Freedom of Information Guidelines

EXEMPTION SECTIONS IN THE FOI ACT

Prepared for the Department of the Prime Minister and Cabinet
As at 9 October 2009

FREEDOM OF INFORMATION (FOI) GUIDELINES
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USING THESE GUIDELINES

These guidelines are a reference tool for decision-makers and others involved in making and notifying FOI decisions. They do not replace the need to obtain comprehensive training on the FOI process and the operation of the specific exemptions. The guidelines provide an outline of the exemptions, articulate the principles on which they operate and cite pertinent cases as examples of how the exemptions have been interpreted by the Administrative Appeals Tribunal (AAT), the Federal Court and the High Court of Australia.

These guidelines only deal with the exemptions of the FOI Act in fairly general terms. In dealing with FOI requests, it may be necessary for agencies to seek legal advice on the interpretation and application of the exemptions. The Privacy & FOI Policy Branch of the Department of the Prime Minister and Cabinet can be contacted in relation to policy aspects of the *Freedom of Information Act 1982* (FOI Act).

It is recommended that new decision-makers refer to *FOI Guidelines - Fundamental Principles and Procedures* which explains a number of central concepts in the FOI Act such as 'document', 'agency', 'document of an agency' and the issues and processes involved in dealing with a request under the FOI Act.

Decision-makers should also refer to *FOI Guidelines - FOI Section 26 Notices - Statement of Reasons* as a companion to these guidelines as it explains the purpose and importance of statements of reasons. It is essential that decision-makers have a good understanding and appreciation of the decision making process in order to be able to explain the factual and rational bases on which the exemptions rest.

Decision-makers may also wish to refer to other guidelines available on the Department's website at www.pmc.gov.au/foi.

Attachments A and B provide lists of cases cited in the guidelines and the citation details. Attachment A lists the cases according to section and Attachment B lists the cases in alphabetical order. (Some of the significant decisions from State and Territory jurisdictions have been included where relevant. Reference is also made to AAT decisions under the *Archives Act 1983* where similar exemptions apply).

To view the exemptions sections as they appear in the FOI Act, see the *Freedom of Information Act 1982*.

These guidelines are a work in progress and are updated each year. Please contact the Privacy & FOI Policy Branch of the Department of the Prime Minister and Cabinet with any errors or omissions.

1 April 2009

DEPARTMENT OF THE PRIME MINISTER AND CABINET

1. Introduction

1.1 The aims and philosophy of the FOI Act

1.1.1 The Commonwealth *Freedom of Information Act 1982* (FOI Act) came into force on 1 December 1982 and gave *every person* the legally enforceable right to obtain access to government held documents. *Person* is defined in section 22 *Acts Interpretation Act 1901* 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 Australian citizens; a person resident abroad, whether or not they are Australian citizens provided they specify an address in Australia to which notices under the FOI Act can be sent; a minor; a body corporate; and an individual person serving a sentence in prison.

1.1.2 Similar legislation has been enacted in all Australian States, the Australian Capital Territory, and the Northern Territory.

1.1.3 The underlying rationale behind the FOI Act is open and accountable government. Its object is to *extend as far as possible the right of the Australian community to access to information in the possession of the Commonwealth* (s 3).

1.1.4 Broadly, the aims of the legislation are to:

- enable people to participate in the policy and decision making processes of government;
- inform people of government functions and enable them to access decisions that affect them;
- open government's activities to scrutiny, discussion, review and criticism;
- enhance the democratic accountability of the Executive; and
- provide access to information collected and created by public officials.

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

1.1.6 The Act should be interpreted in such a way so as to promote these aims. See Interpretation of the exemptions, paragraphs 1.3.1–1.3.5.

1.1.7 The starting point for an agency dealing with an FOI request should be that an applicant has a right to obtain the requested material. Decision-makers must ask themselves whether there is any real sensitivity in the information in that disclosure could reasonably be expected to harm important governmental interests or the personal or business affairs of third parties. It is only then that an agency should start to consider the application of the exemptions, if any, or any other provision in the FOI Act that may have an effect on access to documents.

1.2 General principles governing access

1.2.1 Section 11(1) creates a legally enforceable right to obtain access to a document of an agency or an official document of a Minister in accordance with the

Act but does not give rise to an automatic statutory right of access. There is thus a *prima facie* right of access which is subject to the deferment provisions in s 21 and the exemption provisions in the FOI Act. In addition to exempt documents (see para.1.2.5), the Act has limited application to courts and to the Official Secretary to the Governor-General (sections 5, 6 and 6A) and does not apply to documents covered by section 12 (including documents in the open access period under the *Archives Act 1983*) or covered by section 13 (documents in certain institutions including the Australian War Memorial and the National Library of Australia). When an agency decides to release a document, it is making the decision that no exemption will be made and access to the document will not be deferred (see *Harris v Australian Broadcasting Corporation*).

1.2.2 The legally enforceable right of access given by s 11(1) of the FOI Act does not extend to exempt documents. Section 18 provides that where a valid request has been made and appropriate charges are paid, a document that is subject to the FOI Act shall be disclosed with the only exception being where the document is exempt. The onus of proving that a document is exempt lies with the agency (s 61(1)).

1.2.3 An applicant is not required to demonstrate a need to know in order to exercise the general right of access contained in s 11(1). Section 11(2) states that a person's right of access is not affected by the applicant's motives or the reasons they give for seeking access or the agency's or Minister's belief as to what their reasons are. Also the interests of the applicant are immaterial and cannot be taken into account in deciding whether or not access should be granted (eg *Re Green and Australian and Overseas Telecommunications Corporation*). However, there is a distinction between the threshold right of access to which s 11(2) applies, and decisions made under exemptions containing a public interest (or unreasonableness) test where the identity of an applicant or his or her interests in obtaining access, or the proposed end use of information, may evidence itself as a public interest factor. There are also exemption provisions requiring that in certain cases the identity of the applicant be taken into account: see ss 38(2), 41(2) and 43(2).

1.2.4 Where documents are disclosed in response to an FOI request there is no restriction under the FOI Act on what the applicant may do with them (*News Corporation v National Companies and Securities Commission*; *Searle Australia Pty Ltd v Public Interest Advocacy Centre and Department of Community Services and Health*); and *Colakovski v Australian Telecommunications Corporation*). For this reason it is usually necessary to judge the effect of release of documents by reference to disclosure to the public at large on the basis that further disclosure may occur. (See *FOI Guidelines - Fundamental Principles and Procedures* at paragraphs 5.4–5.6 for more detail). There are however some exceptions to this rule eg personal and business information.

1.2.5 An exempt document is defined in s 4(1) of the FOI Act as:

- a document which is exempt by virtue of the exemptions in Part IV (ss 33 to 47A);
- a document in respect of which an agency, person or body is exempt because of section 7;
- an official document of a Minister that contains matter that does not relate to the affairs of an agency.

1.2.6 Section 22(1)(a)(i) of the FOI Act requires the deletion of exempt matter wherever possible so that access to the remaining non-exempt portions of the document can be given (this section also operates in a similar fashion in relation to irrelevant material – (see s 22(1)(a)(ii)).

1.2.7 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 information that once was sensitive no longer being sensitive. It is always a question of fact whether or not there has been a change in a document's sensitivity. The Administrative Appeals Tribunal (AAT) has recognised on a number of occasions that there may be a change over time in a document's exempt status (see eg *Re Fewster and Department of Prime Minister and Cabinet (No 2)* and *Re Weetangera Action Group and ACT Department of Education and the Arts*).

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

- exemptions which depend on demonstrating the expected harm of disclosure of the contents of the specific documents: ss 33 (national security, defence or international relations), 33A (Commonwealth-State relations), 36 (deliberative documents), 37 (law enforcement), 39 (financial or property interests of the Commonwealth), 40 (operations of agencies), 41 (personal information), 43(1)(b), (c)(i) & (ii) (business and professional affairs), 43A (research), 44 (national economy), 45 (material obtained in confidence); and
- exemptions which protect documents of a particular class or kind without a need to refer to the effects of disclosure: ss 34 (Cabinet documents), 35 (Executive Council), 38 (secrecy provisions), 42 (legal professional privilege), 47 (companies and securities legislation), 47A (electoral rolls), 7 and Schedule 2 (exempt activities of agencies).

1.3 Interpretation of the exemptions

1.3.1 Decision-makers should keep the object and aims of the Act in mind in making access decisions. The object is to make available to members of the public as much government-held information as possible consistent with the proper protection of sensitive government and third party information by means of the exemptions and some exceptions to the operation of the Act (see s 3(1)(b)).

1.3.2 In addition, s 3(2) provides that Parliament's intention is that the provisions of the Act must be interpreted so as to further the object in s 3(1) and that any discretions conferred by the Act must be exercised as far as possible so as to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information. However, the objects clause does not mean that the FOI Act *leans* towards disclosure (*News Corporation v National Companies and Securities Commission*; *Searle Australia Pty Ltd v Public Interest Advocacy Centre and Department of Community Services and Health*).

1.3.3 Where there are ambiguities in the interpretation of provisions of the FOI Act, including exemption provisions, it is proper to give them a construction that would further, rather than hinder, free access to information (*Searle Australia Pty Ltd v Public Interest Advocacy Centre and Department of Community Services and Health; Victorian Public Service Board v Wright*). The onus is on an agency to make out a case for exempting a document based on a construction of the exemptions

which presumes disclosure (see s 61 and *Commissioner for Police v District Court of New South Wales* (*Perrin's case*)). This may have important consequences for the application of public interest tests.

1.3.4 The provisions of the Act, including the exemption provisions, are to be interpreted according to their ordinary meaning, bearing in mind the object of the Act (*Arnold v Queensland* and *Searle Australia Pty Ltd v Public Interest Advocacy Centre and Department of Community Services and Health*). Where an exemption involves determining where the balance of the public interest lies in relation to disclosure of information, decision-makers must take into account all competing public interest factors in facilitating and promoting the disclosure of information (see Introduction, 1.6.3 on the public interest).

1.3.5 Section 32 of the FOI 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 implications 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. Decision-makers need to keep in mind the possible availability of other exemptions. However, only significant and supportable claims should be made.

1.3.6 Agencies are required to comply with the direction issued by the government in 1985 that they should not refuse access to non-contentious material only because there are technical grounds of exemption available under the FOI Act (see paragraph 2.7 of *FOI Guidelines - Fundamental Principles and Procedures*).

1.4 Access to documents apart from the FOI Act

1.4.1 Section 14 encourages Ministers and agencies to disclose or publish documents, including exempt documents, otherwise than under the FOI Act where they can properly do so or are required by law to do so. If full disclosure is made *outside* the FOI Act, an agency's obligations under that Act have been discharged (*Davison v Commonwealth of Australia and the Australian Capital Territory*).

1.4.2 The section is intended to facilitate access to government documents without recourse to the provisions of the FOI Act. Access outside the Act may be appropriate where, for example, the request is for personal information of the requestor. The FOI Act does not prevent or discourage this practice (*Re Arnold Bloch Liebler and Australian Taxation Office (No 2)*).

1.4.3 Decision-makers should keep in mind that release of documents outside the FOI Act means that the protections which would otherwise be afforded under ss 91 and 92 of the Act in respect of civil and criminal liability are no longer available (see *FOI Guidelines - Fundamental Principles and Procedures*, paragraphs 9.1–9.8). Protection against actions for defamation, breach of confidence or infringement of copyright, and against criminal proceedings is restricted to those persons who are *required* to provide access to documents or where they have a bona fide belief that they are required to give access, in accordance with the Act (*News Corporation v National Companies and Securities Commission*).

1.4.4 The phrase *where they can properly do so* has reference both to legal provisions and general norms of public administration. It is clearly not *proper* to disclose information without proper authorisation in circumstances where

unauthorised disclosure is legislatively prohibited, for example by ss 70 and 79 of the *Crimes Act 1914* or secrecy provisions in legislation.

1.4.5 It is also necessary to ensure that adequate protection is given to sensitive information relating to personal privacy and other sensitive third party information (see *FOI Guidelines - Fundamental Principles and Procedures* paragraphs 2.8–2.9). Disclosure of the former may be a breach of the *Privacy Act 1988* Information Privacy Principle (IPP) 11 and disclosure of the latter may inadvertently disclose information the sensitivity of which is not apparent to the decision-maker. Therefore, it is normally desirable to deal with access to sensitive or potentially sensitive third party information under the FOI Act which contains mandatory consultation provisions and provides rights of review (see ss 26A, 27 and 27A and *FOI Guidelines - Fundamental Principles and Procedures* paragraphs 6.29–6.32).

1.5 Discretion to release documents under the FOI Act

1.5.1 Agencies are not obliged to withhold exempt documents where an exemption technically applies if the document contains information which is not sensitive and can be released. Section 18(2) of the FOI Act gives an agency the discretion to release a document under the FOI Act even if it technically falls within an exemption. It is government policy that exemption is to be claimed only where the material is genuinely sensitive and real harm will be caused by its disclosure, notwithstanding that an exemption may apply (Cabinet decision March 1986).

1.5.2 The decision to release exempt material is a decision under the FOI Act provided the conditions in s 15 (concerning the validity of the request) and s 23 (decision to be made by an authorised person) are satisfied. This view is not universally accepted but can be relied upon until there is an AAT or Federal Court decision to the contrary. Note that the Federal Court in *Davison v Commonwealth of Australia and the Australian Capital Territory* held that disclosure outside the Act discharged the agency's duties fully.

1.5.3 The indemnity provisions in ss 91 and 92 of the FOI Act will not apply where the agency is exercising its discretion not to claim the exemption. The provisions only apply where access is *required* to be given, that is, where the exemption provisions do not apply. However, it is Ministers and agencies who give access to documents under the FOI Act (*Re Actors Equity Association of Australia and Australian Broadcasting Tribunal*). The fact that individual officers have to authorise access is recognised by s 92 of the FOI Act, but this does not detract from the fact that it is the Minister or the agency that gives access. It follows that release of these documents where required under the FOI Act would not constitute an unauthorised release by an officer of an agency. (See also *Re McKinnon and Powell and Department of Immigration and Ethnic Affairs* for discussion on effect of ss 91 and 92.)

1.6 The meaning of particular words and phrases in the exemptions - recurring themes

1.6.1 'Substantial adverse effect'

1.6.1.1 A number of exemptions require decision-makers to determine that disclosure will have a *substantial adverse effect* before the exemption can be

claimed. These provisions are ss 39 (financial and property interests of the Commonwealth), 40(1)(c), (d) & (e) (operations of agencies etc) and 44(1)(a) (national economy documents). The word *substantial* has variously been interpreted to mean *severe, of some gravity, large or weighty or of considerable amount, real or of substance* and *not insubstantial* or *nominal* consequences (*Harris and Australian Broadcasting Corporation*; *Re Dyrenfurth and Department of Social Security*; *Re B and Medical Board of the ACT*; *Re Ascic v Australian Federal Police*; *Re Russell Island Development Association and Department of Primary Industries and Energy*; *Re Bayliss and Department of Health and Family Services*). The word *substantial* certainly requires loss or damage that is more than trivial or minimal (*Tillmanns Butcheries Pty Ltd v Australasian Meat Employees Union & Ors*).

1.6.1.2 The adverse effect must be sufficiently serious or significant to cause concern to a properly informed reasonable person (*Re Thies and Department of Aviation*). The AAT in *Re Dyki and Commissioner of Taxation* , noted: [t]*he onus of establishing a 'substantial adverse effect' is a heavy one*. However, with reference to *Re Barkhordar and ACT Schools Authority*, the AAT in *Re Dyki and Commissioner of Taxation* at 130 stated: *whilst a 'substantial adverse effect' may be a formidable obstacle for the Commissioner to establish, it is certainly not impossible*.

1.6.2 'Would or could reasonably be expected to'

1.6.2.1 Several exemptions require a decision-maker to determine whether a specified harm *would or could reasonably be expected to* result from disclosure. These provisions are ss 33 (national security, defence and international relations), 33A (Commonwealth-State relations), 37 (law enforcement and protection of public safety), 40 (operations of agencies) 43(1)(c)(i) and (ii) (adverse effect on business and prejudice future information) and 44 (national economy documents). The decision-maker must have *real and substantial* grounds for the expectation that harm will occur and must not rely on grounds which are merely speculative, imaginable or theoretically possible.

1.6.2.2 Something which is *reasonably expected* is an expectation that is based on reason, one for which *real and substantial grounds* exist when looked at objectively which are not irrational, absurd or ridiculous (*Attorney-General's Department v Cockcroft*; *Re Actors Equity Association of Australia and Australian Broadcasting Tribunal*) or fanciful, imaginary or contrived (*Re Clark v Australian National Parks & Wildlife Service*). Decision-makers must keep in mind that they are considering the reasonableness of the expectation of the alleged effect, not the reasonableness of the claim for exemption (*Searle Australia Pty Ltd v Public Interest Advocacy Centre and Department of Community Services and Health*).

1.6.3 The public interest

1.6.3.1 The phrase *public interest* appears in a number of exemptions in the FOI Act. The concept of public interest is given different applications in various areas of decision making, depending on the legislative or administrative purposes involved. The 1979 Senate Committee on FOI described the concept in the FOI context as a *convenient and useful concept for aggregating any number of interests that may bear upon a disputed question that is of general – as opposed to merely private – concern.*

1.6.3.2 When considering whether documents can or should be released, the concept of the public interest requires a decision-maker to weigh the public interest

factors for and against disclosure and to decide, on balance, whether disclosure is *in* the public interest. In order to comply with the principles in the FOI Act, documents should be released unless the balance lies strongly against disclosure.

1.6.3.1 What is the public interest

1.6.3.1.1 The concept of the public interest is not defined in the FOI Act. This omission was deliberate so that decision-makers have to undertake a specific analysis of what constitutes the public interest in any particular matter at the time, rather than relying on set criteria. The concept is not unique to the FOI Act. It is employed, for example, in determining when public interest immunity may be claimed by government, and sometimes others, in legal proceedings to prevent disclosure of (usually official) documents. Many of the factors found in FOI decisions favouring non-disclosure of official documents have been drawn from cases on public interest immunity. However, those cases do not furnish examples of pro-disclosure factors in making FOI decisions, as there is only one principal factor of this kind relevant – that is, in broad terms, the public interest in the fair and open administration of justice.

1.6.3.1.2 The public interest has been described as something that is of *serious concern or benefit to the public*, not merely of *individual interest* (*British Steel Corporation v Granada Television Ltd*). It has been held that public interest does not mean *of interest to the public* but *in the interest of the public* (*Johansen v City Mutual Life Assurance Society Ltd*).

1.6.3.1.3 Accordingly, to conclude that on balance disclosure of information would be in the public interest (or not contrary to the public interest) is to conclude that the benefit to the public at large resulting from disclosure outweighs the benefit to it of withholding the information. It may be relevant to that conclusion that there is a serious public debate about, or concern with, the issues with which the requested documents deal.

1.6.3.1.4 In arriving at the balance of public interest in a particular case, it may be necessary to consider the interests of a substantial section of the public as a factor to be weighed. As an example in another field, in *Sinclair v Mining Warden of Maryborough* the High Court held that the interests of the residents of Fraser Island were the interests of a substantial section of the public. In the words of Barwick CJ:

> The interest, of course, must be the interest of the public and not mere individual interest which does not involve a public interest. Clearly enough, the material evidenced by the appellant did relate to a public interest not limited to the interests of a less than significant section of the public.

1.6.3.1.5 It is clearly established that *the public interest* is not synonymous with *government interest* (*Re Bartlett and Department of Prime Minister and Cabinet*). For example, it could not be said there is a public interest in the rights of individuals or corporations being unfairly disadvantaged in a dispute with government relating to trading or commercial activities.

1.6.3.1.6 The lack of specificity in the term *public interest* can make it difficult for a decision-maker to ascertain the factors, both for and against disclosure, relevant to particular information (*Re Sutherland Shire Council and Department of Industry, Science and Resources and Department of Finance and Administration*). There is no restriction on the factors to which an agency can refer when determining whether disclosure would be contrary to the public interest. The factors referred to will

depend on the type of information contained in the documents, the context of their creation, the information which would be released and any other circumstances particular to the request. It will not be enough simply to list the factors which are contrary to the public interest; a decision-maker will have to explain why the disclosure of the document would be contrary to the public interest taking into account the public interest in facilitating and promoting the disclosure of information referred to in s 3 (*Arnold v Queensland*) and any other specific pro-disclosure factors.

1.6.3.1.7 Where a decision-maker claims an exemption that incorporates a public interest test and decides that it would be contrary to the public interest to disclose the information, he or she should list in the statement of reasons all the public interest factors, both for and against disclosure, taken into account in applying the test. The decision-maker must be able to show that a specific detriment will occur because of the disclosure. Section 36 (deliberative process documents) expressly contains the requirement to state the public interest ground on which access was refused (s 36(7)) and in practice this requirement should be extended to other exemptions containing a public interest test. It is important that applicants have a clear understanding of an agency's reasons for a decision (see *FOI Guidelines - FOI Section 26 Notices - Statement of Reasons*). This will assist them to assess whether an application for review of the decision is warranted. Provided the matter has been considered carefully and objectively in light of the specific circumstances at hand, the agency cannot be criticised for the view it has taken, even if on review the decision is overturned.

1.6.3.2 Weighing the public interest

1.6.3.2.1 Once the public interest factors have been identified, the decision-maker must then weigh up the various factors and decide either in favour of disclosure or non-disclosure. This is not always an easy task. The requirement to undertake this process is, however, necessary and important. The High Court in *Sankey v Whitlam* said that the task of a court in dealing with a claim for withholding documents on public interest grounds is to weigh competing public interests. The courts and FOI decision-makers must weigh competing aspects of the public interest against each other and decide where the balance lies.

1.6.3.2.2 The balancing exercise does not involve any presumption in favour of release or of non-disclosure. However, the object of the legislation in s 3 to ensure public access to government held information as far as possible, is always to be included as a public interest factor to be weighed in favour of release. For example, where the degree of disadvantage that may be caused by disclosure is small, or the prospect of public disadvantage is comparatively remote, the principles in s 3(2) of the FOI Act may be enough on its own to tip the balance in favour of disclosure (*Arnold v Queensland*). Applying this factor in the balancing process is far more than a formality. A decision-maker must weigh the degree of impairment of the democratic objectives of the Act resulting from non-disclosure of the specific documents against the specific adverse effects of disclosure on the governmental or other interests protected by the exemption. Release, for example, of deliberative process documents will often enhance the democratic process, and that should be given serious weight in considering whether the adverse effects of release should lead to the documents being withheld.

1.6.3.2.3 There will usually be competing public interest arguments for and against disclosure which a decision-maker will have to weigh up. Not undertaking this exercise properly can leave a decision-maker open to the criticism that they failed to consider adequately the arguments in favour of disclosure or failed to properly balance the competing arguments.

1.6.3.2.4 If a decision-maker can say that specific adverse effects on an agency's operations will result from disclosure or it will suffer some significant or substantial impairment of its decision making processes as a result of disclosure, it may be enough to tip the balance in favour of a decision that release would be against the public interest. However, mere inconvenience or embarrassment to an agency or government is not a sufficient ground for relying on the public interest against disclosure.

1.6.3.2.5 When thinking about the application of any public interest factors, decision-makers must remember that they (or some other officer of the agency) may be called upon to provide evidence for why they believe the adverse consequences will occur (for example, if the applicant seeks review of the decision by the AAT).

1.6.3.3 The public interest and class claims

1.6.3.3.1 A public interest claim must relate to the *contents* of a specific document, *not* merely to the *kind* of document it is. It will not be enough in itself that the document falls within a particular *class of document* eg a briefing by a senior public servant of his or her Minister, although the level of communication may be a relevant consideration. The Commonwealth authorities are examined in *Re Weetangera Action Group and ACT Department of Education and the Arts*), where the AAT said that s 36 does not permit the making of a disguised class claim as a public interest ground favouring disclosure. The determination of whether the document is exempt or not will be a determination based on its contents rather than any readily acceptable class exemption (*Re Chapman and Minister for Aboriginal and Torres Strait Islander Affairs*). This does not prevent a claim that the disclosure of a document containing a certain kind of information may have an effect on future provision of similar information (see eg *Department of Social Security v Dyrenfurth*).

