

PART 2 — SCOPE OF APPLICATION OF THE FREEDOM OF INFORMATION ACT

Version 1.6, December 2016

	PAGE
Agencies subject to the FOI Act	2
Prescribed authority	2
Courts, tribunals and the Official Secretary to the Governor-General	3
Exemption of certain persons and bodies	4
Mandatory transfer of requests	6
Responding to access requests if an exemption applies	6
Ministers	7
Decision making in the minister’s office	8
Documents available for access under the FOI access request process	8
Meaning of ‘document’	8
Documents in existence	9
Documents of an agency	9
Official documents of a minister	11
Documents in certain institutions	13
Records of commissions of inquiry	14
Documents open to public access and not available under the FOI access request process	14
Personnel records	15

PART 2 — SCOPE OF APPLICATION OF THE FOI ACT

2.1 Section 11(1) of the FOI Act gives every person a legally enforceable right to obtain access to a document of an agency or an official document of a minister, unless the document is exempt.

2.2 An agency or a minister is not required to give a person access to a document at a particular time if at that time the document is an ‘exempt document’ (s 11A(4)). An ‘exempt document’ is:

- a document that is exempt, or conditionally exempt where disclosure would be contrary to the public interest, under Part IV of the Act (see Parts 5 and 6 of these Guidelines)
- a document in respect of which an agency, person or body is exempt from the operation of the Act under s 7 (see [2.12] – [2.19] below)
- an official document of a minister that contains some matter that does not relate to the affairs of an agency or of a department of state (s 4(1)).

Agencies subject to the FOI Act

2.3 As a general rule, an Australian Government agency will be subject to the FOI Act unless expressly provided otherwise. ‘Agency’ is defined at s 4(1) as:

- a department of the Australian Public Service
- a prescribed authority, or
- a Norfolk Island authority.

Prescribed authority

2.4 A prescribed authority is defined at s 4(1) of the FOI Act to mean:

- a body corporate, or an unincorporated body, established for a public purpose by, or in accordance with the provisions of, an enactment or an Order in Council
- any other body, incorporated or unincorporated, that has been declared by the FOI Regulations to be a prescribed authority for the purposes of the FOI Act¹
- a person holding an office or appointment under an enactment or Order in Council or that is prescribed in the regulations.

2.5 Some bodies, offices and appointments are expressly excluded from that definition of prescribed authority, and hence from the coverage of the FOI Act (ss 4(1), 4(3)). They include:

- an incorporated company or association
- Territory Legislatures, and the officers and members of the Territory legislature
- Royal Commissions; or a Commission of inquiry as defined in s4(1).²

2.6 Unincorporated bodies such as boards, councils and committees that have been

¹ Aboriginal Hostels Ltd is prescribed.

² Records of commissions of inquiry are deemed to be in the possession of other agencies and to be available for FOI Act access, see [2.59].

established to assist or perform functions connected with a prescribed authority are deemed to be within that prescribed authority (s 4(2)). Similarly, an office that has been established by an enactment to perform duties as an employee of a department, a member of a body or for the purposes of a prescribed authority, are not separately treated as a prescribed authority (s 4(3)).

2.7 Section 68A of the *Parliamentary Service Act 1999* exempts departments and people holding or performing the duties of an office established under that Act from the definition of a prescribed authority under the FOI Act.³ In addition, the Parliamentary Budget Office and the Parliamentary Budget Officer are deemed not to be prescribed authorities under s 7(1) and Division 1 of Part I of Schedule 2 of the FOI Act (see [2.12]).

Courts, tribunals and the Official Secretary to the Governor-General

2.8 The FOI Act has a restricted application to courts, court registries and the Official Secretary to the Governor-General.⁴ Specifically, the Act does not apply to a request for access to a document of a court or registry or the Official Secretary to the Governor-General ‘unless the document relates to matters of an administrative nature’ (ss 5, 6A). The Act does not apply to the holder of a judicial office (s 5(1)(b)), nor to the Governor-General. A further exclusion is for documents relating to the handling of complaints about judicial officers (ss 5(1A)–(1C)).

