word version of the statement and revised copy of the marked up documents to FOI for final review and comment)
		Declassify DSN documents by applying redactions and move to DPN
		Convert schedule of documents to PDF, strike through any document DLMS and apply remaining redactions
		Combine all documents and place FOI reference, Item/Serial number on the first page of each document
	FOI	Review final statement and proposed release of documents and request the balance of charges invoice to be raised if applicable
	ADM	Sign statement of reasons and send PDF decision package to FOI (signed statement of reasons, schedule of documents and redacted documents combined)

Day 26 – 30 Alert / Decision	FOI	If request is media or sensitive a MIN ALERT with FINAL decision package to be sent to all Group/Service stakeholders
		Liaise with ADM if comments received as a result of the ALERT process
	ADM	Coordinate a BRIEF in response to ALERT process if required
	FOI	Provide final decision package to applicant and prepare decision for release on the Defence Disclosure Log and advise Defence Web Information Capability if applicable

30 CALENDAR DAY PROCESSING TIMELINE

Day 8 – 10 Consultation	ADM	Provide written direction to FOI to undertake consultation and provide third party contact details and documents (redacted if necessary) to be sent to third parties for review
	FOI	Notify the applicant that consultation is required, seeking agreement to release identity and advise of the new due date, prepare consultation letters and distribute to third parties with redacted documents prepared by ADM
		Advise Group/Service and ADM of revised internal deadline dates

ADM TIP : Use the consultation period wisely and continue to examine, consider and prepare documents whilst awaiting responses

Day 40	FOI	Provide third party responses and recommendations on the proposed release of the documents to the ADM for consideration
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Days 41 – 47 Prepare Review	ADM	Mark proposed redactions to documents in Adobe using exemption codes, draft a statement of reasons and provide to FOI for review
	FOI	Review statement and marked up documents and provide ADM advice on FOI legislation, guidelines and application of exemptions if required and return

Days 48 – 55 Quality Assurance	ADM	Review decision package comments and seek further guidance if required (If significant comments, provide word version of the statement and revised copy of the marked up documents to FOI for final review and comment)
		Declassify DSN documents by applying redactions and move to DPN
		Convert schedule of documents to PDF, strike through any document DLMS and apply remaining redactions
		Combine all documents and place FOI reference, Item/Serial number on the first page of each document
	FOI	Review final statement and proposed release of documents and request the balance of charges invoice to be raised if applicable
	ADM	Sign statement of reasons and send PDF decision package to FOI (signed statement of reasons, schedule of documents and redacted documents combined)

Day 56 – 60 Alert / Decision	FOI	If request is media or sensitive a MIN ALERT with FINAL decision package to be sent to all Group/Service stakeholders
		Liaise with ADM if comments received as a result of the ALERT process
	ADM	Coordinate a BRIEF in response to ALERT process if required
	FOI	Provide final decision package to applicant and prepare decision for release on the Defence Disclosure Log and advise Defence Web Information Capability if applicable

60 CALENDAR DAY PROCESSING TIMELINE



FOI CHARGES ESTIMATE TOOL - SIMPLE - 1 of 2

(insert data in purple shaded boxes only)

GENERAL DATA ESTIMATE

(terms in red are explained on the notes sheet)

Pages (approx) of material in scope	0	in A4 pages
Number of discrete relevant documents	0	
Percentage (approx) of pages to disclose in whole	0%	
Percentage (approx) of pages requiring redaction	0%	
Percentage (approx) of content that is applicant's own personal information	0%	
Number of third parties to consult	0	

PROCESS - search and retrieval -	TIME per task	charge time:	COST @ \$15 per hr
Time required to execute searches - enter hours (including part hours eg 0.5)	0	0.00	\$0.00
Preparing schedules detailing all relevant documents (basic data entry eg doc no, date, description) - enter minutes per 10 documents	0	0.00	\$0.00
Search & Retrieval Subtotal		0.00	\$0.00

