

Information Commissioner's Guideline: A Guide to FOI Exemptions

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Under section 86(1)(a)(i) of the *Information Act*, the Information Commissioner has the function of issuing guidelines to public sector organisations about freedom of information ('FOI'). The Information Commissioner also has general obligations to provide training and to assist parties to exercise their rights.

This Guideline is not a substitute for reading the *Information Act*. The Act is amended from time to time and you should always read the relevant provisions of the Act to check the current wording. Any views expressed in this guideline are preliminary only and the Commissioner remains open to all arguments and evidence on a case by case basis.

All Northern Territory legislation, including the *Information Act*, is freely available online at: <https://dcm.nt.gov.au/nt-legislation-and-publications/current-nt-legislation-database>.

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Who should read this guideline?

This guideline is primarily written for:

- public sector organisations who are seeking guidance about how and when they are able to refuse access to information; and
- applicants who wish to understand whether they have been appropriately refused access to information.

This guideline is intended to be a reference guide to a complex legal framework. While every effort has been made to explain technical legal jargon, much of the discussion is about legislation and court cases. If anything in this guideline is unclear, the Office of the Information Commissioner offers free advice to members of the public and to public sector organisations about the *Information Act* (the Act) and how to exercise their rights.

What are exemptions?

The starting point for the organisation processing the application is to appreciate that the information **must** be provided unless there is a good reason not to. It is not up to the applicant to justify why they want or need the information. Anyone can make a freedom of information (FOI) application. It does not matter who they are or what their intentions might be. The *Information Act* ('the Act') requires that the **organisation** must ultimately prove on the civil standard of balance of probabilities that there are relevant reasons why the information should not be provided (s 125). The Act says organisations can only use certain specific reasons which are listed in the Act. Most of these reasons are set out in sections 43-58 (Part 4) of the Act, and are known as 'exemptions'.

Exemptions are legal reasons an organisation is allowed to use to deny an applicant access to information.

In addition to exemptions, there are some other reasons in the Act for refusing access, such as technical reasons of validity, exemption certificates, or the application is too large to process without unreasonably interfering with the operations of the organisation. These additional reasons are explained elsewhere.

How to provide written reasons for decision

Where an organisation decides to refuse access in full or to grant access to part only of the information sought by the applicant, the organisation's notice of decision to the applicant must contain -

- a statement setting out the applicant's rights of review and the applicant's rights of complaint to the Information Commissioner: section 20(b); and
- the reasons for refusing access to the information, including the provision of the Act on which access is refused: section 21(3). The reasons should also set out the facts and evidence used to support the decision; or

- If it is not in the public interest for the applicant to know whether or not the information exists, the organisation is not required in the notice of decision to confirm or deny the existence of the information or to give reasons for refusing access to it: section 21(4).

Case law states that where a statutory requirement to provide reasons exists, proper, adequate reasons must be given: *In re Poyser and Mills' Arbitration* [1964] 2 QB 467 at 478, cited with approval in *Dornan v Riordan* (1990) 24 FCR 564 at 573. This principle was applied in the NT Information Commissioner's hearing decision in F3/14-15 (24 February 2016, unpublished).

Even if the Act permits the organisation to not reveal its full reasoning to the applicant, the organisation itself should have a corporate record of its reasoning. These records should show that the organisation is satisfied that it has a reasonable evidentiary basis for applying the exemption. If the applicant complains about the decision to the Information Commissioner, the Commissioner will typically require the organisation to provide full reasons and the evidence relied upon to show that the exemption is applicable if these have not been provided. Ultimately, a dispute about a decision can end up in a hearing before the Northern Territory Civil and Administrative Tribunal (NTCAT), and the question of 'whether the decision-maker genuinely attempted to make the original decision on its merits' is relevant to the question of costs (see *Northern Territory Civil and Administrative Tribunal Act* s 133 (b)).

The following hypothetical examples may assist in understanding how to provide adequate reasons for decisions:

Example – inappropriate reasons for refusing access to information:

"After careful consideration, you have not satisfied me that you are a person who needs to know this information, therefore the information will not be provided."

Explanation as to why the reasons given are inadequate: Every person has a right to access government information: section 15. No valid reason for refusing access has been identified and section 17(2) of the Act prohibits an organisation from taking into consideration the reasons why access is being sought. The Act does not require applicants to prove that they 'need to know' the information (although, if they can show that they need to know it, for example to exercise a legal right, this can be factored into the application of the public interest test).

Example – inadequate reasons for refusing access to information:

"After careful consideration, I have denied access to the documents because the information was obtained from a third party."

Explanation as to why the reasons given are inadequate: These reasons fail to identify the section of the Act on which the organisation relies to refuse access. Further, the fact that the information came from a third party is not, without more, a reason to refuse access under the Act.

Example - better but still inadequate reasons for refusing access to information:

“The information in question originated from a commercial entity. This entity was consulted as a third party and objected to disclosure of the information, claiming it contains information which, if disclosed, would be likely to expose it to disadvantage – s 57(1)(b). I have therefore refused access to the information.”

Explanation: This is better, although still not adequate. The exemption being applied is clearly identifiable by the section of the Act cited and it is evident there may be some basis to apply the exemption. However, care has to be taken to apply an exemption correctly. A third party's views are important, but they do not dictate whether information is disclosed. The organisation itself must make and stand by a decision as to whether disclosing the information would in fact be likely to expose the third party to disadvantage under s57(1)(b) of the Act, and whether that disadvantage would be unreasonable. Even if these elements were satisfied, the organisation still needs to explain why it is not in the public interest to release the information in this particular case. Also, there is a time limit on this exemption (the information must have been obtained by the organisation within the last 5 years), so this factor should also be considered.

Example – acceptable reasons

“The information in question originated from a commercial entity within the last two years. This entity was consulted as a third party and objected to disclosure of the information, claiming that the information would, if disclosed, be likely to expose it to disadvantage – s57(1)(b). Evidence was provided to me that access to the information has been restricted to only a few persons even within the commercial entity and that it remains highly confidential and sensitive. I am satisfied that the information would reveal competitive aspects of the commercial entity's business that are not generally available to competitors and which I find could not be disclosed without causing substantial harm to the competitive position of the tenderer. Such harm would include permitting competitors to use in the future details of the tenderer's work arrangements and cost structures which it employs in its business and uses in its tenders. I consider that disclosure of the information would be likely to unreasonably disadvantage the tenderer in the market place.

I have considered the public interest test at s50. I have considered that the information relates to a controversial tender involving a considerable sum of public money, and the public has an interest in knowing that public money is well spent. However, I consider there is an overriding public interest in ensuring that the government is able to attract high quality tenderers who use innovative technology, and disclosing the information is likely to discourage such tenderers from applying in the future. The tender process has numerous checks and balances in place to ensure a proper decision is made. There are also avenues, such as debriefing, for obtaining explanations about the reasons why the successful tenderer was chosen. The applicant has suggested that this tenderer was selected because of its connections to the Minister in question. However, none of the information before me suggests that these allegations are anything more than vague assertions. There is no evidence of fraud or corruption that might outweigh the public interest in keeping tenders

confidential. I find, under section 50(1) that in this case it is not in the public interest to disclose the information. I have therefore refused access to the information.”

Explanation as to why these reasons are adequate: It is clear that the organisation has taken appropriate steps to identify and consider all the relevant elements of the exemption, including the public interest test, and that the application of the exemption has a specific evidentiary basis. Note, even though an applicant’s reasons for seeking access to information cannot be considered under section 17(2), the consideration given to the applicant’s allegations is not inappropriate. This is because the allegations are also relevant to whether disclosure is in the public interest and so can be considered on that basis.

Special situations where you can hide your reasoning

When providing reasons or processing an application, you should take care not to prematurely reveal exempt information to the applicant or to any other person. You should not reveal more information than you have to in order to explain your decision.

The *Information Act* requires you to keep the information you learn while handling an FOI application confidential (s 148). You are only allowed to disclose information:

- as part of administering the Act, or
- with the consent of the person to whom the information relates, or
- if the information is already publicly available.

If it is not in the public interest for an applicant to know whether information exists or not, section 24(3) and section 21(3) (in the case of a partial release of information) allows you to neither confirm nor deny the existence of the information that is withheld. In this situation, you are also not required to provide reasons to the applicant for refusing access in your notice of decision.

If you rely on reasons that you keep hidden from an applicant, it is a good idea to keep an internal record of those reasons, so that if you are called upon later to show you made a proper and genuine decision, you can do so. If the matter ends up before the NTCAT, this will assist you to show that you genuinely made your decision on its merits, in accordance with the Act.

Working out what you should and shouldn’t disclose can be complicated, but don’t panic! If you make efforts in good faith to follow the Act and accidentally get it wrong, s 151 protects you from civil or criminal liability.

The main time to be careful is when there are third parties involved (eg. an organisation or individual with an interest in whether the information is disclosed). Third parties also have rights to put their views in the process, and to contest any decision you make to release the information.

However, if there are no third party interests involved, **the Act is very clear that you can CHOOSE to release information apart from the Act even if an exemption applies** (so long as it does not breach other legal obligations - eg. copyright, contractual provisions, third party rights to appeal your decision etc). Section 10(2) of

the Act states that the Act ‘does not prevent or discourage public sector organisations from ... providing access to government information, including information that is exempt under Part 4 ... otherwise than under this Act if it is proper to do so or is required or permitted by law to be done’.

Frequently Asked Questions

Q. Can multiple exemptions apply to the same information and do I have to list them all?

A. Yes, multiple exemptions can apply. Information could, for example, be both Cabinet information (s 45) and an unreasonable interference with an individual’s privacy (s 56). If one exemption clearly applies to the whole of the information, there is no need to speculate further on what other exemptions may apply, but there is nothing wrong with listing multiple exemptions if you wish to do so. You must give the facts and reasons for each of the exemptions you have claimed in your decision.

Q. If an exemption applies to part of the information on a page, does that mean that I can refuse access to the whole page?

A. No. You can only refuse access to the information that is exempt. You should redact the page to remove the exempt information (i.e. create a copy with exempt information edited out) in accordance with s. 22.

Q. How do I explain which exemptions apply to which bits of information?

A. The usual practice is to number all of the pages located in response to the applicant’s request. Each page ends up with a ‘folio number’. The organisation then creates a schedule, which might look like this:

Folios	Description	Release	Exemption
1-8 (excl 7)	Report on Project X	No	S45(1)(a)(i)
7	P7 of report on Project X, statistical information	Partial	S45(1)(a)(i)
9	Email from Joe Bloggs to Jane Doe	Yes	
10-11	Email from Jane Doe to Joe Bloggs	Partial	S56(1)(a)
12	Memo	No	S45(1)(a)(v)

Where a page is marked partially released, this means that some of the information on the page was edited out before being provided to the applicant. The organisation should keep records of precisely what was redacted on the page.

The schedule then provides a convenient way to reference the information when the organisation explains its various reasons for refusing access to the information. If you are using redaction software (such as Adobe Acrobat or Redax), you can indicate the relevant exemption section by putting overlay text on the redaction box.

Overview to interpreting the exemptions

This overview introduces some concepts and terminology for understanding the exemptions, and relevant principles of statutory interpretation.

FOI legislation is ‘beneficial legislation’

Freedom of information schemes are ‘beneficial legislation’, and provisions such as section 3, are to be interpreted generously and in a way that would further, rather than hinder, free access to information (see *Victorian Public Service Board v Wright* (1986) 160 CLR 145).

Create ‘checklists’ of elements when applying exemptions

When interpreting the Act, make sure that you pay attention to all of the words of the section you are applying. It is often useful to break an exemption into a checklist of dot points to make sure you have covered off all of the relevant ‘elements’ of the section. Legal language aims to be very precise. For example, in s 45(1)(a)(ii), there is an exemption for information that ‘was brought into existence to brief a minister in relation to a matter to be considered by an Executive body’. This does not just mean information that might have the words ‘ministerial briefing’ on them – it is more particular than that. It means:

- at the time the information was ‘brought into existence’, the intention must have been to brief a minister
- further, the intention to brief the minister must have been ‘in relation to a matter to be considered by an Executive body’ (e.g. Cabinet).

These are the two elements that the organisation must prove. The organisation does not have to prove the information *actually went* to the Minister. The exemption will apply if these elements are made out, even if in fact the information is never used to brief the minister: see *Dalla Riva v Department of Treasury and Finance* [2005] VCAT 283. At the same time, if the information was created for another purpose and *later went* to a Minister, then the exemption would not apply. Also, if the information was created to brief a Minister but had no particular connection to Cabinet business, then the exemption would not apply.

Lawyers look carefully for words like ‘and’ and ‘or’. When the word ‘and’ is used in a list of things, every item in the checklist must be proven. When ‘or’ is used then typically only one item in a list of options has to be proven.

Viewing sections in context

While it is important to pay attention to the words of a section, sometimes it can be unclear what those words mean. The High Court has made it clear that to properly understand a section, you have to understand how it fits into the overall scheme of the Act ([Project Blue Sky v ABA](#) [1998] HCA 28; 194 CLR 355). What is the Act trying to achieve? What are the objects of the Act (hint, they’re in s 3)? Courts are also interested in what Parliament was intending when they passed the legislation, and

sometimes look at 'extrinsic materials', particularly the Second Reading Speech that was made when the Act was passed. Relevant excerpts from the Second Reading Speeches from when the *Information Act* was passed and amended are included in this Guideline.

Duties of organisations in dealing with applications

Section 17 of the *Information Act* requires organisations to adopt the following practices when dealing with FOI applications, including applying exemptions:

17 Duty of public sector organisation in dealing with applications

- 1) A public sector organisation that receives an application must deal with the application as promptly and efficiently, and as fairly and openly, as is reasonably possible.
- 2) If an application is about access to government information, the public sector organisation is not to be concerned about, or to take into consideration, the reasons that access is being sought.
- 3) If an application is about:
 - (a) access to personal information about the applicant or another person; or
 - (b) correcting personal information about the applicant; the public sector organisation must deal with the application in a manner that is consistent with the IPPs or a code of practice, as the case requires.
- 4) In fulfilling its duties under this Part, a public sector organisation is not expected to act in a manner that would unreasonably interfere with the conduct of its operations.

Section 17(1) requires an organisation to make reasonable, genuine efforts to process an application in accordance with the Act. The wording behind the provision suggests very strongly that an organisation should not take every technical point. An organisation is required to assist applicants to exercise their rights under the Act: section 88. Ultimately an FOI matter should not be seen as an adversarial contest between an applicant and an organisation, where an applicant tries to obtain as much information as possible and an organisation tries to refuse as much as possible. **The organisation's role is to ensure that the public is given as much information as possible without harming the public interest.** The public interest, it should be noted, does not include the possibility of embarrassment to or lack of confidence in the government, public servants or politicians: s 50(2). Such matters are irrelevant under the Act.

Section 17(2) makes irrelevant the reasons that access is sought, but this does not preclude the decision-maker from considering whether there are measures in place to limit any harm disclosure might cause, or to disregard public interest factors that happen to also be factors motivating the applicant. In the NT Information

Commissioner's hearing decision in F3/14-15 (24 February 2016, unpublished), the Hearing Commissioner noted at [38]:

... representations made by an applicant as to the purpose of the application, and any promises made by the applicant as to the use to be made of the documents accessed should the application be successful, are matters which can be taken into consideration by public sector organisations, and the Information Commissioner should the matter proceed to hearing: *Department of Education and Training v GJ (GD)* [2009] NSWADTAP 33 at [49]; *'FG' and National Archives of Australia* [2015] AICmr 26 at [32], [35].

Section 17 (3) requires that applications concerning personal information be dealt with consistently with the IPPs (the Information Privacy Principles), found in Schedule 2 to the *Information Act*). However, section 17(3) does not elevate IPPs to the status of exemptions. IPPs are not exemptions in their own right, however they do provide an important framework to interpret how to apply some exemptions, particularly s 56(1) (a) (unreasonable interference with privacy).

Different Types of Exemptions

There are two basic categories of exemptions in the *Information Act*.

- **Absolute exemptions** - disclosure is stated *not* to be in the public interest if the exemption applies: section 44. If you can show this exemption applies, you don't have to prove anything else to refuse access. Sections 45-49D (Part 4, Division 2) are exemptions of this kind.
- **Particular case exemptions** – information is to be released even if the exemption applies, unless you can show that *in this particular case* it is not in the public interest: section 50(1). Sections 51-58 (Part 4, Division 3) are exemptions of this kind. To use a 'particular case exemption', you must not only be able to show the exemption applies, you must apply the 'public interest test' set out in section 50. (Note: section 50 is not an exemption in its own right. It is a qualifying test on the exemptions set out at sections 51-58.)

A number of the absolute exemptions are **class exemptions**, meaning they completely exempt a category of document. For example, the frequently used 'client legal privilege' exemption (s 49(d)) is a class exemption. If disclosing a document would 'breach client legal privilege' then it is completely exempt, no matter if disclosure would actually cause any harm.

This is to be contrasted with exemptions which have **harm tests**. For example, a document can be exempt if disclosure 'would prejudice the maintenance of law and order in the Territory (s 46(1)(b)). This exemption requires more than the document having some kind of connection with law and order. It requires the organisation to identify the 'prejudice' (harm) to law and order that would flow from disclosure of the information. In the Second Reading Speech for the *Information Act*, the Attorney-General explained the importance of harm tests:

“These provisions ensure that the decision-maker's mind is properly focused on the effect of disclosure rather than on the class of information at hand.”

Even class exemptions can have **exceptions**. For example, there is a class exemption for information which is ‘an agenda, minute or other record of the deliberations or decisions of an Executive body’ (s 45(1)(a)(iv)), but such documents are not exempt after 10 years after their creation (s 45(3)), and the exemption does not cover information that is ‘purely statistical, technical, scientific or factual’ unless it discloses the deliberations or decision of an Executive body (s 45(2)).

If there is evidence to show that information fits within an absolute exemption) (which includes a class exemption) and is not subject to an exception, that’s the end of the matter; the information is exempt from disclosure. For this reason, most of the litigation in FOI tends to involve interpreting harm tests and competing public interest factors, because this is where there is room for organisations and applicants to take differing views.

Harm tests – identifying the harm

When applying a particular case exemption, it is useful to identify whether a harm test applies and, if so, the nature of the harm that must be proved.

A common mistake for organisations when applying an exemption is not to give enough thought as to whether this specific harm would occur.

For example, section 57 is designed to protect “commercial in confidence” information, though that language is not in the exemption. It is not enough for organisations to simply look at whether the information originated from a business in order to apply this exemption. If section 57(1)(b) is relied upon, the harm that needs to flow from disclosure is ‘to expose [a business] unreasonably to disadvantage.’

This means that the organisation has to identify the harm (eg. how exactly would disclosing this information disadvantage the organisation?) and also look at whether the disadvantage would be unreasonably suffered. It might be a reasonable disadvantage if the organisation should have expected the information be disclosed, or if the disadvantage is trivial.

Some sections specify that the harm suffered must be serious, with a phrase such as ‘substantial adverse effect’. The term ‘substantial adverse effect’ means ‘an adverse effect which is sufficiently serious or significant to cause concern to a properly concerned reasonable person’: *Re Thies and Department of Aviation* [1986] AATA 141. Further, the onus of establishing substantial adverse effect is a heavy one (*Re Cairns Port Authority and Department of Lands* (1994) 1 QAR 663, para 148-150.)

Harm tests – how certain do you need to be?