2.9 The phrase, ‘matters of an administrative nature’, is not defined in the FOI Act. In *Kline v Official Secretary to the Governor General*, the High Court held that the phrase refers to documents that concern ‘the management and administration of office resources, such as financial and human resources and information technology’.⁵ By contrast, the phrase does not apply to documents that relate to the discharge of a court’s or the Governor-General’s ‘substantive powers and functions’.⁶ The Court approved a similar distinction drawn by the Full Federal Court in the decision under appeal⁷ between the substantive functions or powers of a court or the Governor-General, and the office ‘apparatus’

³ The Minister’s second reading speech for the amending legislation to the *Parliamentary Service Act 1999* in May 2013 noted that these amendments are intended to be an interim measure pending consideration of recommendations about this matter arising from the review of the FOI Act undertaken by Dr Allan Hawke AC in 2012–13. The report of the review was tabled on 2 August 2013: *Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010*. The report recommended (pages 51–56) that the FOI Act should not apply to the Parliamentary Librarian, but should apply to documents of an administrative nature in the possession of the Department of the Senate, the Department of the House of Representatives and the Department of Parliamentary Services.

⁴ Section 6 (supplemented by Schedule 1) provides that the Australian Industrial Relations Commission, Australian Fair Pay Commission and Industrial Registrar and Deputy Industrial Registrars are deemed to be prescribed authorities to which the FOI Act applies in respect of requests for documents relating to matters of an administrative nature. However, both Commissions and the Registrars ceased operations in 2009. Some of the functions have been assumed by the Fair Work Commission (previously Fair Work Australia), which is subject to the FOI Act.

⁵ [2013] HCA 52 [13], [41] (joint judgment of French CJ, Crennan, Kiefel & Bell JJ). Gageler J, in a separate judgment at [74], drew a similar distinction between the exercise or performance of substantive powers and functions, and ‘providing logistical support (or infrastructure or physical necessities or resources or platform) for the exercise or performance of those substantive powers or functions to be able to occur’.

⁶ [2013] HCA 52 [41].

⁷ *Kline v Official Secretary to the Governor-General* [2012] FCAFC 184 [21], on appeal from *Kline and Official Secretary to the Governor-General* [2012] AATA 247, which was an appeal from ‘B’ and *Office of the Official Secretary to the Governor-General* [2011] AICmr 6.

supporting the exercise or performance of those substantive powers and functions.

2.10 Applying that distinction, the Court held in *Kline* that the FOI Act did not apply to a request to the Official Secretary for access to documents relating to the administration of the Order of Australia, including decisions on the award of Australian honours. As to courts, the Court observed that the Act applies only to documents relating to the management and administration of registry and office resources, and not to documents relating to the discharge of the substantive powers and functions of adjudication or tasks that are referable to the exercise of judicial, rather than administrative, powers and functions.⁸

2.11 There is no similar exclusion from the FOI Act applying to tribunals, such as the Administrative Appeals Tribunal (AAT) and the Veterans' Review Board. They fall within the definition of 'prescribed authority' in s 4 of the Act, and the Act applies to those tribunals in the same manner as it applies to other agencies. In particular, a request for access may be made for a document in the possession of the tribunal that was created by a tribunal member for the purposes of an adjudication (though the exemption provisions may apply to any such request in the normal way).⁹

Exemption of certain persons and bodies

2.12 Under s 7(1), the following bodies specified in Schedule 2, Part I, Division 1 are not agencies for the purposes of the FOI Act:

- Aboriginal Land Councils and Land Trusts
- Auditor-General
- Australian Secret Intelligence Service
- Australian Security Intelligence Organisation (ASIO)
- Inspector-General of Intelligence and Security
- National Workplace Relations Consultative Council
- Office of National Assessments (ONA)
- Parliamentary Budget Office
- Parliamentary Budget Officer.

2.13 Under s 7(1A), the following parts of the Department of Defence specified in Schedule 2, Part I, Division 2 are taken not to be part of the Department of Defence nor agencies in their own right for the purposes of the FOI Act:

- Australian Geospatial-Intelligence Organisation
- Defence Intelligence Organisation
- Australian Signals Directorate.

Exemptions applying to commercial activities, security and defence intelligence documents, and other matters

2.14 Section 7(2) (supplemented by Schedule 2, Part II) lists agencies that are exempt from the operation of the FOI Act in relation to particular types of documents. The list

⁸ [2013] HCA 52 [45], [47].

⁹ See *McLeod and Social Security Appeals Tribunal* [2014] AICmr 34.

includes:

- the Australian Broadcasting Corporation (ABC) and Special Broadcasting Service (SBS) in relation to program material and datacasting content (discussed below)
- the Reserve Bank of Australia in relation to its banking operations and exchange control matters
- the Australian Statistician, in relation to documents containing information collected under the *Census and Statistics Act 1905*
- the Attorney-General’s Department in relation to documents in respect of activities undertaken by the Australian Government Solicitor and various bodies such as Australia Post, Comcare, Commonwealth Scientific and Industrial Research Organisation (CSIRO), NBN Co and Medicare, in relation to documents in respect of commercial activities (discussed below).

