



NATIONAL ARCHIVES OF AUSTRALIA

Access Examination Policy – personal, business and professional affairs of a person

Access Examination Section

V1.0



Australian Government
National Archives of Australia

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1. EXECUTIVE SUMMARY

The intent of the *Archives Act 1983* (Cth) (the Archives Act) is that all records subject to the Archives Act are to be publicly released unless they contain information that falls within one of the exemption categories in section 33 of the Archives Act.

This is expressed in section 31(1A)(1) which provides that the Archives, ‘must cause’ Commonwealth records in the open access period that are in the custody of the Archives or of a Commonwealth institution, other than exempt records, to be made available for public access.

The Archives Act requires the Archives to publicly release Commonwealth records in the open access period. At the same time the Archives has the obligation to ensure that information that needs continuing protection is not released. It is a matter of balance for staff who hold the appropriate delegation to make decisions on access. The need for balance was clearly articulated by the then Attorney-General the Honourable Gareth Evans in the Archives Bill 1983 (Cth) Second Reading Speech to the Senate, for and on behalf of the Minister for Home Affairs and Environment the Honourable Barry Cohen MP:

“It is expected that under these arrangements the great majority of Commonwealth records more than thirty years old will become available ...Inevitably, however, in the interests of personal privacy, good government and security, some exemptions will have to be applied and these will be very similar to those provided under the Freedom of Information legislation. However, it is expected that relatively fewer records will be withheld under Archives legislation because this deals, in the main, with older records.”¹

With the phased transition from 30 to 20 years for the release of Commonwealth records initiated under amendments to the Archives Act in 2010², the reduction in the open access period places an even greater onus on the Archives to balance public access rights, openness of Government, privacy, security and national interest.

2. PURPOSE

The objective of this Policy is:

- (a) to set out the Archives’ policy for applying exemptions pursuant to sub-section 33(1)(g) for information relating to the personal affairs of any person;
- (b) to set out the Archives’ policy for applying exemptions pursuant to sub-section 33(1)(j) for information relating to the business or professional affairs of any person; and
- (c) to promote the management and release of Commonwealth records in an efficient, effective, economical and ethical way.³

¹ *Commonwealth, Parliamentary Debates, Senate, 2 June 1983, 1182-84* (Gareth Evans).

² The amendments were introduced under the *Freedom of Information Amendment (Reform) Act 2010*.

³ *Public Governance Performance Accountability Act 2013* (Cth) s 8. See definition: *proper*, when used in relation to the use or management of public resources, means efficient, effective, economical and ethical.

This Policy represents the culmination of several years of research, consultation, revision and trial in changing the way access examiners deal with the release of information about individuals in accordance with the provisions of the Archives Act.

3. SCOPE

This Policy applies to decision makers that have a delegation pursuant to section 8 of the Archives Act to make decisions on section 33 exemptions ('Decision Makers').

It is the Archives' policy that Decision Makers may apply more than one section 33 exemption to material being examined.

4. POLICY FOR SECTION 33(1)(g) EXEMPTIONS

Section 33(1)(g) protects personal privacy by providing that a record is exempt if it contains information or material that would involve the unreasonable disclosure of information relating to the personal affairs of any person (including a deceased person).

Decision Makers may exempt information or material pursuant to section 33(1)(g) where:

- (a) it includes information or material relating to the personal affairs of any person; and
- (b) the Decision Maker determines that the disclosure of the information or material would involve an unreasonable disclosure.

Criteria 1- Personal Affairs of any person

The Archives' considers that:

- (a) information about personal affairs covers a broad range of matters and may extend to affairs relating to family and marital relationships, health or ill health, relationships with and emotional ties with other real people⁴; and
- (b) personal affairs are the composite collection of activities personal to the individual concerned.⁵

The following is a non-exhaustive list of some of the information and material that the Archives considers relate to personal affairs.

- Adoption records;
- Applications for employment, expressions of interest, recruitment panel assessments, reports or recommendations;

⁴ This position is supported by the court's consideration in *News Corporation Ltd v National Companies and Securities Commission* (1984) 51 ALR 277 at 293.

⁵ *Commissioner of Police v District Court of New South Wales and Another* (1993) 31 NSWLR 606 at 625.

- Assessments of competency, intellectual capacity;
- Attempted suicide or details about successful suicide;
- Character assessments ;
- Detailed or long term medical histories;
- Documents relating to identity;
- Domestic matters;
- Financial information;
- Illegitimacy;
- Information given in confidence;
- Information provided or gathered by Australian Government agencies relating to allegations of a personal nature;
- Information gathered for intelligence purposes or profiling an individual;
- Information that would identify victims of atrocities or crimes;
- Medical conditions;
- Personnel records of people employed by the Australian Government;
- Physical characteristics that are not visible and to which a stigma may attach;
- Sexual relationships and preference;
- Welfare case files, including those created by defence organisations; and
- Wills that are unlikely to be in the public domain.