Any harm test requires a decision-maker to assess whether harm could happen in the future if the information is disclosed. How certain does the decision-maker have to be that the harm will occur?

The answer is that the level of certainty required will vary depending on the wording of the exemption. Look for the following words to gauge how much certainty is needed:

Wording	Notes / explanation
Would / will	<p>This requires a high degree of confidence.</p> <p>In the NT Information Commissioner’s hearing decision in F3/14-15 (24 February 2016, unpublished), the Hearing Commissioner noted <i>Victoria Police v Marke</i> (2009) 23 VR 203 at [97] with approval:</p> <p><i>The use in the section of the word “would” indicates that the decision-maker must have a high degree of confidence about the conclusion: it is not enough for the decision-maker to conclude that disclosure of a document might or could result in the unreasonable disclosure of the personal information in question. The need for that degree of confidence reflects the primary objective of the [Freedom of Information Act 1987 (Vic)] to provide public access “as far as possible”.</i></p>
Reasonably likely / likely	<p>Mere speculation or conjecture would not be enough (<i>Re ‘B’ and Brisbane North Regional Health Authority</i> (1994) 1 QAR 279 at 339-41). The term ‘likely’ is defined in the Macquarie Dictionary to mean ‘probably or apparently going or destined (to do, be etc.)’.</p> <p>The meaning of this phrase has been considered by the NT Information Commissioner in Collie v Office of the Commissioner for Public Employment (25 March 2008) at [97]:</p> <p><i>In my view, this phrase makes it necessary that the substantial adverse effect be both reasonable and likely. The equivalent Commonwealth and Queensland provisions use the phrase “could reasonably be expected”. In Searle Australia Pty Ltd v Public Interest Advocacy Centre and Anor (1992) 108 ALR 163 at pp 175-178 the phrase has been defined to mean what it says, namely that the decision maker must evaluate whether the material before it supports an expectation that a particular outcome would occur, and then determine whether that expectation was reasonably held. It seems then that “is reasonably likely to” involves the decision maker looking at the material before it to see if it supports the proposition that a particular outcome is likely to occur. It then looks at whether the proposition of likelihood is reasonable.</i></p> <p><i>“Reasonably” requires that the judgment that an adverse effect occur is one that is based on reason. That is to say it must be “reasonable, as distinct from irrational, absurd or ridiculous.”</i></p> <p><i>“Likely” is defined by the Australian Concise Oxford Dictionary as:</i></p>

	<p><i>probable; such as well might happen or be true ... 2. to be reasonably expected.</i></p> <p><i>In view of this definition, and the fact that Parliament did not simply adopt the interstate definition, it seems that the meaning of the phrase in the Information Act is intended to be stronger than “could reasonably be expected”. It suggests that the expected event not only be something that could occur, but the occurrence is reasonably expected and probable in the sense of being more probable than not.</i></p>
A risk/ possibility/ could	This doesn't require that a particular outcome be likely, but that there be a rational possibility based on the known evidence.

Some tips for understanding FOI cases from other jurisdictions

FOI legislation has been around for long enough that there are lots of good examples of how exemptions have been applied. In the NT however, most complaints have settled rather than gone to hearing. For this reason, this guideline discusses numerous cases from other jurisdictions.

A note of caution: while many jurisdictions have similar provisions, often the wording may be slightly different, or the overall objects of the FOI legislation in another jurisdiction may also be different. For this reason, always read cases from other jurisdictions with care, being alert to differences. They provide very good *suggestions* about how to interpret the NT legislation, but ultimately the NT is not obliged to adopt the same interpretation if there are good reasons to adopt a different interpretation. In lawyer-speak, cases from other jurisdictions are ‘persuasive’ not ‘binding’. The exception to this is cases by the High Court of Australia where the High Court decides an issue that also arises under the Territory Act. NT courts and tribunals must follow any direct instructions given by the High Court in cases about how to interpret such law.

For example, the NT *Information Act* is unique in combining our freedom of information, privacy, and records management schemes into the one Act. Most jurisdictions have separate acts for each of these purposes. Like most FOI schemes, the NT Act can be read to support the view that it should be interpreted (as an objective and in the structure of its scheme) to support the release of information unless the Act requires an exemption to be applied.

Section 3(1)(a)(ii) states:

(1) The objects of this Act are:

- (a) to provide the Territory community with access to government information by:
 - ... (ii) creating a general right of access to information held by public sector organisations limited only in those circumstances where the disclosure of particular information would be contrary to the public interest because its disclosure would have a prejudicial effect on essential public interests or on the

private and business interests of persons in respect of whom information is held by public sector organisations;

The NT FOI scheme is a traditional 'application model'. This means that it requires members of the public to make applications for specific information, which the government considers releasing on a case by case basis to that individual. This is to be contrasted with the 'push model' more recently introduced in some jurisdictions (eg. Queensland, New South Wales, and Tasmania) where government organisations are required to publish online 'disclosure logs', providing much of the information they release to an applicant to the public at large. For example, the NSW legislation includes as one of its objectives: 'authorising and encouraging the proactive public release of government information by agencies', and requires Agencies to publish not only the disclosure log and a description of the information it holds, but also all its policies, its register of government contracts, and information it tables in Parliament. Bear in mind that these jurisdictions typically had 'purely application model' legislation prior to the introduction of the current schemes in around 2009 (and their current legislation still provides for applications for specific information) Cases from those jurisdictions are still relevant, though not binding in the Territory.

The closest current equivalents to the FOI scheme in the *Information Act 2002 (NT)* in other jurisdictions are:

- Commonwealth: *Freedom of Information Act 1982*
- ACT: *Freedom of Information Act 1989*
- Tasmania: *Right to Information Act 2009*
- NSW: *Government Information (Public Access) Act 2009* and *Government Information (Information Commissioner) Act 2009*
- Queensland: *Right to Information Act 2009* and *Information Privacy Act 2009*
- South Australia: *Freedom of Information Act 1991*
- Victoria: *Freedom of Information Act 1982*
- Western Australia: *Freedom of Information Act 1992*
- New Zealand: *Official Information Act 1982*

Some of these Acts are structured similarly to the NT legislation, but in many you will find the equivalent exemptions in a 'Schedule' in the back of the Act.

Class Exemptions (no public interest test)

If there is evidence to show information fits into one of these categories, it is exempt:

- has gone to Cabinet or relates to Cabinet business;
- originated from a government body in another Australian jurisdiction and which would be exempt from FOI if held by that body in that other jurisdiction;
- would be an offence to disclose under specific 'secrecy provisions';
- is subject to client legal privilege;
- is subject to parliamentary privilege;
- would be in contempt of a court or tribunal to disclose;
- would disclose matters before a court or tribunal;

- is classified as criminal intelligence by the Commissioner of Police under the *Serious Crime Control Act*;
- relates to witness protection or Police undercover operations;
- was obtained or created because of investigations by the Children's Commissioner, the Health and Community Services Complaints Commissioner, the Auditor-General, the Public Interest Disclosure Commissioner, the Ombudsman, the Anti-Discrimination Commissioner, and a Board or Commissioner appointed under the *Inquiries Act*, a commission of inquiry established under the *Local Government Act*.

Tip: The most common mistake made in applying these exemptions is to forget to check whether the evidence supports the exemption. For example, if you say the documents in question went to Cabinet or that it was prepared for submission to and consideration by Cabinet, you should have evidence to prove that this occurred. If you say the documents are subject to client legal privilege, check that they are actually legal advice from someone acting in a lawyer-client relationship and not just general comments about organisational business made by someone who happens to be a lawyer.

Here are the legislative provisions on which the types of exemptions summarised above are based:

Cabinet Business – s 45(1)(a)

Information is exempt from disclosure if it relates to an Executive body in particular ways. An Executive body is defined in s 45(4) to mean: the Executive Council or a committee of the Executive Council, or Cabinet or a Committee of Cabinet. Section 45(1)(a) provides that information is exempt from disclosure if the information:

- (i) was brought into existence for submission to and consideration by an Executive body, whether or not it has been submitted to or considered by the Executive body; or
- (ii) was brought into existence to brief a minister in relation to a matter to be considered by an Executive body; or
- (iii) was considered by an Executive body; or
- (iv) is an agenda, minute or other record of the deliberations or decisions of an Executive body; or
- (v) would disclose information about the deliberations or decisions of an Executive body, other than information that has been published in accordance with a decision of the Executive body; or
- (vi) would disclose a communication between ministers about the making of a decision or the formulation of a policy if the decision or policy is of a kind generally made or endorsed by an Executive body; or
- (vii) was brought into existence to brief a minister in relation to a matter the subject of consultation between ministers about the making of a decision or the formulation of a policy if the decision or policy is of a kind generally made or endorsed by an Executive body; or

(viii) is a draft of information mentioned in subparagraph (i), (ii), (iii), (iv), (v), (vi) or (vii).

Section 45(2) provides that the information mentioned in section 45(1)(a) is not exempt if the information is purely statistical, technical, scientific or factual (unless disclosure of the information would involve the disclosure of a deliberation or decision of an Executive body).

Section 45(3) provides that information mentioned in section 45(1)(a) is not exempt if 10 years has elapsed since the information came into existence.

Commentary:

In the Second Reading Speech for the *Information Act*, then Attorney-General Toyne, stated:

This class exemption is based on the need to preserve collective ministerial responsibility. It is an exception that exists in all Australian jurisdictions and is a class exemption that has been accepted by the Australian Law Reform Commission as justifiable.

‘Collective ministerial responsibility’ means that we have a system of government where Ministers are able to debate freely in secret, and then present a united view on what the Government will do.

Of course, Ministers do not run every decision they make by Cabinet, and not everything a Minister does will have a connection with Cabinet. Ministers also spend their time liaising with their Department(s), independently managing their own portfolios, serving as a Member of the Legislative Assembly, campaigning as a future political candidate, and managing their private interests. Before you apply section 45(1)(a) to ministerial communications, think about whether the information shows the Minister acting as a member of an Executive body.

Tip: If the information shows the Minister acting as an MLA then arguably the information is not government information or is not subject to parliamentary privilege. If it shows them acting as a private individual you should consider whether the information is ‘government information’ as defined by the Act. If it is not ‘government information’ it is not information that can be accessed under the FOI scheme.

Case Study (F16/14-15, unpublished *prima facie*, 24 August 2015)

The applicant was a journalist who applied to the Department of the Legislative Assembly for specific emails of various MLAs, using the term ‘MLA’ in the application as opposed to ‘Minister’. The information sought related to political donations allegedly discussed by those MLAs. The decision-maker rejected the complaint at the *prima facie* stage.

Under section 5(6) of the *Act*, a Minister and a parliamentary secretary are public sector organisations, but only to the extent that they hold information in connection

with his or her responsibilities as holder of that public office. The decision-maker quoted *Parnell and Prime Minister of Australia (No 2)* 2011 AIAComr 12 (23 December 2011), which considered the Commonwealth equivalent provision to s 5(6):

An underlying premise of the FOI Act is that not all documents held in a minister's office will be subject to the FOI Act. The Act applies only to 'official documents' that relate to the affairs of an agency or department of the Australian Government. As noted above and in the Guidelines, that description does not apply to documents of a purely personal or private nature held by a minister, nor to documents that relate to a minister's constituency responsibilities or that are of a party political nature.

The applicant failed to show that the documents sought were related to the Ministers' responsibilities as Ministers, or alternatively that they were separate records that were required to be kept by the Respondent.

If the question is whether the documents *have been to Cabinet*, section 45(1)(a) can apply to documents that are submitted to Cabinet *after* an FOI application has been lodged, provided that the request applies to them because they are in existence at the time of the application. The question is whether there is evidence they have been submitted to Cabinet at the time the decision is made to apply the exemption (see [Beanland and Department of Justice and Attorney General \(1995\) 3 QAR 26](#)). If documents go to Cabinet before the hearing of an FOI complaint, section 45(1)(a) can apply, even if this occurred after the organisation had made its decision to refuse access.

If the question is whether the documents *were brought into existence with the intention of going to Cabinet or briefing a Minister about Council business*, those exemptions turn on the intention at the time the document was created (see [Fisse and Department of Treasury \(2008\) 101 ALD 424; 48 AAR 131; \[2008\] AATA 288 at \[77\]](#)).

Merely stamping a document 'cabinet in confidence' or similar will not necessarily prove that it is intended to go to Cabinet (see [Secretary, Department of Infrastructure v Asher \[2007\] VSCA 272](#)). In that case, a Department adopted a broad policy of stamping all its reports with 'cabinet in confidence' stamps. Later, the content of some of the reports were actually copied and included in documents that went to Cabinet. VCAT characterised the reports themselves as 'preliminary or preparatory materials', and the fact that material from them later found their way into Cabinet documents did not make the reports themselves exempt.

Where the information has been prepared for multiple purposes, one of which is to brief a Minister in relation to a matter to be considered by an Executive body, the question is whether briefing the Minister for this purpose was the 'dominant purpose' of creating the document (see [Kelsall and Department of Main Roads \(Unreported, Queensland Information Commissioner, 21 August 2008\)](#)). The term 'in relation to' should not be read too widely, but in terms of a relevant relationship, having regard to the scope of the Act. A 'coincidental or mere connexion' is not enough. In *Kelsall*, the documents in question had a sufficient connection to Cabinet business that the decision-maker was satisfied the exemption was made out. Similarly, in [Donnellan v Linking Melbourne Authority \[2014\] VCAT 1027 at \[62\]](#), detailed evidence given by

‘three senior public servants intimately involved in the process of guiding the business plan from its inception to its submission to the Cabinet committees far outweigh[ed] the evidence adduced on behalf of the applicant. ... It may well be that the business plan was, or could be used for another purpose. It is not necessary for the purpose of the submission for consideration by the Cabinet to be the sole purpose for preparation of the business plan.’

These examples can be contrasted with the case of *Re [Travers and Public Transport Authority \[2015\] WAICmr 20 \(30 October 2015\) at \[44\]](#)*. This case concerned documents by which ‘the relevant Minister would ultimately be briefed on the outcome of the agency’s preparation and this may result in a Cabinet submission being prepared, based on the information obtained by the agency. However, that did not mean that the disputed documents were brought into existence for the purpose of submission to an Executive Body or that their disclosure would reveal the deliberations or decisions of an Executive Body.

Exceptions to section 45(1)(a):

There are two exceptions to the section 45(1)(a) exemption set out in the Act:

- 1) Information mentioned in subsection (1)(a) is not exempt under section 44 if the information is purely statistical, technical, scientific or factual material unless disclosure of the information would involve the disclosure of a deliberation or decision of an Executive body.
- 2) Information mentioned in subsection (1)(a) is not exempt under section 44 if a period of 10 years has elapsed since the information came into existence.

You cannot apply section 45(1)(a) to, say, a table of statistical information, unless revealing that information would itself involve disclosing the deliberation or decision of an Executive body. If, for example, the Government announces that Cabinet has made a decision ‘to paint all road signs red, as this has been shown to increase sign visibility’, and an application is made for Cabinet documents that relate to this decision, then section 45(2) would mean that sections of that report showing the scientific data on visibility and colour of road signs would have to be released, unless it revealed further information about the deliberations or decisions of Cabinet beyond what is already known to the public.

There are a number of cases decided under the Commonwealth FOI Act which consider the meaning of the term “factual”. In a decision of the Queensland Information Commissioner (*Hudson (as agent for Fencray Ltd) and Department of the Premier, Economic and Trade Development* (1993) 1 QAR 123) he states:

In *Re Howard and the Treasurer of the Commonwealth* (1985) 3 AAR 169 at 174, the President of the Commonwealth AAT, Davies J, said: "The shorter Oxford English Dictionary defines "factual" as "concerned with facts; of the nature of fact, actual, real". The dictionary defines "fact" as, inter alia, "3 something that has really occurred or is the case; hence, a datum of experience, as dist. from conclusions 1632".

In my opinion, the subject documents do not contain purely factual material. Estimates as to what will happen if certain changes are made to the taxation laws and rates involve elements of judgement or assumption. They are concerned with the future, not with facts. As the Tribunal said in *Re Waterford and Department of Treasury* (No. 1) (1985) 7 ALD 93:

"... I consider that 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."

Note that subsection 45(3) requires looking at the date that the information 'came into existence', not the date it was submitted to Cabinet.

Security and law enforcement class exemptions - s46 (2)(b), (f), (g) and (h)

This section contains four class exemptions relating to Police Intelligence Information. These relate to undercover operations and witness protection:

- (b) discloses the identity of a confidential source of information connected with the detection of unlawful conduct or the enforcement or administration of the law; or
...
- (f) is information, originating from a Police Force Intelligence Division, relating to an authorised operation or a corresponding authorised operation as defined in section 3 of the *Police (Special Investigative and Other Powers) Act*; or
- (g) reveals that an assumed identity, acquired or used by a person in accordance with Part 3 of the *Police (Special Investigative and Other Powers) Act*, is not the person's real identity; or
- (h) reveals the identity of an operative (as defined in section 73 of the *Police (Special Investigative and Other Powers) Act*), or where the operative lives, where the disclosure is not:
 - (i) authorised by leave or an order under section 81 of that Act; or
 - (ii) permitted under section 84 of that Act.

The exemption in section 46(2)(b) is not limited to NT Police, but may be used by any agency providing that the requirements of the exemption are met.

Before making your decision using an exemption within section 46(2), you should consider whether any of the exceptions in section 46(3) are applicable.

Information exempt under corresponding FOI laws – s 47

This exemption applies if:

- it is information that originated with, or has been received from, a person appointed, or a body established, by or under a law of the Commonwealth or of a State or another Territory of the Commonwealth; **and**
- the person or body would not be required to disclose the information under the corresponding FOI law of that jurisdiction.

In *Northern Land Council v Department of Justice and Anor* (F6/09-10, 21 April 2011), this Office considered a third party complainant's argument that a particular document was exempt under s 47. The document was a result of negotiation with the complainant, who did not provide the document but contributed information which was included within the document. The *prima facie* decision maker reasoned that:

Aboriginal Land Councils are listed as a body under Division 1 of Part I of Schedule 2 of the Freedom of Information Act 1982 (Cth). Under section 7(1) of that same Act, the NLC is therefore deemed not to be a prescribed authority for the purposes of that Act. As it is not a prescribed authority, it would not be required to disclose the information if requested under the Freedom of Information Act 1982 (Cth).

... Section 47 does not refer to whether a Commonwealth agency would be restricted from disclosing the deed. Read as a whole, section 47 clearly refers to whether the person or body who the information 'originated with, or has been received from' would not be required to disclose the information under the corresponding FOI law of that jurisdiction. The question is not whether a hypothetical Commonwealth agency would be able to disclose the document, but whether the NLC would not be required to disclose the document under the Freedom of Information Act 1982 (Cth).

.... Section 47 refers to 'information' not to an 'instrument', so it is irrelevant that the NLC holds a counterpart to the Deed. At any rate, the Information Act does not conceptualise information in terms of instruments, but in terms of 'records' and 'information', and it is clear from the definition in s 4 that a copy or a part of a record is also a record. The record held by the Department of Justice that is in dispute in this case neither originated with nor was it received from the NLC.

The *prima facie* decision maker found that the complainant had an argument that a specific piece of information in the document in question was exempt under section 47, because it had originated from the complainant.

Tip: When consulting with third parties that are persons or bodies of another jurisdiction, ask them whether they would be obliged to provide the information under their FOI scheme if the application had been made to them. If not, s 47 may apply.

