



Releasing documents that may be technically exempt

Where an agency considers that a document is exempt under [Schedule 1](#) to the FOI Act, section 23(1)(a) provides that the agency may refuse access to the document. [Section 23](#) does not provide that an agency must refuse access.

In effect, this means that, when dealing with an access application, agencies have a discretion to release documents that may be technically exempt if they are of the view that no harm is likely to follow from disclosure of the information.

This is consistent with the objects of the FOI Act and the duties of agencies when applying the FOI Act. In particular, agencies are to give effect to the FOI Act in a way that assists the public to obtain access to documents promptly and at the lowest reasonable cost (sections [3](#) and [4](#)).

Agencies need to make their own judgment as to when it is appropriate to release documents that are technically exempt in any given case.

Some of the factors that might be relevant to the exercise of discretion when deciding to give access to documents include:

- the age of the document and whether the subject matter is current;
- whether a similar kind of information that is contained in the document has already been disclosed in another way (for example, media statements and - articles, website publication or parliamentary debates (Hansard));
- the interests of the access applicant; and
- the rights of and impact on third parties.

While an agency has a discretion to disclose exempt information, this does not remove the agency's obligation to seek the views of third parties (section [32](#) and [33](#)), if the agency intends to disclose information about those third parties when dealing with an access application.

If you have any general enquiries about the FOI process, please see our website or contact our office.

Note: This Information Sheet is intended as a general guide only and should not be viewed as legal advice. The Information Commissioner considers each complaint on its merits and according to the relevant circumstances.

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