2.15 For a complete list of bodies exempt under s 7(2), see Schedule 2, Part II.

2.16 The exemption for ‘program material’ of the ABC and SBS has been considered in Federal Court¹⁰, AAT¹¹ and IC review cases.¹² In *Australian Broadcasting Corporation and Herald and Weekly Times Pty Limited*, the AAT held that program material means a document ‘which is the program and all versions of the whole or any part of the program, any transmission broadcast or publication of the program, and includes a document of any content or form embodied in the program and any document acquired or created for the purpose of creating the program, whether or not incorporated into the complete program’.¹³ Documents containing salary information about ABC presenters, and documents relating to the classification of television programs, were neither ‘program material’ nor documents ‘in relation to’ program material. That latter phrase requires ‘at least a reasonably direct relationship’ or connection between a document and the nominated topic, and not a connection that is indirect, remote or tenuous.¹⁴

2.17 The term ‘commercial activities’ is defined in s 7(3) as meaning the current or proposed commercial activities of a body that are carried on in competition with persons other than government agencies. A separate definition of ‘commercial activities’ applies to NBN Co, namely, current or proposed commercial activities of NBN Co (s 7(3A)).¹⁵ The following points can be made about the scope of the exemption for ‘commercial activities’¹⁶:

- activities are conducted on a commercial basis if they are related to, engaged in or used for commerce

¹⁰ See *Australian Broadcasting Corporation v University of Technology, Sydney* [2006] FCA 964; and *Bell v Commonwealth Scientific and Industrial Research Organisation* [2008] FCAFC 40.

¹¹ *Australian Broadcasting Corporation and Herald and Weekly Times Pty Limited* [2012] AATA 914

¹² *Herald and Weekly Times Pty Ltd and Australian Broadcasting Corporation* [2012] AICmr 7; ‘F’ and *Australian Broadcasting Corporation* [2012] AICmr 8; ‘ER’ and *Special Broadcasting Service* [2015] AICmr 12; and *Fist and Australian Broadcasting Corporation* [2014] AICmr 14. [2012] AATA 914 [57].

¹⁴ *Australian Broadcasting Corporation and Herald and Weekly Times Pty Limited* [2012] AATA 914 [99].

¹⁵ See *Battersby and NBN Co Ltd* [2013] AICmr 61.

¹⁶ *Battersby and NBN Co Ltd* [2013] AICmr 61. See also *Bell v Commonwealth Scientific and Industrial Research Organisation* [2008] FCAFC 40; *Johnston and Australian Postal Corporation* [2006] AATA 144; and *Internode Pty Ltd and NBN Co Ltd* [2012] AICmr 4.

- the commercial goal (profit making or the generation of income or return) is among the circumstances to be taken into account in determining if a particular activity is a commercial activity
- commercial activity can be regarded as a business venture with a profit-making objective, and involves activity to generate trade and sales with a view to profit, and
- the exemption in s 7(2) does not require that a document be created for the dominant purpose of carrying on a commercial activity, and
- documents that relate to the appointment of a corporate advisor and agreements between two commercial entities¹⁷ have been found to fall within the exemption for commercial activities.

2.18 All Australian Government agencies are exempt from the operation of the Act in relation to ‘intelligence agency documents’ (for example, a document that originated with or was received from ASIO or ONA) (s 7(2A)) and ‘defence intelligence documents’ (for example, a document that originated with or was received from the Department of Defence and relates to the collection, reporting or analysis of operational intelligence (s 7(2C)). These exemptions also apply to documents in the possession of ministers (s 7(2B)). The exemption extends to a part of a document that contains an extract from or a summary of an intelligence agency document or a defence intelligence document. The remainder of the document is not exempt on the same basis, and access may have to be given after deletion of the exempt material under s 22.

2.19 All Australian Government agencies and ministers are also exempt from the operation of the Act in relation to documents containing information obtained at a private session before the Child Sexual Abuse Royal Commission, identifying a natural person who appeared at a private session, or containing information summarised or extracted from a private session (s 7(2E)).

