Australian Government

Office of the Australian Information Commissioner

Guide to the *Freedom of Information Act 1982*

November 2011

Protecting information rights — advancing information policy

Australian Government

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Foreword

Open government is a vital aspect of Australian democracy. The accountability and quality of government are enhanced when the law guarantees public access to government information.

For thirty years the *Freedom of Information Act 1982* has been the legislative anchor for open government in Australia. The Act gives members of the public a legally enforceable right of access to government documents. The declared object of the Act is to promote Australia's representative democracy by increasing public participation in government processes and increasing scrutiny, discussion, comment and review of government actions. Information held by government, as the Act further declares, is a national resource that should be managed for public purposes.

Wide-ranging reforms to the FOI Act commenced in 2010. The reforms make it easier for the public to request FOI access, require agencies to be more proactive in publishing information, tighten restrictions against information disclosure and strengthen oversight of FOI administration by establishing the Office of the Australian Information Commissioner.

The changes to the Australian Freedom of Information Act are matched by similar open government reforms in some Australian and foreign jurisdictions. The pressure for greater transparency and public engagement in government is a global commitment.

This Guide explains the main provisions and underlying principles of the FOI Act. The historical and philosophical underpinnings of the Act are described, as well as the key features of the 2010 reforms.

The Guide is designed for a wide audience, in and outside government. It is particularly aimed at assisting senior leaders in government to maintain a lasting commitment to open government.

Prof John McMillan
Australian Information Commissioner

Ten key FOI messages to take away from this Guide

1. Be open

Transparent government is better government. Openness enables the public to participate in democratic government and assist and review policy development, decision making and service delivery.

2. Be active

Publish information. Information has greater value when shared widely. That is why the FOI Act declares that government information is a national resource for public access and use.

3. Be informed

The FOI Act gives every person a legally enforceable right of access to government documents. Access can be denied only on a ground listed in the FOI Act, and agencies and ministers must have regard to the Information Commissioner's FOI Guidelines when making decisions or exercising powers under the FOI Act.

4. Be innovative

The FOI Act sets out essential minimum requirements to promote public access to information held by government. Use other strategies to make information available on request and to publish information that people will be interested to learn.

5. Be helpful

Help the public to access government information and documents – the FOI Act requires this. People may need help to frame access requests that are not too vague, large or costly to handle. Ensure information about how to make an FOI request is available on your agency's website.

6. Be efficient

People want a quick response when they request information. Timely information is more useful. The FOI Act imposes time limits for handling document requests (30 calendar days for most requests) – and it is better to beat that time limit if possible.

7. Be clear

Good decisions are based on good reasons. A decision under the Act, particularly a decision to deny access or impose a charge, should be stated clearly and comprehensively. Use plain English. Giving good reasons that can be easily understood may also avoid a complaint or request for review.

8. Be a model record keeper

Effective record keeping underpins open government. Electronic information management makes it easier to locate information and make it available upon request, and will improve your agency's efficiency.

9. Be collaborative

Open government requires a team effort – within agencies and across government. Talk to other staff and other agencies about simple and effective ways of publishing information and handling FOI and information requests. Consult the guidance material published by the Office of the Australian Information Commissioner (OAIC) at www.oaic.gov.au.

10. Think public interest

Open government is in the public interest. This principle runs through the FOI Act – through the objects clause, publication requirements, exemptions, charging provisions and access procedures. Rely on it as a guiding principle for greater transparency.

Introduction

The *Freedom of information Act 1982* (Cth) has been a feature of Australia's legislative landscape since 1982. The purpose of the Act was to open government activity to public scrutiny, so as to enhance accountability and encourage citizen engagement with public administration – the foundations of democracy.

In 2010 the Australian Parliament implemented wide-ranging open government reforms – the most significant FOI reforms in 30 years. The OAIC was established and substantial changes were made to the FOI Act.

These reforms strengthened the effectiveness and smooth running of the FOI Act – by simplifying the process for accessing government information; tightening the exemptions to information release; strengthening independent oversight and review of FOI administration; promoting proactive publication of government information; and clearly stating the open government object of the Act.

The reform took place against a backdrop of broad debate about adjusting the focus of public administration to improve service delivery, engage the community, foster collaboration between the public and private sectors, and utilise new information technology in achieving those objectives. This debate – taken up in numerous public sector reports and reviews – converged around the idea that, in the information age, information is a type of resource. By extension, government information is a *national* resource and as such, should be available for public access and use.

This idea is embedded in the reformed FOI Act which includes a powerful new statement of its object – 'to increase recognition that information held by the Government is to be managed for public purposes, and is a national resource' (s 3(3)). The Act includes a new scheme for the proactive publication of government information, which extends the focus of FOI from a reactive model to embrace a responsive, proactive model for information release.

About this Guide

This Guide positions the reformed FOI Act within the information policy landscape, of which there are many elements. One element is international support, in theory and legislative practice, for requiring transparency in government and conferring a legal right on the community to obtain access to government information. FOI is a principle enshrined in international human rights instruments and provides a legislative anchor for transparent government. This places it at the heart of democratic government.

Important too are the recent developments in government information policy that give a broader meaning to open government. Formerly synonymous with public access to government documents, open government now implies

proactive publication of government information (open data) and government collaboration with the community in developing and reviewing policy and administration (citizen engagement).

Technology plays a key role in building this broader open government platform. New practices and concepts that overlap but are distinct become important, such as data management, information exchange, open standards, service delivery and more.

The Guide is divided into two parts:

- **Part A – Freedom of information past and present**: provides an introduction to the foundational principles of FOI, explains the place of FOI within the broader framework of government information policy, and outlines the broader concept of open government. This Part also provides an overview of reforms to the FOI Act since 1982 and explains the role of the OAIC.
- **Part B – Key features of the Freedom of Information Act**: provides a detailed summary of the FOI Act covering issues such as: its scope and application; the steps involved in processing FOI requests; exemptions under the Act; amendment or annotation of personal information held by government; review, complaints and appeals processes; and information publication requirements.

Terms and abbreviations are explained in the Glossary on page 69.

Where to go for further information

The OAIC has produced a range of agency resources which provide practical guidance on complying with the FOI Act and making good decisions.

The Information Commissioner has also issued guidelines under s 93A of the FOI Act to which ministers and agencies must have regard when performing functions and exercising powers under the Act. The guidelines cover all aspects of the operation of the FOI Act.

The guidelines and other FOI resources, including fact sheets for the public are available at Freedom of information on the OAIC website.

In July 2011, the Department of the Prime Minister and Cabinet issued *FOI Guidance Notes* which are intended to assist agencies considering the application of exemptions for Cabinet and deliberative process documents when dealing with FOI requests.

PART A – Freedom of information past and present

1. Introduction to FOI in Australia and abroad

Why FOI legislation is important

The democratic purpose of FOI legislation in Australia is to confer a legal right on members of the public to access information held by the government. When FOI legislation was first being considered by the Australian Parliament in the 1970s, the Senate Standing Committee on Constitutional and Legal Affairs set out three broad reasons why FOI legislation is important. Those reasons are as relevant today.

First, FOI provides a mechanism for individuals to see what information is held about them on government files, and to seek to correct that information if they consider it wrong or misleading.

> It seems to us that there are three quite specific justifications for having effective freedom of information legislation in Australia, each of which arises out of the principles upon which democratic government claims to be based. The first of these touches upon the rights of the individual. With certain national security exemptions ... we believe that every individual has a right to know what information is held in government records about him personally. We believe that the individual has the right to inspect files held about or relating to him, and ... the right to have material which is inaccurate corrected on such a file.[1]

Second, FOI enhances the transparency and accountability of policy making, administrative decision making and government service delivery. For example, FOI enables individuals to understand why and how decisions affecting them are made and, armed with that knowledge, question or support the decisions made by government. Transparency in decision making can also lessen the risk of inefficient and corrupt practices.

> [W]e believe that when government is more open to public scrutiny, it in fact becomes more accountable. As a result there is a greater need for it to be seen as efficient and competent. The accountability of the government to the electorate, and indeed to each individual elector, is the corner-stone of democracy, and unless people are provided with sufficient information accountability disappears.[2]

1 Senate Standing Committee on Constitutional and Legal Affairs, *Freedom of Information* (1979) para 3.3.

2 Senate Standing Committee on Constitutional and Legal Affairs, *Freedom of Information* (1979) para 3.4.

Third, a community that is better informed can participate more effectively in the nation's democratic processes.

> [W]e believe that if people are adequately informed, and have access to information, this in turn will lead to an increasing level of public participation in the processes of policy making and government itself. ... Unless information is available to people other than those professionally in the service of the government, then the idea of citizens participating in a significant and effective way in the process of policy making is set at nought. This participation is impossible without access to information.[3]

More recently, a fourth reason for FOI legislation has emerged. There is greater recognition that information gathered by government at public expense is a national resource and should be available more widely to the public. This is due in considerable part to developments in information technology use in the government and non-government sectors since the FOI Act was enacted. This reason was summarised by the Government 2.0 Taskforce that examined how Web 2.0 technology could be used to achieve more open and responsive government:

> As policy maker and service deliverer, the government spends large sums collecting, analysing and transforming vast amounts of data, information and content ... Government has already invested in the production of this information. It thus exists as a national asset. Internationally and nationally, there is a growing recognition of the extent to which [public sector information] is a resource that should be managed like any other valuable resource – that is to optimise its economic and social value.[4]

An internationally recognised right

The importance of FOI legislation was recognised by the United Nations little more than a year after the organisation's inception. In December 1946 the General Assembly resolved:

> Freedom of Information is a fundamental human right and the touchstone for all freedoms to which the United Nations is consecrated.[5]

3 Senate Standing Committee on Constitutional and Legal Affairs, *Freedom of Information* (1979) para 3.5.

4 Report of the Government 2.0 Taskforce, *Engage: Getting on with Government 2.0* (2009) p 40.

5 United Nations General Assembly, Resolution 59(1), 65th Plenary Meeting, 14 December 1946.

This right is enshrined in Article 19 of the Universal Declaration of Human Rights, adopted in 1948:

> 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.

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.

A Special Rapporteur on Freedom of Opinion and Expression, appointed by the UN Commission on Human Rights to monitor and report on the implementation of Article 19 of the ICCPR,[6] put forward the following set of FOI principles in 2000:

1. Freedom of information legislation should be guided by the principle of maximum disclosure.
2. Public bodies should be under an obligation to publish key information.
3. Public bodies must actively promote open government.
4. Exceptions should be clearly and narrowly drawn and subject to strict 'harm' and 'public interest' tests.
5. Requests for information should be processed rapidly and fairly and an independent review of any refusals should be available.
6. Individuals should not be deterred from making requests for information by excessive costs.
7. Meetings of public bodies should be open to the public.

6 For example, see the 2005 annual report of the Special Rapporteur, UN Document ECN 4/2005/64.

8. Laws which are inconsistent with the principle of maximum disclosure should be amended or repealed.

9. Individuals who release information on wrongdoing – whistle-blowers – must be protected.[7]

A report of the Special Rapporteur in 2010 drew attention to the role of public access to information in sustaining democratic practice:

> In order for democratic procedures to be effective, people must have access to public information, defined as information related to all State activity. This allows them to take decisions; exercise their political right to elect and be elected; challenge or influence public policies; monitor the quality of public spending; and promote accountability. All of this, in turn, makes it possible to establish controls to prevent the abuse of power.[8]

The European Union has also recognised the right to information in Articles 8 and 42 of the *Charter of Fundamental Rights of the European Union*:

> 8. [Personal] data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
>
> 42. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium.[9]

Other recent developments confirm the growing importance attached to public access to government information:

- Twelve European countries – Belgium, Estonia, Finland, Georgia, Hungary, Lithuania, Macedonia, Montenegro, Norway, Serbia, Slovenia, and Sweden – were the first states to sign the world's first treaty on access to information on 19 June 2009, the *Council of Europe Convention on Access to Official Documents*.

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7 *Report of the United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, UN Document E/CN.4/2000/63, 18 January 2000, paras 43, 44. The principles were noted by the United Nations Commission on Human Rights in Resolution E/CN.4/RES/2000/38, 20 April 2000, para 2.

8 *Report of the United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, Mr Frank La Rue, Report to the Human Rights Council, 20 April 2010, paras 30–31.

9 *Charter of Fundamental Rights of the European Union* (2007/C 303/01). These principles were given binding legal force in the Treaty of Lisbon, which came into force on 1 December 2009. The European Parliament resolved on 17 December 2009 that improvements were needed to the legal framework for access to documents.

- Participants at the UNESCO World Press Freedom Day conference in Brisbane on 3 May 2010 made a declaration (the 'Brisbane Declaration') calling on member states to enact legislation guaranteeing the right to information in accordance with the internationally-recognised principle of maximum disclosure, setting out a number of principles and other actions that should be taken.[10]
- A number of countries formed an Open Government Partnership with participating countries endorsing an *Open Government Declaration* on 20 September 2011. 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.[11]

FOI and political culture

Support for open government has a strong footing in democratic political theory. As early as 1822 former United States President James Madison observed:

> A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.[12]

The same point was made the following century by United States consumer advocate Ralph Nader:

> A well informed citizenry is the lifeblood of democracy; and in all arenas of government information, particularly timely information, is the currency of power.[13]

This theme was also taken up in Australia by Prime Minister Malcolm Fraser in 1976 in explaining his Government's support for FOI legislation:

> If the Australian electorate is to be able to make valid judgements on government policy it should have the greatest access to information possible. How can any community progress without continuing and informed and intelligent debate? How can there be debate without information?[14]

10 United Nations Educational, Scientific and Cultural Organisation, *Brisbane Declaration: Freedom of Information: the Right to Know*, 3 May 2010.