Information exempt under corresponding FOI laws – s 48

This exemption refers to a list of offences in Schedule 1 to the Act. It exempts information ‘if disclosure to the applicant would be an offence against a provision specified in Schedule 1’. The following table sets out the provisions specified and provides a brief summary of the kind of information that each provision relates to:

<i>Adoption of Children Act</i> s71(1)	information which identifies a child who has been or may be adopted, the child’s parents and guardians, or a person who adopts the child
<i>Care and Protection of Children Act</i> s 301(1)	information which identifies that a particular child is in the care of the CEO (a ‘foster child’)
<i>Child Protection (Offender Reporting and Registration) Act</i> s 66(1)	information on the sex offender register
<i>Coroners Act</i> s 43(2)	information protected by order of the Coroner (for example, because it is likely to prejudice a fair trial, national or personal security, or to avoid disclosing sensitive personal matters)
<i>Criminal Property Forfeiture Act</i> s 31(1)	information about whether witnesses have provided information (eg. financial information) for a Criminal Property Forfeiture investigation or court proceeding.
<i>Criminal Records (Spent Convictions) Act</i> s 12(1) and (2)	information about spent convictions
<i>Electoral Act</i> s 293(2)	information revealing how a voter chose to vote
<i>Transplantation and Anatomy Act</i> s 28(1)	information identifying organ donors and recipients and similar
<i>Mineral Royalty Act</i> s 50(1)	confidential information about mining royalties
<i>Misuse of Drugs Act</i> s 24(2)	information identifying informants in relation to drug offences
<i>Northern Territory Aboriginal Sacred Sites Act</i> s 38(1)	secret information about Aboriginal sacred sites
<i>Sexual Offences (Evidence and Procedure) Act</i> s 11(1) and (2)	this secrecy provision relates to an earlier section (now replaced with a new section 11) that would identify the complainant in a sexual offence proceeding
<i>Surveillance Devices Act</i> ss 15(1), 16(1) and 52(1) and (2)	private conversations recorded with surveillance devices
<i>Taxation Administration Act</i> s 102(1)	confidential information obtained by tax officers
<i>Witness Protection (Northern Territory) Act</i> s 33(1) and (3)	information about persons who are or were in witness protection

The aim of the secrecy provisions exemption is to make it clear there is no conflict between committing a specified offence and the provisions of the *Information Act*. Release is not to occur if one of these offences would be committed.

In the case of disclosure of information that would be an offence against an Act not specified in the secrecy provisions, the protections within s.151 of the Act would apply where the disclosure was done in good faith in the performance of a function or complying with a requirement of the *Information Act*.

Case Study:

The Information Commissioner received a complaint about an application for information about a person said to be a juror, and the application was for information about the alleged juror's activities in relation to a particular court case. Under s 49B of the *Juries Act*, it is prohibited to disclose information which identifies a juror, but there is no specific secrecy provision for *Juries Act* offences in s 48 of the *Information Act* (or anywhere else in the Act). Section 9 of the *Information Act* provides that in the event of a conflict, the *Information Act* takes precedence over other legislation, and hence over s 49B of the *Juries Act*. To the extent that processing and deciding an application would involve breaching s 49B, no civil or criminal action lies against a person doing so in good faith (see s 151 of the *Information Act*).

However, in the above example, another exemption, such as section 49 (c) is likely to apply. When dealing with secrecy provisions not referred to in the *Information Act*, the other possible grounds of exemption should be considered carefully.

Where the wording of a relevant offence prohibits disclosure, it has been held that the secrecy provision applies strictly. In the case of [Petroulias and Commissioner of Taxation \(2010\) 122 ALD 154; \[2010\] AATA 1060](#) the AAT considered a secrecy provision relating to the following offence:

Subject to this section, an officer shall not either directly or indirectly, either while he is, or after he ceases to be an officer, make a record of, or divulge or communicate to any person any information respecting the affairs of another person acquired by the officer as mentioned in the definition of officer in subsection (1).

The applicant provided evidence he had the consent of various other persons to obtain their information and so argued that the secrecy provision was wrongly applied. The AAT disagreed, arguing that 'the prohibition is absolute' and did not allow disclosure with consent. The AAT further suggested that it would prohibit disclosure even to the agent of another person, although ultimately did not have to rule on that question.

Questions have been raised with the Information Commissioner about how to resolve circularity in relation to s 301(1) of the *Care and Protection of Children Act*, which is a non-disclosure provision regarding a child's identity. The issue is that s 301(2) states:

(2) Subsection (1) does not apply if the publication is permitted or authorised under this Act or any other law in force in the Territory.

Arguably, the *Information Act* is itself a law that permits or authorises publication of such information. At the time the secrecy provisions were first listed in Schedule 1, in 2006, the *Care and Protection of Children Act* did not exist. Section 301 was enacted in 2007 when the *Care and Protection of Children Act* was introduced, and at the time no corresponding secrecy provision exemption existed in the *Information Act*. This only occurred in 2011 when section 301(1) was added to the Schedule in the *Information Act* as part of a number of miscellaneous amendments to the Act. Then Attorney-General Lawrie explained the provision as follows:

The bill also incorporates an amendment to cover a minor issued raised in the report of the Board of Inquiry into the Child Protection System released on 19 October 2010. The rest of the issues raised and recommendations made in the report regarding information sharing will need to be given further thorough consideration to ensure any amendments do not result in unintended consequences. Substantial discussions with relevant agency divisions are required to ensure that any amendments to legislation properly address the issues and provide a framework which is useful. It is important that hasty amendments are not made to legislation.

The *Care and Protection of Children Act* was amended in 2012 to create a new information sharing scheme, but no further consideration appears to have been given to the operation of the secrecy provision in the *Information Act* at that time. The 2012 amendments generally allow far greater sharing of information about children who may be in the care of the Minister than was previously permissible.

The Information Commissioner is of the view that the circularity issue is to be resolved by looking more closely at section 301 (2) of the *Care and Protection of Children Act*.

Since section 48 of the Act and Schedule 1 to the Act currently exempt section 301(1) identifying information from disclosure, such disclosure is not “*permitted or authorised*” under the Act”.

It follows that the section 48 absolute exemption applies and no problem of circularity remains with section 301(2). The information is exempt under the *Information Act*, although it is possible that another provision in the *Care and Protection of Children Act* or elsewhere could authorise disclosure under other legislation.

In addition, the framework in the *Care and Protection of Children Act* around information sharing and confidentiality would be of great significance when applying other exemptions in the *Information Act* to information about children. In particular, it would be very relevant to the application of s 56(1)(a) of the *Information Act* (unreasonable interference with a person’s privacy).

A similar issue of circularity was noted with respect to s 66(1) of the *Child Protection (Offender Reporting and Registration) Act* s 66(1) in an unpublished *prima facie* decision of this office (F8/12-13). In that case, the decision-maker stated:

Unfortunately, and as the Respondent has fairly noted, the language of these sections is confusingly circular. Section 48 of the Information Act prohibits releasing information if it would be an offence to release the information under

section 66(1). Section 66(1)(b) states it is not an offence to release the information under section 66(1)(b) if disclosure is required or authorised under another Act. The Information Act appears to authorise the release of government information unless an exemption applies, hence authorising a release under section 66(1)(b). The correct way to interpret this section is not at all clear and is therefore a matter that should be determined at hearing, not in a prima facie decision. In addition, as a matter of fact, I do not have sufficient evidence to establish that the information in question is from the Register and not from other sources.

That matter settled before hearing, and so did not provide any settled law on the issue. The Commissioner has developed the consideration of this question as follows.

This circularity cannot be resolved in the same way as indicated earlier in relation to section 301(1) of the *Care and Protection of Children Act*. In the case of section 66(1), the permission is in the same section as the prohibition. Therefore when section 66(1) is referred to in Schedule 1 to the *Information Act*, both a prohibition and a permission are brought into the Act. The matter could be resolved by amending the reference to section 66(1) in the Schedule to be a reference to section 66(1)(a), (c), (d) and (e). Or section 66(1)(b) could be moved into another section eg a new section 66(3), and the reference to section 66(1) in Schedule 1 could remain unchanged. That would then mean that section 66(1) would be within the section 48 absolute exemption and this information could not be released under the *Information Act*, whether or not it could be released under other legislation.

Without amendments, it seems prudent to apply the same approach as applied in the case of section 301(1) of the *Care and Protection of Children Act* and to regard the section 48 exemption as applicable on the basis that the legislature did not intend section 66(1)(b) to defeat the section 48 exemption.

Preservation of justice class exemptions - s 49(c), (d), (e), and (f)

This section contains four class exemptions relating to ensuring that freedom of information does not infringe the principle of separation of powers. Information is exempt if it would:

- disclose information about a proceeding or other matter before a court or tribunal; or
- breach client legal privilege; or
- infringe the privileges of the Legislative Assembly or another parliament; or
- be in contempt of a court or tribunal, or a royal commission or other commission of inquiry, whether in the Territory or elsewhere.

Commentary - s 49(c) – information about a court or tribunal proceeding

The first of these exemptions, that the information would ‘disclose information about a proceeding or other matter before a court or tribunal’ is an unusual exemption, and one that does not have an equivalent in other Australian jurisdictions. It was not discussed in the Second Reading Speech when the Act was introduced. Insofar as any discussion occurred about class exemptions, the Attorney-General claimed there

were only two class exemptions in the Act, being the Cabinet exemption and the secrecy provisions. It is therefore unclear what the rationale is for a class exemption that excludes any 'information about a proceeding' irrespective of any harm that might result.

With this in mind, it is the Information Commissioner's view that the exemption is to be construed narrowly. Section 49 is aimed at ensuring that freedom of information does not infringe judicial and quasi-judicial practices and procedures. This suggests the exemption will only apply:

- to a matter currently before a court or tribunal at the time a decision is being made;
- in a narrow sense to documents 'about' a proceeding or other matter, meaning that the documents must not simply relate to the same topic as that which is also a proceeding, but must actually disclose something about the court or tribunal proceeding (e.g. a Memo to a CEO providing an update on proceedings would be 'about' the proceedings);
- to documents which actually 'disclose' information not otherwise made public, bearing in mind that judicial and quasi-judicial forums are often conducted in a public manner. (Although, note, if information is available to the public for free or for a charge, it may be 'publicly available information' under s 12 and hence fall outside the scope of what can be sought via FOI. The mere fact that the documents sought by the Complainant were prepared for and even submitted to a court does not of itself mean that such documents were made public: *Mackenzie v Western Australia Police* [2011] WAICom 28 at [51]-[52].).

The meaning of a 'tribunal' was considered by the Information Commissioner in the hearing decision of *Collie v Office of the Commissioner for Public Employment* (25 March 2008). Determining whether a body is a tribunal relies on a range of indicia which indicate that a body acts like a court rather than being an administrative body. There is an argument that when section 49(c) is read in the context of the Act as a whole, the definition of a tribunal adopted for this section should be consistent with the definition used for section 5(5). This means the exemption in section 49(c) would be limited to courts and tribunals in the sense of these bodies performing their judicial and quasi-judicial functions, not their administrative functions.

Commentary - s 49(d) – client legal privilege

This exemption is designed to keep confidential communications between a lawyer and client, and is in some jurisdictions known as 'legal professional privilege'. Its purpose is to ensure that every person is able to fully inform themselves as to their legal rights, and hence have equal access to justice.

In F6/13-14 (unpublished *prima facie* decision, 14 August 2014) the decision-maker stated the test as to whether a communication is subject to client legal privilege as follows:

Determining whether a communication is privileged at common law involves a consideration of the following:

- whether there is a solicitor-client relationship;
- whether the communication was for the dominant 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 is confidential;
- whether the legal adviser is acting in his/her capacity as a professional legal adviser.

And further noted:

The policy underlying legal professional privilege is to ensure and 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* [1999] HCA 66).

The Territory itself is a 'legal person' which can seek confidential advice from its lawyers. However, confusion arises because the Territory is a large organisation which employs many lawyers, but not all the work it tasks them with is providing legal advice. Where an 'in-house' lawyer is involved in communications, the question arises as to whether the lawyer is actually providing legal advice, or is acting as a more general employee or officer of the organisation. As Mason and Wilson JJ said in *Waterford v Commonwealth* (1987) 163 CLR 54 at 64: 'The wisdom of the centuries is that the existence of the privilege encourages resort to those skilled in the law and that this makes for a better legal system. Government officers need that encouragement, albeit, perhaps for reasons different to those which might be expected to motivate the citizen.'

The test is whether disclosing the information 'would reveal communications between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings' (see *Daniels Corporation v ACCC* (2002) 213 CLR 543 at 552).

Legal advice 'is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context: but it does not extend to advice that is purely commercial or of a public relations character' (see *Balabel v Air India* [1988] 1 Ch 317 Taylor LJ at 330 and approved by *AWB Limited v Honourable Terence Rhoderic Hudson Cole* [2006] FCA 571). The privilege can extend to protect legal research, drafts, and summaries prepared as part of the lawyer-client relationship. However, it does not extend to general policy or management advice (see *Waterford v Commonwealth* (1987) 163 CLR 54). The privilege does not apply to 'communications by a client for the purpose of being guided or helped in the commission of a crime or fraud' (see [Attorney-General \(NT\) v Kearney \(1985\) HCA 60](#) at [12]). In that case it was held that communications designed to further an abuse of statutory power were not privileged because it 'would be contrary to the public interest which the privilege is designed to secure - the better administration of justice - to allow (legal professional privilege) to be used to protect communications made to further a deliberate abuse of statutory power and by that abuse to prevent others from exercising their rights under the law'.

Privilege can attach to communications between the lawyer and a third party, if the function of the communications was to enable a client to obtain legal advice (see *Pratt*

Holdings Pty Ltd v Commissioner of Taxation (2004) 207 ALR 217). There is also a notion of ‘common interest privilege’, where one person’s legal rights align so closely to another’s that they can claim the privilege extends to their communications as well. In F7/12-13 (*prima facie*, unpublished), the decision maker considered whether a person involved in Adult Guardianship matters had a common interest privilege over correspondence with the Department of Health. In that matter, correspondence between the Department and the person in question indicated that there was some temporary alignment of interests, but that the Department indicated to the person that they could not provide her with legal advice. The decision-maker was not satisfied that the exemption should apply and wrote:

From my reading of Australian common law, common interest privilege typically arises in circumstances where a third party’s interests are very closely aligned to the party claiming the privilege, for example a third party insurer whom the party has made a claim upon to cover the costs of a proceeding. A claim will not succeed where a party’s interests are selfish and potentially adverse to the other party’s (see Rich v Harrington (2007) FCA 1987). ...

It is my understanding that common interest privilege only exists for so long as the party’s interests align. In the present Complaint, they have come into conflict. In this situation, I do not believe the Complainant can claim privilege on behalf of DoH, particularly when DoH has effectively decided to waive any claims of privilege that may arise.

Client legal privilege has two main aspects: the ‘advice privilege’, and the ‘litigation privilege’. The litigation privilege can extend to communications which are not about giving legal advice, when they are for the dominant purpose of litigation. The litigation privilege only extends to preparations for litigation before judicial or quasi-judicial bodies. In *AWB Limited v Honourable Terence Rhoderic Hudson Cole* [2006] FCA 571, the Federal Court considered that it could extend to adversarial proceedings before the Administrative Appeals Tribunal, but not to a Royal Commissioner which ‘simply carries out investigations, determines the facts and prepares a report and recommendations. A Commission does not finally determine any rights or obligations.’

Client legal privilege only applies for so long as the information in question remains confidential. Once information has been revealed beyond those involved in the lawyer-client relationship, privilege can often be said to have been ‘waived’. This means it no longer exists and the exemption in s 49(d) cannot apply (see *Bennett v Chief Executive Officer of the Australian Customs Service* (2004) 210 ALR 220; [2004] FCAFC 237). Whether waiver has occurred is a question of fact. It is the client who owns the privilege and makes any decision about whether to waive it, and it is the client whom the privilege protects. The privilege does not exist to protect the lawyer.

The privilege can be waived intentionally or unintentionally. Gibbs CJ of the High Court said in *Attorney-General (NT) v Maurice* (1986) 161 CLR 475; [\[1986\] HCA 80 at \[7\]](#):

... where there is no intentional waiver the question whether a waiver should be implied depends on whether it would be unfair or misleading to allow a party to

refer to or use material and yet assert that that material, or material associated with it, is privileged from production.

Where a copy of a non-privileged document is provided to a lawyer for the purposes of obtaining legal advice, the copy is privileged but the original is not: *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* [1997] HCA 3; [\(1997\) 188 CLR 501](#); [141 ALR 545](#). Further, if the original document is then not produced, the copy may lose its privilege (*Commissioner of Australian Federal Police v Propend Finance Pty Ltd* [1997] HCA 3; [\(1997\) 188 CLR 501](#); [141 ALR 545](#)).

An extensive discussion of legal professional privilege in an FOI context can be found in [Philip Morris Limited and Prime Minister \[2011\] AATA 556 \(15 August 2011\)](#).

Commentary – s49(e) – Parliamentary privilege

Parliamentary privilege exempts information about what was said and done by the NT parliament (the Legislative Assembly) and other Parliaments, as well as some other things done by Members of the Legislative Assembly (MLAs) or by other persons, provided that it is closely connected to the business of the Parliament.

Parliamentary privilege here is essentially the right of the Legislative Assembly to be independent from the control of other arms of government (the Executive and the Judiciary). Parliamentary privilege has a long history. Freedom of speech is one form of privilege. In the *Bill of Rights 1689*, Article 9 provided:

That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.

In the Territory, the *Legislative Assembly (Powers and Privileges) Act* specifically adopts Article 9 as law in the NT at s 6:

6 Freedom of speech

- (1) For the avoidance of doubt, it is hereby declared and enacted that the provisions of article 9 of the Bill of Rights, 1688 apply in relation to the Assembly and, as so applying, shall be taken to have, in addition to any other operation, the effect of the subsequent provisions of this section.
- (2) For the purposes of the provisions of article 9 of the Bill of Rights, 1688 as applying in relation to the Assembly, and for the purposes of this section, ***proceedings in Parliament*** means all words spoken and acts done in the course of, or for the purposes of or incidental to, the transacting of the business of the Assembly or of a committee, and, without limiting the generality of the foregoing, includes:
 - (a) the giving of evidence before the Assembly or a committee, and evidence so given;
 - (b) the presentation or submission of a document to the Assembly or a committee;

- (c) the preparation of a document for purposes of or incidental to the transacting of any such business; and
 - (d) the formulation, making or publication of a document, including a report, by or pursuant to an order of the Assembly or a committee and the document so formulated, made or published.
- (3) In proceedings in a court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in the Assembly, by way of, or for the purpose of:
 - (a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in the Assembly;
 - (b) otherwise questioning or establishing the credibility, motive, intention or good faith of a person; or
 - (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in the Assembly.
- (4) A court or tribunal shall not:
 - (a) require to be produced, or admit into evidence, a document that has been prepared for the purpose of submission, and submitted, to the Assembly or a committee and has been directed by the Assembly or a committee to be treated as evidence taken in camera, or admit evidence relating to such a document; or
 - (b) admit evidence concerning oral evidence taken by the Assembly or a committee in camera or require to be produced or admit into evidence a document, recording or reporting such oral evidence, unless the Assembly or committee has published, or authorised the publication of, the document or a report of the oral evidence.
- (5) In relation to proceedings in a court or tribunal so far as they relate to the interpretation of an Act or an Act of the Commonwealth, neither this section nor the Bill of Rights, 1688 shall be taken to prevent or restrict the admission in evidence of a record of proceedings in the Assembly published by or with the authority of the Assembly or a committee or the making of statements, submissions or comments based on that record.
- (6) In relation to a prosecution for an offence against this Act or an Act establishing a committee, neither this section nor the Bill of Rights, 1688 shall be taken to prevent or restrict the admission of evidence, the asking of questions, or the making of statements, submissions or comments, in relation to proceedings in the Assembly to which the offence relates.
- (7) Without prejudice to the effect that article 9 of the Bill of Rights, 1688 had, on its true construction, before the commencement of this Act, this section

does not affect proceedings in a court or a tribunal that commenced before the commencement of this Act.