1.7 Conclusive certificates

1.7.1 Provisions to issue conclusive certificates in support of all exemptions under which a certificate could be issued were repealed by the *Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act 2009* ('the Certificates Act'). The Certificates Act also repealed the power to issue conclusive certificates under the Archives Act. The effect of the repeal of the certificate power is that the AAT may undertake full merits review of all exemption claims in the normal manner. The Certificates Act provides that existing conclusive certificates will be revoked on and from the time a new request for access to a document covered by a certificate is received on or after commencement of the Act (subitem 34(2) of Schedule 1). The Certificates Act commenced on 7 October 2009. With revocation, a decision can then be made in the normal way on whether or not an exemption should be claimed for the document. If a certificate covers more than one document, and access is not sought to all the documents, the certificate will continue to have effect in relation to those documents not subject to the request for access. The Certificates Act also provides that nothing prevents a person from making a new

request for access to a document covered by a certificate if they were refused access in reliance on a certificate prior to the commencement of the Certificates Act (subitem 34(3)(b) of Schedule 1).

1.8 Refusal to confirm or deny existence of a document

1.8.1 A number of sections provide for the operation of s 25 of the FOI Act - the ability neither to confirm nor deny the existence of a document(s): ss 33 (national security, defence and international relations), 33A (Commonwealth/State relations) and 37 (law enforcement).

1.8.2 Agencies are not required to give information as to the existence of relevant documents where the inclusion of such information in another document would cause the latter to be exempt. The agency may give notice in writing to the applicant that neither confirms nor denies the existence of the document, but informing the applicant that, assuming the existence of the document, it would be exempt under one of the relevant sections noted above.

1.8.3 As use of this section has the effect of preventing the applicant from knowing that access to a document has been denied, resorting to s 25 should be strictly reserved for cases where the circumstances of the request require it. There are particular difficulties in relying on s 25(5). For a more detailed discussion of the use of s 25 see *FOI Guidelines - FOI Section 26 Notices - Statement of Reasons* paragraphs 88–93.

2. Section 7 - Exemption of certain agencies

2.1 Section 7, in conjunction with Schedule 2, entirely exempts some agencies from the FOI Act and exempts others in respect of certain classes of documents.

2.2 Under s 7(1) the various bodies listed in Part I of Schedule 2, and the person holding and performing the duties of the office specified in that Part, are deemed not to be prescribed authorities for the purposes of the Act (ie ASIS, ASIO, the Auditor-General (but not the Australian National Audit Office), the Aboriginal Land Councils and Land Trusts etc).

2.3 Under ss 7(2) and (2AA), the agencies listed in Parts II and III of Schedule 2 (including the Australian Transaction Reports and Analysis Centre, Australia Post, the Reserve Bank, Medicare Australia, the Australian Broadcasting Corporation and Special Broadcasting Services Corporation and a number of primary industry statutory authorities) are exempt in relation to certain material (such as program material); documents concerning certain activities, matters or information; or documents in respect of their commercial activities..

2.4 Section 7(4) requires that references in s7(2AA) and Part II of Schedule 2 to *documents in respect of particular activities* are read as references to *documents received or brought into existence in the course of, or for the purposes of, the carrying on of those activities.* Documents in respect of an agency's commercial activities are, therefore, documents received or created in the course of, or for the purposes of, the agency's commercial activities. The characterisation of the documents as relating to the agency's commercial activities must be at the time they came into existence, not at the time the FOI request is made (*Re Bell and Commonwealth Scientific and Research Organisation (CSIRO)*).

2.5 The term *commercial activities* is defined in s 7(3) to mean *activities carried on by an agency on a commercial basis in competition with persons other than governments or authorities of governments* or activities *that may reasonably be expected in the foreseeable future to be carried on by the agency* on such a commercial basis. In *Re Bell* the AAT found that the CSIRO was not carrying on its development of wireless local area network technology on a commercial basis at the time of the creation of a number of documents brought into existence in the course of, or for the purpose of, that work which were subsequently the subject of an FOI request. However, the Tribunal found that the documents were in respect of its commercial activities because, at the time of their creation, it was reasonably foreseeable that the CSIRO would conduct those activities on a commercial basis.

2.6 On appeal, the Full Court of the Federal court affirmed the decision of the Tribunal that s 7(3)(a) requires consideration of an existing commercial quality of the activities at the time the documents were brought into existence or received. Further, in respect of s 7(3)(b) the Court held that the documents fell within the exemption as when the documents were received or brought into existence, it was reasonably foreseeable that the CSIRO would conduct that research and development on a commercial basis (*Bell v Commonwealth Scientific and Industrial Research Organisation*).

2.7 *Commercial activities* has been considered by the Tribunal on several occasions to include activities which are conducted on a commercial basis in competition with

other private retailers. Regard must be had to both the nature of the activities and their purpose. Profit-making may not be an immediate outcome but can be expected to be an ultimate goal of the activities, which must have a quality of regularity or continuity towards the goal, and must be in competition with a person or entity outside government (*Re Bell*). For example, in *Re Pye and Australian Postal Corporation*, the Tribunal held that the sale of a post office was within the competitive commercial activities of Australia Post which was part of its functions. However, where Australia Post has a monopoly (the exclusive right to carry letters within Australia (s 30 of the *Postal Act*)), it was not in competition (see also *Australian Postal Corporation v Johnson*).

2.8 The extent of an agency's commercial activities requires an examination of the legislation governing or setting up the particular agency. An agency may perform concurrent functions which include commercial and non-commercial activities. It is sufficient to satisfy s7(4) that a substantial and operative purpose for the bringing into existence of a document was the carrying on of the agency's commercial activities, even if that were not the only purpose. The proper approach is not to ask whether some of the contents of the document relate to commercial activities and some relate to non-commercial activities, but instead to determine whether the document was brought into existence for the purposes of the agency's commercial activities (*Australian Postal Corporation v Johnston*).

2.9 For other cases see *Re Johnson's Creek Conservation Committee and CSIRO*, *Re Geary and Australian Wool Corporation*, *Re Political Reference Service* (*NSW*) *Pty Ltd and Australian Telecommunications Commission* and *Delagarde Legal Services Pty Ltd and Commonwealth Scientific and Industrial Research Organisation.*

2.10 The term 'in relation to program material' exempts documents which have a direct or indirect relationship to program material eg it would include intellectual property in the program such as program scripts (*Australian Broadcasting Corporation v The University of Technology, Sydney*).

2.11 Where it is clear from the nature of the documents as described in the request that all the documents are exempt, an agency can refuse to grant access under section 24(5). This will occur only where it is clear that all of the documents are exempt by virtue of section 7, and in this case that they all relate to the commercial activities of the agency. (*Re Delagarde Legal Services Pty Ltd and Commonwealth Scientific and Industrial Research Organisation*)

2.12 Under s 7(2A) agencies in possession of documents originating with or received from ASIS, ASIO, the Office of National Assessments, the Defence Imagery and Geospatial Organisation, the Defence Intelligence Organisation, the Defence Signals Directorate or the Inspector-General of Intelligence and Security are exempt in respect of those documents (*Re Anderson and Attorney-General's Department*). Similar provision is made in respect of Ministers holding documents originating with or received from these agencies (s 7(2B). The effect of these sections, combined with the exclusion of the intelligence agencies under subsections 7(1) and 7(1A), is that such documents are exempt wherever they are found.

2.13 However, the provisions of the FOI Act relating to responding to requests for documents apply ie decisions must be made to claim the exemptions and notified to the applicant under s 26 (see definition of *exempt document* in s 4(1)). An applicant may seek AAT review on the ground that a document does not satisfy the criteria in

s 7 and Schedule 2. It is not mandatory to claim exemption for such documents, but whether or not exemption is to be claimed is a matter for consultation with the agency concerned.

2.14 There are special provisions relating to the mandatory transfer of Schedule 2 documents in s 16 of the FOI Act: see ss 16(2) and (3). Documents originating or received from bodies covered by Schedule 2 are not exempt in the hands of agencies subject to the FOI Act, except in the case of the security agencies mentioned above, and in certain circumstances are required to be transferred to the portfolio department of the exempt body or to an agency exempt in respect of specific kinds of documents. Transfer is mandatory where documents have originated with or been received from a Schedule 2 agency *and* the document is more closely connected with the relevant functions of that agency. (For more details see *FOI Guidelines: Fundamental Principles and Procedures*, paragraphs 6.22–6.24.)

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

3.1.1 Section 33(1) contains two distinct exemptions:

- documents concerning national security, defence and international relations the disclosure of which would, or could reasonably be expected to, cause damage to those interests (s 33(1)(a)); and
- information communicated in confidence to the Commonwealth by a foreign government or international organisation (s 33(1)(b)).

3.1.2 There is no public interest test in s 33. Once an agency is satisfied the elements in s 33(1) exist, a document is established as an exempt document and disclosure is deemed to be contrary to the public interest (*Re Mann and the Australian Taxation Office*). There is no need to weigh up the need for access against the need for security or to consider the need for the Australian public to be informed of reasoned and soundly based research (*Commonwealth of Australia v Hittich*; *Re Dunn and Department of Defence*).

3.1.3 An exemption claim under s33 should relate to a particular document and not be expressed as a claim that a group of documents forms part of a class that are exempt documents (*Re Aldred and Department of Foreign Affairs and Trade*).

3.2 Reasonably be expected to cause damage

3.2.1 For a general meaning of *reasonable expectation* see Introduction, paragraphs 1.6.2.1–1.6.2.2. In the context of s 33, the mere allegation or mere possibility of damage to international relations is insufficient to meet the *reasonable expectation* requirement (*Re O'Donovan and Attorney-General's Department*; *Re Maher and Attorney-General's Department*). There must be *real* and *substantial* grounds for expecting the damage to occur which can be supported by evidence or reasoning (*Attorney-General's Department v Cockcroft*).

3.2.2 The phrase *damage to international relations* includes such things as intangible damage to Australia's reputation or relationships between government officials or loss of confidence or trust in the Government of Australia by an overseas government as well as loss or damage in monetary terms (*Re Maher and Attorney-General's Department*).

3.3 National security, defence and international relations - paragraph 33(1)(a)

3.3.1 National security

3.3.1.1 In broad terms, the 'security' of the Commonwealth refers to matters concerning the protection of Australia and its population from active measures of foreign intervention, espionage, sabotage, subversion and terrorism and the security of any communications system or cryptographic system of any country used for defence or conduct of international relations (see definition in s 4(5) of the FOI Act).

3.3.1.2 If the release of a document would prevent a security organisation from obtaining information on those engaged in espionage, it could reasonably be expected to cause damage to national security if such a document were released (*Re Slater and Cox* (*Director-General of Australian Archives*). In *Re Hocking and Department of Defence*, the AAT held that disclosure of a defence instruction, relating to the Army's tactical response to terrorism and procedures for assistance in dealing with terrorism, would pose a significant risk to security. Documents revealing, or which would assist in revealing, the identity of an ASIO informant, were held exempt under a similar provision in the *Archives Act* (*Re Throssell and Australian Archives*).

3.3.2 Defence

3.3.2.1 In *Re Dunn and Department of Defence* the AAT noted that there is no specific definition of *defence* in the FOI Act. The decisions indicate that *defence of the Commonwealth* includes meeting Australia's international obligations and ensuring the proper conduct of international defence relations, measures to deter and prevent foreign incursions into Australian territory and the protection of the Defence Force from hindrance or activities which would prejudice its effectiveness. There is no specific guidance in the decisions on the question of what constitutes *damage to the defence of the Commonwealth*. However, the AAT has indicated that to make a finding of *damage* it needs to be presented with evidence that the release of the information in question will enable possible enemies of good government to obtain knowledge of the security and defence measures used (*Re Dunn and Department of Defence*).

3.3.3 International relations

3.3.3.1 The phrase *international relations* concerns the ability to maintain good working relations with other overseas governments and international organisations and to protect the flow of confidential information between them. There is no requirement to establish whether or not a document has or has not been released by an overseas authority (*Re McKnight and Australian Archives*).

3.3.3.2 The expectation of damage to international relations must be reasonable in all the circumstances, having regard to the nature of the information; the circumstances in which it was communicated; and the nature and extent of the relationship (*Re Slater and Cox*). A mere allegation or assumption of damage to international relations or the fact that a government has expressed concern about disclosure is not sufficient to satisfy the exemption (*Re O'Donovan and Attorney-General's Department*). There must be real and substantial grounds for the claim (*Secretary, Department of Foreign Affairs v Whittaker*).

3.3.3.3 It is not necessary to find loss or damage in monetary terms, regard must be had among other things, *to relationships between particular persons in one government and persons in another* (*Re Maher and Attorney-General's Department.*) A falling out between individuals would not normally constitute damage to relations between two governments even if there is some loss of cooperation between those individuals. A dispute may, however, have sufficient ramifications to affect relations between governments. It is a matter of degree in light of the particular facts of a case (*Arnold v Queensland*).

3.3.3.4 Lessening the confidence which another country would place on the government of Australia would satisfy the exemption (*Re Maher and Attorney-General's Department*), as would an expected reduction in the quality and quantity of information provided by a foreign government (*Re Wang and Department of Employment, Education and Training*). However, disclosure of ordinary business communications between health regulatory agencies revealing the fact of consultation, will not of itself destroy trust and confidence between agencies (*Re Public Interest Advocacy Centre and Department of Community Services and Health and Searle Australia Pty Ltd (No 2)*).

3.3.3.5 Damage could be intangible eg relationships between high level officials or politicians but there must be a higher degree of certainty than a mere risk (*Secretary, Department of Foreign Affairs v Whittaker*).

3.4 Mosaic approach

3.4.1 The so-called *mosaic approach* refers to the effect of disclosure of specific pieces of information, which are not necessarily themselves sensitive, but may, when put together with other separate information, cumulatively disclose information of a sensitive character (see eg *Re McKnight and Australian Archives*). The general acceptance of the *mosaic approach* does not relieve decision-makers from evaluating whether there are real and substantial grounds for the expectation that the claimed effects will follow from disclosure (*Searle Australia Pty Ltd v Public Interest Advocacy Centre and Department of Community Services and Health*). Even though a piece of information may be innocuous standing alone, when used in conjunction with other pieces of intelligence it may build up a picture the like of which the searcher was seeking to construct (*Re Milliss and National Archives of Australia*).

3.4.2 It is a question of fact as to whether the disclosure of the information on its face, or in conjunction with other material, could reasonably be expected to enable a person to ascertain the identity or existence of a confidential source (*Re Nitas and Minister for Immigration and Multicultural Affairs*). Merely making the assertion is not enough; evidence to support the claim must be available (*Re Dunn and Department of Defence*). In *Re Slater and Cox* the evidence that persuaded the Tribunal that a 'mosaic effect' claim was established was an exercise based upon an analysis of 22 thirty-five-year-old documents. That is, it was demonstrated to the Tribunal by practical example that the claimed damage was reasonable to expect because of the application of the 'mosaic technique'.

3.5 Information communicated to the Commonwealth in confidence by a foreign government - s 33(1)(b)

3.5.1 Section 33(1)(b) applies to information communicated in confidence by another government or by an agency of another government, for example, the

confidential exchange of police information or information received from a foreign defence force agency.

3.5.2 It is necessary only that the information contained in the document be communicated in confidence by or on behalf of a relevant body; there is no need for the information to be confidential in character nor for disclosure to amount to a breach of confidence (*Re Morris and Australian Federal Police*). However, whether the information is in fact confidential, and whether it was communicated in circumstances importing an obligation of confidence, are relevant to the consideration of whether, on the balance of probabilities, information was communicated in confidence (*Re Environment Centre NT Inc and Department of the Environment, Sport and Territories*).

3.5.3 There is no requirement to show that the foreign government continues to maintain confidentiality in respect of the document; the issue is simply whether the document was communicated in confidence at the time (*Re Robinson and Department of Foreign Affairs*). The document will be exempt even if the matter is no longer confidential at the time when access is sought (*Secretary, Department of Foreign Affairs v Whittaker*).

3.5.4 Because information need only be *communicated in confidence*, even the existence of the information in the public domain will, in some cases, not affect the exempt status of the document (*Commonwealth of Australia v Hittich*; *Re Rees and Australian Federal Police*). However, agencies are encouraged not to claim exemption for documents which are already in the public domain. Such information is not sensitive and non-contentious and should be released even if a technical exemption applies (See paragraph 2.6 of *FOI Guidelines, Fundamental Principles and Procedures*, on disclosure of non-contentious material).

3.5.5 It is sufficient for the communications to be part of a general understanding that communications of a particular nature will be treated in confidence and an understanding of confidentiality may be inferred from the circumstances in which the communication occurred, including the relationship between the parties and the nature of the information communicated (*Re Maher and Attorney-General's Department*). The AAT has noted that in some cases there may be circumstances where the identity of the relevant foreign agency should not be disclosed but has found that this would not usually be the case where the agency is the ordinary police force of a foreign country (*Re Wallace and Australian Federal Police*).

3.5.6 Although an agency may submit evidence to show the document was communicated in confidence (and due weight will be given to such evidence) the decision-maker and the AAT have the final responsibility for assessing the claim of confidentiality (*Re Anderson and Department of Special Minister of State*). Similarly, where a foreign government or agency identifies a document as *secret* or *confidential*, the decision-maker is still required to make an independent assessment of the claim of confidentiality.

3.5.7 There is no public interest test in s 33. Once the elements of the exemption are met it does not involve any weighing up of the need for access against the need for security or good relations or to consider whether the Australian public should be informed (*Commonwealth of Australia v Hittich*).

3.6 Non-disclosure of existence or non-existence of a document

3.6.1 Where a document would be exempt under s 33 and notification as to its existence or non-existence could reasonably be expected to cause damage as per the criteria in s 33(1)(a) or (b), an agency is not required to disclose whether or not the document exists (see s 25(1)). The agency may give notice in writing to the applicant under s 25(2) that it neither confirms nor denies the existence of the document, but informs the applicant that, assuming the existence of the document, it would be exempt under s 33. For a more detailed discussion on the use of s 25 see Introduction paragraphs 1.8.1–1.8.3 and *FOI Guidelines - FOI Section 26 Notices* paragraphs 88-93.

3.7 Evidence from Inspector-General of Intelligence and Security

3.7.1 In proceedings before the Tribunal in relation to a document that is claimed to be an exempt document under section 33, the Tribunal must, before determining that a document or part of a document is not exempt from disclosure under s 33, request the Inspector General of Intelligence and Security to appear personally and give evidence on the damage that may be done or on whether information or a matter communicated in confidence would be divulged as per the criteria in s 33(1)(a) or (b), were the document to be disclosed (see s 60A).

4. Section 33A - Documents affecting relations between the Commonwealth and the States

4.1.1 Section 33A(1)(a) and (b) contain two separate exemptions providing:

- that a document is an exempt document if disclosure would, or could reasonably be expected to, cause damage to relations between the Commonwealth and a State (s 33A(1)(a)); and
- that a document is an exempt document if disclosure would divulge information or matter communicated in confidence by or on behalf of a State to the Commonwealth (s 33A(1)(b)).

4.1.2 Even if disclosure is likely to cause damage to Commonwealth/State relations, the exemption will not apply if disclosure would, on balance be in the public interest (s 33A(5)).

4.1.3 A State for the purpose of this section includes the Australian Capital Territory and the Northern Territory (*Re Environment Centre NT Inc and Department of the Environment, Sport and Territories*).

4.2 Damage to Commonwealth-State relations - s 33A(1)(a)

4.2.1 The exemption arises in respect of any document, irrespective of whether it originated with the Commonwealth or one of the States or Territories and whether or not the State (or Territory) has seen, or is aware of the document provided that its disclosure would, or could reasonably be expected to, have the damaging effect specified. It is necessary to appraise the potential effects of disclosure of the particular documents involved in the relevant circumstances (*Arnold v Queensland*).

4.2.2 The term *relations between the Commonwealth and a State* refers to the totality of relations and contacts including the need for a close working relationship, over a wide spectrum of matters and at various levels, between representatives of the Commonwealth and each of the States (*Arnold v Queensland*).

4.2.3 As with s 33, s 33A(1)(a) includes the alternative phrase *could reasonably be expected to* cause damage (see Introduction, paragraphs 1.6.2.1–1.6.2.2 for a more detailed analysis of this phrase). Damage to relations must be established, but it is not necessary to assess the extent of the damage (*Re Angel and the Department of Art, Heritage and Environment*).

4.2.4 It is sufficient that either the mere fact of disclosure of a document or the disclosure of the contents of a document would cause, or could reasonably be expected to cause, damage to relations (*Re Angel and the Department of Art, Heritage and Environment*). There is no requirement that the information be of a sort the disclosure of which would found an action for breach of confidence (*Re Cosco Holdings Pty Limited and Department of Treasury*). Conversely, a mere assertion by a State of diminished frankness and candour is not sufficient (*Re Hyland and Department of Health*).

4.2.5 *Damage* might include:

- the conduct of Commonwealth/State negotiations being made more difficult;
- substantial impairment of good working relations;

- hindering of cooperation;
- prejudice to the flow of information - not only from the States to the Commonwealth, but also from the Commonwealth to the States (*Re Shopping Centre Council and Australian Competition and Consumer Commission*);
- impairment to the proper administration of Commonwealth/State projects and programs or any such future projects or programs; and
- substantial impairment of Commonwealth/State law or programs. However, a modification of a service provided from one department to another will not normally constitute damage to relations between two governments (*Re Cosco Holdings Pty Limited and Department of Treasury*).

4.2.6 The exemption was upheld in respect of information provided to the Commonwealth from the Police Special Branch of a State on the basis that full and frank discussions between police forces are required for the free flow of information necessary to discharge important security duties (*Re Anderson and Department of Special Minister of State*). Disclosure of minutes of Commonwealth/State discussions, where the minutes revealed resolutions reached but not comments made, could not reasonably be expected to inhibit future discussions (*Re Bracken and Minister of State for Education and Youth Affairs*). A State's indication that it may refuse to provide similar information in the future, while relevant, is not determinative in itself (*Re Guy and Department of Transport and Communications*). In relation to extradition proceedings where the Commonwealth has the sole responsibility for putting forward documents, there could be no damage to its relationship with the State authorities (*Re Birch and Attorney-General's Department*).

4.3 Information communicated in confidence by a State or State authority - s 33A(1)(b)

4.3.1 Whether a document is to be regarded as having been communicated in confidence is to be considered at the time it was provided. The fact that information is considered to be confidential at the time it was furnished is sufficient to meet the test of confidentiality in this subsection. The agency need only show that, at the time the information was communicated, it was given with an express or implied understanding that the information would be kept confidential.

4.3.2 If there is evidence to show that the two governments have expressly agreed that the information is given in confidence, then the test of confidentiality will be satisfied (*Re State of Queensland and Australian National Parks and Wildlife Service*). If this test cannot be satisfied, deciding whether the information was given in confidence means looking at all the circumstances associated with the communication of the information, such as the particular relationships between the parties, whether those communications have always been recognised as being made in confidence in the past, and whether the type of material in the documents requires confidential treatment (*Re Maher and Attorney-General's Department*).

4.3.3 It is not necessary to show that disclosure would amount to a breach of confidence in law (*Re Angel and the Department of Art, Heritage and Environment*) or that the information was in fact confidential in nature and communicated in circumstances giving rise to an obligation to treat it as confidential (*Re Environment*

Centre NT Inc and Department of the Environment, Sport and Territories). Nor is it for the decision-maker or the AAT to determine whether the action of labelling the information as confidential was reasonable in the circumstances (*Re Parisi and Australian Federal Police (Qld)*).

4.3.4 The fact that the communications occurred at high level between Governments is not of itself sufficient to prove that it was in confidence (*Re Birch and Attorney-General's Department*).

4.3.5 The cases mentioned in relation to s 33(1)(b), discussed at paragraphs 3.5.1-3.5.6, will also be relevant here.

4.4 The public interest

4.4.1 The public interest test in s 33A(5) must also be satisfied if s 33A is to apply. For a detailed discussion of the public interest, refer to Introduction, 1.6.3).

4.4.2 Satisfaction of s 33A(1) raises the presumption that disclosure would be contrary to the public interest (*Re Mann and the Australian Taxation Office*). Once damage or reasonable likelihood of damage has been found there would need to be some strong countervailing reason to justify disclosure, although it need not be a rare or exceptional case (*Arnold v Queensland*).

