NATIONAL ARCHIVES OF AUSTRALIA

Access Examination Framework

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Australian Government
National Archives of Australia

Contents

Executive summary

An objective of the *Archives Act 1983* (Cth) is to preserve and make publicly available the archival resources of the Commonwealth. In applying this objective, the work of National Archives strengthens trust in democracy and improves government transparency and accountability by connecting Australians to government decisions and activities.

Sections 31(1A) and 31(1) of the Archives Act provide that National Archives ‘must cause’ Commonwealth records in the open access period[1] that are in the care of National Archives or the custody of a Commonwealth institution to be made available for public access (other than exempt records).

Access examination is a legislated role undertaken by decision-makers to whom this power is delegated under the Archives Act. Decision-makers examine Commonwealth records to determine if they contain any exempt information. Records created less than 20 years ago are not available for public access under the Archives Act as they are not in the open access period.

Purpose

The purpose of this framework is to:

- explain the open access period and its relationship to access examination
- describe how access examiners use section 33 of the Archives Act to make access decisions.

Background

To gain access to identified Commonwealth records not yet released, individuals must submit an access application under section 40 of the Archives Act (see Appendix 1 for an overview of the access application process). Once an application is made, the record is examined to determine an access decision. The decision results in the record being either:

- Open – record is released in full
- Open with exception (OWE) – record is released in part

[1] The Archives Act sets the open access period for most Commonwealth records as 20 years, i.e. such records will be in the open access period on and after 1 January in the year that is 21 years after the year the record was created. There are some limited classes of Commonwealth records where the open access period is set for a longer period.

- Closed – record is wholly exempt.

Commonwealth records are eligible for public access where they meet the following conditions. They are:

- in the open access period
- in the care of National Archives or in the custody of a Commonwealth institution
- not an exempt record.

One of the objectives of the Archives Act is to make Commonwealth records publicly available. Although it is expected that the majority of Commonwealth records in the open access period will become available, in the interests of personal privacy, good government and security, some exemptions will have to be applied. The section 33 exemption categories indicate sensitivities in records that may need exemption.

On average, 98.5% of records applied for result in full release (Open). Records partially released (OWE) make up 1.3% of requests for access, while the number of records wholly exempt (Closed) is 0.2%.

Commonwealth records

Section 3(1) of the Archives Act defines a 'Commonwealth record' as:

(a) a record that is the property of the Commonwealth or of a Commonwealth institution; or
(b) a record that is to be deemed to be a Commonwealth record by virtue of a regulation under subsection (6) or by virtue of section 22;
but does not include a record that is exempt material.

Section 3(1) of the Archives Act defines a 'record' as:

a document, or an object, in any form (including any electronic form) that is, or has been, kept by reason of:
(a) any information or matter that it contains or that can be obtained from it; or
(b) its connection with any event, person, circumstance or thing,

Section 2B of the *Acts Interpretation Act 1901* (Cth) defines a 'document' as:

any record of information, and includes:
(a) anything on which there is writing; and

(b) *anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; and*

(c) *anything from which sounds, images or writings can be reproduced with or without the aid of anything else; and*

(d) *a map, plan, drawing or photograph.*

The High Court has held that a record will be considered a Commonwealth record if a Commonwealth body (including National Archives) has the power to control the physical custody of that record.[2]

The open access period

The open access period applies to records in the custody of National Archives as well as records held by other government agencies. Access to records will be refused if the records are not in the open access period.

Most Commonwealth records enter the open access period 20 years after the calendar year that the record came into existence.[3] Cabinet notebooks enter the open access period after 30 years.[4] The open access period for Independent Review documents and Parliamentary Workplace Support Service documents is 99 years after the calendar year that the record came into existence.[5] For all Commonwealth records except Census information, the record will enter the open access period on and from 1 January in the year that is 20, 30 or 99 (depending on record type) after the creation year. The open access period for Census information is 99 years after the relevant Census day.[6]

The right of access applies to most records in the open access period except for:

- court records[7]
- some records in the possession of the Parliament[8]
- some records of governors-general[9]

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[2] *Hocking v Director-General of the National Archives of Australia* (2020) 271 CLR 1; [2020] HCA 19 at [95] (Kiefel CJ, Bell, Gageler and Keane JJ).
[3] Archives Act, section 3(7).
[4] Archives Act, section 22A.
[5] Archives Act, section 22C.
[6] Archives Act, section 22B.
[7] Archives Act, section 19.
[8] Archives Act, section 18.
[9] See, e.g. *Hocking v Director-General of the National Archives of Australia* (2020) 271 CLR 1 at [66] (Kiefel CJ, Bell, Gageler and Keane JJ).

- some records held by other national collecting institutions, such as the Australian War Memorial and the National Library of Australia.[10]

The role of access examination

Access examination is primarily completed in response to an application for access to Commonwealth records made under section 40 of the Archives Act. Access examination is an assessment of a record to determine if it contains information that is exempt under section 33, which if disclosed would or could reasonably be expected to result in some damage or prejudice.

Section 33 specifies exemption categories under which information may be withheld from public release (see Appendix 2 for complete details). Commonwealth records contain a wide variety of information, and a single record might contain information that is exempt under more than one exemption category.

