

Part 2 —

# Scope of application of the Freedom of Information Act

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## PART 2 — SCOPE OF APPLICATION OF THE FREEDOM OF INFORMATION ACT

- 2.1 Section 11(1) of the FOI Act gives every person a legally enforceable right to obtain access to a document of an agency or an official document of a minister, unless the document is exempt.
- 2.2 An agency or a minister is not required to give a person access to a document at a particular time if at that time the document is an ‘exempt document’ (s 11A(4)). An ‘exempt document’ is:
- a document that is exempt, or conditionally exempt where disclosure would be contrary to the public interest, under Part IV of the Act (see Parts 5 and 6 of these Guidelines)
  - a document in respect of which an agency, person or body is exempt from the operation of the FOI Act under s 7 (see [2.13] – [2.26] below)
  - an official document of a minister that contains some matter that does not relate to the affairs of an agency or of a department of state (s 4(1)).

### Agencies subject to the FOI Act

- 2.3 As a general rule, an Australian Government agency will be subject to the FOI Act unless expressly provided otherwise. ‘Agency’ is defined at s 4(1) as:
- a department of the Australian Public Service
  - a prescribed authority or
  - a Norfolk Island authority.

### Prescribed authority

- 2.4 A prescribed authority is defined in s 4(1) of the FOI Act to mean:
- a body corporate, or an unincorporated body, established for a public purpose by, or in accordance with the provisions of, an enactment or an Order-in-Council
  - any other body, incorporated or unincorporated, that has been declared by the FOI Regulations to be a prescribed authority for the purposes of the FOI Act<sup>1</sup>
  - a person holding an office or appointment under an enactment or Order in Council or that is prescribed in the regulations
  - NBN Co.
- 2.5 Some bodies, offices and appointments are expressly excluded from the definition of prescribed authority and therefore are not covered by the FOI Act (ss 4(1) and 4(3)). These include:
- an incorporated company or association
  - Territory Legislatures, and the officers and members of the Territory legislature

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<sup>1</sup> Aboriginal Hostels Ltd has been prescribed under the *Freedom of Information (Prescribed Authorities, Principal Offices and Annual Report) Regulations 2017*.

- Royal Commissions or a Commission of inquiry as defined in s 4(1).<sup>2</sup>
- 2.6 Unincorporated bodies such as boards, councils and committees that have been established to assist or perform functions connected with a prescribed authority are deemed to be within that prescribed authority (s 4(2)). Similarly, an office that has been established by an enactment to perform duties as an employee of a department, a member of a body or for the purposes of a prescribed authority, is not separately treated as a prescribed authority (s 4(3)).
- 2.7 Section 68A of the *Parliamentary Service Act 1999* exempts departments and people holding or performing the duties of an office established under that Act from the definition of a prescribed authority under the FOI Act. The Parliamentary Librarian, the Department of the Senate, and the Department of the House of Representatives are established under the *Parliamentary Service Act 1999* and therefore those entities and their staff are excluded from the operation of the FOI Act. In addition, the Parliamentary Budget Office and the Parliamentary Budget Officer are deemed not to be prescribed authorities under s 7(1) and Division 1 of Part I of Schedule 2 of the FOI Act.

## Courts, tribunals and the Official Secretary to the Governor-General

- 2.8 The FOI Act has a restricted application to courts, court registries and the Official Secretary to the Governor-General.<sup>3</sup> Specifically, the FOI Act does not apply to a request for access to a document of a court or registry, or the Official Secretary to the Governor General ‘unless the document relates to matters of an administrative nature’ (ss 5 and 6A). The FOI Act does not apply to the holder of a judicial office (s 5(1)(b)), or to the Governor-General. A further exclusion exists for documents relating to the handling of complaints about judicial officers (ss 5(1A)–(1C)).
- 2.9 Courts of Norfolk Island are taken to be Norfolk Island authorities for the purposes of the FOI Act and, as with other courts, the FOI Act does not apply unless the document requested relates to matters of an administrative nature (s 5(2)).
- 2.10 The phrase ‘matters of an administrative nature’ is not defined in the FOI Act. *In Kline v Official Secretary to the Governor General*, the High Court held that the phrase refers to documents that concern ‘the management and administration of office resources, such as financial and human resources and information technology’.<sup>4</sup> By contrast, the phrase does not apply to documents that relate to the discharge of a court’s or the Governor-General’s ‘substantive powers and functions’.<sup>5</sup> The High Court approved a similar

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<sup>2</sup> Records of commissions of inquiry are deemed to be in the possession of other agencies and to be available for access under the FOI Act, see [2.72].

<sup>3</sup> Section 6 (supplemented by Schedule 1) deems the Australian Industrial Relations Commission, the Australian Fair Pay Commission and the Industrial Registrar and Deputy Industrial Registrars to be prescribed authorities to which the FOI Act applies in respect of requests for documents relating to matters of an administrative nature. However, both Commissions and the Registrars ceased operations in 2009. Some of the functions have been assumed by the Fair Work Commission (previously Fair Work Australia), which is subject to the FOI Act.

<sup>4</sup> [2013] HCA 52 [13] and [41] (joint judgment of French CJ, Crennan, Kiefel & Bell JJ). Gageler J, in a separate judgment at [74], drew a similar distinction between the exercise or performance of substantive powers and functions, and ‘providing logistical support (or infrastructure or physical necessities or resources or platform) for the exercise or performance of those substantive powers or functions to be able to occur’.

<sup>5</sup> [2013] HCA 52 [41].

distinction drawn by the Full Federal Court in the decision on appeal<sup>6</sup> between the substantive functions or powers of a court or the Governor-General, and the office ‘apparatus’ supporting the exercise or performance of those substantive powers and functions.