Mandatory transfer of requests

2.20 Certain FOI requests must be transferred to another agency (s 16(3)). This requirement applies to FOI requests for documents originating with or received from agencies that are exempt or partly exempt from the FOI Act (in particular, those outlined at [2.12]–[2.13] above). These requirements for the transfer of FOI requests are described in more detail in Part 3 of these Guidelines. Certain requirements also apply for transfer of applications for amendment and annotation of personal information and are described in Part 7.

Responding to access requests if an exemption applies

2.21 Where an agency is exempt in whole from the FOI Act under s 7, it is not obliged to respond to requests for access to documents or amendment or annotation of personal records. It is nevertheless good administrative practice for an exempt agency to reply to an applicant stating that the agency is not subject to the FOI Act. Equally, it may be open to the agency, independently of the FOI Act, to grant access to a document on an administrative basis if there is no secrecy provision that prohibits this.

2.22 A different response may be required where an agency that is exempt only as to particular types of documents receives a request relating to those documents. The applicant

¹⁷ Respectively, *Battersby and NBN Co Ltd* [2013] AICmr 61; and *Internode Pty Ltd and NBN Co Ltd* [2012] AICmr 4.

may dispute the agency's view that the documents are of an exempt nature — for example, that the documents relate to the agency's commercial activities, or do not relate to matters of an administrative nature in a court. It is open to the applicant to seek review of the agency decision by the Information Commissioner. To facilitate that process, the agency should observe the procedures of the FOI Act in responding to the applicant. For example, the agency should respond to the applicant in writing within the timeframe the Act stipulates.

2.23 The procedure outlined in the previous paragraph should also be followed in other circumstances where an agency or minister who is subject to the FOI Act receives a request for documents to which the Act may not apply. For example, the procedure should be followed if a minister receives a request for documents that in the minister's view are not 'official documents of a minister' (discussed below at [2.45]–[2.53]), or if the National Library of Australia or similar agency receives a request for documents that are regarded as being part of a library, historical or museum collection.

Ministers

2.24 The right of access to documents extends to the 'official documents of a minister' (ss 11(1)(b), 11A).¹⁸ The definition of an 'official document of a minister' is discussed at [2.45]–[2.53] below. A minister includes an assistant minister.¹⁹

2.25 A minister is independent of the portfolio department for the purposes of the FOI Act, and is therefore responsible for processing FOI requests received by the minister. It is nevertheless open to a minister's office to arrange with a portfolio department to provide assistance in processing FOI requests, on matters such as the following:

- *Searching shared resources:* upon receiving an FOI request, a minister's office is responsible for conducting a search of the documents it holds, but can arrange with a portfolio department to undertake a search of shared resources such as a ministerial correspondence register.
- *Transfer of requests:* a minister may transfer a request to a portfolio department, with the department's agreement, when s 16 applies (document held by the department but not the minister (s 16(1)(a)); or the subject matter of the document is more closely connected with the department's functions (s 16(1)(b))). It may assist the efficient processing of requests, including complying with the 30-day time limit under the FOI Act, for transfer arrangements to be spelt out. A minister's office must be satisfied that it does not hold the requested documents, or if it does, that the documents are more closely connected with another agency's or minister's functions before deciding to transfer the request.²⁰

¹⁸ In *Dreyfus and Attorney-General (Commonwealth of Australia) (Freedom of information)* [2015] AATA 995 at [63] per Jagot J at [63] the AAT accepted that the definition of exempt document included official documents of a Minister that contain some matter that does not relate to the affairs of an agency or a department of state.

¹⁹ Assistant ministers, like ministers, are appointed under s 64 of the Constitution and have the same responsibilities and obligations under the FOI Act.

²⁰ *Bienstein v Attorney-General* [2007] FCA 1174 (8 August 2007).

- *Reporting*: a minister is required by s 93 of the FOI Act to provide information to the Information Commissioner for the purposes of the Commissioner’s reporting functions. A minister’s office may obtain assistance from a portfolio department in meeting this requirement.

Decision making in the minister’s office

2.26 There is no express power in the FOI Act for a minister to authorise another person to make a decision on an FOI request received by the minister²¹. It is nevertheless open to a minister to authorise senior members of the minister’s staff to make such decisions.²² It is desirable that this be done by a written instrument of authorisation or under an arrangement in writing approved by the minister. In these circumstances, the authorised person makes a decision on behalf of the minister in the capacity of an agent rather than in their own right as an authorised person.

2.27 If the Information Commissioner is asked to review a decision made by a member of the minister’s staff, the Commissioner may require the minister to confirm whether the minister agrees with the decision that is to be reviewed.

