

## **Navigating the new FOI regime: Documents conditionally exempt from disclosure**

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A new regime for seeking access to Commonwealth government information starts on 1 November 2010.<sup>1</sup> The changes promote a pro-disclosure culture and greater openness in government. This article focuses on the new test for documents “conditionally exempt” from disclosure and discusses some implications for information management under the new regime.<sup>2</sup>

The government’s use of technology is an important factor in understanding the extent of information potentially accessible under an FOI request. Like many organisations, much information is created by or provided to government in electronic form. A piece of information may then be attached to or incorporated in another document. Each use of this information may need to be assessed to see if it falls within the scope of an FOI request. Broadening the documents which may be accessed through an FOI request poses additional challenges for government information management practices.

The start of the new FOI regime is also a timely reminder to individuals and businesses that every communication they send to government (including emails) becomes a government-held document potentially accessible

through an FOI request.

### **Exempt and conditionally exempt documents**

The *Freedom of Information Act 1982* (Cth) (FOI Act) gives each person a right to request access to government-held information. Unless the information is in a document that is exempt, access must be given.<sup>3</sup> The amendments to the FOI Act overhaul treatment of exempt documents in two main ways:

- the categories of documents exempt from disclosure will be reduced (and some of the remaining categories narrowed); and
- there will be new categories of “conditionally exempt” documents.

The new regime retains the current position that the government is not required to give access to an exempt document.<sup>4</sup> However, the government must give access to a conditionally exempt document unless, on balance, giving access will be contrary to the public interest.<sup>5</sup>

Table 1 outlines how the exempt document categories will change from 1 November.

**Table 1**

<b>Exempt documents pre 1 November</b>	<b>Treatment from 1 November</b>
Documents affecting national security, defence or international relations (s33)	Remains exempt.
Documents affecting relations with States (s33A)	Conditionally exempt. Replaced by s47B. Pre 1 November test already required disclosure if in public interest.
Cabinet documents (s34)	Remains exempt, but narrower meaning of exempt Cabinet documents (s34).
Executive Council documents (s35)	Repealed and not replaced.
Internal working documents (s36)	Replaced by new 47C - information disclosing deliberative processes which is conditionally exempt.
Documents affecting enforcement of law and protection of public safety (s37)	Remains exempt.
Documents to which secrecy provisions of enactments apply (s38)	Remains exempt.

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<b>Exempt documents pre 1 November</b>	<b>Treatment from 1 November</b>
Documents concerning certain operations of agencies (s40)	Conditionally exempt, but narrower test (s47E).
Documents affecting personal privacy (s41).	Conditionally exempt. There is a new list of factors for the government to take into account in assessing if disclosure is unreasonable (s47F).
Documents subject to legal professional privilege (s42)	Remains exempt, but with some clarifications.
Documents relating to business affairs (s43)	Split into:  (a) exempt: trade secrets and commercially valuable information (s47); and  (b) conditionally exempt: other business affairs-type information that, if disclosed, could be harmful or prejudice future supply of information to government (s47G).
Documents relating to research (s43A)	Conditionally exempt (s47H).
Documents affecting national economy (s44)	Conditionally exempt (s47J).
Documents containing material obtained in confidence (s45)	Remains exempt, but amended to refer to new s47C (deliberative processes).
Documents disclosure of which would be contempt of Parliament or contempt of court s46	Remains exempt.
Certain documents arising out of companies and securities legislation s47	Repealed and not replaced.
Electoral rolls and related documents s47A	Remains exempt.

**How is the public interest in disclosing assessed?**

The new regime gives limited guidance on determining the public interest. Factors favouring access being in the public interest are, if access would:

- (a) promote the objects of the FOI Act;
- (b) inform debate on a matter of public importance;
- (c) promote effective oversight of public expenditure; or
- (d) allow a person to access his or her own personal information.<sup>6</sup>

There is a list of irrelevant factors the government cannot take into account in determining if access would be contrary to the public interest.<sup>7</sup> These factors are if:

- (a) access could result in embarrassment to or loss of confidence in the government;
- (b) access could result in any person misinterpreting or misunderstanding the document;
- (c) the author of the document was (or is) of high seniority in the agency; or
- (d) access could result in confusion or unnecessary debate.<sup>8</sup>

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The FOI Act contains no list of public interest factors weighing against disclosure.<sup>9</sup> If a document is conditionally exempt then, in order for the government to refuse access, a public interest harm in disclosing the document will need to be identified and also assessed as outweighing the public interest favouring disclosure.

The Information Commissioner may also issue guidelines for working out if access would be contrary to the public interest and the government must have regard to those guidelines.<sup>10</sup>

### **Narrowing third party consultation**

The government holds information relating to people's and businesses' personal and business affairs. This information is collected in many ways including through formal government information-gathering activities, carrying out regulatory functions (eg, investigating complaints), lobbying to government and performing government contracts.