11 Countries that have so far endorsed the Declaration include: Brazil, Indonesia, Mexico, Norway, Philippines, South Africa, United Kingdom and the United States, with many more in the process of committing to the Declaration, www.opengovpartnership.org.

12 James Madison, Letter to W T Barry, 4 August 1822.

13 Ralph Nader, *Freedom of Information: the Act and the Agencies* (1970) 5 Harvard Civil Rights – Civil Liberties Law Review 1.

14 The Canberra Times, 23 September 1976, p 2.

United States President Lyndon Johnson echoed the same sentiment when signing that nation's first FOI Act in 1966:

> This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the nation permits. No one should be able to pull the curtains of secrecy around decisions which can be revealed without injury to the public interest.

A recurring theme is that public trust in government is tied to an open political culture, as noted by the Franks Committee in Britain in 1972 in a report on the British Official Secrets Act:

> A democratic government … needs the trust of the governed. It cannot use the plea of secrecy to hide from the people its basic aims. … A government which pursues secret aims, or which operates in greater secrecy than the effective conduct of its proper functions requires, or which turns information services into propaganda agencies, will lose the trust of the people.[15]

It is also frequently said that open government can inhibit pathologies that destroy the fabric of a nation. As United States jurist and later Supreme Court Justice Louis Brandeis observed:

> Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.[16]

To similar effect was the remark of publisher Joseph Pulitzer:

> There is not a crime, there is not a dodge, there is not a trick, there is not a swindle, there is not a vice which does not live by secrecy.

15 Departmental Committee on Section 2 of the Official Secrets Act 1911 (Lord Franks, Chairman), Report, Cmnd 5104, HMSO (1972) vol 1, p 12.

16 Louis D Brandeis, *Other People's Money and How the Bankers Use it* (1914) 92.

2. FOI principles and reforms

Development of FOI legislation in Australia

World-wide, the first legislation relating to FOI was introduced in Sweden in 1766. Finland took the same step nearly two hundred years later in 1951, followed by the United States of America in 1966, and Denmark, Norway, Austria, France and the Netherlands during the 1970s. More than 80 countries now have national FOI legislation.

Australia was the first nation with a Westminster style of government to enact FOI legislation. 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. In those intervening years FOI proposals were considered by two interdepartmental committees (in reports tabled in the Parliament in 1974 and 1976), by the Royal Commission on Australian Government Administration in its report tabled in 1976, and by the Senate Standing Committee on Constitutional and Legal Affairs in a report tabled in 1979.[17] There was considerable public and parliamentary debate about the FOI proposals during that period.

At the same time as FOI legislation was being considered, the Parliament was establishing a new system of administrative law in Australia. Three major Acts were the *Administrative Appeals Tribunal Act 1975*, the *Ombudsman Act 1976* and the *Administrative Decisions (Judicial Review) Act 1977*. There were parallel themes in the FOI and administrative law reforms. Both were designed to confer legal rights upon members of the public to question and challenge government decisions, including by taking a dispute to an independent ombudsman, tribunal or court. Both also had the objective of ensuring greater transparency and accountability in the processes of government.

After its commencement on 1 December 1982, the FOI Act was reviewed many times, resulting in numerous recommendations for amendment and improved FOI administration. Major reports on the Act and its administration were prepared in 1987 by the Senate Standing Committee on Legal and Constitutional Affairs, *Report on the Operation and Administration of the Freedom of Information Legislation*; in 1995 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*; in 1999 by the Commonwealth Ombudsman, *Needs to Know*; in 2004 by the Australian National Audit Office, *Administration of Freedom of Information Requests*; and in 2006 by the Commonwealth Ombudsman, *Scrutinising Government: Administration of the Freedom of Information Act 1982 in Australian Government Agencies*.

17 A more detailed history of the development of the FOI Act up to 1983 is available at www.dpmc.gov.au/foi/history.cfm.

Two other reports in 2007 that had a strong influence on Australian Government developments were prepared by other bodies. Both were strongly critical of FOI law and practice in Australia. They were a report by 'Australia's Right to Know Coalition', formed by 12 major media companies;[18] and a report in Queensland by the FOI Independent Review Panel, appointed by the Queensland State Government.[19]

A finding common to many of those reviews, noted in the comprehensive joint ALRC-ARC review, was that '[c]oncerns about the operation of the Act include the number and breadth of the exemptions, the high cost of obtaining information and the quality of the current review procedures'.[20] Another frequent criticism was that there had been little cultural change in some government agencies, and that a presumption in favour of disclosure was not practised across government. There was also concern that government agencies could exploit restrictions and gaps in FOI laws to make it harder for the public to gain access to government information, especially information that might be embarrassing to the government or an agency.

Another event in 2006 that drew attention to FOI difficulties was the decision of the High Court in *McKinnon v Secretary, Department of the Treasury* (2006) 228 CLR 423. The Court confirmed that the Administrative Appeals Tribunal (AAT) had limited power to review an exemption claim made in a conclusive certificate. The Court's decision was greeted by a chorus of media criticism that the FOI Act had failed to meet its objectives.

In 2007 the Australian Labor Party made an election commitment to 'drive a culture shift across the bureaucracy to promote a pro-disclosure culture' and to reform the FOI Act.[21] The first stage in the Government's FOI reform program was the passage of the *Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act 2009*. The practical effect of the Act was to abolish conclusive certificates for all exemption claims under the FOI Act and the *Archives Act 1983*, and thereby enable the AAT to undertake full merit review of any exemption claim. The symbolic importance of the Act was that Government thereby relinquished its right to have the final say on whether a requested document qualified for exemption on the ground that disclosure would damage security, defence or international relations, or reveal Cabinet, Executive Council or internal policy deliberations.

18 *Report of the Independent Audit into the State of Free Speech in Australia* (2007), report by Ms Irene Moss for the Australia's Right to Know Coalition.

19 Queensland FOI Independent Review Panel, *The Right to Information: Reviewing Queensland's FOI Act* (2007) (chair, Mr David Solomon AM).

20 Australian Law Reform Commission/Administrative Review Council, *Open government: a Review of the Federal Freedom of Information Act 1982*, ALRC Report No 77/ARC Report No 40 (1995) para 1.2.

21 Australian Labor Party, Government Information: Restoring Trust and Integrity (2007), policy statement by Mr Kevin Rudd MP and Senator Joe Ludwig.

The next stage in the reform process, following a period of public consultation, was the introduction into the Parliament in 2009 of the Australian Information Commissioner Bill and the Freedom of Information Amendment (Reform) Bill. In proposing the 2010 reforms, Senator John Faulkner noted:

> Both in practice, and as a symbol, 'freedom of information' represents the pinnacle of citizens right to know: a legal requirement to give the Australian community access to information held by the Australian Government.[22]

After an inquiry by the Senate Finance and Public Administration Legislation Committee,[23] and debate in Parliament, the two Bills were passed by Parliament in May 2010. The reforms constitute the most substantial change to Australia's national freedom of information legislation since the FOI Act was enacted in 1982.

Key FOI principles

The FOI Act introduced six key principles in 1982:

- 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.
- 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 tribunal, 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.

22 *Freedom of Information Reform: Companion Guide,* issues by the Cabinet Secretary, Senator John Faulkner, March 2009.

23 Senate Finance and Public Administration Legislation Committee, Freedom of Information Amendment (Reform) Bill 2009 [Provisions], Information Commissioner Bill 2009 [Provisions] (2010).

Objectives of the 2010 legislative reforms

The 2010 reforms built on those key FOI principles. The *Australian Information Commissioner Act 2010* and the *Freedom of Information Amendment (Reform) Act 2010* made the following broad changes:

- There is a new presumption of openness and of maximum disclosure. Information requested under the FOI Act or otherwise should be provided unless there is an overriding reason not to do so. Whether requested information is covered by an FOI exemption is only one issue to be considered. This presumption of openness is embodied in a new objects clause in the FOI Act and in a new public interest balancing test that applies to many exemptions (both of which are explained below).

- Agencies should proactively publish as much information as practicable on the agency website. A new Information Publication Scheme (IPS) expands the range of information an agency is required to publish, and invites agencies to publish additional information that will be of public interest. This is often described as the 'push' model of FOI disclosure, as contrasted with the traditional FOI model that largely relies on agencies reacting to information requests (the
'pull' model).

- It is easier for members of the public to make FOI requests. The request procedure is simpler, and there are reduced charges, stronger pressure on agencies to observe the processing time limits, and assistance given by the OAIC.

- The FOI review process is designed to be inexpensive and informal, so that it is easier for a person to question or challenge an FOI decision by an agency or minister. New complaint and review procedures based in the OAIC implement this objective.

- Two new independent statutory officers in the OAIC – the Australian Information Commissioner and the Freedom of Information Commissioner – play a leadership role in securing the FOI principles and objectives. The OAIC is, in essence, an information champion, with a comprehensive range of powers and functions to promote open government, protect information rights and advance information policy. A particular function of the OAIC is to ensure improved FOI administration by agencies and ministers, by monitoring and reviewing how the requirements of the legislation are being met.

- FOI, privacy and information policy are integrated in a single office based in the OAIC. This reflects the importance attached to effective information management in government, and reinforces the responsibility of agencies to pay close attention to information issues. The aggregation of information

functions in the OAIC enables a larger and better resourced office to play a strategic role in aiding the development of consistent information policy in government, monitoring information management and record keeping in agencies, and providing advice and assistance to agencies and the public. Greater harmony between privacy and FOI principles can also be managed.

The Archives Act has also been changed as part of this legislative reform package. The open access period in the Archives Act, which defines the age at which most government information is released to the public, is being reduced from 30 years to 20 years (and from 50 years to 30 years for Cabinet documents). This change is being phased in over a 10-year period, commencing on 1 January 2011. All Australian Government agencies, including security intelligence agencies that are excluded from the operation of the FOI Act, fall under the Archives Act.

Summary of the 2010 FOI Act reforms

The main FOI Act changes that commenced on 1 November 2010 are summarised below. A more detailed explanation of the FOI Act including these changes is given in Part B of this Guide.

- ***Objects of the Act***
  The objects clause of the FOI Act was revised to spell out more clearly the intention of the Act to promote disclosure of information held by government and increase scrutiny of government activities.

- ***Coverage of the Act***
  The coverage of the Act was extended to documents held by contracted service providers that are delivering services to the public on behalf of Australian Government agencies.

- ***Narrower exemptions***
  The scope of the exemption for Cabinet documents was amended and the exemptions for Executive Council documents, documents relating to an agency's conduct of industrial relations and documents arising out of companies and securities legislation were repealed.

- ***'Conditional exemptions' and the public interest test***
  Some exemptions were recast as 'conditional exemptions'. Access to a conditionally exempt document can be refused only if, in the circumstances of a particular case, access at that time would, on balance, be contrary to the public interest. This single public interest test replaces a range of public interest tests previously in the Act.

- ***Timeframe for processing requests***
  The standard 30 day time limit for an agency or minister to make a decision on a request is unchanged. However, an agency or minister can now request

an extension of time from the Information Commissioner in certain circumstances, including when the matter is complex or voluminous. No access charge can be imposed if a decision is not made within the statutory time limit, including any authorised extension.

- ***Charges***
  The FOI Act and Freedom of Information (Charges) Regulations have been amended to remove application fees for requesting access to documents and applying for internal review. There is no charge if a person requests access to their personal information, or for the first five hours of decision making time for other requests.

- ***Vexatious applicant declarations***
  The Information Commissioner may declare a person to be a vexatious applicant if satisfied that the person is engaging in FOI actions that are an abuse of process or are manifestly unreasonable.

- ***Complaint investigation***
  The Information Commissioner can investigate a complaint about how an agency handled an FOI request, or took other actions under the FOI Act. The Information Commissioner can also conduct investigations of an agency's actions at the Commissioner's own initiative.

- ***Merit review by the Information Commissioner***
  The system for review of FOI decisions by agencies and ministers was changed. A person may still seek internal review of an agency decision, but can also apply directly to the Information Commissioner to undertake merit review of the agency decision. A decision of the Information Commissioner can be reviewed by the AAT.

- ***Protections for disclosure of information***
  The protection provided by the FOI Act to agencies and their staff against civil and criminal liability was extended, in keeping with the aim of promoting a culture of disclosure. As well as protecting disclosure required in response to a request, the Act protects disclosure in good faith as permitted by the Act.

- ***Information Publication Scheme***
  The information publication requirements in the FOI Act were expanded in the new IPS, aimed at enabling the FOI Act to 'evolve as a legislative framework for giving access to information through agency driven disclosure rather than as a scheme that is primarily reactive to requests for documents'.[24] Information published by an agency must be accurate, up to date and complete. The Information Commissioner is to review compliance by each agency with these requirements every five years.

