

## FREEDOM OF INFORMATION

### The right to access documents held by Federal and Victorian Government Ministers and agencies

Unless stated otherwise, the information in this factsheet applies to both the Commonwealth and Victorian FOI schemes.<sup>i</sup>

#### WHY USE FOI?

FOI can be a useful information gathering tool given that the object is to maximise prompt document release at the lowest reasonable cost, unless a specific exclusion or exemption applies. FOI legislation confers a legal right on every person to access documents held by government Ministers and by agencies. This includes documents that contain an applicant's own personal information or information about government activities more broadly.

#### HOW DO I MAKE A VALID FOI REQUEST?

##### The applicant must:

1. Make the request in writing to the agency or Minister;
2. Provide enough information as is reasonably necessary to enable the documents to be identified; and

##### For a Commonwealth request:

3. State that it is an application under the FOI Act;
4. Provide a return address;
5. Send the request to the agency by post, hand delivery, email, fax or online lodgement.

##### For a Victorian request:

6. Pay the application fee, unless waived or reduced on hardship grounds.

In Victoria, the agency or Minister has a duty to assist an applicant to make a valid request. Under the Commonwealth Act, only agencies, not Ministers, hold the same duty.

In Victoria, it is a good idea to indicate in the request whether you consent to obtaining partial access to a document with exempt or irrelevant parts deleted. The Commonwealth Act assumes partial access unless otherwise stated.

#### WHO CAN I REQUEST DOCUMENTS FROM?

- All State and Federal Government Ministers and Departments
- Universities and TAFE colleges
- Public hospitals
- Local Councils
- Most semi-government Commonwealth and Victorian agencies and statutory authorities
- The administration of Norfolk Island
- Contractors or subcontractors of Commonwealth agencies who provide services to the public or third parties on behalf of a Commonwealth agency.

#### WHAT DOCUMENTS CAN I ACCESS?

'Document' is defined broadly in the legislation.<sup>ii</sup> It includes any material on which there is writing or a mark, figure or symbol, electronically stored information, maps, plans, drawings and photographs and any article from which sounds, images or writing is capable of being produced.

In Victoria you cannot use FOI to access non-personal documents that were created:

- by a Council before 1 January 1989; or
- by an agency before 5 July 1978.

If requesting documents from a Commonwealth or Victorian Minister, the document must be an “official document of a Minister”. This does not include a Minister’s personal or political party documents or documents about the Minister’s electorate affairs.

## HOW CAN I ACCESS THE DOCUMENTS?

- By inspection
- Being provided a copy
- Viewing
- Hearing; or
- Being provided a transcript.

## HOW MUCH DOES IT COST TO APPLY?

**Commonwealth:** Free

**Victoria:** 2 fee units\*<sup>iii</sup>

\*The legislation does not prescribe when an application fee could be waived or reduced on hardship grounds. An agency or Minister looks for evidence of hardship if requested. E.g. Health Care card.

## ARE THERE ANY ADDITIONAL COSTS?

Subject to exceptions, an agency or Minister is required to charge for the costs incurred in providing access to documents and will only grant access once any charges are paid.

### Commonwealth exceptions:

- Requests for documents containing the applicant’s personal information are free.
- The first 5 hours of decision making time is free for all applicants.

### Victorian exceptions:

- Routine requests for access are free;
- Certain charges (eg, search and inspection) are waived if:
  - the applicant’s intended use of the document is for the general public interest or benefit; or
  - the applicant is a Member of the Victorian Parliament; or
  - the request relates to the applicant’s personal affairs information;
- If an applicant seeking their own personal affairs information is impecunious, requests for documents containing their information are free.

### Charge Estimates and Deposits:

#### Commonwealth:

- The applicant must be notified of the estimated charge and given 30 days to respond, or such further time by agreement.
- If requesting a fee waiver or reduction, the applicant must provide a supporting explanation or evidence. The agency or Minister has 30 days to decide on that request. Factors considered include financial hardship and whether granting access is in the general public interest or the interest of a substantial section of the public.
- The applicant may be asked to pay a deposit of 25% of the total estimate or \$20 if the estimate is less than \$100.

#### Victoria:

- If the estimate is below \$50, the agency or Minister does not have to notify the applicant of the estimated charge before processing the request.
- For estimated charges above \$50, the agency or Minister is required to notify the applicant that a deposit is payable. If the calculated charge does not exceed \$100, a deposit of \$25 is required. If the estimated charge exceeds \$100, the deposit will be 50% of the estimated charge.
- There is no general discretion to waive or reduce an access charge.

## HOW LONG WILL IT TAKE?

The agency or Minister has 30 days to notify the applicant of its decision on the request,<sup>iv</sup> but can extend the timeframe:

- by up to 30 days with the applicant's agreement;
- by up to 30 days for the Commonwealth or 15 days for Victoria, if the agency or Minister needs to consult a third party.

Commonwealth agencies and Ministers can also apply to the Office of the Australian Information Commissioner for an extension of time where the request is complex or voluminous or the timeframe has expired.