4.4.3 In some cases, the public interest may favour disclosure where that disclosure will shed light on the reasons for agency action or will contribute information to a public debate on an issue (*Re Bracken and Minister of State for Education and Youth Affairs*). The public interest in continued receipt of information from the Australian Federal Police from its State counterparts may outweigh the public interests in access and in an individual knowing what is said about him (*Re Morris and Australian Federal Police*). The public interest in the continued confidentiality of the deliberations of a Commonwealth/State Ministerial Council has been held to outweigh the public interest in debating the compulsory helmet law (*Re Cyclists Rights Action Group v Department of Transport*).

4.5 Consultation

4.5.1 Where a preliminary decision is made to disclose information affecting Commonwealth/State relations, s 26A requires consultation with the State concerned. A decision-maker must take into account any reasons put forth by the State as to why the document is exempt under s 33A(1), however, the State has no veto over the decision made, which must be based on an independent assessment of the public interest in the particular instance.

4.5.2 Where a State has objected to disclosure and the decision is to release the information, the State has independent review rights under ss 54(1C) and 58(F) of the FOI Act, known as 'reverse-FOI'. The State must be given written notice of the decision as it being given to the applicant (s26A(2)(a)). Access to documents is not to be given until the relevant review period has expired or the AAT or appeal court has confirmed the decision to release the document (s26A(2)(b)). If the State is formally joined as a party to an existing appeal against an agency's decision, it may assert s 33A (and no other section of the FOI Act) even if the section has not been relied upon by that agency (*Re Parisi and Australian Federal Police (Qld)*).

4.5.3 For a more detailed discussion of the consultation process under s 26A see *FOI Guidelines - Guide to Consultation and Transfer of Requests.*

4.6 Non-disclosure of existence or non-existence of a document

4.6.1 As with s 33 above, s 33A also provides that the agency is not required to disclose whether the document sought exists (s 25) where information indicating whether or not a document exists could reasonably be expected to cause damage to Commonwealth/State relations, or divulge information communicated in confidence by a State. Refer to Introduction paragraphs 1.8.1–1.8.3 for a more detailed discussion and to *FOI Guidelines - Fundamental Principles and Procedures*, paragraphs 6.21, 6.33 and 7.13.

5. Section 34 - Cabinet documents

5.1.1 To maintain the confidentiality necessary for the proper functioning of Cabinet, the Government requires that the deliberations of Cabinet and the Executive Council should be protected from mandatory disclosure under the FOI Act. There are four distinct circumstances in which s 34 may exempt a *Cabinet document* from disclosure. These are if the document:

- has been submitted to Cabinet or it is proposed by a Minister to be submitted to Cabinet for its consideration, having been prepared for Cabinet (s 34(1)(a));
- is an official record of Cabinet (s 34(1)(b));
- is a copy of, or part of, or contains an extract from a document referred to in paragraphs 34(1)(a) or (b) (s 34(1)(c)); or
- the release of which would involve the disclosure of any deliberation or decision of Cabinet other than a document which would disclose an officially published decision of the Cabinet (s 34(1)(d)).

5.1.2 The exemptions in s 34(1)(a)-(c) do not apply to purely factual material in Cabinet documents unless release of that material would involve disclosure of any unpublished deliberation or decision of Cabinet (s 34(1A)).

5.1.3 If a document falls within one of the paragraphs in s 34, it qualifies for exemption. Agencies need not consider what harm is expected to flow from disclosure. As with all other FOI exemptions, agencies have a discretion not to claim s 34 (see s 18(2) and paragraphs 1.5.1–1.5.2 of the Introduction). However, agencies should consult the FOI Coordinator in the Department of the Prime Minister and Cabinet (PM&C) before deciding to release a Cabinet document.

5.1.4 The term *Cabinet document* is not defined in s 34 or elsewhere in the Act. *Cabinet* for s 34 purposes means the Cabinet and Cabinet committees including coordinating, functional and special purpose Cabinet committees established by the Prime Minister or by Cabinet (s 34(6)). It does not include informal meetings of Ministers outside the Cabinet. Cabinet notebooks are expressly excluded from the operations of the FOI Act and are not included in s 34 (see definition of 'document' in s 4(1)(e)).

5.2 Documents created for submission to Cabinet – s 34(1)(a)

5.2.1 This paragraph covers all documents which have been prepared for and submitted to Cabinet for consideration, for example, those lodged with the Cabinet Secretariat. The section also covers documents which are proposed to be submitted to Cabinet, though not yet submitted, being documents that were brought into existence for the purpose of submission for consideration by Cabinet. The document must be a final version of what was or would actually be submitted. Drafts of Cabinet documents which have not been approved to be forwarded to Cabinet (ie. not yet signed and dated by the Minister) would not usually qualify under s 34(1)(a) as they would not be proposed to be submitted to Cabinet in that form, although a near final draft subject to some minor textual amendments made by the Minister may be exempt (*Re Reith and Attorney-General's Department*). Earlier drafts may qualify as

deliberative documents and be exempted under s 36, subject to the application of the public interest test in s 36(1) (*Re Corr and Department of Prime Minister and Cabinet* and *Commonwealth v CFMEU*). Only the actual document itself is exempt from disclosure under s 34(1)(a); exact copies of the document are exempt under s 34(1)(c) (*Re Toomer and Department of Agriculture, Fisheries and Forestry and Ors*).

5.2.2 To be exempt under s34(1)(a), a document must not only have been submitted to Cabinet or proposed by a Minister to be so submitted, it must also have been brought into existence for the purpose of submission for consideration by Cabinet (*Re Toomer and Department of Agriculture, Fisheries and Forestry and Ors*; *Re Anderson and Department of Special Minister of State (No 2),* noted with approval in the Queensland case *Re Hudson and Department of the Premier, Economic and Trade Development*). In *Re Toomer and Department of Agriculture, Fisheries and Forestry and Ors* the Tribunal rejected earlier conflicting authority (*Re Porter and Department of Community Services and Health*; see also *Re Fewster and Department of Prime Minister and Cabinet (No 2), Re Aldred and Department of Foreign Affairs and Trade* and the NSW decisions *Hawker v Premier's Department* and *Simos v Baxter*) in which a more expansive view of s 34(1)(a) was taken to the effect that a document which had been submitted to Cabinet need not have been solely created for that purpose to fall within the exemption. In assessing a claim under this section, agencies should be mindful that Government policy favours the more restrictive view of s 34(1)(a) adopted in *Re Toomer and Department of Agriculture, Fisheries and Forestry and Ors.*

5.2.3 In *Re Toomer and Department of Agriculture, Fisheries and Forestry and Ors* Deputy President Forgie commented that the choice of the word *consideration* in s 34(1)(a), rather than *deliberation*, suggested that the exemption might extend to a document prepared simply to inform Cabinet, the contents of which are intended merely to be noted by Cabinet. This approach was adopted by Senior Member Beddoe in *Re McKinnon and Department of Health and Ageing*. The restriction in s 34(1A) will still apply (see paragraph 5.6 below).

5.2.4 Whether a document has been prepared for the purpose of submission to Cabinet will turn on the evidence as to the background of its preparation (*Hawker v Premier's Department* and *Simos v Baxter*) which is to be ascertained at the time the document was created (*Re Hudson and Department of the Premier, Economic and Trade Development; Re Fisse and Secretary, Department of the Treasury*). A document subsequently attached to, or used to assist in preparing a Cabinet submission cannot be classified as a Cabinet document (*Re Aldred and Department of Foreign Affairs and Trade*).

5.2.5 In *Fisse v Secretary, Department of the Treasury* the Full Court of the Federal Court examined the directness of the evidence that is required to establish the purpose of the creation of a document within the context of a s 34 claim. In that case the respondent had relied on evidence from the Cabinet Secretariat regarding what it understood the purpose of creation of certain documents would be, in light of correspondence exchanged between the Prime Minister and the Treasurer and the witness's knowledge of Cabinet processes. While the Full Court accepted that there was no legal error in the Tribunal accepting this evidence, Buchanan and Flick JJ commented that direct knowledge statements and evidence of the intentions of those

involved in the creation of the document, should, if possible, be given by those involved in process, in preference to the drawing of inferences of persons outside the direct process.

5.2.6 A document which was once, but is no longer, proposed for submission to the Cabinet does not fall within s 34(1)(a) (*Re Aldred and Department of Foreign Affairs and Trade*).

5.3 An official record of Cabinet - s 34(1)(b)

5.3.1 This exemption applies where the document is *an official record of the Cabinet*. To come within s 34(1)(b) a document must relate, tell or set down matters relating to Cabinet and its functions and not to matters extraneous to those functions, in a form that is meant to preserve that relating, telling or setting down for an appreciable time (*Re Toomer and Department of Agriculture, Fisheries and Forestry and Ors*). If a document reveals on its face that it is an official record of the Cabinet it will be exempt under paragraph 34(1)(b) (*Re Rae v Department of Prime Minister and Cabinet*) (except to the extent subsection 34(1A) may apply). The document must be an official record of the Cabinet itself, such as a Cabinet Minute (*Re Toomer and Department of Agriculture, Fisheries and Forestry and Ors* per Deputy President Forgie, who held that a document recording the outcome of Cabinet deliberations maintained by what is now known as the Cabinet Secretariat was not an official record of the Cabinet). Agencies are advised to consult the FOI Coordinator of the Department of the Prime Minister and Cabinet to verify whether a document is an official record of the Cabinet.

5.4 A copy or extract of a Cabinet document - s 34(1)(c)

5.4.1 An exact copy of a document exempt from disclosure under s 34(1)(a) or (b) is exempt from disclosure under s 34(1)(c) (*Re Toomer and Department of Agriculture, Fisheries and Forestry and Ors*). To be a *copy or extract* the words used must be a quotation from or reproduce exactly the Cabinet submission or official record of the Cabinet (*Re Aldred and Department of Foreign Affairs and Trade*), indicating that an *extract* would have to be a *verbatim*, or word-for-word, extract. It has been held that a document which was created prior to a Cabinet submission cannot be included in the definition of copy or extract (*Re Aldred and Department of Foreign Affairs and Trade*). However, in *Re McKinnon and Department of Prime Minister and Cabinet*, the Tribunal held, without referring to the decision in *Re Aldred and Department of Foreign Affairs and Trade*, that a document which comprised coordination comments which were later incorporated into a Cabinet submission was exempt under s 34(1)(c) on the basis that it was an extract from the Minister's Cabinet submission, even though the document predated the Cabinet submission itself.

5.5 A document disclosing a deliberation or decision of Cabinet - s 34(1)(d)

5.5.1 Section 34(1)(d) exempts documents disclosing any *deliberation or decision of the Cabinet* other than a document by which a decision of the Cabinet was officially published. *Deliberation* as used in this context has been interpreted in the same sense as in s 36. That is, the document at issue must reflect the active debate in Cabinet, or its weighing up of alternatives, in order to come within the *deliberation*

aspect of s 34(1)(d) (see *Re Fewster and Department of Prime Minister and Cabinet (No 2)* and *Re Porter and Department of Community Services and Health*). The AAT pointed out in *Re Porter* that *it is not to be concluded that there was deliberation in respect of a matter contained in a document merely because a document was before Cabinet at a meeting thereof.* See also the Full Federal Court's discussion of Cabinet deliberations in *Commonwealth v. CFMEU.* A briefing note given to a Minister on topics to be discussed in Cabinet will not, without more, attract the exemption in s 34(1)(d) - though it may fall within s 36 (*Re McKinnon and Secretary, Department of Foreign Affairs and Trade*).

5.5.2 A document by which a decision is *officially published* is one which is written or issued as one of the functions of the person or body responsible for publishing it (such as the Cabinet itself, or the Minister responsible for the matter) and makes the decision generally known, although the announcement may be made to a limited audience, provided it is not conveyed on a confidential basis or for a limited purpose (*Re Toomer and Department of Agriculture, Fisheries and Forestry and Ors*). Documents officially publishing decisions are excluded from the exemption.

5.5.3 It is possible for a document to disclose deliberations of Cabinet even when the document is prepared prior to the Cabinet meeting at which the relevant matters were discussed (*Re Toomer and Department of Agriculture, Fisheries and Forestry and Ors*; *Re McKinnon and Secretary, Department of Foreign Affairs and Trade*; *Re Fewster and Department of Prime Minister and Cabinet* (*No 2*) (*1987*) (AAT decision of 31 July 1987, an extract from which on an unrelated aspect is reported at 13 ALD 139)).

5.5.4 It is necessary to consider the whole of the evidence, of which the document in issue is only part, to determine whether a document discloses deliberations or decisions of Cabinet (*Re Toomer and Department of Agriculture, Fisheries and Forestry and Ors*). The evidence must establish that this is so. In *Re Toomer and Department of Agriculture, Fisheries and Forestry and Ors* briefing notes prepared for the Prime Minister and other Ministers to take to Cabinet were held to be exempt from disclosure under s 34(1)(d).

5.6 Purely factual material

5.6.1 A document otherwise falling within s 34(1)(a)-(c) is excluded from exemption under s 34(1A) to the extent that the document contains *purely factual material* unless:

- the disclosure of the document would involve the disclosure of any deliberation or decision of the Cabinet; and
- the fact of that deliberation or decision has not been officially published.

5.6.2 These exceptions in s 34(1A) acknowledge that the disclosure of purely factual material in advance of an announcement of a Cabinet decision may disclose the deliberations of those bodies. *Purely factual material* has the same meaning as that in s 36. Refer to s 36 – Deliberative process documents at paragraphs 7.6.1-7.6.11 for a detailed discussion of *purely factual material***.**

5.6.3 Material such as statistical data, surveys and factual studies on the feasibility of a new policy or the implications of a proposal will not generally fall

within the s 34(1) exemption unless such material would disclose that Cabinet has deliberated on a particular matter or made a particular decision. However, projections or predictions of future facts cannot be considered to be facts or *purely factual material* according to the ordinary meaning of those words.

5.6.4 The meaning of *officially published* was considered by the Tribunal in *Re Toomer and Department of Agriculture, Fisheries and Forestry and Ors* in the context of the use of the term in s 34(1)(d) (see paragraph 5.5.1 above). The Tribunal did not specifically consider the meaning of *officially published* in the context of s 34(1A), but it can be expected the meaning would be the same ie. for the fact of a deliberation or decision to be *officially published* it must be written or issued as one of the functions of the person or body responsible for publishing it (such as the Cabinet itself, or the Minister responsible) and make the decision generally known. The Full Federal Court in *Department of Industrial Relations v Burchill*, without directly referring to the question of official publication, proceeded on the basis that presentation of a submission to a hearing of the Remuneration Tribunal (in respect of which there was said to be a 'gentlemen's agreement' that confidentiality would be observed by participants) which contained extracts from a Cabinet submission did not constitute official publication, even though the submission was putting forward the official position of the Government.

6. Section 35 - Executive Council documents

6.1.1 Section 35(1) is identical to s 34(1) except that s 35 refers to the Executive Council and the Secretary to the Executive Council, rather than to Cabinet, Cabinet documents and the Secretary to the Department of the Prime Minister and Cabinet. Therefore, the scope of the exemptions that apply to Executive Council documents is identical to the scope of the exemptions applying to Cabinet documents.

7. Section 36 - Deliberative process (internal working) documents

7.1.1 A document is exempt under section 36 if disclosure would:

- disclose matter in the nature of or relating to opinion, advice, recommendation, consultation or deliberation occurring or recorded as part of the deliberative processes involved in the functions of an agency, a Minister or government (s 36(1)(a)); and
- be contrary to the public interest (s 36(1)(b)).

7.1.2 For this section to apply:

- a document must disclose *opinion, advice* or *recommendation* or *consultation or deliberation* that has been *obtained, prepared or recorded* or *has taken place* in the course of, or for the purposes of, the *deliberative processes* of the agency or Minister (*Re Booker and Department of Social Security*);
- those *processes* must be carried out as part of the properly defined *functions* of the agency, Minister or government;
- it must be demonstrable that the balance of the public interest weighs against disclosure; and
- the information in question must not be purely factual.

7.1.3 The section applies to agencies irrespective of whether documents were produced within the agency, received from another agency or received from some outside person or body, provided the elements of the section are satisfied. While the exemption is designed to protect deliberative process documents in appropriate cases, it is only where, on balance, their disclosure would be *contrary* to the public interest that they are exempt; it is not necessary for a decision-maker to be satisfied that disclosure is in the public interest to make a decision to disclose them (*Re Burns and Australian National University*, and *Re Corr and Department of Prime Minister and Cabinet*). It is not sufficient that there is little public interest. The test is whether disclosure would be contrary to the public interest (*Re Sutherland Shire Council and Department of Industry, Science and Resources and Department of Finance and Administration*).There is no presumption that deliberative process material is exempt.

7.1.4 *Matter in the nature of or relating to* has, for the most part, been interpreted to mean matter of the kind specified eg opinion, advice, etc. However, in *Secretary, Department of Employment, Workplace Relations & Small Business v The Staff Development & Training Centre* the Full Federal Court differentiated between the expressions *in the nature of* and *relating to*, but did not discuss the difference.

7.2 *Deliberative processes* and *functions* of an agency, Minister or the Government

7.2.1 The *deliberative processes* of an agency, a Minister or the Government are the thinking, reflecting, deliberating, consultation and recommendation that occur prior to a decision, or before or while undertaking a course of action. They are an

agency's or Minister's *thinking processes* involving weighing up or evaluating competing arguments or considerations that may have a bearing on a course of action, decision or proposal (*Re Waterford and Department of the Treasury* (*No 2*)), frequently endorsed by the AAT and the courts since then). They are concerned with both policy-making processes and non-policy decision making processes involved in agency, ministerial or governmental functions (*Re Murtagh and Federal Commissioner of Taxation* and *Re Reith and Attorney-General's Department* and *Re Zacek and Australian Postal Corporation*). Deliberative processes extend beyond the business of making policy to the design and operation of administrative systems (*Re Waterford and Department of the Treasury (No 2)*) but the term does not extend to every document that is prepared by the Minister or the agency in the course of discharging its functions (*Re Hart and Deputy Commissioner of Taxation*).

7.2.2 *Deliberation* suggests not only collective discussion but collective acquisition and exchange of facts preliminary to an ultimate decision (*Harris v Australian Broadcasting Corporation* where Beaumont J concluded that, while the question of whether the services of a single officer or employee should be terminated does not necessarily involve a policy matter the subject of deliberative process, documents touching upon the employee-applicant were prepared for the purposes of the deliberative processes involved in the functions of the ABC within the meaning of s 36(1)(a)).

7.2.3 A pattern of particular facts considered can of itself be part of a deliberative process (*Re Chapman and Minister for Aboriginal and Torres Strait Islander Affairs*). Consultation is the act of consulting or taking counsel (*Re McGarvin and Australian Prudential Regulation Authority*) and may include documents created outside the agency (*Re Susic and Australian Institute of Marine Science*).

7.2.4 The *functions of an agency* are the tasks it is required to perform eg the complaints determination functions of the Ombudsman or the Human Rights and Equal Opportunity Commission. They do not include purely procedural administrative functions not involving deliberation eg a telephone call not related to the determination of a complaint (*Re VXF and Human Rights and Equal Opportunity Commission*) or management documents created on a day to day basis in the functioning of an agency (*Re Subramanian and Refugee Review Tribunal*). Administrative material merely incidental to an agency's *thinking processes* is not deliberative process material.

7.2.5 Implementation of a decision once it has been made is not part of the deliberative processes of an agency or Minister as there is no further consideration required of that matter (*Re Chapman and Minister for Aboriginal and Torres Strait Islander Affairs*). Similarly, a document does not fall within the definition of *deliberative* merely because it is considered or referred to in the course of agency action (*Re Subramanian and Refugee Review Tribunal*), or even because it prompts that action or serves as the basis for it. To fall within s 36(1)(a), a document must relate to or reflect opinion, advice, recommendation, consultation or deliberation which was part of, or for the purposes of, an agency's or Minister's deliberative processes in carrying out its functions. It is necessary to consider whether the information in question is *in the nature of* or, in the alternative, whether it is information *relating to* information of the relevant kind. (*Secretary, Department of*

Employment, Workplace Relations & Small Business v The Staff Development & Training Centre).

7.2.6 Documents are not *deliberative* if they have merely been considered by the agency or concern material which was generated before the *thinking processes* of the agency commenced or concluded; the contents themselves must reflect the active deliberative processes of the agency (*Re Susic and Australian Institute of Marine Science*). Notes of interview or statements of witnesses which are in the nature of evidence taken by an agency before it starts to consider the issues, will not satisfy s 36(1)(a) (*Re Booker and Department of Social Security*). Conciliation conducted by an agency such as the Human Rights and Equal Opportunity Commission (HREOC) is not part of its deliberative processes (*Re Lynch and Human Rights and Equal Opportunity Commission*).

7.2.7 It is not necessary that a document be communicated to another person for it to be a deliberative process document eg a file note made by an officer of an agency that records deliberations of other officers about a course of action that is involved in the functions of the agency (*Re James and Others and Australian National University*). However, the AAT in *Re Booker and Department of Social Security* observed that *consultation* requires *a two way exchange between at least two parties*. In *Re Chapman and Minister for Aboriginal and Torres Strait Islander Affairs* the AAT concluded that a letter sent from the Minister to the then Prime Minister informing him of the need to make a decision and consulting him about the proposed course of action was in the nature of consultation taking place in the course of, or for the purposes of, the deliberative processes involved in the functions of the Minister. (The situation would have been different if the Minister had already made up his mind).

7.2.8 Where there are continuous deliberative processes between Ministers relating to weighty subjects, those processes will be regarded as part of the functions of the Commonwealth Government, but not all communications between Ministers will satisfy that test (*Re Australian Doctors' Fund and the Department of the Treasury*, affirmed by the Federal Court in *Australian Doctors' Fund Ltd v Commonwealth*). For example, while the words, *I recommend that* of themselves are normally indicative of the deliberative process, it is necessary that the substance of the document be essentially a statement of recommendation (*Harris v Australian Broadcasting Corporation* and see paragraphs 7.6.1–7.6.11 on purely factual material).

7.3 Public interest

7.3.1 It is not enough to establish exemption under s 36 that the documents in questions are of a kind described in s 36 (1)(a). Section 36 (1)(b) requires that it also be shown that their disclosure would be contrary to the public interest. Deliberative process documents are not exempt unless it can be shown that their disclosure would be contrary to the public interest.

7.3.2 Paragraph 1.6.3 deals with the public interest concept and the balancing process involved in making a decision concerning the public interest. The exemption in s 36 is unique in that, rather than "the public interest test" operating as a limit in respect of documents that would otherwise be exempt, it forms part of the s 36 exemption; documents of a kind described in s 36(1) will not be exempt unless it can be shown that their disclosure would be contrary to the public interest. The examples

of public interest factors listed in paragraph 7.4 are relevant to the balancing process that is usually required when this exemption is claimed.

7.3.3 Although the public interest test in s 36(1) is an *open* one in the sense that the provision does not incorporate a defined harm to the public interest which is to be balanced against public interest factors favouring disclosure, in broad terms it may be said that it is concerned with protection against prejudice to *the ordinary business of government* (Mason J in *Commonwealth v John Fairfax & Sons Ltd* in a non-FOI context). *"Broadly speaking section 36 can be seen as an attempt by the legislature to protect the integrity and viability of the decision making process. If the release of documents would impair this process to a significant or substantial degree and there is no countervailing benefit to the public which outweighs that impairment then it would be contrary to the public interest to grant access"* (*Re Murtagh v Federal Commissioner of Taxation*).

7.3.4 Underlying all the relevant public interest factors that could be invoked against disclosure under this exemption provision *is the need to consider the extent to which disclosure of the documents would be likely to impede or have an adverse effect upon the official administration of the agency concerned* (or the performance of functions of a Minister or the Government as a whole) (*Re Lianos and Department of Social Security*,). Nonetheless, the exemption will only apply where those effects are not outweighed by public interest factors favouring disclosure. The requirement for exemption under s 36(1) is that disclosure would be contrary to the public interest. It is not necessary to show that disclosure would be *in* the public interest (*Re Sutherland Shire Council and Department of Industry, Science and Resources and Department of Finance and Administration*).

7.3.5 The effect of the public interest test in relation to deliberative process documents has been a contentious area since the introduction of FOI laws in Australia from the early 1980s. The views of the AAT and other review bodies have evolved, as was expected from the outset by its framers and early interpreters (see eg the comments of Deputy President McDonald in *Re Chapman and Minister for Aboriginal and Torres Strait Islander Affairs*).

