



Australian Government

Department of Infrastructure and Transport

FOI

Statement of reasons made under the *Freedom of Information Act 1982*

Decision and reason for decision of Jim Wolfe, A/g Executive Director, Aviation and Airports

Applicant:

Decision date: 16 August 2012

FOI reference number: 12-81

Documents: Documents relating to NASAG and TISOC

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Summary

1. I have made a decision to release the documents subject to your request in part.

Authority to make this decision

2. I, Jim Wolfe, A/g Executive Director, Aviation and Airports, am an officer authorised by the Secretary of the Department of Infrastructure and Transport (the Department) to make decisions about access to documents in the possession of the Department in accordance with Section 23(1) of the *Freedom of Information Act 1982* (the FOI Act).

Background

3. On 18 June 2012 you made a request for access to documents in the possession of the Department. Your request sought access to:
 - i. *Draft agendas, agendas, draft minutes, minutes, draft records or meeting and records of meeting for the meeting of NASAG that has occurred since 9 February 2012;*
 - ii. *Documents prepared for the purpose of being presented, tabled or otherwise considered at any meeting of NASAG that has occurred since 9 February 2012;*
 - iii. *Any documents containing a report from SGS Economic Planning in relation to the implementation of Guideline A of the National Airports Safeguarding Framework;*
 - iv. *All final (as opposed to draft) minutes and agendas pertaining to meetings of NASAG created or received since 1 May 2010;*
 - v. *All documents evidencing the activities of the NASAG Working Group;*
 - vi. *The Implementation Plan referred to at page 3 of FOI 12-67; and*
 - vii. *Minutes of the meeting of the Transport and Infrastructure Senior Officials Committee which occurred on 30 March 2012 in Hobart.*
4. On 11 July 2012 the Department provided you with an estimate of a charge of \$2548.47.
5. On 18 July 2012 you agreed to pay the charge, and paid the amount in full.

Documents subject to this request

6. The Department has undertaken a search of its records and has identified 66 documents that fall within the scope of your request, as set out above.
7. Please note that no documents were found to be relevant to part VI of your request.
8. The documents subject to your request are listed in the schedule of documents at Schedule 1.

Decision

9. I have made a decision to release the documents subject to your request in part.

I have decided to grant access in full to the following documents:

- Documents 6, 7, 9, 29 - 39, 41, 43 and 45

I have decided to grant access to the following documents in part:

- Documents 5, 8, 40, 42, 44, 46

I have decided to refuse access to the following documents:

- Documents 1-4, 10-28, 47-66

Reasons for decision

10. In accordance with Section 26(1)(a) of the FOI Act, the findings on any material question of fact, referring to the material on which those finding were based and the reasons for my decision to grant partial access to documents follow.
11. In making my decision, I had regard to Sections 3, 11 and 11A of the FOI Act which give the Australian community a legally enforceable right to obtain access to information held by the Government of the Commonwealth. I also considered the following provision of the FOI Act relevant to my decision:
 - Section 47B (Commonwealth – State relations)
 - Section 47C (Deliberative processes)
12. A full extract of all provisions I used to make my decision are provided in Schedule 2.

Statement of reasons

Commonwealth – State relations

Documents –1-4, 5, 8, 10-28, 40, 42, 44, 46 and 47 through 65

13. I have decided to exempt documents 5, 8, 40, 42, 44 and 46 in part and documents 1 through 4, 10 through 28, and 47 through 66 in their entirety pursuant to section 47B of the FOI Act.
14. Section 47B creates a conditional exemption where disclosure of a document either:
 - would, or could reasonably be expected to, cause damage to relations between the Commonwealth and a State (s 47B(a)), or
 - would divulge information or matter communicated in confidence by or on behalf of the Government of a State or an authority of a State, to the Commonwealth, to an authority of the Commonwealth or to a person receiving the communication on behalf of the Commonwealth (s 47B(b)).
15. For the purposes of this exemption, a State includes the Australian Capital Territory and the Northern Territory (Section 4(1)).
16. The documents listed above include draft internal documents, committee working papers as well as correspondence with an external organisation which include opinions, options and discussions regarding national land use planning near airports and flight paths. The documents include discussions and input from a variety of external sources including the NASAG committee members and SGS Economics and Planning, a consultative organisation. The options, opinions and discussions contained within the documents have not been finalised within the NASAG committee and a final policy has not yet been decided.
17. The NASAG working group papers at documents 47-65 contain discussions and input from various committee members. Final iterations of most of the documents have been made publicly available (on the Department's website). I consider that it would have a negative impact on the relationship between the Commonwealth and the State and Territory governments which comprise NASAG if the working drafts used in developing final documents were released. Specifically, I believe that disclosure of this material may:

- impair or prejudice the future flow of information to the Commonwealth and State and Territory members of NASAG;
- undermine the effective working of the committee in the future;
- adversely affect the level of trust and cooperation that is present in existing relationships between the Commonwealth and State stakeholders ;
- create difficulty in ongoing discussions between NASAG members pertaining to the development of joint policies; and
- adversely affect ongoing negotiations between the Commonwealth and the States.

18. These documents also contain emails and correspondence between the Department and SGS Economics and Planning. This organisation was engaged by the Department at the request of NASAG as it had experience in dealing with cross jurisdictional planning and policy formulation. The documents in issue contain draft documents as well as input and comment from each of the NASAG members concerning a draft implementation plan. I consider that the release of these comments and deliberations would have a harmful affect on the cooperative working of the NASAG group into the future.

Document 66

19. Document 66 contains a draft transcript of the minutes of the Transport and Infrastructure Senior Officials Committee (TISOC) meeting held in March 2012. This committee was established under the Council of Australian Governments (COAG) and includes members from State and Territory governments. The committee meets to discuss transport related issues and projects across Australia, TISOC deliberations and discussions are not made public.

Public Interest Test

20. After coming to the conclusion that the documents listed are conditionally exempt in accordance with Section 47B, I considered the Public Interest Test (Section 11A(5)). I have considered whether access to these documents would, on balance, be contrary to the public interest.