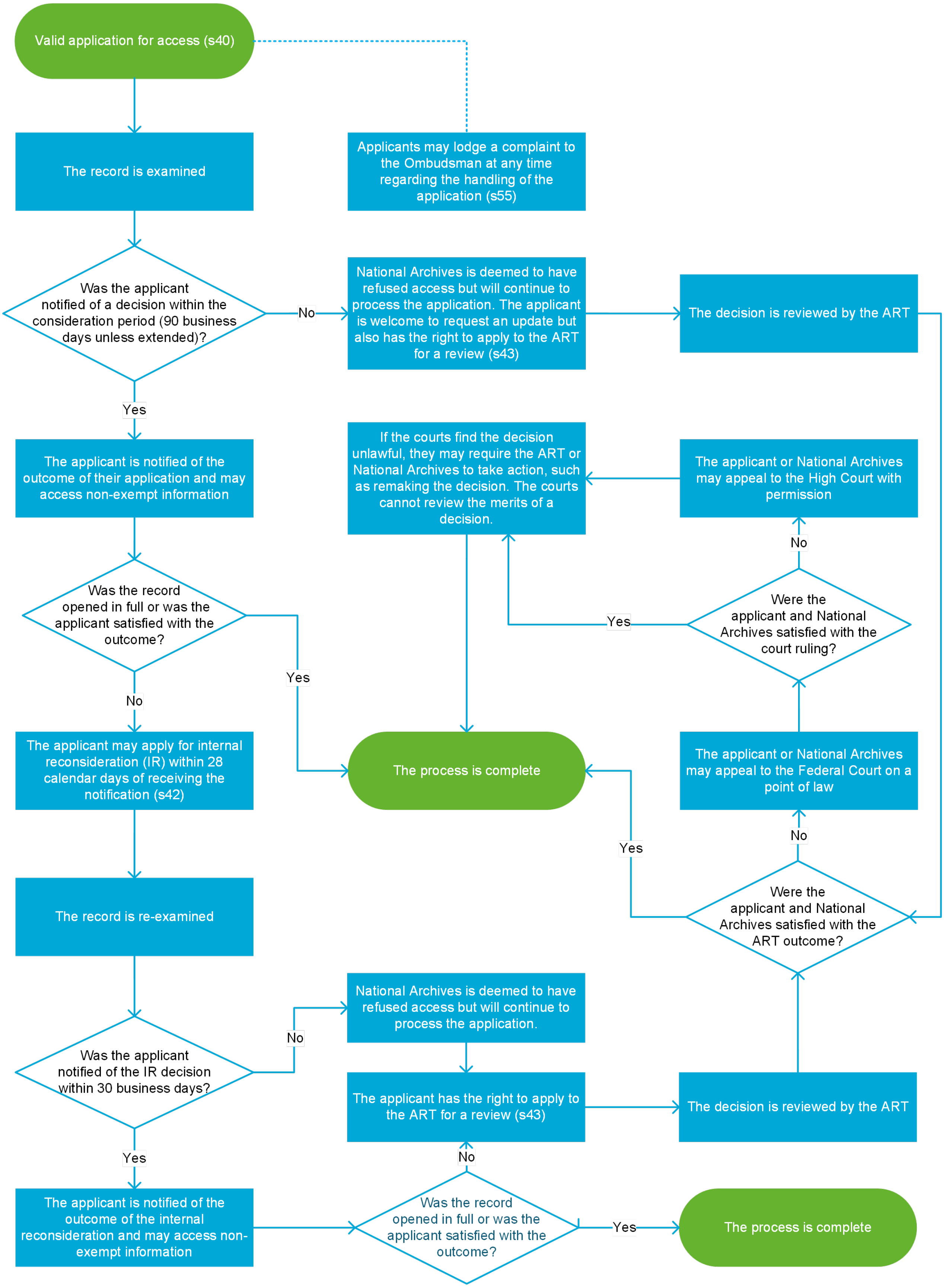
Decision-makers consult policies and guidelines relevant to decision-making under section 33. Decisions or judgments of the Administrative Review Tribunal (ART), the former Administrative Appeals Tribunal (AAT), the Federal Court or the High Court also provide guidance on the exemption provisions. Decision-makers take into account the content of the record, information previously released by National Archives or in the public domain, and background research.

Under section 35, National Archives may consult with agencies for advice on whether certain records are to be treated as exempt. Referral arrangements enable agencies to provide advice which National Archives takes into consideration when making access decisions.

[10] Under the Archives Act, the definition of 'Commonwealth record' excludes a record that is 'exempt material'. 'Exempt material' includes material in the collections of several national collecting institutions (s 3(1)).

Appendices

Appendix 1: Application for access process



Possible outcomes in response to an application for access

Communicating the decision and rights of review

Communicating the decision

Access decisions that are Open with exception (OWE) or Closed require the decision-maker to produce a statement of reasons to communicate the decision to the applicant. A statement of reasons is not required if a record is Open and released in full.

Under section 40(5), the statement of reasons must include:

- the reasons for the decision
- the findings on any questions of fact which affected the decision, referring to the material on which those findings were based
- the name and designation of the decision-maker
- information about rights of review.

Rights of review

In many cases only a small amount of information is withheld. If an applicant is dissatisfied with the reasons for the decision that a record has been identified as exempt, they may apply for a review. Under the Archives Act, the review process consists of 2 stages:

- internal reconsideration of the decision by National Archives
- review by the Administrative Review Tribunal (ART).[11]

A decision of OWE or Closed under section 40 can be reviewed under a section 42 request for an internal reconsideration. In response to an internal reconsideration, the applicant will receive notification of the outcome. If the record is Closed or OWE, this notification will include a statement of reasons outlining the outcome of the reconsideration. Applicants dissatisfied with the outcome of an internal reconsideration decision can seek review of the decision by the ART under section 43.

