

Factsheet: Internal Audit Documents and FOI

Background

Freedom of information (FOI) is a right of citizens to request access to government-held information including information the government holds about a person or about government policies and decisions.

Many internal auditors work in government departments and agencies subject to various access to information statutes. The documents produced by internal auditors – such as audit reports, interview transcripts, emails and other materials – are subject to freedom of information legislation. If an applicant seeks access to audit documents, the documents must be disclosed unless an exemption applies under the relevant freedom of information legislation.

Australian Government agencies are subject to the 'Freedom of Information Act 1982' (Act). Corresponding legislation exists in each Australian jurisdiction, with differing degrees of variation. Examples in this document are based on the Australian Government legislation.

The Australian Information Commissioner is the independent national regulator for freedom of information and privacy and is responsible for the Office of the Australian Information Commissioner (OAIC) which promotes and upholds people's rights to access government-held information and have personal information protected. The Australian Information Commissioner is also the Privacy Commissioner

What is an Internal Audit Document?

In the course of their role, internal auditors work across all areas of an organisation. In addition to the core areas of financial control and ICT, they review tangible aspects of business operations such as an organisation's supply chain or ICT systems, as well as more intangible aspects such as organisational culture and ethics. In fact, any system that has an impact on the effective operation of an organisation may be included in internal audit's scope.

Case law has recognised that:

...the term 'audit' carries the connotation of a systemic, broad ranging examination of specified activities of the organisation the subject of the audit. While the expression is most commonly used in connection with the conduct of audits of the financial affairs and operations of an organisation, it is now often used to describe examinations of non-financial aspects of an organisation's activities, for

example the level of compliance of the organisation with regulatory standards or best practice standards (a form of audit sometimes called a compliance audit or quality audit).¹

Internal audit ordinarily would meet this threshold, so exemptions available for audit operations may be applicable to internal audit work. However, a document will not necessarily meet the definition just because it is called an 'audit report' or has been prepared by an organisation's internal audit function.

Conditional Exemptions

A range of possible exemptions to release are listed in the Act. Certain classes of document are afforded 'conditional exemption' but the Act also states:

Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest.

For internal audit documents, the most relevant exemption is contained in section 47E 'Public interest conditional exemptions – certain operations of agencies' of the Act. This section relates to disclosure which would prejudice effectiveness of procedures or have a substantial adverse effect on the operation of an agency. There are also provisions that relate to disclosure of personal information (section 47F 'Public interest conditional exemptions – personal privacy') or of the business or professional affairs of a third party (47G 'Public interest conditional exemptions – business').

Two thresholds must be crossed in order to satisfy the exemption under section 47E. Firstly, that disclosure of the relevant document could reasonably be expected to have one of the following effects:

- › To prejudice the effectiveness of methods or procedures for conducting internal audits; or
- › To prejudice the attainment of the objects of a particular audit; or
- › To have a substantial adverse effect on the proper and efficient conduct of the relevant agency's operations.

Once the above threshold is met, the second threshold is that disclosure 'would, on balance, be contrary to the public interest'.

¹ Challita v NSW Department of Education and Training [2010] NSWADT 175

The 'Public Interest Test'

In the Act there is a presumption that disclosure of conditionally exempt information is in the public interest unless other public interest considerations against disclosure outweigh those in favour.

The test works by balancing competing considerations, followed by a decision about where the balance lies:

- › The Act sets out several considerations in favour of disclosure including promoting the objects of the Act, informing debate on matters of public importance, and promoting effective oversight of public expenditure (section 11B(3) 'Public interest exemptions – factors').
- › The guidelines issued by the Information Commissioner also list several factors favouring disclosure including revealing or substantiating that an agency or official has engaged in misconduct, or in negligent, improper or unlawful conduct.
- › The Act lists no factors weighing against disclosure – these will only be apparent in the circumstances of the particular document.

Caveats and Disclaimers

Many internal audit reports carry disclaimers, caveats or warnings against third party reliance. These statements do not change the situation in relation to disclosure. They may, however, provide context for readers of the report and reduce the likelihood of the contents being misinterpreted.

Conclusion

There is no 'blanket' exemption for internal audit documents or reports. Each document must be considered on its individual content and particular circumstances. Case law from various jurisdictions has provided some considerations in determining whether information should be released including:

- › Whether the disclosure would prejudice the effectiveness of the audit process for example if staff would be less forthright with auditors if the information they provided was to be made public²
- › The extent to which an agency's functions are overseen by an external body such as the Ombudsman or the Audit Office (external auditor), or in an agency that adheres to the 'International Standards for the Professional Practice of Internal Auditing', the level of external scrutiny afforded by audit committee activity may factor against disclosure³; and
- › Whether there is a risk of prejudicing the agency's ability to obtain information in similar circumstances in the future⁴.

Disclaimer

This document has been prepared to assist internal auditors in understanding how disclosure exemptions may operate under the Act. It provides guidance about the tests which will be applied, as well as public interest arguments referred to in case law. This document is a guide, not legal advice, and should not be relied upon in making formal decisions.

Useful References

Administrative Decisions Tribunal of New South Wales, 2010. *Challita v NSW Department of Education and Training* [2010] NSWADT 175. [Online]

Available at: <http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWADT/2010/175.html>

Office of the Australian Information Commissioner, 2022. *FOI Guidelines*. [Online]

Available at: https://www.oaic.gov.au/_data/assets/pdf_file/0016/12283/D2022-002698-foi-guidelines-combined-February-2022.pdf



2 *Challita v NSW Department of Education and Training* [2010] NSWADT 175

3 *Challita v NSW Department of Education and Training* [2010] NSWADT 175

4 *Re Bennet and Chief Executive Officer of Customs* (2005) 89 ALD 370