21. Firstly, I considered the following factors favouring access, specifically, that disclosure would:

- (a) promote the objects of the FOI Act; and
- (b) inform debate on a matter of public importance

22. Secondly, I considered the following factors against disclosure, specifically, that disclosure could:

- (a) reasonably be expected to have a negative impact on Commonwealth-State relations;
- (b) reasonably be expected to harm the interests of a group of individuals in both NASAG and TISOC;
- (c) reasonably be expected to prejudice the management function of an agency;
- (d) impair or prejudice the future flow of information to the Commonwealth; and
- (e) adversely affect negotiations between the Commonwealth and the States.

23. I have weighed the factors for and against disclosure to determine where the public interest lies. I have decided that access to the documents would, on balance, be contrary to the public interest insofar as an open and cooperative relationship between the Commonwealth and States is an essential requirement during meetings and negotiations with NASAG. I also consider that the ability of TISOC to engage in frank discussions and provide fully informed advice to senior State and Federal government Ministers without prejudice is an important part of their current and ongoing

role. Secondly, the release of the information may have a detrimental effect on Commonwealth-State relations, and will, therefore prejudice the Department's ability to undertake its functions effectively. I am satisfied that any harm to the Commonwealth and States by the release of information under FOI is a strong consideration which I am bound to consider. I am, therefore, satisfied that the factors against disclosure outweigh those in favour of access.

Deliberative process documents

Documents 1-4, 5, 8, 10-28, 40, 42, 44, 46 and 47 through 65

24. I have decided to exempt documents 5,8,40, 42, 44 and 46 in part and documents 1 through 4, 10 through 28, and 47 through 65 in their entirety pursuant to subsection 47C (1) of the FOI Act. This section provides a conditional exemption for documents disclosing deliberative processes. A deliberative process relates to documents that contain opinions, advice, deliberations, consultations or recommendations that have been obtained, prepared or recorded and which are relevant to the functions of the Department.
25. After coming to the conclusion that the documents are conditionally exempt in accordance with Section 47C, I considered the Public Interest Test (Section 11A(5)). I have considered whether access to the documents would, on balance, be contrary to the public interest. Firstly, I considered the following factors favouring access, specifically, that disclosure would:
 - (a) promote the objects of the FOI Act; and
 - (b) inform debate on a matter of public importance.
26. Whilst I have considered these factors, and agree that the objects of the FOI Act should be promoted, I am not satisfied that the release of the documents will significantly inform debate on a matter of public importance, nor have any effect on the effective oversight of planning guidance for noise sensitive developments near airports. The documents were prepared for the deliberative purposes of the Department in so far as they contain preliminary advice, recommendations and discussions which have not been fully considered by the Minister or senior officials. In some cases the documents are not fully representative of the final agreement reached between the Commonwealth and other NASAG members. I do not consider that these preliminary opinions and advice would provide any sound basis for public debate, additional to that which is already publically available. With the exception of an implementation plan (which is yet to be developed for consideration by Ministers) final NASAG documents are publically available on the Departments website.
27. Secondly, I considered the following factors against disclosure, specifically, that disclosure could:
 - (a) reasonably be expected to prejudice the management function of an agency; and
 - (b) reasonably be expected to prejudice an agency's ability to obtain similar information in the future.
28. I am satisfied that the disclosure of the deliberations would, or could reasonably be expected to prejudice the management and functioning of a Government agreement and ongoing policy development. The documents contain deliberations and discussions which have not been fully considered or finalised and the premature release of these documents may inhibit the flow of similar information in the future as well as potentially undermining the cooperative working partnerships that currently exist between the Commonwealth and NASAG members.
29. The documents also consist of correspondence between NASAG members and SGS Economics and Planning. This company was engaged to assist the NASAG members construct a National Airports Safeguarding Framework implementation plan. Due to the intricacies of working with both State and Federal governments in a cross jurisdictional partnership SGS was considered well placed and

experienced to assist NASAG with this work. The documents comprise draft and preliminary discussions between SGS, the Department and other NASAG members and the information contained within the documents has not been fully considered or finalised. Neither Ministers nor Senior Government officials have considered or approved the views expressed in the documents. Comments were sought and provided by NASAG members however these have not been considered in terms of their application, or not, to the draft plan.

30. The documents in issue are all working documents that reflect preliminary opinions and discussions, which may have changed or evolved as the deliberations and time progressed. There was an expectation that all parties including NASAG members and SGS Economics and Planning would be able to engage frankly in discussions with the Commonwealth without being held to views expressed as the thought processes evolved and developed. Publication of initial views may limit the full and frank supply of information to the Commonwealth in the future.
31. Finally, I have weighed the factors to determine where the public interest lies. I have decided that access to the documents, would, on balance, be contrary to the public interest. The provision of information to the Commonwealth is a vital component to the successful operation of the Department's functions, and the factors favouring access are not overriding considerations in this instance. I am satisfied that the factors against disclosure outweigh those in favour of access.

Your rights of review

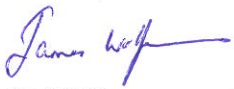
32. If you disagree with this FOI decision, you can ask for the decision to be reviewed. There are two ways you can ask for review of a decision: internal review by the Department, or external review by the Office of the Australian Information Commissioner (OAIC).
33. You can ask the Department to review its decision in relation to access to documents. There is no charge for internal review. You must apply within 30 days of being notified of the decision, unless the Department extends the application time. You should contact the Department if you wish to seek an extension. The Department must make a review decision within 30 days. If it does not do so, its original decision is considered to be affirmed. The review will be carried out by a different departmental officer, usually someone at a more senior level. You must apply in writing and you can lodge your application in one of the following ways:
 - Post:** FOI Coordinator
Department of Infrastructure and Transport
GPO Box 594
Canberra ACT 2601
 - Fax:** +61 2 6247 1347
 - Email:** FOI@infrastructure.gov.au
34. You can ask the OAIC to review the Department's decision in relation to access to documents. The Information Commissioner is an independent office holder who can review the decisions of agencies and Ministers under the FOI Act. The Information Commissioner also investigates complaints about agency actions under the FOI Act. However, if you are complaining that the Department's decision is wrong, it will be treated as an application for a review. You do not need to seek an internal review from the Department before seeking review by the Information Commissioner. However, going through the Department's internal review process gives the Department the opportunity to reconsider its initial decision, and your needs may be met more quickly without undergoing an external review process. The Information Commissioner's review is free. You must apply to the Information Commissioner within 60 days of being given notice of the decision. You can ask the Information Commissioner for an extension of time to apply, and this may be granted if the Information Commissioner considers it is reasonable in the circumstances. You must apply in writing and you can lodge your application in one of the following ways:
 - Online:** www.oaic.gov.au

Post: GPO Box 2999
Canberra ACT 2601
Fax: +61 2 9284 9666
Email: enquiries@oaic.gov.au
In person: Level 3
25 National Circuit
Forrest, ACT; or at
Level 8, Piccadilly Tower
133 Castlereagh Street
Sydney, NSW

More information about Information Commissioner Reviews is available from
[http://www.oaic.gov.au/publications/FOI fact sheet12 your review rights.html](http://www.oaic.gov.au/publications/FOI_fact_sheet12_your_review_rights.html).