Documents available for access under the FOI access request process

2.28 The right of access applies to:

- a document of an agency that is subject to the FOI Act
- an official document of a minister,

unless the document is an exempt document (s 11(1)).

Meaning of ‘document’

2.29 A ‘document’ is defined in s 4(1) to include any or any part of the following:

- any paper or other material on which there is writing
- a map, plan, drawing or photograph
- any paper or other material on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them
- any article or material from which sounds, images or writing are capable of being reproduced with or without the aid of any other article or device
- any article on which information has been stored or recorded, either mechanically or electronically
- any other record of information
- any copy, including any part of any copy, of a reproduction or duplicate of a thing listed above.

2.30 The definition of ‘document’ is broadly stated and is not exhaustive. It includes sound recordings, films, video footage, microfilm, and information stored on computer tapes, disks, DVDs and portable hard drives and devices. It can also include information held on or transmitted between computer servers, backup tapes, mobile phones and mobile

²¹ Whereas s 23 provides that an FOI request to an agency, court or tribunal can be decided by an authorised person.

²² See *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560.

computing devices (see Part 3 of these Guidelines). The term would also cover forms of recorded information that are three-dimensional, such as a land use planning model.

2.31 Because the definition includes ‘any part of’ a document, an agency can deal with a request for a specific portion of a larger document, such as an appendix to a paper or a chapter of a report, without having to examine the entire document for exempt material.²³

2.32 Material maintained for reference purposes that is otherwise publicly available (such as library reference material) and Cabinet notebooks are not ‘documents’ (s 4(1)).²⁴ The Information Commissioner has found that the exclusion for material held for reference purposes by agencies and ministers’ is not intended to exclude from the operation of the FOI Act material published on departmental websites, and apart from the limited circumstances provided for in s 12(1), there is no provision in the FOI Act to refuse access to a document solely on the ground that it is publicly available.²⁵

Documents in existence

2.33 The right of access under the FOI Act is to existing documents, rather than to information. The FOI Act does not require an agency or minister to create a new document in response to a request for access, except in limited circumstances where the applicant seeks access in a different format or where the information is stored in an agency computer system rather than in discrete form (see Part 3 of these Guidelines). A request may nevertheless be framed by reference to a document that contains particular information.

2.34 The right of access applies to documents that exist at the time the FOI request was made. An applicant cannot insist that their request cover documents created after the request is received. However, the agency or minister could consider whether to include documents that were created after the request was received. This could be more administratively efficient because the applicant might otherwise submit a new request for the later documents.

Documents of an agency

2.35 A ‘document of an agency’ is defined in s 4(1) as:

- a document in the agency’s possession, whether created or received in the agency, or
- a document in relation to which an agency has taken contractual measures under s 6C in order to ensure that it receives the document from a contractor or sub-contractor providing services to the public on the agency’s behalf (see [2.37]–[2.44] below).

2.36 ‘Possession’ of a document is not limited to actual or physical possession, but can include constructive possession where an agency has the right and power to deal with a

²³ In *Timmins and Attorney-General’s Department* [2015] AICmr 32 the former Information Commissioner found that one *attachment* to a brief within scope of an applicant’s FOI Request also fell within scope because the brief could not be properly understood without being aware of the contents of the attachment. The other attachment did not fall within scope as it was merely attached to the brief to illustrate work that had been undertaken (at [14]-[22]). Also see Para 10.63 of these *FOI* Guidelines.

²⁴ See *Diamond and Australian Curriculum, Assessment and Reporting Authority* [2013] AICmr 57

²⁵ *Mills and Department of Immigration and Border Protection* [2014] AICmr 54 [20].

document,²⁶ regardless of where and by whom it is stored.²⁷ Any record of information which an agency has downloaded from a shared database or any other database and stored on hard disks or file servers in its physical possession should be treated as a ‘document’ of that agency. As noted below at [2.46], a document in the possession of a staff member providing support functions to a minister has been held in the Victorian Court of Appeal to be a document in the minister’s possession and the inference of constructive possession could be drawn by virtue of the employment relationship.²⁸

Documents held by Commonwealth contractors

2.37 A person may make a request to an agency for access to a document held by a contractor or subcontractor relating to the performance of a ‘Commonwealth contract’. These documents are included in the definition of ‘document of an agency’ (s 4(1)) where the agency has taken contractual measures in accordance with s 6C.