24 Revised Explanatory Memorandum to the Freedom of Information Amendment (Reform) Bill 2010, p 1.

- ***Publication of information disclosed under the FOI Act***
  Agencies and ministers are required to maintain a 'disclosure log'. Information given to a person in response to an FOI request must be published on a website within 10 days, or details provided of how the information may be obtained. This publication requirement does not apply to personal and business information if it would be unreasonable to publish the information or to other types of information the Information Commissioner has determined to be exempt.

The way forward for the FOI Act

The primary purpose of the 2010 reforms to the FOI Act was 'to promote a pro-disclosure culture across government and to build a stronger foundation for more openness in government'.[25]

Further actions are planned to help ensure that the changes to the FOI Act meet the intended objectives, and to identify any areas for improvement or changes required to take advantage of new technologies.

The minister responsible for the FOI Act must have a review of the Act undertaken after 1 November 2012, with the review to be completed within six months and the report tabled in Parliament. A review of the Australian Information Commissioner Act will also be conducted at the same time.

The Government has asked the Information Commissioner to review the charges and fees under the FOI Act with the final report due in early 2012.

In addition, the FOI Act requires each agency, together with the Information Commissioner, to review the operation of the IPS in that agency, at least once every five years. This will be complemented by the Government 2.0 Taskforce's recommendation that the Information Commissioner develop a common methodology for evaluating the economic and social value generated from published public sector information, and publish an annual report on the contribution of each agency to the consolidated value of Commonwealth public sector information – a recommendation accepted in the Government's response to the Report of the Government 2.0 Taskforce.[26] This was taken up by the OAIC in November 2011 in *Issues Paper 2: Understanding the value of public sector information in Australia*.

25 Explanatory Memorandum for the Freedom of Information Amendment (Reform) Bill 2010, p 1.

26 Department of Finance and Deregulation, *Government Response to the Report of the Government 2.0 Taskforce*, recommendations 6.11 and 6.13.

3. FOI and open government

When the FOI Act was enacted in 1982, the terms 'FOI' and 'open government' meant much the same thing – public access to government-held information. However, with significant recent developments in government information policy – culminating in the Australian Government's *Declaration of Open Government* and the establishment of the OAIC – 'open government' has many new connotations.

Foremost are associations with information technology and the possibilities of use and reuse of government information outside the public sector. This was a central theme for the 2009 report of the Government 2.0 Taskforce which noted that: 'Internationally and nationally, there is a growing recognition of the extent to which [public sector information] is a resource that should be managed like any other valuable resource – that is, to optimise its economic and social value.'[27] Flowing from greater information openness are issues of open licensing, metadata standards and machine-readability to enable data reuse. According to the Taskforce, government could further foster openness by adopting Web 2.0 technologies to enhance collaboration and break down barriers between government and the community.

The reformed FOI Act reflects many of these new information policy settings, for example, by formally recognising government information as a national resource and by establishing a proactive scheme for information publication. Other information policy initiatives overlap with, or expand on, the objects of the FOI Act. This chapter provides an overview of those initiatives that have a bearing on open government and FOI. A summary of the newer and broader meaning of 'open government' is given at the end of this chapter.

Open government policy reform between 2008 and 2010

Between 2008 and 2010 the Australian Government commissioned a number of reviews relating to information policy and open government.[28] The reports from those reviews pointed to opportunities, particularly through use of technology, to improve government information-handling practices, foster innovation, promote greater transparency in government, and provide the public with greater access to public sector information. These reports included:

- ***Ahead of the Game: Blueprint for the Reform of Australian Government Administration**, (2010),* Advisory Group on Reform of Australian Government Administration (discussed further below)

27 Report by the Government 2.0 Taskforce, *Engage: Getting on with Government 2.0* (2009) p 40, at www.finance.gov.au/publications/gov20taskforcereport/index.html.

28 These reviews are comprehensively summarised in Section 2 of OAIC, *Towards an Australian Government Information Policy: Issues Paper 1*, November 2010, www.oaic.gov.au/publications/issues_paper1_towards_an_australian_government_information_policy.html.

- ***Engage: Getting on with Government 2.0***, (2009), Government 2.0 Taskforce (discussed further below)
- ***Information Policy and e-governance in the Australian Government***, (2009), Dr Ian Reinecke (report commissioned by the Department of the Prime Minister and Cabinet)
- ***Australia's Digital Economy: Future Directions***, (2009), Department of Broadband, Communications and the Digital Economy
- ***National Government Information Sharing Strategy***, (2009), Department of Finance and Deregulation
- ***Secrecy laws and open government in Australia***, (2009), Australian Law Reform Commission
- ***Venturous Australia: Building Strength in Innovation***, (2008), Department of Innovation, Industry, Science and Research
- ***Review of the Australian Government's use of Information and Communication Technology*** (also known as 'The Gershon Review') (2008), Department of Finance and Deregulation and Sir Peter Gershon.

Engage: Getting on with Government 2.0

A key report was the 2009 report of the Government 2.0 Taskforce, which examined how Web 2.0 technology could be used more effectively to achieve 'more open, accountable, responsive and efficient government'.[29] The report defined its area of focus in terms of three pillars: achieving a shift in public service culture and practice; application of Web 2.0 tools to government; and open access to public sector information.[30]

Recommendation six of the report concerned the release of public sector information. The report argued that as government invests time and resources in collecting, analysing and transforming large amounts of data, public sector information should be considered as a national resource.[31] Unlike other resources,

29 *Engage: Getting on with Government* 2.0, p x.

30 'Public sector information' as used in the Government 2.0 Taskforce report is broadly equivalent to what this Guide refers as 'government information' or 'information held by Government'. The Taskforce accepted the broad Organisation for Economic Co-operation and Development (OECD) definition of public sector information: 'information, including information products and services, generated, created, collected, processed, preserved, maintained, disseminated, or funded by or for the government or public institutions, taking into account [relevant] legal requirements and restrictions' (see OECD recommendation of the Council for Enhanced Access and More Effective Use of Public Sector Information [C(2008)36] at p 4, www.oecd.org/document/36/0,3746,en_2649_34223_44384228_1_1_1_1,00.html.) Further information about the definitions of 'document' and 'information held by Government' under the FOI Act is in Chapter 5 of this Guide.

31 *Engage: Getting on with Government* 2.0,, p 40.

the value of information is generally increased, rather than decreased, by making it available.[32] It is therefore in the national interest to get maximum value from public sector information by making it publicly available for creative reuse.

The report proposed a number of principles in order to maximise the benefits of publishing public sector information. Information should be available free, relatively quickly, licensed for reuse, and in machine readable formats. It must be easy to locate, understand, transform and use. The report summarised these principles as 'find, play, share'.[33] It anticipated that encouraging access and reuse of this public sector information would encourage community engagement with the public sector, increase public accountability and ultimately enhance trust in government.

The Government issued its response to this report in May 2010 and accepted the majority of recommendations with some modifications. It agreed in principle with the publication of public sector information and noted the OAIC's role in this regard, in particular, in reporting to the Cabinet Secretary on information policy. The Government also accepted recommendations that OAIC develop a common methodology to inform government on the social and economic value generated from published public sector information and annually publish a report outlining the contribution of each agency to the consolidated value of Commonwealth public sector information.[34] More generally, a steering group was formed to implement the recommendations, led by the Australian Government Information Management Office with the OAIC as a member.

data.gov.au

As part of the work of the Government 2.0 Taskforce, the data.gov.au website was established to host government datasets.[35] Datasets are provided by numerous government agencies from across Australia and contain highly diverse information, ranging from crime data to locations of public barbeques. The site also provides links to other catalogues of publicly available government data, such as that held by the Australian Bureau of Statistics.

Where agencies have chosen to make the data available under an open licence, the majority have used 'Creative Commons'[36] – a suite of generic licences that allow copyright holders to give advance permission for certain uses of their material – to ensure that their data is available for reuse. The site invites interested parties to use the data that has an open licence in any way they choose, and encourages users to create new applications.[37]

32 The social and economic value of public sector information is taken up in more detail in OAIC, Issues Paper 2: *Understanding the value of public sector information in Australia*, November 2011.

33 Engage, p 41.

34 Department of Finance and Deregulation, Government Response to the Report of the Government 2.0 Taskforce (2010) p 10 (see response to recommendation 6).

35 A dataset is a collection of data, often presented in tabular form.

36 See http://creativecommons.org.au/about/cc.

37 See http://data.gov.au.

Ahead of the Game: Blueprint for Reform of Australian Government Administration

Another important report in 2010 proposing open government reform was *Ahead of the Game: Blueprint for Reform of Australian Government Administration*.[38] The report was prepared for government by an Advisory Group headed by the Secretary of the Department of the Prime Minister and Cabinet. The Government responded in May 2010, accepting all recommendations in the report and the Department of the Prime Minister and Cabinet is tasked with implementing the reform agenda.

One of the nine priority areas for reform listed in the report was 'creating more open government'. The report stated that this could be done by harnessing technology in two areas – making public sector data available to and useable by the public, and using collaborative technologies (such as Web 2.0 tools) to consult the community on the design and review of programs and services.[39] A broader objective in doing so would be to make government agencies more outward looking and embrace a philosophy of 'citizen focused service delivery', resulting in better and more coordinated services to the community. Another broad objective was to enable the community to participate more actively in government, rather than being passive recipients of services and policies.

Declaration of Open Government, 2010

These policy initiatives culminated, in July 2010, in a *Declaration of Open Government*, issued on behalf of the Government by the Minister for Finance and Deregulation.[40] The Declaration arose from a recommendation of the Government 2.0 Taskforce, and picked up the themes in that report on using technology to build a culture of openness and citizen participation in government. The Declaration provided in part as follows:

> The Australian Government now declares that, in order to promote greater participation in Australia's democracy, it is committed to open government based on a culture of engagement, built on better access to and use of government held information, and sustained by the innovative use of technology.
>
> Citizen collaboration in policy and service delivery design will enhance the processes of government and improve the outcomes sought. Collaboration with citizens is to be enabled and encouraged. Agencies are to reduce barriers to online engagement, undertake social networking, crowd sourcing and online collaboration projects and support online engagement by employees, in accordance with the Australian Public Service Commission Guidelines.

38 Advisory Group on Reform of Australian Government Administration, *Ahead of the Game: Blueprint for Reform of Australian Government Administration* (2010).

39 Ahead of the Game, recommendation 2.1.

40 See www.finance.gov.au/e-government/strategy-and-governance/gov2/declaration-of-open-government.html.

The possibilities for open government depend on the innovative use of new internet-based technologies. Agencies are to develop policies that support employee-initiated, innovative Government 2.0-based proposals.

The Australian Government's support for openness and transparency in Government has three key principles:

- **Informing**: strengthening citizen's rights of access to information, establishing a pro-disclosure culture across Australian Government agencies including through online innovation, and making government information more accessible and usable
- **Engaging**: collaborating with citizens on policy and service delivery to enhance the processes of government and improve the outcomes sought; and
- **Participating**: making government more consultative and participative.

In making the *Declaration of Open Government*, the Minister noted that it underpinned a range of Government initiatives already under way, such as the establishment of the OAIC and the Government's broader freedom of information reforms.

OAIC and the *Principles on open public sector information*, 2011

On 1 November 2010, coinciding with the OAIC's commencement, the Information Commissioner released an issues paper entitled *Towards an Australian Government Information Policy* which proposed a set of draft 'Principles on open public sector information' for discussion. The draft Principles covered a number of issues that overlapped with the requirements of the FOI Act, such as: taking a default position of open access to information; sound decision making processes for information release; appropriate charging for access; and transparent complaints processes. The Principles also incorporated other matters (including points raised by the Government 2.0 Taskforce) such as: ensuring information is discoverable and useable (published in open and standards-based format, is machine-readable, and uses high quality metadata) and has clear reuse rights (open licensing terms).

Following consultation with key stakeholders and the public, the OAIC released a revised final set of eight *Principles on open public sector information*.[41] As noted in the accompanying report, the Principles are intended to act as a central point of consonance in the information policy sphere, interacting closely with other government information policies and legislation.

41 OAIC, *Principles on open public sector information*, (2011) www.oaic.gov.au/publications/agency_resources/principles_on_psi_short.html.

The Principles guide agency publication of government information, including information released under the FOI Act, via the IPS. They complement the provisions of the IPS while also guiding agencies on the release of public sector information more broadly, beyond the requirements of the FOI Act. Moreover, the Principles give prominence to the idea of information reuse and the associated issues of open licensing, appropriate formats and metadata standards. This is a central tenet of information openness and is essential if the full potential of government information is to be realised.

The Information Commissioner's guidelines on the IPS encourage agencies to have regard to the Principles.[42] The guidelines encourage agencies to publish information in addition to their requirements under the FOI Act and note that the Act does not limit or restrict publication of information by agencies, including information that is exempt from disclosure under the FOI Act (s 3A).

The Principles are non-binding on agencies, and apply broadly to the spectrum of Australian Government agencies and their varied information holdings.

Open government redefined

Open government now embraces three themes.

Public access to government-held information upon request

FOI legislation gives the public a legal right to request access to specific documents and to challenge access denials before an independent commissioner or tribunal. An FOI Act should embody the key principles and objectives summarised in Chapter 2 of this Guide.

Although FOI access is triggered by requests, government agencies are expected to promote disclosure and assist applicants in other ways. One way is to provide access outside the FOI Act, and release exempt material when it is in the public interest to do so. Another way is to build openness into agency processes – disclosure by design – by preparing records in a form that supports prompt and inexpensive disclosure or publication when access requests are received.

