IN-HOUSE COUNSEL DAY

THURSDAY, 5 MARCH 2026

NATIONAL ARBORETUM, CANBERRA

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NATIONAL ARBORETUM, CANBERRA

Session 3

PROTECTING SENSITIVE COMMONWEALTH DOCUMENTS

PRESENTED BY

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Overview

Part A – Commonwealth sensitive data and documents

1. What are sensitive Commonwealth Government data and documents?
2. Why do they need protection?

Part B – Common Protections

1. How are they protected?
2. Administrative protections
3. Legal protections

Part C – Litigation

1. Obligation to disclose
2. Strategies for protecting sensitive data/documents

Part D – Freedom of information act

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A1 - What is sensitive Commonwealth data?

All Australian Government information held by Australian Government Departments and Agencies

Information which the unauthorised disclosure, misuse, or loss can cause harm to individuals, government operations, national security and public trust

Information that is security-classified information (e.g., PROTECTED, SECRET, TOP SECRET); and OFFICIAL and sensitive information; which may not be classified but still requires controlled handling.

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A2 -Why does it need protection?

- Contains personal and confidential information (*Privacy Act 1988)*
- Supports critical government functions
- May involve national security or infrastructure information
- Could affect the operation of a law enforcement or intelligence agency
- Legally protected as a Commonwealth record
- Subject to strong data security and compliance controls

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B1 – How is it protected

Administrative protections

- Australian Government Protective Security Policy Framework (**PSPF**)

Statutory protections

- Evidence Act 1930 (Cth) - s130
- National Security Information (Criminal and Civil Proceedings) Act 2004
- National Security Information (Criminal and Civil Proceedings) Regulations 2015
- Parliamentary Privileges Act 1987 / Australian Constitution (s49)

Common law doctrine

- Public interest Immunity

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B2 – Administrative Protections

Protective Security Policy Framework

- The *Directive of the security of Government Business* established the PSPF as Australian Government Policy
- The PSPF provides direction and guidance for the Accountable Authorities of Australian Government entities
- Contains mandatory requirements that entities must implement to achieve minimum protective security standards

The Protective security policy framework prescribes what Australian Government entities must do to protect their people, information and resources, both domestically and internationally.

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B2 – Administrative Protections

Who does the PSPF apply to?

- Non-corporate Commonwealth entities must apply the PSPF pursuant to s21 of the *Public Governance, Performance and Accountability Act 2013* (**PGPA Act**)
- Corporate Commonwealth entities and wholly –owned Commonwealth are recommended to adopt PSPF as best practice
- Those working within, and for, the Australian Government, including APS employees, third-party service providers and contracted staff.
- Service providers that provide services to Australian Government entities or are required to implement the PSPF according to relevant deeds or agreements.

B2 – Administrative Protections

The PSPF uses four security classifications:

TOP SECRET

Information whose unauthorised disclosure could cause exceptionally grave damage to the national interest, national security, or international relations

SECRET

Information whose unauthorised disclosure could cause exceptionally grave damage to the national interest, national security, or international relations

PROTECTED

Information where unauthorised disclosure could cause damage to the national interest, organisations, or individuals.

OFFICIAL: Sensitive

Information where unauthorised disclosure could cause damage to an individual, organisation or government.

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B2 – Administrative Protections

- All other information from business operations and services requires a routine level of protection and is treated as OFFICIAL
- Official information is all information created, sent or received as part of the work of the Australian Government.
- Official information is a record and provides evidence of what an entity has done and why.

- Information that does not form part of official duty is treated as UNOFFICIAL
- Assessed as having no business impact if released

OFFICIAL and UNOFFICIAL are not security classifications and are not mandatory markings

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B2 – Administrative Protections

Table 3: Potential Damage of Compromise of Information's Confidentiality

	TOP SECRET	SECRET	PROTECTED	OFFICIAL: SENSITIVE	OFFICIAL	UNOFFICIAL
Business Impact level	5 – Catastrophic business impact	4 – Extreme business impact	3 – High business impact	2 – Low to medium business impact	1 – Low business impact	No business impact
Expected level of damage	Exceptionally grave damage to the national interest, organisations or individuals.	Serious damage to the national interest, organisations or individuals.	Damage to the national interest, organisations or individuals.	Limited damage to an individual, organisation or government generally if compromised.	No or insignificant damage. This is the majority of routine information.	No damage. This information does not form part of official duty.