PROCESS - decision-making -	TIME per task	charge time:	COST @ \$20 per hr
Examine relevant pages for decision making - enter minutes per page	3	0.00	\$0.00
Redacting pages that are partially disclosed - enter minutes per page	1	0.00	\$0.00
Consult third parties - enter average per third party in hours	2	0.00	\$0.00
Preparation and notification of decision			
Writing statement of reasons - enter hours	3	3.00	\$60.00
Complete schedule by recording decision @ 4 documents per minute		0.00	\$0.00
Decision-making Subtotal (before deduction of 5 hours)		3.00	\$60.00
Decision-making Subtotal (after deduction of first 5 hours free for all)		0.00	0

ESTIMATED TOTALS

NUMBER OF RELEASED PAGES		0
TIME (in hours)		0.00
TOTAL COST		\$0.00
Financial hardship/public interest discount (as %)	0%	\$0.00
TOTAL COST (after discount)		\$0.00
MAXIMUM DEPOSIT		N/A

CONSERVATIVE CALCULATIONS OF PAGE NUMBERS - 2 of 2

*Docs * Pages*

	ITEMS IN SCOPE	No. Docs	Avg ~Pages	Count	Comment
Cat 1.				0	
Cat 2.				0	
Cat 3.				0	
Cat 4.				0	
Cat 5.				0	
Cat 6.				0	
Cat 7.				0	
Cat 8.				0	
Cat 9.				0	
Cat 10.				0	
	ALL	0	#DIV/0!	0	

CONSERVATIVE TIME ESTIMATES	No.
Total Hours (For one FTE to complete)	0
Total Weeks (For one FTE to complete)	0
Full Time Staff Needed to complete in 60 days	0.0

PURPLE: Enter information here**GREEN or CLEAR:** Formulas or content please do not touch**YELLOW:** Key information to prepare PA

NOTES**USING THIS TOOL**

This tool assists in generating an estimate but should not be considered definitive or binding. The Office of the Australian Information Commissioner has emphasised the need for agencies to base estimates on a reasonable sampling of relevant documents to ensure that appropriate assumptions are used to generate estimates for charging purposes. Some IC review decisions suggest a sample of 10-20% would be 'reasonable'.

This tool is a tweaked version of the AGS Simple charges tool developed in January 2017

Term	Explanation
In A4 pages	To estimate the volume it is necessary to take a common denominator. This tool uses A4 page equivalency. It may be necessary to sample some hits to derive an average document size
Documents	This is the number of pages remaining after reviewing the hits and removing irrelevant pages. These are the pages that the decision-maker will need to consider in terms of release or exemption.
Redaction	The process of blocking out parts of a document using redacting software or a manual process.
Own personal information	An agency may not charge a person for accessing personal information about themselves. Where a request seeks access in part to the applicant's personal information and in part to other information, it is permissible to charge for the balance of the request. The tool calculates the total cost of processing the request and then deducts the percentage of personal information from the total.
Third parties	The Freedom of Information (Charges) Regulations allow agencies to charge for the time spent 'in consultation with any person or body'. Where third parties, including other Commonwealth agencies, are consulted on a request the agency may charge this as part of its decision-making time. Time taken to consult with a third party will be context-specific. It includes time taken to prepare correspondence for the third party and time taken in discussion with the third party. As a general guide, allow up to 2 hours for a typical consultation with a non-government third party. Government third parties typically require less assistance to understand the FOI Act and so may require less time depending on the circumstances.
Discount	The OAIC Guidelines explain the circumstances in which a charge might be discounted for financial hardship or public interest reasons. Agencies have a broad discretion to reduce/waive charges for other reasons, as well as a discretion not to impose a charge at all.



What sort of documents should I release administratively?

Stakeholder fact sheet

Section 15A of the FOI Act provides provisions for persons seeking access to documents containing their personal information to first seek them through the **Department's established administrative processes**.

If a member or ex-serving member of the Australian Defence Force or a current or ex-employee of the Department of Defence is seeking access to their **personnel records** they **must** seek them administratively in the first instance, using the established administrative process.

You must not rely on the FOI process to handle requests made for access to documents which can be handled outside the FOI Act. There are several categories of documents which should be considered for release without a formal FOI application.

