

Australian Capital Territory Law Handbook

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What is Freedom of Information?

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Contributed by Dr James Pople and current to 10 February 2018

Freedom of Information (FOI) is the legal and administrative framework in which citizens have a right to access government information.

Documents held by Commonwealth agencies and ministers are covered by the [Freedom of Information Act 1982 \(Cth\)](#) (FOI Act(Cth)). Documents held by ACT Government agencies and ministers are covered by the [Freedom of Information Act 2016 \(ACT\)](#) (FOI Act (ACT)). The objects of both Acts make it clear that they are intended to provide a right of access to information held by government, promoting representative democracy: FOI Act (Cth), s 3; FOI Act (ACT), s 6. Both Acts also encourage the release of government information, even if no request has been made: FOI Act (Cth), ss 3, 3A, Part II; FOI Act (ACT), ss 6, 9, Part 4.

This right to access is not absolute. Documents generated by, or held by, some agencies are not covered by FOI legislation (for example, documents of intelligence agencies). Some classes of documents are also not covered by FOI legislation (for example, documents held by ministers relating to their personal or political activities; and documents held by certain agencies that relate to their commercial activities). And, access can be refused (in part, or in full) to a requested document that is covered by FOI legislation, if an exemption applies to that document.

What information is covered?

The FOI Act (Cth) provides a right to access "documents": s 11.
The FOI Act (ACT) provides a right to access "government

information": s 7. The FOI Act (ACT) goes on to define "government information" to mean information that is "contained in a record": s 14. Each Act has a broad definition of what is meant by "document" or "record", and there is no requirement that the "document" or "record" be in paper form. But neither Act requires the disclosure of government information that has not been recorded in some way. That means that there is no obligation on an agency or a minister to create a new document or record in response to an FOI request. However, in some circumstances, a document or record may be provided in a different form than the form in which it was requested: FOI Act (Cth), s 20; FOI Act (ACT), s 47.

Can I make an FOI request?

Each Act provides that "every person" has the right to make an FOI request: FOI Act (Cth), ss 11, 15(1); FOI Act (ACT), ss 7, 30(1). The person making a request does not have to be an Australian citizen, or a resident of Australia or of the ACT. Requests can be made by companies or associations. Requests can be made anonymously, but must include contact details (which could be simply an e-mail address). However, if you make a request for a document that contains your own personal information, you may be required to provide proof of your identify, if the request is made under the FOI Act (Cth); and you must do so if the request if made under the FOI Act (ACT): s 30(3).

Accessing government information

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Contributed by Dr James Pople and current to 10 February 2018

How do I make an FOI request?

An FOI request does not have to be in a particular form (though Directorates often have a particular form you can use). If you make a request under the FOI Act (Cth) it must be in writing and state that it is being made for the purposes of the Commonwealth FOI Act: s 15(2). If you make a request under either the Commonwealth or ACT Act, you must include a contact address (e-mail or postal), and give enough information for the agency or minister to identify the document or documents you are requesting: FOI Act (Cth), s 15(2); FOI Act (ACT), s 30(2). The agency or minister should confirm receipt of your FOI request within 14 days (FOI Act (Cth), s 15(5)(a)) or within 10 working days (FOI Act (ACT), s 32).

You should make your request to the agency or minister who has the document you are requesting. If you send your request to a different agency or minister, they are required to transfer it to the agency or minister that holds the document: FOI Act (Cth), s 16; FOI Act (ACT), s 57. But that may delay the processing of your request.

It is important to clearly identify the documents you want. If your request is too broad, the agency or minister may refuse to process it (see below). If your request is too narrow, you may not obtain all of the information you want. If you are not sure how to identify the documents you want, you should ask the agency or minister for assistance. If your request does not adequately identify the documents you want, the agency or minister must help you to do so: FOI Act (Cth), s 15(3); FOI Act (ACT), s 31.

If the agency or minister says that it would not be practical to process your request (because, for example, the request is too broad and covers too many documents), they may refuse to

process your request: FOI Act (Cth), s 24, 24AA; FOI Act (ACT), ss 43, 44. But, before they can refuse to process your request, the agency or minister must first consult with you about how you could reduce the scope of your request, so that it could be processed: FOI Act (Cth), ss 24, 24AB; FOI Act (ACT), s 46.