- 2.11 Applying that distinction, the High Court held in *Kline* that the FOI Act did not apply to an FOI request to the Official Secretary to the Governor General for access to documents relating to the administration of the Order of Australia, including decisions on the award of Australian honours. As to courts, the High Court observed that the FOI Act applies only to documents relating to the management and administration of registry and office resources, and not to documents relating to the discharge of the substantive powers and functions of adjudication or tasks referable to the exercise of judicial, rather than administrative, powers and functions.<sup>7</sup>
- 2.12 There is no similar exclusion from the FOI Act applying to tribunals, such as the Administrative Appeals Tribunal (AAT) and the Veterans’ Review Board. Tribunals fall within the definition of ‘prescribed authority’ in s 4 of the FOI Act and the FOI Act applies to them in the same way as it applies to other agencies. In particular, an FOI request may be made for access to a document in the possession of the tribunal that was created by a tribunal member for the purpose of an adjudication (though the exemption provisions may apply to any such FOI request in the usual way).<sup>8</sup>

## Exemption of certain persons and bodies

- 2.13 Some persons and bodies are excluded from the operation of the FOI Act. As a result, access to documents held by these people or bodies cannot be requested under s 15(1) of the FOI Act.
- 2.14 Under s 7(1), the following bodies specified in Schedule 2, Part I, Division 1 are not prescribed authorities for the purposes of the FOI Act and are therefore not subject to the FOI Act:
- Aboriginal Land Councils and Land Trusts
  - Auditor-General
  - Australian Secret Intelligence Service
  - Australian Security Intelligence Organisation (ASIO)
  - Australian Signals Directorate
  - Inspector-General of Intelligence and Security
  - National Workplace Relations Consultative Council
  - Office of National Intelligence (ONI)
  - Parliamentary Budget Office

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<sup>6</sup> *Kline v Official Secretary to the Governor-General* [2012] FCAFC 184 [21], on appeal from *Kline and Official Secretary to the Governor-General* [2012] AATA 247, which was an appeal from ‘B’ and *Office of the Official Secretary to the Governor-General* [2011] AICmr 6.

<sup>7</sup> [2013] HCA 52 [45] and [47].

<sup>8</sup> See *McLeod and Social Security Appeals Tribunal* [2014] AICmr 34.

- Parliamentary Budget Officer.
- 2.15 Under s 7(1A), the following parts of the Department of Defence specified in Schedule 2, Part I, Division 2 are taken not to be part of the Department of Defence or agencies in their own right for the purposes of the FOI Act:
- Australian Geospatial-Intelligence Organisation
  - Defence Intelligence Organisation.
- 2.16 Section 7(2AAA) of the FOI Act provides that the Parliamentary Workplace Support Service, the Parliamentary Workplace Support Service Advisory Board and the Parliamentary Workplace Support Service Consultative Committee are not prescribed authorities for the purposes of the FOI Act. As a result, these entities are not subject to the FOI Act.
- 2.17 Further, s 7(2DC) of the FOI Act provides that ministers and agencies are exempt from the operation of the FOI Act in relation to documents given to, or received by the Parliamentary Workplace Support Service, the Parliamentary Workplace Support Service Advisory Board and the Parliamentary Workplace Support Service Consultative Committee or documents brought into existence by those bodies, regardless of when the documents came into existence.

## Exemptions applying to commercial activities, security and defence intelligence documents and other matters

- 2.18 Section 7(2) (supplemented by Schedule 2, Part II) lists agencies that are exempt from the operation of the FOI Act in relation to particular documents. The list includes:
- the Australian Broadcasting Corporation (ABC) and Special Broadcasting Service (SBS) in relation to program material and datacasting content (discussed below)
  - the Reserve Bank of Australia in relation to its banking operations and exchange control matters
  - the Australian Statistician, in relation to documents containing information collected under the Census and Statistics Act 1905
  - the Attorney-General's Department in relation to its commercial activities and activities undertaken by the Australian Government Solicitor
  - various bodies such as Australia Post, Comcare, Commonwealth Scientific and Industrial Research Organisation (CSIRO), NBN Co and Medicare, in relation to documents in respect of commercial activities (discussed below).
- 2.19 For a complete list of bodies exempt under s 7(2), see Schedule 2, Part II.
- 2.20 The exemption for 'program material' of the ABC and SBS has been considered in

Federal Court,<sup>9</sup> AAT<sup>10</sup> and IC review decisions.<sup>11</sup> In *Australian Broadcasting Corporation and Herald and Weekly Times Pty Limited*, the AAT decided that program material means a document ‘which is the program and all versions of the whole or any part of the program, any transmission broadcast or publication of the program, and includes a document of any content or form embodied in the program and any document acquired or created for the purpose of creating the program, whether or not incorporated into the complete program’.<sup>12</sup> Documents containing salary information about ABC presenters, and documents relating to the classification of television programs, were neither ‘program material’ nor documents ‘in relation to’ program material. That latter phrase requires ‘at least a reasonably direct relationship’ or connection between a document and the nominated topic, and not a connection that is indirect, remote or tenuous.<sup>13</sup>

2.21 The term ‘commercial activities’ is defined in s 7(3) as meaning the current or proposed commercial activities of an agency that are carried on in competition with persons other than governments or authorities of governments. A separate definition of ‘commercial activities’ applies to NBN Co, namely, current or proposed commercial activities of NBN Co (s 7(3A)).<sup>14</sup> The following points can be made about the scope of the exemption for ‘commercial activities’:<sup>15</sup>

- activities are conducted on a commercial basis if they are related to, engaged in, or used for commerce
- the commercial goal (profit making or the generation of income or return) is among the circumstances to be taken into account in determining whether a particular activity is a commercial activity
- commercial activity can be regarded as a business venture with a profit-making objective and involves activity to generate trade and sales with a view to profit
- the exemption in s 7(2) does not require that a document be created for the dominant purpose of carrying on a commercial activity and
- documents that relate to the appointment of a corporate advisor and agreements between 2 commercial entities<sup>16</sup> have been found to fall within the exemption for commercial activities.

