

# Australian Government, Attorney- General's Department.

## GENERAL DESCRIPTION OF THE FREEDOM OF INFORMATION ACT 1982

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### Introduction

1.1 The *Freedom of Information Act 1982* (FOI Act) came into effect on 1 December 1982. It extends the right of every person to access to information in the possession of the Government of the Commonwealth and its authorities in two ways:

- a. it requires Commonwealth agencies (Departments and authorities) to publish information about their operations and powers affecting members of the public as well as their manuals and other documents used in making decisions and recommendations affecting the public; and
- b. it requires agencies to provide access to documents in their possession unless the document is within an exception or exemption specified in the legislation.

1.2 Access to all documents in the possession of the Government is not possible as confidentiality must be maintained where it is necessary for the protection of essential public interests and the private and business affairs of persons and organisations in respect of whom information is collected.

1.3 The FOI Act made a fundamental change to the emphasis of the law prior to 1 December 1982 in the following ways:

(i) The FOI Act creates a right of access. Prior to 1 December 1982, the release of information held by agencies was, as a rule, a matter of discretion and the agency was entitled to withhold information without having to justify its actions unless there was a requirement to disclose the information. Examples of the instances in which there are such requirements are as follows:

- a. subordinate legislation (regulations and by-laws) is required to be published;
- b. most agencies are required to publish annual reports;
- c. many appointments and the like are required to be published in the Gazette;
- d. reports of some advisory bodies must be tabled in Parliament and so become published;
- e. under certain legislation (eg the *Administrative Decisions (Judicial Review) Act 1977*) statements of reasons for decisions must be given on request by a person aggrieved by some decisions;
- f. subject to the application of the doctrine of public interest immunity, the courts have power to require documents to be produced in legal proceedings; and
- g. the Parliament has power to compel the giving of evidence and the production of documents. Royal Commissions have like powers.

(ii) The FOI Act does not require a person to establish any special interest or "need to know" before he or she is entitled to seek or be granted access.

(iii) The FOI Act sets out the circumstances in which access can be denied as a matter of discretion.

1.4 The FOI Act is not a code. It does not prevent or discourage the giving of access to any exempt document to which access can lawfully be given other than under the FOI Act. It is a minimum not a maximum standard.

## Application of the Act

2.1 There are few Commonwealth Departments and authorities to which the FOI Act does not apply. It does not apply to Parliament or Parliamentary departments. Some authorities (listed in Schedule 2 of the FOI Act) are specifically excluded from the operation of the FOI Act either totally or in respect of defined areas of their functions. It applies to courts and tribunals only in respect of their administrative functions. It applies to all other authorities.

2.2 The FOI Act applies to "official" documents in the possession of a Minister i.e. those that relate to the affairs of an authority or of a department of State. The legislation does not apply to documents relating to Party matters or to a Minister in her or his capacity as a Member of Parliament.

## Exemptions

3.1 Exemptions are based on what is essential to maintain the system of government based on the Westminster system and on what is necessary for the protection of the legitimate interests of third persons who provide information to the Commonwealth Government. The exemptions are designed to provide a balance between the rights of applicants to disclosure of government held documents and the need to protect the legitimate interests of government and third parties who deal with government.

3.2 In certain circumstances, documents relating to the following categories (where their release could damage Government or third party interests or other public interests) are exempt:

- documents relating to national security, defence or international relations;
- documents relating to Commonwealth/State relations;
- Cabinet and Executive Council documents;
- deliberative process documents;
- documents relating to enforcement of the law and protection of public safety;

- documents to which secrecy provisions of other laws apply;
- documents relating to financial or property interests of the Commonwealth;
- documents relating to certain operations of agencies;
- documents containing personal information;
- documents subject to legal professional privilege;
- documents relating to business affairs, etc;
- documents relating to the national economy;
- documents containing material obtained in confidence;
- documents disclosure of which would be contempt of Parliament or contempt of court; and
- certain documents arising out of companies and securities legislation.

3.3 Exemptions are to be claimed only where the relevant information is genuinely sensitive and real harm will be caused by its disclosure. They should not be claimed simply because they are technically available.