Contacts

35. If you wish to discuss this decision, please contact the Department's FOI Co-ordinator on (02) 6274 7844 or email FOI@infrastructure.gov.au



Jim Wolfe
A/g Executive Director
Aviation and Airports

16 August 2012



Schedule of documents

Applicant:

Decision date: August 2012

FOI reference number: 12-81

Documents: Documents relating to NASAG and TISOC

Document reference (FOI 12-81 reference)	Date of document	Pages	Author	Recipient	Document description	Decision	Exemption Provision
Parts i and ii							
1		7	Department of Infrastructure and Transport	NASAG Members	National Airports Safeguarding Framework Consultations	Exempt	Sections 47B and 47C
2		5	Department of Infrastructure and Transport	NASAG Members	National Airports Safeguarding Framework - Measures for managing impacts of Aircraft Noise - Guideline A	Exempt	Sections 47B and 47C
3		7	Department of Infrastructure and Transport	NASAG Members	National Airports Safeguarding Framework - Measures for managing impacts of Aircraft Noise - Guideline A	Exempt	Sections 47B and 47C
4		4	Department of Infrastructure and Transport	NASAG Members	National Airports Safeguarding Framework - Measures for managing impacts of Aircraft Noise - Guideline A	Exempt	Sections 47B and 47C
5		7	Department of Infrastructure and Transport	NASAG Members	Draft Minutes - NASAG Meeting 8 February 2012	Release in part	Sections 47B and 47C
6		2	Department of Infrastructure and Transport	NASAG Members	NASAG Meeting Outcome Action Items	Release in full	

			Transport		- February 2012		
7		1	Department of Infrastructure and Transport	NASAG Members	Draft agenda – NASAG Meeting 20 April 2012	Release in full	
8		6	Department of Infrastructure and Transport	NASAG Members	NASAG – Draft Minutes – Meeting 20 April 2012	Release in part	Sections 47B and 47C
9		1	Department of Infrastructure and Transport	NASAG Members	NASAG Meeting Outcome Action Items – April 2012	Release in full	
Part iii							
10		5	SGS Economics and Planning	Department of Infrastructure and Transport	Draft National Airports Safeguarding Framework	Exempt	Sections 47B and 47C
11		12	SGS Economics and Planning	Department of Infrastructure and Transport	Draft Implementation Plan	Exempt	Sections 47B and 47C
12		8	SGS Economics and Planning	Department of Infrastructure and Transport	Commonwealth, State and Territory Airport-related Legislation	Exempt	Sections 47B and 47C
13		8	SGS Economics and Planning	Department of Infrastructure and Transport	NASAG follow up- draft implementation Plan	Exempt	Sections 47B and 47C
14		19	SGS Economics and Planning	Department of Infrastructure and Transport	NASAG follow up- Implementation – Legislation, Regulations and Policies	Exempt	Sections 47B and 47C
15		24	SGS Economics and Planning	Department of Infrastructure and Transport	NASAG follow up- Implementation – Legislation, Regulations and Policies	Exempt	Sections 47B and 47C
16		19	SGS Economics and Planning	NASAG Members	National Airports Safeguarding Plan – Draft Implementation Plan	Exempt	Sections 47B and 47C
17		5	SGS Economics and Planning	Department of Infrastructure and Transport	NASAG Implementation Plan for SA	Exempt	Sections 47B and 47C

18	9/03/2012	24	SGS Economics and Planning	Department of Infrastructure and Transport	Revised Draft Implementation Plan – National Airports Safeguarding Agreement	Exempt	Sections 47B and 47C
19	9/03/2012	1	SGS Economics and Planning	Department of Infrastructure and Transport	Comments on Implementation Plan	Exempt	Sections 47B and 47C
20	8/03/2012	2	Australian Local Government Association	SGS Economics and Planning	Comments on Implementation Plan – ACT Response	Exempt	Sections 47B and 47C
21	8/03/2012		Defence	SGS Economics and Planning	Comments on Implementation Plan – Defence Response	Exempt	Sections 47B and 47C
22	8/03/2012	17	NSW	SGS Economics and Planning	Comments on Implementation Plan – NSW Response	Exempt	Sections 47B and 47C
23	8/03/2012	17	NT	SGS Economics and Planning	Comments on Implementation Plan – NT Response	Exempt	Sections 47B and 47C
24	8/03/2012	17	Qld	SGS Economics and Planning	Comments on Implementation Plan – Qld Response	Exempt	Sections 47B and 47C
25	8/03/2012	2	SA	SGS Economics and Planning	Comments on Implementation Plan – SA Response	Exempt	Sections 47B and 47C
26	8/03/2012	1	Tas	SGS Economics and Planning	Comments on Implementation Plan – Tas Response	Exempt	Sections 47B and 47C
27	8/03/2012		Vic	SGS Economics and Planning	Comments on Implementation Plan – Vic Response	Exempt	Sections 47B and 47C
28	8/03/2012	2	WA	SGS Economics and Planning	Comments on Implementation Plan – WA Response	Exempt	Sections 47B and 47C
Part IV							
29	7/05/2010	1	Department of Infrastructure and Transport	NASAG Members	NASAG Agenda for meeting 7 May 2010	Release in full	