This does not limit parliamentary privilege to just the circumstances described in s 6, although it provides a useful checklist of circumstances where parliamentary privilege will apply. In particular, the Legislative Assembly inherits all the powers and privileges of the Commonwealth House of Representatives, at s 4 of the *Legislative Assembly (Powers and Privileges) Act*.

4 Powers, privileges and immunities not elsewhere declared

The powers (other than legislative powers), privileges and immunities of the Assembly and of its members, committees and officers, to the extent that they are not declared by this Act, other than this section, shall be the powers (other than legislative powers), privileges and immunities for the time being of the House of Representatives of the Commonwealth, and of the members, committees and officers, respectively, of that House.

Section 14 of that same Act also defines the ‘precincts of the Assembly’ and notes that the Speaker has control and management of the precincts of the Assembly subject to the directions of the Assembly. Section 22 makes it clear that the Assembly has the power to control the publication of documents prepared for the purpose of submission to the Assembly or a committee of the assembly:

22 Unauthorised disclosure of evidence

A person shall not, without the authority of the Assembly or a committee, publish or disclose:

- a) a document which has been prepared for the purpose of submission, and submitted, to the Assembly or a committee and has been directed by the Assembly or the committee to be treated as evidence taken in camera or the publication of which has not been authorised by the Assembly or the committee; or
- b) any oral evidence taken by the Assembly or a committee in camera, or a report of any such oral evidence,
- c) unless the Assembly or committee has published, or authorised the publication of, the oral evidence.

Maximum penalty: In the case of a natural person, 40 penalty units or imprisonment for 6 months. In the case of a corporation, 215 penalty units.

Section 49(e) of the *Information Act* will exempt any information that falls within s 22 of the *Legislative Assembly (Powers and Privileges) Act*. However, if the information is actually presented to the Assembly or an Assembly committee without an order that says it will be kept ‘in camera’ (confidential), then publication is currently authorised by Standing Order 240:

STANDING ORDER 240

Tabled Papers are Public Documents

Unless otherwise ordered, all papers and documents presented to the Assembly will be considered public and the publication of such documents is authorised. Papers are available for inspection at the offices of the Assembly by Members and by other persons. Copies of an entire document or in part may be made, and a fee may be levied by the Clerk for the cost of copying any material.

Tip! It is important to check that this standing order is current at the time a decision under the *Information Act* is made, as the Standing Orders of the Assembly are liable to change from time to time. They can be found here: <http://www.nt.gov.au/lant/parliamentary-business/standing-orders.shtml>.

Note that if documents are made available (free of charge or for purchase), then they are classified as 'publicly available information' and fall outside the scope of what can be applied for under the *Information Act* by virtue of s 12 of that Act. Standing Order 240 would suggest that papers and documents presented to the Assembly will fall either within s 12 (and so outside the scope of FOI) or be protected by parliamentary privilege and so exempt.

Questions arise about how far parliamentary privilege extends beyond documents presented to the Legislative Assembly:

- Parliamentary privilege does not apply to a copy of a document that does not derive from the copy tabled in parliament. For example, if an MLA tabled a copy of a newspaper article, it does not follow that all copies of the newspaper circulating in the community are subject to Parliamentary privilege. Copies that do not derive from the copy tabled do not attract privilege. (see *Szwarcbord v Gallop* (2002) 167 FLR 262).
- A document does not attract privilege merely because it is sent to an MLA: 'It is not, I think, possible for an outsider to manufacture parliamentary privilege for a document by the artifice of planting the document upon a parliamentarian... The privilege is not attracted to a document by s 16(2) until at earliest the parliamentary member or his or her agents does some act with respect to it for the purposes of transacting business in the House.' (see *O'Chee v Rowley* (1997) 150 ALR 199).
- However, documents generated in the course of an MLA preparing for parliamentary business, can attract the privilege: 'proceedings in Parliament include the preparation of a document for purposes of or incidental to the transacting of any business of a House. More generally, such proceedings include all acts done for such purposes, together with any acts that are incidental to them. Bringing documents into existence for such purpose; or, for those purposes, collecting or assembling them; or coming into possession of them, are

therefore capable of amounting to ‘proceedings in Parliament’. (see *O’Chee v Rowley* (1997) 150 ALR 199, *Erglis v Buckley* [2005] QCA 204).

- In *Daglish v Department of Natural Resources* [2006] QICmr 3, *Stiller and Department of Transport* [2009] QICmr 8, and *Moriarty and Department of Health* [2010] QICmr 35, ‘parliamentary briefs’ and ‘briefing notes’ prepared by a Department for a Minister to use in Parliament were held to be subject to parliamentary privilege.
- The Information Commissioner notes that this line of authority has not yet been considered or adopted in the Territory. The Information Commissioner’s view is that care has to be taken with applying rules around parliamentary privilege created for court proceedings to the situation of releasing documents to the community under FOI. The content of parliamentary privilege in the context of FOI must to some extent be informed by the aims and objectives of the *Information Act*, and its role in facilitating the democratic process, noting the implied Constitutional right to freedom of political communication. Arguments have been made that parliamentary privilege applies to conversations between an MLA and constituents because failure to do so would have an ‘obvious potential to deter’ such engagements from occurring (see *O’Chee v Rowley*). However, it is difficult to see that the same deterrent effect would apply to public servants in a Department (as distinct from the Minister’s political advisors) tasked with briefing a Minister to perform his or her functions as a Minister, some of which includes being accountable to the Legislative Assembly. Departments are not supposed to brief a Minister in the Minister’s capacity as an MLA but only as a Minister. The *Information Act* specifically provides at s 5(6) that a Minister performing his or her functions as a Minister is a public sector organisation. The object of FOI is to open up the Executive / Administrative arm of government (Ministers, Departments, public servants etc.) to public scrutiny and transparency.
- An important question is how closely connected the documents are with the business of the House. For example, in *Crane v Gething* (2000) 169 ALR 727, French J considered a Senator’s travel itineraries, and held:

“I would not have regarded the itineraries as falling within the protected class. The fact that they would include names of constituents who have made representations or have had meetings with the Senator and which neither they nor the Senator would want to make public does not of itself raise an issue of parliamentary privilege. The documents do not otherwise answer the description of s 16 [of the *Parliamentary Privileges Act* 1987 (Cth)].”
- Courts have read the equivalent of s 6 of the *Legislative (Powers and Privileges) Act* narrowly. For example ‘something apparently made unlawful by the provision of 16(3) is not to be unlawful unless, in the opinion of the court in which the matter arises, the apparently prohibited activity in fact impairs freedom of speech in Parliament of the person whose statements are to be challenged.’ (see *Laurence v Katter* (1996) 141 ALR 447).

- Political party meetings are not ‘proceedings in Parliament’. In the New Zealand case of *Huata v Prebble & Anor*, the NZ Court of Appeal held: ‘Caucus meetings do not qualify as ‘proceedings in Parliament’. Caucus does not transact the business of the House but is a party-political meeting for coordinating strategies that may or may not relate to proceedings in Parliament. ... The correct view is that political meetings are not proceedings in Parliament and lack protection of parliamentary privilege.’ See also *R v Turnbull* [1958] Tas SR 80 at 84.
- The actions of persons within Parliament can be criticised out of parliament by the general community. The origin of many authorities concerns the extent to which the *courts* can criticise Parliament, a matter involving the separation of powers, which raises different issues from general community debate. The community can question the proceedings of Parliament outside Parliament (see *R v Murphy* [1986] 5 NSWLR 18). In New Zealand, a political party that examined the conduct of a member in Parliament as part of a disciplinary hearing to determine whether to expel that member was not considered to infringe Parliamentary privilege because it was about ‘the fundamental democratic right of free election to Parliament.’ (see *Peters v Collinge* [1993] 2 NZLR 554).

In reality, it can be factually difficult to draw the line between when a Minister is performing functions as a Minister, as an MLA, and as a member of a political party. It is a Department (the Department of the Legislative Assembly) that is itself subject to FOI that from an administrative perspective supports the Assembly, and provides its infrastructure, and some of that infrastructure may in turn be supported by other Departments. The Agency arrangements which provide support to MLAs and Ministers are subject to change, and Ministers may use tools or spaces provided for MLA purposes for ministerial purposes and vice versa without clearly defining what is intended. To date, no matter exploring exactly where this line should be drawn has proceeded to hearing, and so there is no specific legal authority on the question in this jurisdiction.

Commentary – s 49(f) – contempt of court

In [*Henderson and Department of Education*](#) (Queensland Information Commissioner, 22 July 1997), the Commissioner found that:

The rationale for proceedings for contempt of court is the protection of the effective administration of justice. The publication of material which tends to interfere with, or which is intended to interfere with, the fair trial of particular pending criminal or civil proceedings may constitute a contempt.

I cannot see how disclosure of the documents in issue to [the access applicant] would tend to interfere with the fair trial of the pending action, and the applicant has provided no evidence or detailed submissions explaining how she perceives that could occur. I am not satisfied that disclosure of the documents in issue would tend to influence witnesses or potential witnesses in the evidence that they would give to the court, in a manner that would interfere with the fair trial of the pending action. Even if potential witnesses were to obtain knowledge of the documents in issue, being information from the applicant's personnel file held by the Department, that information, in my assessment, is of such an innocuous and uncontentious

character that it could neither influence a potential witness, nor disadvantage the applicant's case before the Supreme Court.

The FOI Act is often relied upon by parties to litigation to obtain documents from government agencies. Use of the FOI Act is frequently an adjunct to the normal discovery and inspection processes. If the applicant's contention were correct, any document of a government agency would be exempt from disclosure under the FOI Act, if it was relevant to litigation that had commenced. This, in my view, is clearly not contemplated by the FOI Act generally (see *Re Sobh* [1994] 1 VR 41; (1993) 65 A Crim R 466, per Brooking J at pp.475-476) nor by s50(a) of the FOI Act in particular.

As previously noted, the NT *Information Act* is unique in that it contains the exemption in s49(c), which does provide that information is exempt if it merely discloses information about a proceeding or other matter before a court or tribunal. Nevertheless, as also discussed, that exemption can be read narrowly. Section 49(f) certainly ensures that information should not be disclosed if it conflicts with an order of the court or would impact on the system of justice. The wording of s 49(f) also makes it clear that the processes of a Royal Commission or commission of inquiry, even one from another jurisdiction, are protected from interference via disclosure through the FOI scheme.

Class exemptions to protect investigations – s49AA, 49A, 49B, 49C, and 49D

There are five exemptions that have been added since the Act was passed in 2002. These protect the confidentiality of the operations of watchdog bodies such as the Ombudsman, the Public Interest Disclosure Commissioner, the Auditor-General, and the Anti-Discrimination Commission. The addition of these exemptions since the commencement of the Act recognises partly new legislative developments (the PID Commissioner did not exist in 2002 and the Ombudsman's legislative framework has been substantially reviewed since that time), but also recognises that these bodies are intended to operate with a degree of independence and confidentiality but do not fit neatly into the quasi-judicial indicia of tribunals and so are not necessarily excluded from the operation of FOI on that basis.

Section 49AA provides a class exemption for Police intelligence, which was initially only protected by a harm test based exemptions, primarily s 46. Prior to the enactment of s 49AA, Police protected criminal intelligence via an exemption certificate from the Chief Minister under s 59, which effectively functioned as a class exemption.

Absolute Exemptions with a Harm Test (no public interest test)

In addition to the class exemptions, Part 4 Division 2 of the Act contains absolute exemptions which incorporate a harm test. This means that while there is no additional public interest test, the exemption requires the organisation prove that there is enough of a chance that a certain harm will occur. The harm and how likely it has to be is defined by the words of the section.

In these sections, the **harm** is highlighted in orange and the words relating to the **chance of it occurring** are highlighted in red and bold.

Protecting the Territory economy – s 45(1)(b) and (c)

Information is exempt if:

- (b) disclosure of the information **would** prejudice the ability of the Territory Government to manage the Territory economy or **would** otherwise seriously damage the Territory economy; or
- (c) disclosure of the information **would** result in an **unfair benefit or detriment to a person** by prematurely disclosing decisions in respect of government policy about one or more of the following:
 - (i) taxation;
 - (ii) the stability, control or adjustment of prices of goods or services, rents or other costs or of rates of wages, salaries or other incomes;
 - (iii) borrowing of money by the Territory;
 - (iv) entering into trade agreements with the Commonwealth, a State or another Territory of the Commonwealth or another country.

Much of the harm contemplated by section 45(1)(c) could be likened to the concept of 'insider trading'. Disclosure of the information would result in an applicant unfairly having access to exclusive government policy or commercial information that he or she can use to position himself or herself in an advantageous way.

Security and law enforcement harm test exemptions - s46 (2)(a), (c), (d), and (e).

Section 46(2) contains four exemptions with harm tests, which exempt information where disclosure would prejudice the maintenance of law and order in the Territory in any of the following ways:

- (a) **prejudices the investigation of a breach or possible breach of the law** (whether generally or in a particular case); or
- ...
- (c) discloses methods or procedures for preventing, detecting, investigating or otherwise dealing with matters connected with breaches or evasions of the law and disclosure of those methods or procedures **prejudices or is likely to prejudice their effectiveness**; or

- (d) discloses a matter that facilitates or is likely to facilitate a person's escape from lawful custody; or
- (e) endangers the life or physical safety of a person;

Commentary

The Commonwealth equivalent exemption to s 46(2)(a) requires less certainty than the NT exemption. The Commonwealth exemption is made out if the prejudice 'would' occur or even if it just could 'reasonably be expected' to occur. The NT exemption requires the organisation to prove the prejudice 'would' occur. Even the Commonwealth exemption requires 'more than a mere risk or possibility'. As the AAT put it in [Maksimovic v Commonwealth Director of Public Prosecutions \[2009\] AATA 700 at \[25\]](#):

To establish the exemption under s 37(1)(a) of the FOI Act it is necessary to show that disclosure would, or [could] reasonably be expected to prejudice an investigation, which requires more than a mere risk or possibility, and includes a situation where a person would be able to ascertain the state of the investigator's information and thereby avoid detection (*News Corporation Ltd v National Companies and Securities Commission* [\(1984\) 1 AAR 511](#)).

The exemption in s 46(2)(c) requires more than showing that a particular investigation method was used. The organisation must demonstrate that disclosing that method prejudices or is likely to prejudice the effectiveness of those methods. This means that the exemption will be hard to apply to obvious or commonly known methods. In [Wallace and Australian Federal Police \(2004\) 83 ALD 679; \[2004\] AATA 845](#), the AATA considered the Commonwealth equivalent provision at [115]:

What must be borne in mind in considering exemptions claimed under [s 37\(2\)\(b\)](#) is that the exemption applies not where a document identifies a method or procedure, but where it **discloses one and where the disclosure would be reasonably likely to prejudice the effectiveness of the methods or procedures**. As the Tribunal said in [Alistair Peter Scholes and Australian Federal Police \[1996\] AATA 347 at \[147\]](#):

If the methods are methods which every reader of detective stories and every watcher of "Blue Heelers", "Janus", "The Bill" and other police shows on TV knows all about, then the identification of the methods will disclose nothing and, further, will have no effect on the effectiveness of those methods or procedures.

Similarly, in [Lobo and Dept. of Immigration and Citizenship \(2011\) 124 ALD 238; \[2011\] AATA 705 at \[212\]-\[219\]](#) the AAT refused to apply the exemption to methods which appear 'from time to time in the various forms of news reporting, in the theatre, at the cinema, on the television and in books, both fiction and non-fiction. They are all known.' However, the AAT did note that (at [213], quoting *Re Mickelberg and Australian Federal Police*):

it is one thing for observers to deduce, with varying success from everyday experience, media reports and other informal sources, what appear to be the methods and procedures employed by such agencies to achieve their objects, but it is quite another thing to have spelt out publicly from the agencies (sic), own documents or in the proceedings of a Tribunal such as this what those methods and procedures are. The risk that they may be less effective would seem to be increased if a person endeavoring to combat or evade them has authoritative knowledge of them'.

Note: there is an additional exemption specifically for correctional facilities at s 54(d) of the Act:

- (d) prejudice the administration, management or security of a custodial correctional facility (as defined in section 11(1)(a) of the *Correctional Services Act*) or detention centre.

You can find more information on this exemption at page **XX** of this Guideline.

Exception:

46(3) the disclosure of information does not prejudice the maintenance of law and order in the Territory if it discloses information that:

- (a) reveals that the scope of a law enforcement investigation has exceeded limits imposed by law; or
- (b) reveals the use of illegal methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasion of the law; or
- (c) contains a general outline of the structure of a program adopted by a public sector organisation for investigating breaches of, or enforcing or administering, the law; or
- (d) is a report on the degree of success achieved in a program adopted by a public sector organisation for investigating breaches of, or enforcing or administering, the law; or
- (e) is a report prepared in the course of routine law enforcement inspections or investigations by a public sector organisation that has a function of enforcing and regulating compliance with a particular law other than the criminal law; or
- (f) is a report on a law enforcement investigation where the substance of the report has been disclosed to the person or body the subject of the investigation.

Preservation of the system of justice harm test exemptions – s 49(a) and (b)

In addition to class exemptions, s 49 contains two exemptions with harm tests, which makes information exempt if its disclosure **would**:

- (a) prejudice the prosecution of an offence against a law of the Territory or elsewhere; or
- (b) prejudice the right of a person to a fair trial or impartial adjudication;

Commentary:

One clear example where such prejudice may arise is by disclosing information about a person's prior offences or by speculating, sub judice, about a person's possible guilt or innocence upon specific charges that have been laid. That conduct could also be a contempt under section 49(f), though contempt would be a more complex exemption to make out than section 49 (a) or (b).

Section 49(a) and (b) of the *Information Act* would not however extend to information similar to that referred to in sections 136 and 137 of the *Evidence (National Uniform Legislation) Act (NT)*:

136 General discretion to limit use of evidence

The court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might:

- (a) be unfairly prejudicial to a party; or
- (b) be misleading or confusing.

137 Exclusion of prejudicial evidence in criminal proceedings

In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant.

The reason why section 136 and 137 issues do not arise in the context of section 49(a) or (b) is that someone at the trial (normally the prosecutor) must attempt to adduce that evidence (section 136) or the information must already be in evidence, and the court has a discretion to limit the use of the evidence (section 135).

While prejudicial information does come before juries by prior publications, the prejudice can potentially be 'cured' by the judge giving the jury a direction to ignore all information they have heard about the issues in the trial and limit their deliberations to the evidence led at trial. It is difficult however, for a decision-maker handling an FOI matter to rely on the expectation of the judge issuing such a direction. Section 49 (a) and (b) is not to be read as subject to a direction by the judge; rather it refers to

information that may be released into the public domain and may come to the attention of a jury, for example. If the character of the information is such as would, in the normal event, result in the relevant prejudice in subsections (a) or (b), the decision-maker cannot speculate about judicial directions or what may occur at a trial.