As a general rule, the sorts of documents that are suitable for administrative release include those:

- that relate to an individual
- provided by an individual to the Department, which an individual would reasonably be expected to have access to
- where the information involved would be released if it was requested under the FOI Act, either generally or to particular applicants whom the information concerns or affects
- which are publicly available or can be made publicly available

For example: documents which should be made available include service records, medical records, personnel file/records, fact finds (used to be referred to as Quick assessments) that involve the member and recruiting files. This list is not exhaustive and other documents containing personal information should also be considered.

Administrative access will not be appropriate at all times. Where disclosure of the information sought would likely impact third parties, or would result in information from the documents being heavily redacted prior to disclosure, it may be more appropriate to deal with the request through the FOI process.

Please note – FOI will **not** seek administrative release for documents such as:

- Inquiry Officer Inquiries (IOI) – Defence Inquiries are only to be released in accordance with the Defence (Inquiry) Regulations, subsection 63(2).
- Documents to which secrecy provisions apply – under section 38 of the FOI Act and inclusive of items listed in Schedule 3 of the FOI Act

What should be considered when releasing documents outside the FOI Act?

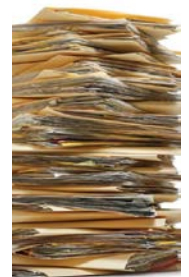
When releasing documents outside the FOI Act which also contain information other than that of the requesting individual you should prepare the document to comply with the *Privacy Act 1988*.

It is therefore necessary to point out to the applicant that the document should continue to be treated as official information and should not be released to the public.

Further guidance relating to privacy matters can be located at:

Web: <http://drnet/People/ComplaintResolution/Pages/Complaints.aspx>

Email: defence.privacy@defence.gov.au



Further information

Applicants seeking their **personnel records** are asked to provide written evidence to the FOI Directorate that they have attempted to seek the documents administratively in the first instance and any responses they have received from the actioning area.

For applicants who agree to an administrative release, they must first withdraw their FOI request. This does not prevent or preclude the applicant from making any future valid FOI request.

Requests for access to personnel records

Members and former members of the ADF, or current and former employees of the Department, who wish to have access to their personnel records are prevented by section 15A of the FOI Act from applying under the Act unless they have first requested access through normal administrative channels.

These may be their personal, health or psychology records.

More information can be found here <http://www.defence.gov.au/Records/>

Accessing documents through the National Archives of Australia (NAA)

Requests can be made to access Commonwealth archival records in the OPEN period (more than 20 – 30 years old).

If the records sought were created by a Commonwealth Department or Agency and are more than 20 years old, a request to access them under the *Archives Act 1983* (Cth) can be made by emailing ref@naa.gov.au or at the NAA webpage <http://www.naa.gov.au/collection/askquestion/index.aspx>

Accessing documents through other related agencies

The Department of Veterans Affairs – <https://www.dva.gov.au/>

The Australian War Memorial – <https://www.awm.gov.au>

Links to legislation and guidance about FOI

Office of the Australian Information Commissioner (OAIC)
<https://www.oaic.gov.au/freedom-of-information/>

Freedom of Information Act 1982 (FOI Act)
<https://www.legislation.gov.au/Series/C2004A02562>

FOI Guidelines
<https://www.oaic.gov.au/freedom-of-information/foi-guidelines/>

FOI contact details

For further information please contact the FOI Directorate:

Freedom of Information Directorate CP1-6-001
Campbell Park Offices
Canberra ACT 2600

Send an email to:
FOI@defence.gov.au



Coordinator's Information

Stakeholder fact sheet

This information is to aid **FOI Coordinators** to support Authorised Decision Maker's within their group or service to undertake FOI Decision Making on behalf of the **Secretary of the Department of Defence**, the principal officer for FOI in Defence.

It is recommended that FOI Coordinator's attend the Accredited Decision Makers course.

Types of engagement

Request for documents – when your group or service has been identified as potentially holding documents that match the scope of an FOI request.

Tasking/driving instructions – when your group or service has been identified as holding documents that match the scope of an FOI request.