Criteria 2- Unreasonable disclosure

Information or material relating to personal affairs is exempted only where its release *'would involve the unreasonable disclosure of information relating to the personal affairs of any person (including a deceased person)'*.

The question of whether disclosure would be unreasonable must be determined having regard to all the relevant circumstances, bearing in mind the public interest in the protection of personal privacy. Depending upon their relevance in a particular case, in addition to other factors which may be relevant, the following six factors should be considered by Decision Makers when deciding whether or not disclosure would be unreasonable.

1- What is the nature and perceived sensitivity of the information to be disclosed?

In assessing the nature and sensitivity of information, and therefore the reasonableness of disclosure, it may assist to consider the following:

- community attitudes;
- the context in which the information appears;
- 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
- the level of detail.

2- What is the age and current relevance of the information?

The older the record, the less likelihood there is that it would be unreasonable to disclose any information it contains concerning the personal affairs of a person.

3- What is the age of the subject of the information?

The following parameters are to be used as a guide when making a determination on unreasonable disclosure:

- At 100 years of age it may be assumed that a person is deceased and subject to the matters noted below in relation to disclosure of information about deceased persons, the potential for unreasonable disclosure is low;
- Where a person is over 70 years of age it may be assumed that the person is not in the workforce; and
- Where a person is under 70 years of age it may be assumed that the person is employable.

The following formula may be used by the Archives to determine the age of a person and whether they are likely to be in the workforce or to have died:

- (a) date or approximate date of birth known – count the number of years from that date;
- (b) date or approximate date of birth unknown, but the person was an adult at time of incident - assume the person is still working up to 50 years, and still alive up to 80 years, from the date of document or incident; and
- (c) date of birth unknown, but the person was a child at the time of incident - assume the person is still working up to 60 years, and still alive up to 90 years from the date of document or incident.

Information of a deceased person- In some cases it may be appropriate to exempt from release information about a deceased person on the basis that disclosure would be unreasonable because of the effect on descendants. The following formula may be used by the Archives:

- (a) date or approximate date of birth of subject known- assume descendants still alive up to 130 years from that date;
- (b) date or approximate date of birth of subject unknown- assume descendants still alive up to 110 years from date of documents or date of incident; and
- (c) if it is known or can be assumed that the subject was a young adult (under 30 years), middle-aged (in their 40s) or older at the time of the incident, this information should be used to approximate his or her date of birth for the purpose of the above calculations.

Records the disclosure of which may be considered unreasonable – it may be considered unreasonable to disclose the following information or material on personnel records of Australian Government employees where it is calculated or known that the subject of the information is under 70 years of age:

- Medical records or references to medical conditions;
- Character assessments;
- Claims for compensation;
- Confidential reports, including inquiries or reviews undertaken in private and not available in the public domain;
- Disciplinary documentation;
- Information received in confidence;
- Information or material relating to security clearances; confidential or classified information provided to an employee;
- Nominal rolls of sick and wounded not publicly available;
- Officer profiles;
- Performance assessments;
- Personal or private correspondence on personnel records;
- Records of interview and/or conversation; and
- Referee reports.

4- To what extent is the information already in the public domain?

Information may be considered to be in the public domain if:

- (a) it has been published at some time;
- (b) its publication was not to a limited audience or in a specialist publication; and
- (c) such information remains easily accessible today to any interested member of the public.

In this context, ‘publication’ is interpreted widely to include any release in the public domain whether in radio, television, print media or online.

5- Does the information have a credible source?

It would generally be unreasonable to release comments made about a person that would be considered by a reasonable person to be offensive or likely to cause distress and do not appear to come from a credible source. This will be particularly so for unsubstantiated allegations.

6- Are there cultural factors that should be considered?

In a small number of cases, the cultural background of the persons identified in the record may indicate that Aboriginal and Torres Strait Islander sensitivities, ethnic sensitivities, religious codes, cultural practices or norms may be relevant to the decision.

Aboriginal and Torres Strait Islander sensitivities can relate to:

- (a) people affected by former government removal policies: for example, sensitivities should be considered where relevant records relate to removal and institutional care as these policies were racially based; and
- (b) personal involvement in secret/sacred cultural matters: depending on the context, this information (which does not often appear in records) would be exempt.

5. POLICY FOR SECTION 33(1)(j) EXEMPTIONS

Section 33(1)(j) provides that a record is exempt from public access if it contains:

information or matter (other than information or matter referred to in section 33(1)(h)) concerning a person in respect of his business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking, being information or matter the disclosure of which would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs.

Section 33(1)(j) can apply either to people or to organisations and undertakings. This Policy is limited to the application of section 33(1)(j) to the business and professional affairs of individuals.

Section 33(1)(j) protects information relating to the business or professional affairs of a person being information the disclosure of which would or could reasonably be expected to unreasonably affect that person adversely in respect of his or her lawful business or professional affairs.