<sup>9</sup> See *Australian Broadcasting Corporation v University of Technology, Sydney* [2006] FCA 964 and *Bell v Commonwealth Scientific and Industrial Research Organisation* [2008] FCAFC 40.

<sup>10</sup> *Australian Broadcasting Corporation and Herald and Weekly Times Pty Limited* [2012] AATA 914.

<sup>11</sup> *Herald and Weekly Times Pty Ltd and Australian Broadcasting Corporation* [2012] AICmr 7; ‘F’ and *Australian Broadcasting Corporation* [2012] AICmr 8; ‘ER’ and *Special Broadcasting Service* [2015] AICmr 12 and *Fist and Australian Broadcasting Corporation* [2014] AICmr 14.

<sup>12</sup> [2012] AATA 914 [57].

<sup>13</sup> *Australian Broadcasting Corporation and Herald and Weekly Times Pty Limited* [2012] AATA 914 [99]. See also, *Jonathan Sequeira and Australian Broadcasting Corporation (Freedom of information)* [2023] AICmr 23 [29] in which a distinction was made between program material acquired for the purpose of creating a program and one in which the work was created and owned by a third party and not broadcast by the ABC.

<sup>14</sup> See *Battersby and NBN Co Ltd* [2013] AICmr 61.

<sup>15</sup> *Battersby and NBN Co Ltd* [2013] AICmr 61. See also *Bell v Commonwealth Scientific and Industrial Research Organisation* [2008] FCAFC 40; *Johnston and Australian Postal Corporation* [2006] AATA 144 and *Internode Pty Ltd and NBN Co Ltd* [2012] AICmr 4.

<sup>16</sup> Respectively, *Battersby and NBN Co Ltd* [2013] AICmr 61 and *Internode Pty Ltd and NBN Co Ltd* [2012] AICmr 4.

- 2.22 All Australian Government agencies are exempt from the operation of the FOI Act in relation to ‘intelligence agency documents’ (for example, a document that originated with or was received from ASIO or ONI) (s 7(2A)) and ‘defence intelligence documents’ (for example, a document that originated with or was received from the Department of Defence and relates to the collection, reporting or analysis of operational intelligence (s 7(2C)). These exemptions also apply to documents in the possession of ministers (s 7(2B)). The exemption extends to a part of a document that contains an extract from, or a summary of, an intelligence agency document or a defence intelligence document. The remainder of the document may not be exempt on the same basis and access may have to be given after deletion of exempt matter under s 22.
- 2.23 Section 7(2DA) exempts ministers and agencies from the operation of the FOI Act in relation to documents given to, or received by, the Independent Review into the workplaces of Parliamentarians and their staff (the Review), or in relation to a person performing functions in relation to the Review for the purposes of the Review, or a document brought into existence by the Review or a person performing functions in relation to the Review. However, ministers and agencies, other than the Australian Human Rights Commission, are not exempt in relation to documents created for purposes other than the Review to which a right of access otherwise exists or existed under the FOI Act.
- 2.24 All Australian Government agencies and ministers are exempt from the operation of the FOI Act in relation to documents that contain a summary of, or an extract or information from, a private session of a Royal Commission to which Part 4 of the *Royal Commissions Act 1902* applies,<sup>17</sup> as well as documents that originated with, or have been received from, a Royal Commission<sup>18</sup> and the documents:
- contain information obtained at a private session of the Commission or
  - relate to a private session and identifies a natural person who appeared at a private session or
  - contain information given by a natural person to a member, or member of the staff, of the Commission for the purposes of a private session (whether or not the private session was, or is to be, held) and identifies the person who gave the information or
  - contain information to which s 6ON of the *Royal Commission Act 1902* (which deals with certain information given to the Child Sexual Abuse Royal Commission) applies or
  - contain information to which s 6OP of the *Royal Commission Act 1902* (which deals with certain information given to the Disability Royal Commission) applies or
  - contain information to which s 6OQ of the *Royal Commissions Act 1902* (which deals with certain information given to the Defence and Veteran Suicide Royal Commission) applies.
- 2.25 ‘Data scheme entities’, as defined in the *Data Availability and Transparency Act 2022*,<sup>19</sup>

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<sup>17</sup> Part 4 of the *Royal Commissions Act 1902* relates to private sessions for certain Royal Commissions which include the Child Sexual Abuse Royal Commission, the Defence and Veteran Suicide Royal Commission and the Disability Royal Commission.

<sup>18</sup> As defined in Part 4 of the *Royal Commissions Act 1902*.

<sup>19</sup> ‘Data scheme entities’ are defined in s 11(1) of the *Data Availability and Transparency Act 2022* to be either data custodians of public sector data or accredited entities. Section 11(1) provides that an entity is a **data custodian** if it is a Commonwealth body and is not an excluded entity, and it either controls public sector data (whether alone or



are excluded from the operation of the FOI Act in relation to a document that contains scheme data within the meaning of that Act, to the extent the document contains such data.

- 2.26 Also excluded from the operation of the FOI Act are documents held by Australian Government agencies and ministers that originated with, or have been received from, the Australian Transaction Reports and Analysis Centre (AUSTRAC) (an AUSTRAC intelligence document) that concerns information communicated to AUSTRAC:<sup>20</sup>
- under s 16 of the *Financial Transaction Reports Act 1988*
  - under s 41 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*
  - in response to a notice given under s 49 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*
  - that contains a summary of, or an extract or information from, an AUSTRAC intelligence document, to the extent that it contains such a summary, extract or information.

