



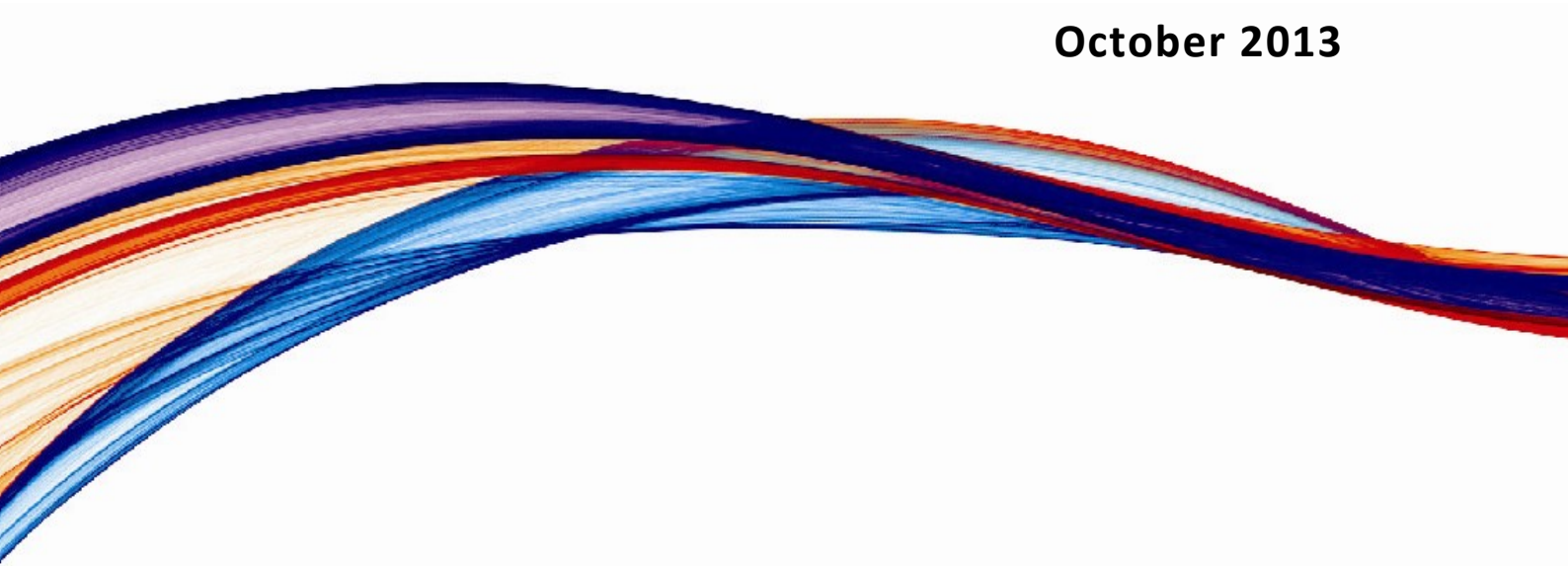
Australian Government

Office of the Australian Information Commissioner

Explanatory Statement

Freedom of Information Act 1982
Disclosure Log Determination No. 2013-1
(Exempt Documents)

October 2013



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This explanatory statement has been prepared by the Australian Information Commissioner. It explains the scope and intended operation of Disclosure Log Determination No. 2013-1 made under s 11C(2) of the *Freedom of Information Act 1982* (Cth) (the Act).

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 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 one of the above dot points (s 11C(1)(d)).

Disclosure Log Determination No. 2013-1 (Exempt Documents) allows an agency or Minister not to publish a document on a disclosure log if it was an exempt document at the time of its release to an applicant or would have been an exempt document had it been requested by someone other than the applicant.

The determination is made in identical terms to Disclosure Log Determination No. 2011-1, which was made by the Information Commissioner on 27 September 2011 and came into force on 17 October 2011 for a period of 2 years. The 5 year period of Determination No. 2013-1 reflects the Information Commissioner's view that the determination has operated effectively during the past 2 years and continues to be warranted for 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).