The exemption requires more than that the information shows the person in a negative light – it would have to rationally be capable of impacting the prosecution or the person’s right to a fair trial. In the Information Commissioner’s unpublished hearing decision (F3/14-15), many documents were released which showed the person in question in a very bad light, but the circumstances were that the negative information contained in these documents was already in the public domain, and so the Hearing Commissioner did not consider that disclosure of the documents would actually prejudice the person’s right to a fair trial, because it did not meaningfully make the risks of prejudice any worse.

Particular Case Exemptions (where the public interest test applies)

Part 4 Division 3 of the Act lists a range of exemptions which apply ***if and only if*** it can be shown that in this particular case, the public interest factors in favour of keeping the information confidential outweigh the factors in favour of disclosure. This is known as the **public interest test** and is set out in s 50.

Public Interest Test

50 Exemption

(1) Government information mentioned in this Division is exempt only if it can be shown that, in the particular case, it is not in the public interest to disclose the information.

(2) To show that, in a particular case, it is not in the public interest to disclose government information, the following matters are irrelevant:

- a) the possibility that the disclosure may result in embarrassment to, or a lack of confidence in, the Territory Government or a public sector organisation;
- b) the possibility that the applicant may misunderstand the information disclosed.

Section 50 is **not** a stand-alone exemption. You cannot simply withhold information because you say it is not in the public interest. You must show first that the information fits one of the exemptions provided for by sections 51-58, and then *in addition* you must show that the test in section 50 is satisfied. When you write your reasons, you should show clearly that you have addressed both the exemption and section 50, not simply assumed that section 50 applies because the information fitted within the exemption.

Because these exemptions are conditional on satisfying the public interest test, they all use the word 'may'.

When introducing the *Information Act*, then Attorney-General Toyne discussed in the Second Reading Speech an intention to create a public interest test that was drafted broadly to adapt to different circumstances, but which allowed more information to be disclosed than in some other jurisdictions:

The majority of exemptions are contained within Division 3 where the decision-maker is required to consider, in each individual case, whether it is not in the public interest to disclose the information. This is a more liberal application of the public interest test than in some jurisdictions which require a showing that disclosure is in the public interest. Under the Information Bill, this information will only be exempt if it can be shown in a particular case that it is not in the public interest to disclose the information.

Our application of the public interest test is consistent with the idea that government should be open and accountable, not one where an applicant must satisfy the need for the information to be released. Some submissions received requested that the public interest test be defined. However, the absence of a definition is by design and not by neglect. Public interest tests are a feature of a number of areas of law - for example defamation law, competition policy and industrial relations law. Contempt law is a good example of a public interest defence. For example, in *Hinch and Macquarie Broadcasting Holdings Limited v The Attorney-General for the State of Victoria*, in a case involving well known broadcaster Derryn Hinch, it was necessary for the High Court to balance the public interest in the discussion of public affairs with the public interest in ensuring that a person received a fair trial. The courts and legislatures have been careful not to enter into attempts to define what is meant by 'the public interest' because the concept, by necessity, will be different in particular contexts and at particular times.

The NT Information Commissioner has always adopted the view that applying the Particular Case Exemptions involves the following process:

Step 1

Identify whether all the elements of an exemption apply (any of the sections from 51-58), including whether any harm tests can be satisfied.

Step 2

Make sure the exemption you are applying does not have any relevant exceptions (eg. time limits after which the exemption can no longer apply).

Step 3

Identify all the public interest factors for and against disclosure that apply in the particular case. Do not include the matters prohibited by sections 50(2) or 17(2). Consider the objects of the Act (section 3), and if applying section 52, in Step 1 consider the list of factors in section 52(5).

Step 4

Assess the weight of those factors and decide whether the factors against disclosure outweigh the factors for disclosure. Your decision is made on the balance of probabilities (that is, you must find for the exemption to apply that the factors against disclosure are greater than 50% as compared to those in favour of disclosure, being the civil standard of proof). However, your decision is not required to state any percentages.

When considering the application of section 50 together with the associated exemptions, a decision-maker or reviewer is making a fresh decision (see sections 39(4) and 40), and so should engage in a full consideration and balancing of all relevant factors, as section 39(4) requires. In [McKinnon v Secretary, Dept of Treasury \(2006\) 228 CLR 423; 91 ALD 516; \[2006\] HCA 45](#) Gleeson CJ and Kirby J of the High Court noted that the starting point for making an assessment of what is in the public interest involves considering the statutory scheme as a whole, at [5]:

Inevitably, it will involve a judgment as to where the public interest lies. Such judgment, however, is not made in a normative vacuum. It is made in the context of, and for the purposes of, legislation which has the object described above, which begins from the premise of a public right of access to official documents, and which acknowledges a qualification of that right in the case of necessity for the protection of essential public interests (s 3(1)(b)).

(Legal note: Take care when reading *McKinnon* because the decision as a whole has limited application to the NT. The above quote is applicable because it concerns a provision substantially similar to the equivalent provision in the NT – which is section 3(1)(a) of the NT Act – although the quote comes from a minority joint judgment, it was cited with approval in [Lobo and Dept. of Immigration and Citizenship \(2011\) 124 ALD 238; \[2011\] AATA 705 at \[236\]](#). Most of the *McKinnon* decision was about another particular issue which, while it refers to a ‘public interest test’, is very different from the test in section 50 of the NT Act. In particular, *McKinnon* was about a tribunal’s limited powers on review to overturn a particular public interest test in the Commonwealth legislation.)

While the NT legislation does not include the words ‘on balance’ in the wording of section 50, the Information Commissioner’s view is that when the section is properly read in light of the Act as a whole and the extrinsic materials, the intention is that all relevant public interest factors for and against disclosure are considered and the decision maker then considers whether, when all relevant matters are considered, ‘it can be shown that, in the particular case, it is not in the public interest to disclose the information.’

Tip! In practical terms, decision makers should provide reasons which identify the key factors considered, both for and against disclosure. Where there are competing factors, it may assist in promoting a fair and transparent process to explain why some factors outweighed others, but the Information Commissioner recognises that the synthesis of competing factors is not necessarily a precise and mechanical process capable of being articulated. So long as it is evident that the decision-maker made a genuine effort to further the objects and scheme of the legislation (which

aims to disclose information where possible), then a comprehensive explanation of why some factors were given more weight than others is not expected.

The High Court has recognised that there is a public interest in informed political debate in *Lange v ABC* (1997) 189 CLR 520:

Accordingly, this Court should now declare that each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia. The duty to disseminate such information is simply the correlative of the interest in receiving it. The common convenience and welfare of Australian society are advanced by discussion – the giving and receiving of information – about government and political matters.

The ‘Fitzgerald Report’ (1989) stated:

Information is the lynch-pin of the political process. Knowledge is, quite literally, power. If the public is not informed, it cannot take part in the political process with any real effect.

Confidentiality (between government bodies) – s 51

Section 51 provides:

Information may be exempt under s 50 if disclosure of the information **would prejudice inter-governmental relations** between an Australian body politic and a body politic overseas or between 2 or more bodies politic in Australia or in the Territory.

The AAT, in considering the equivalent Commonwealth provision, has considered that the relationship in question is between organisations, not between their individual employees. See [Lobo and Dept. of Immigration and Citizenship \(2011\) 124 ALD 238; \[2011\] AATA 705 at \[80\]](#):

What is encompassed within the words “relations between the Commonwealth and a State” was a matter considered by the Full Court of the Federal Court in [Arnold \(on behalf of Australians for Animals\) v Queensland \[1987\] FCA 148](#). Wilcox J said that:

“... the words ‘relations between the Commonwealth and a State’ refer to the total relationship between the Commonwealth and the relevant State. As is essential in a federation, there exists a close working relationship, over a wide spectrum of matters and at a multitude of levels, between representatives of the Commonwealth and representatives of each State. The word ‘relations’ includes all of those contacts. It would not normally be correct to describe a falling out between particular individuals on each side as constituting damage to ‘relations’ between the two governments, even if there was some loss of co-operation between those individuals. But a dispute may have ramifications sufficiently extensive for it to affect ‘relations’ between the governments as such. Questions of degree arise. They can only be considered in the light of the facts of each case.”

The Commonwealth and Queensland provisions are framed in terms of the governments as a whole, whereas the NT legislation is framed in terms of a 'body politic'. For example, section 38 of the Queensland *Right to Information Act* provides:

Matter is exempt matter if its disclosure could reasonably be expected to -

- cause damage to relations between the State and another government; or
- divulge information of a confidential nature that was communicated in confidence by or on behalf of another government;
- unless its disclosure would, on balance, be in the public interest.

In Queensland the phrase 'another government' has been considered to exclude local government entities (see [Santoro, *MLA and Department of Main Roads; Brisbane City Council \(Third Party\) \(2000\) 5 QAR 405 at \[25\]*](#)).

The Northern Territory as a whole is a body politic: section 5 *Northern Territory Self-Government Act 1978*, which is a Commonwealth statute. Section 51 would not apply to relations between two NTG Agencies (eg. Departments) as they are part of a single 'body politic'.

Section 25(1) of the *Local Government Act (NT)* states that a local council is a body corporate.

Section 11(a) of the Queensland *Local Government Act 2009* provides:

A local government -

- a) is a body corporate with perpetual succession

In *Ostwald Accommodation Pty Ltd v Western Downs Regional Council* [2015] QSC 210, Jackson J said at [26]:

"The constitutional power of a local government is thus conferred in the language of plenary power in s 9 of the LGA, namely that a local government has the power to do anything that is necessary or convenient for the good rule and local government of its local government area. However, there are many limits, starting with the express provision that a local government can only do something that the State can validly do. Unlike the State, which is a body politic, a local government is a body corporate. Councillors are responsible for its activities."

By contrast, section 220 of the NSW *Local Government Act 1993* provides that local councils are bodies politic of the State of NSW and are not bodies corporate.

A statutory organisation is not a body politic. This is so well accepted that it is stated in a Glossary of the Commonwealth Department of Finance, as follows:

body corporate – A legal entity, other than a body politic or a natural person. It includes a statutory corporation, a company and an incorporated association.

At <https://www.finance.gov.au/resource-management/governance/policy/glossary/>

No Territory legislation has constituted anybody or organisation as a body politic, a power which the legislature possesses: see *Hoxton Park Residents Action Group Inc v Liverpool City Council (No 2)* [2011] NSWCA 363, a decision of the NSW Court of Appeal discussing that power.

An example of a large statutory organisation that is a body corporate (and not a body politic) is Charles Darwin University: see section 4 of the *Charles Darwin University Act (NT)*.

Deliberative processes – s 52

Section 52 works a little differently from the other exemptions, in that it is technically a 'class exemption' (rather than a harm exemption), but it is then subject to the public interest test, and includes its own particular rules for applying the public interest test. The exemption provides as follows:

- 1) Information may be exempt under section 50 if disclosure of the information would disclose:
 - (a) an opinion, advice or recommendation brought into existence by or on behalf of a public sector organisation in the course of, or for the purposes of, the deliberative processes that are part of the functions of the organisation; or
 - (b) a record of consultations or deliberations of a public sector organisation in the course of, or for the purposes of, such deliberative processes.
- 2) Information mentioned in subsection (1) is not exempt under section 50 if the information is purely statistical, technical, scientific or factual.
- 3) Information mentioned in subsection (1) is not exempt under section 50 if the information is:
 - (a) a final decision, order or ruling given or made in the exercise of an adjudicative function; or
 - (b) the reasons for such a decision, order or ruling.
- 4) Information mentioned in subsection (1) is not exempt under section 50 if a period of 10 years has elapsed since the information was brought into existence.
- 5) To show that, in a particular case, it is not in the public interest to disclose government information mentioned in subsection (1), a public sector organisation may have regard to the following factors:
 - a) the more senior the person who created, annotated or considered the information and the more sensitive the information, the more likely it will be that

the information should not be disclosed (but the seniority of the person is not by itself a sufficient reason not to disclose the information);

- b) the disclosure of information that was brought into existence in the course of the development and subsequent promulgation of policy tends not to be in the public interest;
- c) the disclosure of information that **will inhibit frankness and candour in future pre-decisional considerations** is likely not to be in the public interest;
- d) the disclosure of information that **has the potential to inhibit the independence of the decision-maker because of the possibility that the disclosure could result in the decision-maker being unduly pressured or harassed** is likely not to be in the public interest;
- e) the disclosure of information where there is **a risk** that the disclosure will result in **a mischievous interpretation of the information** is likely not to be in the public interest;
- f) the disclosure of information that **will lead to confusion and unnecessary debate resulting from disclosure of possibilities considered** tends not to be in the public interest (but a tentative or optional quality of the information is not by itself a sufficient reason not to disclose the information);
- g) the disclosure of information that does not fairly disclose the reasons for a decision subsequently taken **may be unfair to a decision-maker and may prejudice the integrity of the decision-making process.**

Commentary:

The overarching aim of this exemption is to encourage good quality decision making by government. This involves striking an appropriate balance between confidentiality and transparency.

Good quality organisational decision making processes involve creating drafts, tossing around ideas, researching, consulting, and often some internal debate between competing views. This process of deliberation tends to leave a trail of records ranging from well thought out submissions, to sketchy notes of conversations or brainstorming sessions. Sometimes these notes will capture terrible or irrelevant ideas that were never going to be seriously pursued. The issue is that organisations are unlikely to explore creative, innovative, or controversial ideas if they cannot do so in a confidential space.

On the other hand, transparency is an important safeguard against poor or corrupt processes. If a decision with significant public impact is being promoted as having been made after substantial research and consultation, and the records show that it was hastily slapped together on a weekend, the process itself may be of public interest.

There is no one decisive factor as to what is in the public interest. Even the factors listed in section 52(5) are factors that the organisation *may* have regard to. It is not required to have regard to those factors if they are irrelevant, and other relevant factors can be considered. This is consistent with *Re Rae v Department of Prime Minister* (1986) 12 ALD 589 and *Re McGarvin v Australian Prudential Regulation Authority* (1998) 53 ALD 161, which considered similar factors as they existed in case law (which are known as the 'Howard factors' deriving from a case called *Re Howard v Treasurer of the Commonwealth* (1985) 7 ALD 626).

The Information Commissioner makes the following observations about the factors listed:

- (5)(a) - Seniority can be of significance because persons with seniority tend to handle decisions at a more sensitive and strategic level.
- (5)(b) - Much government decision-making concerns the development of policy. People genuinely hold different views as to what is a 'good policy' and what course of action is likely to further or harm the public interest, and unnecessary airing of internal debate is unlikely to be in the public interest, because it risks an internal culture where people are loathe to speak up with alternative views. However, it is possible to imagine a situation where a policy is adopted after a process which inexplicably ignored overwhelming evidence that the policy was damaging the public interest. It may be in the public interest to disclose this information so that the public can ask appropriate questions about why the policy was adopted and whether it should continue to be adopted. This is likely to turn on whether there is anything of substance in the records that would further public debate and understanding in a relevant way.
- (5)(c) – Internal decision-making which involves frank and candid discussions of options and reasons tends to lead to better decision-making, and better decisions by government is in the public interest. Section 52 does not exist to hide poor processes, to protect individuals or the government from embarrassment, or to avoid controversy about matters of genuine public interest. Certainly, if the records reveal a corrupt process, it would be difficult to argue that this exemption should apply. While the frankness and candour argument can be quite applicable to comments made in a brainstorming / off the cuff environment, it cannot be assumed that public servants would stop doing their public duty if their decisions were made public, and there are arguments that potential scrutiny can encourage better decision making. In *Sankey v Whitlam* (1978) 142 CLR 1, Mason J of the High Court said at 97: 'The possibility that premature disclosure will result in want of candour in Cabinet discussions or in advice given by public servants is so slight that it may be ignored ... I should have thought that the possibility of future publicity would act as a deterrent against advice which is specious or expedient.' This reasoning was endorsed by the Queensland Information Commissioner in *Eccleston*, who added at [134]:

“Even if some diminution in candour and frankness caused by the prospect of disclosure is conceded, the real issue is whether the efficiency and quality of a deliberative process is thereby likely to suffer to an extent which is contrary to the public interest. If the diminution in previous candour and frankness merely

means that unnecessarily brusque, colourful, or even defamatory remarks are removed from the expression of deliberative process advice, the public interest will not suffer. Advice which is written in temperate and reasoned language and provides justification and substantiation for the points it seeks to make is more likely to benefit the deliberative processes of government. In the absence of clear, specific and credible evidence, I would not be prepared to accept the substance or quality of advice prepared by professional public servants could be materially altered for the worse, by the threat of disclosure under the FOI Act.”

The persons whose frankness and candour are to be considered have been held by the Information Commissioner NT to be the officers of the organisation conducting the deliberative process, not any external persons with whom they may consult ([see *Collie v Office of the Commissioner for Public Employment* \(25 March 2008\)](#) at [86]).

5(d),(e),(f), and (g) – It is doubtful how much public interest there is in disclosing half-baked notes or proposals that might have been but ultimately were not adopted, unless those records usefully inform what course of action can be taken going forward. Internal disagreements might have a dramatic quality which could make for entertaining reading, but which add little of relevance to informing the democratic process and which, if disclosed, could have the negative effect of diverting public attention from the real issues of policy and process. Making good decisions sometimes involves creating a space where ideas can be debated and explored freely; it would be difficult to do this if participants knew that anything they might say could later be made public, where it could be taken out of context.

Not all records fall within the scope of this section. The records must be one of the following:

- an opinion;
- an advice;
- a recommendation;
- a record of consultations; or
- a record of deliberations

Further, the record must also have been brought into existence by or on behalf of the public sector organisation in the course of its deliberative processes. For example, an unsolicited opinion from a member of the public is unlikely to fall within the section 52 exemption, because it was not brought into the existence in the course of the organisation’s deliberative processes (see [Philip Morris Ltd and Prime Minister \(2011\) 122 ALD 619; \[2011\] AATA 556 at \[212\]](#) which concerned different wording of similar effect). Similarly, an opinion by an employee as to where they would like to have lunch has nothing to do with these agency processes.

In the course of deliberative processes, there may be procedural or administrative processes (e.g. travel approval forms for a trip to conduct community consultation). These documents would not themselves contain information that fits within section 52. In *Re Waterford and Department of Treasury (No 2)* (1984) 5 ALD 588, the AAT considered the Commonwealth equivalent and stated:

...documents disclosing deliberative processes must, in our view, be distinguished from documents dealing with the purely procedural or administrative processes involved in the functions of an agency. A document which, for example, discloses no more than a step in the procedures by which an agency handles a request under the FOI Act is not a document to which [the deliberative processes exemption] applies.

This position has also been accepted in Queensland in [*Eccleston and Department of Family Services and Aboriginal and Islander Affairs* \(1993\) 1 QAR 60](#).