The Archives applies a four limb test for the exemption of information or material pursuant to section 33(1)(j):

- (a) the information or matter must concern a person in respect of his or her business or professional affairs;
- (b) the disclosure of the information or matter would or could be expected to be unreasonable;
- (c) the disclosure of the information or matter would or could reasonably be expected to affect the person in respect of its lawful business or professional affairs; and
- (d) that effect on the person would be an adverse affect.

Criteria 1- Business or professional affairs

Business affairs are the affairs that relate to a person's business. The Macquarie Dictionary provides the following definitions for business:

- (a) one's occupation, profession, or trade;
- (b) the sale of goods and services for the purpose of making a profit;
- (c) a person, partnership, or corporation engaged in business; an established or going enterprise or concern;
- (d) to earn a living from a commercial activity; and
- (e) to be carrying out an activity, enterprise, etc., successfully.

Professional affairs are the affairs that relate to a person's profession. The Macquarie Dictionary provides the following definitions for profession:

- (a) a vocation requiring knowledge of some department of learning or science, especially one of the three vocations of theology, law, and medicine;
- (b) any vocation, occupation, etc.; and
- (c) the body of persons engaged in an occupation or calling.

A person can be considered a professional whether they work in the private, not-for-profit or government sector.

Criteria 2- Unreasonable Disclosure

Information or material relating to business or professional affairs is exempted only where *the disclosure of the information or matter would or could be expected to unreasonably affect the person adversely in respect of its lawful business or professional affairs.*

The question of whether disclosure would or could reasonably be expected to have an unreasonable adverse effect on the person must be determined having regard to all the relevant circumstances, bearing in mind any relevant public interest factors.

Depending upon their relevance in a particular case, in addition to other factors which may be relevant, the following four factors should be considered by Decision Makers when deciding whether or not disclosure would be unreasonable.

1- What is the nature and perceived sensitivity of the information to be disclosed?

In assessing the nature and sensitivity of information, and therefore the reasonableness of disclosure, it may assist to consider the following:

- community attitudes;
- the context in which the information appears;
- 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
- the level of detail.

2- What is the age of the subject of the information?

The following parameters are to be used as a guide when making a determination on unreasonable disclosure:

- At 100 years of age it may be assumed that a person is deceased and subject to the matters noted below in relation to disclosure of information about deceased persons, the potential for unreasonable disclosure is low;

- Where a person is over 70 years of age it may be assumed that the person is not in the workforce; and
- Where a person is under 70 years of age it may be assumed that the person is employable.

3- To what extent is the information already in the public domain?

Information may be considered to be in the public domain if:

- (a) it has been published at some time;
- (b) its publication was not to a limited audience or in a specialist publication; and
- (c) such information remains easily accessible today to any interested member of the public.

In this context, ‘publication’ is interpreted widely to include any release in the public domain whether in radio, television, print media or online.

4- Whether the information has any current relevance.

Does the information have current relevance to the person in respect of his or her business or professional affairs.

Criteria 3- Would or could reasonably be expected

Information or material relating to business or professional affairs is exempted only where it concerns a person in respect of his business or professional affairs being information or matter the disclosure of which *would, or could reasonably be expected to*, unreasonably affect that person adversely in respect of his lawful business or professional affairs.

The phrase “would or could reasonably be expected” means that there must be at least a real, significant or material possibility based on reasonable grounds. A mere “suspicion” or “remote chance” will not be sufficient.⁶

Criteria 4- Affect the person adversely

Information or material relating to business or professional affairs is exempted only where *the disclosure of the information or matter would or could be expected to unreasonably affect the person adversely in respect of its lawful business or professional affairs.*

It is necessary to consider whether the effect on the person would be adverse. It is also necessary to consider whether the adverse effect would be on their current business or professional affairs.

⁶ *Chemical Trustee Ltd v Federal Commissioner of Taxation* [2013] AATA 623.

6. RELATED INFORMATION

The Archives Act 1983 – Section 33(1)(g)

Exempt records

(1) For the purposes of this Act, a Commonwealth record is an exempt record if it contains information or matter of any of the following kinds:

(g) information or matter the disclosure of which under this Act would involve the unreasonable disclosure of information relating to the personal affairs of any person (including a deceased person);

The Archives Act 1983 – Section 33(1)(j)

Exempt records

(1) For the purposes of this Act, a Commonwealth record is an exempt record if it contains information or matter of any of the following kinds:

(j) information or matter (other than information or matter referred to in paragraph (h)) concerning a person in respect of his or her business or professional affairs or concerning the business, commercial or financial affairs of an organization or undertaking, being information or matter the disclosure of which would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his or her lawful business or professional affairs or that organization or undertaking in respect of its lawful business, commercial or financial affairs.

AUTHORISATION

This Policy has been approved by:

A handwritten signature in black ink, appearing to read 'Lennard Marsden', written over a horizontal line.

Lennard Marsden
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Executive and Information Services
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14 July 2014