



Australian Government

Attorney-General's Department

# **FREEDOM OF INFORMATION**

## **AN OVERVIEW**

Released under the Freedom of Information Act 1982 by the Attorney-General's Department

# Philosophy of the Act

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- The 'New Administrative Law'
- Open Government: transparency and accountability
- Participation in the democratic system
- Scrutiny of government actions or decisions

# Objects of the Act

The objects of the Act are to:

- Give the Australian community access to information held by the Government by providing a legal right of access to Government held documents;
- Increase public participation in Government processes and increase public scrutiny of Government decisions and actions; and
- Increase recognition that information held by the Government is a national resource and is to be managed for public purposes.

# Documents Covered by the Act

- *All documents* in the possession of Government departments and agencies including electronic ones (eg. E-mails).
- All "official documents of Ministers"
- NOT:
  - Documents created prior to 1977;
  - Documents held by Parliament or Parliamentary Departments;
  - Documents held by Schedule 2 authorities, e.g. ASIO;
  - Documents that have originated with, or have been received from, ASIS, ASIO, DIO, etc.



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# The FOI Process

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# Who can make a request?

A request can be made by *anybody* irrespective of whether they are an Australian citizen and/or a permanent resident.

# What is a valid request?

The request must :

- be in writing (e-mail will suffice); and
- provide such information concerning the document as is reasonably necessary to enable the agency to identify it.

# Time Limits

- Clock starts: date of receipt of *valid* request
- Acknowledge receipt: within **14 days**
- Make decision: within **30 days**

## BUT NOTE:

- Where consultation with third parties is required by the Act, an extra 30 days processing time is allowed.
- The clock stops on the date an estimate of charges is sent and restarts on receipt of deposit or waiver of charges.



# Charges

- No longer any application fees.

## Processing Charges

- Search and retrieval: \$15 per hour
- Decision-making: \$20 per hour

An applicant can request waiver charges.

# Waiver of Charges

Processing charges may be waived for any reason including:

- it would cause the applicant financial hardship; or
- the release of the document(s) is in the general public interest or in the interest of a substantial section of the public.

# What Documents Must be Released?

All documents within the ambit of a request must be released unless they are exempt from disclosure under the Act.

Exempt documents can be released if the agency is happy to release them – they just don't *have* to be released.

# Notification of Decision

When refusing to grant access to any material, the notification to the applicant of the decision must include:

- the findings of any material questions of fact;
- the material on which those findings were based;
- reasons for the decision;
- the name and designation of the decision-maker; and
- information setting out the applicant's rights of review.

# Obligation to Delete Exempt Material

If an exempt document can be rendered non-exempt by the deletion of certain material, the processing agency is obliged to delete that material and release the edited document to the applicant.

# No Documents Found

A request may be refused if:

- a) all reasonable steps have been taken to find the document; and
- b) the agency is satisfied that the document:
  - (i) is in the agency's possession but cannot be found; or
  - (i) does not exist.

# Unreasonable Diversion of Resources

A request may be refused if its processing would substantially and unreasonably divert the resources of the agency from its other operations.

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# Transfer of Requests

A request may be transferred, in part or in full, to another agency where:

- the requested document is not in the possession of the receiving agency but is known to be in the possession of another agency; or
- the subject-matter of the document is more closely connected with the functions of another agency.



# Right of Review

If an applicant wishes to have a primary decision of an agency reviewed he/she has two options:

- 1) Internal review by another senior officer of the agency; or
- 2) External review by the Australian Information Commissioner.

# Administrative Appeals Tribunal

If an applicant is unhappy with a decision of the Australian Information Commissioner, he/she can seek a review of his decision by the Administrative Appeals Tribunal.