## Mandatory transfer of FOI requests

- 2.27 Some FOI requests must be transferred to another agency (ss 16(2) and 16(3)). This requirement applies to FOI requests for documents originating with, or received from, agencies that are exempt or partly exempt from the FOI Act (in particular, those outlined at [2.14] – [2.15] above). The requirements for transfer of FOI requests are described in more detail in Part 3 of these Guidelines which also identifies the categories of document for which a mandatory transfer is required.
- 2.28 Certain requirements also apply for transfer of applications for amendment and annotation of personal information and are described in Part 7 of these Guidelines.

## Responding to FOI requests if an exemption applies

- 2.29 Where an agency is exempt in whole from the FOI Act under s 7, it is not obliged to respond to FOI requests for documents or applications for amendment or annotation of personal records. It is nevertheless good administrative practice for an exempt agency to reply to an FOI applicant stating that the agency is not subject to the FOI Act. Equally, it may be open to the agency, independently of the FOI Act, to grant access to a document on an administrative basis if there is no secrecy provision that prohibits this.
- 2.30 A different response may be required if an agency that is exempt only in relation to particular types of documents receives an FOI request relating to those documents. The FOI applicant may dispute the agency's view that the documents are of an exempt nature — for example, that the documents relate to the agency's commercial activities, or do not relate to matters of an administrative nature in a court. It is open to the FOI applicant to seek Information Commissioner review of the agency's decision. To facilitate that process, the agency should observe the procedures in the FOI Act when responding to the FOI applicant. For example, the agency should respond to the FOI applicant in writing within the timeframe that applies under the FOI Act and advise the

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jointly with another entity), including by having the right to deal with that data, or has become the data custodian of output of a project in accordance with s 20F.

<sup>20</sup> Part II, FOI Act 1982 (Cth).

FOI applicant they can seek IC review of the decision that the documents they seek are not subject to the FOI Act.

- 2.31 The procedures outlined in the previous paragraph should also be followed in other circumstances where an agency or minister that is subject to the FOI Act receives a request for documents to which the FOI Act may not apply. For example, this procedure should be followed if a minister receives an FOI request for documents that are, in the minister’s view, not ‘official documents of a minister’ (discussed below at [2.56] – [2.62]), or if the National Library of Australia or similar agency receives a request for documents that are regarded as being part of a library, historical or museum collection.

## Ministers

- 2.32 The right of access to documents extends to the ‘official documents of a minister’ (ss 11(1)(b) and 11A).<sup>21</sup> The definition of an ‘official document of a minister’ is discussed at [2.56] – [2.62] below. A minister includes an assistant minister.<sup>22</sup>
- 2.33 A minister is independent of the portfolio department for the purposes of the FOI Act and is therefore responsible for processing any FOI requests they receive. It is nevertheless open to a minister’s office to arrange for a portfolio department to provide assistance in processing FOI requests on matters such as:
- Searching shared resources: on receiving an FOI request, a minister’s office is responsible for searching for the documents it holds, but can arrange for the portfolio department to undertake a search of shared resources, such as a ministerial correspondence register.
  - Transfer of requests: a minister may transfer a request to the portfolio department, with the department’s agreement, when s 16 applies (document held by the department but not the minister (s 16(1)(a)), or when the subject matter of the document is more closely connected with the department’s functions (s 16(1)(b))). It may assist the efficient processing of FOI requests, including compliance with the 30-day time frame in the FOI Act, for transfer arrangements to be documented in a written arrangement between the minister and the department and for details of the arrangement be published on the minister’s website. Similarly, the department should advise FOI applicants of the role they may perform under arrangements with the minister’s office. A minister’s office must be satisfied that it does not hold the requested documents, or if it does, that the documents are more closely connected with another agency’s or minister’s functions before deciding to transfer the request.<sup>23</sup>
  - Reporting: a minister is required by s 93 of the FOI Act to provide information to the Information Commissioner for the purposes of the Information Commissioner’s reporting functions. A minister’s office may obtain assistance from a portfolio department in meeting this requirement.

- 2.34 When an agency assists a minister to process an FOI request, they are undertaking

<sup>21</sup> In *Dreyfus and Attorney-General (Commonwealth of Australia) (Freedom of information)* [2015] AATA 995 at [63] per Jagot J, the AAT accepted that the definition of exempt document includes official documents of a minister that contain some matter that does not relate to the affairs of an agency or a department of state.

<sup>22</sup> Assistant ministers, like ministers, are appointed under s 64 of the Constitution and have the same responsibilities and obligations under the FOI Act.

<sup>23</sup> *Bienstein v Attorney-General* [2007] FCA 1174.

FOI Act functions. Therefore complaints about the way an FOI request was handled, in these discrete circumstances, are subject to the Information Commissioner’s complaint handling jurisdiction in Part VIIB of the FOI Act.<sup>24</sup> For example, if the department maintains a mailbox to which the minister’s FOI requests are sent and forwards those requests to the minister.

2.35 Further information about the kinds of documents that can be requested from a minister and the impact of a new minister on outstanding FOI requests and reviews can be found at [2.56] – [2.67] below.

## Decision making in the minister’s office

2.36 There is no express power in the FOI Act for a minister to authorise another person to make a decision on an FOI request received by the minister.<sup>25</sup> It is nevertheless open to a minister to authorise senior members of the minister’s staff to make FOI decisions.<sup>26</sup> This should be undertaken in accordance with a written instrument or under an arrangement in writing approved by the minister. In these circumstances, the authorised person makes a decision on behalf of the minister in the capacity of an agent, rather than in their own right as an authorised person.

# Documents available in response to an FOI request

2.37 The right of access applies to:

- a document of an agency that is subject to the FOI Act
- an official document of a minister

unless the document is an exempt document (s 11(1)).