Open data through proactive publication of public sector information

Government agencies should initiate information publication, working from the premise that public sector information is a national resource that should be available for community access and use. Technology holds the key to effective publication. Information should be published on the web in a form that makes it easily discoverable, downloadable, machine-readable and useable. As far as practicable, information should be published on open licensing terms so that it can be re-used by the community.

42 OAIC, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982*, *Part 13: Information Publication Scheme*, paragraph 13.10.

Proactive publication can be supported by the data.gov.au website, the Information Publication Scheme in the FOI Act, and effective information management and governance within agencies.

Civic engagement and collaboration

Open government should facilitate community participation in government policy formulation, decision making, and program review. These processes can be enhanced by the innovative use of technology by agencies.

Technology can help build a government culture that is more customer or citizen focussed, making it easier for the community to access government services and to exchange information with government. Community participation in government can be facilitated and improved by techniques such as blogs, social networking, crowd sourcing and online consultation and community collaboration projects.

4. Office of the Australian Information Commissioner

The OAIC is an independent statutory agency established by the *Australian Information Commissioner Act 2010.* The OAIC reports to the Minister for Privacy and Freedom of Information and falls within the portfolio of the Attorney-General.

The OAIC is headed by the Australian Information Commissioner, supported by the Freedom of Information Commissioner, the Privacy Commissioner and the staff of the OAIC. The Office has three broad functions:

- the **privacy functions**, which are the functions conferred on the Information Commissioner by the *Privacy Act 1988* and other legislation
- the **freedom of information** functions, which are functions directed to oversight of the operation of the FOI Act and to protecting the public's right of access to government documents
- the **information commissioner** functions, which require the Information Commissioner to report to the Minister on policy and practice with respect to government information management.

This comprehensive range of functions and powers allows the OAIC to play an active and strategic role in assisting the development of a consistent and workable information policy across all Australian Government agencies.

While the privacy and FOI functions can be carried out by each of the three Commissioners, in practice, the FOI Commissioner will be chiefly responsible for the FOI functions, and the Privacy Commissioner for the privacy functions.

Information commissioner functions

The Information Commissioner is solely responsible for the information commissioner functions, and is supported by an Information Advisory Committee. The members of the Committee are appointed by the Minister and comprise senior executives from key agencies and suitably experienced people from outside government.[43]

The information commissioner functions empower the Commissioner to report to the Minister on any matter relating to the government's policy or practice with respect to 'the collection, use, disclosure, management, administration or storage of, or accessibility to, information held by government'.[44]

43 A list of members of the Information Advisory Committee is available at www.oaic.gov.au/infopolicy-portal/iac.html.

44 See the *Australian Information Commissioner Act 2010,* s 7(a)(i).

Since its commencement, the OAIC has undertaken a number of information policy initiatives, in line with this function. In 2010 the OAIC released an issues paper entitled *Towards an Australian Government Information Policy* which proposed a set of principles on open public sector information. (The issues paper and Principles are discussed in greater detail in Chapter 3.) The issues paper provided a comprehensive overview of recent information policies and initiatives and sought to identify areas of overlap and complexity in the information policy environment. In May 2011, following consultation, the OAIC released a final set of *Principles on open public sector information* accompanied by a report on their review and development. In November 2011 the OAIC released a further Issues Paper discussing a methodology for assessing the economic and social value of published public sector information, *Issues Paper 2: Understanding the value of public sector information in Australia.*

The OAIC also manages a public sector Information Contact Officer Network known as 'ICON' which meets regularly to share ideas on advancing the goals of open government, circulate news on developments in information policy and to discuss all aspects of FOI and privacy.

The Information Commissioner is an ex officio member of the Administrative Review Council that advises the Government on administrative law reform.[45]

Freedom of information functions

The FOI functions and powers of the Information Commissioner are described in more detail in Part B of this Guide. The following is an overview of the FOI functions.

- ***Promoting awareness of the FOI Act and providing advice***
  Promoting awareness and understanding of the FOI Act among ministers, agencies and the community; providing FOI information, advice, assistance and training to ministers, agencies and the community

- ***Issuing guidelines***
  Issuing guidelines on the interpretation and administration of the FOI Act (to which agencies and ministers must have regard when applying the Act)

- ***Overseeing the IPS***
  Overseeing the IPS, including assisting agencies to publish information under the scheme and reviewing agency compliance with the scheme

- ***Monitoring compliance with the FOI Act***
  Monitoring, investigating and reporting on compliance by agencies and ministers with the FOI Act; and preparing an annual report on the basis of information and statistics collected from agencies and ministers

45 The Council is established by the *Administrative Appeals Tribunal Act 1975*, Part V.

- ***Complaint investigation***
  Investigating complaints from the public about FOI administration by agencies, and undertaking own motion investigation of agency actions; issuing an implementation notice (following an investigation) requiring an agency to specify the action it will take to implement the Commissioner's recommendations

- ***Merit review***
  Upon application from a person following an FOI request to an agency or minister, reviewing an agency's or minister's decision to refuse or defer access, provide access to a qualified person instead of the applicant, impose a charge, refuse to amend a record of personal information, refuse an extension of time to apply for internal review, or to grant access where an affected third party objects to the proposed disclosure. The Information Commissioner has formal powers to require any person to provide information, documents or answers to questions, and the decision of the Commissioner is binding upon the agency or minister

- ***Granting extensions of time to agencies and declaring an applicant 'vexatious'***
  Exercising two new powers: to extend the time for an agency or minister to make a decision on an FOI request; and, on the Commissioner's own motion or upon application from an agency or minister, to make a vexatious applicant declaration that restricts a person's rights to make an FOI request or application

- ***Reviewing operation of the FOI Act***
  Conducting a review of FOI charges in the first year, and conducting a review of the operation of the FOI Act after two years.

Reporting and compliance

Under the Australian Information Commissioner Act, the Information Commissioner must prepare an annual report as soon as practicable after the end of the financial year, for presentation to the minister and tabling in Parliament, covering a range of FOI and privacy matters. The FOI matters include:

- information about any guidelines issued by the Information Commissioner under the FOI Act
- the number of applications for access to documents received during the year
- the decisions made on requests for access (for example, whether access was granted or refused)
- the numbers of applications made for internal review, Information Commissioner review and AAT review, and the results of those reviews

- the number of complaints made to the Information Commissioner (other than requests for merit review) and the results of any investigations undertaken as a result of those complaints.

Agencies are obliged to provide the Information Commissioner with the information the Commissioner needs to prepare the report.

The Information Commissioner must also monitor and report on the operation of the IPS.

PART B — Key features of the Freedom of Information Act

5. Scope of application of the FOI Act

The FOI Act provides that 'every person has a legally enforceable right to obtain access … to a document of an agency [and] an official document of a Minister' (s 11) unless the document is exempt. This chapter explains those three key terms – agency, minister and document – that define the scope of application of the FOI Act. It also outlines the coverage of government contractors under the Act.

Government agencies

Most Australian Government agencies are subject to the FOI Act, including:

- all departments of the Australian Public Service
- an agency that is a 'prescribed authority', which includes agencies established under an enactment or Order-in-Council (other than incorporated companies) and bodies declared by regulation
- a Norfolk Island authority.

The Act contains a detailed definition of statutory bodies and office holders that are to be treated either as separate agencies, or as part of another agency. A complete list of agencies subject to the operation of the Act is given in the annual report on the FOI Act.[46]

Some Australian Government agencies are expressly excluded from the operation of the Act. The list includes Aboriginal Land Councils and Land Trusts, the Auditor-General, Australian Government Solicitor, the Australian Industry Development Corporation and security intelligence agencies such as the Australian Secret Intelligence Service (ASIS), the Australian Security Intelligence Organisation (ASIO), the Inspector-General of Intelligence and Security (IGIS) and the Office of National Assessments (ONA).

Some agencies are exempt in relation to particular documents – for example, the Australian Broadcasting Corporation and Special Broadcasting Service are exempt in relation to their program material; Australia Post, Comcare, CSIRO (Commonwealth Scientific and Industrial Research Organisation) and Medicare in relation to their commercial activities; and the Reserve Bank of Australia in relation to its banking operations and exchange control matters.

46 See the *Freedom of Information Act 1982 – Annual Report* available at www.oaic.gov.au/foi-portal/decisions_foi.html. Reports from prior to 2010–11 are available at www.dpmc.gov.au/foi/annual_reports.cfm.

The Act applies to courts only in relation to documents that concern matters of an administrative nature, and not to documents relating to the judicial role of a court in conducting proceedings and deciding cases before it. Similarly, the Official Secretary to the Governor-General is subject to the Act only in respect of matters of an administrative nature and not functions discharged by the Governor-General under the Constitution or an enactment.

All agencies and ministers are exempt from the operation of the Act in relation to 'intelligence agency documents' (for example, a document originating with, or received from, ASIO or ONA) and 'defence intelligence documents'. These are documents that originated with, or were received from, the Department of Defence and relate to the collection, reporting or analysis of operational intelligence; or special access programs under which a foreign government provides restricted access to technologies. This exemption also applies to those parts of documents that contain a summary of, or information from, an intelligence document or a defence intelligence document.

Ministers

The FOI Act treats a minister's office as being separate from the portfolio department. A minister's office is thus responsible for processing FOI requests that are directed to the minister, and for making a decision on a request. The same applies to parliamentary secretaries.

The Act applies to an 'official document of a minister' (s 11). This means documents relating to the affairs of an Australian government agency, and not documents of a personal or party political nature or relating to the minister's electorate affairs.

The Act applies only if the document is 'in the possession of the Minister', including a document that has passed from the minister's possession 'if he or she is entitled to access the document and the document is not a document of an agency' (s 4). The effect of that provision is that a request cannot be made under the FOI Act to a former minister. Any records transferred by a former minister to the National Archives of Australia will be available under the Archives Act when the open access period is reached.

It is open to a minister to seek advice and assistance from a portfolio department in dealing with an FOI request. The minister's office can transfer a request to another agency if the agency also holds the relevant documents or the request relates more closely to its functions.

Government contractors

The FOI Act applies to some documents created or held by contractors or subcontractors who provide services to the public or third parties on behalf of agencies. If an agency receives a request for access to a document held by a contractor to which the Act applies, the agency is to take action to obtain a copy of the document from the contractor, and then decide whether access is to be given to the document under the FOI Act.

To implement this principle, agencies are required to ensure that all applicable contracts entered into after 1 November 2010 include a clause that enables the agency to obtain relevant documents from the contractor or subcontractor, when an FOI request is received by the agency. As noted above, this requirement only applies to contracts relating to provision of services on behalf of an agency to the public or a third party. It does not apply to contracts for the procurement of services for the agency's use, such as information technology services or cleaning services provided to the agency. The Information Commissioner has published a model clause and guidance material to assist agencies in meeting this requirement.[47]

Documents

The right of access conferred by the FOI Act applies to documents, not information. However, some provisions of the Act do refer to information. The declared object of the Act is to foster public access to 'information held by the Government' (s 3). Agencies are required as part of the IPS to publish 'information in documents to which the agency routinely gives access' and to maintain a disclosure log of 'information in accessed documents'. Some exemptions in the Act also refer to information, such as the exemption applying to the 'unreasonable disclosure of personal information', information communicated in confidence by a foreign government, and commercially valuable information.

'Document' is defined broadly in the Act as including any paper or other material on which there is writing or a mark, figure or symbol; electronically stored information; maps, plans, drawings and photographs; and any article from which sounds, images or writing are capable of being reproduced. However, 'document' does not include material retained for reference purposes that is otherwise publicly available (for example, library books) or Cabinet notebooks.

It is apparent from that definition that the term 'document' extends to draft letters and papers that have not been destroyed; personal correspondence on agency files; personnel files of agency staff; diaries and calendars; post-it notes; file covers; card indexes; information stored on computer hard-drives or servers; laptop computers and portable storage devices used by agency staff (such as CD-ROMs,

47 See OAIC guidance, Documents held by Government Contractors – Agencies obligations under the Freedom of Information Act 1982, www.oaic.gov.au/publications/guidelines/documents_held_by_government_contractors_october2010.html.

USB sticks, personal mobile devices); emails; DVDs; sound recordings; films and video footage; and microfilm.The FOI Act applies to a document of an agency if it is 'in the possession of the agency, whether created in the agency or received in the agency' (s 4). The Act thus applies to documents (or information in documents) received from third parties, including state and foreign governments, and documents an agency has downloaded from an external website or shared database.

A document can be 'in the possession' of an agency even though the agency does not have physical possession. An example is where an agency's information is stored on a server or information database that is managed on its behalf by another agency or external service provider. Similarly, the FOI Act provides that a document transferred by an agency to the National Archives of Australia is deemed to remain in the agency's possession until the document reaches the open access period, at which time a request for the document should be directed to the Archives.

The FOI Act does not apply to some Australian Government records that are accessible to the public under other arrangements. This applies to the library, historical and museum collections of the Australian War Memorial, National Library of Australia, National Museum of Australia, National Archives of Australia and the National Film and Sound Archive.