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B 2 – Administrative Protections

	TOP SECRET	SECRET	PROTECTED	OFFICIAL: SENSITIVE	OFFICIAL
Text-based marking	Documents: Yes. Recommended application: Centre top and centre bottom of each page; capitals, bold text, large fonts, and distinctive colour (red preferred).	Documents: Yes. Recommended application: Centre top and centre bottom of each page; capitals, bold text, large fonts and distinctive colour (red preferred).	Documents: Yes Recommended application Centre top and centre bottom of each page; capitals, bold text, large fonts and distinctive colour (red preferred).	Documents: Yes. Recommended application: Centre top and centre bottom of each page; capitals, bold text, large fonts and distinctive colour (red preferred).	Documents: Optional. Recommended application: Centre top and centre bottom of each page; capitals, bold text, large fonts and distinctive colour (red preferred).
Alternative marking	Colour-based marking (red preferred) or apply entity's marking scheme.	Colour-based marking (salmon pink preferred) or apply entity's marking scheme.	Colour-based marking (blue preferred) or apply entity's marking scheme.	Colour-based marking (yellow preferred) or apply entity's marking scheme.	Colour-based marking (grey preferred) or apply entity's marking scheme.
Paragraph marking	Optional. (TOP SECRET) or abbreviated to (TS)	Optional. (SECRET) or abbreviated to (S).	Optional. (PROTECTED) or abbreviated to (P).	Optional. (OFFICIAL: Sensitive) or abbreviated to (O:S).	Optional. (OFFICIAL) or abbreviated to (O).
Access control	Need-to-know principle: Yes. Security clearance: NV2 (minimum). Temporary access: NV1 (minimum), supervised.	Need-to-know principle: Yes. Security clearance: NV1 (minimum). Temporary access: Supervised.	Need-to-know principle: Yes Security clearance: Baseline (minimum) Temporary access: Supervised	Need-to-know principle: Yes. Security clearance: Nil, employment screening only for entity personnel. Agreement or arrangement for non-government stakeholders[2].	Need-to-know principle: Recommended Security clearance: Nil, employment screening only for entity personnel. *Access controls N/A if information approved for public release.*

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B2 – Administrative Protections

Classifying Commonwealth documents

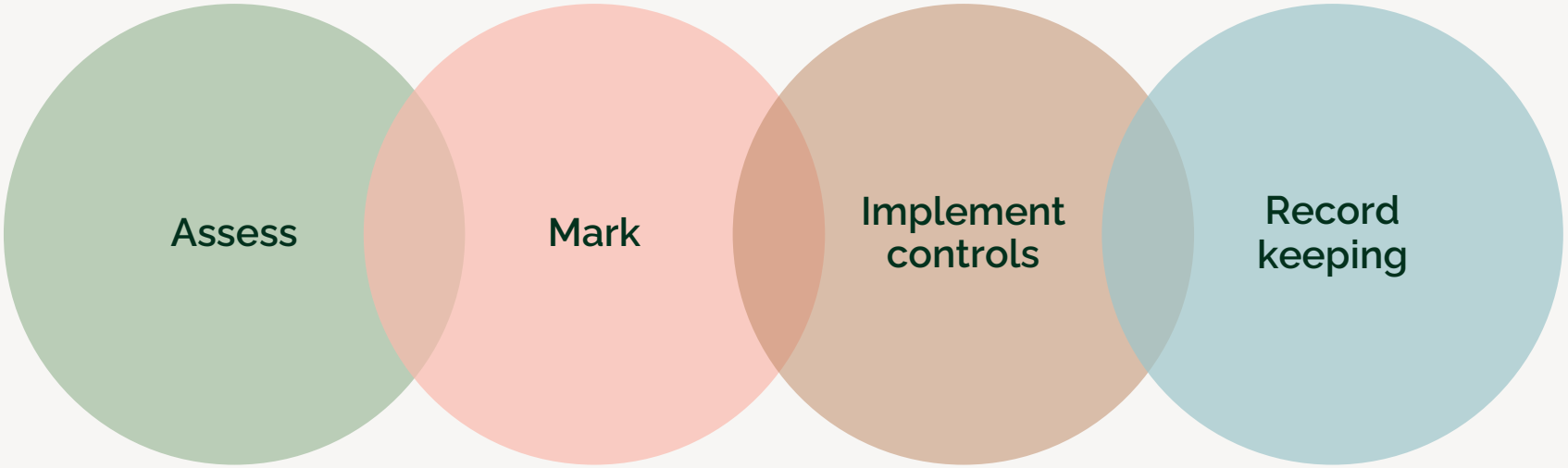
- Official information is all information created, sent or received as part of the work of the Australian Government.
- It is a record and provides evidence of what an entity has done and why.
- It requires an appropriate degree of protection as information (and assets holding information) are subject to both intentional and accidental threats.
- A security classification is determined and applied by the Originator