How long will it take to process my FOI request?

Both the Commonwealth and ACT Acts impose time limits on agencies and ministers to process FOI requests. Under the FOI Act (Cth), the agency or minister must make a decision about your request within 30 days: FOI Act (Cth), s 15(5)(b)). Under the FOI Act (ACT), the agency or minister must make a decision about your request within 20 working days: FOI Act (ACT), s 40(1)). However, those deadlines can be extended in certain circumstances: for example, by agreement with you, or because the agency or minister has to consult a third party about your application. A third party is consulted in circumstances where, for example, their personal information or business information is included in a document you have requested: FOI Act (Cth), ss 27, 27A; FOI Act (ACT), s 38.

If a decision is not made about your FOI request before the (possibly extended) deadline, then a decision is deemed to have been made refusing you access to the document you requested: FOI Act (Cth), s 15AC(3); FOI Act (ACT), s 39(1)(a). You can seek review of that deemed decision (see below).

How much does it cost to make an FOI request?

The agency or minister can charge you a fee to process your FOI request: FOI Act (Cth), s 29; FOI Act (ACT), s 104. However, the agency must first tell you that a fee will be payable, and give you an estimate of how much you will have to pay. That fee does not have to be charged, and can be waived in some circumstances: Freedom of Information (Charges) Regulations 1982 (Cth), r 3(1); FOI Act (ACT), s 107.

No fee is charged if your request is for your own personal

information: Freedom of Information (Charges) Regulations 1982 (Cth), r 5(1), (4); FOI Act (ACT), s 105(1)(a).

No fee is charged if your request is not processed before the (possibly extended) deadline: Freedom of Information (Charges) Regulations 1982 (Cth), r 5(2), (3); FOI Act (ACT), s 39(1).

Exemptions

The agency or minister can decide not to give you access to a document you have requested, if it is exempt: FOI Act (Cth), s 11A; FOI Act (ACT), s 35(1)(c). If it is practicable to do so, they can create a copy of the document, edited so that the exempt material has been redacted, and give you that edited document: FOI Act (Cth), s 22; FOI Act (ACT), s 50.

Under the FOI Act (Cth), the following documents can be exempt:

- documents affecting national security, defence or international relations (s 33);
- Cabinet documents (s 34);
- documents affecting enforcement of law and protection of public safety (s 37);
- documents to which secrecy provisions of enactments apply (s 38);
- documents subject to legal professional privilege (s 42);
- documents containing material obtained in confidence (s 45);
- Parliamentary Budget Office documents (s 45A);
- documents the disclosure of which would be a contempt of Parliament or a contempt of court (s 46);
- documents disclosing trade secrets or commercially valuable information (s 47); and
- electoral rolls and related documents (s 47A).

Under the FOI Act (Cth), a document can be "conditionally exempt", which means that it is exempt only if giving you access to the document would, on balance, be contrary to the public interest (s 11A(5)). A document can be conditionally exempt if its disclosure:

- would damage Commonwealth-State relations (s 47B);
- would disclose government deliberative processes (s47C);

- would have a substantial adverse effect on the financial or property interests of the Commonwealth (s 47D);
- would prejudice, or have a substantial adverse effect, on certain operations of agencies (s47E);
- would involve the unreasonable disclosure of personal information about any person (s 47F);
- would unreasonably affect a person or organisation in respect of their (or its) lawful business (s 47G);
- would unreasonably disadvantage a researcher in the Commonwealth Scientific and Industrial Research Organisation or the Australian National University, before that research is complete (s 47H); or
- would have a substantial adverse effect on Australia's economy (s 47J).

Under the FOI Act (ACT), a document is exempt if it contains "contrary to the public interest information", and, on balance, disclosure of that information would be contrary to the public interest: ss 16, 17. That information is:

- information the disclosure of which would be contempt of court or of the Legislative Assembly (Schedule 1, 1.1);
- information in possession of a court or tribunal (1.1A);
- information subject to legal professional privilege (1.2);
- information the disclosure of which is prohibited under law (1.3);
- sensitive information about an individual (1.4);
- information in the possession of the ACT Auditor-General (1.5);
- Cabinet information (1.6);
- information obtained through an examinations under the *Australian Crime Commission (ACT) Act 2003* (1.7);
- information in the possession of the ACT Human Rights Commission (1.8);
- information about the identities of people who made various public interest disclosures (1.9);
- information relating to requests to cost election commitments (1.10);
- information in electoral rolls and related documents (1.11);
- information in the possession of the Ombudsman (1.12)
- information whose disclosure would, or could, damage the security of the Commonwealth, the ACT or a State (1.13); or
- law enforcement or public safety information (1.14).