## WHAT ARE THE POSSIBLE OUTCOMES?

The agency or Minister may:

- transfer the request to another agency
- release document(s) in full
- release document(s) with exempt or irrelevant parts removed
- refuse access to all of the document(s)
- refuse access to some documents and release others in full or with exempt or irrelevant parts removed
- find no documents
- defer release, e.g. until after the document is presented to Parliament
- otherwise refuse to process the request, e.g. where it would substantially and unreasonably divert the resources of the agency from its other operations.
- be deemed or taken to have refused access if no decision is made within the statutory timeframe.

## WHEN CAN ACCESS TO A DOCUMENT BE REFUSED?

- The document or part of the document is exempt
- Commonwealth: the document is already publicly available or the document falls under a conditional exemption and releasing the document would be contrary to the public interest.
- Victoria: the document contains information that is open to public access under another enactment for a fee or charge or is otherwise available for purchase from an agency.<sup>v</sup>

There are numerous exemptions. Some of the more commonly applied include:

- documents containing or disclosing personal information about other people
- internal working documents of the agency
- cabinet documents
- law enforcement documents
- documents covered by legal professional privilege
- documents containing information provided in confidence
- documents containing trade secrets or commercial information of a business

The agency or Minister must provide the applicant with a statement of reasons if access to a document or part of a document is refused.

## CAN I SEEK REVIEW?

### *Victoria:*

#### **Office of the Victorian Information Commissioner (OVIC)**

An applicant can seek review from the OVIC<sup>vi</sup> of a decision:

- to refuse access to documents (whether in full or in part); or
- not to waive or reduce the application fee.

**Time limit:** 28 days from the date of notice of the agency or Minister's decision.

**Cost:** Free.

#### **Victorian Civil & Administrative Tribunal (VCAT)**

An applicant can apply to the VCAT seeking review of:

- a decision by the OVIC
- a decision by the agency or Minister to impose an access charge (but must first obtain a certificate from the OVIC that the matter is of sufficient importance for VCAT to consider)
- Of a refusal decision taken to be made by the agency, Minister or the OVIC.

**Time limit:** 60 days from the date of notice of the agency or Minister's decision.

**Cost:** Fees apply, except for review of a refusal decision taken to be made or where documents contain the applicant's own personal affairs information.

There is a right to seek leave to appeal from the VCAT to the Supreme Court on a question of law.

## **Commonwealth:**

### **Commonwealth Internal Review**

An applicant can apply in writing for internal review, so long as the agency head or Minister did not personally make the decision.

**Time limit:** 30 days from the date of notice of the agency or Minister's decision, or any further extended time as the agency allows.

**Cost:** Free

### **Office of the Australian Information Commissioner (OAIC)**

An applicant can seek review from the OAIC of the agency or Minister's original decision or decision on internal review, including:

- a decision to refuse access to documents in full or in part
- deemed refusals
- a decision not to extend time to apply for internal review
- a decision to impose a charge

**Time Limit:** 60 days from the date of notice of the agency or Minister's decision.

**Cost:** Free

### **Administrative Appeals Tribunal (AAT)**

An applicant can apply to the AAT seeking review of the OAIC's decision.

**Time frame:** 28 days from the date of notice of the OAIC's decision.

**Cost:** Fees apply.

There is a right of appeal from the AAT to the Federal Court on a question of law.

## **CAN I COMPLAIN?**

The applicant can complain to the OVIC or OAIC about any aspect of how the agency handled the request.

The Commonwealth and Victorian Ombudsman also accepts complaints in limited circumstances.

## **OTHER WAYS TO ACCESS INFORMATION**

Some agencies are willing to provide access to documents outside of the FOI scheme. This can sometimes be quicker and easier, where for example, you are seeking access to your own personal information.

## **FOR MORE INFORMATION**

Visit the following websites:

### **OVIC**

[www.ovic.vic.gov.au](http://www.ovic.vic.gov.au)

### **VCAT**

<https://www.vcat.vic.gov.au/get-started/review-and-regulation>

### **OAIC**

<https://www.oaic.gov.au/freedom-of-information/>

### **AAT**

<http://www.aat.gov.au/applying-for-a-review>

- 
- <sup>i</sup> *Freedom of Information Act 1982 (Cth)* (“**FOI Act (Cth)**”); *Freedom of Information Act 1982 (Vic)* (“**FOI Act (Vic)**”).
- <sup>ii</sup> See FOI Act (Vic) s 5(1); FOI Act (Cth), s 4(1).
- <sup>iii</sup> Currently \$28.40, increasing to \$28.90 from 1 July 2018.
- <sup>iv</sup> FOI Act (Vic), s 21(1)(a); FOI Act (Cth), s 15(5)(b). Time begins to run from the date a valid request is received.
- <sup>v</sup> See full list of exclusions in FOI Act (Vic), s 14.
- <sup>vi</sup> FOI Act (Vic), s 49A; 70 days for personal health information.

DISCLAIMER: The information in this document is intended to be a general guide only. The information is not intended to constitute professional or legal advice, and you should rely on your own inquiries and assessment. The Law Institute of Victoria expressly disclaims any and all liability for any loss or damage arising from reliance upon any information in this document. DATE OF ISSUE: 17/01/2019