7.3.6 Under s 36(7), the public interest grounds - both those in favour of non disclosure and those favouring disclosure - on which a decision to exempt a document under s 36 has been made must be included in an agency's statement of reasons under s 26 of the FOI Act (*Re Burns and ANU* and *Re Kamminga and Australian National University*).

7.4 Examples of public interest factors

7.4.1 In this section, public interest factors are provided to assist decision-makers. However, they are in no way prescriptive or exhaustive. It is important that decision-makers consider the particular circumstances of the request and those factors which are specific to the facts at hand. If the matter proceeds to the AAT then clear evidence of the effect of disclosure will be required. The requirement is that disclosure be contrary to the public interest, not that disclosure is in the public interest. A decision-maker will need to determine and then weigh up the relevant factors for and against disclosure and make a reasoned judgment as to where the balance lies.

7.4.2 There are many cases where the public interest factors in section 36 have been considered. In each case both the public interest factors in favour and against disclosure must be identified and weighed up. These factors will depend on the circumstances. Some examples of the type of factors which may be relevant follow.

7.4.3 Depending on the circumstances, factors in favour of disclosure might include:

- the general public interest in government-held information being accessible (applying this factor in the balancing process is far more than a formality; release, for example, of deliberative process documents will often enhance the democratic process, and that should be given serious weight in considering whether the expected effects of release should lead to the documents being withheld);
- making the public better informed and promoting discussion of public affairs;
- contributing to the public's right to participate in and influence the processes of government decision making and policy formulation on an issue of concern to them, whether or not they choose to exercise the right;
- that there is serious concern in the community about an issue dealt with in the documents sought;
- where the enhancement of scrutiny of government decision making processes and improving accountability and participation (where, for example, disclosure of a document would disclose the reasons for a decision);
- where contribution to adequate debate on a matter of public concern, particularly where some of the material in the documents is already public knowledge, and disclosure would complete the picture of what is known about a matter;
- the public interest in a person having a right of access to their personal records or to documents containing decisions which affect them; and
- where the sensitivity of the material has diminished over time.

7.4.4 The following are some factors which might weigh against disclosure. Decision-makers should note that these factors have at times been rejected in AAT. Decisions and their success will depend on the evidence as well as the counterbalancing factors for disclosure in the particular circumstances. Examples include:

- premature release of an incomplete and provisional report which could have created a misleading and perhaps unfair impression;
- where the documents are concerned with matters that were not settled and recommendations that were not adopted and release would not make a valuable contribution to public debate;
- where reasons for a decision are not fully disclosed in the documents sought (this ground should be used sparingly, since it is often open to an agency to release the real or full grounds for decision without damage to governmental interests);
- where disclosure will lead to confusion and unnecessary debate;
- prejudice to negotiations or damage to relations between the Commonwealth and a state;
- prejudice to the particular deliberative or decision making process concerned (this can only be argued where the process has not conducted and it can be shown how and why disclosure would prejudice it);
- jeopardy to candour; and
- disclosure would undermine essential processes involved in the administration of government, for example, the convention of cabinet confidentiality.

7.4.5 There are a large number of cases which have considered the 'frankness and candour' argument that release of pre-decisional communications is likely to circumscribe the free expression of opinion from bureaucrats to Ministers and between bureaucrats if public servants feel that their opinions may be opened up to public scrutiny at a later date. In addition it might be claimed that release of such communications may mean that in the future bureaucrats are reluctant to record such communications in writing.

7.4.6 Such claims have been rejected in a number of cases including *Re McCarthy and Australian Telecommunications Commission* and *Re Fallon Group Pty Ltd and Federal Commissioner of Taxation*.

7.4.7 Such claims have been upheld, however, in *Re Wallace and the Director of Public Prosecutions* and *Re Terrill and the Department of Transport and Regional Services* and the High Court expressed a willingness to accept this type of argument in *McKinnon v Secretary, Department of the Treasury* case. In *Re Wallace and the Director of Public Prosecutions*, Senior Member Dwyer concluded that some of the documents (emails and other internal memoranda passing between DPP lawyers) were exempt from disclosure on the basis that their release would tend to inhibit communications containing frank expressions of opinion in future, or to inhibit recording of the them, and that the inability to conduct or record such communications in confidence would be contrary to the public interest in the efficient and effective conduct of the business of the DPP. In *Re Terrill and the Department of Transport and Regional Services* Senior Member Dwyer decided that certain documents containing policy advice concerning a decision relating to the location of an internal bypass which would form part of the Hume Highway were

exempt under section 36 on the grounds that their disclosure would potentially limit the provision of future advice containing opinion or subjective analysis.

7.4.8 The Federal Court and AAT have acknowledged there is a weighty public interest in protecting the confidentiality of a documents contents where that document would reveal the substance of another document that is exempt under the FOI Act. For example, maintaining the confidentiality of a Cabinet submission is necessary for the proper functioning of Cabinet, and outweighs the public interest in knowing the subject matter of a report that would disclose the contents of the clearly exempt Cabinet submission to which the report relates (*Re Fisse and Secretary, Department of the Treasury; Fisse v Secretary, Department of the Treasury*).

7.5 Draft documents

7.5.1 Exemption is often claimed for draft documents under section 36. However the fact that a document is a draft which differs from the final version is not sufficient in itself to satisfy the public interest test in section 36(1)(b). This will depend on the content of the document. It is incorrect to assume that the disclosure of opinions or advice in draft would confuse or mislead the public (*Re McGarvin and Australian Prudential Regulation Authority*).

7.5.2 However, the AAT has held that there may be no public interest in seeing the reasons why a draft was presented for signature in a particular form (*Re Terrill and the Department of Transport and Regional Services*). The Tribunal held that the release of an incomplete draft obtained from a consultant would to be contrary to the public interest on the basis it would not make a valuable contribution to public debate to release documents concerned with matters that were not settled and recommendations that were ultimately not adopted (*Re McKinnon and Secretary, Department of Families, Housing, Community Services and Indigenous Affairs*).

7.6 Purely factual material

7.6.1 Section 36 does not apply to *purely factual material* (s 36(5)). The question whether any of the contents of a document are purely factual material should logically be decided before addressing the public interest issue. The purpose of the exception to s 36(1) is basically to allow the release (without the need to refer to the balance of the public interest) of factual material taken into account in decision making which does not reveal *thinking processes*. This is in accordance with the democratic objects of the Act, including assisting participation in decision making.

7.6.2 The word *purely* in s 36(5) refers to whether documents *simply* or *merely* contain information of a factual nature. In other words, the information must be *factual* in fairly unambiguous terms (*Re Waterford and Treasurer* (*No 1)*). Whether a document contains purely factual material is a matter of substance: the form or the words used are not of themselves determinative (the Full Federal Court in *Harris v Australian Broadcasting Corporation*).

7.6.3 A commonsense approach should be taken to the task of characterising matter as factual or otherwise, according to its substance (ie. its substantive nature or character) rather than semantics (ie. merely by reference to the particular terms in which it is couched). It is necessary to have regard to both the content of the document and the context forming part of the deliberative processes (*Re Chapman and Minister for Aboriginal and Torres Strait Islander Affairs*). Material which

contains elements of judgment or opinion concerning purely factual matters may still be capable, depending on its context and its purpose in that context, of properly being characterised as merely factual matter (*Re Chapman and Minister for Aboriginal and Torres Strait Islander Affairs*; *Re Hudson and Department of the Premier, Economic and Trade Development*).

7.6.4 Material of a factual nature is not information of a *purely factual nature* if that material would reveal deliberation that has taken place in the course of the deliberative process involved in the functions of an agency (*Re Swiss Aluminium and Department of Trade*). A distinction can be made between factual material which is investigative in character and contains findings of fact, and, on the other hand, opinion, advice or recommendation which forms part of the deliberative process (*Harris and Australian Broadcasting Corporation*).

7.6.5 A selection of facts which discloses a deliberative pattern of thought is not *purely factual* although it would need to give an indication beyond the subject matter to the thinking processes involved. Projections of future revenue (or expenditure) are not purely factual (*Re Waterford and Treasurer (No 1)*). Factual material which is inextricably intertwined with deliberative material is not purely factual material (*Re Howard and the Treasurer of the Commonwealth*). A conclusion which involves opinion, advice or recommendation for the purposes of the deliberative process may be exempt under s 36(1), but statements expressed as opinion, conclusion or finding may sometimes be in the nature of facts as the author sees them, rather than being part of the deliberative process (*Harris v Australian Broadcasting Corporation*).

7.6.6 A conclusion which is one of *ultimate* fact based on a series of *primary* facts might only be a statement in respect of *purely factual* material (the Full Federal Court in *Harris v Australian Broadcasting Corporation, Re Kavvadias and Ombudsman*). Disclosure of purely factual material which gives some indication of the subject matter of the document but no indication of the thinking processes will not be exempt (*Re Anderson and Department of Special Minister of State (No 2)*).

7.6.7 In considering the equivalent of s 36(1) in the Queensland FOI Act, the Queensland Information Commissioner concluded that the section was not intended to protect raw data or evidentiary material upon which decisions are made. The exemption does not extend to matter which *merely* consists of factual or statistical matter or expert opinion etc (*Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs*). The word *merely* in the Queensland Act, can be equated with the word *purely* in the Commonwealth Act (*Re Chapman and Minister for Aboriginal and Torres Strait Islander Affairs*).

7.6.8 The Tribunal in *Harris v Australian Broadcasting Corporation* drew a distinction between statements of facts which can stand alone and are subject to disclosure under s 36(5) and those *which are so close to the deliberative process that they form part of it*. In *Re Chapman and Minister for Aboriginal and Torres Strait Islander Affairs* paragraphs containing only background information against which the process was carried out were held not exempt, but paragraphs containing both statements of fact and *material about the Minister's considered opinion and/or proposed course of action* were not excluded by s 36(5) from exemption and had to be considered under the public interest provisions of s 36(1)(b). If the Minister had already made up his mind on the course of action to be taken, rather than merely referring to his proposed action, those parts of the document dealing with that course

of action would also have been subject to the exception in s 36(5) (and the material would also not have been deliberative).

7.6.9 The report of investigations consisting merely of underlying facts as perceived by a consultant can be categorised as purely factual, even if it involves some fact finding or provisional views (the Full Federal Court in *Harris v Australian Broadcasting Corporation*). However, names of possible appointees to the Australian Constitutional Commission were not recorded for the purpose of establishing as a fact what the names of the people were, but for the purpose of recommending suitable appointees as part of the deliberative processes in the selection procedure (*Re Reith and Attorney-General's Department*). Documents containing estimates as to the likely consequences which may result from changes to the taxation laws involving elements of judgment or assumption are not purely factual (*Re Howard and Treasurer of the Commonwealth*). Projections or predictions of likely future revenue are a long way from being capable of being considered as facts or as *purely factual material* according to ordinary conceptions of the use of the language (*Re Waterford and Treasurer (No 1)*)

7.6.10 Where a document contains both factual material and information involved in the deliberative processes of an agency, access should only be provided to the factual material if the deliberative material can be separated out (*Harris v Australian Broadcasting Corporation*). If the two types of information are inextricably intertwined and cannot be separated, the whole of that material will be exempt (*Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs*).

7.6.11 Where a document contains a mixture of factual and deliberative process material and the *purely factual* material can be separated out, the FOI Act requires release of an edited copy of the document by deleting the deliberative process material under s 22.

7.7 Other exceptions to s 36(1)

7.7.1 Reports of scientific or technical experts

7.7.1.1 Section 36(6)(a) provides that reports of such experts, whether employed within an agency or not, and including reports expressing their views on scientific or technical matters, are not subject to s 36(1). This provision has been narrowly confined by the courts and the AAT, so that, for example, a report by a legal consultant into the affairs of the ABC's Legal Branch (*Harris and Australian Broadcasting Corporation*), or a report by an economist (*Re Waterford and Department of the Treasury (No 2)*), were held not to be reports of scientific or technical experts. In *Harris and Australian Broadcasting Corporation*, Beaumont J said that the phrase *technical experts* was *intended to describe experts in the mechanical arts and applied sciences generally*. This approach has not been widened since then, despite criticism by some commentators.

7.7.1.2 Reports of external assessors of an application for a medical research grant were held to be reports of scientific or technical experts on their field of expertise (*Re Wertheim and Department of Health*).

7.7.2 Reports of a prescribed body or organisation established within an agency

7.7.2.1 Section 36(6)(b) excludes such reports from the exemption in s 36(1). However, no such bodies or organisations have been prescribed by the regulations.

7.4.3 Records of, or formal statements of, the reasons for final decisions given in the exercise of a power or an adjudicative function

7.7.3.1 The contents of most such documents will already have been notified to the persons concerned, but this provision would also make them available unless they are subject to some other exemption.

8. Section 37 - Law enforcement and public safety

8.1.1 This section applies to documents the disclosure of which would, or could reasonably be expected to, affect the enforcement of a law and/or the protection of public safety in any of the following ways:

- prejudice the conduct of investigations of a breach or possible breach of the law (s 37(1)(a));
- reveal the existence or identity of a confidential informant (s 37(1)(b));
- endanger the life or physical safety of any person (s 37(1)(c));
- prejudice the fair trial of a person or the impartial adjudication of the particular case (s 37(2)(a));
- disclose lawful methods or procedures for investigating, preventing, detecting or dealing with breaches of the law where disclosure of those methods would, or would be reasonably likely to, reduce their effectiveness (s 37(2)(b)); or
- prejudice the maintenance or enforcement of lawful methods for the protection of public safety (s 37(2)(c)).

8.1.2 Section 37 relates to the investigative or compliance activities of an agency and the enforcement of the law, including the protection of public safety. An agency is not required to disclose documents which would prejudice investigations or possible prosecutions or reveal the identity of confidential informants. The document in question *should have a connection with the criminal law or the processes of upholding or enforcing civil law* (*Re Gold and Australian Federal Police and National Crime Authority*). The term *law* refers to a law of the Commonwealth or a State or Territory (s 37(3)).

8.1.3 There is no separate public interest test associated with this section (*Re Edelsten and Australian Federal Police, Department of Health v Jephcott*).

8.1.4 Exemption does not depend on the nature of the document or the purpose for which it was brought into existence. A document will be exempt if its disclosure would or could reasonably be expected to have one or more of the consequences set out in the above categories. In utilising this section, a decision-maker will need to examine the circumstances surrounding the creation of the document and the possible consequences of its release. The adverse consequences need not be just as a result of disclosure of a particular document, consideration may also be given to whether disclosure, in combination with information already available to the applicant, would result in any of the above consequences.

8.2 Reasonable expectation

8.2.1 In the context of s 37, the *mere risk* or *mere possibility* of prejudice to an investigation does not qualify as a *reasonable expectation* of prejudice (*News Corporation v National Companies and Securities Commission*; *Re Anderson and Australian Federal Police*; *Re Bartlett and Secretary, Department of Social Security*). A decision-maker would have to make a judgment, for instance, whether persons who would otherwise supply information to the Commonwealth, would decline to do so if the documents in question were disclosed (*Attorney-General's Department v Cockcroft*). For a general meaning of *reasonable expectation* see Introduction paragraphs 1.6.2.1–1.6.2.2.

8.2.2 The use of the word *could* in respect of the reasonable expectation in the alternative to *would* is considered less stringent, and requiring *no more than a degree of reasonableness being applied to deciding whether disclosure would cause the consequences*. Therefore, the reasonable expectation refers to activities that *might reasonably be expected to have occurred, be presently occurring, or could occur in the future* (*Maksimovic and Australian Customs Service*).

8.3 The conduct of an investigation or breach of the law – s 37(1)(a)

8.3.1 This exemption applies to documents where there is a current or pending investigation and release of the document would. or could reasonably expected to, prejudice the conduct of that investigation in some way or the enforcement or proper administration of the law in a particular instance. Because of the phrase *in a particular instance*, it is not acceptable for prejudice to occur to other or future investigations: it must relate to the investigation at hand (*Re Murtagh and Federal Commissioner of Taxation*). If disclosure would affect more than the particular case at hand, consideration should be given to the use of an alternative exemption, for example, s 40(1)(d) of the FOI Act (see paragraphs 11.2–11.4), although in *Re Hart and Deputy Commissioner for Taxation* the AAT upheld such a claim under section 37(1)(a) (see.8.3.5 below).

8.3.2 The exemption is concerned with the conduct of an investigation and not the eventual outcome. For example, it would apply where disclosure would forewarn the applicants of the direction of the investigation and the evidence and resources available to the investigating body putting the investigation in jeopardy (*News Corporation v National Companies and Securities Commission*). The section will not apply if the investigation is closed or where the investigation is being conducted by an overseas agency (*Re Rees and Australian Federal Police*). In such a case exemption under s 37(2)(b) may be appropriate (see paragraphs 8.7.1–8.7.6). However, where the investigation is merely suspended or *dormant* rather than closed, or new information may revive an investigation, the AAT has been inclined to find that s 37(1)(a) applies provided the expectation that an investigation may revive is more than speculative or theoretical (see *Re Doulman and CEO of Customs* where the AAT found that the fact that customs searches on the applicant had ceased did not mean the investigation had ended (see also *Re Noonan and ASIC*)).

8.3.3 It is not necessary to be able to identify a particular person who would use the information to frustrate or hinder the conduct of the investigation (*News Corporation v National Companies and Securities Commission*). However, s 37(1)(a)

cannot be used if disclosure will assist a fair and impartial investigation (*Re O'Grady and Australian Federal Police*).

8.3.4 Whether the requisite degree of prejudice will occur is a matter for evidence (*Re Murtagh and Federal Commissioner of Taxation*). The fact the document is relevant to an investigation is not sufficient; the information contained in the document must indicate a breach of the law and be prepared in the course of, or for the purposes of, an investigation (*Re O'Grady v Australian Federal Police*).

8.3.5 In *Re Hart and Deputy Commissioner of Taxation* the AAT noted that the relevant test under section 37(1)(a) is the potential effect on the investigation of disclosure to the whole world. In that case the AAT found that, while the status of the investigation made it unlikely that the applicant could use the information to thwart the investigation relating to him, others could do so and therefore the claim for exemption was made out.

8.4 Disclosure of a confidential source - s 37(1)(b)

8.4.1 Confidential in nature

8.4.1.1 This exemption is intended to protect the identity of a confidential source of information in relation to the administration or enforcement of the law rather than the information itself. It is the source, rather than the information, which is confidential. Accordingly, s 37(1)(b) may continue to apply even if the information supplied by the confidential source is now out of date or incorrect (*Re Dale and Australian Federal Police*). Section 37(1)(b) is not limited to particular instances in the same way as s 37(1)(a).

8.4.1.2 Where information is supplied which may enable those responsible for enforcing or administering a law to enforce or administer it properly and the person who supplies it wished his or her identity not to be known by anyone who does not need to know it for the purpose of enforcing or administering the law, that person's identity will be protected under this paragraph (*Department of Health v Jephcott*). It must be demonstrated that the information was supplied on the understanding, express or implied, that his or her identity will remain confidential.

8.4.1.3 Section 37(1)(b) also applies to protect information which would allow the applicant to ascertain the existence or non-existence (rather than the identity) of a confidential source of information (*Re Jephcott and Department of Community Services*). The section may also apply even if the information is old or wrong and the informant is untruthful or malicious (*Re Doulman and CEO of Customs*).

8.4.1.4 To satisfy the elements of the exemption, the information in the document must:

- have been provided under an express or implied pledge of confidentiality;
- properly relate to the enforcement or administration of law; and
- disclose the existence or identity of the confidential source of the information or enable that person's identity to be ascertained.

(*McKenzie v Department of Social Security*; *Re Bartlett and Secretary, Department of Social Security*; *Re Sinclair and Department of Social Security.* For a useful discussion of this provision see *Petroulias and Others v Commissioner of Taxation*).

8.4.1.5 In some cases, the evidence may justify a conclusion that disclosure of information will lead to its being linked to already-available information and so lead to the disclosure of yet other information (ie the identity of the confidential source): *Petroulias and Others v Commissioner of Taxation* (see also paragraphs 3.4.1–3.4.2 in Section 33 - Documents Affecting National Security etc for a discussion of this approach, known as 'the mosaic approach').

8.4.1.6 Section 37(2A) specifies that a person is taken to be a confidential source of information in relation to the enforcement or administration of the law if the person is receiving or has received, protection under a program conducted under the auspices of the Australian Federal Police, or the police force of a State or Territory.

8.4.2 Express or implied confidentiality

8.4.2.1 Section 37(1)(b) protects the identity of a person who has supplied information on an express or implied understanding that their identity would remain confidential.

8.4.2.2 This section cannot be used if the applicant is within the understanding of confidence between the third party and the agency (*Re Lander and Australian Taxation Office*) although there are cases where a number of parties may be within a given understanding of confidence, for example, where police pass information to other police on a confidential basis (*Re Edelsten and Australian Federal Police*). However, there is no general rule that police witnesses are confidential sources (*Re Scholes and Australian Federal Police*).

8.4.2.3 It is not essential that the confidential source provide the information under an express agreement. In some situations, an implied pledge of confidentiality can be made out from the circumstances surrounding the matter (*Department of Health v Jephcott*). For example, the provider may have supplied the information under the reasonable expectation that his or her identity would be kept confidential. Even though a denunciation letter may not expressly indicate that it was both written and received in confidence, it may be possible to imply that it was written and received under a pledge of confidentiality (*Re McKenzie and Secretary, Department of Social Security*). For example, the Tribunal has found that confidentiality was implied where the writer did not want any further involvement after providing the information to the Department, there was no address given, the writer indicated that he or she feared retribution and the letter was sent to the Minister as well as the Department (*Re Kindler and Minister for Immigration and Multicultural and Indigenous Affairs*). In some cases, confidentiality can be inferred from the practice of the agency to receive similar types of information in confidence (*Re Hayes and Department of Social Security*). Where the provider of the information was anonymous, the agency may be able to show that there was a pledge of confidentiality given (*Streeter v DEETYA*).

8.4.2.4 The fact that an agency holds out to the public that it will treat information received in confidence can be a relevant circumstance in implying a pledge of confidentiality (*Re Miniter and CEO Centrelink*). However, it may be doubtful as to whether representations to people at large can found an obligation of confidence.

8.4.3 Enforcement or administration of the law

8.4.3.1 The phrase *the enforcement or the proper administration of the law* is not confined to the enforcement or administration of statutory provisions. It requires only

that a document *should have a connection with the criminal law or with the processes of upholding or enforcing civil law* (*Re Gold and Australian Federal Police and National Crime Authority*).

8.4.3.2 The requirement for a department to administer law in accordance with funds allocated to it or to administer specific legislation does not exclude it from being involved in the administration of the law in a particular case (*Re Bartlett and Secretary, Department of Social Security*). For example, a Royal Commission was considered to be concerned with the *administration of the law* (*Re Gold and Australian Federal Police and National Crime Authority*).

8.4.4 Disclosure of the source of the information

8.4.4.1 There must be a reasonable expectation that the identity of the confidential source will be ascertainable from the contents of the documents (*Re Rees and Australian Federal Police*). Where no identity is apparent and the information is general in nature so that it is unlikely to lead to identification of the source or it could have come from any one of several persons, the element is not satisfied (*Re Bartlett and Secretary, Department of Social Security*).

8.4.4.2 The confidentiality of a source is lost if other disclosures make it possible to determine who the source is (*Re Chandra and Minister for Immigration and Ethnic Affairs*). However, the inadvertent or unauthorised leaking of a document does not diminish the quality of confidence attaching to it (*Re Cullen and Australian Federal Police*).

8.4.4.3 A decision-maker must also bear in mind that the identity of a person can sometimes be ascertained from handwriting in limited circumstances (see for example, *McKenzie v Department of Social Security*, in which the decision under s 37(1)(b) to release a typical version of a 'dob in' letter with the author's name and address also deleted and not the original handwritten version was affirmed). Other identifying material on a document may include letterhead, the nature of the information, which may only be known to a limited number of people, and information which would enable a person having relevant background knowledge to identify the source (*mosaic* effect, see paragraphs 3.4.1–3.4.2) (*Re Gold and Department of Prime Minister and Cabinet*).