## Decision-making

4.1 The onus for deciding whether an exemption applies or whether disclosure would be in or contrary to the public interest, is on the agency and not the applicant or the third party consulted.

4.2 The requestor must be notified of the agency's decision in writing. The decision must contain

- the day on which the decision was made;
- the name and designation of the decision-maker;
- findings on any material questions of fact;
- reference to the material on which the findings of fact were based; and
- information about review rights.

## Refusal of Access

5.1 Where a Minister or agency decides to refuse access in accordance with a request, a statement of reasons for that decision must be given to the applicant (s26).

5.2 Sometimes only part of the information in a document is sensitive and needs to be exempted. Wherever practicable, a copy of the document with that information deleted is to be made available (s22).

## Procedures For Applying

6.1 Procedures for access to documents have been kept as simple as possible. In summary, a request for access to a document must:

- be made in writing (but does not have to be in a particular form); and
- provide enough information to enable the document(s) sought to be identified; and
- specify an address in Australia for the service of notices; and
- be sent to the agency at an address specified in a current telephone directory; and
- be accompanied by the application fee (\$30).

6.2 The purpose of these formal requirements is to enable agencies to identify specific freedom of information requests and to handle them accordingly. Agencies are required to assist people to make valid applications where they are able to do so (s15).

## Right of review

7.1 A person whose request is not dealt with promptly may:

- complain to the Ombudsman if it is thought there has been an undue delay (s57);
- appeal to the Administrative Appeals Tribunal if no notice of a decision is received after 30 days (s56):-
  - the Tribunal is to deal with the matter as if the request has been refused; and
  - the Tribunal may allow the agency further time to make a decision.

## Internal Review

7.2. Where a decision has been made not to grant access to documents to the applicant or where a decision has been made to disclose a document notwithstanding contentions to the contrary by third parties, there is an entitlement to have that decision reviewed by the agency concerned (s54):

- this does not apply where the original decision was made by the principal officer of the agency or by a Minister;
- the review is to be conducted by the principal officer or a person authorised by the principal officer specifically for the purpose;
- where there is an entitlement to this internal review, this must be sought before an appeal to the Administrative Appeals Tribunal (s55).

## Administrative Appeals Tribunal

7.3 The applicant may apply to the Administrative Appeals Tribunal (the AAT) to review a decision given on internal review by an officer authorised under s.23, or a decision made initially by a Minister or principal officer, or a deemed refusal. The following points apply to AAT review:

- the AAT may review decisions to refuse access (in whole or part), to defer access, to grant access contrary to a contention of a third party or to impose charges in relation to a request for access;
- in the cases where a conclusive certificate has been issued, special arrangements operate but the AAT can still review the decision;
- in all cases, other than those involving conclusive certificates, the AAT can change the original decision; and
- if the AAT finds to be justified a claim that a document is exempt, it does not have any discretion to give access to that document.

7.4 The AAT is empowered to recommend to the Attorney-General, in appropriate cases, that, where an applicant is successful or substantially successful in an application for review before the AAT, the costs be paid by the Commonwealth.

#### Conclusive Certificates

7.5. Where a conclusive certificate has been issued, the AAT considers whether there are reasonable grounds for the claims that the documents to which the conclusive certificate relates are exempt rather than where the final public interest lies. The decision of the AAT takes the form of a recommendation to the Minister. The recommendation is public. Whether the Minister acts on a recommendation is a matter for the Minister's discretion but an explanation must be made to Parliament if a recommendation is rejected.

#### Commonwealth Ombudsman

7.6. An applicant may also apply to have an agency's decision investigated by the Ombudsman, or can appeal to the Federal Court from the AAT on a point of law, or may apply to the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* although the last avenue of review may be denied because of the comprehensive review rights before the AAT.

## Use of Agency's Resources

8.1. Dealing with freedom of information requests inevitably has an impact on an agency's resources. The FOI Act attempts to strike a balance in the application of these resources. Departments and authorities are established to carry out Government programs of one kind or another and they must operate within the limits of staff and money made available within the overall budget. To divert an undue proportion of agency resources to responding to freedom of information requests would adversely affect the service to the public provided by those agencies (s24).