6. Requests under the FOI Act

When a person makes an FOI request, a number of issues may need to be addressed by the agency. They include:

- assisting an applicant, where necessary, to meet the requirements of the FOI Act when making a request
- consulting a third party who may be affected by disclosure of requested documents
- transferring a request to a more appropriate agency
- notifying and imposing a charge for access to a document
- granting or refusing access to a document and providing the reasons for the access decision.

In processing an FOI request, agencies must operate within the timeframes set out in the FOI Act. This chapter explains these processes and agency obligations under the FOI Act. (References in this chapter to an 'agency' include a minister unless stated otherwise.)

Who can make an FOI request

The FOI Act states that 'every person' has a legally enforceable right to obtain access to documents under the Act. The person making the request does not have to be an Australian citizen or resident, nor be in Australia at the time of making the request. A request can also be made by a company, an organisation or a state government agency.

In principle, all people have an equal right of access. The FOI Act states that a person's right of access is not affected by any reason they give for seeking access, or the agency's belief as to why the person is seeking access. As that implies, an agency should not ask a person why they are seeking access or what they intend to do with any documents they receive.

In practice, there are situations in which a person's identity is relevant to whether access will be granted. A person is more likely than other members of the public to be granted access to documents that contain their own personal information; and a business is more likely than others to be granted access to documents that contain information about its commercial or financial affairs. It may be appropriate in that setting for an agency to elicit information about the applicant's identity (or whether another person has authorised the applicant to obtain documents on their behalf), but it is important that the enquiry goes no further than is necessary to establish the person's identity.

How to make a request

Five requirements must be met for a request to qualify as a request under the FOI Act.

- ***Written request**:* The request must be in writing. Many agencies have a pro forma request form on their website.
- ***FOI flag**:* The request must state that it is an application made under the FOI Act. Agencies should take a flexible approach when assessing whether an applicant has met this requirement.
- ***Documents described**:* The request must describe the document that is being sought. The description need not be precise: the FOI Act requires only that the request 'provide such information … as is reasonably necessary to enable a responsible officer' of the agency to identify the document.
- ***Return address**:* The request must provide an address (which may be an email address) to which notices may be sent by the agency to the applicant.
- ***Sent to agency**:* The applicant must send the request to the agency, either to a postal address provided in a current telephone directory, by hand delivery to such an address, or electronically by email, facsimile or online lodgement. Many agencies have provided an online lodgement facility on their web site.

An FOI applicant does not have to disclose his or her identity; a pseudonym can be used, or one person can make a request on behalf of another. As noted earlier, identity can become important where a person is, for example, requesting access to a document that contains personal information.

An agency has a duty to provide reasonable assistance to a person to make a request that meets those five FOI Act requirements. This duty does not extend to ministers, but ministers' staff are urged to adopt a similar approach. Assistance from agencies should be provided as needed, either before a request is made or after an incomplete request is received. The assistance can be provided informally by telephone, or in writing by email or letter.

An agency has two further obligations. One is to provide reasonable assistance to a person to direct their request to the appropriate agency. Agencies and ministers must also consult with an applicant before refusing a request on the basis that it does not adequately identify the documents being requested or would substantially and unreasonably divert the resources of the agency from its other business.

A request that does not meet the FOI Act requirements can still be handled by an agency outside the FOI Act. However, if a person's request is not treated as an FOI request, they are not entitled to seek Information Commissioner review of the agency's access decision. If the person's intention is unclear, the agency should contact them to confirm whether they wish their request to be handled as an FOI request.

Timeframes for dealing with requests

The FOI Act stipulates the following timeframes for dealing with a request:

- ***Notifying receipt of request**:* Upon receiving a request an agency must as soon as practicable, but within 14 calendar days, take reasonable steps to notify the applicant that the request has been received. The notification can be provided by email if the applicant supplied an email address.

  A request is received on the day it arrives at the agency – for example, the day on which the request is received by email or by post. The period of 14 days for notifying the applicant commences on the day after receipt, and ends at midnight on the 14th day (or, if that is a weekend or public holiday, at midnight on the next business day). In effect, an agency has a minimum of 14 full calendar days in which to notify an applicant that the request was received.

  The 14 day period does not start running until the request complies with the five requirements listed above. An agency is expected to act promptly to notify an applicant that a request does not comply, and to use direct methods such as telephone or email to resolve any simple deficiency.

- ***Notifying decision**:* The agency must notify the applicant of its decision as soon as practicable, but within 30 calendar days after the day on which the request is received. If a decision is not notified in this period and the period has not been extended as set out below, the agency is deemed to have made a decision refusing to provide access. The applicant may then seek Information Commissioner review of the agency's deemed refusal decision. Furthermore, the agency cannot later impose a charge for providing access.

- ***Providing access**:* If the agency decides to provide access to documents in response to a request, access must be provided as soon as reasonably practicable after the applicant has been notified of the decision, the applicant has paid any charges for access set by the agency and any opportunities a third party has to seek review of the decision to grant access have run out, as explained below. The agency is not required to provide access within the statutory processing period. However, an applicant may complain to the Information Commissioner about unreasonable delay by an agency in providing access.

There are six ways that the 30 day processing period is or can be extended:

- ***Consultation**:* An agency may extend the period for 30 days to enable it to consult an affected third party or a State or foreign government or organisation as part of deciding whether a document covered by a request is exempt. This consultation mechanism is explained in more detail below. The applicant must be notified of an extension decision.

- ***Agreement**:* An applicant may agree in writing to extend the processing period for up to 30 days. The agency must notify the Information Commissioner of any such agreement. This avenue applies even where the period has been extended for 30 days to facilitate consultation with a third party.

- ***Information Commissioner extension – complex and voluminous requests**:* An agency may request that the Information Commissioner extend the processing period on the basis that the request is complex or voluminous. The request must be made within the initial processing period (which will be 30 days if there has been no extension; 60 days if consultation is occurring; or up to 90 days if an applicant has agreed to a further extension). The Information Commissioner may extend the processing period for 30 days, or such shorter or longer period as the Commissioner considers appropriate. The Commissioner is to notify the applicant and the agency of a decision as soon as practicable. An agency can, within the extended period, apply to the Commissioner for a further extension.

- ***Information Commissioner extension – deemed decisions**:* If an applicant has applied to the Information Commissioner for review of an agency's deemed refusal decision, the agency may apply to the Commissioner for further time to make a decision on the request. The Commissioner may grant an extension, subject to any conditions considered appropriate. This avenue is available only once.

- ***Settling a charge**:* If an agency notifies an applicant during the processing period (including an extended period) that a charge is payable, the period is suspended until the charge or a deposit is paid. If the applicant does not agree to pay the charge within 30 days or such further period allowed by the agency, or does not contend the charge, the FOI request is taken to have been withdrawn.

- ***Clarifying scope of request:*** Before refusing a request on the basis that it does not adequately identify the documents requested, or that processing it would substantially and unreasonably divert the resources of the agency from its other business, an agency must consult with the applicant. The processing period is suspended from the day the applicant is given written notice until they respond in writing by withdrawing or revising the request, or indicating they do not wish to change the request. Unless an agency decides otherwise, an applicant must respond within 14 days.

Consultation with third parties

An agency should consult with a third party before deciding to grant access to a document, in the following circumstances:

- with a business or a person – if they are likely to contend that the document is exempt under the exemption for trade secrets and commercially valuable information, or under the conditional exemption for business, commercial, financial and professional affairs
- with a person – if they are likely to contend that the document is exempt under the conditional exemption for personal privacy
- with a State government – if the document requested (or information therein) originated with the State; the State is likely to contend that the document is exempt under the conditional exemption for Commonwealth-State relations; and a consultation arrangement has been entered into between the Commonwealth and the State[48]
- with a foreign government or organisation – if disclosure of the document could damage the Commonwealth's international relations or would divulge information communicated in confidence by the foreign government or organisation.

In each case: the FOI processing period is extended by 30 days if the agency decides to undertake consultation; the FOI applicant must be notified that consultation is occurring; and the third party will not generally be told the applicant's name, unless the applicant agrees or the name is disclosed in a subsequent review of the agency's decision. However, other aspects of the consultation procedure differ in each case.

A *person or business* need only be consulted if it is reasonably practicable to consult them and they are likely to contend that the document relating to them is exempt. The time limit for processing requests is a relevant factor in deciding whether consultation is reasonably practicable. Another relevant factor is whether the information is already well known or publicly accessible from other sources.

If consultation is offered, the person or business must be given a reasonable opportunity to make a submission. The decision to grant access or to apply an exemption rests with the agency. The third party must be notified in writing if the agency decides to grant access, and has the right to apply for internal review of the agency's decision and Information Commissioner review (internal review is not available for a decision made by a minister or personally by the head of the agency). A third party who is dissatisfied with the outcome of an Information Commissioner review may seek an AAT review. Access cannot be granted until the time has expired

48 'State' includes Norfolk Island. Where a request for a document is made to a Norfolk Island authority or minister, similar consultation mechanisms apply if the document originated with the Commonwealth or a State.

for the third party to exercise those review rights, or a review application is finalised and is unsuccessful. Alternatively, if the agency decides not to grant access and the applicant seeks Information Commissioner review of that decision, the third party is to be notified and can be joined as a party in the Information Commissioner review process.

The same procedure applies to consultation with a *State government*, with one variation. Consultation with a State government is required only if an arrangement to that effect has been entered into between the Commonwealth and the State. The agency must not decide to grant access unless consultation has occurred in accordance with that arrangement.[49]

A less extensive procedure applies for consultation with *foreign governments* and organisations. The agency has a discretion to decide if consultation is appropriate. The foreign government or organisation does not have a right to apply for review of a decision by the agency to grant access.

Transferring a request

An agency may transfer a request for access to another agency, in three situations:

- where the document requested is in the possession of the other agency, but not the agency receiving the request
- where the subject matter of the document is more closely connected with the other agency's functions
- where the document originated in, or has been received from, an agency that is excluded wholly or partly from the operation of the FOI Act (for example, ASIO or Australia Post) and is more closely connected with that other agency's functions.

In the first two instances the other agency must agree to the transfer of the request.

The statutory processing period continues to run from the day on which the request was first received by an agency. It is therefore important that consultation about transferring a request occurs early between agencies so that a decision can be made within the statutory processing period.

Part of a request may be transferred – for example, where only some of the requested documents are in the possession of the other agency. Both agencies must then make a separate decision on their part of the request and notify the applicant accordingly.

49 A similar requirement applies in relation to documents affecting Norfolk Island intergovernmental relations.

The agency that first received the request must notify the applicant of a transfer. An exception applies if the fact of the transfer (for example, to a security intelligence agency) would itself disclose exempt information. The agency receiving the request can refuse it without confirming or denying that the requested document exists.

A minister's office, as noted earlier, can seek advice and assistance from an agency in processing a request. A minister may also authorise someone in the agency to make a decision on their behalf. This is distinct from a decision by the minister to transfer the request to the agency, which may only be done in accordance with the requirements outlined above.

Granting a request for access

An agency is required to provide access to a document upon request, unless one of the reasons considered below under 'Refusing a request for access' applies. Access is to be granted as soon as reasonably practicable after the applicant is notified of the agency's decision (often the two will be simultaneous if no third party review rights apply).

An applicant can request that access be given in one of the following forms:

- inspection of the document
- a copy of the document
- hearing or viewing an audio or visual recording
- providing a written transcript of an audio recording or a document written in code.

An agency must provide access in the form the applicant requested, unless this would interfere unreasonably with the agency's operations, jeopardise the physical preservation of a document, or infringe a third party's copyright. Where an alternative form of access is given, an agency may not impose a higher charge than if access had been given in the form the applicant requested.

As a practical matter, it is likely that agencies will increasingly provide access by electronic means – for example, by emailing a PDF copy of the documents.

The way in which agencies store and manage their information should not operate as an obstacle to access under the FOI Act. Indeed, the Act allows an applicant to request that information stored on a computer be made available in written form, provided this does not substantially and unreasonably divert the resources of the agency from its other operations. The increasing shift towards creating and storing information in electronic format requires agencies to take reasonable steps to give applicants access to information that is not in written form.

Information held on servers, hard disks, portable drives, mobile phone devices and mobile computing devices are potentially subject to access under the FOI Act.

Agencies should develop guidelines and procedures for the efficient storage and retrieval of such information.

Beyond those examples, an agency is not required to create a new document to satisfy an FOI request. However, it may sometimes be simpler and more effective to do so. An example is where information can easily be compiled from a database to answer a specific request, rather than providing many separate documents with extensive deletions. More generally, an agency should be ready to discuss with an applicant whether information or an answer to a question will satisfy a request more effectively or cheaply than providing access to a range of documents that are not self-explanatory.

Deferring access

An agency may defer giving access to a document in response to an FOI request in the following circumstances:

- if the document is required to be published by law – until the end of the period in which the document is required to be published
- if the document has been prepared for presentation to Parliament or to a particular person or body – until the end of a reasonable period for it to be presented
- if the premature release of the document would be contrary to the public interest – until the occurrence of any event, or the end of any time period, after which the document's release would not be contrary to the public interest
- if a minister considers the document is of such general public interest that the Parliament should be informed first of the contents of the document – until the end of five sitting days of either House of Parliament.

An agency must tell the applicant the reasons for deferring access and, as far as possible, indicate how long the deferment period will be. A decision to defer access to a document is a decision that is reviewable by the Information Commissioner.

