

Explanatory Statement

Freedom of Information (Disclosure Log – Exempt Documents) Determination 2018

Issued by the authority of the Australian Information Commissioner (Commissioner) under the *Freedom of Information Act 1982* (Cth) (Act).

This explanatory statement relates to the *Freedom of Information (Disclosure Log – Exempt Documents) Determination 2018* (Determination).

This explanatory statement fulfils the Commissioner's obligations under subsection 15G(4) of the *Legislation Act 2003* (Legislation Act).

Authority for the making of Determination

The Commissioner is empowered by subsection 11C(2) of the Act to make the Determination.

Purpose of Determination

Subsection 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 any of the following:

- a) personal information about any person, if it would be 'unreasonable' to publish the information (s 11C(1)(a))
- b) information about the business, commercial, financial or professional affairs of any person, if publication of that information would be 'unreasonable' (s 11C(1)(b))
- c) other information of a kind determined by the Information Commissioner if publication of that information would be 'unreasonable' (s 11C(1)(c))
- d) 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 a) to c) above (s 11C(1)(d)).

The Determination specifies two kinds of information for the purposes of s 11C(1)(c) being information in a document if the document was an exempt document at the time of its release to a freedom of information request applicant (FOI applicant) or it would have been an exempt document had it been requested by someone other than the FOI applicant.

The effect of the Determination is that if information in a document released to an FOI applicant is of a kind specified in section 6 of the Determination then the agency or Minister is not required to publish the information on a disclosure log if it would be unreasonable to do so.

The Determination is in substance the same as Disclosure Log Determination No. 2013-1, which was made by the Australian Information Commissioner on 14 October 2013 and came into force on 17 October 2013 for a period of five years.

The five year period of the Determination reflects the Commissioner's view that Disclosure Log Determination No. 2013-1 operated effectively during the past five years and the substantive provision continues to be warranted for the reasons outlined in this statement.

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 of State.

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).

Subsection 6(1) of the Determination specifies two kinds of information for the purposes of paragraph 11C(1)(c) of the Act. The effect is, that if an agency or Minister has released information to an FOI applicant of a kind that falls within subsection 6(1) and the agency or Minister determines it would be unreasonable to publish that information, they are relieved from publishing the information on a disclosure log.

Paragraph 6(1)(a)

The Commissioner determining the kind of information in paragraph 6(1)(a) recognises that an agency or Minister may decide that it is appropriate to provide access to an exempt document to a particular FOI applicant but that it would be unreasonable to publish the document more widely. For example, an agency may have released an exempt document to a particular FOI applicant in connection with a research project, in connection with legal proceedings in which the FOI applicant is involved, or because the confidential nature of information in a document would not be jeopardised by selective release to a particular FOI applicant. In these circumstances, the agency or Minister may decide that it is unreasonable to publish this information more widely in a disclosure log.

Paragraph 6(1)(b)

The Commissioner determining the kind of information in paragraph 6(1)(b) recognises that the exempt status of a document can depend on the identity of the FOI applicant. That is, a document may not be an exempt document when it is released to a particular FOI applicant,

but would be an exempt document if another person sought access to it. For example, the Act provides that an exemption may be claimed for documents to which secrecy provisions in other enactments apply. Circumstances may arise where a secrecy provision allows release of a document to a particular recipient, but would prohibit its release to a different recipient.

This would establish the conditions for the use of paragraph 6(1)(b) because the document may be an exempt document if requested by someone other than a particular FOI applicant. In this case, specifying this kind of information in paragraph 6(1)(b) removes doubt about how disclosure log publication requirements interact with secrecy provisions in other legislation by relieving an agency or Minister from having to publish on a disclosure log a document released to a particular FOI applicant if it would be unreasonable to do so.

Similar considerations could apply to documents that would fall under other exemptions in the Act if requested by anyone other than the particular FOI applicant, but that do not explicitly fall under one of the other exclusions from disclosure log publication in subsection 11C(1) of the Act.