In Victoria, drafts have usually been exempted under the equivalent of the deliberative processes exemption. In [*Yarra CC v Roads Corporation* \[2009\] VCAT 2646](#), the Tribunal said at [24]:

There is a long line of authority in this Tribunal and its predecessor, the Administrative Appeals Tribunal of Victoria to the effect that draft and incomplete documents which form part of the deliberative process are not appropriate for release. The rationale for that is that to release a draft implicitly attributed to a Government agency or perhaps a Minister or the Government as a whole of views or policies or determinations which were ultimately not taken at all or held at all or were taken or held only in a materially amended form. Hence in the case of a draft which is found to fall within Section 30(1)(a) of the *Freedom of Information Act* in terms of Section 30(1)(b), the public interest will generally come down against release and in favour of holding the document exempt. The cases are *Western Mining Corporation v Department of Conservation, Forests and Lands* (1989) 3 VAR 150, 160 per Deputy President Galvin and Member Handley; *Brog v Department of The Premier and Cabinet* (1989) 3 VAR 201; *Wyman v Monash University* (unreported Administrative Appeals Tribunal of Victoria, Judge A.F. Smith, President, 20 August 1991); and my own decision in *Marple v Department of Agriculture* (1995) 9 VAR 29, 43-4. More recently in this Tribunal reference may be made to *Oostermeyer v The Alfred Hospital* (1998) 13 VAR 449 and *Moloney v Department of Human Services* (2001) 18 VAR 238, 246.

This approach was endorsed by VCAT in [*Tee v Department of Planning and Community Development* \[2013\] VCAT 1150](#), where the Tribunal said at [66]:

‘There must be a high threshold public interest to be served by release of the documents, not merely a possibility that the public good may be served by it.’

The NT Information Commissioner’s view is that the Victorian approach does not translate well to the NT, where the starting principle in the NT legislation it is in the public interest for information to be made public unless there is a good reason for it not to be. The Victorian approach also elevates the fact that a document is a ‘draft’ to a special status which outweighs other factors, an approach not supported by the plain wording of the *Information Act (NT)*. The NT’s position is more aligned with the AAT and Queensland. For example, when considering disclosing the draft version of a

report in [QVFT and Secretary, Dept of Immigration and Citizenship \[2011\] AATA 763](#), the AAT stated at [30]:

I do not accept the Secretary's contention that disclosure in this case could reasonably be expected to inhibit "frankness and candour in future pre-decisional communications". This is not a case where the advice contained in the draft report differed in any material way to that contained in the final form of the report. There is nothing to indicate that (within DIAC at least) the advice given was considered to be controversial or the subject of internal debate. If the Secretary is contending that the release of a report of this type will inhibit frankness and candour within the public service by nature of it being an internal working document, I cannot agree. As Hayne J observed in *McKinnon v Secretary, Department of Treasury (2006) 228 CLR 423 (McKinnon)* at [64]:

The bare fact that the disputed documents are internal working documents of a kind described in s 36(1)(a) of the Act will not demonstrate that there are reasonable grounds for the claim that their production will be contrary to the public interest. The Act assumes that such documents may be, but are not necessarily, of a kind whose production would be contrary to the public interest.

In that case, documents were also considered which related to briefing the Commonwealth Ombudsman who was conducting a review into the management of long-term detainees. The discussion provides an interesting example of weighing public interest factors about a controversial topic of public interest, although it should be noted that the involvement of an 'oversight body' (the Ombudsman) was likely to be of significance, since an Ombudsman investigation is itself a mechanism designed to improve government decision-making, and its effectiveness requires the Ombudsman to control the confidentiality of the process in accordance with a statutory scheme. In denying access to the documents, the AAT explained its reasoning as follows [35]-[40]:

...the real question raised is whether disclosure of any of the disputed documents would be contrary to the public interest. As Gleeson CJ and Kirby J stated in *McKinnon* at [5], that decision "... inevitably ... will involve a judgment as to where the public interest lies". Their Honours went on to say:

Such judgment, however, is not made in a normative vacuum. It is made in the context of, and for the purposes of, legislation which has the object described above, which begins from the premise of a public right of access to official documents, and which acknowledges a qualification of that right in the case of necessity for the protection of essential public interests (s 3(1)(b)).

In *QVFT and Secretary, Department of Immigration and Citizenship [2011] AATA 763* at [36]-[40], the AAT said:

There is significant public interest and debate about DIAC's management of long-term detainees. Sections of the Australian community are concerned that some detainees may not be treated in a manner consistent with Australia's

international obligations. Others within the community believe that the treatment afforded to detainees is overly generous. It is a matter of common knowledge that there is significant information within the public arena about the subject matter of the review undertaken by the taskforce. Disclosure in these circumstances might reasonably be expected to fill in some of the gaps and promote more informed discussion.

In deciding whether disclosure would be in the public interest, I have borne in mind, as the applicant points out, that the Secretary has not adduced any evidence to support his contention that release of the disputed documents would stifle candour within DIAC and between DIAC and the Ombudsman. It is not possible to predict with any certainty how officers of either agency would react if the disputed documents were released — it goes without saying that the reaction would not necessarily be uniform. Nor can it be objectively measured. Its assessment must involve a degree of speculation.

I think it reasonable to assume however that, given the sensitive nature of the issues under discussion and the oversight role played by the Ombudsman, disclosure of internal working documents of this type might dampen the recording of future candid exchanges within and between both organisations. This would plainly be contrary to the public interest. In contrast to the draft report discussed above, the disputed documents contain a range of options that were canvassed, not all of which were adopted. While there are powerful factors that favour disclosure, in this case they are outweighed by the real and material risk that candour at the deliberative stage of decision-making might be dampened. For that reason I have decided that disclosure would be contrary to the public interest.

For completeness, I note that there is nothing in the documents to suggest that the options canvassed by the task force were unlawful, or the deliberations were conducted in an improper manner. Had that been the case, I may have reached a different decision.

I am satisfied that the claim for exemption under s 36(1) in respect of each disputed document is justified. I am also satisfied that the deletions made under s 22 of the Act only included “irrelevant matter”.

The public interest in protecting the preliminary aspects of certain investigations was also recognised by QCAT, when an organisation used the equivalent of section 52 to refuse access to a preliminary investigative report which was part of the early processes of preparation for an independent body’s decision about issues of public health and safety (see [Hassan v Australian Health Practitioner Regulation Agency \[2014\] QCAT 414](#)). In the NT, many of these investigative records are protected by specific exemptions (sections 49A-49D).

Exceptions:

Note that information is not exempt under section 52 if any of the following apply:

- it is purely statistical, technical, scientific or factual (s 52(2))

- it is a final decision, order or ruling given or made in the exercise of an adjudicative function, or the reasons for such a decision order or ruling (s 52(3))
- a period of more than 10 years has passed since the information came into existence (section 52(4)).

In Queensland, it has been held that information can still be ‘factual’ if it happens to be inaccurate, because the relevance of the information may be that the statement itself was made (see *Re Burke and Gold Coast City Council* (Unreported, Queensland Information Commissioner, 17 November 1997)).

See also the discussion on page **XX** relating to “factual” material in the context of section 45.

Effective operations of public sector organisation – s 53

Section 53 provides:

Information may be exempt under section 50 if disclosure of the information is **reasonably likely to**:

- a) **prejudice the effectiveness of a method or procedure for the conduct of a test, examination or audit** by a public sector organisation; or
- b) **prejudice the attainment of the objects of a test, assessment or audit** conducted by a public sector organisation; or
- c) **have a substantial, adverse effect on the management** by a public sector organisation **of the officers or employees of the organisation**; or
- d) **have a substantial, adverse effect on the conduct of industrial relations** by a public sector organisation.

Commentary:

The exemptions provided by sections 53(a) and (b) tend to be applied by educational institutions which are subject to freedom of information (such as public schools and universities). The case of [Re H and Department of Education \[2014\] WAICmr 21](#) provides a good illustration of the application of an equivalent exemption. The decision endorsed a common sense dictionary definition of a ‘test’ as being ‘a critical examination or trial of a person’s or thing’s qualities ... the means of so examining ... a standard for comparison or trial ... a minor examination’. In that case, a parent sought his son’s year 9 chemistry paper, so the WA Information Commissioner found that the relevant question was whether ‘disclosure of the chemistry test could reasonably be expected to damage the effectiveness of the School’s methods or procedures for conducting the chemistry tests.’ The applicant argued that writing new tests was not an onerous obligation. The School put forward evidence about the complexity of writing and re-writing tests to the required standards and was able to establish the exemption should be applied.

In [Challita v NSW Department of Education and Training \[2010\] NSWADT 175 \(14 July 2020\)](#) the applicant sought an internal audit by the Department of the ‘selective schools unit’. In finding that the document was an ‘audit’, the Tribunal reaffirmed a view taken in an earlier case that (at [29]):

the term ‘audit’ carries the connotation of a systemic, broad ranging examination of specified activities of the organisation the subject of the audit. While the expression is most commonly used in connection with the conduct of audits of the financial affairs and operations of an organisation, it is now often used to describe examinations of non-financial aspects of an organisation’s activities, for example the level of compliance of the organisation with regulatory standards or best practice standards (a form of audit sometimes called a compliance audit or a quality audit).

The tribunal noted that when considering whether there would be prejudice or some kind of harm, the ‘focus must be on the future effect on a function of the agency, not on the effect of disclosure in the present controversy: see *Robinson v Director General, Department of Health* [\[2002\] NSWADT 222](#) at paragraph [63]’.

Two of the exemptions provided in this section require a reasonable likelihood that the resulting harm would be serious enough to be called a ‘substantial adverse effect’. In [Re Lobo and Department of Immigration and Citizenship \[2011\] AATA 705](#) the AAT discussed the phrase as it has appeared in cases at [223]:

223. The words “*substantial adverse effect*” have been considered in a number of cases. Beginning with the word “*substantial*”, its ordinary meanings include that of “... *considerable in amount, extent, importance, etc ...*”. In considering the meaning of the expression “*substantial loss or damage*”, Bowen CJ said in *Tillmanns Butcheries Pty Ltd v. Australasian Meat Employees Union & Ors*:

“The word ‘substantial’ would certainly seem to require loss or damage that is more than trivial or minimal. According to one meaning of the word the loss or damage would have to be considerable (see *Palser v. Grinling* [1984] 1 ALL Er 1; [1984] AC 291 at 316-7). However, the word is quantitatively imprecise; it cannot be said that it requires any specific level of loss or damage. No doubt in the context in which it appears the word imports a notion of relativity, that is to say, one needs to know something of the circumstances of the business affected before one can arrive at a conclusion whether the loss or damage in question should be regarded as substantial in relation to that business.”

Justice Deane said:

“The word ‘substantial’ is not only susceptible of ambiguity; it is a word calculated to conceal a lack of precision. In the phrase ‘substantial loss or damage’, it can, in an appropriate context, mean real or of substance as distinct from ephemeral or nominal. It can also mean large, weighty or big. It can be used in a relative sense or can indicate an absolute significance, quantity or size ... As at present advised, I incline to the view that the phrase, substantial loss or damage, in s45D(1) includes loss or damage that is, in the

circumstances, real or of substance and not insubstantial or nominal. It is, however, unnecessary that I form or express any concluded view in that regard, since the ultimate conclusion which I have reached is the same regardless of which of the alternative meanings to which reference has been made is given to the word 'substantial' in s45D(1)."

224. In *Harris v Australian Broadcasting Corporation and Others*, Beaumont J considered whether reports of an independent review of the Legal Department of the respondent were exempt within the meaning of s 40(b) of the FOI Act as it was then enacted. His Honour found that it was possible that the reports could embarrass those charged with supervising or reviewing the operations of the Legal Department but went on to say:

"However, I am not persuaded that any such effect, even if adverse, could fairly be described as 'substantial' in its impact. In my view, the 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."

225. Muirhead J has also considered the expression "*substantial adverse effect*" as it appears in s 40 in the case of *Ascic v Australian Federal Police [1986] FCA 260*. He made specific reference to Beaumont J's use of the word "*gravity*" which caused him some difficulty. In Muirhead J's view at [14]:

"'*Substantial*' is a word of common usage which can stand on its own feet and the work ascribed to it in statutory interpretation will depend on the statute and of course the issues under consideration. Deane J gave detailed consideration to the word in *Tillmanns Butcheries Pty Ltd v. Australasian Meat Industry Employees' Union* (1979) 27 ALR 376 at 382. Whilst the court there was considering an application under s. 45D of the *Trade Practices Act 1974* which refers to 'substantial loss or damage' his Honour's words that 'substantial loss or damage ... includes loss or damage that is in the circumstances, real or of substance and not insubstantial or nominal' appear to me to be appropriate to most circumstances and closer to the plain meaning of the word and its dictionary interpretations."

226. In the same year as Muirhead J published his judgment in *Ascic*, the AAT reached the conclusion that a "*substantial adverse effect*" "connotes an adverse effect which is sufficiently serious or significant to cause concern to a properly informed reasonable person": *Re Thies and Department of Aviation* [1986] AATA 141 at [24].

227. Deputy President McMahon summarised the effect of these authorities when he considered the same expression, "*a substantial adverse effect*", when used in the context of s 39 of the FOI Act. He did so in *Re Connolly and Department of Finance* [1994] AATA 167 at [25] where he said:

"... There must be a degree of gravity before this exemption can be made out (*Harris v Australian Broadcasting Corp ...*); the effect must be 'serious' or 'significant': *Re James ...* Normally a value judgment has to be made as

to whether an adverse effect is or is not substantial when considering exemptions claimed under other sections. ...”

Care should be taken in applying section 53(c) to routine matters of staff management. In *Re McGowan and Department of Premier and Cabinet* [2015] WAICmr 3, the WA Information Commissioner discussed that openness and transparency about such matters does not necessarily create a more ‘adverse effect’ than secrecy:

95 (NB: Numbering has changed). In [Re Ayton and Police Force of Western Australia \[1999\] WAICmr 8](#) (*Re Ayton*) the former Commissioner said at [19]:

To justify its decision to refuse access to the disputed document based on clause 11(1)(c) or (d), the agency must show that disclosure could reasonably be expected to result in either a "substantial adverse effect" on the management or assessment of its personnel or on an agency's conduct of industrial relations. As I have stated before, the requirement that the adverse effect must be "substantial" is an indication of the degree of gravity that must exist before a prima facie claim for exemption is established: [Harris v Australian Broadcasting Corporation \[1983\] FCA 242; \(1983\) 78 FLR 236](#) (*Harris*). In the context of the exemption in clauses 11(1)(c) and (d), I accept that "substantial" is best understood as meaning "serious" or "significant": *Re Healy and Australian National University* (AAT, 23 May 1985 unreported); *Re James and Australian National University* (1984) 2 AAR 327 at 341.

96. At [24] the former Commissioner also noted:

... personnel issues between managers and subordinates can and do occasionally surface in any large organisation. They are simply administrative issues that managers must deal with as part of their working responsibilities, and may be viewed by contemporary managers as opportunities for change and improvement, rather than as organisational threats.

97. *Re NTEU and Schwarz and others* [2001] WAICmr 1 concerned an application by the National Tertiary Education Union for documents relating to senior academic staff salaries and benefits. The former Commissioner was not persuaded that disclosure of the information would result in a substantial adverse effect on the management or assessment of its personnel noting at [86]:

I consider that it is equally likely that transparency and openness about such matters could create a better understanding of the real issues between those involved rather than fostering the ongoing speculation and deepening of the divisions which both parties acknowledge presently exist.

98. In claiming an exemption the agency must do more than simply assert that a set of events is likely to come to pass. The agency submits that ‘it is possible that high profile incidents may occur in the future’ and further that it is ‘concerned that if issues of this nature are released to the general public then the willingness

of staff to cooperate fully with voluntary inquiries on any similar matters in the future will be substantially compromised’.

He determined the documents were not exempt under the equivalent to section 53, stating:

‘The disputed documents concern an investigation undertaken at the most senior levels by a key central government agency into the conduct of other senior government officers following events which relate to a former Minister. I consider that there is a strong public interest in ensuring that such investigations are conducted fairly, robustly and with integrity. Disclosure of the disputed documents would further that public interest.’

The NT Information Commissioner considered the application of section 53(c) to the report of an investigation into a public sector grievance appeal in [Collie v Office of the Commissioner for Public Employment \(25 March 2008\)](#) at [101]:

The OCPE argues that persons responding to a grievance allegation made against them would not give frank and candid responses if there was a prospect that those responses would be released pursuant to the Act. I cannot see why such persons would not vigorously and truthfully defend themselves from untrue allegations. I cannot see why they would be any more likely to reveal inappropriate conduct to an OCPE investigator with the power to recommend that they be disciplined or dismissed as opposed to the world at large, as it would presumably be detrimental to their interests either way. Furthermore, the Commissioner has the power to compel witnesses to attend, provide evidence, and answer questions on oath. There are sanctions for persons who refuse to do so if requested.

The Information Commissioner further noted at [104]:

...it is important to recognise that this was not an informal raising of the matter with management. The OCPE claims on its website that the formal grievance proceedings will be conducted in accordance with principles of natural justice and procedural fairness. In the circumstances arising in the present matter, Dr Collie could hardly expect that her allegations could be investigated without them being disclosed to the staff members complained about. Any understanding of confidentiality must therefore be qualified to the extent necessary to ensure procedural fairness.

And at [106]:

It is my view that disclosure of the report in this case may lead to a change in grievance investigation practices in terms of the assurances that are given about confidentiality. However, I cannot see how such a consequence would be adverse. On the contrary, it would cause employees to be accurately informed of their rights and liabilities, and it would facilitate application of the principles of natural justice.

There are a number of useful decisions of the Queensland Information Commissioner which deal with access to complaints and investigations within government workplaces. These decisions consider the equivalent exemption to section 53(c) and the factors which can be taken into account to assess whether there is a substantial adverse effect, and the public interests. Some of these are:

McCann and Queensland Police Service (1997) 4 QAR 30
TCD and Department of Primary Industries (1995/ S0072)
Veenstra and Department of Public Works and Housing (1996 /S0163)
HNS and Queensland Health (Department of Health) (2000 /S0102)
WLS and Queensland Rail (2001 / S0203)
Claes and Queensland Rail (1998 / S0010)

Health, safety, environment and place of significance – s 54

Section 54 provides:

Information may be exempt under section 50 if disclosure of the information **would**:

- (a) pose a serious threat to the life or health of a person; or
- (b) prejudice measures for the protection of the health or safety of the public; or
- (c) harm the habitats of, or prejudice measures to protect or manage, species of flora or fauna the continued survival of which are at risk; or
- (ca) harm, or prejudice measures to protect, a place of scientific, cultural or historical significance (including anything situated in the place); or
- (d) prejudice the administration, management or security of a custodial correctional facility (as defined in section 11(1)(a) of the *Correctional Services Act*) or detention centre.

Commentary:

The tests set out in section 54 are objective, in the sense that the decision-maker must consider all known relevant information and come to a view as to whether there is an objective risk of the harm occurring. The fact that a particular individual might subjectively believe that the harm will occur is not the test (see *Murphy and Queensland Treasury* (Office of the Information Commissioner (Qld), Decision No 95023 19 September 2005)).

Whether the exemptions are applicable will be crucially dependent on whether information is before a decision-maker which enables them to be satisfied that the harm 'would' indeed occur.

For example, in F13/05-06 (unpublished *prima facie*, 4 December 2008), the decision-maker considered a case where a Department had refused to disclose to the

Complainant his own mental health records, relying on section 54(a). In upholding the application of the exemption, the delegate of the Information Commissioner wrote:

‘Health’ encompasses more than simply ‘physical safety’; it includes the “the state of being well in body or mind”, “a person’s mental or physical condition”. Therefore the exemption is not restricted to the assessment of whether there is the probability of posing a physical threat but also whether disclosure of the information would pose a threat to a person’s mental well-being. “Pose” is defined as to behave affectedly in order to impress others or to assume an attitude of body.