2.38 Agencies are required by s 6C to ensure that Commonwealth contracts entered into on or after 1 November 2010 contain contractual measures that enable the agency to obtain any document for which an FOI access request is received. The term ‘Commonwealth contract’ is defined in s 4(1) to mean a contract:

- to which the Commonwealth or an agency is or was a party
- where services are or were to be provided under the contract on behalf of an agency to a person who is not the Commonwealth or an agency, and
- the services are in connection with the performance of the agency’s functions or the exercise of its powers.

2.39 In summary, in relation to contracts entered into on or after 1 November 2010, the FOI Act confers a right of access to documents held or created by a contractor or subcontractor relating to their provision of services on an agency’s behalf to the public or a third party. If an agency receives a request for access to such a document, the agency is to take action to obtain a copy of the document from the contractor or subcontractor, and then decide whether access is to be given to that document under the FOI Act.

2.40 A person who has been given access to a document of this kind may make a request to the agency under s 48 to amend or annotate personal information contained in the document about that person. However, s 48 applies only if the personal information ‘has been used, is being used or is available for use by the agency or Minister for an administrative purpose’.

²⁶ In *McLeod and Social Security Appeals Tribunal* [2014] AICmr 34 ([20]) the Information Commissioner noted that a question may arise as to whether documents created by a person in an official capacity but not stored in the record system of an agency are documents that are ‘in the possession of the agency’. It was said that this issue could arise in many other situations in which documents created by an agency staff member or contractor are either not stored in the agency’s record system or are viewed as personal working papers. The information Commissioner explained that ‘possession’ of a document is not limited to actual or physical possession, but can include constructive possession where an agency has the right and power to deal with a document, regardless of where and by whom it is stored.

²⁷ In *Brett Goyne and Australian National Audit Office* [2015] AICmr 9 the Information Commissioner considered that documents within the possession of the Australian National Audit Office (ANAO) would be within the ‘constructive possession’ of the Auditor-General because the role of the ANAO was to assist the Auditor-General under the Auditor-General Act (at [26]). This was consistent with the listing of the Auditor-General as an ‘Exempt agency’ (within Schedule 2 of the FOI Act) being extended to the ANAO.

²⁸ *Office of the Premier v Herald and Weekly Times* [2013] VSCA 79 [66].

2.41 If the agency or Minister collects, utilises, has access to or relies on personal information in order to perform its functions, this is information that has been used, being used or is available for use for an ‘administrative purpose’. This requirement would not be satisfied by reason only that the agency has a right to obtain the document from the contractor under a contract to which s 6C applies. Therefore where an agency or Minister is provided with access to a database by a private contractor that contains a wide range of personal information, all the personal information may not be available for use by the agency or Minister for an administrative purpose. It is relevant to consider whether the individual provided his or her personal information to the private contractor for limited purposes that do not extend to provision of the information to the agency or Minister. The purpose that the information was provided by the individual may be evidenced by:

- a written agreement between the individual and the contractor,
- information such as in a booklet or brochure that was provided to the individual prior to him or her providing his or her information to the contractor, or
- evidence from the individual and the contractor of the context within which the personal information was provided.

2.42 In addition, it is relevant to consider the terms upon which the agency or Minister has access to the database that is owned by the contractor.

2.43 Whether personal information has been used or is being used by the agency or Minister for an administrative purpose is a question of fact. This question must be determined by considering firstly whether the information is personal information, secondly whether the information was used or is currently being used by the agency and thirdly, whether the information was used or is being used in the course of performing the functions of the agency or Minister. Whether the information is available for use by the agency or Minister is also a question of fact. This depends on whether the agency or Minister has a right to access the information in question (see [2.36] above).

2.44 The Information Commissioner has published an agency resource containing guidance material about s 6C and a model clause that agencies can include in relevant contracts. The agency resource and model clause is available at www.oaic.gov.au.

Official documents of a minister

2.45 An ‘official document of a minister’ means a document in a minister’s possession in their capacity as a minister, being a document that relates to the affairs of an agency (s 4(1)).