Where applicants have not been notified of National Archives' decision on an application under section 40 by the end of the consideration period for the application,[12] National Archives is deemed to have refused access, and the applicant may appeal directly to the ART.[13] If an applicant chooses not to appeal to the ART on the basis of a deemed refusal, National Archives will continue to process the application beyond its due date. Where an applicant chooses to appeal to the ART on

[11] Archives Act, Pt V Div 4.
[12] Section 40A of the Archives Act sets out the rules for determining the consideration period for an application for access.
[13] Archives Act, section 40(8).

the basis of a deemed refusal, National Archives will also continue to process the application beyond its due date where further time to do so is allowed by the ART. If National Archives makes a decision on the application within this further time, and the applicant is dissatisfied with the decision, then the ART's review extends to a review of that decision.[14]

Appendix 2: Section 33 exemption categories

The section 33 exemption categories require the decision-maker to determine the likelihood of harm resulting from disclosure. Some exemption categories require the decision-maker to be satisfied that harm **would** occur, while others require only a reasonable belief that harm **could** occur. Two categories include a public interest test.

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

Section in Act	Short description
33(1)(a)	security, defence or international relations
33(1)(b)	foreign information communicated in confidence
33(1)(c)	adverse effect on Commonwealth financial or property interests
33(1)(d)	breach of confidence
33(1)(e)(i)	prejudice an investigation into a breach of the law or the enforcement or proper administration of the law
33(1)(e)(ii)	disclose confidential source of information
33(1)(e)(iii)	endanger the life or physical safety of a person
33(1)(f)(i)	prejudice a fair trial
33(1)(f)(ii)	prejudice the effectiveness of lawful methods of law enforcement
33(1)(f)(iii)	prejudice lawful methods for the protection of public safety

[14] Archives Act, section 40(11).

33(1)(g)	unreasonable disclosure of personal affairs
33(1)(h)	disclosure of trade secrets or commercially valuable information
33(1)(j)	business, commercial or professional affairs
33(2)	legal professional privilege contrary to the public interest
33(3)	secrecy provisions of taxation legislation
33(4A) & (4B)	current or former ASIO employee or affiliate
33(4C) & (4D)	current or former ASIS employee

Reasonable expectation of damage

If the decision-maker reasonably determines that the release of information would or could result in damage or prejudice of the kind stated in the exemption categories, the information is exempt from release. A decision-maker does not have to determine whether damage itself is likely or probable, only that the *expectation* of damage is reasonable.[15]

The Administrative Appeals Tribunal (AAT) and the Federal Court have considered the meaning of a 'reasonable expectation' in the context of the Archives Act. They have held that:

- an expectation which is 'irrational, absurd or ridiculous,'[16] or 'fanciful, imaginary or contrived'[17] will be insufficient to enliven the relevant exemption category
- a 'mere possibility' of damage is also insufficient, and a reasonable expectation 'must be based on rationally probative evidence and must be reasonable in all of the circumstances, having regard to the nature of the information, the circumstances in which it was communicated, and [if applicable], the nature and extent of the relationship that could be damaged.'[18]

[15] *Arnold v Queensland* (1987) 13 ALD 195 at 204.
[16] *Attorney-General's Department v Cockcroft* (1986) 10 FCR 180 at 190 (Bowen CJ and Beaumont J).
[17] *Milliss v National Archives of Australia* [2000] AATA 565 at [19].
[18] *McGrath v Director-General, National Archives of Australia* [2020] AATA 1790 at [96].

Public interest test

Sections 33(1)(c) and 33(2) contain a 'public interest' test. The Archives Act does not define the public interest. The Freedom of Information (FOI) Guidelines from the Office of the Australian Information Commissioner (OAIC) provide that the public interest is considered to be:

- something that is of serious concern or benefit to the public, not merely of individual interest
- not something of interest *to* the public, but in the interest of the public
- not a static concept – where it lies in a particular matter will often depend on a balancing of interests
- necessarily broad and non-specific, and
- related to matters of common concern or relevance to all members of the public, or a substantial section of the public.[19]

National Archives adopts a similar approach to the public interest as outlined in the OAIC FOI Guidelines, given the similarity of the public interest test in the Archives Act and the *Freedom of Information Act 1982* (Cth) (FOI Act).

Public interest considerations include freedom of expression, freedom of the media, the proper administration of government, social justice, public health and safety, national security, and the prevention and detection of crime and fraud.[20] It also refers to the good order and functioning of community and government affairs for the wellbeing of citizens.[21]

The AAT has held that a decision-maker should not consider the public interest in deciding whether a record is exempt unless the exemption category expressly states that it should be considered.[22]

The concept of the public interest is not defined in the Archives Act, and decision-makers need to consider what constitutes the public interest in any particular matter at the time, rather than relying on set criteria. Decision-makers can consider the following in relation to public interest:

- something which is of serious concern or benefit to the public, not individual interest[23]
- something which is in the interest of the public rather than of interest to the public[24]

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[19] OAIC, *FOI Guidelines*, Part 6: Conditional Exemptions [6.224].
[20] See Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Report No 123 (2014) Pt 9.
[21] Wheeler C (2006) 'The public interest. We know it's important, but do we know what it means'. *AIAL Forum No 48.*
[22] *Throssell and Australian Archives* (1987) 14 ALD 292 at 295.
[23] *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473 at 480 (Barwick CJ).
[24] *Johansen v City Mutual Life Assurance Society Pty Ltd* (1904) 2 CLR 186 at 188 (Griffith CJ).

- a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the wellbeing of its members[25]
- a discretionary value judgment to be made by reference to undefined factual matters, confined only 'in so far as the subject matter and the scope and purpose of the statutory enactments may enable.'[26]

33(1)(a) Security, defence or international relations

> *(a) information or matter the disclosure of which under this Act could reasonably be expected to cause damage to the security, defence or international relations of the Commonwealth.*

Section 33(1)(a) relates to information concerning defence, national security and international relations. These 3 components are distinct but closely related concepts. The damage caused by release could be tangible and physical, such as damage to public buildings, civil facilities and other essential infrastructure. Or damage might be intangible, such as damage to intelligence interests, capabilities, objectives and methods, or defence strategy, plans and capabilities. Disclosure of sensitive information could damage the trust and confidence of foreign governments in Australia, causing damage to international relations.