## Meaning of ‘document’

2.38 A ‘document’ is defined in s 4(1) to include any or any part of the following:

- any paper or other material on which there is writing
- a map, plan, drawing or photograph
- any paper or other material on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them
- any article or material from which sounds, images or writing are capable of being reproduced with or without the aid of any other article or device
- any article on which information has been stored or recorded, either mechanically or electronically
- any other record of information

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<sup>24</sup> The Information Commissioner has power to investigate the actions taken by an agency in the performance of functions or the exercise of powers under the FOI Act, but does not have the same power with respect to ministers.

<sup>25</sup> Whereas s 23 provides that an FOI request to an agency, court or tribunal may be decided by an authorised person.

<sup>26</sup> See *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560.

- any copy, including any part of any copy, of a reproduction or duplicate of a thing listed above.
- 2.39 The definition of ‘document’ is broadly stated and is not exhaustive. It includes sound recordings, films, video footage, microfilm, and information stored on computer tapes, disks, DVDs and portable hard drives and devices. It can also include information held on or transmitted between computer servers, backup tapes, mobile phones and mobile computing devices (see Part 3 of these Guidelines). The term also covers forms of recorded information that are 3-dimensional, such as a land use planning model.
- 2.40 Because the definition of document includes ‘any part of’ a document, an agency can deal with an FOI request for a specific portion of a larger document, such as an appendix to a paper or a chapter of a report, without having to examine the entire document for exempt matter.<sup>27</sup>
- 2.41 Material maintained for reference purposes that is otherwise publicly available (such as library reference material) and Cabinet notebooks are not ‘documents’ (s 4(1)).<sup>28</sup> The Information Commissioner has found that the exclusion for material held for reference purposes by agencies and ministers’ is not intended to exclude from the operation of the FOI Act material published on departmental websites, and apart from the limited circumstances provided for in s 12(1), there is no provision in the FOI Act to refuse access to a document solely on the ground that it is publicly available.<sup>29</sup>

## Documents in existence

- 2.42 The right of access under the FOI Act is to existing documents, rather than to information, for example, answers to a series of questions on a topic. The FOI Act does not require an agency or minister to create a new document in response to an FOI request except in the limited circumstances set out in ss 17 and 20. These circumstances arise when the FOI applicant seeks access in a different form (s 20) or where it appears that the FOI applicant seeks information that is not available in a discrete form in written documents but is stored in an agency computer system rather than in a discrete form (see Part 3 of these Guidelines). An FOI request may nevertheless be framed by reference to a document that contains particular information.
- 2.43 The right of access applies to documents that exist at the time the FOI request was made. An FOI applicant cannot insist that their FOI request cover documents created after the FOI request is received. However, the agency or minister can consider whether to include documents that were created after the FOI request was received. This may be more administratively efficient because the FOI applicant might otherwise submit a new FOI request for the later documents.

## Documents of an agency

- 2.44 A ‘document of an agency’ is defined in s 4(1) as:

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<sup>27</sup> In *Timmins and Attorney-General’s Department* [2015] AICmr 32 the Information Commissioner found that an attachment to a brief within the scope of the applicant’s FOI request was also within the scope of the request because the brief could not be properly understood without being aware of the attachment’s contents. Another attachment was not considered to be in scope because it was only attached to the brief to illustrate work that had been undertaken (at [14]-[22]).

<sup>28</sup> See *Diamond and Australian Curriculum, Assessment and Reporting Authority* [2013] AICmr 57.

<sup>29</sup> *Mills and Department of Immigration and Border Protection* [2014] AICmr 54 [20].

- a document in the agency’s possession, whether created or received in the agency or
- a document in relation to which an agency has taken contractual measures under s 6C to ensure that it receives the document from a contractor or sub-contractor providing services to the public on the agency’s behalf (see [2.48] – [2.55] below).

2.45 ‘Possession’ of a document is not limited to actual or physical possession, but can include constructive possession where an agency has the right and power to deal with a document,<sup>30</sup> regardless of where and by whom it is stored.<sup>31</sup> Any record of information which an agency has downloaded from a shared database or any other database and stored on hard disks or file servers in its physical possession should be treated as a ‘document’ of that agency.

2.46 The definition of ‘document of an agency’ does not require the document to be related to the functions or activities of the agency, only that the document is in the possession of the agency.<sup>32</sup>

2.47 As noted at [2.57], a document in the possession of a staff member providing support functions to a minister has been held in the Victorian Court of Appeal to be a document in the minister’s possession and the inference of constructive possession could be drawn by virtue of the employment relationship.<sup>33</sup>

## Documents held by Commonwealth contractors

2.48 A person may make an FOI request to an agency for access to a document held by a contractor or subcontractor relating to the performance of a ‘Commonwealth contract’. These documents are included in the definition of ‘document of an agency’ (s 4(1)) because of the requirement that contracts preserve the right to access to this information.

2.49 Agencies are required by s 6C of the FOI Act to ensure that Commonwealth contracts entered into on or after 1 November 2010 contain contractual measures that enable the agency to obtain any document when an FOI request is received. The term ‘Commonwealth contract’ is defined in s 4(1) to mean a contract:

- to which the Commonwealth or an agency is or was a party

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<sup>30</sup> In *McLeod and Social Security Appeals Tribunal* [2014] AICmr 34 at [20] the Information Commissioner noted that a question may arise as to whether documents created by a person in an official capacity but not stored in the record system of an agency are documents that are ‘in the possession of the agency’. It was said that this issue could arise in many other situations in which documents created by an agency staff member or contractor are either not stored in the agency’s record system or are viewed as personal working papers. The information Commissioner explained that ‘possession’ of a document is not limited to actual or physical possession, but can include constructive possession where an agency has the right and power to deal with a document, regardless of where and by whom it is stored. As a result, text messages on work issued mobile phones, documents on personal devices on which software has been installed so the device can be used for work purposes, and public servants using applications such as ‘WhatsApp’ on work issued devices to exchange text, images and video or audio messages may be ‘documents of an agency’ on the basis that they can be said to be within the constructive possession of the agency.