B2 – Administrative Protections

- The Originator is:
    - the entity that initially generated the information; or
    - first received the unmarked information from outside the Australian Government; and
    - assessed the value, importance or sensitivity of the information by considering the potential damage that would arise if the information's confidentiality was compromised; and assigned the corresponding protective marking or security classification.

B2 – Administrative Protections

Classification process



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B3- Legal protections

Legal protections unique to the Commonwealth

- *Evidence Act 1995* (Cth) (section 130)
- Common law doctrine (public interest immunity)
- *National Security Information (Criminal and Civil Proceedings) Act 2004*
- *National Security Information (Criminal and Civil Proceedings) Regulations 2015*
- *Parliamentary Privileges Act 1987* / Australian Constitution (s49)

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B3- Legal protections

Public Interest Immunity

- Public interest immunity is a doctrine recognised in both the common law and statute (s 130 of the Evidence Act)
- It allows a Court to withhold evidence if secrecy or confidentiality outweighs the competing public interest in admitting the evidence
- It requires the court to conduct a balancing exercise, weighing the harm disclosure may cause to Government, national security, or public administration, against the importance of the information to the administration of justice.

B3- Legal protections

. ***Sankey v Whitlam* (1975) 142 CLR 1**

- Widely regarded as the leading High Court authority on public interest immunity in Australia.
- Established the conventional test for public interest immunity that a document will be immune from disclosure if the public interest in keeping the document confidential outweighs the public interest in disclosing it.
- Requires the Court to balance the competing public interests:
    - in maintaining confidentiality to protect government functioning, and
    - in the administration of justice, which favours disclosure.
- Established that
    - public interest immunity claims must be responsibly and precisely made;
    - that there is no absolute class-based immunity; and
    - courts must conduct a real assessment in each case.

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B3- Legal protections

EVIDENCE ACT 1995 (CTH)

(1) *If the public interest in admitting into evidence information or a document that relates to matters of state is outweighed by the public interest in preserving secrecy or confidentiality in relation to the information or document, the court may direct that the information or document not be adduced as evidence.*

(2) ….

(4) Without limiting the circumstances in which information or a document may be taken for the purposes of subsection (1) to relate to matters of state, the information or document is taken for the purposes of that subsection to relate to matters of state if adducing it as evidence would:

(a) prejudice the security, defence or international relations of Australia; or

(b) damage relations between the Commonwealth and a State or between 2 or more States; or

(c) prejudice the prevention, investigation or prosecution of an offence; or

(d) prejudice the prevention or investigation of, or the conduct of proceedings for recovery of civil penalties brought with respect to, other contraventions of the law; or

(e) disclose, or enable a person to ascertain, the existence or identity of a confidential source of information relating to the enforcement or administration of a law of the Commonwealth or a State; or

(f) prejudice the proper functioning of the government of the Commonwealth or a State.