Refusing a request for access

The policy of the FOI Act is that access to documents should be granted wherever possible. This policy is reflected in the objects clause in the Act, in the public interest test that is an element of many exemption provisions, and in the statement in the Act that it does not limit or restrict agencies giving access to documents, even if an exemption could be claimed.

Access can be refused only on a ground stated in the Act (called an 'access refusal decision'). The grounds include:

- The request did not meet the requirements of the FOI Act – for example, the request was not made in writing or did not adequately describe the documents requested. Agencies should, however, be mindful of their obligation to take reasonable steps to assist a person to make a request that complies with the formal requirements of the FOI Act.
- The agency has taken all reasonable steps to locate the requested document but has determined that it cannot be found or does not exist.
- The work involved in processing the request would substantially and unreasonably divert the agency's resources or substantially and unreasonably interfere with the performance of the minister's functions.
- The agency and applicant have failed to agree on a charge for access.
- The document requested is an exempt document. (See Chapter 7 of this Guide for further information.)
- The document requested is a conditionally exempt document and providing access at that time would, on balance, be contrary to the public interest. (See Chapter 7 of this Guide for further information.)
- The document requested is an official document of a minister that contains some matter not relating to the affairs of an agency or a Department of State.
- The request is made to an agency that is excluded (wholly or partly) from the operation of the FOI Act, or the request relates to a document that originated with an agency that is excluded.

An applicant who is dissatisfied with an agency's access refusal decision can apply either for internal review or Information Commissioner review of that decision. (See Chapter 9 of this Guide for further information.)

Reasons for refusing access

An agency must provide a statement of reasons if a request for access to a document is refused or if access is deferred. This applies to original decisions and to internal review decisions. Providing good statements of reasons can lead to greater acceptance of decisions and a reduction in complaints and requests for review.

If the public interest test has been applied, in deciding that a document is conditionally exempt, the decision maker must indicate what public interest factors were considered.

In some limited circumstances, an agency may refuse to confirm or deny the existence of the requested document, while noting that if such a document did exist, it would be exempt. This approach may apply, for example, to documents relating to a covert criminal investigation where public knowledge of the existence of the investigation may, in and of itself, be revelatory and potentially damaging.

The notice of decision must include the name and designation of the decision maker, and information about review rights.

In a review the Information Commissioner may require a decision maker to provide a statement of reasons if it was not given, or if the Commissioner considers it was inadequate. An applicant may also apply to the AAT for a declaration that a statement of reasons provided to them does not contain adequate particulars of, for example, findings on material questions of fact or the reasons for the decision. If the AAT makes such a declaration the decision maker is required to provide those particulars to the applicant within 28 days.

If an edited copy of a document is provided, the decision maker must indicate the grounds for deletions, including why any part is exempt.

Charges

An agency or minister has a discretion to impose or not impose a charge for access to a document, though no charge may exceed the charges set out in the *Freedom of Information (Charges) Regulations 1982* (the Charges Regulations). When determining the appropriate charge, the agency or minister should take account of the 'lowest reasonable cost' objective, stated in the objects clause of the FOI Act.

Below is a table of charges that can be imposed by an agency. As the table indicates, a charge can be imposed for the staff time and resources expended in processing an FOI request for a document, and for postage, photocopying, or reducing information to a written document. Other important principles are that that there is no application fee for making a request for documents, for amendment of personal records, or for seeking internal review or review by the Information Commissioner; the first five hours of decision making time are free; and an agency may impose a lower charge than set out in the Charges Regulations. Application fees apply for requests for review by the AAT, unless the applicant is exempt or the Registrar waives the fee on grounds of financial hardship.

If the agency or minister assesses that a charge is liable to be paid, the agency or minister must give the applicant a written notice setting out the estimated charge and any deposit the applicant might need to pay. The applicant must notify the agency or minister within 30 days if they agree to pay the charge, consider the charge should be reduced or not imposed, or withdraw the request. The agency or minister can agree to extend the 30 days. If they do not receive the written notice within the 30 days (or the time as agreed) the request is taken to be withdrawn.

If a person contends that a charge should be reduced or not imposed, the agency or minister must decide within 30 days whether to agree to this request or not. The agency or minister must take into account whether payment of the

charge would cause financial hardship to the applicant, and whether giving access to the document in question is in the general public interest or in the interest of a substantial section of the public. If no decision is made within 30 days, it is taken to be a refusal. A person can seek internal review or Information Commissioner review on a decision not to reduce or not to impose a charge.

The time period for processing an FOI request is suspended from the time an applicant receives notice of a proposed charge to the time the applicant pays the charge (or a deposit, or a reduced charge if that is agreed) or a decision is made that no charge is payable.

Table of charges listed in the Schedule to the Charges Regulations

Activity item	Charge
***Search and retrieval*:** time spent searching for or retrieving a document	$15 per hour
***Decision making*:** time spent in deciding to grant or refuse a request, including examining documents, consulting with other parties, and making deletions	First five hours: Nil Subsequent hours: $20 per hour
Electronic production: retrieving and collating information stored on a computer or on like equipment	Actual cost incurred by the agency or minister in producing the copy
Transcript: preparing a transcript from a sound recording, shorthand or similar medium	$4.40 per page of transcript
Photocopy: a photocopy of a written document	$0.10 per page
Other copies: a copy of a written document other than a photocopy	$4.40 per page
Replay: replaying a sound or film tape	Actual cost incurred in replaying
Inspection: supervision by an agency officer of an applicant's inspection of documents or hearing or viewing an audio or visual recording	$6.25 per half hour (or part thereof)
***Delivery*:** posting or delivering a copy of a document at the applicant's request	Actual cost

Protections when access to documents is given

The FOI Act provides a range of protections against civil and criminal liability for the Commonwealth, ministers, agencies and agency officers who give access to documents, in good faith, if required or permitted by the FOI Act or otherwise. Similarly, a person is not liable to any action for defamation, or breach of confidence, because they have supplied a document to an agency or minister and access to the document is given.

7. Exemptions

There are two broad classes of documents that may be exempt from disclosure under the FOI Act:

- exempt documents (such as documents affecting national security, defence or international relations, Cabinet documents or documents affecting law enforcement and protection of public safety)
- conditionally exempt documents, where access is conditional upon meeting a public interest test (such as documents affecting Commonwealth-State relations or documents that are used for deliberative processes).

Exempt documents

The first class of exempt documents are not required to be disclosed in response to an FOI request. Nevertheless, a decision maker has a discretion to disclose the documents where no other law prohibits their release. The following types of documents are exempt.

Documents affecting national security, defence or international relations

A document is exempt if its disclosure would, or could reasonably be expected to, cause damage to Australia's security, defence, or international relations. It is also exempt if its disclosure would divulge any information communicated in confidence by, or on behalf of, a foreign government, an authority of a foreign government, or an international organisation. Where the matter involves a foreign government, an authority of a foreign government, or an international organisation, the agency or minister may consider it appropriate to consult them. This consultation extends the statutory timeframe for making a decision by 30 days.

Cabinet documents

A document is exempt if it has been, or is or was proposed by a minister to be, submitted to Cabinet, and it was created for the main purpose of being submitted to Cabinet for consideration. Documents created primarily to brief a minister on such a submission, or proposed submission, and official records of the Cabinet are also exempt documents. Documents that would disclose Cabinet deliberations or decisions are also exempt, unless the existence of the deliberation or decision has been officially disclosed.

Documents affecting law enforcement and protection of public safety

A document is exempt if it would, or could reasonably be expected to, prejudice a law enforcement investigation; disclose the existence or identity of a confidential source; endanger the life or physical safety of a person; prejudice the fair trial of a person; disclose lawful methods for protecting public safety; or disclose lawful methods for preventing, detecting or investigating possible breaches of the law and which would prejudice their effectiveness.

Documents to which secrecy provisions of enactments apply

Ordinarily, secrecy provisions in other legislation do not operate, in the context of the FOI Act, to prevent disclosure of documents if disclosure is required under the Act. However the FOI Act preserves the operation of some specific secrecy provisions in other legislation, as outlined in a Schedule to the Act. The specified secrecy provisions operate as an exemption for the purposes of the FOI Act. This exemption does not apply where the document contains personal information about the applicant, except with respect to documents covered by some secrecy provisions in the *Migration Act 1958*.

Documents subject to legal professional privilege

Documents that are subject to legal professional privilege are exempt documents. Legal professional privilege is a rule of law that protects the confidentiality of communications between a lawyer and his or her client. This exemption does not apply if the person entitled to claim legal professional privilege has waived that claim.

Documents containing material obtained in confidence

A document is exempt if its disclosure under the FOI Act would found an action by a person (other than an agency or the Australian Government) for breach of confidence. This section applies where a person who has provided confidential material to an agency could initiate a breach of confidence action against that agency, if the agency disclosed the material.

Documents the disclosure of which would be contempt of Parliament or court

A document is exempt if its public disclosure would be in contempt of court; be contrary to an order made by a Royal Commission or a tribunal or other person or body having power to take evidence on oath (for example, the Information Commissioner or the AAT); or infringe the privileges of the Australian Parliament, the House of Representatives or the Senate, or a Parliament or House of a Parliament of one of the states or territories, including Norfolk Island.

Documents disclosing trade secrets or commercially valuable information

A document is exempt if its disclosure would disclose trade secrets or other information having commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed. The agency or minister must consult with the relevant person or organisation if it appears that they might reasonably want to contend that the document is exempt. This consultation extends the statutory timeframe for making a decision by 30 days. (This exemption does not apply where the trade secrets or commercial information concerns the person making the application or an organisation or business on behalf of which the person is making the application.)

Electoral rolls and related documents

An electoral roll, a document setting out particulars of an elector and that was used to prepare an electoral roll, and copies of such documents are exempt. This exemption does not apply to that part of the roll, or a document setting out the particulars of an elector, where the elector is the FOI applicant.

Public interest conditional exemptions

The second class of exemption applies to conditionally exempt documents – that is, its exemption is conditional upon meeting a public interest test. Access must generally be given to a conditionally exempt document unless disclosure would be contrary to the public interest at the time of decision. The following types of documents are conditionally exempt.

Documents affecting Commonwealth-State relations

A document is conditionally exempt if its disclosure would, or could reasonably be expected to, cause damage to the relations between the Commonwealth and a state or territory; or it would divulge information communicated in confidence between the Commonwealth and a state or territory. The agency or minister must consult with the relevant state(s) if it appears that the state might reasonably want to contend that the document is conditionally exempt. This consultation extends the statutory timeframe for making a decision by 30 days.

Documents that are used for deliberative processes (internal working documents)

A document is conditionally exempt if it relates to opinions, advice, or recommendations, or consultation or deliberation that has taken place, as part of the deliberative processes involved in the functions of an agency or minister. This does not include operational information (see Chapter 10 of this Guide), or purely factual material. The exemption also does not cover reports of scientific or technical experts; or the record of, or a formal statement of reasons for, a final decision given in the exercise of a power.

Documents affecting the financial or property interests of the Commonwealth

A document is conditionally exempt if its disclosure would have a substantial adverse effect on the financial or property interests of the Commonwealth or of an agency.

Documents about certain operations of agencies

A document is conditionally exempt if its disclosure would, or could reasonably be expected to, do one of the following things:

- prejudice the effectiveness of procedures or methods for the conduct of tests, examinations or audits by an agency

- prevent the effective conduct of particular tests, examinations or audits conducted by an agency (for example, disclosing the answers to particular test questions before the tests are conducted)
- have a substantial adverse effect on the management or assessment of personnel by the Commonwealth or by an agency
- have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

Documents involving personal privacy

A document is conditionally exempt if its disclosure would involve the unreasonable disclosure of personal information about any person, including a deceased person. When considering whether unreasonable disclosure of personal information would result, the decision maker must take into account factors such as the extent to which the information is well known, the availability of the information from publicly accessible sources, and whether the person to whom the information relates is known to be (or have been) associated with the matters dealt with in the document.

The agency or minister must consult with the relevant person (or their legal representative) if it appears that the person might reasonably want to contend that the document is conditionally exempt. This consultation extends the statutory timeframe for making a decision by 30 days. (This exemption does not apply to information in the document that relates to the person making the FOI application. However in some specified circumstances, where the information relates to the FOI applicant, the decision maker may give access to the document to a qualified person such as a medical practitioner or psychiatrist, nominated by the applicant, rather than to the applicant directly.)

Documents involving business affairs

A document is conditionally exempt if its disclosure would disclose information about a person's business or professional affairs, or an organisation's business, commercial or financial affairs, and that disclosure would, or could reasonably be expected to, affect the person or organisation adversely in relation to those affairs. This exemption also applies if the disclosure could reasonably be expected to prejudice the future supply of information to the Australian Government for the administration of a law or of matters administered by an agency. The agency or minister must consult with the relevant person or organisation if it appears that the person or organisation might reasonably want to contend that the document is conditionally exempt. This consultation extends the statutory timeframe for making a decision by 30 days. (This exemption does not apply if the information relates to the FOI applicant, whether that is a person, an organisation, or a person acting on behalf of an organisation.)

Documents relating to research by specified organisations

A document is conditionally exempt if it contains information relating to research that is being carried out, or is to be carried out, by an officer of either the Australian National University or the CSIRO, and disclosure of the information before the research is completed would be likely to unreasonably expose the officer or organisation to disadvantage. This exemption does not apply to research carried out by other Australian Government agencies.