<sup>31</sup> In *Brett Goyne and Australian National Audit Office* [2015] AICmr 9 the Information Commissioner considered that documents within the possession of the Australian National Audit Office (ANAO) would be within the ‘constructive possession’ of the Auditor-General because the role of the ANAO is to assist the Auditor-General under the *Auditor-General Act 1997* [26]. This is consistent with the listing of the Auditor-General as an ‘Exempt agency’ (within Schedule 2 of the FOI Act) being extended to the ANAO.

<sup>32</sup> ‘OV’ and *Commonwealth Scientific and Industrial Research Organisation (Freedom of information)* [2018] AICmr 48 [23], [25]–[26].

<sup>33</sup> *Office of the Premier v Herald and Weekly Times* [2013] VSCA 79 [66].

- where services are or were to be provided under the contract on behalf of an agency to a person who is not the Commonwealth or an agency<sup>34</sup> and
- in which the services are in connection with the performance of the agency's functions or the exercise of its powers.

2.50 In summary, in relation to contracts entered into on or after 1 November 2010, the FOI Act confers a right of access to documents held or created by a contractor or subcontractor relating to their provision of services on an agency's behalf to the public or a third party. If an agency receives an FOI request for access to such a document, the agency is to take action to obtain a copy of the document from the contractor or subcontractor, and then decide whether access is to be given to that document under the FOI Act.

2.51 A person who has been given access to a document of this kind may apply to the agency under s 48 of the FOI Act to amend or annotate the personal information in the document about that person. However, s 48 applies only if the personal information 'has been used, is being used or is available for use by the agency or Minister for an administrative purpose'.

2.52 If the agency collects, uses, has access to, or relies on, personal information to perform its functions, this is personal information that has been used, is being used, or is available for an 'administrative purpose'. This requirement will not be satisfied only because the agency has a right to obtain the document from the contracted service provider under a contract to which s 6C applies. Therefore, where a contracted service provider gives an agency access to a database that contains a wide range of personal information, not all the personal information may be available for use by the agency for an administrative purpose. It is relevant to consider whether the individual provided their personal information to the contracted service provider for limited purposes that do not extend to provision of the information to the agency. The purpose that the information was provided by the individual may be evidenced by:

- a written agreement between the individual and the contractor
- information such as in a booklet or brochure that was provided to the individual prior to them providing their personal information to the contractor or
- evidence from the individual and the contractor of the context within which the personal information was provided.

2.53 In addition, it is relevant to consider the terms under which the agency or minister has access to the database that is owned by the contractor.

2.54 Whether personal information has been used or is being used by the agency or minister for an administrative purpose is a question of fact. This question must be determined by

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<sup>34</sup> In *'LI' and Department of Education and Training (Freedom of information)* [2017] AICmr 41 [18] the Australian Information Commissioner found that the requested documents were likely held by a 'Block Grant Authority' which received and assessed applications and made recommendations to the Minister under a funding agreement. The Information Commissioner said that the funding was by way of a capital grant and did not form part of a Commonwealth contract as defined in s 4(1) of the FOI Act. In *Michael Leichsenring and Department of Defence (Freedom of information)* [2024] AICmr 70 (7 April 2024) [21]–[22] the relevant contract provided for services to be provided to the Commonwealth and not to 'a person who is not the Commonwealth or an agency' as required by the definition of '**Commonwealth contract**' in s 4(1) of the FOI Act. As a result, the Assistant Commissioner decided the relevant contract was not a 'document of an agency' under s 4(1) of the FOI Act.



considering firstly whether the information is personal information, secondly whether the information was used or is currently being used by the agency and thirdly, whether the information was used or is being used in the course of performing the functions of the agency. Whether the information is available for use by the agency or minister is also a question of fact. This depends on whether the agency or minister has a right to access the information in question (see [2.45] above).

2.55 The Information Commissioner has published an agency resource containing guidance material about s 6C and a model clause that agencies can include in relevant contracts.<sup>35</sup>

## Official documents of a minister

2.56 An ‘official document of a minister’ means a document in a minister’s possession in their capacity as a minister, being a document that relates to the affairs of an agency (s 4(1)).

2.57 The first element of this definition is that a document is ‘in the possession of a Minister ... in his or her capacity as a Minister’. This includes a document in the possession of a minister’s office, and is not confined to a document that is personally held by the minister. For example, under a similar provision in Victoria it was held that an electronic diary maintained by the Premier’s Chief of Staff in providing support functions to the Premier was a document in the Minister’s possession.<sup>36</sup>

2.58 ‘Possession’ of a document can also include constructive as well as actual possession: see [2.45]. Section 4(1) further provides that a document is in a minister’s possession if the minister is entitled to access a document that has passed from their possession, other than a document that is a document of an agency. See the discussion at [2.68] concerning documents that a minister has placed in the care of the National Archives of Australia and at [2.65] in relation to briefing materials returned to a department.

2.59 The second element of the definition is that a document in the minister’s possession ‘relates to the affairs of an agency’. This phrase is to be understood broadly as encompassing documents that relate to matters within the portfolio responsibility of a minister or the business or activities of an agency.<sup>37</sup> The content of a document and the context in which it was created or held will be important.<sup>38</sup>

2.60 Documents held by a minister that have been found to relate to the affairs of an agency include:

- entries in the Prime Minister’s appointments diary relating to meetings with other political leaders to discuss the legislative program<sup>39</sup>
- a letter to the Prime Minister from a former Prime Minister conveying views on issues of national policy<sup>40</sup>

<sup>35</sup> See OAI website ‘[What is an agency’s obligations on a Commonwealth contract? | OAI](#)’.