In broad terms, the 'security' of the Commonwealth refers to information or matter concerning the protection of Australia and its population from active measures of foreign intervention, espionage, sabotage, subversion and terrorism.[27]

The defence of the Commonwealth includes:

- meeting Australia's international defence obligations and ensuring the proper conduct of international defence relations
- measures to detect, deter and prevent foreign incursions into Australian territory
- protection of the Defence Force from hindrance or from activities which would prejudice its effectiveness.[28]

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[25] *Smith v Director of Public Prosecutions* [1991] 1 VR 63 at 48075 (the Court).
[26] *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216 (Mason CJ, Brennan, Dawson and Gaudron JJ).
[27] The meaning of 'security' in the Archives Act should be interpreted in a way that mirrors the definition of 'security' at s 4 of the *Australian Security Intelligence Organisation Act 1979* (*Staats and National Archives of Australia* [2010] AATA 531 at [99]).
[28] OAIC, [*FOI Guidelines*, Part 6: Conditional Exemptions] [5.36].

The Commonwealth's international relations refers to political, military and economic relations with foreign governments and international organisations. Underpinning international relations is the ability of Australia to work with other governments and international organisations to protect Australia's international interests.[29]

33(1)(b) Foreign information communicated in confidence

(b) information or matter:

- *(i) that was communicated in confidence by, or on behalf of, a foreign government, an authority of a foreign government or an international organisation (the foreign entity) to the Government of the Commonwealth, to an authority of the Commonwealth or to a person who received the communication on behalf of the Commonwealth or an authority of the Commonwealth (the Commonwealth entity); and*
- *(ii) which the foreign entity advises the Commonwealth entity is still confidential; and*
- *(iii) the confidentiality of which it would be reasonable to maintain.*

This category relates to information provided in confidence to the Australian Government by foreign governments or recognised international organisations where the information remains confidential. Each subparagraph of paragraph (b) must be satisfied for this exemption to apply.

Where a record contains information received from a foreign entity that was originally communicated in confidence, it is exempt under s 33(1)(b) if it is still confidential and if it would be reasonable to maintain that confidence.

Decision-makers should consider if:

- there was a clear understanding on the part of the entity sending the information that it was communicated in confidence
- the information was received in confidence
- the information was stored and handled in a way to protect its confidentiality
- the information was covered by an agreement relating to confidentiality.

[29] See, e.g. *McKnight and Australian Archives* (1992) 28 ALD 95 at 112.

33(1)(c) Adverse effect on Commonwealth financial or property interests

> *(c) information or matter the disclosure of which under this Act would have a substantial adverse effect on the financial or property interests of the Commonwealth or of a Commonwealth institution and would not, on balance, be in the public interest.*

This exemption category exempts from release records that satisfy all 3 of the following criteria:

- Release would have an adverse effect on the Commonwealth's financial or property interests.
- The adverse effect would be substantial.
- The release would not, on balance, be in the public interest.

The Commonwealth's financial interests relate to its capacity to realise the full potential value of its assets. Its property interests extend to the title, claim or security of assets, including buildings, natural resources and intellectual property.

Examples of records which may be subject to this exemption include those related to:

- the Commonwealth's strategy in relation to buying, selling, owning, renting or borrowing assets
- information which could, if disclosed, affect the market price of an asset or resource or make a measurable change to the dollar value return to the Commonwealth
- technical details on the production of bank notes and postage stamps
- details of the locations of vaults or valuable property, such as artwork or equipment, which might make them vulnerable to theft or damage
- the security of Commonwealth buildings, including vulnerabilities to fire, damage or sabotage.

33(1)(d) Breach of confidence

> *(d) information or matter the disclosure of which under this Act would constitute a breach of confidence.*

This exemption category relates to information which, if disclosed, would constitute a breach of confidence.

The following 5 criteria should be met for a potential disclosure to constitute a breach of confidence:

1. It must be possible to identify with specificity the information in question, i.e. identify the specific information that is claimed to be confidential and not just make a broad claim.
2. The information must have the necessary quality of confidentiality and not, for example, be common or public knowledge.
3. The information must have been received by the recipient in circumstances imparting an obligation of confidence.
4. There must be an actual or threatened misuse of the information, i.e. use or disclosure would be unauthorised.
5. The person (or agency) would suffer a detriment as a result of disclosure of the information.[30]

33(1)(e)(i) Prejudice an investigation into a breach of the law or the enforcement or proper administration of the law

(e) information or matter the disclosure of which under this Act would, or could reasonably be expected to:

(i) prejudice the conduct of an investigation of a breach, or possible breach, of the law, or a failure, or possible failure, to comply with a law relating to taxation or prejudice the enforcement or proper administration of the law in a particular instance.

A record is likely to be considered exempt under this category if it contains information relating to:

- a current investigation into a breach or possible breach of the law
- the investigation of a taxation matter
- the enforcement or proper administration of the law in a particular case.

The public disclosure of this information may prejudice the conduct of an investigation, as it would enable an individual to take action to defeat or frustrate attempts by law enforcement agencies to:

- ascertain whether any offence or breach of the law had occurred
- discover the circumstances of a breach of the law
- discover the details of an investigation.