Courtesy consultation – when another government agency seeks Defence comments on that agency's proposal to release documents under the FOI Act. When your group or service has been identified as the originator of the documents subject to consultation.

Section 48 amendments – when an individual has applied for amendment or annotation of documents held by Defence where personal information about the individual is:

- (a) incomplete, incorrect, out of date or misleading; and
- (b) being used (or has been used) by Defence for an administration purpose.

AusTender not for publication (NP) activities

Timeframes

Under the FOI Act Defence has 30 calendar days to provide a decision and documents to the applicant.

DEFENCE FOI – 30 CALENDAR DAY TIMELINE

Calendar Days 0 - 7	Calendar Days 8 - 17	Calendar Days 18 - 25	Calendar Days 26 - 30
<i>Provide documents to understand size/complexity of request; need for charges [may stop clock] Frontloading to maximise time for busy stakeholders.</i>	<i>Examine/Prepare/Review</i>	<i>Feedback from DFOI Finalising Decision</i>	<i>IF MARKED SENSITIVE FOI SEND MIN ALERT 5 DAYS PRIOR BY DAY 30 DECISION TO APPLICANT</i>
BY DAY 7 DOCUMENTS DUE	BY DAY 17 DRAFT DECISION DUE	BY DAY 25 FINAL DECISION DUE	

Extensions – managed by FOI Directorate

- **Section 15AA of the FOI Act** [+30 days] – with applicant agreement
- **Section 15AB of the FOI Act** [x days] – at the discretion of the Information Commissioner
- **Consultation** [+30 Days]
 - Business
 - Personal
 - State relations
 - International

NOTE: Extensions are not available for section 48 amendment and annotation of personal records requests





Providing documents

Stakeholder fact sheet

What documents do I have to provide?

If you are asked to provide documents, you will be given a '**scope**', which describes the documents that the applicant is seeking. If you think a document **may match the scope** of a request but you are not sure, you should provide it so that the decision maker can determine if it does. You must provide the signed document search list when you provide the documents.

What if there are no documents matching the scope of the request?

If there are no documents matching the scope of the request, you should provide a detailed list of the searches you undertook to determine that no documents exist, or that they could not be found. It is beneficial to include why you think no documents exist such as the date range or not handled by Defence etc.

What is a 'document' for the purposes of the FOI Act?

The term 'document' is defined broadly in the FOI Act and includes, but is not limited to, minutes, submissions, files, emails (including personal emails), post it notes, diaries, notebooks, reports, computer print outs, tapes or disks, text messages, maps, plans, photographs, microfiche, tape recordings, films, videotapes and metadata. You should also consider draft documents, unless they are specifically excluded from the scope of the request.

Do I have to provide documents if they contain personal information, national security information, or other sensitive information?

Yes. If a document matches the scope of a request, regardless of its classification, distribution or sensitivity, you must provide the document.

Can I contact the applicant or third parties directly?

No. Only the FOI Directorate may contact applicants and third parties. Contact FOI@defence.gov.au if you believe contact with the applicant or third parties is required.

In what format should I provide the documents?

You must provide copies of the **original, unedited** documents. You must not alter the documents in any way. If there are a large number of documents contact your FOI coordination area to get access to a shared Objective folder to place the documents in.

When is my deadline to provide documents?

The FOI Act imposes strict statutory time limits. It is vital that you meet the deadline requested by the FOI Directorate. If you think you will not be able to meet the deadline you should contact your FOI coordinator, or the FOI Directorate, immediately.

Where can I find further information?

Further information is available from the FOI intranet page

<http://drnet/AssociateSecretary/ODMP/Pages/ODMP-Fol-and-Privacy.aspx>

Alternatively, you may contact your FOI Coordinator or the FOI Directorate:

Email: FOI@defence.gov.au





What is a document for the purpose of Freedom of Information?