<sup>36</sup> *Office of the Premier v Herald and Weekly Times* [2013] VSCA 79 [65]–[66].

<sup>37</sup> *Fletcher and Prime Minister of Australia* [2013] AICmr 11 [20] and *Office of the Premier v Herald and Weekly Times* [2013] VSCA 79 [79]. This was also considered by the Western Australian Information Commissioner in *West Australian Newspapers Ltd and Department of the Premier and Cabinet, Re* [2015] WAICmr 9 by the [42]–[69].

<sup>38</sup> *Dreyfus and Attorney-General (Commonwealth of Australia) (Freedom of Information)* [2015] AATA 995 [63]–[64].

<sup>39</sup> *Fletcher and Prime Minister of Australia* [2013] AICmr 11.

<sup>40</sup> *Parnell and Department of the Prime Minister and Cabinet* [2012] AICmr 31.

- a reference written by a minister on official letterhead<sup>41</sup> and
- a work diary of a ministerial adviser (in a Victorian decision).<sup>42</sup>

2.61 Documents held by a minister that do not ‘relate to the affairs of an agency’ include:

- personal documents of a minister or the minister’s staff
- documents of a party political nature<sup>43</sup>
- documents held in the minister’s capacity as a local member of parliament not dealing with the minister’s portfolio responsibilities.<sup>44</sup>

2.62 Examples of documents that do not relate to the affairs of an agency include entries in the Prime Minister’s appointments diary relating to meetings with business leaders at the annual national party conference<sup>45</sup> and a letter to the Prime Minister from an organisation established to provide support to the political party headed by the Prime Minister.<sup>46</sup>

## Change of Minister<sup>47</sup>

2.63 Where there is a change of minister,<sup>48</sup> obligations under the FOI Act continue. Although outgoing ministers will either transfer or destroy different categories of documents when ceasing office,<sup>49</sup> agencies and ministers should take all reasonable steps to preserve the rights of access provided in the FOI Act.<sup>50</sup> This includes continuing to process FOI requests on hand, preserving documents requested prior to the change of minister, and preserving an FOI applicant’s review rights.

2.64 Where an FOI request is made to a minister and there is a change of minister before a decision is made on the request, consideration of the FOI request will fall to the new minister.<sup>51</sup>

<sup>41</sup> *Parnell and Minister for Infrastructure and Transport* [2011] AICmr 3 [14].

<sup>42</sup> *Office of the Premier v Herald and Weekly Times* [2013] VSCA 79.

<sup>43</sup> See *The Australian and Prime Minister of Australia* [2016] AICmr 84 [17] in which the Information Commissioner identified the following diary entries as relating to party political events and which were therefore did not relate to the affairs of an agency: meetings between the Prime Minister and various members of the Liberal National Coalition, some of whom were serving Ministers; entries pertaining to meetings between the Prime Minister and members of the Liberal National Coalition who were not serving Ministers; entries for party political events scheduled for the Prime Minister’s attendance.

<sup>44</sup> *Re Michael Nassib Said and John Dawkins, MP* [1993] AATA 9.

<sup>45</sup> *Parnell and Prime Minister of Australia (No. 2)* [2011] AICmr 12.

<sup>46</sup> *Parnell and Prime Minister of Australia* [2011] AICmr 10.

<sup>47</sup> The law relating to documents in the possession of a minister, where there is a change in minister, is not settled given a current appeal to the Full Federal Court of Australia from the decision in *Patrick v Attorney-General (Cth)* [2024] FCA 268. Agencies and ministers should be aware that the information in this section reflects the judgement subject to that appeal and will be updated should the outcome of the appeal change this position.

<sup>48</sup> Information about the circumstances in which changes to ministerial arrangements occur and the principles to be applied are set out in the APSC publication ‘Ministerial Transitions – Strengthening Partnerships’ issued November 2021 (available from the APSC website [Ministerial Transitions | Australian Public Service Commission \(apsc.gov.au\)](https://www.apsc.gov.au/ministerial-transitions)).

<sup>49</sup> See ‘Quick reference guide to General Records Authority 38 – Ministers of State’ which is available on the National Archives website at [Quick reference guide to General Records Authority 38 – Ministers of State | naa.gov.au](https://www.naa.gov.au/quick-reference-guide-to-general-records-authority-38-ministers-of-state).

<sup>50</sup> Section 11 of the FOI Act.

<sup>51</sup> *Patrick v Attorney-General (Cth)* [2024] FCA 268 [123]. See also s 20 of the *Acts Interpretation Act 1901* which provides that the holder or occupier of an office, appointment or position includes all persons who for the time being hold or occupy the office, appointment or position or who perform the duties of the office, appointment or position.



- 2.65 A document does not cease to be an ‘official document of a minister’ if the new minister does not have possession of the document. The status of the document as an ‘official document of a minister’ is to be decided by the facts and circumstances that existed at the time the FOI request was received.<sup>52</sup> If a minister received and returned a document, such as a briefing from a portfolio department, the document is a document of the department and not an official document of the minister. However, a copy of such a document retained by the minister is an official document of the minister.
- 2.66 Further, because an FOI decision to refuse access to a document is subject to review (and as a result, the decision may be set aside or varied) there is an obligation on ministers to preserve both the documents and the FOI applicant’s review rights. In circumstances where the agency undertakes FOI functions on behalf of a minister and there is a change of minister those obligations also apply.<sup>53</sup>
- 2.67 The provisions of the FOI Act relating to the amendment and annotation of personal records also apply to the official documents of ministers (s 48). That is, a person may apply to a minister to amend or annotate an official document that is claimed to contain incomplete or incorrect personal information about the person making the application (see Part 7 of these Guidelines).