This exemption category concerns records which, if released, could negatively affect an investigation. Prejudice refers to actions or circumstances that could create harm or bias to the fairness, accuracy or effectiveness of an investigation. Prejudice may cause detriment or

[30] OAIC, *FOI Guidelines*, Part 6: Conditional Exemptions [5.189].

disadvantage to either party and interfere with the pursuit of justice. The paragraph refers to investigations into breaches of law, taxation and the proper administration of law. Paragraph (e)(i) applies to all state, territory and Commonwealth criminal and civil laws.[31]

The term ‘in a particular instance’ qualifies each phrase in section 33(1)(e)(i). The phrase means that a link to a current or ongoing case or investigation must be made. This exemption cannot be applied on the basis that there is potential for an investigation, a future investigation, or to investigations in general.[32]

This exemption can be applied if there is a *reasonable expectation* of damage to an investigation, enforcement capacity or the administration of a legislatively specified scheme. The link between the record and an investigation does not have to be stated in the record for the exemption to be applicable.

By the time records reach the open access period, it is unlikely that many proposed or described investigations are ongoing, given Australia’s statute of limitations laws.

33(1)(e)(ii) Disclose a confidential source of information

> *(e) information or matter the disclosure of which under this Act would, or could reasonably be expected to:*
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> > *(ii) disclose, or enable a person to ascertain, the existence or identity of a confidential source of information in relation to the enforcement or administration of the law.*

A record may be exempt under section 33(1)(e)(ii) if it contains information that:

- identifies a confidential source of information
- was provided to law enforcement
- relates to the enforcement or proper administration of the law.

This exemption relates to protection of confidential sources of information in relation to law enforcement and the administration of the law. In most instances, this category protects against the direct identification of a confidential source, such as the release of records containing a name. However, it may also be used to exempt other identifying features that may indicate the source of

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[31] Archives Act, section 33(4).
[32] *Murtagh and Commissioner of Taxation* (1984) 6 ALD 112 at 129.

the information, for example an address, date of birth, identification number or the informant's contact person. It may also include less obvious information that, when put with other key information, may be used to identify the confidential source.[33] This exemption category safeguards the identity of these people to prevent harm including physical, reputational or financial harm.

This exemption extends to informants who have provided information to law enforcement organisations such as the Australian Crime Commission, the National Anti-Corruption Commission, the Australian Federal Police or a state police force. In addition, it extends to persons who have been a witness within the meaning of the *Witness Protection Act 1994*. The identity of any individual who has supplied information on a confidential basis for the purpose of law enforcement may be protected from disclosure pursuant to this exemption.

The AAT has noted that a similar FOI Act exemption – 37(1)(b) – can operate in some circumstances to the advantage of informants prompted by 'improper motives', because the public interest is 'in favour of generally respecting the anonymity of informants.[34]

33(1)(e)(iii) Endanger the life or physical safety of a person

(e) information or matter the disclosure of which under this Act would, or could reasonably be expected to:

(iii) endanger the life or physical safety of any person.

This exemption category may be applied to withhold information that could endanger the life or physical safety of any person. It relates to information which, if released, could put someone at risk of physical harm. This exemption may also be used to withhold information about technologies, devices or hazardous materials which may threaten life or physical safety if released.

A record is likely to be exempt under section 33(1)(e)(iii) if it contains information which:

- includes instructions for the use of harmful substances or technologies
- relates to harmful substances or technologies
- could enable someone to threaten an individual, or a collective of people, with harm
- could incite hate, discrimination or retaliation that could result in harm
- reveals the location of harmful material or substances

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[33] *Petroulias and Commissioner of Taxation* [2006] AATA 333 [29]-[30]; see, e.g. *Besser and Attorney-General's Department* [2013] AICmr 12 (25 February 2013) at [16].
[34] *Sinclair and Department of Social Security* (1985) 9 ALN N127 at N130.

- contains plans for the construction of weapons which may be used for harm.

Advances in technology may have rendered certain substances, technologies or equipment obsolete, but their potency may not have diminished. The life or physical safety of a person could be endangered by disclosure of information relating to even obsolete substances, technologies or equipment.

Stores of dangerous materials or devices could be rendered vulnerable to theft or misuse if their whereabouts were disclosed, which may result in harm to an individual.

An individual's life or physical safety could be endangered by a number of different types of threats, ranging from harassment to an attack intending murder.

33(1)(f)(i) Prejudice a fair trial

(f) information or matter the disclosure of which under this Act would, or could reasonably be expected to:

(i) prejudice the fair trial of a person or the impartial adjudication of a particular case.

This exemption category relates to protecting the integrity of the administration of justice. Information exempt under this category would interfere with a fair trial or affect the impartial adjudication of a case. The term 'trial' refers to a criminal or civil legal proceeding before a court or tribunal, at the Commonwealth, state or territory level.[35] The reference to 'a particular case' means that there must be a link to a current or ongoing case. Like section 33(1)(e)(i), this exemption cannot be applied on the basis that there is potential relevance to an ongoing case, an envisaged future case or to cases in general.[36]

A record may be exempt under section 33(1)(f)(i) if it contains information which:

- could prejudice a fair trial or impartial adjudication
- has a clear link to a current or ongoing trial or case.

The public disclosure of this information would, or could reasonably be expected to, prejudice the fair trial of a person or the impartial adjudication of a particular case.

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[35] Archives Act, section 33(4).
[36] *Murtagh and Commissioner of Taxation* (1984) 6 ALD 112 at 129.

33(1)(f)(ii) Prejudice the effectiveness of lawful methods of law enforcement

(f) information or matter the disclosure of which under this Act would, or could reasonably be expected to:

(ii) disclose lawful methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures.

This exemption category may be applied to ensure that law enforcement can carry out their functions effectively where the release of information would reduce the effectiveness of law enforcement in preventing, detecting or investigating breaches or evasions of the law. A record is not exempt merely because it identifies methods or procedures for preventing, detecting or investigating breaches or evasions of the law. There must be resulting prejudice from that disclosure. 'Prejudice' means some kind of damage, harm, injury, impairment or compromise to the action underway by authorities.[37] There must be a reasonable expectation that prejudice could result.

