

# PART 1 — INTRODUCTION

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## PART 1 — INTRODUCTION

### Structure and purpose of the Information Commissioner's FOI Guidelines

1.1 The *Freedom of Information Act 1982* (the FOI Act) s 93A provides that the Australian Information Commissioner may issue written guidelines for the purposes of the FOI Act (Guidelines). These Guidelines provide information and guidance on the interpretation, operation and administration of the *Freedom of Information Act 1982* (the FOI Act). The Guidelines are divided into the following parts:

- Part 1 – Introduction
- Part 2 – Scope of application of the FOI Act
- Part 3 – Processing and deciding on requests for access
- Part 4 – Charges for providing access
- Part 5 – Exemptions
- Part 6 – Conditional exemptions
- Part 7 – Amendment and annotation of personal records
- Part 9 – Internal agency review of decisions
- Part 10 – Review by the Information Commissioner
- Part 11 – Complaints and investigations
- Part 12 – Vexatious applicant declarations
- Part 13 – Information publication scheme
- Part 14 – Disclosure log
- Part 15 – Reporting

1.2 The FOI Act specifies that agencies and ministers must have regard to these guidelines in exercising powers and functions under the FOI Act, both generally (s 93A) and specifically in relation to:

- the Information Publication Scheme (s 9A(b)) (see Part 13 of these Guidelines)
- in working out whether access to a conditionally exempt would, on balance be contrary to the public interest (s 11B(5)) (see Part 6 of these Guidelines)
- in making a decision on a request for access to a document of an agency or an official document of a minister (s 15(5A)) (see Part 3 of these Guidelines).

### Overview of the FOI Act

1.3 The FOI Act is the legislative basis for open government in Australia at the Commonwealth level. The FOI Act applies to official documents of Australian Government ministers, documents of most Commonwealth agencies and in some circumstances, contractors of the Commonwealth (see Part 2 of these Guidelines).

1.4 The FOI Act is supplemented by the *Freedom of Information (Charges) Regulations 1982* and the *Freedom of Information (Miscellaneous Provisions) Regulations 1982*.

1.5 Each person has legally enforceable rights under and subject to the FOI Act to obtain access to government documents and to apply for the amendment or annotation of records of personal information held by government.

1.6 The FOI Act also requires agencies to publish specified categories of information, and encourages the proactive release of other government held information.

### **Objects of the FOI Act**

1.7 In performing functions and exercising powers under the FOI Act, agencies and ministers must also consider its objects, which are set down in s 3:

- to give the Australian community access to information held by government, by requiring agencies to publish that information and by providing for a right of access to documents
- to promote Australia's representative democracy by increasing public participation in government processes, with a view to promoting better-informed decision making
- to promote Australia's representative democracy by increasing scrutiny, discussion, comment and review of government activities
- to increase recognition that information held by government is to be managed for public purposes and is a national resource
- that powers and functions under the FOI 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.

1.8 In interpreting the provisions of the FOI Act, the interpretation that would best achieve these objects is to be preferred (*Acts Interpretation Act 1901*, s 15AA).

### **Access to government documents**

#### ***Form of request***

1.9 There are some formal requirements to make a valid FOI request for documents of an agency or official documents of a minister. They include that a request must be in writing (s 15(2)(a)) and must state that it is a request for the purposes of the FOI Act (s 15(2)(aa)).

1.10 A request must also provide such information as is reasonably necessary to enable a responsible officer of the agency or the minister to identify the document that is requested (s 15(2)(b)) and must give details of how notices under the FOI Act may be sent to the applicant (see Part 3 of these Guidelines).

1.11 An agency has a duty to take reasonable steps to assist a person to make a request so that it complies with the formal requirements of the FOI Act (s 15(3)) (see Part 2 of these Guidelines).

#### ***Charges***

1.12 Section 29 of the FOI Act provides a discretion for an agency or minister to impose a charge for processing a request or providing access to a document. Imposition of a charge must be assessed at the lowest reasonable cost under the *Freedom of Information (Charges) Regulations 1982* (Charges Regulations) (see Part 4 of these Guidelines). A charge cannot be imposed if an applicant is seeking access to a document that contains their own personal information (Charges Regulations, reg 5(1)).