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B3- Legal protections

EVIDENCE ACT 1995 (CTH)

.....

(5) Without limiting the matters that the court may take into account for the purposes of subsection (1), it is to take into account the following matters:

(a) the importance of the information or the document in the proceeding;

(b) if the proceeding is a criminal proceeding--whether the party seeking to adduce evidence of the information or document is a defendant or the prosecutor;

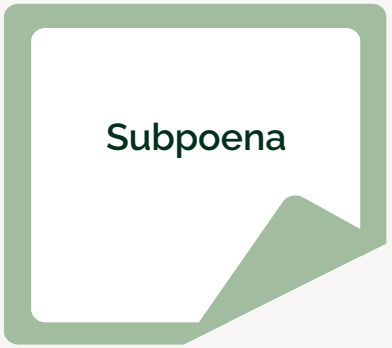
(c) the nature of the offence, cause of action or defence to which the information or document relates, and the nature of the subject matter of the proceeding;

(d) the likely effect of adducing evidence of the information or document, and the means available to limit its publication;

(e) whether the substance of the information or document has already been published;

(f) if the proceeding is a criminal proceeding and the party seeking to adduce evidence of the information or document is a defendant--whether the direction is to be made subject to the condition that the prosecution be stayed.

C1 – Obligation to disclose



Is a compulsory court order that, once issued and validly served, imposes a legal obligation on the recipient to comply.

Process in litigation where Commonwealth is a party to that litigation. Typically subject to order of Court or pursuant to statute requiring production.

A Commonwealth department has a legally enforceable statutory obligation to process and determine FOI requests.

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C1 – Obligation to disclose

Discovery obligations

- Obligation varies from jurisdiction to jurisdiction but principally requires a party to litigation to:
    - conduct a reasonable search of its records; and
    - produce all documents in its possession, custody or power in respect of documents:
        - upon which the party relies;
        - that adversely affect the party's case;
        - that adversely affect the other party's case; and
        - that support the other party's case

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C1 – Obligation to disclose

- For the purposes of discovery, a "document" means "any record of information". It does not just mean paper documents and has been widely interpreted by the Court to essentially include any form of recording or storing information.
- It includes records kept on any device containing sounds, words, or images including :
  - devices such as laptops, tablets and smart phones (including texts, voicemails, videos, images, and any other audio or visual data);
  - computer hard drives;
  - electronic storage devices, such as USB drives, SD cards and external hard drives; and
  - back-up tapes.
- The PSPF does not override Australian law, and it does not create a legal privilege that would prevent disclosure.
- The PSPF triggers handling requirements of documents for the Commonwealth, not disclosure exemptions.

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C2 - Strategies for protecting sensitive data/documents

- The nature of the material to be protected will determine the strategy.
- Common strategies include:

1. Objection to full production of sensitive documents
2. Partial objections to sensitive aspects of documents through redactions
3. Conferral and inspection of documents by legal practitioners subject to undertakings
4. Review of PSPF classification for possible declassification of documents

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C2 - Strategies for protecting sensitive data/documents

- Requires detailed affidavit evidence of grounds for PII claim – potentially from Originator
- Open and closed evidence and submissions likely necessary
- Production of full copy of documents to court only will be required
- Express orders required for management of documents by Court including safe hand delivery (if required) to judicial officer

Objection to full production of sensitive documents

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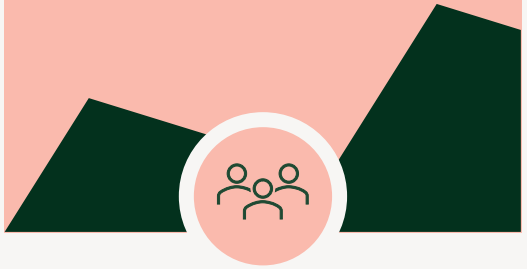
C2 - Strategies for protecting sensitive data/documents