8.5 Endanger the life or physical safety of any person – s 37(1)(c)

8.5.1 An exemption is available under s 37(1)(c) where disclosure of information such as a person's identity, views or whereabouts would make that person a potential target of violence by another person or group of persons. There must be a reasonable apprehension of danger. For example, the disclosure, without more, of the name of an officer connected with an investigation of certain threats made by the applicant, will not be sufficient (*Re Boehm and Department of Industry Technology and Commerce*). A reasonable apprehension does not mean the risk has to be substantial. However, an irate or angry phone call on its own from a member of the public may not be sufficient to warrant exemption under this section.

8.5.2 In *Re Dykstra and Centrelink* the AAT found that in the absence of evidence, it could not be satisfied that there was a real apprehension of danger notwithstanding the respondent's intemperate language and bad behaviour including

one occasion when he punched a pillar in the Tribunal and damaged it. The Tribunal noted that, despite his high level of frustration, the respondent had never attempted to cause any person at the Tribunal physical harm. Furthermore, the respondent had not been convicted of any offences since 1993. (NB: On appeal to the Federal Court on a point of law, the matter was remitted to the AAT. On this occasion (2003 AATA 202), extensive evidence was given in camera and the AAT found the exemption proved). In *Re Ford and Child Support Registrar* the third party gave extensive evidence about her fear if the FOI applicant was given access to documents. The third party had been the main prosecution witness during the FOI applicant's criminal trial for which he was still in gaol. She said he had written threatening letters to her and her friends and she was scared of him. The Tribunal found that there was a real and objective apprehension by her of harm from him and the exemption was upheld.

8.5.3 The Queensland Information Commissioner in *Re Murphy and Queensland Treasury* (upheld by the Supreme Court in *State of Queensland v Albietz*) found that the fact that a person feels aggrieved at the behaviour of government officials, whether that grievance is reasonable or not, and is prone to lapsing into intemperate verbal abuse does not necessarily mean that the person would commit, or would even consider committing, acts that would endanger the life or physical safety of government officials. The Information Commissioner also found that a threat, or the commencement, of litigation against a person is not harassment which endangers a person's life or physical safety.

8.5.4 The provision was satisfied where an FOI applicant had a long and documented history of physical violence towards persons from the respondent agency and property and the document would have revealed the identity of the author and the security arrangements concerning the applicant (*Re Matthews and Department of Social Security*).

8.5.5 The exemption was not satisfied where evidence was produced that one of several institutions where animal experiments were conducted had received a bomb threat. It was held that danger to lives or physical safety was only considered to be a possibility, not a real chance (*Re Binnie and Department of Agriculture and Rural Affairs*).

8.5.6 In *Re Ward and Victoria Police* the Victorian AAT found that there was a real risk of physical harm being sustained by a police informant if his identity was revealed and *circulated in the drug related crimes industry*. On the other hand, in *Re Lawless and Secretary to Law Department and Ors* the Tribunal found that any resentment the applicant displayed towards the witness flowed from the series of events including her evidence, retraction and reinstatement, rather than the specific information in issue, and held that the apprehended danger to persons must arise from the disclosure of the specific document in issue, rather than from other circumstances and that evidence of the risk of violence must be produced.

8.6 Prejudice to a fair or impartial trial - s 37(2)(a)

8.6.1 This paragraph exempts a document the disclosure of which would, or could reasonably be expected to prejudice the fair trial of a person or the impartial adjudication of a particular case. It is necessary to establish which persons would be affected. The reference to *trial* refers to a criminal or civil proceeding before a court

or tribunal of some kind. The term *prejudice* may refer to the law relating to contempt of court. The fact that documents are relevant to an investigation is not of itself sufficient to justify exemption.

8.6.2 The difficulty of showing a *reasonable expectation* of prejudice in relation to a trial or adjudication has resulted in the limited use of this section. In *Re O'Grady v Australian Federal Police* the AAT refused to accept a claim under this section where, on the facts, disclosure to the applicant could actually facilitate the adjudication of the matter. It is not inevitable that the proper administration of the law will be prejudiced if an accused, prior to trial, has access to the police brief comprising witness statements and some administrative forms, but this should be determined on a case by case basis (*Sobh v Police Force of Victoria*).

8.7 Prejudice to law enforcement methods and procedures - s 37(2)(b)

8.7.1 *Lawful methods and procedures* in s 37(2)(b) refer to activities concerning the prevention, detection, investigation of the law or with matters arising from a breach of the law and can extend to taxation and police investigations. The exemption is concerned with an agency's methods and procedures for dealing with breaches of the law, where disclosure would, or could reasonable be expected to, adversely affect the effectiveness of those methods and procedures. Letters containing explanations of doctors' treatments and their response to an applicant's complaint did not have any connection with investigative methods or procedures (*Re Boyd and Medical Board of Western Australia*).

8.7.2 The word *lawful* is intended to exclude unlawful methods and procedures, for example, methods of conducting illegal phone taps, or planting of evidence or entrapment.

8.7.3 There must be a *reasonable expectation* that a document will disclose a method or procedure and a reasonable expectation or a real risk of prejudice to the effectiveness of that investigative method or procedure (*Re Anderson and Australian Federal Police*). If the only result of disclosure of the methods would be that those methods were no surprise to anyone, there could be no reasonable expectation of prejudice (*Re Bartlett and Department of Social Security*; *Re Russo and Australian Securities Commission*; *Re Wallace and Australian Federal Police*).

8.7.4 The exemption will not apply to routine techniques and procedures already well known to the public or documents containing general information (*Re Robinson and Australian Federal Police*; *Re Anderson and Australian Federal Police*). In *Re Russo v Australian Securities Commission*, the AAT rejected a s 37(2)(b) claim concerning the method of allocating priorities to matters, with the observation that disclosing such a method is on par with *disclosing that the respondent uses pens, pencils, desks, chairs and filing cabinets in the investigation of possible breaches of the Corporations Law*. However in *Re Mickelberg and Australian Federal Police* and *Re Edelsten and Australian Federal Police* the AAT held that authoritative knowledge of the particular law enforcement methods used (as opposed to the applicant's suspicion or deduction) would assist endeavours to combat them.

8.7.5 The exemption may apply to methods and procedures that are neither obvious nor a matter of public notoriety, even if evidence of a particular method or procedure has been given in a proceeding before the courts (*Re T and Queensland*

Health) and is more likely to apply where disclosure of a document would disclose covert, as opposed to overt or routine methods or procedures (*Re Anderson and Australian Federal Police*). The method used by law enforcement agencies in gathering information in relation to an investigation from as many sources as possible, the evaluation of that information and the placement of it on the agency's records is a fundamental and overt method, the disclosure of which would not prejudice its effectiveness in the future (*Re T and Queensland Health*).

8.7.6 Records of police interviews involving the taping of proceedings and the taking of a statement which was reduced to tape was held not to be exempt because such practices are widespread and evidence of them is given daily in the courts (*Re Lawless and Secretary to Law Department and Ors*). In *Re Murphy and Australian Electoral Commission*, the AAT held that disclosure of examples of acceptable reasons for refusing to vote in a compulsory election from the AEC's internal manual would reasonably be expected to prejudice the effectiveness of law enforcement procedures because people who failed to vote would be able to circumvent the procedures by submitting one of the acceptable reasons.

8.8 Protection of public safety - s 37(2)(c)

8.8.1 This section exempts documents if disclosure would prejudice the maintenance or enforcement of lawful methods for the protection of public safety.

8.8.2 The comments in paragraphs 8.7.1–8.7.2 above that relate to the terms *lawful* and *prejudice* apply to s 37(2)(c) in relation to the protection of public safety. The words *public safety* do not extend beyond safety from violations of the law and breaches of the peace (*Re Thies and Department of Aviation*).

8.8.3 In *Re Parisi and Australian Federal Police* (*Qld*), the AAT observed that the words *public safety* should not be confined to any particular situation, such as civil emergencies or court cases involved in the enforcement of the law. The AAT went on to note that considerations of public safety and lawful methods will be given much wider scope in times of war than in times of peace.

8.8.4 In *Re Thies and Department of Aviation* the *protection of public safety* was not considered to be a general term such that it could extend to air safety exclusive of the existence of any related breaches of the law. In *Re Hocking and Department of Defence* the applicant was denied access to a portion of an army manual relating to the tactical response to terrorism and to Army procedures to meet requests for assistance in dealing with terrorism because if the relevant section of the manual were made public, there would be a significant risk to security.

8.9 Withholding information about the existence of documents - s 25

8.9.1 Section 25 of the FOI Act permits an agency to give notice that it neither confirms nor denies the existence of a document if information as to its existence would, if it were included in a document, make the document exempt under s 37(1). In the context of s 37, even though members of the public may suspect that certain security procedures exist it may not be appropriate to confirm or deny their existence if it may be likely to prejudice their efficiency for the future (*Re Anderson and Australian Federal Police (No 2)*). For more detail refer to the Introduction

paragraphs 1.8.1–1.8.3 and to *FOI Guidelines - FOI Section 26 Notices – Statement of Reasons* paragraphs 88–93.

9. Section 38 -Documents to which secrecy provisions of enactments apply

9.1.1 Section 38 is an acknowledgment that some documents which could not be exempted under other provisions should nevertheless not be disclosed as there are policy reasons to keep them secret. Section 38 is intended to have the effect of preserving the operation of specific secrecy provisions in other legislation.

9.1.2 The Government policy is that s 38 should apply only where the secrecy enactment concerned specifically and directly identifies the nature of the information not to be disclosed. It is not intended to include information which is identified by reference only to the manner or capacity in which it is received. In two decisions, the AAT emphasised the need to establish a link between the information sought to be exempted and the powers and functions set out in the relevant secrecy provision (*Re Richardson and Federal Commissioner of Taxation* and *Re Allrange Tree Farms Pty Ltd and Deputy Commissioner of Taxation*).

9.1.3 Section 38 provides that a document is exempt if disclosure is prohibited under a provision of another Act (s 38(1)(a)) and either:

- that provision is specified in Schedule 3 to the FOI Act (s 38(1)(b)(i)); or
- s 38 expressly applies to the document or information contained in the document, by that provision, or by another provision of that or any other enactment (s 38(1)(b)(ii)).

9.1.4 Section 38 should be used only where truly necessary, lest it become a means of exempting information more appropriately considered, for example, under ss 41, 43 or 45 of the Act. The primary purpose of secrecy provisions in legislation is the prohibition against *unauthorised* disclosure of client information. Most secrecy provisions allow disclosure in certain circumstances such as with consent, where the information relates to the applicant, where it is in the course of an officer's duty to do so or in an officer's performance of duties, or exercise of powers or functions (see for example *Re Duncan and Anor and Department of Health and Ageing*). What is in the course of an officer's duties is to be interpreted broadly so as to encompass not only FOI disclosure but any other routine disclosures that may be linked to those duties or functions (*Canadian Pacific Tobacco Company Ltd v Stapleton*). However, where the secrecy provision restricts the disclosure to *performance of duties under this Act*, that phrase will not encompass FOI disclosure unless that is required by s 38(2) (see paragraph 9.1.6). An exception to the prohibition 'as otherwise authorised under any other Act' does not include the FOI Act as it would make inclusion of the provision in Schedule 3 meaningless (*Illawarra Retirement Trust v Secretary, Department of Health and Ageing*).

9.1.5 Section 38 is not available where the relevant secrecy provision is not listed in Schedule 3 to the FOI Act or expressly applied by other legislation. However, in *Kwok v Minister for Immigration and Multicultural Affairs*, Tamberlin J of the Federal Court found that a secrecy provision in the *Migration Act 1958* enacted subsequent to the enactment of s 38 and which did not expressly refer to s 38 as required by subparagraph 38(1)(b)(ii) was nevertheless expressed in such comprehensive language that it overrode s 38. On appeal (*NAAO v Secretary,*

Department of Immigration and Multicultural Affairs) the full Federal Court overturned the decision on another point.

9.1.6 Section 38(2) provides that s 38 does not apply to documents in so far as they contain personal information about the applicant. The exception applies only to personal information about the applicant and not to 'mixed personal information', that is, personal information about the applicant which, if disclosed, would also reveal personal information about another individual or individuals (for example, information about the financial affairs of a married couple). If the FOI applicant's information can be separated from any third party personal information, the FOI applicant's information will not be exempt under s 38(1) and can be disclosed. If, however, personal information about the applicant is inextricably intertwined with that of another person or other people, it will be exempt from disclosure under s 38(1) (*Re Richardson and Commissioner of Taxation* (2004); see also *Re Collie and Federal Commissioner of Taxation* (2003); *Re Petroulias and Commissioner of Taxation* (2006)).

9.1.7 The operation of s 22(1) of the FOI Act should also be considered in the context of disclosure. Section 22(1) provides that where a document contains exempt information and it is possible to provide a copy of the document with deletions so that the document is no longer exempt, such documents should be released with the appropriate deletions.

9.1.8 A number of FOI cases have considered the possibility that s 16 of the *Income Taxation Assessment Act 1936* (*'the ITAA'*) may not be breached if documents can be released by the removal of identifying material. For example, the AAT in *Re Mann and Federal Commissioner of Taxation* contemplated the possibility that documents could be released without breaching subsection 16(2) by the use of 'anonyms and obscurities' and deletions, so as to remove any matters which would identify, or enable identification of, the person. In *Re The Fallon Group Pty Ltd and Federal Commissioner of Taxation*, the AAT held that it was possible to give access to certain documents without offending subsection 16(2) of the ITAA by making such deletions that those copies would not permit readers to identify the persons to whose affairs the information related.

9.1.9 However, later cases have rejected this approach. Senior Member Dwyer in *Re Corrs Chambers Westgarth and Federal Commissioner of Taxation* held that an officer may be prohibited from disclosing information to one person about another person even though the identity of that person has been deleted, on the basis that the character of the information is not changed by editing out the names of the individuals. Similarly, Deputy President Forgie in *Re Collie and Deputy Commissioner of Taxation* held that the requirement in s 16(2) for an officer not to divulge information about another person does not require that the person be identifiable from the information. It is enough that it is information about the affairs of another person. The Tribunal in *Re Mann and Federal Commissioner of Taxation* held that where the identity of the persons mentioned in the document is obscured in some way or anonyms are used, disclosure will still be in breach of s 16(2).

9.1.10 It remains to be seen how the AAT will determine this issue in the future. Decisions of the AAT are not binding but a line of similar decisions is very persuasive and recent decisions of the AAT have supported this approach (see *Re*

Hart and Commissioner of Taxation and *Re Richardson and Commissioner of Taxation*).

9.1.11 In *Re Coulthard and Secretary to the Department of Social Security* the AAT rejected a s 38 claim in respect of a file note of a conversation with the applicant's mother. Although it was a document to which s 1312 of the *Social Security Act* applied and therefore came within Schedule 3 to the FOI Act, the file note contained personal information relating to the applicant and therefore s 38(2) applied.

9.1.12 In *Re Brearley v Health Insurance Commission* the AAT held that s 130 of the *Health Insurance Act* and s 135A of the *National Health Act* prohibited the disclosure to any other person of any information with respect to the deceased person's affairs acquired by a person in the performance of duties or the exercise of powers or functions under those Acts. As the provisions were specified in Schedule 3 of the FOI Act, the documents were exempt under s 38(1).

9.1.13 Section 38(3) contains a limited exception to section 38(2). Section 38 will apply in relation to a person's own personal information where that person requests access to a document the disclosure of which is prohibited under s 503A of the *Migration Act 1958*, as affected by s 503D of that Act.

9.1.14 Disclosure where required by the FOI Act will not be a breach of secrecy provisions in other legislation. Unless s 38 or some other exemption applies, access is available under the FOI Act (*Re Actors Equity Association of Australia and Australian Broadcasting Tribunal*).

9.1.15 The effect of s 38(1A) is to limit the use of s 38 to the terms of the particular secrecy provision involved, and the exemption is only available to the extent that the secrecy provision prohibits disclosure (*NAAO v Secretary, Department of Immigration and Multicultural Affairs*). It is not necessary that the section uses the term prohibit, provided the effect is that disclosure is prohibited (*Illawarra Retirement Trust v Secretary, Department of Health and Ageing*). While it is important to remember that no condition can be put on the future use of a document once it is disclosed under the FOI Act, disclosure under the Act is in fact to the FOI requester. A decision-maker seeking to apply s 38 of the FOI Act is therefore required to consider the identity of the FOI applicant in relation to the document. This is because s 38(1A) permits disclosure of a document in cases where the prescribed secrecy provision does not prohibit disclosure to that person (*Re Young and Commissioner of Taxation*).

10. Section 39 - documents affecting financial or property interests of the Commonwealth

10.1.1 For this section to apply, disclosure of a document must have a *substantial adverse effect* on the financial or property interests of the Commonwealth. A document which simply relates to the financial or property interests of the Commonwealth or an agency is not sufficient to bring the document within this section. For a discussion on the phrase *substantial adverse effect* see Introduction paragraphs 1.6.1.1–1.6.1.2.

10.1.2 Even if the requirements of the exemption in s 39 (1) can be established, the public interest test in s 39(2) must be considered and the exemption will not apply if disclosure would, on balance, be in the public interest (See Introduction, paragraph 1.6.3, for a detailed discussion of the public interest).

10.1.3 The financial or property interests referred to in s 39 are not limited to expenditure involving or relating to buildings or land. The exemption may also have application where the Commonwealth or an agency is engaged in revenue-generating activities or has property interests other than buildings or land.

10.1.4 This exemption has been the subject of only a few AAT decisions. In *Re Connolly and Department of Finance,* when considering the release of documents concerning the Commonwealth Government's strategy for the disposal of Australia's uranium stockpile, the AAT found that the Commonwealth was engaged in a competitive activity and that access would result in a substantial adverse effect on the value of the Commonwealth's property in its uranium stockpile. In *Re The Staff Development & Training Centre and Secretary The Department of, Employment, Workplace Relations and Small Business* the AAT found that an Operations Manual, which detailed the processes used to check tenderers' financial viability, did not contain material which revealed models used to assess financial viability and therefore would not have a substantial adverse effect on the future assessments of tenders or on the agency's ability to obtain value for money in its letting of the contracts in the Job Network Program. The AAT's decision was affirmed by the Federal Court in *Secretary, Department of Employment, Workplace Relations & Small Business v The Staff Development & Training Centre*. However on appeal the Full Federal Court found that the evidence for the finding was unsafe and the matter was remitted to the AAT on this and other points: *Secretary, Department of Employment, Workplace Relations & Small Business v The Staff Development & Training Centre*.

10.1.5 In *Re Hart and Deputy Commissioner of Taxation* an application was made for documents which would allow individuals subject to investigation by the ATO to anticipate action that taxation investigators might take. However the AAT rejected a claim for exemption under s 39 finding that while disclosure could have a substantial adverse effect on the amount of revenue collected by the ATO, this was not a financial interest in the process of revenue collection.

11. Section 40 - Certain operations of agencies

11.1.1 This section recognises the need for an agency to protect from release information that is necessary for the proper conduct of its operations (including personnel management and industrial relations matters) where it is not in the public interest that such documents be released.

11.1.2 Section 40(1) exempts documents that would or could reasonably be expected to:

- prejudice the effectiveness of procedures or methods for the conduct of tests, examinations or audits by an agency (s40(1)(a));
- prejudice the attainment of the objects of particular tests, examinations or audits conducted or to be conducted by an agency (s40(1)(b));
- have a substantial adverse effect on the management or assessment of personnel by the Commonwealth or by an agency (s40(1)(c));
- have a substantial adverse effect on the proper and efficient conduct of the operations of an agency (s40(1)(d)); or
- have a substantial adverse effect on the conduct, by or on behalf of the Commonwealth or an agency, of industrial relations (s40(1)(e)).

11.1.3 The phrase *could reasonably be expected to* here, and elsewhere in the FOI Act, requires a judgment as to whether it is reasonable, as distinct from mere speculation, to expect the supposed consequences (*News Corporation v National Companies and Securities Commission* and *Searle Australia Pty Ltd v Public Interest Advocacy Centre and Department of Community Services and Health*). A reasonable person would not expect anything without real and substantial grounds for doing so. Refer to Introduction paragraph 1.6.2 for a more detailed discussion of this phrase.

Section 40(1) does not apply where disclosure of the document would, on balance, be in the public interest (s40(2)).

11.2 Prejudice the effectiveness of procedures or methods for the conduct of tests, examinations or audits by an agency - s 40(1)(a), and prejudice the attainment of the objects of particular tests, examinations or audits conducted or to be conducted by an agency - s 40(1)(b)

11.2.1. Sections 40(1)(a) and 40(1)(b) require an assessment that the conduct or objects of the audits, tests, examinations etc be prejudiced in a particular instance. *Prejudice* does not impose quite as high or strict a standard as *substantially adversely affect* in s 40(1)(c) and s 40(1)(d) (*Re James and the Australian National University*).

11.2.2 There are three elements of the test to be satisfied under s 40(1)(a) and s 40(1)(b). They are:

- there must be a reasonable expectation that the specified effect of disclosure will occur;
- the effect will be to prejudice the conduct or attainment of the objects of the audit test or examination; and

- there is no overriding public interest in disclosure.

11.2.3 What will amount to prejudice will depend on the circumstances of each case. An example would be where disclosure of the document would advantage or disadvantage a person in relation to the test or examination about to be conducted by the agency. Access to patent examiners' completed examination papers was refused on the basis that it would allow candidates to deduce the style of answers which find favour with the examiners and to better prepare for the examination than other candidates (*Re Watermark and Australian Industrial Property Organisation*). In another case, access to a random sample of candidates' responses was refused because, although academic examiners may bring different views to bear, it is essential that their final view, if properly and fairly arrived at, should prevail (*Re Redfern and University of Canberra*).

11.2.4 In both of these cases, the Tribunal was concerned that disclosure could lead to the judgment of examiners being challenged after every set of examinations thereby inhibiting examiners. Possible plagiarism and wide circulation of papers would breach the security and integrity of the system (*Re Ascic v Australian Federal Police*).

11.2.5 The release of the questions in a psychometric test, the guidelines for administering it and the applicant's score sheet were found exempt under s 40(1)(a) and (b). The Tribunal accepted that if psychological tests and related material were available the results would not be an accurate reflection of the person undertaking the test and would frustrate the purpose of administering the tests. The reliability of the tests would be prejudiced were the material made generally available for scrutiny by persons who might be the subject of the test (*Re Crawley and Centrelink*).

11.3 Substantial adverse effect on the management or assessment of personnel by the Commonwealth or by an agency - s 40(1)(c), and on the proper and efficient conduct of the operations of an agency - s 40(1)(d)

11.3.1 Sections 40(1)(c) and 40(1)(d) are provisions of potentially broad application, but there are stringent evidentiary requirements for the claim of a *substantial adverse effect*, and the public interest test required by s 40(2) must be separately satisfied (see discussion of test at Introduction, paragraphs 1.6.1.1-1.6.1.2).

11.3.2 It may be, for example, that given documents relate to *operations* of an agency, and that their disclosure would have, in some measure, an *adverse effect*. However, that effect may not be *substantial* in the sense discussed below.

11.3.3 These sections exempt material if the expected effects of disclosure of *the particular documents at issue* satisfy the relevant requirements - *Re Dyrenfurth and Department of Social Security* at 585:

> [W]hile it may be easy to conclude that in the present case there may well be some undesirable effects arising from disclosure, it is a big step to conclude that disclosure of the particular information in these particular documents could reasonably be expected to have a substantial adverse effect.

11.3.4 The phrase *substantial adverse effect* as used in s 40(1)(c) and (d) is discussed in *Harris v Australian Broadcasting Corporation* at 564:

> [T]he insertion of a requirement that the adverse effect be "substantial" is an indication of the degree of gravity that must exist before this exemption can be made out. There is no such threat established on the material here.

11.3.5 The comment appears in many later decisions, which have often concluded that the required *effect* does not exist. Thus, in *Re Williams and Registrar of Federal Court,* at 222, in relation to demonstrating a substantial adverse effect, the Tribunal said:

> 'The difficulties in now establishing such a case are formidable. It follows, in my view, that the documents now in question are also not protected by this provision'.

11.3.6 For further discussion on the meaning of the term see Introduction paragraph 1.6.1.

40(1)(c)

11.3.7 Decisions on s 40(1)(c) also include: *Re Booker and Department of Social Security*; *Re Boyle and Australian Broadcasting Corporation* and *Re Southern and Department of Employment Education and Training*. Each of these cases related to work place harassment complaint investigations.