2.46 The first element of this definition is that a document is ‘in the possession of a Minister ... in his or her capacity as a Minister’. This includes a document in the possession of a minister’s office, and is not confined to a document that is personally held by the minister. For example, under a similar provision in Victoria it has been held that an electronic diary maintained by the Premier’s Chief of Staff in providing support functions to the Premier was a document in the Minister’s possession.²⁹

2.47 ‘Possession’ of a document can also include constructive as well as actual

²⁹ *Office of the Premier v Herald and Weekly Times* [2013] VSCA 79 [65]–[66].

possession: see [2.36]. Section 4(1) further provides that a document is in a minister's possession if the minister is entitled to access a document that has passed from his or her possession, other than a document that is a document of an agency. See the discussion at [2.52] concerning documents that a current minister has placed in the care of the National Archives of Australia and at [2.53] in relation to briefing materials returned to a department.

2.48 The second element of the definition is that a document in the minister's possession 'relates to the affairs of an agency'. This phrase is to be understood broadly as encompassing documents that relate to matters within the portfolio responsibility of a minister or the business or activities of an agency.³⁰ The content of a document and the context in which it was created or held will be important.³¹

2.49 Documents held by a minister that have been found to relate to the affairs of an agency include:

- entries in the Prime Minister's appointments diary relating to meetings with other political leaders to discuss the legislative program³²
- a letter to the Prime Minister from a former Prime Minister conveying views on issues of national policy³³
- a reference written by a minister on official letterhead,³⁴ and
- a work diary of a ministerial adviser (in a Victorian decision).³⁵

2.50 Documents held by a minister that do not 'relate to the affairs of an agency' include:

- personal documents of a minister or the minister's staff
- documents of a party political nature, and
- documents held in the minister's capacity as a local member of parliament not dealing with the minister's portfolio responsibility.³⁶

2.51 Examples of documents that do not relate to the affairs of an agency include entries in the Prime Minister's appointments diary relating to meetings with business leaders at the annual national party conference³⁷ and a letter to the Prime Minister from an organisation established to provide support to the political party headed by the Prime Minister.³⁸

³⁰ *Fletcher and Prime Minister of Australia* [2013] AICmr 11 [20]; *Office of the Premier v Herald and Weekly Times* [2013] VSCA 79 [79]. This was also considered more recently in *West Australian Newspapers Ltd and Department of the Premier and Cabinet, Re* [2015] WAICmr 9 by the Western Australian Information Commissioner.

³¹ *Dreyfus and Attorney-General (Commonwealth of Australia) (Freedom of Information)* [2015] AATA 995 [63] – [64].

³² *Fletcher and Prime Minister of Australia* [2013] AICmr 11.

³³ *Parnell and Department of the Prime Minister and Cabinet* [2012] AICmr 31.

³⁴ *Parnell and Minister for Infrastructure and Transport* [2011] AICmr 3 [14].

³⁵ *Office of the Premier v Herald and Weekly Times* [2013] VSCA 79.

³⁶ *Re Michael Nassib Said and John Dawkins, MP* [1993] AATA 9.

³⁷ *Parnell and Prime Minister of Australia (No. 2)* [2011] AICmr 12.

³⁸ *Parnell and Prime Minister of Australia* [2011] AICmr 10.

2.52 The application of the FOI Act to documents ‘in the possession of a minister’ excludes by implication documents held by a former minister. Those documents may, however, be available under the *Archives Act 1983* (see [2.55] below). Where an FOI request is made to a minister and there is a change of minister in the course of the request or an IC review, the new minister is the respondent. If the requested document is not in the possession of the new minister, the FOI Act will not apply as the document is no longer an ‘official document of a minister’.³⁹

2.53 If a minister received and returned a document, such as a briefing, from a portfolio department, the document is a document of the department and not an official document of the minister. However, a copy of such a document retained by the minister is an official document of the minister.

2.54 The provisions of the FOI Act relating to the amendment and annotation of personal records apply also to the official documents of ministers (s 48). That is, a person may apply to a minister to amend or annotate an official document that is claimed to contain incomplete or incorrect personal information about the person making the request (see Part 7 of these Guidelines).

Archived ministerial documents

2.55 A document that a current or former minister has placed in the care of the National Archives of Australia is not a document of an agency (s 13(1)). Access to archived documents is governed principally by the Archives Act. Access will be available under the FOI Act only in two situations. The first is where an agency also has a copy of a document placed by a minister in the National Archives. The second could arise under s 4(1) of the FOI Act, which provides that an official document of a minister includes a document that has passed from the minister’s control ‘if he or she is entitled to access to the document and the document is not a document of an agency’. Neither the FOI Act nor the Archives Act expressly provides that a current minister has a right of access to a document the minister has transferred to the National Archives. However, the National Archives has not identified any prohibition in the Archives Act that prevents access by a current minister to such documents, and it is the practice of the National Archives to give a current minister access when requested.