Under the provisions of this exemption I can take into consideration the mental well-being of a person in regard to their health. As I am not medically qualified I rely on the expert opinions submitted to the OIC by the Respondent, the Complainant having refused to provide any current reports, documentation or submissions to support his claim that the application of section 54(a) is incorrect. Based on the information before me, the referrals to relevant medical papers and notes on file by previous officers who have spoken to the Complainant there is a valid argument that the release of the information, the subject of this complaint, would pose a serious threat to the life or health of the Complainant and to other persons.

I note that the information provided to me by the Respondent to support their decision is nearly 20 years old. The information records the diagnosis of a serious mental illness which the Complainant suffered at that time. The Complainant has not provided any evidence to refute the currency of that diagnosis despite requests to provide such information. This has left me in a position where I have to make my decision on the information before me.

In making any decision I follow Mansfield J’s decision that all the material evidence should be addressed. In this particular case the evidence before me indicates that the Complainant was diagnosed with a particular mental illness that leads to violent behaviour for which the triggers are not clearly understood in the profession of psychiatry.

Clinical studies have shown that violent behaviour can be triggered by a range of stimuli not the least of which is access to medical information and reports and opinions which, if not released in a structured environment, has been shown to have a detrimental effect on the patient and to associated persons.

After considering the present facts and examining the relevant information I am of the view that the Respondent has a very strong case to refuse access to the information based on the exemption of section 54(a) in the absence of any information that would refute the diagnosis currently on file.

In Queensland, a Department sought to apply an equivalent exemption over related information, however in that case use of the exemption was not upheld ([WRT and Department of Corrective Services \(Unreported, Queensland Information Commissioner 26 April 2002\)](#)). The different results turned on different facts:

The sexual offences for which the applicant was convicted occurred approximately eight years ago. There is no evidence before me to suggest that, since that time, the applicant has engaged in any behaviour that could reasonably be regarded as endangering any person's life or physical safety. As far as I am aware, he has never displayed violent behaviour towards an adult male. Moreover, the applicant has previously been given access to a number of psychological assessments and reports concerning him which deal with matter not dissimilar to the matter contained in [Dr A's] report. There is nothing before me to suggest that the disclosure to the applicant of that information resulted in the endangerment of any person's life or physical safety. I am not satisfied that there is anything exceptional about the nature of the matter in issue in this review (as compared with matter that has previously been disclosed to the applicant) such as to afford a reasonable basis for expecting that its disclosure could endanger the physical safety of [Dr A]. The applicant has been aware of [Dr A's] identity as the author of the report for some time. [Dr A] has not suggested that the applicant has attempted to initiate any contact with [Dr A]. In any event, mere contact, even if it is perceived by the recipient as harassment or intimidation, is not enough to satisfy the requirements of s.42(1)(c) of the FOI Act. The focus of s.42(1)(c) is on physical safety. An expectation of harassment or intimidation will not satisfy s.42(1)(c) unless it is harassment or intimidation which endangers a person's life or physical safety.

In Apache Northwest Pty Ltd and Department of Mines and Petroleum and Lander and Rogers Lawyers, Re [2010] WAICmr 35, the Western Australian Information Commissioner considered whether releasing documents about the layout of a gas pipeline facility, including the process flow and location of hazardous substances, could attract an exemption designed to avoid prejudice to public safety. Looking closely at the documents in question, some were found to give rise to risk of a terrorist threat, whereas others were more about occupational health and safety. The Information Commissioner upheld the exemption in relation to the former but not the latter.

I accept that there are inherent dangers in working on and around Varanus Island and that any accidents, sabotage or attack on the Facilities could have potentially catastrophic consequences. However, the question for my consideration is whether those consequences to personnel and property could reasonably be expected from the disclosure of Documents 1, 3, 4, 4A and 9.

I do not accept, as Apache claims, that all of the information in Documents 1, 3, 4, 4A and 9 is exempt under clauses 5(1)(e) and (f). Some of that information is clearly public information (see, for example, Part 1, section 1, item 1.4 of Document 3). Even though Varanus Island is in a relatively remote location, there is a good deal of published material on WA's offshore oil and gas industry to have already identified the Facilities as a possible terrorist target. Information such as views of Varanus Island and its infrastructure can be down-loaded from the internet as also can information that certain platforms are manned or unmanned. Moreover, pipeline routes are marked on navigational charts.

Some information - such as the general principles of plant shutdown or the hydrocarbon production process - would, as Apache has acknowledged, be

common industry knowledge. Other information - such as the function of various structures - could be inferred from satellite images.

...

I have made a distinction between two categories of information contained in Documents 1, 3, 4A and 9. The first is information that is relevant to possible gradual damage (such as corrosion) to the Facilities and natural events such as storms, tsunamis or earthquakes. The second category is information relating to instantaneous or malicious damage caused by, for example, fire or explosion. In my opinion, only disclosure of the latter type of information could reasonably be expected to endanger the life or physical safety of any person or the security of any property. As a result, I have excluded from disclosure information such as detailed schematics or information that relates to hazardous substances, critical juncture points and the likely outcomes of different events, where it seems to me that that information is not publicly available but if disclosed could reasonably be expected to endanger the life or physical safety of persons at the Facilities or endanger the security of the Facilities if it were obtained by persons of malicious intent, because it could assist those persons to achieve their aims.

I have considered Apache's claims concerning the cumulative effects of disclosure of the disputed documents together with other information that might be accessible. That claim is also known as the 'mosaic theory'. It was discussed by the Queensland Information Commissioner in *Re O'Reilly and Queensland Police Service* ([1996](#)) [3 QAR 20](#) at [18]-[22]. In *Re O'Reilly*, the Commissioner made the point that the disclosure of information should not necessarily be viewed in isolation. However, the mosaic theory does not give rise to any separate exemption and can only be used to establish a factual basis for satisfaction of an exemption provision in the FOI Act. I agree with those comments. Based on the material before me, I am not persuaded that there is any factual basis for its application in the circumstances of this complaint, other than in respect of the information listed in the appendix.

In the hearing decision of F1/10-11 (unpublished hearing decision, 8 July 2011), the NT Information Commissioner considered the applicability of the exemption to a report, and found that evidence of 'bad blood' was not enough for the exemption to apply:

In relation to s 54(a) of the Act the respondent, in submission, referred to certain statements by employees. No medical evidence of any threat to the health of such employees, nor any credible evidence of fear of physical violence by the complainant, or his wife or anyone else, was provided. On the face of the report there appears to be bad blood between some employees and the complainant.

I am not satisfied, on the evidence provided, that there is any threat, if one exists, brought about by the disclosure of the report, nor that the disclosure would pose a threat to the life or health of any person. I am not satisfied, even if there was a threat, that it would be serious enough as required by the section.

This decision followed the reasoning of *Murphy v Queensland Treasury* (1995) 2 QAR 744, which cited *Re Toren and Secretary, Department of Immigration and Ethnic Affairs* (Commonwealth AAT, Q93/578, 8 March 1995, Deputy President Forgie, unreported), where it was said:

Personal vendettas and bad blood, however undesirable, are not inevitably accompanied by physical harm, or the threat of it, by one person to another. They may be carried out in quite subtle ways by, for example, besmirching another's character or setting out to attract another's customers and so destroy his or her business. Neither of these means of implementing a personal vendetta necessarily involves any action that would endanger the life or physical safety of any person although they may cause immeasurable harm to a person. They could, for example, cause such emotional damage to a person, or ruin him or her financially, that they could be said to 'destroy' his or her life. It is difficult to say that those subtle ways would or could reasonably be expected to endanger a person's life or physical safety unless the 'destruction' of the person's life were so great that the person who is the object of the personal vendetta were driven to commit suicide or harm himself or herself in some way. There is no suggestion in this case that disclosure of any of the documents would, or could reasonably be expected to lead to [any relevant person] harming himself in this way.

Confidentiality to third parties (legal and non-commercial) – s 55

This section really contains two exemptions. The first in section 55(1) mirrors common law obligations of confidence (eg. contractual or equitable) and can apply to both personal and business information. The second in section 55(3) is defined by section 55(4) to effectively exclude commercial information, which is dealt with by the exemption in section 57.

(1) Information may be exempt under section 50 if disclosure of the information (otherwise under this Act or another Act) **would** be a **breach of confidence for which a legal remedy could be obtained**.

(2) Information mentioned in subsection (1) is not exempt under section 50 unless its disclosure would enable a legal remedy to be obtained for a breach of confidence owed to a person other than:

- a) a person in their capacity as:
 - (i) a minister or parliamentary secretary; or
 - (ii) a member of the staff of a minister or parliamentary secretary; or
 - (iii) a member of a public sector organisation; or
- b) the Territory or a public sector organisation.

(3) Information may be exempt under section 50 if:

- a) the information was communicated in confidence to a public sector organisation; and

b) either:

- (i) the information **would** be exempt under this Part if it had been brought into existence by a public sector organisation; or
- (ii) disclosure of the information **would be reasonably likely** to **impair the ability of a public sector organisation to obtain similar information in the future** and it is in the public interest that such similar information continues to be so obtained.

(4) Information mentioned in subsection (3) does not include information that:

- a) was obtained by a public sector organisation from a business, commercial or financial undertaking; and
- b) is a trade secret or other information of a business, commercial or financial nature.

(5) Information mentioned in subsection (3) is not exempt under section 50 if a period of 5 years has elapsed since the information was communicated to the public sector organisation.

(6) The Commissioner may, on application and if of the opinion that it is in the public interest to do so, extend the period mentioned in subsection (5) in its application to particular information on one or more occasions and on each such occasion for a limited, specified period or for an unlimited period.

Commentary - s 55(1):

Section 55(1) 'is to be evaluated by reference to a hypothetical legal action in which there is a clearly identifiable plaintiff, possessed of appropriate standing to bring a suit to enforce an obligation of confidence said to be owed to that plaintiff, in respect of information in the possession or control of the agency faced with an application ... for access to the information at issue' (see *Robino & Ors and Department of Health* [1998] QICmr 16 and [Re 'B' and Brisbane North Regional Health Authority \(1994\) 1 QAR 279](#)). This may be in the form of contractual obligations, or an action in equity for breach of confidence. As discussed by the NT Information Commissioner in F1/10-11 (unpublished, hearing decision, 8 July 2011) an equitable action for breach of confidence involves showing:

- specific information exists which is in fact confidential;
- the information was 'communicated in such circumstances as to fix the recipient with an equitable obligation of conscience not to use the confidential information in a way that is not authorised by the confider of it';
- the proposed use must be a misuse or unauthorised use; and
- the proposed use must be likely to cause detriment to the person who confided the information.

The High Court considered an action for equitable breach of confidence in [Commonwealth v John Fairfax & Sons Ltd \("Defence Papers case"\) \[1980\] HCA 44; \(1980\) 147 CLR 39 \(1 December 1980\)](#). More recently the WA Supreme Court

awarded damages for equitable breach of confidence in [Wilson v Ferguson \[2015\] WASC 15](#), and the cause of action was considered in an FOI context in [Matthews and Australian Securities and Investments Commission and Newmont Australia Ltd and Ryan and Knapp \(Parties Joined\) \[2014\] AATA 769](#) (24 October 2014).

For a discussion of the development of equitable breach of confidence, see: [Caldwell, Jillian "Protecting Privacy Post Lenah: Should the Courts Establish a New Tort or Develop Breach of Confidence?" \[2003\] UNSWLAWJL 4; \(2003\) 26\(1\) University of New South Wales Law Journal 90](#), and [Jennifer Stuckey 'The Equitable Action for Breach of Confidence: Is Information Ever Property' \(1981\) Sydney Law Review 402](#).

Note that s 55(2) provides an exception to s 55(1), namely that it does not apply to a breach of confidence owed to the Territory, a public sector organisation, or a person in their capacity as a member of a public sector organisation.

Commentary – s 55(3)

The most commonly applied part of this section is section 55(3)(b)(ii). In the *prima facie* decision F9/14-15 (unpublished), the Information Commissioner's delegate broke this subsection into its elements to provide a 'checklist' for the organisation about what it had to prove. Note that **all three** of the dot points below have to be proven by the organisation, it is not enough to simply assert there was an understanding of confidentiality:

- the information was in fact communicated in confidence; and
- disclosure of the information would be reasonable likely to impair the ability of a public sector organisation to obtain similar information in the future; and
- it is in the public interest that such similar information continues to be obtained.

In [Collie v Office of the Commissioner for Public Employment \(25 March 2008\)](#), the organisation submitted evidence that persons participating in a grievance review were told that 'confidentiality is observed at all times' and that 'all documents and information relating to grievances are kept on confidential files'. The NT Information Commissioner found that any assurances of confidentiality were necessarily subject to the *Information Act* and to requirements of natural justice, stating at [111]:

...this is not and cannot legally be a blanket assurance of confidentiality, particularly from the other persons involved in the grievance review, such as Dr Collie.

The Commissioner continued at [112]:

In order to establish this exemption, the OCPE would need to provide evidence that there was an understanding of confidentiality with the relevant persons in this case. Even if standard OCPE procedures were that undertakings were obtained from everyone, I have no particular reason to believe that Professor Adam followed standard OCPE procedures. For future reference, such evidence might take the form of statements from the persons spoken to about their understanding of how the information provided by those persons might be

used or disclosed. It also might be evident from notes taken by Professor Adam at the time, or undertakings of confidentiality which are on the grievance file.

There must be evidence to allow the decision-maker to be satisfied that the information was in fact communicated in confidence, although this does not require a formal agreement of confidentiality, it may require more than stamping the words 'in confidence' or 'confidential' on a document (see [Glascott v Victoria Police \[2014\] VCAT 615](#)).

In [Re 'B' and Brisbane North Regional Health Authority \(1994\) 1 QAR 279](#) the Queensland Information Commissioner considered a corresponding provision in that jurisdiction and considered factors relating to impairing the future supply of information. In that decision a sceptical approach was taken to an assumption that future information would not be supplied if the sources of the information were under an obligation to supply such information (for instance government employees, as an incident of their employment; or where there is a statutory power to compel the disclosure of information). This approach was endorsed in *TLN and TLP and Fraser Coast Regional Council* [2009] QICmr 56 (an unreported decision [summarised by the Queensland Information Commissioner in annotated legislation](#)), where it was assumed the future supply of information would be unlikely to be affected if:

- the information is given in order to obtain some benefit, licence or approval from the government (such as information supplied in order to obtain a permit);
- the supplier would be disadvantaged if they failed to supply the information.

Sub-section 55(5) excludes from exemption information which was communicated to the public sector organisation more than 5 years earlier. The 5 year period can be extended on application to the Commissioner, if the Commissioner is of the opinion that it is in the public interest to do so (s.55(6)). An application may be made by a public sector organisation or a third party. Details relating to the extension are [available on the Commissioner's website](#).

Privacy and cultural information – s 56

This section provides an exemption for the private information of individuals, and an exemption for secret Aboriginal cultural information:

(1) Information may be exempt under section 50 if disclosure of the information **would:**

- (a) **be an unreasonable interference with a person's privacy;** or
- (b) **disclose information about an Aboriginal sacred site or Aboriginal tradition.**

(2) Disclosure of information may be an unreasonable interference with a person's privacy even though the information arises from or out of the performance of a public duty.

Commentary – s 56(1)(a):

This is the most commonly applied exemption in the Act.

To understand what would be an unreasonable interference with privacy, it is necessary to look at the framework and definitions around privacy in the *Information Act*. 'Privacy' in the Act is defined to mean 'privacy with respect to personal information' at section 4. The Objects of the Act include 'establishing a regime for the responsible collection and handling of personal information by public sector organisations' – section 3(1)(b)(ii). Under section 17(3), a public sector organisation has a duty to handle freedom of information applications 'in a manner that is consistent with the IPPs or a code of practice, as the case requires.' The IPPs are the Information Privacy Principles and can be found in Schedule 2 of the Act. (A 'code of practice' is a specific kind of document which, if approved by the Information Commissioner and published in the *Gazette*, provides an alternative set of rules to the IPPs. It does not mean a code of conduct. At the time of writing this Guideline, no organisation has implemented a code of practice.)

The definition of personal information was amended in 2015 to exclude information that identifies public sector staff acting in an official capacity, provided the information discloses no other personal information about the person:

4A Personal information

(1) Government information that discloses a person's identity or from which a person's identity is reasonably ascertainable is **personal information**.

(2) However, the government information is not **personal information** to the extent that:

(a) the person's identity is disclosed only in the context of having acted in an official capacity for a public sector organisation; and

(b) the government information discloses no other personal information about the person.

(3) In this section:

acted in an official capacity, in relation to a public sector organisation, means having exercised a power or performed a function as, or on behalf of, the organisation.

Prior to this amendment, the definition of personal information was extraordinarily broad for freedom of information legislation, and included anything from which a person's identity could be reasonably ascertained. The practical effect was that every time a public servant was identifiable in a document, even if performing a routine administrative or professional role, the information could be considered 'personal information'. This broad application imposed an administrative burden on

organisations in terms of fees, access rights, use and disclosure of information, and necessary third party consultations.

In the Information Commissioner's view, the effect of the amendment is to narrow the scope of personal information to matters pertaining to something akin to a public servant's 'personal affairs', as it is referred to in some jurisdictions. Hence, a public servant's personnel file would contain personal information beyond their role on behalf of the organisation, and so could still be personal information because it would not fall within the exclusion of section 4A(2)(b). However, public servants who write internal memos as part of carrying out their functions for the organisation can no longer argue that the appearance of their names in such documents makes them their 'personal information'.

In any event, section 56(1)(a) requires more than that the information be identified as personal information. It requires that an *unreasonable* interference with privacy be identified.

In the NT hearing decision F3/14-15 (unpublished, 24 February 2016), the Hearing Commissioner cited [Victoria Police v Marke \(2008\) 23 VR 223](#) with approval at [35]-[36]:

First, while the facts and matters that will result in the application of s 56(1)(a) will "vary with the circumstances of each case", as Maxwell P observed in *Marke* in an ordinary case the decision-maker will need to consider the following matters:

- the nature of the personal information;
- the sensitivity (past and present) of the personal information;
- any view about disclosure expressed by any person to whom the personal information relates;
- the relationship between the personal information and any other information in the document;
- how the personal information was obtained by the agency (whether voluntarily or involuntarily, and whether or not in confidence);
- whether and to what extent the personal information was already known to the applicant;
- the nature of any interest which the applicant can demonstrate in
 - i. the information in the document other than personal information; or
 - ii. the personal information.

Secondly, as noted in *Marke*, "the starting point is that the applicant has a statutory right of access to the document unless it is adjudged to be an exempt document". Whether it is an exempt document involves a consideration of competing public interest factors (s 50), and, in the case of s 56(1)(a), "matters peculiar to the applicant, the document, and the personal information in question", for example, those which have been noted above. If the public interest factors in favour of disclosure outweigh the unreasonable interference with a person's privacy, then the applicant's statutory right of access will prevail. Conversely, if the public interest factors in favour of disclosure do not outweigh

the public interest factors against disclosure such as, for example, a disclosure of information that is determined to be an unreasonable interference with a person's privacy, then the applicant's statutory right of access will not prevail.

It would appear that the police investigation documents came into possession of the First Respondent in the ordinary course of the investigation and prosecution of an offence. They were not provided in confidence to the First Respondent by the police, nor was the personal information given to the police by the Second Respondent provided in confidence. While, by deciding to plead guilty, much of what was said by the Second Respondent to the police did not come out in evidence, this does not mean that what was said to the police was said in confidence.