11.3.8 In other cases involving the application of s 40(1)(c) the following findings were made:

- disclosure of a draft report of a Merit Protection and Review Agency investigation of a staff promotion process would not have a *substantial adverse effect* (*Re Wallace and Merit Protection and Review Agency*);
- disclosure of the statements of fellow employees as to the applicant's misbehaviour would create a reluctance in staff to provide statements in future and impact detrimentally on staff morale with a loss of trust in management to protect their safety and welfare (*Re Wilson and Australian Postal Corporation*);
- judicial notice could not be taken of the effect of release of the names of Australian Taxation Office officers upon management of personnel. Evidence is required to show a substantial adverse effect (*Re Collie and Deputy Commissioner of Taxation*); and
- embarrassment to officers from disclosure is not a substantial adverse effect (*Harris v Australian Broadcasting Corporation*, *Re Marr and Telstra*).

40(1)(d)

11.3.9 Section 40(1)(d) (proper and efficient conduct of operations) requires the following tests to be satisfied:

- there will be a *reasonable expectation* of the effect (see paragraphs 1.6.2.1-1.6.2.2 for an explanation of what amounts to a *reasonable expectation*);
- the effect must be both substantial and adverse (not beneficial) (see discussion at paragraphs 1.6.1.1–1.6.1.2);

- the way in which the agency carries out its functions will need to be changed to its disadvantage; and
- notwithstanding the identified disadvantage, it is not in the public interest that the document be disclosed.

11.3.10 The substantial adverse effect must be on the 'proper and efficient operations of the agency'. The operations of an agency extends to the way in which an agency discharges or performs any of its functions (Re *James and Australian National University* (*41*), Re *Petroulias and Others and Commissioner of Taxation*). What is 'proper and efficient' will be a matter of fact. 'Efficient' involves producing a desired result with the minimum of wasted effort. 'Proper' imports a sense of what is appropriate to the purpose or circumstances and that which conforms to established standards of behaviour or manners (Re *Petroulias and Others v Commissioner of Taxation*).

11.3.11 Many claims of exemption have been made under s 40(1)(d) and most have been unsuccessful. On one occasion, the Tribunal, decided the exemption was not made out as the effect of the expected changes to the agency's operation flowing from disclosure would be beneficial rather than adverse because the changes would enhance efficiency (*Re Scholes and Australian Federal Police*).

11.3.12 Examples of successful claims of exemption under this paragraph include where it was established that:

- disclosure would enable persons who failed to vote to select an acceptable excuse from the sample of such excuses in the Procedures (Elections) Manual relied upon by investigators and consequential changes to the AEC's procedures would have a substantial adverse effect on its operations (*Re Murphy and Australian Electoral Commission*);
- the inability of the Australian Competition and Consumer Commission to in future obtain industry information and experience giving insight into the impact or lack thereof of any industry regulation would mean the Australian Competition and Consumer Commission would take longer and require more investigations when dealing with anti-competitive behaviour, and that would create an expensive and inefficient system (*Re Telstra and Australian Competition and Consumer Commission*);
- the chilling effect on the receipt of information in future by the Merit Protection and Review Agency would require it to use its coercive powers under its Act, whereas the Merit Protection and Review Agency relies on the cooperation of Commonwealth agencies subject to its supervision and resort to its formal powers would increase its workload and impede its ability to perform its real functions (*Re Sherrington and Merit Protection and Review Agency*); and
- the disclosure of the IPs and URLs of Internet content that is either prohibited content or potentially prohibited content under Schedule 5 to the *Broadcasting Services Act 1992*could reasonably be expected to reduce the number of complaints about internet content and therefore substantially reduce the ability of the agency to administer the statutory regulatory scheme

which is largely dependent on complaints (*Re Electronic Frontiers Australia and the Australian Broadcasting Authority*).

11.4 Substantial adverse effect on the conduct by or on behalf of the Commonwealth or an agency of industrial relations - s 40(1)(e)

11.4.1 Section 40(1)(e) requires a similar test be applied to that in s 40(1)(d), but in relation to the conduct of industrial relations. Tribunal decisions which have upheld claims of exemption include where it was established that:

- the disclosure of names of Australian Taxation Office officers in circumstances where the union to which the officers belonged had threatened to escalate industrial unrest if the names were disclosed: *Re Mann and the Australian Taxation Office*) (but note that in *Re Collie and Deputy Commissioner of Taxation* the Tribunal was not prepared to accept such a claim without sufficient evidence including the effect on the agency); and
- disclosure of documents containing information about certain events relating to the hiring and discharging of union members could reasonably be expected to damage the Marine Cooks, Marine Stewards and Seamen's Engagement System and the parties' confidence in Australian Maritime Safety Authority's administration of it (*Re Saxon and Australian Maritime Safety Authority*).

11.4.2 Even where a substantial adverse effect can be shown, s 40(2) must be separately satisfied. Should the balance of the public interest favour disclosure, this will override the existence of any *substantial adverse effect* and require disclosure of the documents despite the effects to be suffered.

11.4.3 The effect of the public interest test under s 40(2) allows the *prima facie* presumption of exemption to be overturned if it be in the public interest. The onus is on the applicant to raise public interest factors in favour of disclosure. This is an evidentiary onus and does not displace the general onus on the agency in s 61 (*Re Mann and Australian Taxation Office*). Public interest factors favouring disclosure and against disclosure are discussed in detail at Introduction paragraph 1.6.3.

12. Section 41 - Documents affecting personal privacy

12.1.1 Section 41 protects personal privacy by exempting documents the disclosure of which would result in the unreasonable disclosure of personal information about any individual person, including a deceased person (see *Re Chandra and Minister for Immigration and Ethnic Affairs*).

12.1.2 One aspect of personal privacy is the interest of an individual in having some control over the information held by others about him or her (information privacy). In the context of the FOI Act, the public interest in protection of that interest may need to give way in individual cases to public interest factors favouring disclosure. Moreover, apart from pro-disclosure public interest factors, not all personal information is of such a nature that it warrants exemption from disclosure under s 41. There is no presumption in the FOI Act that *personal information* is necessarily exempt.

12.1.3 Where there is an FOI request, disclosure of personal information is governed by the FOI Act and not the *Privacy Act 1988* (Privacy Act). The reason for this is that the Privacy Act contains a number of exceptions which allow for the disclosure of personal information. One of these exceptions is where disclosure is 'required or authorised by or under law'. Any request made under the FOI Act is deemed to fall within this particular exception. The exception to this is in relation to a disclosure outside the FOI Act (see *FOI Guidelines - Fundamental Principles and Procedures* , paragraphs 2.1–2.6). The Privacy Act is designed to protect information from disclosure in the normal course of the operations of an agency, in the absence of an FOI request or some other legal provision relating to the disclosure of information. (For further information on the relationship between the FOI and Privacy Acts see the now-archived *FOI Memo 93 - FOI and the Privacy Act*).

12.1.4 The exemption does not apply where a person seeks access to documents containing his or her own personal information (s 41(2)). That is, where the document contains only personal information about the applicant, an agency cannot find that the release of that information to the applicant is unreasonable under s 41(1). However, such information may be exempt under other exemption provisions of the FOI Act. If the information is joint personal information, ie. it concerns the requestor and another individual - and the personal information about the requestor cannot be disclosed without also disclosing personal information about the other individual - the information may be exempt under s 41(1) (see paragraphs 12.4.1–12.4.7).

12.1.5 If it is likely that the individual concerned might wish to oppose disclosure of personal information about himself or herself, a decision to give access to personal information must not be made unless -where it is reasonably practicable to do so in all the circumstances - the person concerned is first consulted and given a reasonable opportunity to make submissions that the document is exempt under s41 and those submissions have been considered by the decision-maker (s27A). See the discussion of the consultation obligation in paragraphs 12.7.1–12.7.10 below). If the agency decides to grant access over the objection of the individual concerned, the individual must be given notice of the decision and access is not to be given until the individual has had the opportunity to exercise his or her rights of review (s27A(2)).

12.1.6 There are two distinct concepts in this exemption both of which must be established to make a document exempt: *personal information* and *unreasonable disclosure.*

12.2 Personal information

12.2.1 There is no doubt that the term *personal information* is a very wide one (see *Re Hittich and Department of Health, Housing and Community Services*). In *ALRC Report 22 - Privacy* (1983) the Australian Law Reform Commission (in Vol.2 at p 82) stated: '[a]ny information about a natural person should be regarded as being personal information'. In *Kristoffersen v Department of Employment, Workplace Relations and Small Business* the Federal Court observed that '[t]he definition in the current legislation makes clear that it is concerned with information which does identify a person, but the question arises whether more is then required; namely that something be said about them'.

12.2.2 Personal information has the following features (see definition s 4(1) FOI Act and s 6(1) Privacy Act)*:*

(i) it relates to only a natural person, ie an individual not a corporation, trust or body politic;

(ii) the information must say something about the individual;

(iii) the information may be in the form of an opinion, it may be true or untrue, and it may form part of a database; and

(iv) the individual's identity is known or ought reasonably be able to be ascertained using the information in the document.

12.2.3 The first requirement is that to be *personal information* the information must relate to an individual. An individual is a flesh and blood natural person not a legal person which includes corporations, trusts, bodies politic, (states and foreign governments) and incorporated associations (s 22, *Acts Interpretation Act 1901*).

12.2.4 The second requirement is that the information says something about an individual, which means that it must convey some information about the person: it is not enough that a person be identified. For example, use of a name, signature, or phone number of a person appearing in a context that conveys no information about the person (see eg *Re Veale and Town of Bassenden*; and see definitions of *about* referred to in *Re Collie and Deputy Commissioner of Taxation*). However, if the name or signature occurs in a context that will tell something about the individual, it will be personal information eg the name appears on a list of recipients of approvals under legislation. Again, information only about a company with which a person is otherwise known to be associated will not be personal information about that person.

12.2.5 The third requirement is that the individual be identified in the information (eg name with address, position or listed home telephone number) or is reasonably able to be identified (eg an address, listed home telephone number, description of work, position or home, sufficient to be able to readily identify the individual). The inquiry is not restricted to the actual information in the document and would include other information known more widely about the individual which would allow it to be accepted that the information in the document is about that individual. The inquiry may extend to other information in the public arena about the individual which

would allow it to be concluded that the information in the document is about that individual (see *Re Morris and Australian Federal Police*).

12.2.6 This is a difficult area as it is not clear by whom the individual has to be able to be identified. The range of possibilities extends from the Australian public at large to the spouse or parent of the individual. There have been no AAT or Court decisions on what is the appropriate test. It probably lies somewhere in between these two extremes. For example, in *Re Sime and Minister for Immigration and Ethnic Affairs*, the AAT held that a combination of a document and extrinsic material would enable the identification of the actual solicitor handling a particular case (See also the decision of the WA Information Commissioner in *Re West Australian Newspapers Limited and Department of the Premier and Cabinet* for a discussion of the issue).

12.2.7 Bearing in mind that such a test is to be applied by decision-makers in agencies, they need to be able to conclude whether the information in the document together with other known information will allow this individual to be identified. A fair test would seem to be that the individual be identifiable by a moderately informed member of the community or a significant section of the community.

12.2.8 Examples of information which have been found to be *personal information* are:

- a person's telephone number and his or her address (*Re Green and Australian and Overseas Telecommunications Corporation*; *Re Zalcberg and Australian and Overseas Telecommunications Corporation*; *Re Raisanen and SBS*);
- details of a person's ex-partner including name, date of birth, home ownership, receipt of a pension and whether they were co-habiting (*Re VXV and the Department of Social Security and VXW*);
- documents referring to citizenship or permanent residency applications (*Re McCallin and Department of Immigration and Citizenship*);
- a person's tax file number (*Re Jones and Commissioner of Taxation*);
- a person's reasons and motivation for requesting a private ruling by the Commissioner of Taxation concerning a family member's estate, including the beneficiaries and their benefit under the will (*Re Jones and Commissioner of Taxation*);
- information about the effect of management practices on individual (unnamed) residents of nursing homes whose identities could be ascertained from the documents (*Re Advocacy for the Aged Assoc. Inc. and Department of Community Services and Health*);
- the names of evaluators of drugs and of doctors participating in the trial of certain drugs (*Re Hittich and Department of Health, Housing and Community Services*);
- work performance and vocational competence of a former army major (*Re Warren and the Department of Defence*);
- the terms on which a person is employed including a letter offering re-employment (*Lalogianna v Australian National University*);

- the identity of the foreign skills recognition reader who assessed the applicant's Indian University PhD thesis (*Re Nathan and Department of Employment, Education and Training*);
- applications of successful applicants for positions on the Refugee Review Tribunal and lists of referees (*Re Huttner and Department of Immigration and Ethnic Affairs*);
- a random sample of examination responses where the identities of students could be ascertained from the papers, by means of the appearance of student numbers and candidates' handwriting (*Re Redfern and University of Canberra*);
- names of dissenting shareholders in company takeovers, on lists of unclaimed moneys held in an ASIC data base (*Re Evans and Australian Securities and Investment Commission*);
- information concerning a police investigation and prosecution of an individual (*Re Scholes and Australian Federal Police*); and
- information concerning a change of script writers for the program *Brides of Christ*, screened on ABC (*Re Keane and Australian Broadcasting Corporation*).

12.2.9 Decisions by the Information Commissioner under the WA FOI Act (the only other Australian FOI Act to use the term personal information) include the following within the concept of *personal information*:

- letters by a shire council about claims by the FOI applicant for compensation for damage to their home caused by a nearby council building project (*Re Hesse and Shire of Mundaring*);
- names of third parties involved in the incarceration of a patient in a psychiatric hospital (*Re A and Heathcote Hospital*);
- the name and signature revealing an employment relationship (*Re Kobelke and Minister for Planning*);
- the name, position and opinion of a former Town Clerk on matters within his responsibility as an officer of the Council Re (*Veale and Town of Bassenden*).
- names and addresses, gender, employment and family connections of tenants in a residential complex where that information would enable the applicant to identify those individuals (*Re Hayes and the State Housing Commission of Western Australia (Homeswest)*);
- information contained in a statement given to police investigating corruption allegations (R*e Fabbri and Police Force of Western Australia*);
- the academic qualifications, details of past and present employment with Government agencies, examples of relevant duties, roles and dealings and information concerning the approach to management, conflict resolution and communication contained in an expression of interest in appointment to an acting position in the state public service (*Re Byrnes and Department of Environment and another*);

- "De-identified" information contained in a report of an inquiry into obstetric and gynaecological services at a hospital (*Re West Australian News Papers Limited and Department of the Premier and Cabinet*); and
- handwritten documents, where the identity of the person in whose hand the document is written is ascertainable (*Re Ross v City of Perth*) (This will usually require the applicant to have personal knowledge of the document's author or be able to recognise the handwriting because of some contact or relationship with the writer).

12.2.10 Several decisions have provided guidance on information that is not *personal information* including:

- where there is no mention of the applicant's name or any other characteristics which could identify the applicant (*Re Burkala and the City of Belmont*); and
- a company was not an individual who could have personal information (*Re Kobelke and Minister for Planning*).

Personal information about the applicant is not exempt personal information

12.2.11 Section 41(2) provides that the exemption does not apply where the personal information is only about the requestor. However, s 41(2) will not operate where the information is about the requestor and another individual, ie, joint personal information, and the personal information about the requestor cannot be disclosed without also disclosing personal information about the other individual. See paragraphs 12.4.1–12.4.7 below on joint personal information.

12.3 Unreasonable disclosure

12.3.1 The second part of s 41(1) exemption requires a finding that disclosure would be unreasonable. Section 41(1) is designed to prevent the *unreasonable invasion of the privacy of third parties* (Deputy President Hall in *Re Chandra and Minister for Immigration and Ethnic Affairs*). There is no assumption in s 41(1) that all personal information is necessarily exempt (see *Colakovski v Australian Telecommunications Corporation* and *Re Scholes and Australian Federal Police*). Rather, it protects only that personal information it would be *unreasonable* to disclose.

12.3.2 Public interest considerations are at the core of the term *unreasonable.* (*Colakovski v Australian Telecommunications Corporation*). However, the test is *unreasonableness* not *public interest,* although it is referred to as a modified public interest test. The application of the test involves a consideration of all the factors relevant in a particular case and a balancing of all legitimate interests (*Wiseman v Commonwealth*; see also eg *Re Chandra and Minister for Immigration and Ethnic Affairs*): primarily the public interest in the privacy of individuals (see *Colakovski v Australian Telecommunications Corporation*) and the public interest in the disclosure of government-held information will affect the weight to be given to each factor (eg *Re Albanese and CEO Officers of the Australian Customs Service*).

12.3.3 The most comprehensive statement of the factors to be considered can be found in *Re Chandra and Minister for Immigration and Ethnic Affairs*. In that case the Deputy President of the AAT considered that whether disclosure is

'unreasonable' requires consideration of all the circumstances, including the nature of the information; the circumstances in which it was obtained; the likelihood of it being information that the person concerned would not wish to have disclosed without consent; and whether the information has any current relevance. It is also necessary to balance the public interest that the FOI Act recognises in the disclosure of documents of an agency against the public interest in protecting the personal privacy of an individual whose personal affairs may be unreasonably disclosed by granting access to the documents. The test has been adopted on numerous occasions.

12.3.4 In *ABCD v Refugee Review Tribunal*, the Federal Court affirmed the approach of the Tribunal in referring to the test in *Chandra* and contemplating four factors for determining whether disclosure is unreasonable in all the circumstances.

12.3.5 The Tribunal in *Re McCallin and Department of Immigration* summarised the four considerations from *ABCD* as:

- whether the author of the document could be identified;
- whether the documents contain personal information about a third party;
- whether the release of the documents would cause stress on the third party; and
- no public purpose would be achieved by the release of the documents.

12.3.6 The factors to be considered are *all the circumstances* including:

- The nature of the information, (for example, whether it is bland, common place information, disclosure of which holds no serious consequences) (*Re Z and Australian Taxation Office*; *Re Strang and Department of Immigration and Ethnic Affairs and Siddha Yoga*; *Re Sampak Export Pty Ltd and Anor and Secretary, Department of Agriculture, Fisheries and Forestry and Anor*). However, there is no need to show some particular expected damage to the third party as a result of disclosure, such as 'some particular unfairness, embarrassment or hardship' that would affect the person as a result of disclosure (Heerey J in *Colakovski v Australian Telecommunications Corporation*). This will include a consideration of the context in which it appears, for example, occurrence of a person's name in a police file or in a Navy List on postings of naval officers, or where there are allegations of wrongdoing, misconduct or criminal activity (*Re Anderson and Australian Federal Police*; *Re "SRTTT" and Department of Defence*).
- The circumstances in which the information was obtained eg obtained under statutory compulsion or obtained in confidence (*Re Lianos and Department of Social Security*; *Re Timmins and National Media Liaison Service*). The fact that information had been gathered covertly about a third party would add weight to its disclosure being unreasonable, so long as it was sensitive in nature.
- The current relevance of the information (ie, whether the information is out of date (*Re Wiseman and Defence Service Homes*). It may be unreasonable to disclose a document containing false material relating to the requestor if it would disclose personal information about a third party (*Re Walsh and Chairman, Centrelink*).

- The stated object of the legislation in s3 to facilitate and promote the disclosure of information (*Arnold v Queensland*; *Re Booker and Department of Social Security*).
- The extent to which the person concerned is a public figure and the relationship of the information to that public status (*Re Anderson and Australian Federal Police*).
- The extent to which the information is already a matter of public knowledge, or is known by or readily available to the person seeking access (*Re Z and Australian Taxation Office*; *Re Lander and Department of Social Security*; *Re Beale and Centrelink*).
- Whether there was any expectation of confidentiality (*Re Redfern and University of Canberra*) or whether the information is quite innocuous (*Re Timmins and National Media Liaison Service*).
- Whether the information would shed light on the workings of government (*Colakovski v Australian Telecommunications Corporation*). However, disclosure need not do more than suggest there is an issue to be explored concerning the adequacy of Government action or inaction the resultant public discussion of which could facilitate the accountability of government (*Re Hanbury-Sparrow and Department of Foreign Affairs and Trade*).

12.3.7 Disclosure was found not to be unreasonable in cases involving:

- the names and addresses of subscribers to government news releases, speeches and reports (*Re Timmins and National Media Liaison Service*);
- the applications of successful applicants for APS positions (*Re Dyki and Commissioner of Taxation*);
- the total remuneration paid to public servants (*Asher v Department of State & Regional Development*);
- the association between the applicant and the named third parties which was public knowledge (*Re Mickelberg and Australian Federal Police*);
- personal information of a fellow public servant where that individual has no objection to disclosure of the material (*Re Young and Commissioner of Taxation*);
- information (about her daughter) which was already well known to the applicant (*Re White and Department of Education, Training and Youth Affairs*); and
- the names of dissenting shareholders whose unclaimed moneys were held by ASIC (*Re Evans and Australian Securities and Investments Commission*).

12.4 Joint personal information

12.4.1 Documents will frequently contain information that concerns more than one individual, including the applicant. Where that information can be separated from information about other persons and disclosure of the third party information would be unreasonable, it should be deleted and the non-exempt information released.

12.4.2 However, in some cases information about two or more individuals is so interwoven that it cannot be separated in this way. Examples might be:

- an application by two people for a defence service home loan;
- information provided by one person about their relationship with another person for the purposes of a supporting parent's benefit, or by a child in relation to an application for independent study support;
- an application by a family to migrate to Australia.

12.4.3 The appropriate test of whether separation of information is possible (where it is personal information about the applicant and personal information about another person) is whether the removal of information about one person would diminish or impair the quality or completeness of the information. If not diminished or impaired, the information probably does not relate to the applicant and an exemption may be claimed in appropriate circumstances (*Re Anderson and Australian Federal Police* and *Re McKinnon & Powell and Department of Immigration and Ethnic Affairs*).

12.4.4 Section 41(2) provides that the exemption in s 41(1) does not apply to a request by a person by reason *only* of the inclusion in a document of information relating to that person. However, the provision does not give an absolute right to access your own information, and is subject to the other exemptions in the FOI Act. In the case of joint personal information, this includes the exemption in s 41(1).

12.4.5 In deciding whether disclosure of that information generally would be unreasonable, factors to take into account include:

- a relationship between the parties which would make objection to disclosure unlikely (see *Re Anderson and Australian Federal Police* and *Re VXV and Department of Social Security and VXW*); and
- the privacy of the other individual, including Information Privacy Principle (IPP) 11 in the Privacy Act and also IPP 6 which is to the effect that an individual concerned is normally entitled to access to information about him or herself (*Re Carter and Department of Health* and *Re Munday and Commissioner for Housing*; note also the view expressed in *Re Strang and Department of Immigration and Ethnic Affairs and Siddha Yoga* that s 41(2) would override s 11(2) which is subject to the Act as a whole).

12.4.6 Also relevant are the rights of amendment of personal information in Part V of the FOI Act, which are dependent on the applicant first having lawful access to the information. In *Re Munday and Commissioner for Housing* the importance of the applicant having access to serious allegations about himself was held to justify the disclosure of the information to him despite the privacy interests of the other person.

12.4.7 Decisions on disclosure of joint personal information should only be made after consultation with the third party wherever reasonably practicable (see paragraphs 12.7.1–12.7.6 on Consultation).

12.5 Information about agency personnel

12.6.1 Where access is sought to information about an individual's work related activities in the agency, such as the name of an employee, the manner in which the individual carried out tasks or behaviour in the workplace, it is unlikely that

disclosure would be unreasonable unless the information went beyond work related matters to the personality, private characteristics or disposition of the individual (*Re Toomer & Department of Primary Industries and Energy* and *Re Dyki & Commissioner of Taxation*).

12.5.2 There are several cases which look at the question and make quite strong statements that it would not be unreasonable to disclose information in the work environment ie personal information about officers engaged in work activities - it would be an exceptional case for it to be unreasonable disclosure. See, for example, *Re Schlegel & Department of Transport and Regional Services*, *Re Subramanian and Refugee Review Tribunal*, *Re Lalogianni and ANU* and *Re Cook and Comcare*. However, the Tribunal has found disclosure of agency officers names to be unreasonable where the applicant had a propensity to pursue matters obsessively and there was no need for the officers to be contacted directly in the future (*Re Bartucciotto and Commonwealth Ombudsman*).

12.5.3 The Government's policy guidelines in (now archived) *FOI memo 94* (para 12) would suggest that usually, it would not be reasonable for officers to contend that their names when associated with their work is exempt under section 41(1).