Reasons for decision

If the person dealing with your FOI request decides to refuse you full access to the document you requested, they must give you written reasons for their decision: FOI Act (Cth), s 26; FOI Act (ACT), s 24(2).

Review of decisions

If your FOI request is refused, or deemed to be refused (because no decision was made before the deadline), you can seek to have that access refusal decision reviewed.

If the agency or minister decided to give you access to the document you requested, a third party who was consulted about your FOI request can seek to have that access grant decision reviewed.

Under the FOI Act (Cth), unless the decision was made by the head of an agency or by a minister, that review can be an internal review. An internal review is conducted by the same agency, but by a different person than the person who made the original decision: FOI Act (Cth), Part VI. There is no internal review under the FOI Act (ACT).

Under the FOI Act (Cth), an FOI decision (including an internal review decision) can be reviewed by the Information Commissioner: Part VII. Under the FOI Act (ACT), an FOI decision can be reviewed by the Ombudsman: Division 8.2. In either case, an independent officer will consider the arguments of all the parties (and, maybe, examine the document in question) and make their own decision about your FOI request. The Information Commissioner, or the Ombudsman, can affirm the decision, vary the decision, or set it aside and replace it with a different decision.

Under the FOI Act (Cth), any of the parties to a review by the Information Commissioner can seek further review of the Commissioner's decision in the Administrative Appeals Tribunal (AAT): Part VIIA. Under the FOI Act (ACT), any of the parties to a review by the Ombudsman can seek further review of the Ombudsman's decision in the ACT Civil and Administrative Tribunal (ACAT): Division 8.3.

A party to a decision on review by the AAT or the ACAT, who is dissatisfied with that review decision, can appeal to the Federal Court (from the AAT) or the ACT Supreme Court (from the ACAT): FOI Act (Cth), Part VII, Division 10; ACT Civil and Administrative Tribunal Act 2008 (ACT), s 86. An appeal to the Federal Court can only be on a question of law. An appeal to the ACT Supreme Court can only be made with the leave of the Supreme Court.

There are deadlines, and procedures, that apply to anyone seeking review by the Information Commissioner, the Ombudsman, the AAT or the ACAT; and to anyone seeking to appeal to the Federal Court or the ACT Supreme Court. Fees may be payable for review by the AAT or the ACAT, or appeal by the Federal Court or the ACT Supreme Court. Information about those deadlines, procedures and fees are available from those bodies' websites (see below).

Disclosure logs

Agencies and ministers are required to publish (usually on their websites) documents that they make available in response to FOI requests, and information about those requests: FOI Act (Cth), s 11C; FOI Act (ACT), s 28. However, that does not apply to all documents made available in response to FOI requests. For example, documents containing personal information would not normally be published.

Amendment of personal information

If you think that a document that you have access to (including through an FOI request) contains information about you that is incomplete, incorrect, out of date or misleading, and is used by an agency or a minister, you can apply under the FOI legislation to have that document amended or annotated: FOI Act (Cth), Part V; FOI Act (ACT), Part 6.

If the agency or minister decides not to amend or annotate the document, you can seek to have that decision reviewed in the same way that you can seek to have FOI decisions reviewed (see above).

Complaints

Under the FOI Act (Cth), if you are dissatisfied with the way that an agency has processed your FOI request, or your request to amend personal information, you can make a complaint to the Information Commissioner (Part VII, Division 2) or the Ombudsman (Part VII, Division 3). Under the FOI Act (ACT), if you are dissatisfied with the way that an agency or a minister has processed your FOI request, or your request to amend personal information, you can make a complaint to the Ombudsman (s 69). For example, you could make a complaint if you are not satisfied with the time that an agency took to process your request, or if you do not think that the agency provided you with adequate assistance to make your request. If you are dissatisfied with a decision that has been made, as opposed to how it was made, you should seek review of that decision (see above) rather than making a complaint.