Documents affecting Australia's economy

A document is conditionally exempt if its disclosure would, or could reasonably be expected to, have a substantial adverse effect on Australia's economy by influencing a decision or action by a person or entity; or by giving a person or group of people an undue benefit or detriment in relation to business they carry on by providing premature knowledge of a proposed or possible action of a person or entity. The definition of a 'person' includes a body corporate, and the government of a state or territory. The 'substantial adverse effect' can relate to a particular sector of the economy or the economy of a particular region of Australia. This conditional exemption applies to documents relating to currency or exchange rates, taxes, proposals for expenditure, the regulation or supervision of banking and insurance institutions, and so on.

Public interest test

Once a document has met the threshold of being conditionally exempt, then the decision maker must apply the public interest test to assess whether access to the document should be given. Application of the public interest test involves weighing up factors for and against disclosure to determine whether access at the time would, on balance, be contrary to the public interest. In this process a decision maker needs to identify factors favouring disclosure and factors not favouring disclosure, and to determine the comparative importance to be given to these factors.

The Act outlines factors favouring disclosure that *must* be taken into account in applying the public interest test. These factors are whether access to the document would:

- promote the objects of the FOI Act
- inform debate on a matter of public importance
- promote effective oversight of public expenditure
- allow a person to access his or her own personal information.

The Act also outlines factors decision makers *must not* take into account in deciding whether access to the document would, on balance, be contrary to the public interest. These factors are:

- access to the document could result in embarrassment to the Australian Government, or a loss of confidence in the Government
- access to the document could result in any person misinterpreting or misunderstanding the document
- the author of the document was (or is) of high seniority in the agency to which the FOI request was made
- access to the document could result in confusion or unnecessary debate.

Although providing access to a document might be contrary to the public interest at a particular time, changes in circumstances may mean that disclosure is not contrary to the public interest at a future time. In this case, a different decision might be made on a new FOI request.

8. Amendment or annotation of personal information

The FOI Act enables people to apply to have records about them amended that they believe are incomplete, incorrect, out of date or misleading. This applies to information that has been used, is being used, or is available for use by an agency or minister for an administrative purpose.

A request for correction or annotation differs from other FOI processes because it applies to 'records of information' rather than 'documents'. The request is not confined to any particular document but may apply to any record of that information held by the agency or minister, which is being used for an administrative purpose (for example, a date of birth the applicant claims is incorrect).

The right to request amendment or annotation of a document is limited to:

- documents of an agency or official documents of a minister containing personal information about the applicant
- documents to which the applicant already has lawful access
- circumstances where the personal information in the document is incomplete, incorrect, out of date or misleading, and
- circumstances where the personal information has been used, is being used or is available for use by the agency or minister for an administrative purpose.

Requests for amendment of personal information

A request to an agency or minister for amendment of personal information must be in writing and specify an address in Australia to which notices can be sent to the person. The request must be sent to the agency or minister, by giving it to an officer of the agency or a member of staff of the minister at an office of the agency or minister specified in a current telephone directory, or by posting it to that address, or emailing it to an email address specified by the agency or the minister.

As far as practicable, the request must specify

- the document(s) containing the personal information that should be amended
- the information that is claimed to be incomplete, incorrect, out of date or misleading
- whether the information is claimed to be incomplete, incorrect, out of date or misleading
- the reasons why this is claimed
- the amendment requested.

The agency or minister must notify the applicant of their decision within 30 days of receiving the application. Agencies or ministers may apply to the Information Commissioner for a one-off extension of that time period. The Information

Commissioner may impose any condition to an extension that he or she considers appropriate. If the agency or minister does not make a decision within the statutory timeframe or the time as extended by the Information Commissioner, this is deemed to be a refusal.

Where an application for amendment is refused, the applicant may apply to have the record annotated so that the record includes a statement outlining their objection. (People can apply at any time for an annotation to a record. They do not have to apply for an amendment before seeking an annotation.)

Requests for annotation of personal information

A request to an agency or minister for annotation of personal information must be in writing and specify an address in Australia to which notices can be sent to the person. The request must be sent to the agency or minister, by giving it to an officer of the agency or a member of staff of the minister at an office of the agency or minister specified in a current telephone directory, or by posting it to that address, or emailing it to an email address specified by the agency or the minister.

As far as practicable, the request must specify the document(s) containing the personal information that should be annotated and be accompanied by a statement by the applicant specifying

- the information that is claimed to be incomplete, incorrect, out of date or misleading
- whether the information is incomplete, incorrect, out of date or misleading
- the reasons why this is claimed
- any other information that would make the information complete, correct, up to date or not misleading.

Generally, an agency or minister must annotate a record as requested if it is contained in a document of the agency or an official document of the Minister. However, agencies or ministers are not obliged to annotate a record where the agency or minister considers the annotation voluminous, defamatory or irrelevant. The agency or minister may also attach their own comments to an annotation. Thus it is open to an agency or minister to express their view or interpretation of the matter that the annotation deals with.

The agency or minister must give the applicant a written statement of reasons if they decide not to amend or annotate personal records. These decisions can be reviewed internally (unless it is made by the principal officer of the agency or the minister personally) or by the Information Commissioner.

9. Review, complaints and appeals

There two main avenues a person may take to have an access grant decision or access refusal decision reviewed:

- internal agency review
- Information Commissioner review.

Where a person is dissatisfied with a review decision by the Information Commissioner they may apply to the AAT for review. Both the Information Commissioner and the AAT can refer questions of law to the Federal Court of Australia during a review. In some limited circumstances, the Commonwealth Ombudsman can investigate complaints about agency actions on FOI matters.

Internal agency review

An applicant who is dissatisfied with a decision to refuse access to a document or an affected third party who is dissatisfied with a decision to grant access to a document can apply for internal agency review of that decision. If the decision was made by a minister or personally by the principal officer of an agency, internal review is not available. In this circumstance, a person can seek review by the Information Commissioner.

Applications for internal review must be made in writing and, in general, within 30 days of notification of the original decision, unless the agency agrees to an extension.

An internal review must be undertaken by an authorised officer other than the original FOI decision maker. The review decision must be a fresh decision on the merits of the FOI issue. The review decision must be notified within 30 days of the agency receiving the application. If the agency does not make a decision within the statutory timeframe (or as extended by the Information Commissioner), the original decision is deemed to be affirmed. An agency may then apply to the Information Commissioner for a one-off extension to make a decision. If the Information Commissioner agrees, the Commissioner may allow any further time considered appropriate and may apply any conditions considered reasonable.

A person is not required to apply for internal review before applying for review by the Information Commissioner. However, the Information Commissioner considers it is usually better for a person to seek internal review first. Internal review can be quicker than external review and enables an agency to take a fresh look at its original decision and to discuss the matter with the applicant.

Information Commissioner review

A person who disagrees with an agency's or minister's decision about access to a document (including a deemed decision) or a decision on a request to amend or annotate a record of personal information, may apply to the Information Commissioner for merit review of the decision.

Types of decisions reviewable by the Information Commissioner

The following types of decisions can be reviewed by the Information Commissioner – a decision:

- to refuse access in full or in part (including a deemed refusal)
- made by an agency on internal review to refuse access in full or in part (including a deemed affirmation of the original decision)
- to defer giving access for a specified time (except where the deferral is to allow Parliament to be informed of the contents of the document before it is made public)
- to give access to a qualified person instead of the applicant (for example, a medical practitioner)
- not to allow extra time to apply for internal review
- to grant access (in this case, the person applying for the review would be the affected third party)
- made on internal review to grant access or a deemed affirmation of a decision to grant access (again, the person applying for the review would be the affected third party)
- to impose a charge for processing an FOI request
- to refuse to amend or annotate a record of personal information.

Review by the Information Commissioner is intended to be informal and non-adversarial. The Information Commissioner does not simply review the reasons given by the agency or minister, but determines the correct and preferable decision in the circumstances. The Information Commissioner has powers to inspect all relevant material, including material that the agency or minister claims is exempt. Agencies are obliged to assist the Information Commissioner in a review, and most matters will be reviewed on the papers rather than through formal hearings.

Applying for Information Commissioner review

To apply for an Information Commissioner review, a person must apply to the Commissioner in writing and give details about how notices can be sent to the person (this can include an email address).

The application should include a copy of the notice of decision given by the agency or minister that the review request relates to, if one has been provided (or, in the case of a deemed decision, details of the respondent agency or minister and whether the decision under review is an original decision or on internal review). Where possible, the request should also indicate the reasons why the person disagrees with the decision.

Applications for review should be made within 60 days of the notice of decision being given to the applicant or the request being deemed to be refused, or 30 days if the applicant for review is an affected third party concerning a decision to grant access. The Information Commissioner may extend this timeframe if satisfied that it is reasonable in the circumstances.

If the Information Commissioner receives a request for a review of a decision about refusing access to a document that involves an affected third party, the agency must, as soon as practicable, take all reasonable steps to notify the third party of the request for review. In some cases this might be the first time the third party has heard about the FOI application, if the original decision was to refuse access and there had been no need to consult the third party. There are some exceptions to this requirement, such as where notification of an affected third party might prejudice the conduct of an investigation into a possible breach of the law.

Information Commissioner preliminary inquiries and grounds for not proceeding with review

The Information Commissioner can undertake preliminary inquiries to determine if a matter should be reviewed. The Information Commissioner may also decide not to undertake a review, or continue a review, where he or she is satisfied that:

- the application is frivolous, vexatious, misconceived, lacking in substance or not made in good faith
- the review applicant has failed to cooperate, or failed to comply with a direction of the Information Commissioner
- the review applicant cannot be contacted
- it is desirable in the interests of the administration of the FOI Act that the review application be considered by the AAT rather than by the Information Commissioner.

In most cases the agency has the onus of establishing why their decision was justified. Agencies must use their best endeavours to assist the Information Commissioner to make the correct and preferable decision in relation to access to documents. However, if the decision being reviewed is about granting access, the affected third party has the onus of establishing why a decision refusing the FOI request is justified.

Powers of the Information Commissioner

The Information Commissioner has the following powers in dealing with a review request:

- The Commissioner can require a person to provide information and/or documents.
- The Commissioner can require a minister or the principal officer of an agency to produce a document claimed to be exempt (with some qualification where the claimed exemption relates to national security or Cabinet matters)
- If an agency or minister cannot find a document, the Information Commissioner may require the agency or minister to conduct further searches.
- The Commissioner can require a person to attend to answer questions and to take an oath or affirmation that the answers given will be true.

A person who gives information or documents to the Information Commissioner, or answers questions, in good faith and as part of a review, is not liable for any civil proceedings should another person suffer injury, damage or loss of any kind. If a document or information is provided for the purpose of the review, this will not waive any subsequent claim for legal professional privilege over the document or information.

If the Information Commissioner proposes making a decision that a document affecting national security, defence or international relations is not exempt, the Commissioner must request the Inspector-General of Intelligence and Security to appear to give evidence on the matter.

Hearings

The Information Commissioner can conduct hearings as part of a review. Hearings are not intended to be a standard part of Information Commissioner reviews, since they can increase contestability, introduce more formality to the process and prolong the matter. A review can be carried out on the documents or other available material if:

- the Information Commissioner considers the matter can be adequately determined
- the Information Commissioner is satisfied that there are no unusual circumstances that warrant a hearing
- none of the parties has applied for a hearing.

Any party may apply to the Information Commissioner for a hearing at any time before a review decision is made, and the Information Commissioner may allow the application. However, the Commissioner must be satisfied there is a special reason to warrant a hearing.

Hearings must be conducted in public unless the Information Commissioner is satisfied there are reasons to hold the hearing (in whole or part) in private.

Timeframe for Information Commissioner review

The time taken to complete a review will depend on a number of factors, including:

- the type and range of issues involved
- the number and type of documents involved
- whether there is a need to refine the scope of the issues the applicant has raised
- whether the agency or minister needs to undertake further searches for documents
- whether parties other than the agency and the applicant need to be consulted or become part of the review
- any new issues the parties have introduced during the review
- the time parties take to respond to requests for information or other issues raised
- the extent to which the parties are willing to engage in informal resolution processes.

The Information Commissioner's decision on a review is binding on the agency or minister. If the Information Commissioner finds that a document is exempt, the Commissioner cannot order that access be given to that document (whereas an agency or minister always has a discretion to give access to an exempt document).

The Information Commissioner can also recommend that an amendment be made to a record of personal information, subject to two limitations. The Information Commissioner cannot recommend an amendment to a personal record if the record is a record of a decision under legislation by a court, tribunal, authority or person. Nor can the Information Commissioner recommend an amendment to a personal record if that involves the determination of a question that the person applying for the review is, or has been, entitled to have reviewed by the agency (on internal review), the Information Commissioner, a court or tribunal. For example, if a person was seeking to have an amendment made to a record that relates to the determination of a benefit under social security legislation, the Information Commissioner could not recommend an amendment to the record if the person could have, or can, apply for review of that determination (for example, an internal agency review or a review by the Social Security Appeals Tribunal).