30	7/05/2010	4	Department of Infrastructure and Transport	NASAG Members	NASAG Minutes for meeting 7 May 2010	Release in full	
31	6/08/2010	1	Department of Infrastructure and Transport	NASAG Members	NASAG Agenda for meeting 6 August 2010	Release in full	
32	6/08/2010	7	Department of Infrastructure and Transport	NASAG Members	NASAG record of meeting 6 August 2010	Release in full	
33	27/10/2010	1	Department of Infrastructure and Transport	NASAG Members	NASAG Agenda for meeting 27 October 2010	Release in full	
34	27/10/2010	6	Department of Infrastructure and Transport	NASAG Members	NASAG record of meeting 27 October 2010	Release in full	
35	10/12/2010	1	Department of Infrastructure and Transport	NASAG Members	NASAG Agenda for meeting 10 December 2010	Release in full	
36	10/12/2010	10	Department of Infrastructure and Transport	NASAG Members	NASAG record of meeting 10 December 2010	Release in full	
37	18/03/2011	1	Department of Infrastructure and Transport	NASAG Members	NASAG Agenda for meeting 18 March 2011	Release in full	
38	18/03/2011	5	Department of Infrastructure and Transport	NASAG Members	NASAG record of meeting 18 March 2011	Release in full	
39	18/08/2011	1	Department of Infrastructure and Transport	NASAG Members	NASAG Agenda for meeting 18 August 2011	Release in full	
40	18/08/2011	6	Department of Infrastructure and Transport	NASAG Members	NASAG record of meeting 18 August 2011	Release in part	
41	16/11/2011	1	Department of Infrastructure and Transport	NASAG Members	NASAG Agenda for meeting 16 November 2011	Release in full	
42	16/11/2011	9	Department of	NASAG Members	NASAG record of meeting	Release in	Sections 47B

				Infrastructure and Transport		16 November 2011	part	and 47C
43	8/02/2012	1	Department of Infrastructure and Transport	NASAG Members		NASAG Agenda for meeting 8 February 2012	Release in full	
44	8/02/2012	7	Department of Infrastructure and Transport	NASAG Members		NASAG record of meeting 8 February 2012	Release in part (provided at document 5)	Sections 47B and 47C
45	20/04/2012	1	Department of Infrastructure and Transport	NASAG Members		NASAG Agenda for meeting 20 April 2012	Release in full	
46	20/04/2012	6	Department of Infrastructure and Transport	NASAG Members		NASAG record of meeting 20 April 2012	Release in part (provided at document 8)	Sections 47B and 47C
Part v								
47	28/11/2011	11	Department of Planning-NSW	Department of Infrastructure and Transport		NASAG Working Group Drafting Workshop	Exempt	Sections 47B and 47C
48	29/11/2011	2	Department of Infrastructure and Transport	Department of Planning		NASAG Working Group Drafting Workshop	Exempt	Sections 47B and 47C
49	29/11/2011	3	Department of Transport- Victoria	Department of Infrastructure and Transport		NASAG Working Group Drafting Workshop	Exempt	Sections 47B and 47C
50	5/12/2011	14	Department of Infrastructure and Transport	Department of Planning-NSW, Department of Transport and Main Roads -Qld, SA Government, ACT Government, Department of Planning & Community Development- Vic		NASAG Working Group Drafting Workshop	Exempt	Sections 47B and 47C
51	6/12/2011	14	SA Government	Department of Planning-NSW, Department of Transport and Main Roads -Qld, ACT Government, Department of Planning		NASAG Working Group Drafting Workshop	Exempt	Sections 47B and 47C

52	9/12/2011	1	Department of Infrastructure and Transport	and Community Development- Vic ACT Government	Follow up NASAG drafting	Exempt	Sections 47B and 47C
53	12/12/2011	2	Department of Planning- NSW	Department of Infrastructure and Transport	NASAG Working Group	Exempt	Sections 47B and 47C
54	12/12/2011	1	Department of Infrastructure and Transport	Department of Planning- NSW, Department of Transport and Main Roads -Qld, ACT Government	NASAG Working Group	Exempt	Sections 47B and 47C
55	9/12/2011	11	ACT Government	Department of Infrastructure and Transport	Follow up NASAG drafting	Exempt	Sections 47B and 47C
56	12/12/2011	2	Department of Infrastructure and Transport	Department of Planning- NSW	NASAG Working Group	Exempt	Sections 47B and 47C
57	16/12/2011	3	Department of Infrastructure and Transport	SA Government	NASAG Working Group	Exempt	Sections 47B and 47C
58	20/12/2011	3	Department of Transport and Main Roads -Qld	Department of Infrastructure and Transport	NASAG Working Group	Exempt	Sections 47B and 47C
59	3/01/2012	2	SA Government	Department of Infrastructure and Transport, Department of Planning- NSW, Department of Transport and Main Roads -Qld, ACT Government	NASAG Working Group	Exempt	Sections 47B and 47C
60	16/01/2012	3	Department of Infrastructure and Transport	Department of Planning- NSW, Department of Transport and Main Roads -Qld, ACT Government, Department of Planning and Community Development- Vic	NASAG Working Group	Exempt	Sections 47B and 47C

61	18/01/2012	16	Department of Infrastructure and Transport	Department of Planning- NSW, Department of Transport and Main Roads -Qld, SA Government, ACT Government, Department of Planning & Community Development- Vic	NASAG Working Group	Exempt	Sections 47B and 47C
62	20/01/2012	4	Department of Infrastructure and Transport	Department of Planning & Community Development- Vic	NASAG Working Group	Exempt	Sections 47B and 47C
63	24/01/2012	5	Department of Planning & Community Development- Vic	Department of Infrastructure and Transport	NASAG Working Group	Exempt	Sections 47B and 47C
64	24/01/2012	2	Department of Infrastructure and Transport	Department of Transport and Main Roads -Qld	NASAG Working Group – suggested edits to draft papers	Exempt	Sections 47B and 47C
65	24/01/2012	3	Department of Transport and Main Roads -Qld	Department of Infrastructure and Transport	NASAG Working Group – suggested edits to draft papers	Exempt	Sections 47B and 47C
Part vi							
No documents found.							
Part vii							
66	30/03/2012	13	N/A	N/A	Transport and Infrastructure Senior Officials' Committee – Draft Minutes of meeting 30 March 2012	Exempt	Section 47B



Schedule of relevant provisions in the FOI Act

3 Objects—general

- (1) The objects of this Act are to give the Australian community access to information held by the Government of the Commonwealth or the Government of Norfolk Island, by:
 - (a) requiring agencies to publish the information; and
 - (b) providing for a right of access to documents.
- (2) The Parliament intends, by these objects, to promote Australia's representative democracy by contributing towards the following:
 - (a) increasing public participation in Government processes, with a view to promoting better-informed decision-making;
 - (b) increasing scrutiny, discussion, comment and review of the Government's activities.
- (3) The Parliament also intends, by these objects, to increase recognition that information held by the Government is to be managed for public purposes, and is a national resource.
- (4) The Parliament also intends that functions and powers given by this Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost.