## Administrative Impact

8.2. Account was taken of the administrative impact on agencies. This is expressed in a number of provisions of the FOI Act:

- the FOI Act applies to all documents which came into existence after 1 December 1977;
- in the case of documents relating to the personal information of the requestors it applies to all documents irrespective of how old they are;
- the FOI Act does not require agencies to make available information that is not already in documentary form (which is very broadly defined to include any record of information) except in two cases. The first is in relation to publication of material under Part II of the FOI Act (see paragraph 1); the second relates to the obligation to provide computer print-outs of information stored on computers or to provide transcripts of sound recordings;
- the FOI Act requires an applicant for access to a document, in consultation (if necessary) with the agency concerned, to provide a reasonable identification of the document sought. This provision is intended to assist applicants in making their requests;
- the requirement to take all reasonable steps to enable the applicant to be notified of a decision on a request as soon as practicable but in any event within 30 days represents a compromise between the desirability of early decisions and the diversion of resources that would be required by shorter time limits.

## Fees and Charges

9.1 The FOI Act provides that fees and charges may be levied:

- a \$30 application fee must accompany each application if it is to be a valid request when received;

- the rates of charges are fixed in accordance with regulations made under the FOI Act (see the attached list of charges);
- no fees or charges are payable for requests for documents relating to the requestor's income support matters (Reg 6), benefits or allowances set out in certain regulations;
- the charges may be remitted in whole or in part in certain circumstances (eg cases of financial hardship, or the giving of access is in the public interest).

## Amendment of Information

10.1. A person who has been lawfully provided with access to a document containing her or his personal information may request an agency to amend or annotate it if the information is incomplete, incorrect, misleading or out of date:

- if the agency grants the request for amendment it makes the amendment by altering the record or adding a notation;
- the agency must take all reasonable steps to enable the applicant to be notified of a decision on his request as soon as practicable but in any event within 30 days;
- if the agency fails to make a decision or makes a decision refusing to make the amendment, the applicant may apply for review to the AAT;
- an applicant who fails before the AAT is nevertheless entitled to have the relevant file endorsed to show the respects in which it is claimed the information is incomplete, incorrect, misleading or out of date.

## Required Consultation

11.1 The FOI Act provides special procedures at sections 26A, 27 and 27A where a request is made for access to a document containing information relating to the business or professional affairs of a person, the business, commercial or financial affairs of an organisation or undertaking, the personal information of a person other than the applicant, or concerns

Commonwealth/State relations:

- that person, undertaking or State is to be consulted, where practicable, before a decision to release the document is taken;
- if a decision is made to give access to the document, that person or undertaking may seek internal review or AAT review. Decision-makers should consult other agencies, organisations or people wherever necessary to obtain information upon which to make a proper decision. The documents are to be held for 30 days to allow the third party to be consulted and if need be to seek review.



## Annual Report

12.1. The Minister administering the FOI Act is required to report annually to the Parliament on the operation of the FOI Act. The report contains detailed statistical information.

### SCHEDULE OF FEES & CHARGES

#### UNDER THE FREEDOM OF INFORMATION ACT 1982

For requests for access to documents other than income support documents

##### (a) APPLICATION FEE

- fee accompanying request for access: \$30.00
- fee accompanying application for internal review: \$40.00

##### (b) OTHER CHARGES

search and retrieval time - per hour	\$15.00
decision making time - per hour	\$20.00
extraction and production of written documents from computers or other like equipment	actual cost incurred
reproduction of computer information onto magnetic data	actual cost incurred
transcripts of sound recordings, shorthand, etc - per page	\$ 4.40
photocopies of written documents - per page	\$ 0.10
copies, other than photocopies, of written documents - per page	\$ 4.40
replaying or copying films, tapes etc.	actual cost incurred
inspection - per half hour (or part thereof)	\$ 6.25
despatch to an address other than an Information Access Office	cost of postage and delivery

##### (c) DEPOSITS MAY BE CHARGED

- where the charges under (b) above exceed \$25.00 but do not exceed \$100.00: \$20.00
- where the charges under (b) above exceed \$100.00: 25% of the preliminary assessment