### Archived ministerial documents

- 2.68 A document that a current or former minister has placed in the care of the National Archives of Australia is not a document of an agency (s 13(1)). Access to archived documents is governed principally by the *Archives Act 1983*. Access will be available under the FOI Act in 2 situations:
- The first is where an agency has a copy of a document placed by a minister in the National Archives.
  - The second could arise under s 4(1) of the FOI Act, which provides that an official document of a minister includes a document that has passed from the minister’s control ‘if he or she is entitled to access to the document and the document is not a document of an agency’. Neither the FOI Act nor the *Archives Act* expressly provides that a current minister has a right of access to a document that the minister has transferred to the National Archives of Australia, however there is nothing in the *Archives Act* that prevents access by a current minister to such documents.

## Documents in certain institutions

- 2.69 If an agency places:
- a document in the memorial collection within the meaning of the *Australian War Memorial Act 1980*
  - a document in the collection of library materials maintained by the National Library of Australia
  - material in the historical material in the possession of the Museum of Australia
  - a document in the care of the National Archives of Australia (other than as a document relating to the administration of the National Archives) or

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<sup>52</sup> *Patrick v Attorney-General (Cth)* [2024] FCA 268 [99].

<sup>53</sup> *Patrick v Attorney-General (Cth)* [2024] FCA 268 [108] and [115].

- a program or related material in the collection of the National Film and Sound Archive of Australia

the document is deemed to be in the possession of the agency that transferred the document (s 13(2)). If that agency no longer exists, the document is deemed to be in the possession of the agency with functions to which the document is most closely related. A person seeking access to the document can make an FOI request to the relevant agency, which must retrieve the document from the institution to meet the request.

2.70 A document is not deemed to be a ‘document of an agency’ by reason of its being in one of the collections outlined above if a person (including a minister or former minister) other than an agency, placed the document in the care or custody of the relevant institution (s 13(1)).

2.71 Documents that are in the custody of the National Archives of Australia and are within the open access period are discussed below at [2.73].

## Records of commissions of inquiry

2.72 Records of certain commissions of inquiry are also deemed to be ‘documents of an agency’ and within the possession of the relevant agency, as follows:

- records of a Royal Commission that are in the care of the National Archives of Australia are taken to be documents of an agency and in the possession of the department responsible for the *Royal Commissions Act 1902* (currently the Attorney-General’s Department) (s 13(3)(a))
- records of the Commission of Inquiry (as defined under the now repealed *Quarantine Act 1908*)<sup>54</sup> that are in the care of the National Archives of Australia are taken to be documents of an agency and to be in the possession of the Agriculture Department (within the meaning of the *Biosecurity Act 2015*) (s 13(3)(b))
- records of a Commission of Inquiry under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* that are in the custody of the National Archives are taken to be documents of an agency and in the possession of the department responsible for the Offshore Petroleum and Greenhouse Gas Storage Act (s 13(3)(c)).

## Documents open to public access and not available under the FOI Act

2.73 As discussed above, the right to obtain access under the FOI Act does not apply to all documents that are in the possession of agencies that are subject to the FOI Act. The FOI Act does not apply to documents of the following kinds that are open to public access under other arrangements:

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<sup>54</sup> The Commission of inquiry referred to in s 13(3) relates to the equine influenza outbreak in Australia in 2007 and related matters.

- the document or a copy of it is within the open access period as defined in the *Archives Act*,<sup>55</sup> unless the document contains personal information, including personal information about a deceased person (s 12(1)(a))<sup>56</sup>
- the document is already publicly available, as part of a public register or in accordance with an enactment where a fee or other charge may apply (s 12(1)(b)).<sup>57</sup> An example of a public register is a register of births, deaths and marriages. A consumer protection register is an example of a register created under an enactment. This extends to documents that are available to the public in accordance with arrangements made between the agency and a publisher.<sup>58</sup>
- the document, under a State or Territory law, is open to public access as part of a land title register subject to a fee or charge (s 12(1)(ba))
- the document is made available for purchase by the public in accordance with arrangements made by an agency (s 12(1)(c)).<sup>59</sup>

## Personnel records

2.74 If an agency has established procedures for access to personnel records, an employee or former employee may only apply for access to their records under the FOI Act in limited circumstances (s 15A). A personnel record means those documents containing personal information about an employee or former employee that an agency has kept for personnel management purposes (s 15A(1)). An application under the FOI Act for access to those records may only be made where the employee or former employee has made a request under those agency procedures and is either:

- not satisfied with the outcome or
- has not been notified of the outcome within 30 days (s 15A(2)).

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<sup>55</sup> The open access period is defined in s 3(7) of the *Archives Act 1983* and in ss 22A (cabinet notebooks) and 22B (census information).

<sup>56</sup> In *Park-Kang and Secretary, Department of Foreign Affairs and Trade (Freedom of information)* [2015] AATA 703, Member Webb found (at [22]) that while s 12(1)(a) of the FOI Act removed a person's entitlement under that enactment to obtain access to a document within the 'open access period' determined under the Archives Act, s 12(1) does not act negatively upon an applicant's accrued right to review, or to the right of access that crystallized under the FOI Act at the time that he made his request. This is so because the applicant's FOI request and application for review under the FOI Act were made before the records in question crossed the 'open access period' threshold under the Archives Act.

<sup>57</sup> In *Knapp and Australian Accounting Standards Board* [2014] AATA 744, the AAT considered the meaning of 'available for purchase' at [24]–[26]) and found that the documents must be capable of being obtained without undue delay and in a condition that the public can take advantage of them.

<sup>58</sup> *Lester and Commonwealth Scientific and Industrial Research Organisation* [2014] AATA 646 [22].

<sup>59</sup> *Lester and Commonwealth Scientific and Industrial Research Organisation* [2014] AATA 646 [27]–[28].