Documents in certain institutions

2.56 If an agency transfers:

- a document to the memorial collection within the meaning of the *Australian War Memorial Act 1980*
- a document to the collection of library materials maintained by the National Library of Australia
- material to the historical material in the possession of the Museum of Australia
- a document to the care of the National Archives of Australia (other than as a document relating to the administration of the National Archives), or
- a program or related material in the collection of the National Film and Sound Archive of Australia,

³⁹ *Philip Morris Ltd and Treasurer* [2013] AICmr 88; *Thomas and Prime Minister* [2014] AICmr 18.

the document is deemed to be in the possession of the agency that transferred the document (s 13(2)). If that agency no longer exists, the document is deemed to be in the possession of the agency with functions to which the documents are most closely related. A person seeking access to the document can make an FOI request to the relevant agency, which must retrieve the document from the institution to meet the request.

2.57 A document is not deemed to be a ‘document of an agency’ by reason of its being in one of the collections outlined above if a person (including a minister) other than an agency placed the document in the care or custody of the relevant institution (s 13(1)).

2.58 Documents that are in the custody of the National Archives and are within the open access period are discussed below at [2.60].

Records of commissions of inquiry

2.59 Records of certain commissions of inquiry are also deemed to be ‘documents of an agency’ and within the possession of the relevant agency, as follows:

- records of a Royal Commission that are in the care of the National Archives are taken to be documents of an agency and in the possession of the department responsible for the *Royal Commissions Act 1902* (currently the Department of the Prime Minister and Cabinet) (s 13(3)(a))
- records of the Commission of Inquiry under the *Quarantine Act 1908* that are in the care of the National Archives are taken to be documents of an agency and in the possession of the department responsible for the Quarantine Act (s 13(3)(b))
- records of a Commission of Inquiry under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* that are in the care of the National Archives are taken to be documents of an agency and in the possession of the department responsible for the Offshore Petroleum and Greenhouse Gas Storage Act (s 13(3)(c)).

Documents open to public access and not available under the FOI access request process

2.60 As discussed above, the right to obtain access under the FOI Act does not apply to all documents that are in the possession of agencies that are subject to the FOI Act. The Act does not apply to documents of the following kinds that are open to public access under other arrangements:

- the document or a copy of it is within the open access period as defined in the Archives Act, unless the document contains personal information, including personal information about a deceased person (s 12(1)(a) — see Part 1 of these Guidelines for information about the open access period)⁴⁰
- the document is already publicly available, as part of a public register or in accordance with an enactment where a fee or other charge may apply

⁴⁰ In *Park-Kang and Secretary, Department of Foreign Affairs and Trade (Freedom of information)* [2015] AATA 703, Member Webb held (at [22]) that while s 12(1)(a) of the FOI Act removed a person’s entitlement under that enactment to obtain access to a document within the ‘open access period’ determined under the Archives Act, s 12(1) does not act negatively upon an applicant’s accrued right to review, or to the right of access that crystallized under the FOI Act at the time that he made his request. This is so because the applicant’s request for access and application for review under the FOI Act were made before the records in question crossed the ‘open access period’ threshold under the Archive Act.

(s 12(1)(b)).⁴¹ An example of a public register is a register of births, deaths and marriages. A consumer protection register is an example of a register created under an enactment. This extends to documents that are available to the public in accordance with arrangements made between the agency and a publisher.⁴²

- the document, under a State or Territory law, is open to public access as part of a land title register subject to a fee or charge (s 12(1)(ba))
- the document is made available for purchase by the public in accordance with arrangements made by an agency (s 12(1)(c)).

Personnel records

2.61 If an agency has established procedures for access to personnel records, an employee or former employee may only apply for access to their records under the FOI Act in limited circumstances (s 15A). A personnel record means those documents containing personal information about an employee or former employee that an agency has kept for personnel management purposes (s 15A(1)). An application under the FOI Act for access to those records may only be made where the employee or former employee has made a request under those agency procedures and is either not satisfied with the outcome, or has not been notified of the outcome within 30 days (s 15A(2)).

⁴¹ In *Knapp and Australian Accounting Standards Board* [2014] AATA 744, the AAT considered the meaning of ‘available for purchase’ at [24] – [26]) as The documents must be capable of being obtained without undue delay and in a condition that the public could take advantage of them.

⁴² *Lester and Commonwealth Scientific and Industrial Research Organisation* [2014] AATA 646 [22].