Paragraph 1(a) of Determination No. 2013-1 relieves an agency or Minister of any obligation to publish in a disclosure log an exempt document that has been released to an applicant, where publication would be unreasonable. The effect of paragraph 1(a) is that an agency or Minister may decide that it is appropriate to provide access to the particular applicant but it would be unreasonable to publish the document more widely. For example, an agency may have released an exempt document to a particular applicant in connection with a research project, in connection with legal proceedings in which the applicant is involved, or because the confidential nature of information in a document would not be jeopardised by selective release. In these circumstances, under paragraph 1(a) the agency or Minister may decide that it is unreasonable to publish this information more widely in a disclosure log.

Paragraph 1(b) of Determination No. 2013-1 recognises that the exempt status of a document can depend on the identity of the applicant. That is, a document may not be an exempt document when it is released to a particular 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 operation of paragraph 1(b) because the document may be an exempt document if requested by someone other than a particular applicant. In this case, paragraph 1(b) removes doubt about how disclosure log publication requirements interact with secrecy provisions in other legislation by allowing an agency or Minister not to publish the document if it would be unreasonable to do so. Similar considerations could apply to documents that would fall under other exemptions in the FOI Act if requested by anyone other than the applicant, but that do not explicitly fall under one of the exclusions from disclosure log publication in s 11C(1).

Operation

This determination will remain in force for a period of 5 years from the date of commencement.

Definitions

In this determination:

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

Consultation

The Information Commissioner made Determination No. 2011-1 in September 2011 following a public consultation process¹ and an earlier discussion paper about the operation of the Act's disclosure log provisions.²

In September 2013, the Information Commissioner published a discussion paper about the renewal of Determination No. 2011-1 for public comment. The discussion paper was available on the OAIC's website over a three week consultation period. The OAIC used social media and its email newsletter to publicise this consultation. The OAIC also contacted relevant stakeholders directly by email to inform them about the consultation.

The OAIC received four written submissions in response to this consultation. All submissions were from Australian Government agencies which supported renewing Determination No. 2011-1. Two submissions reported relying on Determination No. 2011-1 when deciding that it would be unreasonable to publish information on their disclosure log.

The Information Commissioner took these submissions into account in preparing Determination No. 2013-1 and this explanatory statement. The submissions are available on the OAIC website.³

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*.

¹ www.oaic.gov.au/freedom-of-information/foi-engaging-with-you/previous-foi-consultations/disclosure-log-determination-no-1-july-2011/.

² www.oaic.gov.au/freedom-of-information/foi-engaging-with-you/previous-foi-consultations/foi-disclosure-logs-discussion-paper-march-2011/.

³ www.oaic.gov.au/freedom-of-information/foi-engaging-with-you/previous-foi-consultations/renewal-of-disclosure-log-determination-no.-2011-1-exempt-documents-september-2013/renewal-of-disclosure-log-determination-no-20.

Determination No. 2013-1 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

Determination No. 2013-1 provides agencies and Ministers the discretion to decide that it would be unreasonable to publish on a disclosure log information in a document released to an applicant that:

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

Human rights implications

Determination No. 2013-1 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 1(a) of Determination No. 2013-1 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 Determination No. 2013-1 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. Determination No. 2013-1 restricts the amount of information published on the disclosure log.

However, these restrictions must be balanced with the increased access to information Determination No. 2013-1 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.

Determination No. 2013-1 only operates when documents are exempt from release under the Act, or in the case of paragraph 1(b), when the documents would be exempt if requested by anyone other than the 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 1(b) of Determination No. 2013-1 turns on the identity of the person requesting access to the document. Paragraph 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 1(b) ensures that the disclosure log provisions of the FOI Act do not effectively:

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

Paragraph 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 1(b) places on broader public access to information through a disclosure log is consistent with Article 19(3) of the ICCPR.

Conclusion

Determination No. 2013-1 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.