Stakeholder fact sheet

The FOI Act does not contain an exhaustive definition of what constitutes a 'document'. However, section 4 states that a '**document**' includes:

- (a) any of, or any part of any of, the following things:
 - (i) any paper or other material on which there is writing;
 - (ii) a map, plan, drawing or photograph;
 - (iii) any paper or other material on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them;
 - (iv) any article or material from which sounds, images or writings are capable of being reproduced with or without the aid of any other article or device;
 - (v) any article on which information has been stored or recorded, either mechanically or electronically;
 - (vi) any other record of information; or
- (b) any copy, reproduction or duplicate of such a thing; or
- (c) any part of such a copy, reproduction or duplicate;

but does not include;

- (d) library material maintained for reference purposes; or
- (e) Cabinet notebooks.



What can documents include?

Documents can include minutes, submissions, files, emails, post it notes, diaries, notebooks, reports, computer print outs, tapes or disks, text messages, maps, plans, photographs, microfiche, tape recordings, films, videotapes and metadata.

Drafts are included within the FOI Act and need to be considered if within the scope of the request. Check with the FOI Directorate if you are unsure.

Meaning of a document in the form of a 'record' and 'writing'?

DOCUMENT: means '**any record of information**'

- 'record' includes information stored or recorded by means of a computer or paper.
- 'writing' is any mode of representing or reproducing words, figures, drawings or symbols in a visible form and therefore constitutes a document.



When identifying documents ...

Understand the scope of the FOI request:

- Before identifying documents for an FOI request, action areas need to understand what documents the applicant is seeking and whether they can be released administratively. If the scope of the request is still unclear, notify the FOI Directorate. They will liaise with the applicant to seek clarification.

Once the scope is established:

- Make sure you conduct adequate searches to locate the documents matching the FOI request.
- Include drafts unless they are excluded from the scope of the request.

Providing information for a preliminary assessment of charges:

- Consider the number of documents that fit the scope of the request.
- The preliminary assessment of charges may be revised if the applicant narrows the scope after receiving the estimated charges. Make sure you conduct a thorough search at this first stage.

If you require further detail or further information relating to this process, contact FOI Directorate.



FOI contact details

Freedom of Information Directorate CP1-6-001
Campbell Park Offices
Canberra ACT 2600

Send an email to:

FOI@defence.gov.au

Visit our website:

Intranet: <http://drnet/AssociateSecretary/ODMP/Pages/ODMP-Fol-and-Privacy.aspx>

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Request for documents checklist

Stakeholder quick reference guide

- Your group/service will receive a **request for documents** if it has been identified as potentially holding documents that match the scope of the request.
- When you are tasked to search for documents, they need to be identified and retrieved promptly to allow sufficient time to undertake decision making activities.
- If you hold documents you should provide them or at a minimum provide information about:
 - the number of documents
 - the number of pages in each
 - search time required or undertaken
 - any known sensitivities surrounding the documents

If the FOI Directorate determines processing charges apply, a preliminary assessment of charges will be sent to the applicant, which will in turn stop the clock. All charges decisions are made by the FOI Directorate.

Checklist

- ☐ Does the scope of the request require clarification or refining? Please contact the FOI Directorate immediately to discuss.
- ☐ Do you believe other areas may hold documents that match the scope? Please advise the FOI Directorate for further tasking.
- ☐ Identify **action areas** within your group/service that may hold documents or individuals that can assist with searching.
(Please also see and use as required: [Providing Documents for FOI](#) and [Document search list](#))
- ☐ Consolidate the documents retrieved from your group/service and provide to FOI.
- ☐ You must provide a pdf copy of the original unedited documents (including attachments). You must not alter the documents in any way. If there are a large number of documents, please ask the FOI case officer to provide access to a shared Objective folder to place the documents.

The FOI Directorate will subsequently advise if further action is required.

- If the applicant agrees to pay the charges, further tasking/driving instructions will be sent to you.
- The FOI Directorate may determine that charges do not apply. Further tasking/driving instructions will be sent to you.
- The FOI Directorate may send the applicant advice that their request is too large. You may be asked for advice on how the applicant can refine their scope.
- The applicant may withdraw their request or be unwilling to pay the charges, at this time the request is withdrawn or deemed withdrawn. You will not receive any further correspondence.