11 Right of access

- (1) Subject to this Act, every person has a legally enforceable right to obtain access in accordance with this Act to:
 - (a) a document of an agency, other than an exempt document; or
 - (b) an official document of a Minister, other than an exempt document.
- (2) Subject to this Act, a person's right of access is not affected by:
 - (a) any reasons the person gives for seeking access; or
 - (b) the agency's or Minister's belief as to what are his or her reasons for seeking access.

11A Access to documents on request

Scope

- (1) This section applies if:
 - (a) a request is made by a person, in accordance with subsection 15(2), to an agency or Minister for access to:
 - (i) a document of the agency; or
 - (ii) an official document of the Minister; and
 - (b) any charge that, under the regulations, is required to be paid before access is given has been paid.
- (2) This section applies subject to this Act.

- Note: Other provisions of this Act are relevant to decisions about access to documents, for example the following:
- (a) section 12 (documents otherwise available);
 - (b) section 13 (documents in national institutions);
 - (c) section 15A (personnel records);
 - (d) section 22 (access to edited copies with exempt or irrelevant matter deleted).

Mandatory access—general rule

- (3) The agency or Minister must give the person access to the document in accordance with this Act, subject to this section.

Exemptions and conditional exemptions

- (4) The agency or Minister is not required by this Act to give the person access to the document at a particular time if, at that time, the document is an exempt document.

Note: Access may be given to an exempt document apart from under this Act, whether or not in response to a request (see section 3A (objects—information or documents otherwise accessible)).

- (5) The agency or Minister must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.

Note 1: Division 3 of Part IV provides for when a document is conditionally exempt.

Note 2: A conditionally exempt document is an exempt document if access to the document would, on balance, be contrary to the public interest (see section 31B (exempt documents for the purposes of Part IV)).

Note 3: Section 11B deals with when it is contrary to the public interest to give a person access to the document.

- (6) Despite subsection (5), the agency or Minister is not required to give access to the document at a particular time if, at that time, the document is both:

- (a) a conditionally exempt document; and
- (b) an exempt document:
 - (i) under Division 2 of Part IV (exemptions); or
 - (ii) within the meaning of paragraph (b) or (c) of the definition of **exempt document** in subsection 4(1).

23 Decisions to be made by authorised persons

- (1) Subject to subsection (2), a decision in respect of a request made to an agency may be made, on behalf of the agency, by the responsible Minister or the principal officer of the agency or, subject to the regulations, by an officer of the agency acting within the scope of authority exercisable by him or her in accordance with arrangements approved by the responsible Minister or the principal officer of the agency.
- (2) A decision in respect of a request made to a court, or made to a tribunal, authority or body that is specified in Schedule 1, may be made on behalf of that court, tribunal, authority or body by the principal officer of that court, tribunal, authority or body or, subject to the regulations, by an officer of that court, tribunal, authority or body acting within the scope of authority exercisable by him or her in accordance with arrangements approved by the principal officer of that court, tribunal, authority or body.

26 Reasons and other particulars of decisions to be given

- (1) Where, in relation to a request, a decision is made relating to a refusal to grant access to a document in accordance with the request or deferring provision of access to a document, the decision-maker shall cause the applicant to be given notice in writing of the decision, and the notice shall:

- (a) state the findings on any material questions of fact, referring to the material on which those findings were based, and state the reasons for the decision; and
- (aa) in the case of a decision to refuse to give access to a conditionally exempt document—include in those reasons the public interest factors taken into account in making the decision; and

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).

- (b) where the decision relates to a document of an agency, state the name and designation of the person giving the decision; and
 - (c) give to the applicant appropriate information concerning:
 - (i) his or her rights with respect to review of the decision;
 - (ii) his or her rights to make a complaint to the Information Commissioner in relation to the decision; and
 - (iii) the procedure for the exercise of the rights referred to in subparagraphs (i) and (ii); including (where applicable) particulars of the manner in which an application for internal review (Part VI) and IC review (Part VII) may be made.
- (1A) Section 13 of the *Administrative Decisions (Judicial Review) Act 1977* does not apply to a decision referred to in subsection (1).
- (2) A notice under this section is not required to contain any matter that is of such a nature that its inclusion in a document of an agency would cause that document to be an exempt document.

(see section 11A).

47B Public interest conditional exemptions—Commonwealth-State relations etc.

A document is conditionally exempt if disclosure of the document under this Act:

- (a) would, or could reasonably be expected to, cause damage to relations between the Commonwealth and a State; or
- (b) would divulge information or matter communicated in confidence by or on behalf of the Government of a State or an authority of a State, to the Government of the Commonwealth, to an authority of the Commonwealth or to a person receiving the communication on behalf of the Commonwealth or of an authority of the Commonwealth; or
- (c) would, or could reasonably be expected to, cause damage to relations between the Commonwealth and Norfolk Island; or
- (d) would divulge information or matter communicated in confidence by or on behalf of the Government of Norfolk Island or an authority of Norfolk Island, to the Government of the Commonwealth, to an authority of the Commonwealth or to a person receiving the communication on behalf of the Commonwealth or an authority of the Commonwealth; or
- (e) would, or could reasonably be expected to, cause damage to relations between Norfolk Island and a State; or
- (f) would divulge information or matter communicated in confidence by or on behalf of the Government of a State or an authority of a State, to the Government of Norfolk Island, to

an authority of Norfolk Island or to a person receiving the communication on behalf of Norfolk Island or of an authority of Norfolk Island.