Finally, I have determined that the report of psychologist ... (Document 12) is exempt from disclosure under s 50 of the *Information Act* because disclosure of such information would be an unreasonable interference with the Second Respondent's privacy (s 56(1)(a)). The information contained in the [psychologist's] report was intensely personal to the Second Respondent and was, and remains today, very sensitive. The report was obtained by the court for its use in the sentencing process, and the extent to which the contents of such report should be disclosed was a matter for the judge conducting the sentencing hearing...

While the factors in *Marke* constitute a useful checklist, they are not prescribed by the legislation, and it would seem appropriate to follow the AAT's statement concerning an equivalent exemption that all relevant factors must be considered (see [Sarchese and Secretary, Dept. of Agriculture, Fisheries and Forestry \[2011\] AATA 849 at \[34\]](#)):

In determining whether disclosure would be unreasonable, all relevant factors must be taken into account including the nature of the information, any public interest in disclosure and the extent to which it is known—to persons other than the person to whom it relates—and, any possible harm or prejudice that might result from the disclosure.

In [Colakovski v Australian Telecommunications Corporation \[1991\] FCA 152](#), Heerey J of the Federal Court held:

Turning to the criterion of unreasonableness prescribed by the s 41(1) exclusion, it seems to me that attention is directed, amongst other things, to whether or not the proposed disclosure would serve the public interest purpose of the legislation, which is to open to public access information about government which government holds, this being information which in truth is held on behalf of the public. I do not think it is necessary in order to make out the s 41(1) exclusion that there is some particular unfairness, embarrassment or hardship which would enure to a person by reason of the disclosure. Such matters, if present, would doubtless weigh in favour of the exclusion. But if the information disclosed were of no demonstrable relevance to the affairs of government and was likely to do no more than excite or satisfy the curiosity of people about the person whose personal affairs were disclosed, I think disclosure would be unreasonable.

A detailed discussion of the principles of what constitutes personal information was provided by the AAT in [Re Denehy and Superannuation Complaints Tribunal \(2012\) 131 ALD 413; \[2012\] AATA 608 at \[26\]](#):

Section 41: the interpretation and application of the provision

26. Various authorities have considered the concept of “*personal information*” as it appears in the FOI Act. I considered them in my earlier decision of [Re Lobo and Department of Immigration and Citizenship \[2011\] AATA 705](#) and adopt my analysis of them at [287] to [331] as well as that at [137] to [212] in [Re LJXW and Australian Federal Police \[2011\] AATA 187](#). Rather than repeat them, I summarise some of the essential features of the privilege that are relevant for the purposes of this case:

- (1) The information that is protected from disclosure by s 41 is all information concerning or relating to an individual, and so “*about ... [a] person*” extending from the most intimate information or opinion about the individual’s private or domestic affairs to that about work or employment and activities conducted in public.
- (2) The accuracy or truth of the information or validity of the opinion is irrelevant.
- (3) “*... Something may be notorious, but its notoriety does not deprive it of the character of information relating to the person’s ‘personal affairs’....*”
 - (a) This is equally applicable in considering what amounts to “*personal information*”.
- (4) The individual must either be named or be an individual whose “*... identity is apparent, or can reasonably be ascertained, from the information or opinion.*”
 - (a) If this is so when regard is had solely to the information or opinion, the criterion for exemption is met;
 - (b) It is also met if the identity of the individual is apparent or can reasonably be ascertained by reading the information or opinion in the document with that in the public arena. The information or opinion in the document is no less the source or origin of the identification so that it can still be said that the individual’s “*... identity is apparent, or can ... be ascertained, from the information or opinion.*”
 - (i) The ease with which publicly available information can be obtained is relevant in determining whether an individual’s identity “*can reasonably be ascertained*” (emphasis added) and not in determining the base question i.e. whether the individual’s “*... identity is apparent, or can ... be ascertained, from the information or opinion.*” The public information must itself be reasonably available before it can be said that identity can be reasonably ascertained on this basis.

Speculation or conjecture that it may be available is not enough.

- (ii) The criterion for exemption would *not* be met if regard must be had to information that is *not* available to the public.

(5) “... [W]hether or not disclosure would be ‘unreasonable’ is a question of fact and degree which calls for a balancing of all the legitimate interests involved”.

(a) The exemption in s 41 is Parliament’s resolution of any inconsistency between the protection of two public interests: the public interest in the disclosure of information held by government and the public interest in protecting the personal privacy of individuals whose information is held by government. The balance between the two is achieved by determining whether the personal privacy of that third party might reasonably be disclosed by granting access under the FOI Act.

- (i) Therefore, s 41 should not be recast in terms of its being a statutory expression of a “*public interest in protecting personal privacy*”.

- (ii) There is no room in s 41 to introduce a public interest test or criterion.

(b) In deciding whether disclosure under the FOI Act is unreasonable, regard must be had to the matters in s 27A(1A) as well as other matters the decision-maker considers relevant:

“... including the nature of the information that would be disclosed, the circumstances in which the information was obtained, the likelihood of the information being information that the person concerned would not wish to have disclosed without consent, and whether the information has any current relevance. Plainly enough what s 41 seeks to do is to provide a ground for preventing unreasonable invasion of the privacy of third parties.”

- (i) In practical terms, this means that regard must be had to the consequences of disclosure in the public arena and the effect of those consequences on the individual.

- (ii) Except in so far as they affect the individual, the effect of disclosure on persons other than the individual or on activities undertaken in the public or private arena is not a relevant consideration.

(c) What is unreasonable disclosure in terms of s 41(1) must be judged by reference to an objective standard and not by reference to the interests, knowledge or reasons of the person requesting access or by reference to the identity of that person.

- (d) “If documents contain information which could provide valuable evidence or lead to evidence that would be useful or material in establishing the commission of an offence under the law, that is a matter which in my view may be taken into account in determining whether the disclosure of the information would be unreasonable under s 41(1). ...”

Because personal information extends to information from which a person’s identity can reasonably be ascertained, there is currently some doubt over the practical way to define the scope of personal information in an age of ‘big data’. In [Ben Grubb and Telstra Corporation Limited \[2015\] AICmr 35 \(1 May 2015\)](#), Mr Grubb sought to access ‘all the metadata information Telstra has stored’ about him in relation to his mobile phone service, including (but not limited to) cell tower logs, inbound call and text details, duration of data sessions and telephone calls and the URLs of websites visited. The Australian Information Commissioner held that this was personal information of Mr Grubb on the basis that, with contemporary equipment and skills in Telstra’s possession, Mr Grubb’s identity was reasonably ascertainable from the information. This decision was reversed on appeal by the AAT in [Telstra Corporation Limited and Privacy Commissioner \[2015\] AATA 991 \(18 December 2015\)](#). In January 2016, the Privacy Commissioner lodged an appeal with the Federal Court concerning the AAT’s decision, which was dismissed by a full bench of the Federal Court in January 2017.

Commentary – s 56(1)(b)

The wording of section 56(1)(b) refers to disclosing ‘an Aboriginal sacred site’. In one case, a question arose during the Information Commissioner’s investigation as to whether this exemption was capable of applying to information that certain land had ‘no known sacred sites’. The Commissioner’s delegate took a common sense view that the words of the section appear to require the identification of information about a particular actual sacred site, and so it did not apply. While it is conceivable that situations may arise where there are secret Aboriginal traditions about the precise location of sacred sites, applying the exemption would require some evidence that such a tradition existed and that the information in question would disclose the secret locations by something like a process of deduction.

Confidentiality to third parties (commercial) – s 57

(1) Information may be exempt under section 50 if disclosure of the information **would** disclose information obtained by a public sector organisation from a business, commercial or financial undertaking that is:

- (a) a trade secret; or
- (b) other information of a business, commercial or financial nature and the disclosure is **likely to expose the undertaking unreasonably to disadvantage**.

(2) To decide whether disclosure of information is likely to expose an undertaking unreasonably to disadvantage, a public sector organisation may have regard to the following considerations:

(a) whether the information is generally available to the undertaking's competitors;

(b) whether the information would be exempt under this Part if it had been brought into existence by a public sector organisation;

(c) whether the information could be disclosed without causing substantial harm to the competitive position of the undertaking;

(d) whether there are any considerations in the public interest in favour of disclosure that outweigh considerations of competitive disadvantage to the undertaking (for example, the public interest in evaluating aspects of government regulation of corporate practices or environmental controls);

(e) any other considerations that in the opinion of the public sector organisation are relevant.

(3) Information may be exempt under section 50 if disclosure of the information would disclose:

(a) a trade secret of a public sector organisation; or

(b) information about a public sector organisation that is engaged in trade or commerce where the information is of a business, commercial or financial nature and the disclosure is **reasonably likely to expose the organisation unreasonably to disadvantage**; or

(c) the results of scientific or technical research undertaken or being undertaken by a public sector organisation where:

(i) the research could lead to a patentable invention; or

(ii) the disclosure of the results in an incomplete state is **reasonably likely to expose a business, commercial or financial undertaking unreasonably to disadvantage**; or

(iii) the disclosure of the results before completion of the research is **reasonably likely to expose the public sector organisation unreasonably to disadvantage**; or

(d) an examination paper, a paper submitted by a student in the course of an examination, an examiner's report or any other similar document where the uses to which the paper, report or other document have not been completed.

(4) Information mentioned in subsection (1) is not exempt under section 50 if a period of 5 years has elapsed since the information was obtained by the public sector organisation.

(5) Information mentioned in subsection (3) is not exempt under section 50 if a period of 5 years has elapsed since the information came into existence.

(6) The Commissioner may, if of the opinion that it is in the public interest to do so, extend the period mentioned in subsection (4) or (5) on one or more occasions and on each such occasion for a limited, specified period or for an unlimited period.

Commentary – s 57(1)(a)

The nature of a 'trade secret' was discussed by the Commissioner's delegate in F6/10-11 (unpublished *prima facie* decision, 29 September 2011):

Section 57 has two alternative limbs, the first of which applies if the information is a trade secret. The Complainants accept that the indicia for a trade secret are those set out in *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 36 FCR 111 and in *Re Cannon and Australian Quality Egg Farms Ltd* [1994] QICmr 9, namely:

- the extent to which the information is known outside the business;
- the extent to which it is known by employees and others involved in the business;
- the extent of measures taken by the business to guard the secrecy of the information;
- the value of the information to the business and its competitors;
- the amount of effort or money expended in developing information;
- the ease or difficulty with which the information could be properly acquired or duplicated by others.

The Complainants submit, and I accept, that a trade secret does not just include 'secret formulae' but a range of information that could, for example, encompass the names of customers and the goods which they buy (see *Re Cannon*). The essence of the test is whether the information is in fact a secret and whether it would be to the advantage of trade rivals to obtain.

In my view, the quantity of stock purchased by a business in a given quarter could be a trade secret if it is in fact kept secret, and if it would be to the advantage of trade rivals to obtain it. There is no requirement that the trade secret be information of scientific or technical nature.

Commentary – s 57(1)(b)

In F11/15-16 (*prima facie* decision, unpublished), the Information Commissioner's delegate took the view that 'information of a business, commercial or financial nature' is:

...broad enough to capture not only information about the 'money-making' activities of an organisation, but also information relating to a company's internal financial position, its assets and liabilities, and any other financial information'.

In that case, the information related to the production costs and production constraints of a business with the exclusive ability to operate a business on particular land. The organisation had decided to remove figures that detailed production costs and constraints, and noted that certain kinds of competition were impossible because no

other business could operate a business on the same land. The business (as a third party) continued to object to other information being released, which related to information about the assessment of public health and safety issues on the land.

In considering whether any disadvantage suffered by the business would be 'unreasonable', the decision-maker referred to *Re Maher and Attorney-General's Department (No 2)* (1986) 13 ALD 98, where the AAT stated at [47]:

The parameters of the word 'unreasonable' and the circumstances which may lay the foundation for its applicability are wide and may cover diverse considerations. It is true that in a given case, in particular circumstances, it could be argued that although the disclosure of certain documents may have an adverse effect on a company, such adverse effect was not unreasonable, eg, where non-disclosure would prevent the public being made aware of matters which affected it, eg exposure of criminal conduct, hazardous work practices etc. In such circumstances, the word 'unreasonable' could encompass public interest concerns, but the use of the word 'unreasonable' of itself does not oblige a Tribunal to take 'public interest' in account in every application for exemption pursuant to that section. ... it would not necessarily be on each occasion and each case would depend on its facts.

The decision-maker noted that these comments about not considering the public interest are inapplicable in the NT because section 57(2)(d) refers specifically to 'whether there are any considerations in the public interest in favour of disclosure that outweigh considerations of competitive disadvantage to the undertaking (for example, the public interest in evaluating aspects of government regulation of corporate practices or environmental controls)'.

In general, all relevant factors ought to be taken into account (see [Colakovski v Australian Telecommunications Corp. \(1991\) 29 FCR 429.](#))

Even though determining whether exposure to disadvantage would be 'unreasonable' will often require some consideration of public interest factors, there is still a requirement to further apply the public interest test set out in section 50. What is 'unreasonable' is likely to be informed by public interest considerations, but there may be differences.

For example, suppose an applicant sought information that revealed that a third party had come onto the premises of a business and released a bio-weapon that had dispersed and harmed members of the public, and generated intense public interest and debate. Imagine that a government report into this incident disclosed certain confidential information about the layout of the business which would cause harm to the business if released. The organisation itself, which has already suffered the terrible misfortune of the incident, could probably argue that release of this information would expose it unreasonably to further disadvantage. However, a decision could potentially still be made that under section 50 the information was of overwhelming public interest, and disclosure was necessary to facilitate community grieving and informed debate about a proper policy response, and so the public interest in disclosing the information outweighed the public interest in protecting that particular business from further financial disadvantage.

Reputational damage can be the kind of adverse effect contemplated. In an AAT case, the adverse effect identified was association of the name of a business with a criminal investigation, thereby damaging the reputation (see [Walker and Australian Federal Police \[2010\] AATA 965 at \[76\]](#)). Similarly in F6/10-11 (unpublished *prima facie* decision, 29 September 2011) a number of organisations had provided data to a government organisation about their sales of a certain kind of item, which was known to be used for and contribute to anti-social behaviour. The data had been provided voluntarily to assist government to develop informed policy to combat such anti-social behaviour. As a third party, disputing disclosure of the information, one organisation argued that one of the adverse impacts of the data could be reputational damage to its business if it was used as part of a 'sensationalist media story'. The *prima facie* decision maker accepted the business had an argument that disclosure of the information could expose it unreasonably to disadvantage.

(Note: at *prima facie* stage, the strength of this argument was not evaluated, and in particular the business may have faced difficulties if the matter had progressed to hearing in showing that the disclosing the information would have caused any further reputational damage beyond what it already suffered as an organisation that sold the items in question. It would have also had to overcome some compelling public interest factors in favour of disclosure.)

In weighing up competing considerations with respect to the application of an equivalent exemption in Victoria, (see [Louise Asher MP v Victorian Workcover Authority \[2002\] VCAT 369 \(13 May 2002\)](#)), VCAT considered whether information about a tender process to select a company to provide advertising services should be disclosed, and provided the following illustrative examples of competing considerations (at [35]-[36]):

It seems to me that what has to be balanced in determining whether release would unreasonably disadvantage Shannon's Way is:

- The government's stated policy that all major contracts should be transparent and available to the public;
- The public interest in open and accountable government especially in the expenditure and administration of a scheme set up to benefit injured workers;
- The fact that the public will not be able to scrutinise the price of this contract until at least October 2004 by which time the various annual reports will finally have disclosed the total amount paid during the three years of the contract, assuming each year's payment is in excess of \$100,000.00.
- The fact that this contract has already run for one year;
- The fact that the contract in question leaves open for further negotiation price-setting for a number of activities;

This should be balanced against:

- The fact that this is a 3-year non-exclusive contract.

- The evidence that Shannon's Way will be disadvantaged in the market place in future tenders because competitors will know the pricing structure.

Overall I have come to the conclusion that there is greater weight to be placed on the need for transparency and accountability than on the tenuous evidence that the company will be disadvantaged vis-à-vis its competitors. Although the information is not generally available to the company's competitors, that is only one of the factors for consideration and that factor by itself does not militate against disclosure. I have concluded that the information can be disclosed without causing substantial harm to the competitive position of the undertaking (see s 34(2)). I find that release of the document in full will not be likely to expose the company unreasonably to disadvantage.

Exceptions

Sub-section 57(4) excludes from exemption information which was obtained by the public sector organisation more than 5 years earlier. Sub-section 57(5) similarly excludes information which came into existence more than 5 years earlier. The 5 year period can be extended on application to the Commissioner, if the Commissioner is of the opinion that it is in the public interest to do so section.57(6)). An application may be made by a public sector organisation or a third party. Details relating to the extension are [available on the Commissioner's website](#).

Financial and property interests of the Territory or NTG – s 58

This exemption provides that:

Information may be exempt under section 50 if disclosure of the information is **reasonably likely to have a substantial, adverse effect on the financial or property interests of the Territory or of a public sector organisation.**

Commentary

The equivalent provision in Queensland has been considered, and the Information Commissioner there has considered the acquisition of land is a relevant 'financial or property interest' (see [Little; Cantoni and Department of Natural Resources \(1996\) 3 QAR 170](#)), and providing financial assistance to infrastructure projects is a relevant 'financial interest' (see [Seeney, MP and Department of State Development; Berri Limited \(Third Party\) \(2004\) 6 QAR 354.](#))

In [Cairns Port Authority and Department of Lands; Cairns Shelf Co No.16 Pty Ltd \(Third Party\) \(1993 S0111, 11 August 1994\)](#), the Cairns Port Authority sought to restrain the Department of Lands from publishing valuation reports over a parcel of land. It argued that if the information was disclosed, there was a risk the lessee of the land would commence litigation to challenge the amount payable under the lease. The Queensland Information Commissioner was troubled by this submission at [103]:

There may be a legitimate issue, however, as to whether it is repugnant to public policy that a risk of litigation should be accepted as an adverse effect which is deserving of recognition for the purposes of s.45(1)(c)(ii) of the FOI Act. Litigation in the system of courts comprising the judicial branch of government is the pre-eminent means sanctioned by liberal democratic societies for the peaceful settlement of disputes concerning the assertion of legal rights, and it promotes and reinforces respect for the rule of law, which is one of the cornerstones of our tolerant, liberal democratic traditions. I sympathise with the comment by Cairns Shelfco, in the penultimate paragraph of the extract from its submission set out at paragraph 94 above, that there is something grotesque about the argument that Parliament could have intended an exemption provision to operate so as to prevent disclosure of information which would assist a person to air a grievance (or to seek to vindicate an asserted legal right) in the courts.

The Queensland Information Commissioner took the view that litigation was, in the ordinary meaning of the words of the section, an 'adverse effect', but one which faced substantial countervailing public interest factors. He further noted at [131]:

If Cairns Shelfco can establish an error in the valuations of such a serious nature as to satisfy the limited grounds for legal challenge identified in Professor Duncan's statutory declaration, then the public interest in fair treatment of Cairns Shelfco according to law, in accountability for the performance of the functions of the Valuer-General, and accountability for the adoption of fair commercial practices by state government authorities which operate on a commercial basis, would, in my opinion, cumulatively outweigh the public interest consideration favouring non-disclosure which is inherent in the satisfaction of the first two elements of s45(1)(c).