

# **PART 1 — INTRODUCTION TO THE *FREEDOM OF INFORMATION ACT 1982***

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## PART 1 — INTRODUCTION TO THE *FREEDOM OF INFORMATION ACT 1982*

### Why is freedom of information legislation important?

1.1 Freedom of information (FOI) legislation plays a key role in a modern democracy for four reasons:

- FOI provides a mechanism for individuals to check information about them held on government files, and seek to correct that information if they consider it is wrong or misleading.
- FOI enhances the transparency and accountability of policy making, administrative decision making and government service delivery.
- A community that is better informed can participate more effectively in the nation's democratic processes.
- Information gathered by government, at public expense, is a national resource and should be available more widely to the public.

### Development of FOI legislation in Australia and abroad

1.2 Australia was the first nation with a Westminster style of government to enact FOI legislation in 1982.<sup>1</sup> The legislation was first proposed to the Parliament in 1974 during the Labor government of Prime Minister Whitlam, but was enacted in 1982 under the Coalition government of Prime Minister Fraser. The legislation was partially based on reports of two interdepartmental committees (1974 and 1976; reports tabled in the Parliament), of the Royal Commission on Australian Government Administration (1976) and the Senate Standing Committee on Constitutional and Legal Affairs (1979).

1.3 After its commencement on 1 December 1982, the FOI Act was reviewed many times, including by the Senate Standing Committee on Legal and Constitutional Affairs, *Report on the Operation and Administration of the Freedom of Information Legislation* (1987); jointly by the Australian Law Reform Commission (ALRC) and the Administrative Review Council (ARC), *Open Government: A Review of the Federal Freedom of Information Act 1982* (1985); the Commonwealth Ombudsman, *Needs to Know* (1999); the Australian National Audit Office, *Administration of Freedom of Information Requests* (2004); and the Commonwealth Ombudsman, *Scrutinising Government: Administration of the Freedom of Information Act 1982 in Australian Government Agencies* (2006).

1.4 Building on the reform proposals in those reports, the *Freedom of Information Amendment (Reform) Act 2010* and the *Australian Information Commissioner Act 2010* (AIC Act) were passed by Parliament in May 2010, and commenced on 1 November 2010. Further information about the reform process, which included public consultation on exposure draft legislation and an inquiry by the Senate Finance and Public Administration Legislation Committee, is available on the Attorney-General's Department website at [www.ag.gov.au/RightsAndProtections/FOI/Pages/Freedomofinformationreforms.aspx](http://www.ag.gov.au/RightsAndProtections/FOI/Pages/Freedomofinformationreforms.aspx).

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<sup>1</sup> A more extensive history is provided in Office of the Australian Information Commissioner, *Guide to the Freedom of Information Act 1982* (2011) Chapters 1-3, at [www.oaic.gov.au](http://www.oaic.gov.au).

1.5 The importance of FOI legislation has also been recognised in international law. In December 1946 the General Assembly of the United Nations resolved:

Freedom of Information is a fundamental human right and the touchstone for all freedoms to which the United Nations is consecrated.

1.6 Article 19 of the Universal Declaration of Human Rights, adopted in 1948, similarly provides:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

1.7 The right is echoed also in Article 19 of the International Covenant on Civil and Political Rights (ICCPR), adopted in 1966:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - (a) For respect of the rights or reputations of others;
  - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

1.8 Access to information legislation, first enacted by Sweden in 1766, has now been enacted in more than eighty countries. A majority of those countries jointly established in 2011 an international Open Government Partnership (OGP), and endorsed an *Open Government Declaration*.<sup>2</sup> The Declaration commits countries to: increasing the availability of information about governmental activities; supporting civic participation; implementing high standards of professional integrity; and increasing access to new technologies for openness and accountability. The Australian Attorney-General announced in May 2013 that it was the intention of the Labor Government to join the OGP. The Coalition Government has since indicated that Australia's participation is under consideration.

### Key FOI principles — from 1982 to 2010

1.9 The FOI Act introduced six key principles in 1982 that have been unchanged in the life of the Act:

- All members of the public enjoy an equal right of access to government documents. An FOI applicant is not required to explain their reason for seeking access, or demonstrate a special need for or interest in a document.

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<sup>2</sup> [www.opengovpartnership.org](http://www.opengovpartnership.org).