**Exempt documents**

1.13 Where an FOI request has been made and any required charges have been paid, an agency or minister must give access to a document unless at that time of its decision, it is an ‘exempt document’. Exempt document means:

- the agency, person or body is exempt from the operation of the FOI Act, entirely or in respect of certain documents (see ss 5-7 and schs 1-2 of the FOI Act; and Part 2 of these Guidelines),
- in the case of official documents of a minister, a document contains matter not relating to the affairs of an agency or department of state (see s 4(1) and Part 2 of these Guidelines), or
- an exemption under Part IV of the FOI Act applies to the document (see Part 5 and Part 6 of these Guidelines).

1.14 Exemptions under Part IV of the FOI Act fall into two categories:

- Division 2: those which are not subject to a separate public interest test (eg documents affecting national security, Cabinet documents or documents affecting law enforcement and public safety) (see Part 5 of these Guidelines), and
- Division 3: those subject to a public interest test under s 11A(5) which is weighted in favour of disclosure (eg documents affecting personal privacy, deliberative processes or certain business information) (see Part 6 of these Guidelines)

**Timeframes**

1.15 An agency or minister has a statutory obligation to acknowledge that an FOI request has been received as soon as practicable, and no later than 14 days after receiving a request (s 15(5)(a)).

1.16 Once an FOI request for documents has been received, an agency or minister must, as soon as practicable, and no later than 30 days after receiving a request, take all reasonable steps to enable the applicant to be notified of a decision on the request (s 15(5)(b)).

1.17 The FOI Act allows for the extension of that statutory timeframe in certain circumstances, for example, where third-party consultation is required, with the agreement of the applicant or with the approval of the Information Commissioner (see Part 3 of these Guidelines).

**Practical refusal**

1.18 An agency or minister may refuse a request if a ‘practical refusal reason’ exists (s 24) but only after following the ‘request consultation process’ set out in s 24AB of the FOI Act (see Part 3 of these Guidelines).

1.19 A practical refusal reason means that:

- a request does not sufficiently identify the requested documents (s 24AA(1)(b)); or
- the work involved in processing the request:
  - in the case of an agency—would substantially and unreasonably divert the resources of the agency from its other operations (s 24AA(1)(a)(i)), or
  - in the case of a Minister—would substantially and unreasonably interfere with the performance of the Minister’s functions (s 24AA(1)(a)(ii)).

***Reasons for decisions***

1.20 If access is refused in respect to any part of a request for access, the decision maker must provide a statement of reasons under s 26 of the FOI Act (see Part 3 of these Guidelines). That provision also applies in relation to a decision to refuse to amend or annotate a record (s 51D(3)).

***Disclosure log***

1.21 Agencies and ministers must publish information that has been released in response to each FOI access request on a website, subject to certain exceptions under s 11C of the FOI Act. This publication is known as a ‘disclosure log’ (see Part 14 of these Guidelines).

**Amendment and annotation of personal information**

1.22 Individuals have the right under Part V of the FOI Act to seek amendment or annotation of their personal information in a document of an agency or an official document of a minister (see Part 7 of these Guidelines).

1.23 Where an applicant already has lawful access to the document, which has been used, is being used or is available for use by the agency or minister for an administrative purpose and contains personal information about the applicant which is incomplete, incorrect, out of date or misleading, an applicant may request that a record:

- be corrected (amendment), or
- be annotated to include a statement explaining their objection and the reasons for their objection (annotation).

1.24 A decision on a request for amendment or annotation must be made and notified as soon as practicable but not later than 30 days from the day after the request for amendment or annotation was received (s 51D(1)).

**Review of decisions*****Internal review***

1.25 A person who is not satisfied with a decision on a request for documents, or for amendment or annotation, may request an internal review by the agency of an ‘access refusal’ decision (in the case of the FOI applicant; s 54(2)) or an ‘access grant’ decision (in the case of an affected third party; s 54A(2)) (see Part 9 of these Guidelines).

