



# Environmental Defenders Office

## Accessing Commonwealth Government Information

*Disclaimer: This factsheet is a guide only and is designed to give readers a plain English overview of the law. It does not replace the need for professional legal advice in individual cases. To request free initial legal advice on a public interest environmental or planning law issue, please visit our [website](#).*

*While every effort has been made to ensure the information is accurate, the EDO does not accept any responsibility for any loss or damage resulting from any error in this factsheet or use of this work.*

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### Overview

Public access to information held by government departments is important in promoting open, accountable government. Access to Australian Government information is governed by the *Freedom of Information Act 1982* (Cth) (**FOI Act**).

The Office of the Australian Information Commissioner (**OAIC**) at the national level is responsible for ensuring the objectives of the FOI Act and the *Privacy Act 1988* (Cth) are achieved.

The OAIC can provide advice directly to the community about accessing information. The OAIC is led by the Australian Information Commissioner (**the Information Commissioner**).

The OAIC is independent of other government agencies. The role of the Information Commissioner is to promote public awareness and understanding of the FOI Act, and provide information, support, advice, assistance and training to agencies and the general public. The OAIC also has the power to review decisions made by government agencies and to deal with complaints.

Visit: The OAIC [website](#)

### The public's right to access information

Access to Federal and State Government information is governed separately. If you seek access to information about the Federal Government's approval of an action impacting a matter of national environmental significance, e.g. nationally listed

threatened species, you would need to follow the process set out under national law under the FOI Act.

For information on accessing State Government Information see the factsheet on our [website](#) for the relevant jurisdiction.

## Accessing Australian Government information

Every person has a right to access a document of an agency or an official document of an Australian Government Minister in accordance with the FOI Act. Australian Government agencies must publish certain information including:

- Information about the agencies' structure, functions and operations
- Operational information including the agencies' rules, guidelines and practices
- Annual reports
- Information that is routinely given to the public
- Information that is routinely given to the Parliament

If the information is not published by the agency, you can request a copy of the document. An agency or Minister must give you the requested document unless the document is an exempt document or a conditionally exempt document.

The FOI Act defines a **document** as:

- Any paper or other material on which there is writing or a mark, figure or symbol
- Electronically stored information
- A map, a plan, a drawing or a photograph
- Any article from which sounds, images or writing are capable of being produced.

If a document is exempt under the FOI Act, an agency or minister can refuse to disclose it. However, agencies and ministers have a discretion to provide access to a document where the law permits, even if the document is exempt.<sup>1</sup> The Freedom of Information Guidelines<sup>2</sup> provide that agencies and ministers should consider in each case whether an exempt document can be released without causing significant harm and allow access to documents wherever possible.<sup>3</sup>

- Exempt documents include:
- Documents that would or could be expected to cause damage to the security, defence or international relations of the Commonwealth;
- Official records of Cabinet or a document submitted to Cabinet for consideration;

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<sup>1</sup> Section 3A, FOI Act.

<sup>22</sup> <https://www.oaic.gov.au/freedom-of-information/freedom-of-information-guidance-for-government-agencies/foi-guidelines>

<sup>3</sup> Part 5, paragraph 5.6 of the FOI Guidelines

- Documents which may prejudice the investigation of a breach of law, expose confidential sources of information, endanger the life or physical safety of a person, prejudice a fair trial, disclose law enforcement methods which would prejudice their effectiveness or prejudice the protection of public safety;
- Documents to which secrecy provisions of other legislation apply;
- Documents subject to legal professional privilege;
- Documents that contain information which, if disclosed, would be a breach of confidence;
- Documents originating from the Parliamentary Budget Office;
- Documents whose disclosure would be contempt of Parliament or contempt of court;
- Documents that disclose trade secrets or commercially valuable information, and/or;
- Documents relating to Electoral rolls<sup>4</sup>

Access to conditionally exempt documents must be given unless in the circumstances disclosure would on balance be contrary to the public interest.<sup>5</sup> Conditionally exempt documents include documents that may affect Commonwealth-State relations, deliberative processes, financial or property interests of the Commonwealth, certain operations of agencies, personal privacy, business, research and the economy.<sup>5</sup>

#### Factors relating to public interest exemptions

To determine whether access to a document would be in the public interest the decision maker considers factors that favour access to the information against public interest factors against disclosure. Factors that favour access to the document include:

- The promotion of public participation in Government processes and increasing scrutiny, discussion and review of Government activities;
- Increasing recognition that Government information is a public resource;
- Facilitating and promoting public access to information promptly and cost effectively;
- Informing debate on a matter of public importance;
- Promoting the effective oversight of public expenditure; and
- Allowing a person to access their personal information.<sup>6</sup>

The decision maker must not take into consideration factors such as whether the document may cause embarrassment to or loss of confidence in the Australian Government, the possibility of misinterpretation or misunderstanding the document, whether the author is of high seniority in the relevant agency or if access to the document

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<sup>4</sup> *Freedom of Information Act 1982* (Cth), Part 4, Div 2 (FOI Act).

<sup>5</sup> *Freedom of Information Act 1982* (Cth), s 11A(5).

<sup>6</sup> *Freedom of Information Act 1982* (Cth), s 11B(3).

may cause confusion or unnecessary debate.<sup>7</sup>

## **Request for access**

To request access to a document of an agency or an official document of a Minister the request must be in writing and include the following information:

- State that the application is made under the FOI Act.
- Provide sufficient information about the document so that the agency or Minister can identify it.
- Provide an address (which may include an electronic address) for the delivery of notices issued under the FOI Act.<sup>8</sup>

The request may be sent to the relevant agency or Minister by post, or to an email address provided by the agency or Minister, or hand delivered to an officer of the agency or staff of the Minister. Government agencies and Ministers have a duty to assist a person to make a request that meets the requirements.

The relevant agency must acknowledge that it has received your request within 14 days from the day the request has been received.<sup>9</sup> The agency must notify you of its decision to grant or deny access to the information within 30 days of receiving the request.<sup>10</sup> This period may also be extended in certain circumstances or where it has been agreed.

## Charges

The relevant agency or Minister may decide whether you will be required to pay a charge to process the request for information and to provide access to the information.<sup>11</sup> You can find more information on what charges may apply via the OAIC website that you can access via this [link](#).

When you receive the agency or Minister's notice stating the charge, you have 30 days to respond in writing.<sup>12</sup> You can either:

- agree to pay the estimated charge
- dispute the way they calculated the estimated charge
- ask them to reduce or not apply the charge
- change your FOI request to reduce the work needed to process it
- withdraw your FOI request.

If you don't respond within 30 days, your request is taken to have been withdrawn.<sup>13</sup>

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<sup>7</sup> *Freedom of Information Act 1982* (Cth), s 11B(4).

<sup>8</sup> *Freedom of Information Act 1982* (Cth), s 15(2).

<sup>9</sup> *Freedom of Information Act 1982* (Cth), s 15(5)(a).

<sup>10</sup> *Freedom of Information Act 1982* (Cth), s 15 (5)(b).

<sup>11</sup> *Freedom of Information (Charges) Regulations 2019* (Cth), s 3 (Charges Regulations).

<sup>12</sup> *Freedom of Information Act 1982* (Cth), s 29(1)

<sup>13</sup> *Freedom of Information Act 1982* (Cth), s 29(1)(g)

If you dispute the estimated charge or ask for it to be reduced or not applied, the agency or Minister may take into account any issue raised by you, but must take into account:

- Whether the charge will cause you financial hardship
- Whether disclosing the requested document is in the general public interest or in the interest of a substantial section of the public.<sup>14</sup>

## **Refusal of access**

An agency or Minister may refuse access to information for practical reasons if it is determined that the work involved in providing access to the information would substantially and unreasonably divert the resources of the agency or would substantially and unreasonably interfere with the performance of the Minister's functions.<sup>15</sup>

If a request is refused for practical reasons, the agency or Minister must notify you in writing of its intention to refuse access and provide you with assistance within a 14 day consultation period to revise your application so that it may no longer be refused for practical reasons.<sup>16</sup>

Requests may also be refused if the information requested cannot be found, does not exist or has not been received.<sup>17</sup>

## **Review of decisions**

### Internal reviews

You may request that a decision made by an agency be reviewed by that agency (by a person other than the decision maker). An application for internal review must be submitted to the agency within 30 days of receiving notification of the decision.<sup>18</sup>

Agencies are required to complete internal reviews within 30 days of receiving the application for review, however this period may be extended.<sup>19</sup> The two types of decisions that may be reviewed internally are:

- o access refusal decisions, and;
- o access grant decisions.