Partial objections to sensitive aspects of documents through redactions



- Requires application of redactions to only parts of documents subject to genuine PII claim
- Will require affidavit evidence to support each redaction to each document
- If contested, full production to the Court will be required together with redacted bundle
- Express orders required for management of documents by Court including safe hand delivery (if required) to judicial officer

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C2 - Strategies for protecting sensitive data/documents

- Requires written undertaking executed by the legal representative for the other party
- Must contain express agreement that privilege is not waived and contents of document will not be disclosed
- Inspection should occur in person using physical documents or, if electronic, using controlled technology

Conferral and inspection of documents by legal practitioners subject to undertakings

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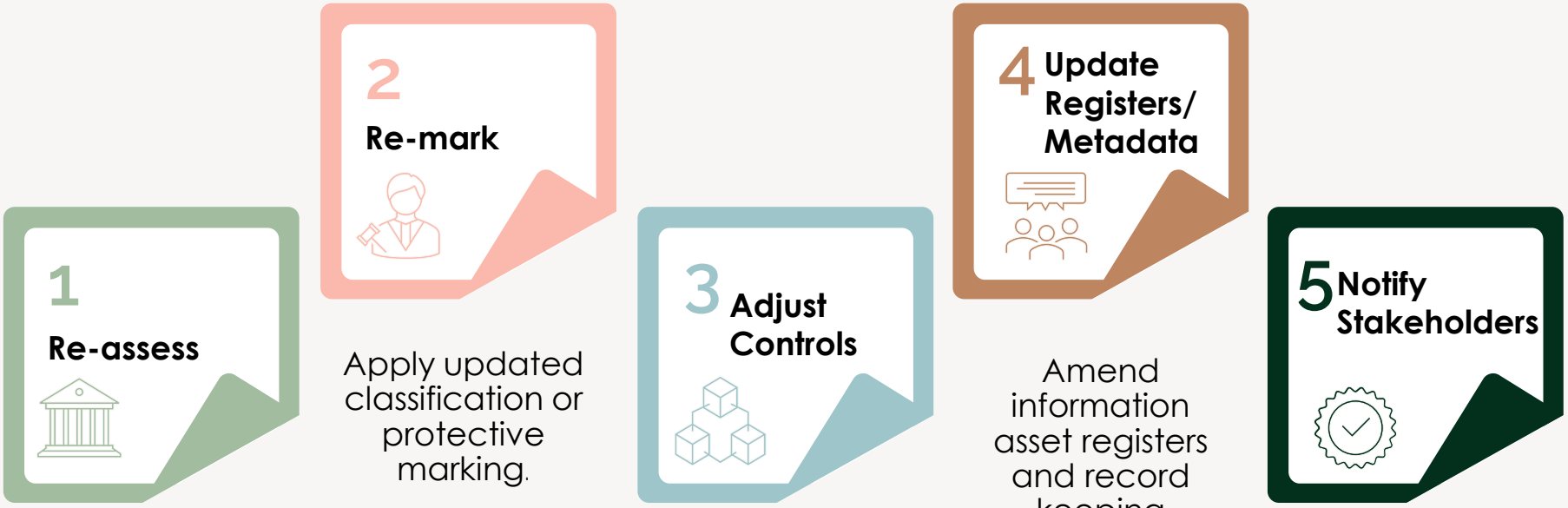
C2 - Strategies for protecting sensitive data/documents Reclassification



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D - Freedom of Information Act 1982

- FOI Act creates a legally enforceable right of access to information from the Commonwealth
- Commonwealth has lawful grounds to refuse production via two broad categories:
    - Documents that are exempt; and
    - Documents that are conditionally exempt but may be withheld if disclosure would be contrary to the public interest
- Rights are specific statutory based that allow an agency to refuse access in whole or in part.
- Requires Departments/agencies to conduct a balancing test between the public interest in disclosure and the public interest in withholding

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SPECIALISED AREAS

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