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# Main Exemptions

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# National Security, Defence, International Relations

A document is an exempt document if its disclosure would, or could reasonably be expected to, cause **damage to:**

- (i) *the security of the Commonwealth;*
- (ii) *the defence of the Commonwealth; or*
- (iii) *the international relations of the Commonwealth; or*

# National Security, Defence International Relations cont'd

*(b) would divulge any information communicated in confidence by or on behalf of a foreign government.*

# Cabinet Documents

A document is an exempt document if it is/was:

- (a) a document that has been **submitted to the Cabinet** for its consideration or is or was proposed by a Minister to be so submitted, being a document that was brought into existence **for the dominant purpose of submission** for consideration by the Cabinet;
- (b) an **official record** of the Cabinet;

# Cabinet Documents cont'd

- (c) brought into existence for the dominant purpose of briefing a Minister on a document to which (a) above applies;
- (d) a draft of a document to which (a) above applies;
- (e) a document that is a **copy of**, or of a part of, or contains an **extract from**, a document referred to in paragraph (a) or (b); or
- (d) a document the disclosure of which would involve the **disclosure of any deliberation or decision** of the Cabinet, unless the deliberation or decision has been officially disclosed.

# Cabinet Documents cont'd

Note that the above provision does **not** apply to **purely factual material** unless the disclosure of the material would involve the **disclosure of a deliberation or decision** of the Cabinet that has not been officially disclosed.



# Commonwealth/State Relations

A document is exempt if its release would, or could reasonably be expected to, damage Commonwealth/State relations or disclose information communicated in confidence by a State AND would be contrary to the public interest.

# Internal Deliberative Documents

A document is an exempt document if its disclosure would disclose matter in the nature of **opinion, advice or recommendation** obtained, prepared or recorded in the course of, or for the purposes of, the **deliberative processes** involved in the functions of an agency or Minister AND would be **contrary to the public interest**.

*(Note that this provision does **not** apply to purely factual material.)*

# Law Enforcement Documents

*A document is exempt if its disclosure would, or could reasonably be expected to, adversely affect a range of law enforcement activities or endanger the life or physical safety of a person.*

# Documents Concerning Operation of Agencies

A document is an exempt document if its disclosure would, or could reasonably be expected to, have a **substantial adverse effect** on the proper and efficient conduct of the operations of an agency AND would be contrary to the public interest.

# Documents Covered by Secrecy Provisions

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A document is exempt if its disclosure is prohibited by the secrecy provisions in certain other Acts. The other Act has to be referred to in Schedule 3 of the FOI Act.

# Documents Containing Personal Information

A document is an exempt document if its disclosure would involve the **unreasonable disclosure of personal information** about any person (including a deceased person) AND would be contrary to the public interest.

The term 'personal information' is defined to mean:

*'information or an opinion ..... whether true or not, ..... about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.'*

# Damage to National Economy

A document is exempt if its disclosure would or could reasonably be expected to have a substantial adverse effect on the national economy AND is contrary to the public interest.

# Contempt of Court or Parliament

A document is exempt if its disclosure would constitute contempt of court or Parliament.



# Documents Subject to Legal Professional Privilege

*A document is an exempt document if it would be privileged from production in legal proceedings on the ground of legal professional privilege.*

# Section 42: Notes

For the material to be exempt:

- there must be a **solicitor-client relationship**;
- it must have been created for the *dominant purpose* of:
  - giving or receiving legal advice; or
  - use in actual or anticipated legal proceedings; and
- the privilege must not have been waived.

# Documents Relating Business Affairs

*A document is an exempt document if its disclosure would:*

- *have an unreasonable effect on a person's business or professional affairs or an organisation's business, commercial or financial affairs; or*
- *prejudice the future supply of information to an agency for the purpose of administration of matters administered by it*

*AND is contrary to the public interest.*

# Documents Obtained in Confidence

*A document is an exempt document if its disclosure would found an action, by a person other than the Commonwealth, for **breach of confidence.***

# Section 45: Notes

For the material to be exempt:

- it must be *confidential* in character;
- communicated in *mutual* confidence;
- disclosure would be an *unauthorised use* of the material; and
- there is 'no defence in law' – no overriding legal or policy consideration that would necessitate the release of the material.

# Public Interest Factors

In assessing whether disclosure of material would be contrary to the public interest, the following must not be taken into account:

- access could cause embarrassment to the Government or loss of confidence in it;
- access could result in the public misinterpreting or misunderstanding the document;
- the high seniority of the author of the document;
- access could result in confusion or unnecessary debate.

# Public Interest Factors cont'd

In assessing whether disclosure of a document would be contrary to the public interest, factors favouring access being granted include whether disclosure would:

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