12.6 Indirect disclosure

12.6.1 Sections 41(3) to 41(8) are concerned with indirect release of an individual's own personal information. It provides a scheme whereby, in certain cases, a requestor's *personal information* can be provided to a qualified person (see definition s 41(8)) nominated by the requestor rather than directly to the requestor. These provisions only apply where the information was provided by a qualified person acting in that capacity.

12.6.2 These sections only come into operation where the agency is of the view that disclosure directly to the requestor of information provided by qualified persons in the health industry might be detrimental to the requestor's physical or mental health or well-being.

12.7 Consultation

12.7.1 Section 27A prescribes a consultation process to be followed in respect of requests for access to documents containing personal information.

12.7.2 A decision to grant access to personal information must not be made unless, where it is reasonably practicable to do so, the agency has first consulted the person to whom the information relates and has given the potentially affected individual a reasonable opportunity to contend that the information is exempt under s 41(1) (see s 27A). There are four aspects to this requirement.

12.7.3 The obligation to consult arises only *where it is reasonably practicable to do so,* having regard to all the circumstances. It may not be reasonably practicable where the individual's whereabouts cannot be ascertained using reasonable effort, or where consultation cannot be undertaken in the time limited (60 days where properly notified under s 15(6)) or the volume of work associated is too great. The latter is particularly relevant if the information is innocuous and its release unlikely to be unreasonable.

12.7.4 The obligation is to give the person *a reasonable opportunity to make submissions in support of a contention that the document…is exempt.* Agencies must give the individual consulted sufficient information about the documents to allow the individual to make submissions in support of such a contention. This will usually, but not always, require that a copy of the information be shown to the individual, who is to be given a reasonable time to respond. If a document contains information about other persons, deletions may be necessary to protect their privacy. Where there is joint personal information, consultation will often be needed with the other person concerned. See paragraphs 6.29–6.33 of *FOI Guidelines – Fundamental Principles and Procedures*, for some general points relating to consultation. A failure to respond in the time stated should usually be followed up with a reminder.

12.7.5 The right to make submissions is in respect of a contention that *the document is an exempt document under s 41* only. The individual's right to make a contention is restricted to s 41(1) ie, that the document is exempt because its disclosure would be an unreasonable disclosure or personal information (*Re Mitsubishi Motors Australia Ltd and Dept of Transport* and *Re McKinnon and Powell and Department of Immigration and Ethnic Affairs*).

12.7.6 The agency must take into account any submissions from the individual and any contention of unreasonable disclosure under s 41(1) but the agency must still make its own decision (*Searle Australia Pty Ltd v Public Interest Advocacy Centre and Department of Community Services and Health*). The individual consulted has no power of veto. However, the objection to disclosure is always a relevant consideration. The consent of the individual whom the information is about is not necessarily determinative of 'unreasonableness' although section 41(2) would apply if the material is solely about the applicant (*Re Campillo and Australian Federal Police*).

12.7.7 Although s 27A does not require consultation unless the agency is inclined to disclose the *personal information*, agencies are advised to consult in any event. Consultation will provide information to assist the making of an objective decision and pre-empt criticism from an external reviewer (*Re Scholes and Australian Federal Police*). Consultation will avoid later embarrassment should the individual have no objection to disclosure and allows further time (thirty days) to make a decision (s 15(6)). No extension of time is available at internal review. In addition, should the individual object to disclosure this is a factor which, with others, may be sufficient to constitute *unreasonable disclosure.*

12.7.8 Section 27A (1A) provides limited circumstances where consultation is not required because the person consulted could not reasonably contend disclosure would be unreasonable. In deciding whether or not to consult, the agency is required to consider relevant matters including whether the individual's identity and the information are in the public domain. Where there is any doubt, the agency should consult.

12.7.9 Where an application has been made to the AAT to review an exemption of personal information whether made under section 41(1) or another exemption, the agency is required by sections 59A(3) to take all reasonable steps to inform the individual of the proceedings. Notice is to be given to the third party of the AAT application 'as soon as practicable'. Upon receiving notice, it is open to the third party to apply to the AAT to be made a party to the application (see subsection

30(1A) of the AAT Act). An agency or Minister may apply to the AAT for an order not to give notice to an affected third party if giving notice would not be appropriate. In considering whether to make the order, the AAT must have regard to certain grounds in subsection 59A(4) which include whether notice could prejudice the conduct of an investigation or enable a person to ascertain the identity of a confidential source. This provision was inserted by the *Freedom of Information (Removal of Conclusive Certificates and other Measures) Act 2009* and applies to requests received after commencement of that Act.

12.7.10 Further detailed guidance on consultation appears in *FOI Guidelines – Guide to Consultation and Transfer of Requests.*

13. Section 42 - Legal professional privilege

13.1. Section 42(1) of the FOI Act provides that a *document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege*. The test to be applied is the common law test rather than, for example, the test of client privilege under the *Evidence Act 1945* (see *Commonwealth of Australia v Dutton* where the Full Federal Court observed that the common law test is applicable when considering section 42 of the FOI Act). It is important that each aspect discussed below is addressed in the section 26 notice of decision.

13.2 Elements of the privilege

13.2.1 The underlying policy basis for legal professional privilege is to promote the full and frank disclosure between a lawyer and their client. The privilege relates to the purpose of the communication and not to the information contained in the documents themselves (*Mann v Carnell* as restated in *Comcare v Foster*).

13.2.2 At common law, determining whether a communication is privileged involves a consideration of whether there is a solicitor–client relationship, whether the communication was for the purpose of giving or receiving legal advice or for use or in connection with actual or anticipated litigation, whether the advice given is independent and whether the advice given is confidential (*Grant v Downs*; *Waterford v Commonwealth of Australia*).

13.2.3 In 1999, the High Court in *Esso Australia Resources Ltd v Commissioner for Taxation* held that the common law now invoked a *dominant purpose* test, in line with the *Evidence Act* and legal professional privilege law in other common law countries. The communication may have been brought into existence for more than one purpose but will be privileged if the main purpose of its creation was for giving or receiving legal advice or for use in actual or anticipated litigation. The *dominant purpose* test has been applied in *Re De Domenico and Chief Minister's Department* and *Re Wallace and Director of Public Prosecutions* and *Jorgensen v Australian Securities Investments Commission*.

13.2.4 Legal professional privilege is the client's privilege to assert or to waive, and the legal adviser is not in a position to waive it except with the authority of the client (*Re Haneef and the Australian Federal Police* affirming the previous position taken in *Mann v Carnell* that *it is the client who is entitled to the benefit of such confidentiality, and who may relinquish that entitlement*). Sometimes the client will be 'the Commonwealth' (for instance where advice is provided to a department), but in practice the Commonwealth agency receiving the advice is the agency that will need to decide whether to assert or waive the privilege. If the privilege is asserted, that agency will need to provide any necessary evidence to establish that the document in question is exempt from disclosure under s 42 of the FOI Act. This will be so even if the relevant FOI request is made to a different agency.

13.2.5 By the terms of a Cabinet decision made in March 1986, agencies are not to assert legal professional privilege unless *real harm* would result from disclosure of the information (see Brazil Direction). The phrase *real harm* distinguishes between substantial prejudice to the agency's affairs and mere irritation, embarrassment or inconvenience to the agency. Kirby J has also commented broadly in the context of

the Victorian FOI Act that legal professional privilege should extend only to what is necessary and justifiable to fulfil its purposes (*Osland v Secretary to the Department of Justice*).

13.2.6 In *Re Albanese and CEO Officers of the Australian Customs Service* the AAT rejected the submission that it had the power to review the agency's decision to claim privilege as well as the discussion to refuse access on that basis and should apply the Brazil Direction. The Tribunal does not have the power to grant access to exempt documents and is not empowered to review the decision to claim privilege separately from reviewing the validity of the privilege claim itself (*Bennett v Australian Customs Service*). That is, if an agency decides to claim exemption under s42, the Tribunal can review that decision and decide whether or not the documents are privileged, not whether or not the agency should have claimed or waived privilege.

13.2.7 Legal professional privilege can extend to documents containing information that is on the public record. In *Comcare v Foster* the privilege was upheld in regard to documents containing reference to information on the public record which were given to the lawyers for the purpose of undertaking a critical assessment in forming views about components of the legal questions. The Federal Court upheld the exemption on the basis that disclosure of those documents would reveal confidential communications concerning the seeking and giving of legal advice on the various issues comprehended by those legal questions.

13.3 Exception for section 9 material

13.3.1 Section 42(2) provides that a document which is required to be published under section 9(1) is not an exempt document under section 42(1) by reason only of the inclusion in that document of matter that is used or is to be used for the purpose of the making of decisions or recommendations referred to in section 9(1) of the Act (*Bennett v Australian Customs Service* as restated in *Re Albanese and CEO Officers of the Australian Customs Service*). This would usually concern generic legal advice, eg on the interpretation of legislation and would not extend to advice given for a particular matter, even where that advice included interpretation of legislation, unless the advice were subsequently used for s 9 purposes (Full Federal Court in *Bennett v Australian Customs Service*).

13.4 Waiver of privilege

13.4.1 The availability of a legal professional privilege claim depends on whether there has been waiver of privilege which may be express or implied. Waiver may occur, for example, in circumstances where the document in question has been widely distributed or the content of the legal advice has been disclosed or acted upon. In *Mann v Carnell* the High Court held that the circumstances in which the court will hold that waiver of legal professional privilege has occurred is *where the [earlier] disclosure [is] inconsistent with the confidentiality protected by the privilege.* This will involve an examination of the circumstances of any earlier releases. If the document has been disclosed to a limited audience with a mutual interest in the contents of the document, it may not be inconsistent to continue to claim that the document is confidential and privileged (*Re Burchill and Department of Industrial Relations* and *Drinkwater v Director-General, Department of Health*). The inconsistency test of *Mann v Carnell* has been affirmed by the High Court in *Osland*

v Secretary to the Department of Justice as the appropriate test for determining whether privilege has been waived.

13.4.2 For example, including in an Annual Report a reference to an issue which had been the subject of legal advice was held not to constitute a waiver of privilege in a legal advice extending beyond that issue (*Re Saint and Director of Professional Service Review*).On the other hand, in *Re Mining Holding Company and Commissioner of Taxation* the AAT accepted, in line with recent cases, that waiver could occur inadvertently and that it is by no means necessary that it is clearly intended and deliberate.

13.4.3 In *Bennett v Australian Customs Service* (*Bennett*) the Full Court of the Federal Court held that disclosure of the conclusions provided in legal advice, even without disclosure of the reasoning supporting those conclusions, could still result in an implied waiver of privilege if disclosure included the effect of the legal advice. However, since *Bennett* the High Court has said in *Osland v Secretary to the Department of Justice* the appropriate approach is that a limited disclosure of the existence, and the effect, of legal advice could be consistent with maintaining confidentiality in the actual terms of the advice. Therefore, voluntary disclosure of the gist of conclusions of advice by a privilege claimant will not necessarily constitute a waiver of the legal professional privilege over the whole of the advice referred to, including the reasons for making those conclusions. Whether the disclosure is inconsistent with maintaining confidentiality will depend on the circumstances of the case (*Osland v Secretary to the Department of Justice*).

13.5 Severance

13.5.1 If only part of a document contains material which is privileged under s 42, s 22 requires disclosure of the part which is not privileged from production (see *Waterford v Commonwealth of Australia*).

13.6 Government legal advisers and in–house lawyers

13.6.1 Section 42 may operate to exempt communications between agencies and their legal advisers, including government legal advisers such as the Attorney-General's Department and the Australian Government Solicitor. The guidelines for a claim of legal professional privilege in these circumstances are set out in *Waterford v Commonwealth of Australia* as follows:

- legal advice given by a qualified lawyer employed by the government can be privileged;
- for the privilege to attach, the legal adviser must be acting in his/her capacity as a professional legal adviser;
- the giving of the advice must be attended by the necessary degree of independence;
- the *dominant purpose* test must be satisfied;
- the advice must be confidential; and
- the fact that the advice arose out of a statutory duty does not preclude the privilege applying.

13.6.2 For the privilege to be available, there must be a true solicitor-client relationship between the legal adviser and the agency concerned. This will include whether, in fact, the lawyer can be said to have the necessary degree of independence and is subject to professional standards (see further *Re Proudfoot and Human Rights and Equal Opportunity Commission*, which restates *Waterford v Commonwealth of Australia*, and *Re Collie and Australian Securities and Investments Commission*). Legal qualifications alone will not suffice, but the holding of a legal practice certificate is not a necessary ingredient (*Re McKinnon and Department of Foreign Affairs*; *Australian Hospital Care Pty Ltd v Duggan*). Advice given by an in–house lawyer on purely administrative or procedural matters will not be privileged. Legal advice given by the Director of Public Prosecutions or the Office of Parliamentary Counsel may also be privileged, on the basis that it relates to the DPP/OPC and the government agency dealing with them and that the DPP/OPC act as legal advisers to the Commonwealth (see *Re Wallace and Director of Public Prosecutions*).

13.6.3 Records made by officers of an agency summarising communications which are themselves privileged also attract the privilege (*Trade Practices Commissioner v Sterling*; *Re Geary and Australian Wool Corporation* and *Re Ralkon Agricultural Co Pty Ltd and Aboriginal Development Corporation*). Privilege may attach to a copy document provided for a legal advice if the copy was made for the dominant purpose of obtaining legal advice or for the dominant use in legal proceedings (*Commissioner, Australian Federal Police v Propend Finance Pty Ltd*).

14. Section 43 - Business Affairs

14.1.1 There are several different exemptions within section 43 and these are expressed to be separate from each other. Section 43 applies to exempt a document where the document would disclose:

- trade secrets (s 43(1)(a));
- any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished (s 43(1)(b)); or
- information concerning a person in respect of his or her business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking (s 43(1)(c)), being information the disclosure of which:
  - would, or could reasonably be expected to, unreasonably affect that person or business adversely (s 43(1)(c)(i)); or
  - could reasonably be expected to prejudice the future supply of information to the Commonwealth or an agency (s 43(1)(c)(ii)).

14.1.2 In the context of the FOI Act, blanket protection for business and commercial affairs was never intended. As an exemption provision, s 43 has no special status, as shown by the following quotation:

> The (1979) Senate Committee (on the FOI Act) rejected the notion that there was a right to total corporate privacy: 'business corporations are created under federal and State laws and are properly subject to regulation by governments for the common good. A corollary of this is the public's right to know how well that regulation is being carried out on its behalf'. *Bayne, Freedom of Information* p 194.

14.1.3 To satisfy the several exemptions in this section it is necessary to demonstrate that the documents relate to a business or commercial activity. While it is clear that a government agency may have business or commercial activities where it is in competition with others, the outsourcing by a department of its services for unemployed people to private sector job network providers was held to be a governmental activity not a business or commercial activity: *Secretary, Department of Workplace Relations, Employment and Small Business and The Staff Development and Training Company* (Full Fed Ct).

14.1.4 Where the document contains only business or professional information about the applicant, the exemptions in section 43(1) cannot be applied (s 43(2)). Where the information concerns both the applicant and another business, the section may apply to exempt the information of the other business and the applicant's own information, but only if the two cannot be separated.

14.2 Trade secrets - s 43(1)(a)

14.2.1 If a given document contains a trade secret, this is a sufficient basis in itself upon which to found an exemption. There is no public interest test in s 43(1)(a).

14.2.2 A trade secret has been referred to as a *type of information which has about it the necessary quality of secrecy to be the subject of a confidence* (Dean, *The Law of Trade Secrets* (1990) page 20)).

14.2.3 In *Re Organon Pty Ltd and Department of Community Services and Health* the AAT adopted the test used to determine a *trade secret* in *Ansell Rubber Co v Allied Rubber Industries Pty Ltd* (but added factor (a) below) when deciding that the relevant considerations are:

(a) whether the information is of a technical character;

(b) the extent to which the information is known outside the business of the owner of that information;

(c) the extent to which the information is known by persons engaged in the owner's business;

(d) measures taken by the owner to guard the secrecy of the information;

(e) the value of the information to the owner and to his or her competitors;

(f) the effort and money spent by the owner in developing the information; and

(g) the ease or difficulty with which others might acquire or duplicate the secret.

14.2.4 However, in *Searle Australia Pty Ltd v Public Interest Advocacy Centre and Department of Community Services and Health* the Federal Court noted that 'the indicia stated in *Re Organon Pty Ltd and Department of Community Services and Health* were merely guides. It may be that the more technical information is, the more likely it is that, as a matter of fact, the information will be classed as a trade secret. But technicality is not required. Many valuable trade secrets could be understood by a lay person, if informed of them' (at 174–5). Information to be a trade secret must be able to be put to advantageous use by someone involved in an identifiable trade (at 173).

14.2.5 A trade secret was held by the Federal Court to be information possessed by one trader, while the information remains generally unknown, which gives the trader an advantage over its competitors (*Department of Employment Workplace Relations and Small Business v Staff Development and Training Company* [*upheld by Full Federal Court]*).

14.3 Information of value - s 43(1)(b)

14.3.2 Determining information of value

14.3.1.1 Determining whether information is exempt under s 43(1)(b) requires a decision-maker to consider:

- whether the document contains information of commercial value; and
- whether there is a reasonable likelihood that that value would reasonably be destroyed or diminished through disclosure under the FOI Act.

There is no public interest test for this exemption.

14.3.1.2 Information has commercial value to an agency or to another person if it is valuable for the purposes of carrying on the commercial activity in which that agency or other person is engaged (*Re Mangan and The Treasury*; *Re Metcalf Pty Ltd and Western Power Corporation*). That information may be valuable because it is important or essential to the profitability or the viability of a continuing business operation. Also information has commercial value to an agency or another person if a genuine, arm's length buyer is prepared to pay to obtain that information from that agency or person (see *Re Cannon and Australian Quality Egg Farms* and *Re Hassell and Department of Health of Western Australia*). This would include a competitor who could use the information to block other competitors in the field (*Re Mangan and The Treasury*).

14.3.1.3 An agreement contained details of profit and loss sharing between the parties and an unusual methodology for managing the project. The evidence was that, if known, this would give property developers and potential contractors knowledge of the strengths and weaknesses of the joint venture. The AAT held that the document had commercial value to the parties which could reasonably be expected to be diminished if it were to be disclosed (*Re ADI Residents Action Group and Department of Finance and Administration*).

14.3.1.4 The investment of time and money is not a sufficient indicator in itself of the fact that information has a commercial value. Information can be costly to produce without necessarily being worth anything (*Re Hassell and Department of Health of Western Australia*). It has commercial value if it can be used to commercial advantage by its owner.

14.3.1.5 If it is aged or out of date (*Re Angel and the Department of Art, Heritage and Environment*) or is publicly available (*Re Brown and Minister for Administrative Services*) information may have no remaining commercial value. Examples include:

- a four year old pricing list (*Re McPhillamy and Queensland Treasury*);
- expenditure by the Department of Health on an anti-smoking campaign did not of itself cause the campaign to have commercial value (*Re Hassell and Department of Health Western Australia*); and
- the methods used to prepare a land planning appeal which methods seemed straightforward and commonsense (*Re Kobelke and Minister for Planning*).

14.3.2 Effects of disclosure

14.3.2.1 Even where information has commercial value, it is necessary to show that there is a reasonable expectation that its value will be destroyed or diminished by disclosure. This does not always occur. For example, the AAT held that disclosure of a contractor's hourly charge-out rate would not affect the value of that rate at all (*Re Environment Centre NT Inc and Department of the Environment, Sport and Territories*). The classification of cargo in brief and general terms and its weight was not without further evidence, sufficient to satisfy the exemption (*Re AUS-SHIP P&I and Australian Maritime Safety Authority*).

14.3.2.2 The question under s 43(1)(b) is not whether there is a reasonable basis for the claim for exemption but whether the commercial value of the information could reasonably be expected to be destroyed or diminished if it were disclosed. The two questions are different. The decision-maker is concerned not with the reasonableness of the claimant's behaviour but with the effect of disclosure (*Searle Australia Pty Ltd v Public Interest Advocacy Centre and Department of Community Services and Health*).

14.4 Disclosure could reasonably be expected to have an unreasonable adverse effect on the business or professional affairs of a person or the business, commercial or financial affairs of an organisation - s 43(1)(c)(i)

14.4.1 Could reasonably be expected to

14.4.1.1 *Could reasonably be expected to* refers to an expectation which is based on reason (*Re Actors Equity Association of Australia and Australian Broadcasting Tribunal*). For further discussion of the meaning of this phrase see Introduction paragraph 1.6.2.

14.4.2 Unreasonable adverse effect on disclosure

14.4.2.1 The word *unreasonably* in s 43(1)(c)(i) imports a need to balance public and private interests. However, it does not follow that the public interest it will in all cases constitute a total statement of the factors that are relevant in assessing what is to be viewed as an unreasonable effect (*Re Actors Equity Association of Australia and Australian Broadcasting Tribunal (No 2)*).

14.4.2.2 The public interest underlies the term *unreasonable*, but it will not be the only relevant factor to be assessed. If it be in the public interest that certain information be disclosed, that would be a factor to be taken into account in deciding whether a person would be *unreasonably* affected by the disclosure; the effect, though great, may be reasonable in the circumstances. For example, if the relevant information showed that a business practice or product posed a threat to public safety or involved serious criminality, a judgment might be made that it was not unreasonable to disclose it, even though the adverse effect on the business concerned would be serious (*Searle Australia Pty Ltd v Public Interest Advocacy Centre and Department of Community Services and Health*). It is not the reasonableness of the claim of harm, but rather the objective assessment of the expected adverse effect, that must be established.

14.4.2.3 Whether the effect, even if great, is unreasonable involves a consideration of all the relevant factors (*Colakovski v Australian Telecommunications Corporation*). For example, it has been held that an examiner, if

competent, should be able to support his or her marks, and it was irrelevant that he or she may be subjected to uninformed and unfair criticism (*Re Watermark and Australian Industrial Property Organisation*). Also, professionals are expected to supply proficient and competent advices and must be prepared, if necessary, to stand behind them. Whilst most professionals would undoubtedly prefer to avoid involvement in litigation, most would see it as an unavoidable hazard which is part of their work (*Re Ralkon Agricultural Company and Aboriginal Development Corporation*).

14.4.2.4 Where it is the case that disclosure would result in the release of facts already in the public arena, such disclosure can not be found to cause an unreasonable adverse effect on business affairs (*Re Daws and Department of Agriculture Fisheries and Forestry*). In *Re Daws*, the applicant was concerned about information contained in an investigation report, in that it would negatively affect his business affairs. As the document had already been previously raised in some detail through Parliament, the court held there was no adverse affect as the information contained in the document was already in the public arena.

14.4.3 Business, commercial or financial affairs of an organisation or undertaking

14.4.3.1 The separate adjectives in the phrase should not be treated as discrete indicia of *business affairs*. The phrase itself is a comprehensive phrase intended to embody the totality of the money–making affairs of an organisation or an undertaking as distinct from its private or internal affairs. *Anything which occupies the time and attention and labour of a* (*person*)*, for the purpose of profit ... is business* (*Re Cockcroft and Attorney–General's Department*). An organisation's *business affairs* will relate to the profitability and viability of its business operations (*Re Cannon and Australian Quality Egg Farms Pty Ltd*).

14.4.3.2 Not all information coming from a business will necessarily concern its business affairs. A racehorse owners' association submission to government on the approach it should take to the racing industry in Western Australia, was held not to be about the association's business (*Re Western Australian Racehorse Owner's Association and Office of Racing and Gaming*). A statement by an employer of the details of an injury occasioned to an employee in a steel works was also held not to be about the organisation's business (*Re Groom and Accident Compensation Commission*).

14.4.3.3 There is a list of examples which have been classified as business affairs in the Queensland Information Commissioner's decision of *Re Cannon and Australian Quality Egg Farms Pty Ltd:*

- statements of financial information provided to a Broadcasting Control Tribunal by commercial television licensees containing audited balance sheets and profit and loss accounts of companies, information on costs of production for programs and information about revenue earned by resale of programs (*Re Actors Equity of Australia and Australian Broadcasting Tribunal*);
- information as to a company's pricing structure (*Re Drabsch and the Collector of Customs*);

- information gathered to prove the efficacy or otherwise of a product manufactured by a company, including health and safety information on a particular drug gathered by a pharmaceutical company (*Re Public Interest Advocacy Centre and Department of Community Services and Health and Searle Australia Pty Ltd (No 2)*);
- information supplied by a woodchipping company to a Commonwealth agency in the nature of operating and financial information, future strategies, expected export market movements, selling prices and overseas customer lists (*Re Angel and the Department of Art, Heritage and Environment*);
- a report provided to the Department of Transport by a firm of property consultants which had analysed tenders received for a property development program (*Hefferman and Department of Transport*); and
- Ship's Master's report made in respect of a voyage to the Middle East carrying a cargo of live sheep exported from Australia (*Livestock Transporting & Trading and Australian Maritime Safety Authority*).