33(1)(f)(iii) Prejudice lawful methods for the protection of public safety

(f) information or matter the disclosure of which under this Act would, or could reasonably be expected to:

(iii) prejudice the maintenance or enforcement of lawful methods for the protection of public safety.

This exemption category is used to prevent the disclosure of information that could adversely affect lawful responses to threats and emergencies that pose a danger to public safety. Disclosure must be likely to prejudice the future use and effectiveness of lawful protective methods for this exemption to apply.

The lawful methods covered by this exemption include Commonwealth, state or territory responses to actual or possible incidents or emergencies that might threaten public safety.[38]

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[37] See *Staats and National Archives of Australia* [2010] AATA 531 at [105].

[38] The AAT has held that the equivalent provision in the *Freedom of Information Act 1982* (s 37(2)(c)) will include information concerning planned responses to terrorist attacks (*Hocking and Department of Defence* (1987) 12 ALD 554), and likely natural disasters, but should not be confined to certain types of incidents or emergencies that may threaten public safety (*Parisi and Australian Federal Police (Qld)* (1987) 14 ALD 11 at 17).

33(1)(g) Unreasonable disclosure of personal affairs

(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).

This exemption is intended to balance the rights of individuals to have their reputation and privacy protected against the public's right of access to records relating to individuals and their conduct. For this exemption provision to apply, it must be demonstrated that the record includes information relating to the personal affairs of any person *and* that the disclosure of that information would be an unreasonable disclosure.

National Archives considers that 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, and relationships with or emotional ties to other real people.[39] Personal affairs are the composite collection of activities personal to the individual concerned.[40]

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 6 factors are 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, decision-makers consider:

- 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
- the level of detail.

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[39] *News Corporation Ltd v National Companies and Securities Commission* (1984) 1 FCR 64 at 79 (St John J).
[40] *Commissioner of Police v District Court of New South Wales* (1993) 31 NSWLR 606 at 624-625 (Kirby P).

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

The older the record then, generally speaking, the less likely it is that its release would involve an unreasonable disclosure of information concerning the personal affairs of a person.

Age does not always diminish Aboriginal and Torres Strait Islander cultural sensitivities forming part of the personal affairs of an individual.

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

The following parameters are useful when making a determination on unreasonable disclosure:

- Where a person is over 75 years of age it may be assumed that the person is not in the workforce.
- Where a person is under 75 years of age it may be assumed that the person is employable.
- At 97 years of age, it may be assumed that a person is deceased and the potential for unreasonable disclosure is low (subject to the considerations below relating to descendants).

National Archives may use the following to determine the age of a person and whether they are likely to be in the workforce or to have died:

- If the date or approximate date of birth is known, count the number of years from that date.
- If the date or approximate date of birth is unknown but the person was an adult at the time of the 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.
- If the date of birth is unknown but the person was a child at the time of the 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.

If the subject of the information is a juvenile, consideration should be given to whether information relating to court cases (spent convictions), welfare cases or adoptive parents is exempt.

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

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

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

In this context, 'publication' is interpreted to include any radio, television, print media and online release in the public domain.[41]

5. Does the information have a credible source?

It would be unreasonable to release comments about a person that would be considered offensive or likely to cause distress and do not appear to come from a credible source, including unsubstantiated allegations.

6. Are there cultural factors that should be considered?

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

Aboriginal and Torres Strait Islander sensitivities may relate to:

- **People affected by former government removal policies.** Sensitivities should be considered where relevant records relate to removal and institutional care.
- **Personal involvement in secret/sacred cultural matters, sites and objects.** Depending on the context, this information should be considered for exemption.
- **The identity and/or abilities of individuals with cultural, ceremonial and ritual obligations** would most likely not be disclosed on the basis of unreasonableness.

In considering whether the personal affairs exemption would apply, decision-makers may also consider the following factors:

Information relating to 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.[42]

Examples of information that could be harmful include a parent's affair, hereditary health conditions, or a parent's unplanned or illegitimate pregnancy.

- If the date or approximate date of birth of the subject is known, assume descendants are still alive up to 100 years from that date.

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[41] See generally *Attorney-General (UK) v Heinemann Publishers Australia* (1987) 10 NSWLR 86 ('*Spycatcher case*') at 161-166 (Kirby P and Street CJ); *Johns v Australian Securities Commission* (1993) 178 CLR 408 at 432 (Brennan J).
[42] See, e.g. *Dale and Australian Federal Police* (1997) 47 ALD 417.