An *access refusal decision* includes decisions made in relation to refusing to provide access to a document or decisions made in relation to charging a fee for providing access to the

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<sup>14</sup> *Freedom of Information Act 1982* (Cth), s 29(5)

<sup>15</sup> *Freedom of Information Act 1982* (Cth), ss 24 and 24AA.

<sup>16</sup> *Freedom of Information Act 1982* (Cth), s 24AB.

<sup>17</sup> *Freedom of Information Act 1982* (Cth), s 24A.

<sup>18</sup> *Freedom of Information Act 1982* (Cth), s 54B(1).

<sup>19</sup> *Freedom of Information Act 1982* (Cth), s 52.

information.<sup>20</sup>

An *access grant decision* is a decision to grant access to a document where there is a requirement to consult with a State, a person or organisation, or an individual or the legal personal representative of a deceased person.<sup>21</sup>

If the agency reviewing the decision does not provide a decision to you within 30 days of commencing the internal review, the original decision is taken to be affirmed.<sup>22</sup>

### Reviews by the Information Commissioner

Review by the Information Commissioner is a merit review process. This means the Information Commissioner does not just review the reasons given by the agency or minister, but rather decides the correct or preferable decision in the circumstances.

If the Information Commissioner finds that the original decision was not correct in law or not the preferable decision, the decision can be varied or set aside and a new decision substituted.

Decisions that are reviewable by the Information Commissioner include access refusal decisions and access grant decisions, agency decisions made under internal review, and decisions refusing to allow more time to submit an application for review of an access review decision.

You have 60 days after receiving notification of the decision to submit an application to the Information Commissioner to review an access refusal decision.<sup>23</sup> If you require the Information Commission to review an access grant decision, you must submit your application to the Information Commissioner 30 days after notice is given to affected third parties in relation to the access grant decision.<sup>24</sup>

The Information Commissioner has no power to grant access to exempt documents.<sup>25</sup>

You may appeal to the Federal Court in relation to decisions made by the Information Commissioner on a question of law.<sup>26</sup>

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<sup>20</sup> *Freedom of Information Act 1982* (Cth), s 53A.

<sup>21</sup> *Freedom of Information Act 1982* (Cth), s 53B.

<sup>22</sup> *Freedom of Information Act 1982* (Cth), s 54D.

<sup>23</sup> *Freedom of Information Act 1982* (Cth), s 54S(1).

<sup>24</sup> *Freedom of Information Act 1982* (Cth), s 54S(2).

<sup>25</sup> *Freedom of Information Act 1982* (Cth), s 55L.

<sup>26</sup> *Freedom of Information Act 1982* (Cth), s 56.

Visit: The OAIC page on [Freedom of Information Reviews](#) for more information on internal reviews and reviews by the Information Commissioner

### Reviews by the Administrative Appeals Tribunal

An application may be made to the Administrative Appeals Tribunal (**AAT**) for the review of decisions made by the Information Commissioner.<sup>27</sup> A person cannot apply directly for review of an agency or a Minister's decision to the AAT, the person must apply for a review by the Information Commissioner first.<sup>28</sup>

A person must apply to the AAT within 28 days after the day they receive the Information Commissioner's decision.<sup>29</sup>

The AAT has power to review original decisions made by an agency or Minister and may make decisions in relation to granting access to information held by the agency or Minister.<sup>30</sup> The AAT cannot provide access to exempt documents.<sup>31</sup>

### Glossary

**AAT** means the Administrative Appeals Tribunal

**Charges Regulations** means the *Freedom of Information (Charges) Regulations 2019 (Cth)*

**FOI Act** means the *Freedom of Information Act 1982 (Cth)*

**Information Commissioner** means the Australian Information Commissioner

**OAIC** means the Office of the Australian Information Commissioner

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<sup>27</sup> *Freedom of Information Act 1982 (Cth)*, Part VIIA.

<sup>28</sup> *Scholes and Decision Maker (Freedom of information)* [2018] AATA 4091

<sup>29</sup> *Administrative Appeals Tribunal Act 1975*, s 29(2).

<sup>30</sup> *Freedom of Information Act 1982 (Cth)*, s 57A–58.

<sup>31</sup> *Freedom of Information Act 1982 (Cth)*, s 58(2).