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).

47C Public interest conditional exemptions—deliberative processes

General rule

- (1) A document is conditionally exempt if its disclosure under this Act would disclose matter (***deliberative matter***) in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of:
- (a) an agency; or
 - (b) a Minister; or
 - (c) the Government of the Commonwealth; or
 - (d) the Government of Norfolk Island.

Exceptions

- (2) Deliberative matter does not include either of the following:
- (a) operational information (see section 8A);
 - (b) purely factual material.

Note: An agency must publish its operational information (see section 8).

- (3) This section does not apply to any of the following:
- (a) reports (including reports concerning the results of studies, surveys or tests) of scientific or technical experts, whether employed within an agency or not, including reports expressing the opinions of such experts on scientific or technical matters;
 - (b) reports of a body or organisation, prescribed by the regulations, that is established within an agency;
 - (c) the record of, or a formal statement of the reasons for, a final decision given in the exercise of a power or of an adjudicative function.

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).



Australian Government

Department of Infrastructure and Transport

FOI

Statement of reasons made under the *Freedom of Information Act 1982*

Decision and reason for decision of David Williamson, Executive Director, Policy and Research

Applicant:

Decision date: **October 2012**

FOI reference number: **13-07**

Documents: **Ernst & Young Report on the Dedicated Freight Infrastructure Project**

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Dear Mr Parnell,

Freedom of information request no. 13-07

The purpose of this letter is to give you a decision about access to documents that you requested under the *Freedom of Information Act 1982* (the FOI Act).

Summary

1. I have made a decision not to release the documents subject to your request.
2. I have made a decision not to impose charges.

Authority to make this decision

3. I, David Williamson, Executive Director, Policy and Research, am an officer authorised by the Secretary of the Department of Infrastructure and Transport (the Department) to make decisions about access to documents in the possession of the Department in accordance with Section 23(1) of the FOI Act.

Background

4. On 13 September 2012 you made a request for access to documents in the possession of the Department of Infrastructure and Transport (the Department). Your request sought access to:

"the Ernst and Young report provided under CN643891 in relation to the Dedicated Freight Infrastructure Project."

Documents subject to this request

5. I have undertaken a search of the Department's records and identified two (2) documents which fall within the scope of your request, as set out above.
6. The documents subject to your request are listed in the schedule of documents at Schedule 2. The schedule of documents provides a description of each document that falls within the scope of your request and the access decision for each of those documents.
7. In February 2012, the Department appointed consultants Ernst and Young to compile a report on the dedicated freight infrastructure project. The research for the report has been split into two stages.
8. Stage 1 is a scoping study and the draft stage 1 report has been submitted by Ernst and Young to the Department for comment. Stage 2 involves case studies which are currently in the process of being undertaken. The participating States have not yet had the opportunity to comment on the preliminary material and the Department has not finalised its views on the draft. The report is expected to be finalised in 2013.

Decision

9. I have made a decision not to release any documents subject to your request pursuant to sections 47C (Deliberative processes) and 47B (Commonwealth – State relations) with the reasons for my decisions as follows.

Reasons for decision

10. In accordance with Section 26(1)(a) of the FOI Act, the findings on any material question of fact, referring to the material on which those finding were based and the reasons for my decision to refuse access to documents follow.
11. In making my decision, I had regard to Sections 3, 11 and 11A of the FOI Act which give the Australian community a legally enforceable right to obtain access to information held by the Government of the Commonwealth. I also considered the following provisions of the FOI Act relevant to my decision:
 - Section 47C (Deliberative processes)
 - Section 47B (Commonwealth – State relations)
12. A full extract of all provisions I have used to make my decision are provided in Schedule 3.

Deliberative process documents

Documents –1 and 2

13. I have decided to conditionally exempt documents 1 and 2 in their entirety pursuant to subsection 47C (1) of the FOI Act. Section 47C(1) provides an exemption for opinions, advice or recommendations that have been obtained, prepared or recorded, or consultations or deliberations that have taken place, in the course of, or for the purposes of, a deliberative process of the agency or a minister.
14. Documents 1 and 2 comprise draft or preliminary reports and case studies that contain opinions, advice or recommendations which have been obtained and prepared for the purposes of, the processes of the Department. I have, therefore, decided that the information is conditionally exempt in accordance with Section 47C.

Public Interest Test

15. After coming to the conclusion that the documents are conditionally exempt in accordance with Section 47C, I considered the Public Interest Test (Section 11A(5)). I have considered whether access to the documents would, on balance, be contrary to the public interest. Firstly, I considered the following factors favouring access, specifically, that disclosure would:
 - (a) promote the objects of the FOI Act;
16. I have considered this factor, and agree that the objects of the Act should be promoted.
17. Secondly, I considered the following factors against disclosure, specifically, that disclosure could:
 - (a) reasonably be expected to prejudice the management function of an agency;
 - (b) reasonably be expected to prejudice an agency's ability to obtain similar information in the future; and
 - (c) reasonably be expected to adversely affect ongoing negotiations between the Commonwealth and the States and adversely affect completion of Stage 2 of the dedicated freight infrastructure project.
18. I am satisfied that the disclosure of these preliminary and unfinished reports could reasonably be expected to prejudice the management and functioning of the Department's ongoing research and policy formulation. The documents in issue contain deliberations and discussions which have not

been fully considered or finalised by officials and, as discussed above, the State Governments involved have not yet had a chance to comment on the material in the draft documents.

19. I consider that the release of these unfinished documents could potentially undermine the cooperative working partnerships that currently exist between the Commonwealth and State Governments as well as the external provider- and the deliberations underway. I am of the opinion that releasing these draft documents at this point would also have a detrimental effect on the timely completion of the project.
20. Finally, I have weighed the factors to determine where the public interest lies. I have decided that access to the documents, would, on balance, be contrary to the public interest. The provision of information to the Commonwealth is a vital component to the successful operation of the Department's functions, and the factors favouring access are not overriding considerations in this instance.
21. Accordingly, I am satisfied that the documents are exempt under section 47C(1) and that disclosure would be contrary to the public interest.