1.26 An access refusal decision is defined in s 53A as:

- a) a decision refusing to give access to a document in accordance with a request
- b) a decision giving access to a document but not giving, in accordance with the request, access to all documents to which the request relates
- c) a decision purporting to give, in accordance with a request, access to all documents to which the request relates, but not actually giving that access
- d) a decision to defer the provision of access to a document (other than a document covered by paragraph 21(1)(d) (Parliament should be informed of contents))
- e) a decision under section 29 relating to imposition of a charge or the amount of a

charge

- f) a decision to give access to a document to a qualified person under subsection 47F(5)
- g) a decision refusing to amend a record of personal information in accordance with an application made under section 48, and
- h) a decision refusing to annotate a record of personal information in accordance with an application made under section 48.

1.27 An access grant decision is defined in s 53B as a decision to grant access to a document where there is a requirement to consult with a state under s 26A, the Commonwealth or a state under s 26AA, a business entity under s 27, or an individual or legal personal representative of a deceased person under s 27A (see Part 3 of these Guidelines).

1.28 Internal review is a merit review at a latter point in time and the new decision maker is not bound by the earlier decision.

1.29 Internal review is not available if an access refusal decision or access grant decision was made by a minister (ss 54(1) and 54A(1)) or made personally by the principal officer of an agency (ss 54(1) and 54A(1)) (see Part 9 of these Guidelines).

### ***Information Commissioner review***

1.30 An FOI applicant can apply to the Information Commissioner for merit review (IC review) of an access refusal decision by an agency or minister (s 54L), and an affected third party can apply for review of an access grant decision (s 54M) (see Part 10 of these Guidelines).

1.31 The application for IC review can be made following the initial decision by the agency or minister, or after internal review by the agency. This includes where a decision is not made within the statutory time frame and is a deemed access refusal (ss 15AC(3) and 51DA(2)) or a deemed affirmation of the original decision after a request is made for internal review (54D(2)).

1.32 The Information Commissioner can affirm the agency's or minister's decision, vary that decision, or set aside the decision and substitute a new decision to be implemented by the agency or minister (s 55K).

1.33 Decisions of the Information Commissioner made in accordance with s 55K of the FOI Act are published on the Australasian Legal Information Institute website ([www.austlii.edu.au](http://www.austlii.edu.au)). A summary table with links to the decisions is published on the website of the OAIC ([www.oaic.gov.au](http://www.oaic.gov.au)).

### ***Further review of decisions***

1.34 A party to the IC review can apply to the Administrative Appeals Tribunal (AAT) for review of the Information Commissioner's decision under s 55K (s 57A(1)(a)) or review of an agency or minister's decision where the Information Commissioner has decided not to undertake a review under s 54W(b) (s 57A(1)(b)). An application may also be made to the AAT for review of a decision to make a vexatious applicant declaration

(s 89N) (see [1.36]-[1.37]; and Part 10 of these Guidelines).

1.35 Additionally, the Federal Court of Australia may decide questions of law referred by the Information Commissioner (s 55H) or determine matters on appeal on a question of law from the Information Commissioner's decision (s 56) (see Part 10 of these Guidelines).

### ***Complaints and investigations***

1.36 The Information Commissioner can investigate an action taken by agencies under the FOI Act, either in response to a complaint or on the Commissioner's own motion (see Part 11 of these Guidelines).

1.37 The IC review function and the complaint investigation function provide different remedies. For example:

- through the IC review process, the Information Commissioner can make the correct and preferable decision (if more than one legally correct option is available) on a request for access, amendment or annotation (s 55K) or finalise an IC review matter by making a decision in accordance with the terms of an agreement reached by the parties (s 55F) (see Part 10 of these Guidelines)
- the outcome of a complaint investigation can be a notice of completion to the agency and any complainant, containing results of the investigation and any recommendations (ss 86 – 88).

1.38 Given the different outcomes and potential overlap between complaints and IC reviews, the Information Commissioner may decide not to investigate a complaint that could be dealt with more effectively through an IC review process.

1.39 Under the *Ombudsman Act 1976*, the Commonwealth Ombudsman also retains authority to investigate complaints against agency actions under the FOI Act.

### **Information Publication Scheme**

1.40 Part II of the FOI Act establishes an Information Publication Scheme (IPS) for Australian Government agencies subject to the FOI Act. This is a statutory framework for pro-active publication of information (see Part 13 of these Guidelines).