AAT review

Most review decisions by the Information Commissioner (including a decision to declare a person a vexatious applicant), can be reviewed by the AAT. However a person cannot apply to the AAT for review of the Information Commissioner's

decision not to undertake or continue a review. A person can also apply to the AAT for review of an agency's decision if the Information Commissioner has decided that the matter is better reviewed by the AAT. In this case, the decision by the agency or the minister is the decision that the AAT would review.

An application to the AAT must be made within 28 days of the Information Commissioner's decision being given to the review applicant.

Where the matter being reviewed is the Information Commissioner's declaration that a person is a vexatious applicant, the Information Commissioner is a party to the proceedings in the AAT. For other decisions (for example, a decision to refuse or grant access to a document) the agency or minister will be a party to the proceedings, and not the Information Commissioner. An agency or minister must notify affected third parties if an FOI applicant seeks AAT review of a decision to refuse access to third party information.

In AAT proceedings to review an FOI decision, the agency or minister who received the access request or the application for amendment of personal records has the onus of establishing that a decision that is adverse to the FOI applicant should be given. If an affected third party is a party to the proceeding, the third party has the onus of establishing that a decision refusing to give access to the document is justified, or the AAT should give a decision adverse to the person who made the request.

More information about review by the AAT can be found at www.aat.gov.au.

Federal Court

Both the Information Commissioner and the AAT can refer questions of law to the Federal Court of Australia during a merit review.

A party to a review also has the right to appeal to the Federal Court on a question of law from a decision of the Information Commissioner or of the AAT. Such an appeal must be made within 28 days of the decision being given, or within any further period that the Federal Court may allow.

More information about the Federal Court can be found at www.fedcourt.gov.au.

Complaints and investigations

The Information Commissioner can investigate agency actions relating to the handling of FOI matters and agency compliance with the IPS, either in response to a complaint or on the Commissioner's own motion. Such investigations may point to systemic problems in agencies or help identify areas where improvements in FOI handling can be made. The Commissioner cannot investigate the handling of an FOI matter by a minister, but can undertake merit review of the decision.

The Information Commissioner will not investigate a matter as a complaint if the proper remedy is for the person to seek review of the merit of an FOI decision. The complaints process is intended to deal with the manner in which agencies handle FOI requests and procedural compliance matters. Examples might include where there is delay by an agency in processing an FOI request; an agency failed to consult a third party whose interests would be affected before it released a document; an agency continued to insist that an FOI applicant narrow the scope of a reasonable request, or the complaint concerned an alleged conflict of interest by the decision maker.

Making a complaint to the Information Commissioner

To make a complaint to the Information Commissioner, a person must:

- complain in writing, either by post, email or via the FOI complaint form on the OAIC website
- identify the agency about which the complaint is being made.

The complaint should also include some information to indicate what the complaint is about.

Information Commissioner preliminary inquiries and grounds for not proceeding with investigation

The Information Commissioner may make preliminary inquiries to determine whether or not to investigate a complaint. For example, it might be necessary to make such inquiries to determine whether the complaint relates to an action under the FOI Act.

The Information Commissioner may decide not to investigate a complaint until an agency has had the opportunity to address the matter, or if the Commissioner is satisfied that the agency has adequately addressed the complaint. Other grounds for deciding not to investigate a complaint are:

- the complainant has, or had, a right to have the action reviewed by the agency, the Information Commissioner, a court or a tribunal, and has not exercised that right when it would be reasonable to do so
- the complainant has, or had, a right to complain to another body and has not exercised that right when it would be reasonable to do so
- the complaint is frivolous, vexatious, misconceived, lacking in substance or not made in good faith
- the complainant does not have sufficient interest in the subject matter of the complaint.

Powers of the Information Commissioner

A complaint investigation must be conducted in private and in the way the Information Commissioner considers fit. The Information Commissioner has certain compulsory powers, such as requiring the production of information and documents, or requiring a person to attend to answer questions and to take an oath or affirmation. These are the same powers as the Information Commissioner has when undertaking a merit review. The Information Commissioner or an authorised officer also has a limited power to enter the premises of an agency or a contracted service provider if the principal officer of the agency or the person in charge of the service provider agrees.

Giving a document or information to the Information Commissioner in connection with an investigation does not waive any subsequent claim to legal professional privilege over the document or information.

A person is immune from civil proceedings and from criminal or civil penalty if they give information, produce a document or answer a question in good faith for the purposes of an investigation. The protection applies even if no compulsory process was involved. The complainant is also immune from civil proceedings, provided that the complaint was made in good faith.

Investigation results of the Information Commissioner's complaint investigation

On completing a complaint investigation, the Information Commissioner must notify the agency and the complainant in writing of the outcome. The Information Commissioner's notification must include the 'investigation results', the reasons for those results and the recommendations (if any). The 'investigation results' are:

- the matters that were investigated
- any opinion that the Information Commissioner has formed in relation to those matters
- any conclusions that the Information Commissioner has reached
- any suggestions that the Information Commissioner believes might improve the agency's processes
- any other information of which the Information Commissioner believes the agency should be aware.

The Information Commissioner may make formal recommendations that the Commissioner believes the agency should implement. If the Information Commissioner is not satisfied that the agency has taken adequate appropriate

action to implement the recommendations, the Commissioner may subsequently report to the minister responsible for the agency and the minister responsible for the FOI Act. The minister responsible for the FOI Act must table the report in Parliament.

Commonwealth Ombudsman

The Commonwealth Ombudsman may also investigate complaints about agency handling of FOI requests. In the normal course of events, such complaints are likely to be transferred to the Information Commissioner. However, in some circumstances, such as where there are other issues as well as FOI involved, it may be preferable for the Ombudsman to deal with the complaint. The Information Commissioner can transfer complaints to the Ombudsman.

Vexatious applicants

The Information Commissioner may declare a person to be a vexatious applicant, either on the Commissioner's own initiative or after considering an application by an agency or minister. A vexatious applicant declaration is not an action that will be undertaken lightly by the Commissioner, but its use may be appropriate at times. If an agency or minister applies for a vexatious applicant declaration, they must show clearly and convincingly that the declaration should be made.

The FOI Act sets out the grounds for declaring a person to be a vexatious applicant. The types of behaviour that might lead the Information Commissioner to consider declaring a person to be a vexatious applicant include:

- repeatedly engaging in access actions that involve an abuse of process
- harassing or intimidating an individual or an agency employee
- unreasonably interfering with the operations of an agency
- seeking to use the FOI Act to circumvent restrictions imposed by a court on access to a document or documents.

Such behaviour might occur when the person makes repeated requests for documents, amendment or annotation of personal records, internal review, or merit review by the Information Commissioner. An agency or minister who applies for a vexatious applicant declaration bears the onus of showing that the declaration should be made.

Before making a declaration, the Information Commissioner must give the person concerned an opportunity to make oral or written submissions.

A vexatious applicant declaration must be made in writing and be notified as soon as practicable to the person concerned. The declaration sets the terms and conditions for the effect of the declaration. For example, the declaration might

provide that an agency or minister may refuse to consider any request by the person for documents under the FOI Act that are made without the written permission of the Information Commissioner.

A decision by the Information Commissioner to declare a person to be a vexatious applicant can be reviewed by the AAT.

10. Publication requirements

Information Publication Scheme

A new Information Publication Scheme applies to Australian Government agencies that are subject to the FOI Act. The scheme provides a statutory framework for the pro-active publication of information by agencies. The IPS underpins a pro-disclosure culture across government, and transforms the FOI framework from one that was primarily reactive to individual requests for documents, to one that also relies more heavily on agency driven publication of information. The IPS requirements also reflect the objective that information held by government is a national resource to be managed for public purposes.

The IPS requires agencies covered by the FOI Act to:

- publish an agency plan
- publish specified categories of information
- consider proactively publishing other government information.

Agencies must ensure that information published under the IPS is accurate, up to date and complete.

Many agencies highlight the IPS by an icon developed by the OAIC, published on the home page of the agency website.

Agency plan

The IPS requires agencies to publish an information publication plan, describing what information the agency proposes to publish, how the information will be made available and other steps the agency will take to ensure compliance with IPS requirements.

Publication of an agency plan is a continuing obligation. Agencies must ensure that all information the agency publishes under the IPS, including the agency plan, is 'accurate, up to date and complete'. Agencies should therefore ensure that the agency plan is regularly reviewed and updated where necessary.

The Information Commissioner has published an Agency Plan template, that can be adapted by agencies, in the *Guidelines issued under s 93A of the Freedom of Information Act 1982* available on the OAIC website.

Publication of specified categories of information

The IPS specifies nine classes of information, in addition to the information publication plan, that agencies must publish on their website. The classes of information that must be published are:

- details of the agency's organisational structure
- details of the functions of the agency, including its decision making powers and other powers affecting members of the public
- details of appointments of officers within the agency that are made under legislation, other than Australian Public Service employee appointments
- the information in agency annual reports that are laid before the Parliament
- details of arrangements for members of the public to comment on specific policy proposals for which the agency is responsible, including how (and to whom) those comments may be made
- information in documents to which the agency routinely gives access in response to FOI requests, other than in specified cases such as where the information contains personal information and it would be unreasonable to publish the information
- information that the agency routinely provides to Parliament in response to requests and orders from the Parliament
- contact details for an officer or officers who can be contacted about access to the agency's information or documents under the FOI Act
- the agency's operational information (information held by the agency to assist it to perform or exercise its functions or powers in making decisions or recommendations affecting members of the public, such as decision making manuals and guidelines).

Other information to be published under the IPS

The FOI Act does not limit or restrict publication of information by agencies, including information that is exempt from disclosure under the FOI Act.

Agencies are generally best placed to identify other information that should be included in the IPS. In doing so, agencies should strive to implement the objects of the FOI Act, which declare that information held by government is a national resource that should be managed for public purposes, and that the Parliament intends to increase scrutiny, discussion, comment and review of the Government's activities.

Compliance with the IPS

The Information Commissioner is responsible for investigating agency compliance with the IPS and monitoring, investigating and reporting on the operation of the scheme. In addition, each agency, with the Information Commissioner, must review the operation of the IPS within that agency at least once every five years.

Disclosure log listing information released under the FOI Act

Agencies and ministers must publish details of information that has been released in response to each FOI access request, subject to certain exceptions. This publication is known as a 'disclosure log'. The purpose of the disclosure log is to make available to the world at large information that has been released under the FOI Act.

The disclosure log must be published on an agency's or minister's website (and can usually be found through an icon or link on the homepage). The information released under the FOI Act may be published in one of three ways:

- making the information available for downloading from the agency's or minister's website (it is common that PDF copies of documents released under the FOI Act are made available)
- linking to another website where the information can be downloaded, or
- giving details of how the information may be obtained (for example, upon written request for a photocopy, for which a copying charge can be).

If publication in a disclosure log would be unreasonable, an agency or minister is not required to publish:

- personal information about any person
- information about the business, commercial, financial or professional affairs of any person
- exempt information that has been released under the FOI Act, or information that would have been exempt had the FOI request been received from a person other than the particular applicant (this last ground of exclusion arises from a determination made by the Information Commissioner under the FOI Act).

An agency or minister can also decline to publish information that would require extensive modification to make it publishable.

Information must be published in a disclosure log within ten working days of access being granted to the FOI applicant. The Information Commissioner has recommended that this issue be raised with applicants, particularly if the applicant may object to publication occurring simultaneously with access being granted. If that does occur, the Commissioner has recommended that consideration be given to reducing or waiving any FOI access charge that would otherwise be imposed on the applicant.

It is open to an agency or minister to place supplementary information on a disclosure log – for example, to point out that a document has been revised and published elsewhere. It is also open to an agency or minister to archive information that was published in documentary form on a disclosure log, provided the disclosure log reference to the information is retained. If copyright restrictions apply to a document published on a disclosure log these should be noted.

Legal protections for IPS and disclosure log publication

The FOI Act provides a range of protections against civil and criminal liability for the Commonwealth, minister, agencies, agency officers who publish information, in good faith, in the belief that publication was either required or permitted under the IPS. Similarly, a person is not liable to any action for defamation, or breach of confidence, because they have supplied a document to an agency or minister and the document is published. Legal protections also apply to the release of information in response to an FOI request, and to publication apart from the FOI Act.

These protections complement the policy objective of the Act, of providing a secure framework for publication of government information to the public. The protections are conditional, and apply only where a minister or agency officer publishes a document in good faith in the belief that the publication was required or permitted under the Act.

Glossary

AAT	Administrative Appeals Tribunal
access grant decision	a decision under the FOI Act by an agency or minister to grant access to a requested document
access refusal decision	a decision under the FOI Act by an agency or minister to refuse access to a requested document
Charges Regulations	*Freedom of Information (Charges) Regulations 1982*
deemed decision	occurs if the allowable time for making an FOI decision (regarding access to documents, or amendment or annotation of personal information) has expired without the applicant receiving notice of the decision; in these circumstances, the decision is deemed to be an upholding of the original decision, or where no decision exists, a refusal of the request.
FOI Act	*Freedom of Information Act 1982* (Cth)
Information Commissioner review	(referred to in the FOI Act as 'IC review'); merit review by the Information Commissioner of an agency's decision regarding access to, or annotation of, a document, carried out at the request of an applicant or third party
internal agency review	an internal review of an FOI decision by an agency, carried out by an authorised officer who was not involved in the original decision
IPS	Information Publication Scheme (established under Part II of the FOI Act)
OAIC	Office of the Australian Information Commissioner