***Commonwealth-State relations
Documents –1 and 2***

22. I have decided to conditionally exempt documents 1 and 2 in their entirety pursuant to section 47B of the FOI Act.
23. Section 47B creates a conditional exemption where disclosure of a document either:
 - would, or could reasonably be expected to, cause damage to relations between the Commonwealth and a State (s 47B(a)), or
 - would divulge information or matter communicated in confidence by or on behalf of the Government of a State or an authority of a State, to the Commonwealth, to an authority of the Commonwealth or to a person receiving the communication on behalf of the Commonwealth (s 47B(b)).
24. For the purposes of this exemption, a State includes the Australian Capital Territory and the Northern Territory (Section 4(1)).
25. The documents include draft and preliminary reports as well as correspondence with an external organisation which include opinions, options and discussions regarding dedicated freight infrastructure for Australian container ports. The documents include input from a variety of external sources including several State Governments. The content contained within the documents has not been confirmed or finalised with the relevant Government officials, who have not commented on the draft documents as yet and a final report has not been completed.
26. I consider that if these draft documents were released, it could reasonably be expected to damage the working relationship between the Commonwealth and the State governments. Specifically, I believe that disclosure of this material may:
 - impair or prejudice the future flow of information such as the Commonwealth's ability to access State Governments statistical databases;
 - adversely affect existing relationships between the Commonwealth and the States;
 - create difficulty in ongoing discussions between the Commonwealth and the States pertaining to the development of future research work; and
 - adversely affect ongoing discussions between the Commonwealth and the States on the dedicated freight infrastructure project.

27. Accordingly, I am satisfied that the documents fall within the scope of the conditional exemption for Commonwealth-State relations (section 47B). Under the FOI Act, access to a document covered by a conditional exemption must be given unless it would be contrary to the public interest.

Public Interest Test

28. After coming to the conclusion that the documents listed are conditionally exempt in accordance with Section 47B, I considered the Public Interest Test (Section 11A(5)). I have considered whether access to these documents would, on balance, be contrary to the public interest.
29. Firstly, I considered the following factors favouring access, specifically, that disclosure would:
- (a) promote the objects of the FOI Act.
30. I have considered this factor, and agree that the objects of the Act should be promoted.
31. Secondly, I considered the following factors against disclosure, specifically, that disclosure could:
- (a) reasonably be expected to damage Commonwealth-State relations;
 - (b) reasonably expected to prejudice the department's ability to obtain confidential information;
 - (c) reasonably expected to prejudice the department's ability to obtain similar information in the future; and
 - (d) impair or prejudice the future flow of information to the Commonwealth
33. I have weighed the factors for and against disclosure to determine where the public interest lies. I have decided that access to the documents would, on balance, be contrary to the public interest. As discussed above, the information in these documents is of a nature that it is likely to damage relations with the States. In addition, it may also cause these State Governments to limit or decrease the amount of information and/or cooperation supplied to the Commonwealth Government for this ongoing project, as well as future work.
33. Accordingly, I am satisfied that the documents are exempt under section 47B and that disclosure would be contrary to the public interest.

Your rights of review

34. If you disagree with your FOI decision, you can ask for the decision to be reviewed. There are two ways you can ask for review of a decision: internal review by the Department, and external review by the Office of the Australian Information Commissioner (OAIC).
35. You can ask the Department to review its decision in relation to access to documents. There is no charge for internal review. You must apply within 30 days of being notified of the decision, unless the Department extends the application time. You should contact the Department if you wish to seek an extension. The Department must make a review decision within 30 days. If it does not do so, its original decision is considered to be affirmed. The review will be carried out by a different

departmental officer, usually someone at a more senior level. You must apply in writing and you can lodge your application in one of the following ways:

Post: FOI Coordinator
Department of Infrastructure and Transport
GPO Box 594
Canberra ACT 2601
Fax: +61 2 6247 1347
Email: FOI@infrastructure.gov.au

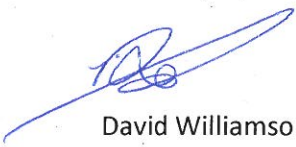
36. You can ask the OAIC to review the Department's decision in relation to access to documents. The Information Commissioner is an independent office holder who can review the decisions of agencies and ministers under the FOI Act. The Information Commissioner also investigates complaints about agency actions under the FOI Act. However, if you are complaining that the Department's decision is wrong, it will be treated as an application for a review. You do not need to seek an internal review from the Department before seeking review by the Information Commissioner. However, going through the Department's internal review process gives the Department the opportunity to reconsider its initial decision, and your needs may be met more quickly without undergoing an external review process. The Information Commissioner's review is free. You must apply to the Information Commissioner within 60 days of being given notice of the decision. You can ask the Information Commissioner for an extension of time to apply, and this may be granted if the Information Commissioner considers it is reasonable in the circumstances. You must apply in writing and you can lodge your application in one of the following ways:

Online: www.oaic.gov.au
Post: GPO Box 2999
Canberra ACT 2601
Fax: +61 2 9284 9666
Email: enquiries@oaic.gov.au
In person: Level 3
25 National Circuit
Forrest, ACT; or at
Level 8, Piccadilly Tower
133 Castlereagh Street
Sydney, NSW

More information about Information Commissioner Reviews is available from
[http://www.oaic.gov.au/publications/FOI fact sheet12 your review rights.html](http://www.oaic.gov.au/publications/FOI%20fact%20sheet12%20your%20review%20rights.html).

Contacts

37. If you wish to discuss this FOI decision, please contact the Department's FOI coordinator on (02) 6274 7844 or via email at foi@infrastructure.gov.au



David Williamson
Executive Director
Policy and Research

9 October 2012



Australian Government

Department of Infrastructure and Transport

FOI

Schedule 1

Schedule of documents

Applicant:

Decision date: October 2012

FOI reference number: 13-07

Documents:

Ernst & Young Report on the Dedicated Freight Infrastructure Project

Document reference	Author	Recipient	Document description	Decision	Exemption Provision
1	Ernst and Young	Department of Infrastructure and Transport	Stage 1 draft	Exempt in full	S47B & 47C
2	Ernst and Young	Department of Infrastructure and Transport	Stage 2 – Preliminary draft case study	Exempt in full	S47B & 47C



Schedule of relevant provisions in the FOI Act

3 Objects—general

- (1) The objects of this Act are to give the Australian community access to information held by the Government of the Commonwealth or the Government of Norfolk Island, by:
 - (a) requiring agencies to publish the information; and
 - (b) providing for a right of access to documents.
- (2) The Parliament intends, by these objects, to promote Australia's representative democracy by contributing towards the following:
 - (a) increasing public participation in Government processes, with a view to promoting better-informed decision-making;
 - (b) increasing scrutiny, discussion, comment and review of the Government's activities.
- (3) The Parliament also intends, by these objects, to increase recognition that information held by the Government is to be managed for public purposes, and is a national resource.
- (4) The Parliament also intends that functions and powers given by this Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost.