1.41 The IPS requires agencies to publish a broad range of information on their website and provides a means for agencies to proactively publish other information. Agencies must also publish a plan that explains how they intend to implement and administer the IPS (an agency plan).

### **Vexatious applicant declarations**

1.42 The Information Commissioner has the power to declare a person to be a vexatious applicant (s 89K). The Information Commissioner may exercise that power if satisfied that a person has engaged in one or more FOI access actions that involve an abuse of process or if a particular request is manifestly unreasonable. Before making such a declaration, the Commissioner must invite the person involved to make a submission (see Part 12 of these Guidelines).

1.43 Decisions in which a declaration is made are published on the websites of the OAIC ([www.oaic.gov.au](http://www.oaic.gov.au)) and the Australasian Legal Information Institute ([www.austlii.edu.au](http://www.austlii.edu.au)).

### Publication and access powers not limited

1.44 The FOI Act is not intended to restrict the circumstances in which government information can be released. Section 3A(2) states that it is not the intention of the Parliament in enacting the FOI Act to limit the power of government agencies to publish information or provide access to documents, or to prevent or discourage agencies from doing so.

1.45 An agency may disclose information without a request under the FOI Act, including information which would be exempt under the FOI Act. An agency may also disclose exempt information if a request is made under the FOI Act, except where restrictions such as secrecy provisions prohibit disclosure.

### Administrative access to documents

1.46 The Information Commissioner encourages agencies to establish administrative access schemes to give access to certain types of information outside the formal FOI process (see Part 3 of these Guidelines). Greater access to government information informally or via specific administrative access schemes advances the object of the FOI Act to ‘facilitate and promote public access to information, promptly and at the lowest reasonable cost’.<sup>1</sup>

### Oversight of FOI Act

1.47 The OAIC, established under the *Australian Information Commissioner Act 2010* (AIC Act), is an independent agency that monitors FOI and promotes the objects of the FOI Act through a range of statutory functions. In addition to merit review of FOI decisions, investigating complaints about FOI administration and the vexatious applicant declaration powers, the Commissioner:

- publishes these Guidelines, which are to be revised periodically
- registers and makes decisions on requests for extensions of time under the FOI Act<sup>2</sup>
- promotes awareness and understanding of the FOI Act
- provides advice and assistance to the public and agencies, and
- monitors agency compliance with the FOI Act.

1.48 The Information Commissioner must also prepare an annual report, for presentation to the Attorney-General and tabling in Parliament, covering a range of FOI and privacy matters (s 30 of the AIC Act). Agencies must provide the Commissioner with FOI information needed to prepare the report (s 93 of the FOI Act) (see Part 15 of these Guidelines).

1.49 The OAIC is headed by the Australian Information Commissioner, who may be

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<sup>1</sup> See *FOI agency resource 14: Administrative access*, July 2014, at [www.oaic.gov.au](http://www.oaic.gov.au).

<sup>2</sup> See Part 3 of these Guidelines and *FOI agency resource 13: Extension of time for processing requests*, July 2014, at [www.oaic.gov.au](http://www.oaic.gov.au)

supported by an FOI Commissioner and a Privacy Commissioner. In addition to its FOI function, the OAIC has:

- privacy functions under the *Privacy Act 1988* (Privacy Act)
- the information commissioner functions, which are to report to the minister on policy and practice with respect to government information management and any other functions conferred on the Information Commissioner.

1.50 The privacy, FOI and information commissioner functions are vested in the Information Commissioner by the AIC Act. The privacy and FOI functions can be exercised by any of the commissioners. Only the Information Commissioner can exercise the information commissioner functions.

### ***Further published resources***

1.51 In addition to these Guidelines, the website of the OAIC ([www.oaic.gov.au](http://www.oaic.gov.au)) provides various practical resources for the public and government agencies on the operation and administration of the FOI Act. These include:

- Written guidance such as the FOI Guide, FOI fact sheets and answers to frequently asked questions
- Resources for FOI decision makers (FOI agency resources) including step by step guidance, tips, checklists, and templates for notices and statements of reasons
- A database of published Information Commissioner review (IC review) decisions.