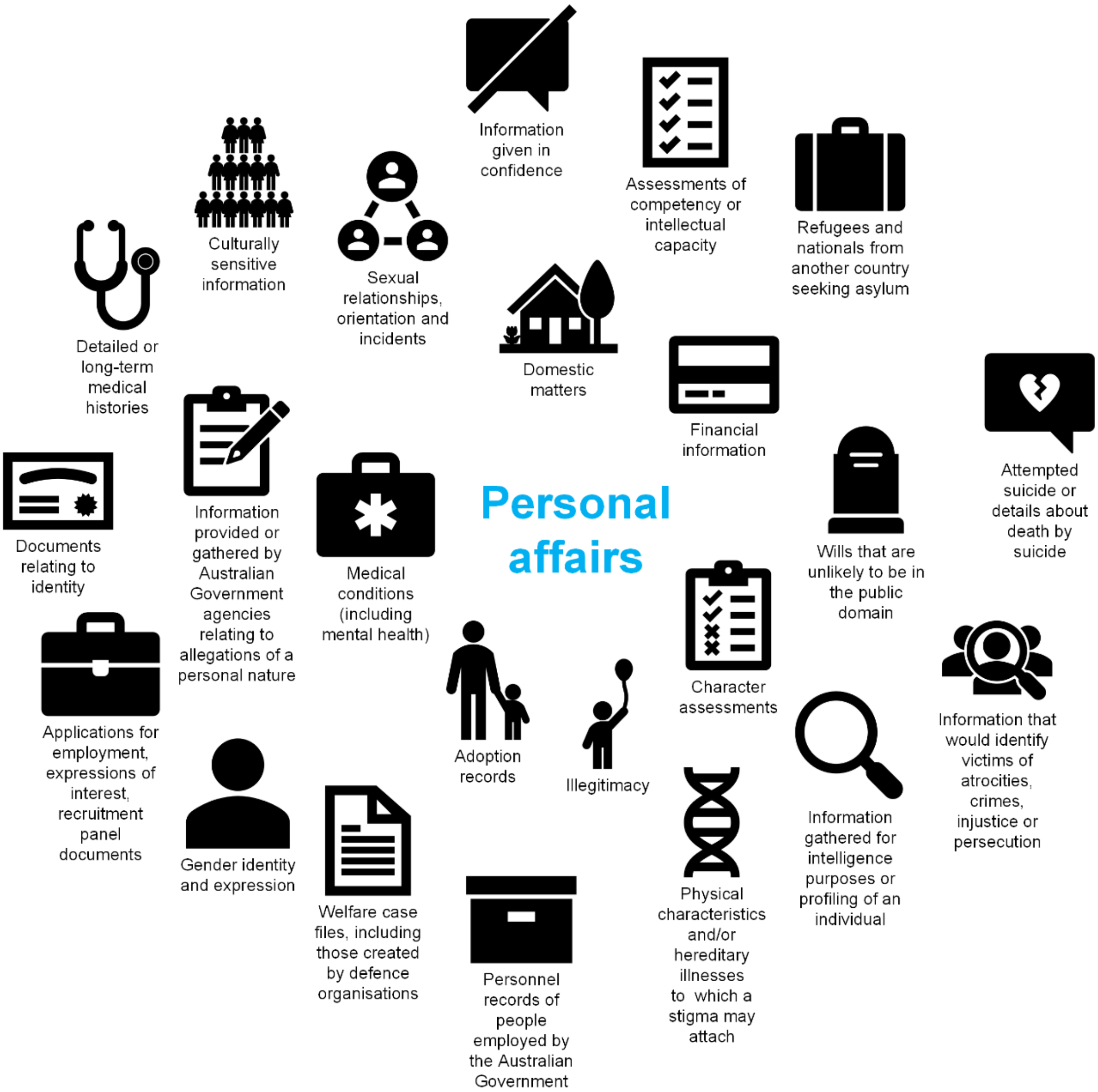
- If the date or approximate date of birth of the subject is unknown, assume descendants are still alive up to 100 years from the date of document or incident.
- If it is known or can be assumed that the subject was a child (under 18 years), young adult (under 30 years), middle-aged (in their 40s) or older at the time of the incident, use this information to approximate their date of birth for the purpose of the above calculations.

Personnel records of Australian Government employees

It may be considered unreasonable to disclose information on personnel records of Australian Government employees where it is calculated or known that the subject of the information is under 75 years of age. This includes:

- medical records or references to medical conditions (including mental health)
- 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 and 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
- referee reports.

The following infographic contains examples of personal affairs that National Archives considers may require exemption:



33(1)(h) Disclosure of trade secrets or commercially valuable information

> *(h) information or matter relating to trade secrets, or any other information or matter having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information or matter were disclosed.*

Records are exempt under this category if they contain information relating to trade secrets or a matter which has a commercial value that would be diminished or destroyed if disclosed.

A record is likely to be exempt from public release under section 33(1)(h) if it contains:

- information deemed to be a trade secret because it is not commonly known or in use, and is not public property
- information that is deemed to have an enduring commercial or non-commercial value.

The following non-exhaustive list of factors can be used to determine if information is a trade secret:

- the value of the information to its 'owner' and to competitors
- the extent to which the information is known outside of the business of the 'owner' of the information
- the extent to which the information is known by employees and others involved in the business
- the extent of measures taken by the owner to guard the secrecy of the information
- the ease or difficulty with which the information could be properly acquired or duplicated by others
- whether the information is of a technical character.[43]

33(1)(j) Business, commercial or professional affairs

(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.

Section 33(1)(j) can apply either to individuals or to organisations and undertakings. It 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 their lawful business or professional affairs.

National Archives applies a 4-limb test for the exemption of information or material pursuant to section 33(1)(j). All conditions must be satisfied.

- The information or matter must concern a person in respect of their **business or professional affairs**.

[43] See, e.g. *Del Casale v Artedomus (Aust) Pty Ltd* [2007] NSWCA 172 at [40] (Hodgson JA).

- The **disclosure** of the information or matter would or could be expected to be **unreasonable**. The following questions can be considered:
    - What is the nature and perceived sensitivity of the information to be disclosed?
    - What is the age of the subject of the information?
    - To what extent is the information already in the public domain?
    - Does the information have any current relevance?
- The disclosure of the information or matter would or could reasonably be expected to affect the person in respect of their lawful business or professional affairs and
- That effect on the person would be an adverse effect.

33(2) Legal professional privilege contrary to the public interest

(2) For the purposes of this Act, a Commonwealth record is an exempt record if it is of such a nature that:

(a) it would be privileged from production in legal proceedings on the ground of legal professional privilege; and

(b) disclosure of the record would be contrary to the public interest.

This exemption category applies if a document contains information that would be privileged from production in legal proceedings on the ground of legal professional privilege (LPP) **and** disclosure of that information would be contrary to the public interest.

LPP protects the confidentiality of communications between a lawyer and their clients, including in the context of actual or anticipated litigation. For LPP to apply, a legal adviser-client relationship must have existed at the time that the record was created, the dominant purpose of the communication must have been for giving or receiving legal advice, and the advice must have been confidential. The information must continue to be sensitive despite the passage of time and have enduring confidentiality.

