

16 August 2011

Office of the Australian Information Commissioner
GPO Box 5218
SYDNEY NSW 2001

By email: consultation@oaic.gov.au

Dear Sir/Madam

DISCLOSURE LOG DETERMINATION No 1 – EXEMPT DOCUMENTS

The National Film and Sound Archive of Australia (**NFSA**) has considered the draft of the above determination and welcomes this opportunity to comment.

SUMMARY

Suggested changes to wording

As detailed in the revised draft attached, the NFSA believes that changing some of the wording of the determination and the explanatory statement would clarify its meaning.

Guidance on the determination

The NFSA understands that, where a document contains information that is exempt or would be exempt if requested by another applicant, the determination will allow agencies to release that document to a particular applicant without having to publish the document on its disclosure log.

The NFSA supports this development, but recommends that the OAIC should amend its Freedom of Information guidelines to assist agencies with the practical aspects of treating an application in this way.

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For example, it would benefit agencies to have guidance on the following questions:

1. How should agencies deal with requests from applicants to treat their applications in this way?
2. What should agencies tell (prospective) applicants about the possibility of having their applications treated in this way?
3. What do agencies need to tell applicants when they decide to release a document to them without publishing it more widely? Do they need to specify the information that is exempt or would otherwise be exempt?
4. Should agencies consider the applicant's intended use of the document before deciding not to publish it more widely?

FOR MORE INFORMATION

We appreciate the OAIC's consideration of the issues and recommendations outlined in this submission. If you have any questions about this submission, please contact Mark Murphy, Principal Legal Officer, by phone on 02 6248 2142 or by email at mark.murphy@nfsa.gov.au.

Yours sincerely



Ann Landrigan
Acting Chief Executive Officer

SUGGESTED CHANGES TO DRAFT DETERMINATION AND EXPLANATORY MEMORANDUM

Freedom of Information Act 1982 - Part III - Disclosure Log Determination No 1 - exempt documents

Effective: (*dates will be inserted later*)

I, John McMillan, Australian Information Commissioner, make this determination under section 11C(2) of the *Freedom of Information Act 1982* (the Act).

(1) Information referred to in paragraphs (a) or (b) of section 11C(1) to which an agency or Minister has given access to an applicant under section 11A of the Act is prescribed for the purposes of section 11C(1)(c) of the Act as:

(a) information in a document that was an exempt document at the time that access was given by the agency or Minister to the applicant;

(b) information in a document that the agency or Minister would have decided was an exempt document at the time that access was given to the applicant, if the request for that document had been received from a person other than the applicant.

(2) In this determination ***agency***, ***applicant*** and ***exempt document*** have the same meaning as in section 4 of the Act.

(3) This determination will remain in force for two years from the date of commencement.

Dated:

Professor John McMillan
Australian Information Commissioner

Freedom of Information Act 1982

Disclosure Log Determination No 1

Explanatory Statement

1. PURPOSE AND AUTHORITY

1.1 Explanatory statement

This explanatory statement has been prepared by the Australian Information Commissioner. It explains the scope and intended operation of Disclosure Log Determination No 1 made under s 11C(2) of the *Freedom of Information Act 1982* (Cth) (the Act).

1.2 Purpose

Section 11C(3) of the Act requires agencies and Ministers to publish information that has been released in response to each freedom of information access request on their websites subject to certain exceptions. This publication is known as a 'disclosure log'.

The disclosure log requirement does not apply to:

- personal information about any person, if it would be 'unreasonable' to publish the information (s 11C(1)(a))
- information about the business, commercial, financial or professional affairs of any person, if publication of that information would be 'unreasonable' (s 11C(1)(b))
- other information of a kind determined by the Information Commissioner if publication of that information would be 'unreasonable' (s 11C(1)(c))
- any information if it is not reasonably practicable to publish the information because of the extent of modifications that would need to be made to delete information listed in one of the above dot points (s 11C(1)(d)).

The purpose of Determination No 1 is for the Commissioner to prescribe for the purposes of s 11C(1)(c), information referred to in paragraphs (a) or (b) of s 11C(1) to which an agency or Minister has given access to an applicant under s 11A of the Act as:

- a) information in a document that was an exempt document at the time that access was given by the agency or Minister to the applicant
- b) information in a document that the agency or Minister would have decided was an exempt document at the time that access was given to the applicant, if the request for that document had been received from a person other than the applicant.

2. REASONS FOR MAKING THE DETERMINATION

The Act gives every person a legally enforceable right to obtain access to documents of an agency and official documents of a Minister other than exempt documents (s 11). The phrase 'exempt document' is defined in ss 4 and 31B as meaning:

- a document that is exempt under Part IV Division 2
- a document that is conditionally exempt under Part IV Division 3, if access to the document at that time would, on balance, be contrary to the public interest
- a document in respect of which an agency, person or body is exempt from the operation of the Act under s 7, and
- an official document of a Minister that contains some matter that does not relate to the affairs of an agency or Department.

The Act does not limit an agency's or minister's power to give access to information or a document that is exempt under the Act (s 3A).

Paragraph 1(a) of Determination No 1 relieves an agency or Minister of any obligation to publish in a disclosure log an exempt document that has been released to an applicant. The agency or Minister may decide that it is appropriate to provide access to the particular applicant but not to publish the document more widely. For example, the document may have been released to the particular applicant in connection with a research project, in connection with legal proceedings in which the applicant is involved, or because the confidential nature or commercial value of information in a document would not be jeopardised by selective release.

Paragraph 1(b) of Determination No 1 recognises that the exempt status of a document can depend on the identity of the applicant. For example, it would not be an unreasonable disclosure of personal information or contrary to the public interest to release to a person a document that relates specifically and only to them (s 47F). However, it may be an unreasonable disclosure or contrary to the public interest to release that document to another person. The identity of the applicant is similarly relevant in applying the conditional exemption for business affairs (s 47G).

3. OPERATION

This determination will remain in force for a period of 2 years from the date of commencement.

The disclosure log provisions in the Act, including the determination mechanism in s 11C(2) came into effect on 1 May 2011. At the time of making this determination these provisions include requirements and procedures that are new and have not been tested. The operation and effect of this determination will require review in 2 years.

4. DEFINITIONS

In this determination:

- a) **agency, applicant and exempt document** have the same meaning as in section 4 of the Act;
- b) **disclosure log** means the publication under s 11C of information that has been released to an applicant under the Act.

5. CONSULTATION

(This paragraph will be inserted after the consultation period)