14.4.4 Business or professional affairs of a person

14.4.4.1 The use of the term *professional* in s 43(1)(c) as part of the phrase *concerning a person in respect of his or her business or professional affairs,* would seem to indicate that the word is to be given its usual (dictionary) meaning. This view is reinforced when it is seen that the term is used in juxtaposition with the term *business.*

14.4.4.2 The ordinary dictionary definition of a profession is a *vocation in which a professed knowledge of some department of learning is used in its application to the affairs of others, esp. one of the three learned professions of divinity, law and medicine* (Shorter Oxford Dictionary). The word *profession* is not one which is rigid or static in its signification; it is undoubtedly progressive with the general progress of the community (*Re Fogarty and Chief Executive Officer, Cultural Facilities Corporation*).

14.4.4.3 The word *profession* may well have been inserted for more abundant caution in case providers of professional services might not have been thought of, in some quarters, as being engaged in running a business. The use of the word *profession* is intended to cover the work activities of a person who is admitted to a recognised *profession*, and who ordinarily offers professional services to the community at large for a fee ie. it refers to the running of a professional practice for the purpose of generating income (*Re Pope and Queensland Health and Hammond*). Section 43(4), makes it clear that the exemption does not apply merely because the information refers to a person's status as a member of a profession. The clear inference is that the exemption does not apply to the affairs of a salaried employee who happens to be a member of a profession eg a doctor or a lawyer.

14.4.4.4 The activities of government employees carried out pursuant to their employment are not considered to be the business or professional affairs of those persons, and documents relating to an employee's activities as a government employee are not documents relating to the employee's business affairs within the meaning of s43(1)(c) (*Young v Wicks*; *Re Fogarty and Chief Executive Officer, Cultural Facilities Corporation*).

14.4.4.5 It is clear that public servants will not be accepted as members of a profession for the purpose of s 43(1)(c). The AAT held in relation to auditors: "There is no evidence that would indicate community acceptance of the audit function of officers in the Australian Taxation Office as 'professional affairs…The totality of Australian Taxation Office auditors does not represent a group of thoroughbreds similarly educated with knowledge of some department of learning or science. Instead, they resemble a real cross-breed where some of the group possess no academic qualifications at all…I am not prepared to extend the ordinary meaning of the term" (*Re Dyki and Commissioner of Taxation*).

14.4.4.6 This mirrors the distinction drawn earlier in s 43(1)(c) in relation to a natural person between his or her business or professional affairs on the one hand and his or her private and family affairs on the other.

14.5 Prejudice supply of information – s 43(1)(c)(ii)

14.5.1 Documents containing information of a kind described in s43(1)(c)(ii) will be exempt if their disclosure could reasonably be expected to prejudice the future supply to the Commonwealth or an agency of information for the purpose of the administration of the law or the administration of matters administrated by an agency. The exemption consists of two parts:

- a reasonable expectation of a diminution in the volume or quality of business affairs information to government; and
- that the diminution will prejudice the operations of the agency.

14.5.2 There needs to be a reasonable likelihood that disclosure would result in a reduction in both the quality and the quantity of business affairs information flowing from the private sector to government (*Re Maher and Attorney General's Department* and *Re Telstra and Australian Competition and Consumer Commission*) or that disclosure of the source's identity is likely to inhibit the flow of information to the agency (*Re Caruth and Department of Health, Housing, Local Government and Community Services*). Consideration of whether there will be a prejudice to the supply of information from a substantial number of sources available and whether release of one source's information will create a perception in the minds of other sources that their information will also be released is also relevant (*Re B and Brisbane North Regional Health Authority*). However, in circumstances where the information at issue can be compulsorily obtained or is required in order for a certain benefit or grant to be determined, no claim of *prejudice* is available.

14.5.3 There is no modified public interest test in s 43(1)(c)(ii). However, the AAT has held that there needs to be a reasonable expectation of prejudice to the operations of the agency (*Re Angel and the Department of Art, Heritage and Environment*). This will include a consideration of the degree of dependence placed on the information by the Department (*Re Dillon and Department of Trade*).

14.5.4 Prejudice will not occur if the information in question is routine or administrative (that is, generated as a matter of practice: *Re Kobelke and Minister for Planning*). It is also necessary to focus on the agency's future ability to obtain like information, not just on the provision of particular information from a particular source (*Re Metcalf and Western Australian Power Corporation*).

14.6 Undertaking

14.6.1 Sections 43(1)(c), 43(1)(c)(i), 43(2)(b) and 43(3) include the term *undertaking* in addition to the terms *person and organisation.* Section 43(3) states that a reference in the section to *undertaking* includes a reference to an undertaking carried on by government or an authority of government. Section 43(1)(c)(i) includes the term *undertaking* in the context of *concerning the business, commercial or financial affairs of an organisation or undertaking.* However, the early Federal Court decision of *Harris v Australian Broadcasting Corporation* held that s 43 exists not to protect government, but rather third parties that deal with government. Government agencies cannot look to s 43 to protect information about themselves.

14.6.2 Whilst not specifically referring to the *Harris* decision, the Full Federal Court in *Secretary, Department of Employment Workplace Relations and Small Business v Staff Development and Training Company* appeared to accept that a government department could claim the benefit of s 43 exemption although it did not have to decide the point having found that the department (DEWRSB) was engaged in governmental activities not business or commercial activities.

14.7 Competitive commercial activities and Part II of Schedule 2

14.7.1 Where an agency is listed in Part II of Schedule 2 to the FOI Act in respect of documents relating to its competitive commercial activities, documents disclosing those activities will be exempt in the agency's hands. The fact that the agency is required to act in a business like manner is not to be confused with commercial activities as defined (*Re Pye and Australian Postal Corporation*). Commercial activities has been discussed in several AAT decisions. For a further discussion of this schedule and s 7, see Exemption of certain agencies, paragraphs 2.1–2.13. Transfer provisions apply to allow an agency listed in the schedule to invoke the exemption provided.

14.8 Consultation

14.8.1 Section 27(1) provides that no decision to grant access to business affairs information of a third party is to be made without consultation with the third party (where it is reasonably practicable to do so in all circumstances). Unlike section 27A, consultation is not restricted to where a reasonable contention of exemption under section 43(1) could be made.

14.8.2 Submissions made by the business consulted, which are limited to making claims under section 43(1) FOI Act (*Re Mitsubishi Motors Australia Ltd v Department of Transport*), are to be taken into account but the business consulted has no power of veto. Should a decision be made to disclose the document or part of document notwithstanding the objections, the business consulted must be notified of it and has independent review rights under ss 54(1D) and 59 of the FOI Act, known as 'reverse-FOI'.

14.8.3 Where the agency has refused access to documents containing information of a kind described in s43(1) and the matter comes before the AAT, the agency is required to inform the business of the proceedings (section 59(3)). Notice is to be given to the third party of the AAT application 'as soon as practicable'. Upon receiving notice, it is open to the third party to apply to the AAT to be made a party to the application (see subsection 30(1A) of the AAT Act). An agency or Minister may apply to the AAT for an order not to give notice to an affected third party if giving notice would not be appropriate. In considering whether to make the order, the AAT must have regard to certain grounds in subsection 59(4) which include whether notice could prejudice the conduct of an investigation or enable a person to ascertain the identity of a confidential source. This provision was inserted by the Freedom of Information (Removal of Conclusive Certificates and other Measures) Act 2009 and applies to requests received after commencement of that Act.

14.8.4 For further information concerning consultation, see *FOI Guidelines - Guide to Consultation and Transfer of Requests.*

15. Section 43A - Documents relating to research

15.1.1 Section 43A exempts documents that contain information about research that is being, or is to be, undertaken by an officer of an agency specified in Schedule 4 where disclosure of the information before completion of the research would be likely unreasonably to expose the agency or officer to *disadvantage*. The only agencies listed in Schedule 4 are the CSIRO and the Australian National University.

15.1.2 The term *disadvantage* is not defined in s 43A and there are no AAT or court decisions on the provision.

15.1.3 This section can be used, for example, to protect the researcher's priority of publication. However, consideration should be given to deferral of access pursuant to s 21(1)(c) which allows an agency to defer access if the premature release of the document would be contrary to the public interest.

15.1.4 This exemption does not apply to documents that relate only to completed research (s 43A(2)) or to research of agencies other than those listed in Schedule 4.

16. Section 44 - Documents affecting the national economy

16.1.1 A document will be exempt if its disclosure would be contrary to the public interest because it could reasonably be expected to:

- have a substantial adverse effect on the ability of the Commonwealth to manage Australia's economy (s 44(1)(a)); or
- result in an undue disturbance of the ordinary course of business in the community, or undue benefit or detriment to any person or class of persons, by reason of giving premature knowledge of or concerning proposed or possible action or inaction of the Commonwealth Government or Parliament (s 44(1)(b)).

16.1.2 Section 44(1) applies only if disclosure *could reasonably be expected* to have a *substantial adverse effect* on the management of the economy or cause *undue disturbance* of business or *an undue benefit or detriment* by giving premature knowledge of possible Government action. An example might be details of the Budget before its formal release. See Introduction paragraphs 1.6.2.1–1.6.2.2 for a discussion of the term *could reasonably be expected to* and paragraphs 1.6.1.1-1.6.1.2 for a discussion of *substantial adverse effect*.

16.1.3 It is the consequences of disclosure that are significant when determining whether a document is exempt under s 44, not the nature of the document or the information contained in the document (although they are likely to be relevant considerations). The expected effect of disclosure must be on the government's ability to manage the economy. These words seem to suggest that the effect must be on the process of decision making in relation to the economy, rather than on the economy itself.

16.1.4 Even though s 44 refers to the public interest, it does not impose a public interest test as such. Once the criteria set out in s 44(l)(a) or (b) are satisfied, disclosure is in effect deemed to be contrary to the public interest, and the applicant cannot argue that disclosure might nevertheless be in the public interest on other grounds (*Re Mann and Australian Taxation Office*). See Introduction, 1.6.3, for a discussion of the public interest.

16.1.5 Section 44(2) lists some of the documents that might be considered exempt under s 44(1) provided the above elements are satisfied and includes documents relating to currency or exchange rates, taxes, the regulation of financial institutions, foreign investment or government borrowing. This list is not exhaustive.

16.1.6 The AAT in *Re Waterford and Treasurer of Commonwealth of Australia (No 2)* stated that, if disclosure of the document entitled Forward Estimates of Budget Receipts had the potential to have a significant impact on the government's ability to control the economy, then its disclosure would be contrary to the public interest and it would be exempt (but did not have to decide whether disclosure could reasonably be expected to have that effect as the document was the subject of a conclusive certificate).

17. Section 45 - Breach of confidence

17.1.1 Section 45(1) of the FOI Act provides that *a document is an exempt document if its disclosure under this Act would found an action, by a person other than the Commonwealth, for breach of confidence*.

17.1.2 This section applies where a person who has provided confidential material to an agency could initiate a breach of confidence action against that agency, should the agency disclose the material (*Re Kamminga and Australian National University*; *Jorgensen v Australian Securities Investments Commission*).

17.1.3 To found an action for breach of confidence (which means that section 45 would apply), five separate criteria must be satisfied. In addition, further exceptions and limitations as to the availability of a confidentiality claim may also apply (see paragraphs 17.1.5–17.1.9). The five criteria are as follows:

(i) The information at issue (ie the information claimed to be confidential) must be identified with specificity and not merely in global terms (see Gummow J in *Corrs Pavey Whiting and Byrne v Collector of Customs*).

(ii) The information must be *inherently confidential*, that is, known only to a limited class of parties and not more broadly (for example, certain information relating to a Royal Commission was not inherently confidential as it *might be expected to be known to a number of people: Re Gold and Department of the Prime Minister and Cabinet*; certain information copied to two other organisations as well as to the agency was not confidential: *Re Richardson and the Australian Taxation Office*; see also *Re Jorgensen and Australian Securities Investments Commission* which commented on the need for evidence of this).

(iii) The information must have been communicated and received on the basis of a mutual understanding of confidence (*Re Jorgensen and Australian Securities Investments Commission*; *Re Harm and Department of Social Security;* and *Re Liddell and Department of Social Security*). If, for example, an agency routinely publishes such information, the communication cannot satisfy this requirement because the details will not have been received in confidence. It is also important to note that this issue must be judged according to the understanding of the parties *at the time of the communication*, not in retrospect. An obligation of confidentiality can be express or implied (*Re Bunting and Minister Immigration and Multicultural and Indigenous Affairs*). Circumstances which are relevant to the application of this third criterion include:

- longstanding, consistent and well-known practices within the agency of carefully protecting information, as provided to it by third party individuals or companies;
- facts and circumstances which clearly indicate the implicit and mutual understanding of confidentiality that existed as between the provider and recipient at the time that the information was communicated; and

- explicit requests to, and assurances given by, agency staff that the information as conveyed to the agency would be kept protected and, to the extent possible, not disclosed.

(iv) Disclosure of the information, were it to occur, must be an *unauthorised use* of the information (this may require an examination of the *nature* of the confidential relationship, that is, whether it can be said to encompass an additional party beyond those to the original communication, disclosure to which additional party could be deemed to be *authorised*) (*Joint Coal Board v Cameron*; *Re Lander and Department of Social Security*); and

(v) Disclosure would cause the confider to suffer a detriment. In *Re Petroulias and Others v Commissioner of Taxation* the AAT held that the disclosure of information would cause the informant detriment in two ways, firstly, from exposure to possible public comment and public discussion of the actions that informant chose to take and, secondly, from personal criticism by those the subject of the information. However, it is not clear whether suffering a detriment is a necessary element of an action for breach of confidence. Some commentators say it is not, because equity operates upon the conscience and not on the basis of damage caused. However, other authorities say it is necessary and certainly prudent to proceed on the basis that detriment must be established (*Re B and Brisbane North Regional Health Authority*). The AAT has applied the criterion in several cases (eg *Re Toren and Department of Immigration and Ethnic Affairs* and *Re Raisenan and SBS*). In *Re Kamminga and Australian National University* the AAT said that, if it were a necessary ingredient, the disclosure of the information through FOI would be sufficient detriment to the confider.

17.1.4 The agency must have no *public policy* defence to the confidant's breach of confidence action. Such a defence will arise rarely, depending as it does on some overriding public good – such as avoidance of a threat to public health – being served by disclosure.

17.1.5 The criteria in s 45 are not satisfied by the marking of documents as *confidential* or *commercial–in–confidence*, or by the giving of relevant undertakings or agreement, although such an agreement will assist in satisfying the third criterion in 17.1.3 above (*Searle Australia Pty Ltd v Public Interest Advocacy Centre and Department of Community Services and Health; Re Perth Radiation Oncology Centre and Department of Health; Re Richardson and the Australian Taxation Office*). Just as significant, if not more so, will be the conduct of the parties to an allegedly confidential communication, and what can be inferred from their conduct in each particular case (*Corrs Pavey Whiting and Byrne v Collector of Customs*). In circumstances where information is required to be produced by statutory demand, and is not given voluntarily, its disclosure could not be regarded a breach of confidence (*Re Drabsch and the Collector of Customs*).

17.1.6 Evidence that an agency has carefully considered the segregation and control of confidential information, and has document management practices which afford an appropriate degree of protection to this information, is significant in

assessing whether information is received on a confidential basis (*Re Midland Metals and Collector of Customs*).

17.1.7 Documents which were once confidential may lose that quality through waiver, subsequent disclosures of the same material, or through the passage of time (*Re Gold and Prime Minister and Cabinet*; *Re Chandra and Minister for Immigration and Ethnic Affairs*; *Re Anderson and Department of Special Minister of State* (*No 2*); *Re Kahn and Australian Federal Police*). In addition, the obligation to maintain confidentiality may be for a limited period only. For example, witnesses interviewed in relation to a disciplinary enquiry may be told that their statements will be kept confidential until such time as proceedings are commenced, at which time the principles of natural justice would require disclosure of the statements (see two decisions of the QLD Information Commissioner: *Re "E" and Legal Aid Office* (*QLD*) and *Re Coventry and Cairns City Council*).

17.1.8 Information may be supplied on a limited confidential basis which permits the recipient to divulge it to a limited class of persons. This does not destroy its confidential character (*Re Burchill and Department of Industrial Relations*). The creators of the document would usually fall within this class (*Joint Coal Board v Cameron*).

17.1.9 An unauthorised release of information does not destroy its confidential character (*Re Cullen and Australian Federal Police*) nor will inadvertent disclosure (*Re Fryar and Australian Federal Police*).

17.1.10 A confidential communication disclosed to a third party may still be exempt under s 45 on the basis that equitable relief would be available against that third party, however innocently that third party may have acquired that information. Nor does there need to be any impropriety in its acquisition. The third party is bound by the obligation of confidence and restrained from further breach, even if the information were obtained inadvertently, once the third party learns of its confidentiality (*Director of Public Prosecution v Kane* and *Re ADI Residents Action Group and Department of Finance and Administration*).

17.2 The contractual and equitable dimensions of an obligation of confidence

17.2.1 The law of confidentiality comprises both contractual and equitable elements. In *Re ADI Residents Action Group and Department of Finance and Administration* the AAT considered these elements in the context of FOI legislation. In *Re Kamminga and Australian National University* the AAT, whilst not determining the matter, said that it is not clear whether a contractual right of confidence is included in s 45 of the FOI Act or whether it is only covered in those cases where the auxiliary equitable jurisdiction in relation to a breach of confidence could be invoked.

17.3 *Fairfax* doctrine

17.3.1 Where government itself is the provider of information, and seeks to enforce a confidence, it is clear that detriment must be established by reference to the preponderant public interests which would be damaged upon disclosure (*Commonwealth of Australia v John Fairfax & Sons Ltd*). Unlike a private party seeking to enforce a confidence, the Commonwealth is obliged to act in the broader

public interest. As such, public discussion and criticism of government actions is not sufficient detriment. Harm to broader public interests cannot be demonstrated unless there is demonstrable prejudice to the interests of the community which extends beyond discussion or debate of the government information to be disclosed.

17.3.2 The issue of whether a *public body* owned by government or associated with it also needs to show detriment to the public interest in order to enforce a confidence is addressed in *Esso Australia Resources Ltd v Plowman*. In that case, the High Court held that the *Fairfax* doctrine does apply to these bodies. For examples of the direct application of the *Fairfax* doctrine in the FOI context see *Re Sullivan and Department of Industry, Science and Technology* and *Re ADI Residents Action Group and Department of Finance and Administration*.

17.3.3 The effect of s 45(2) is that s 45(1) is not applicable to deliberative documents as described in s 36 (except where confidence is owed to a Commonwealth non-Governmental source).

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

18.1.1 Section 46 provides that a document may be exempt where its *public disclosure*, apart from the FOI Act and any immunity of the Crown, would:

- be in contempt of court (s 46(a));
- be contrary to an order or direction by a Royal Commission, tribunal or other person or body having the power to take evidence on oath (s 46(b)); or
- infringe the privileges of the Parliament of the Commonwealth or of a State or house of such a Parliament or of a Territory Legislative Assembly or of Norfolk Island (s 46(c)).

18.1.2 Documents protected under s 46(a) include documents which are protected by the courts as part of their power to regulate their own proceedings, for example, names of parties or witnesses in litigation or statements and evidence presented to the court. Documents protected by s 46(b) are documents subject to an order of a Royal Commission, tribunal or other body having power to take evidence on oath (eg the AAT) prohibiting their publication. Documents protected under s 46(c) may include documents and records of evidence presented to Parliamentary Committees. However, in the absence of a resolution or standing order to the contrary it is not necessarily a breach of privilege to disclose these documents under the FOI Act.

18.1.3 Public disclosure of documents pursuant to an FOI request will not necessarily *infringe the privileges of the Parliament of the Commonwealth* within the meaning of s 46(c). Section 46(c) is more concerned with circumstances where information provided to a house or committee of Parliament has been disclosed without authority, for example, where a Standing Order of Parliament prohibits disclosure (see, in this context, House of Representatives Standing Order 346 and Senate Standing Order 37). However, disclosure of information under the FOI Act, where disclosure has not been prohibited under a resolution or Standing Order, will not infringe any relevant privileges or amount to the *impeaching or questioning* of proceedings in Parliament.

18.1.4 Documents developed specifically for use in Parliamentary proceedings and being so used may be within the privilege although it will not extend to every document (*O'Chee v Rowley*). Commonly, current possible parliamentary questions or question time briefs will be subject to Parliamentary privilege.

18.1.5 The object of the words *public disclosure* is to make exempt any document that would have any of the effects described above if disclosure were made to the public generally rather than to an FOI applicant. For example, disclosure to a particular person may not amount to a contempt of court. Whether such disclosure would be contempt of court must be determined by supposing that the agency had disclosed the document to the public generally.

18.1.6 The purpose of the words *apart from this Act and any immunity of the Crown* is to make exempt any document that would have any of the effects in s 46(a), (b) or (c), apart from the protections in the FOI Act (see ss 91 and 92) and the protections afforded by the immunities of the Crown.

18.1.7 The AAT rejected the argument that s 46(b) of the FOI Act had effect only for as long as the Letters Patent establishing a Royal Commission remained effective and that any order for confidentiality would have to be judged against other exemptions in the Act (*Re Aldred and Department of Prime Minister and Cabinet*). Undisputed evidence that certain documents were the subject of an order of confidentiality by the Royal Commissioner, Mr Costigan QC was enough to make the documents exempt under s 46(b) provided such an order had a continuing effect (*Re Gold and the Australian Federal Police and the National Crime Authority*).

18.1.8 Disclosure of the transcript of an ex tempore judgment could not interfere with the administration of justice in the case of the applicant's family law proceedings as the proceedings were concluded and so would not interfere with the administration of the law as a continuing process. While publication of certain details of proceedings of the Family Court is an offence under s 121 of the *Family Court Act 1975*, such publication is not a contempt of court. The authority of the court would only be diminished by disclosure if there were something defective in unsettled judgments (*Re Altman and Family Court of Australia*).

19. Section 47 - Certain documents arising out of companies and securities legislation

19.1.1 Section 47 exempts from disclosure documents relating to the now defunct National Companies and Securities Commission (NCSC). Such documents are also exempt under the Victorian and NSW FOI Acts. The NCSC was abolished on 31 July 1992 and replaced with the Australian Securities Commission (now the Australian Securities and Investment Commission (ASIC)).

19.1.2 Section 47 has not been amended to take these changes into account. The documents held by the former NCSC are now held by the ASIC and, if an FOI request were made for these documents, they would be exempt under this section. As the ASIC is an agency for the purposes of the FOI Act any request for documents, other than an NCSC document, would have to be dealt with in the normal way.

19.1.3 This section also exempts from disclosure documents relating to the Ministerial Council for Companies and Securities if those documents were prepared by a Commonwealth agency or received from a State or a State authority and prepared for the purposes of the Ministerial Council or which disclose decisions or deliberations of the Ministerial Council other than an official publication. The Ministerial Council itself is not subject to the FOI Act. Requests for such documents would, in most cases, be transferred to the ASIC.

19.1.4 There is no requirement to consider the public interest. If the document falls within one of the exempt categories, then it is exempt even if there would be no adverse effect.

20. Section 47A - electoral rolls and related documents

20.1.1 Section 47A was inserted in the FOI Act on 24 December 1992 to ensure computerised information relating to the electoral roll held by the Australian Electoral Commission (AEC) is protected from disclosure, so that such information cannot be obtained and manipulated for advertising, direct marketing or other purposes.

20.1.2 The provision only applies to electoral rolls and material derived from electoral rolls and only includes names and addresses (refer to s 83 *Commonwealth Electoral Act* 1918). It does not protect from disclosure electoral material that contains other information about electors such as age or occupation. The exemption does not apply to individuals who seek access to records about themselves.

Attachment A

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