11 Right of access

- (1) Subject to this Act, every person has a legally enforceable right to obtain access in accordance with this Act to:
 - (a) a document of an agency, other than an exempt document; or
 - (b) an official document of a Minister, other than an exempt document.
- (2) Subject to this Act, a person's right of access is not affected by:
 - (a) any reasons the person gives for seeking access; or
 - (b) the agency's or Minister's belief as to what are his or her reasons for seeking access.

11A Access to documents on request

Scope

- (1) This section applies if:
 - (a) a request is made by a person, in accordance with subsection 15(2), to an agency or Minister for access to:
 - (i) a document of the agency; or
 - (ii) an official document of the Minister; and
 - (b) any charge that, under the regulations, is required to be paid before access is given has been paid.
- (2) This section applies subject to this Act.

- Note: Other provisions of this Act are relevant to decisions about access to documents, for example the following:
- (a) section 12 (documents otherwise available);
 - (b) section 13 (documents in national institutions);
 - (c) section 15A (personnel records);
 - (d) section 22 (access to edited copies with exempt or irrelevant matter deleted).

Mandatory access—general rule

- (3) The agency or Minister must give the person access to the document in accordance with this Act, subject to this section.

Exemptions and conditional exemptions

- (4) The agency or Minister is not required by this Act to give the person access to the document at a particular time if, at that time, the document is an exempt document.

Note: Access may be given to an exempt document apart from under this Act, whether or not in response to a request (see section 3A (objects—information or documents otherwise accessible)).

- (5) The agency or Minister must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.

Note 1: Division 3 of Part IV provides for when a document is conditionally exempt.

Note 2: A conditionally exempt document is an exempt document if access to the document would, on balance, be contrary to the public interest (see section 31B (exempt documents for the purposes of Part IV)).

Note 3: Section 11B deals with when it is contrary to the public interest to give a person access to the document.

- (6) Despite subsection (5), the agency or Minister is not required to give access to the document at a particular time if, at that time, the document is both:
- (a) a conditionally exempt document; and
 - (b) an exempt document:
 - (i) under Division 2 of Part IV (exemptions); or
 - (ii) within the meaning of paragraph (b) or (c) of the definition of **exempt document** in subsection 4(1).

23 Decisions to be made by authorised persons

- (1) Subject to subsection (2), a decision in respect of a request made to an agency may be made, on behalf of the agency, by the responsible Minister or the principal officer of the agency or, subject to the regulations, by an officer of the agency acting within the scope of authority exercisable by him or her in accordance with arrangements approved by the responsible Minister or the principal officer of the agency.
- (2) A decision in respect of a request made to a court, or made to a tribunal, authority or body that is specified in Schedule 1, may be made on behalf of that court, tribunal, authority or body by the principal officer of that court, tribunal, authority or body or, subject to the regulations, by an officer of that court, tribunal, authority or body acting within the scope of authority exercisable by him or her in accordance with arrangements approved by the principal officer of that court, tribunal, authority or body.

26 Reasons and other particulars of decisions to be given

(1) Where, in relation to a request, a decision is made relating to a refusal to grant access to a document in accordance with the request or deferring provision of access to a document, the decision-maker shall cause the applicant to be given notice in writing of the decision, and the notice shall:

- (a) state the findings on any material questions of fact, referring to the material on which those findings were based, and state the reasons for the decision; and
- (aa) in the case of a decision to refuse to give access to a conditionally exempt document—include in those reasons the public interest factors taken into account in making the decision; and

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).

- (b) where the decision relates to a document of an agency, state the name and designation of the person giving the decision; and
- (c) give to the applicant appropriate information concerning:
 - (i) his or her rights with respect to review of the decision;
 - (ii) his or her rights to make a complaint to the Information Commissioner in relation to the decision; and
 - (iii) the procedure for the exercise of the rights referred to in subparagraphs (i) and (ii); including (where applicable) particulars of the manner in which an application for internal review (Part VI) and IC review (Part VII) may be made.

(1A) Section 13 of the *Administrative Decisions (Judicial Review) Act 1977* does not apply to a decision referred to in subsection (1).

(2) A notice under this section is not required to contain any matter that is of such a nature that its inclusion in a document of an agency would cause that document to be an exempt document.

(see section 11A).

47B Public interest conditional exemptions—Commonwealth-State relations

A document is conditionally exempt if disclosure of the document under this Act:

- (a) would, or could reasonably be expected to, cause damage to relations between the Commonwealth and a State; or
- (b) would divulge information or matter communicated in confidence by or on behalf of the Government of a State or an authority of a State, to the Government of the Commonwealth, to an authority of the Commonwealth or to a person receiving the communication on behalf of the Commonwealth or of an authority of the Commonwealth.

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).

47C Public interest conditional exemptions—deliberative processes

General rule

(1) A document is conditionally exempt if its disclosure under this Act would disclose matter (***deliberative matter***) in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of an agency or Minister or of the Government of the Commonwealth.

Exceptions

(2) Deliberative matter does not include either of the following:

- (a) operational information (see section 8A);
- (b) purely factual material.

Note: An agency must publish its operational information (see section 8).

(3) This section does not apply to any of the following:

- (a) reports (including reports concerning the results of studies, surveys or tests) of scientific or technical experts, whether employed within an agency or not, including reports expressing the opinions of such experts on scientific or technical matters;
- (b) reports of a body or organisation, prescribed by the regulations, that is established within an agency;
- (c) the record of, or a formal statement of the reasons for, a final decision given in the exercise of a power or of an adjudicative function.

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).