- The right of access to government documents is a *legal* right. A government agency or minister has no residual discretion to deny access to documents upon request, and can do so only if a document is exempt from disclosure under the FOI Act.
- A person who is denied access to a document can appeal against the decision of the agency or minister to an independent review body, which can review the merits of that decision and make a fresh determination that is binding on the agency or minister (except, prior to 2009, when a conclusive certificate was in place).
- At all stages of the FOI processing and review process the agency or minister bears the onus of establishing that their decision is justified.
- Agencies must publish information that explains their role and work, such as their decision making powers, organisational structure, categories of documents, FOI procedures, and policies and guidelines applied in making decisions that affect members of the public.
- An agency or minister may grant access to any document, even an exempt document, unless prevented by a secrecy provision in another statute from doing so.

1.10 The 2010 reforms to the FOI Act, which were the most wide-ranging and significant FOI reforms since 1982, built on those key principles in the following ways:

- A presumption of openness and of maximum disclosure was made more explicit in the Act. Two examples of this strengthened approach were a revised FOI Act objects clause (summarised below), and a new category of conditional public interest exemptions that can be relied upon to refuse access to information only if access would at the time be contrary to the public interest. A single public interest test applies to all conditional exemptions and is weighted towards disclosure, by listing factors that must be taken into account and irrelevant factors that cannot be considered. Some exemption categories, including Executive Council documents, were repealed.
- A new statutory framework for proactive publication of information by government agencies was established, through a new Information Publication Scheme (IPS) and disclosure logs of documents released under the Act. Under the IPS agencies are required to publish — generally on the agency website — an information publication plan, as well as nine specified classes of information. Agencies are encouraged to identify other categories of information for IPS publication.
- It was made easier for members of the public to make FOI requests: a request can be made by email; there is no application fee or charge for the first five hours of FOI processing; stronger regulation applies to agency observance of processing time limits; and agencies are required to consult with FOI applicants before refusing access on the basis that the work involved in processing the request would substantially and unreasonably divert the agency from its other operations.
- A new independent oversight office, the Office of the Australian Information Commissioner (OAIC), was established, headed by the Information Commissioner supported by the Freedom of Information Commissioner and the Privacy Commissioner. The OAIC has a range of functions and responsibilities, described below.

1.11 The reformed FOI Act applies to all requests for access to records or amendment of personal information received on or after 1 November 2010. The OAIC also commenced on 1 November 2010. The OAIC can only undertake review of decisions made in respect of requests received on or after 1 November 2010, but can investigate complaints about agency FOI handling occurring prior to that date. The IPS and disclosure log requirements commenced on 1 May 2011.

1.12 The *Archives Act 1983* was amended at the same time, to progressively reduce the open access period that specifies the age at which most Commonwealth government records are available for public access. This period is being brought forward from 30 years to 20 years (and from 50 years to 30 years for Cabinet notebooks). These changes are being phased in over a 10-year transition period, so that by 2021 the open access period will be 20 years for most Commonwealth records. The open access period remains at 99 years for census information.

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

1.13 The objects of the Act, which were amended in 2010, emphasise the reasons for giving the Australian community access to information held by government. Government officers must have regard to these objects when making decisions under the legislation.

1.14 The objects of the FOI Act are set out 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
- to ensure that powers and functions in the FOI Act are performed and exercised, as far as possible, so as to facilitate and promote public access to information, promptly and at the lowest reasonable cost.

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

1.16 The Information Commissioner encourages agencies to establish administrative access schemes to give access to certain types of information outside the formal FOI

process. 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>3</sup> More information about administrative access schemes is given in Part 3 of these Guidelines.

1.17 To complement this, ss 90, 91 and 92 provide a range of protections against civil and criminal liability related to the publication of, or giving access to, documents in good faith under the FOI Act or in the belief that it is otherwise required or permitted.

### **The role of the Australian Information Commissioner**

1.18 The OAIC is headed by the Australian Information Commissioner, supported by the FOI Commissioner (a new position) and the Privacy Commissioner (an existing position that moved to the OAIC). The OAIC has three broad functions:

- the privacy functions, which are functions formerly conferred on the Privacy Commissioner by the *Privacy Act 1988*
- the FOI functions, which are new functions directed to provide oversight of the operation of the FOI 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.

1.19 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 all three commissioners, although that the privacy functions are principally exercised by the Privacy Commissioner and the FOI functions by the FOI Commissioner. Only the Information Commissioner can exercise the information commissioner functions. The OAIC is supported by an Information Advisory Committee and a Privacy Advisory Committee.

1.20 The FOI functions include merit review of FOI decisions, investigating complaints about FOI administration, publishing guidelines on the FOI Act, promoting awareness and understanding of the FOI Act, conducting training, providing advice and assistance, monitoring agency compliance with the FOI Act, and collecting and publishing information and statistics about FOI matters.