Operation

The Determination commences at the start of the day after the day it is registered on the Federal Register of Legislation maintained under section 15A of the Legislation Act 2003.

The Determination will remain in force for a period of five years from the day it commences and is repealed at the end of that period.

The Determination also repeals the previous determination; Disclosure Log Determination No. 2013-1 (Exempt Documents) F2013L01798.

Definitions

In the determination:

- a) **Act** means the *Freedom of Information Act 1982* (Cth)
- b) **Disclosure log** means the publication under section 11C of information that has been released to an applicant under the Act.
- c) 'agency', 'applicant' and 'exempt document' have the same meaning as in section 4 of the Act

Consultation

In October 2018, the Information Commissioner undertook consultation in relation to the renewal of Determination No. 2013-1 and sought public comment. The consultation was available on the OAIC's website over a two week consultation period.¹ The OAIC also contacted relevant stakeholders directly by email to inform them about the consultation.

¹ <https://www.oaic.gov.au/engage-with-us/consultations/disclosure-log-determination/consultation-information-disclosure-log-determination>

The OAIC received three written submissions in response to this consultation. Two submissions were from Australian Government agencies which supported renewing Determination No. 2013-1. One submission was from a private entity.

The Information Commissioner took these submissions into account in preparing the Determination and this explanatory statement.

Statement of Compatibility with Human Rights

This Statement of Compatibility with Human Rights has been prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

The Determination is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the determination

The Determination specifies two kinds of information which agencies and Ministers then have the discretion to decide that it would be unreasonable to publish on a disclosure log. The kinds of information are information in a document released to an FOI applicant that:

- is exempt under the Act, or
- would be exempt if requested by anyone other than the applicant.

Human rights implications

The Determination engages the right to freedom of expression in Article 19 of the *International Covenant on Civil and Political Rights (ICCPR)*. Specifically, Article 19(2) of the ICCPR provides that:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

Paragraph 6(1)(a) of the Determination facilitates increased access for individual applicants to exempt documents in cases where the agency or Minister may otherwise have refused access only out of concern about publishing information in the documents on a disclosure log. This increased access advances Article 19(2) of the ICCPR.

However, an argument could be made that the Determination restricts the rights of people other than individual applicants under Article 19(2) of the ICCPR. The Act disclosure log requirements facilitate general public access to information released to individual applicants. The Determination restricts the amount of information published on the disclosure log.

However, these restrictions must be balanced with the increased access to information the Determination provides to individual applicants, as described above. The restrictions should also be considered in light of Article 19(3) of the ICCPR, which provides that:

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

The Determination only operates when documents are exempt from release under the Act, or in the case of paragraph 6(1)(b), when the documents would be exempt if requested by anyone other than the particular FOI applicant. Exemptions in the Act allow agencies and Ministers to refuse access to specific kinds of documents, such as documents affecting national security, defence or international relations, Cabinet documents or documents affecting law enforcement and protection of public safety. The scope of the exemptions contained in the Act is generally consistent with Article 19(3) of the ICCPR.

It is also relevant that paragraph 6(1)(b) of the Determination turns on the identity of the person requesting access to the document. Paragraph 6(1)(b) will typically operate in cases where a document contains information that relates to the applicant in some way but does not clearly fall under one of the disclosure log publication exceptions in s 11C(1). Paragraph 6(1)(b) ensures that the disclosure log provisions of the Act do not effectively:

- circumvent categories of exempt documents specified in the Act, or
- raise doubt about how disclosure log obligations interact with exemptions in the Act or secrecy provisions in other legislation.

Paragraph 6(1)(b) also complements the existing disclosure log exceptions in s 11C(1) of the Act for documents containing personal information or information about the business, commercial, financial or professional affairs of any person. For these reasons, the limitation paragraph 6(1)(b) places on broader public access to information through a disclosure log is consistent with Article 19(3) of the ICCPR.

Conclusion

The Determination is compatible with human rights because it advances the protection of human rights. To the extent that it may also limit human rights, those limitations are reasonable, necessary and proportionate.