The right to access government-held information under an FOI request includes information relating to third parties. However, before access may be given, the third party concerned has to be consulted to see if they object to the disclosure.

From 1 November, the obligation to consult will be narrowed to only arise if it appears to the government that the person or organisation might reasonably wish to contend the document contains exempt or conditionally exempt information (relating to their personal or business affairs).<sup>11</sup> The matters the government must consider in deciding this are:

- (a) how well-known is the information;
- (b) is the person's or organisation's association with the information known;
- (c) is the information publicly accessible; and
- (d) any other relevant matters.

Narrowing the obligation to consult in this way means individuals and businesses should consider if they need to be more proactive in telling the government when they would wish to object to their information being disclosed. Businesses should consider reviewing their practices for sharing information with government, in particular via email. For example, are communications sent by email subject to less scrutiny as to their content than a formal letter?

### **Applying the conditionally exempt test**

The new FOI regime (and in particular the new conditionally exempt test) raises some challenges for government in its application:

### **Conditionally exempt is a complex test:**

The conditionally exempt test adds further complexity to assessing FOI requests. It is anticipated that, to properly discharge its responsibilities, the government will need to allocate more resources to assessing FOI requests against the public interest conditionally exempt criteria and to consulting with affected third parties.

### **Weighing the pros and cons of disclosure:**

For at least an initial period, it may be unclear how to weigh-up the factors favouring and against disclosure. For example, it may be difficult to compare as a public interest concern the potential harm to a business if sensitive information about it is released with the public interest in knowing about the matter.

### **Limits to drawing on State government reforms:**

New information access laws already operate in New South Wales, Queensland and Tasmania. They all apply a public interest test in assessing whether to give access to information. While they each categorise types of information in similar ways, each defines and applies its public interest test differently.<sup>12</sup> This limits the opportunity for Commonwealth and State governments to draw upon each others' experiences and case law to apply consistent decision-making approaches.

### **Information management:**

Will the new FOI regime result in a substantial increase in FOI requests? If so, to respond effectively to this and meet processing deadlines set by the FOI Act, government agencies may need to change their information management practices. For example, agencies might move to classify information upon creation or receipt according to the exempt and conditionally exempt categories that could apply. Agencies might also be more pro-active in seeking third party views on disclosing their information at the time the agency collects the information.

### **Conclusion**

Introducing the conditionally exempt test may well see an increase in the number of FOI requests as people seek access to information previously not accessible. Applying the conditionally exempt test itself will be more resource-intensive than is currently the case as it requires the additional step of assessing the public interest.

Finally, it will be an ongoing challenge for government agencies to maintain effective information management practices to enable them to identify information falling within the scope of an FOI request and to process the request within the timeframe required by the FOI Act.

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<sup>1</sup> The amending legislation is the *Freedom of Information*

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*Amendment (Reform) Act 2010* (Cth).

<sup>2</sup> References in this article to “the government” making a decision on granting access for an FOI request are to the Agency or Minister with the responsibility for making the decision.

<sup>3</sup> The FOI Act also gives the government decision-maker other limited discretions such as to release a document after redacting exempt or irrelevant material (s22).

<sup>4</sup> FOI Act current s11(1) and new s11A(4). Note under the pre and post 1 November 2010 changes, the government has discretion to give access to an exempt document.

<sup>5</sup> FOI Act new s11A(5).

<sup>6</sup> FOI Act new s11B(3).

<sup>7</sup> FOI Act new s11B(4).

<sup>8</sup> State government reforms contain similar (and some different) irrelevant factors. For example, see the *Government Information (Public Access) Act 2009* (NSW) (GIPA Act) s15, *Right to Information Act 2009* (QLD) Schedule 4, *Right to*

*Information Act 2009* (Tas) Schedule 2.

<sup>9</sup> State government FOI reforms have attempted to address this issue. For example, the GIPA Act contains an exhaustive list of public interest considerations against disclosing information (s14 and Schedule 1).

<sup>10</sup> FOI Act new 11B(5). The Information Commissioner is a newly-created role responsible for over-seeing the new FOI regime, and has powers to conduct investigations and review decisions on access.

<sup>11</sup> FOI Act new s27 (business affairs exempt and conditionally exempt information) and 27A (personal information conditionally exempt information).

<sup>12</sup> For example, in NSW the GIPA Act contains a presumption in favour of disclosing government information unless there is an overriding public interest against disclosure. It then lists exhaustive factors to consider in assessing if the public interest does not favour disclosure (which reflects some of the exempt and conditionally exempt categories in the FOI Act) and a non exhaustive list favouring disclosure.