There must also be no evidence that the LPP has been waived or withdrawn by the client in the intervening period, or that the advice has been made public.

A record is not exempt under section 33(2) just because a claim of LPP can be made. Release of the privileged information must also be contrary to the public interest. This determination is likely to be based on the extent of harm that may result from release.

A record is likely to be exempt from public release under section 33(2) if it contains:

- information provided by a legal practitioner relating to matters which could still be considered confidential
- information which could subject a third party to legal proceedings
- information which may have contemporary relevance, and which could prejudice the legal position of the Commonwealth in the event of future legal proceedings.

33(3) Secrecy provisions of the taxation legislation

(3) For the purposes of this Act, a Commonwealth record is an exempt record if:

(a) it contains information or matter:

(i) that relates to the personal affairs, or the business or professional affairs, of any person (including a deceased person); or

(ii) that relates to the business, commercial or financial affairs of an organization or undertaking; and

(b) there is in force a law relating to taxation that applies specifically to information or matter of that kind and prohibits persons referred to in that law from disclosing information or matter of that kind, whether the prohibition is absolute or is subject to exceptions or qualifications.

This exemption category ensures that information collected under relevant tax laws remains confidential and exempt from release. This is the case whether any prohibitions specified in such legislation are qualified or absolute.

Division 355 of Schedule 1 to the *Taxation Administration Act 1953* (Cth) (the TAA) clearly sets out the circumstances in which confidential taxpayer information may be disclosed. The Guide to the Division in the TAA states:

> *The disclosure of information about the tax affairs of a particular entity is prohibited, except in certain specified circumstances. Those exceptions are designed having regard to the principle that disclosure of information should be permitted only if the public benefit derived from the disclosure outweighs the entity's privacy.*[44]

Release under the Archives Act is not one of the specified circumstances. National Archives cannot release protected taxpayer information no matter how innocuous it may seem.

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[44] TAA, section 355-1.

This exemption only applies to information that was acquired under the tax law of the Commonwealth or of a state or territory.[45]

There is no assessment of the likelihood of harm or damage, or the reasonableness of disclosure, required for this exemption. The only considerations required are whether:

- the information was obtained under or for the purposes of a taxation law
- the information is related to an identifiable entity.

33(4A) and (4B) Identification of a current or former ASIO employee or affiliate

(4A) a Commonwealth record is an exempt record if:

(a) it contains information or matter:

(i)that identifies a person as being, or having been, an ASIO employee or an ASIO affiliate; or

(ii) from which the identity of a person referred to in subparagraph (i) could reasonably be inferred, or that could reasonably lead to the identity of such a person being established; and

(b) *the information or matter has not been made public by means of broadcasting or reporting proceedings of the Parliament as authorised by the Parliament, unless the Minister administering section 92 of the Australian Security Intelligence Organisation Act 1979 or the Director-General of Security has consented in writing to the information or matter being made public.*

(4B) If:

(a) the consent of the Minister administering section 92 of the Australian Security Intelligence Organisation Act 1979 or the Director-General of Security has been given in relation to information or a matter for the purposes of that section (before, on or after the commencement of this subsection); and

(b) that information or matter is substantially the same as the information or matter referred to in subsection (4A) of this section; the consent referred to in paragraph (a) of this subsection is taken also to be consent given for the purposes of subsection (4A).

This exemption category concerns the release of records containing information allowing the reasonable inference or explicit confirmation of the identity of a former or current ASIO employee

[45] Archives Act, section 33(4).

or affiliate. The terms ‘ASIO employee’ and ‘ASIO affiliate’ are defined in the *Australian Security Intelligence Organisation Act 1979* (Cth) (ASIO Act).

Relevant information will only be releasable if either:

- the information has been made public via a parliamentary approved form of broadcasting or reporting of Australian parliamentary proceedings
- National Archives is in possession of the written consent of the Director-General of ASIO or the responsible minister (administering section 92 of the ASIO Act) to the information or matter being made public.

33(4C) and (4D) Identification of a current or former ASIS employee

(4C) a Commonwealth record is an exempt record if:

(a) it contains information or matter:

(i) that identifies a person as being, or having been, a staff member of the Australian Secret Intelligence Service (ASIS) (within the meaning of the Intelligence Services Act 2001) or an agent of ASIS; or

(ii) from which the identity of a person referred to in subparagraph (i) could reasonably be inferred, or that could reasonably lead to the identity of such a person being established; and

(b) the information or matter has not been made public by means of broadcasting or reporting proceedings of the Parliament as authorised by the Parliament;

unless the responsible Minister for ASIS (within the meaning of the Intelligence Services Act 2001) or the Director-General of ASIS has consented in writing to the information or matter being made public.

(4D) If:

(a) the consent of the responsible Minister for ASIS (within the meaning of the Intelligence Services Act 2001) or the Director-General of ASIS has been given in relation to information for the purposes of section 41 of that Act (before, on or after the commencement of this subsection); and

(b) that information is substantially the same as the information referred to in subsection (4C) of this section.

The consent referred to in paragraph (a) of this subsection is taken also to be consent given for the purposes of subsection (4C).

This exemption category concerns the release of records containing information allowing the reasonable inference or explicit confirmation of the identity of a former or current ASIS staff member or agent. The term 'staff member' is defined in the *Intelligence Services Act 2001* (Cth).

Relevant information will only be releasable if either:

- the information has been made public via a parliamentary approved form of broadcasting or reporting of Australian parliamentary proceedings
- National Archives is in possession of the written consent of the Director-General of ASIS or the minister for ASIS (within the meaning of the Intelligence Services Act) to the information or matter being made public.