1.21 An FOI applicant can apply to the Information Commissioner for merit review (IC review) of an access refusal decision by an agency or minister, and an affected third party can apply for review of an access grant decision. The application for IC review can be made following the initial decision by the agency or minister, or after internal review by the agency. The Information Commissioner can affirm the agency’s or minister’s decision, vary that decision, or substitute a new decision to be implemented by the agency or minister. A party to the IC review can apply to the Administrative Appeals Tribunal (AAT) for review of the Commissioner’s decision, except in some limited circumstances (see Part 10 of these Guidelines).

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<sup>3</sup> See OAIC, *Agency resource 14: Access to government information – administrative access schemes*, September 2012, at [www.oaic.gov.au](http://www.oaic.gov.au).

1.22 The Information Commissioner can also investigate action taken by agencies under the FOI Act, either in response to a complaint or on the Commissioner's own motion. The merit review function and the complaint investigation function provide different remedies. If a person is concerned with the correctness of an access refusal or access grant decision, the appropriate mechanism is an application for IC review. If a person is concerned about an agency's delay or lack of assistance, a complaint is more appropriate. The Commonwealth Ombudsman retains authority to investigate complaints against agency action under the FOI Act, although the OAIC is chiefly responsible for FOI complaints (see Part 11 of these Guidelines).

1.23 The Information Commissioner also has the power to declare a person to be a vexatious applicant. The Commissioner may exercise that power if satisfied that a person has engaged in FOI access actions that involve an abuse of process or if a particular request or application 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).

1.24 The Information Commissioner must 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).

## Coverage of the FOI Act

### *Agencies and contracted service providers*

1.25 Most Australian Government agencies are subject to the FOI Act, the general rule being that the Act applies unless it is expressed not to apply. Agencies subject to the Act include:

- all departments of state (that is, departments of the Australian Public Service)
- an agency that is a 'prescribed authority', which covers most other Australian Government agencies that are not departments of state, and in particular most Commonwealth entities under the *Public Governance, Performance and Accountability Act 2013*.

1.26 Agencies that are exempt from the FOI Act (s 7 and Schedule 2 of the Act) include the Auditor-General; security intelligence agencies such as the Australian Security Intelligence Organisation (ASIO) and the Inspector-General of Intelligence and Security; and certain defence intelligence agencies (see Part 2 of these Guidelines).

1.27 Some agencies are exempt in relation to particular documents — for example, the Australian Broadcasting Corporation in relation to program material, Comcare in relation to its commercial activities, and the Department of Defence in relation to documents covering the collection, reporting or analysis of operational intelligence or special access programs (s 7 and Schedule 2).

1.28 The Act has been extended to cover some documents created or held by a contractor or subcontractor relating to the provision of services to the public or third parties on an

agency's behalf (s 6C). An FOI request relating to such documents must be made to the agency. Agencies must ensure that all relevant contracts entered into on or after 1 November 2010 include provisions that enable the agency to obtain from the contractor or sub-contractor any document relating to the performance of the contract so as to meet the request (see Part 2 of these Guidelines).

### **Documents**

1.29 The right of access enshrined in the FOI Act applies to 'documents'. This term is defined in s 4(1) to include maps, photographs, and any article from which sounds, images or writing are capable of being reproduced (for example, emails). There is no general obligation on agencies to reduce information to written documentary form in order to facilitate an FOI request, except in relation to information that is stored on a computer tape or disk (s 17).

1.30 If a request for a document is made, the document must be disclosed unless one of the exemption provisions applies. The right of access is also limited in certain circumstances, such as where a statutory scheme establishes a right of access to a document, subject to a fee or charge (such as a land title register), or an agency has an arrangement that allows a member of the public to purchase the document (see Part 3 of these Guidelines).

### **Extension of FOI Act to Norfolk Island**

1.31 The *Territories Law Reform Act 2010* was passed by Parliament on 26 November 2010, and received assent on 10 December 2010. The Act extended the application of the FOI Act to Norfolk Island, including by amending the definition of 'agency' to include a 'Norfolk Island authority'. The right to access documents only applies to documents of a Norfolk Island Authority and official documents of a Norfolk Island minister that are five years old or less when the provisions commence, subject to some limited exceptions. The provisions commenced on 1 January 2011, with the exception of the IPS requirements which apply to Norfolk Island authorities from 1 May 2013.

### **References in the Guidelines**

1.32 A reference to a paragraph is to a paragraph of text in the same Part of these Guidelines. A reference to a section is to a section of the FOI Act or other Act as specified.