

# Factsheet

## 40. Freedom of information under Western Australian law

Environmental groups and individuals with environmental concerns often need to obtain documents relating to governmental decision-making.

This Fact Sheet sets out an overview of Freedom of Information laws relating to information held by State Government departments and authorities. It includes practical suggestions and advice as to how these laws can be used to obtain such information. For details of Commonwealth Freedom of Information laws, see **Fact Sheet 41**.

### To whom do freedom of information laws apply?

The *Freedom of Information Act 1992* (the "FOI Act") provides *any person* with the legal right to access information held by any "agency", which includes:

- State Ministers;
- State Government departments;
- State Government agencies (including such bodies as the Water and Rivers Commission and the Forest Products Commission);
- Local governments; and
- some other "public bodies".

It should be noted that FOI applications cannot be made to certain "exempt agencies". These include: ordinary Members of Parliament (ie MP's other than Ministers) and joint or standing committees of either the Legislative Council or Legislative Assembly.

### What information is accessible?

The FOI Act refers to accessing "documents", and that term will be used throughout this Fact Sheet. In fact, the term is defined to include maps, plans, photographs, audiotapes, videotapes and electronic records of any type.

All documents held by agencies covered by the FOI Act are accessible, unless the document is an "exempt document" (see below).

### To whom do I apply?

Apply to the agency you think has the document you want. Agencies subject to the FOI Act have a legal duty to help you locate the correct agency, and an FOI Coordinator appointed for this purpose. An FOI Coordinator will also help you comply with the requirements for a correct FOI application.

### How do I apply?

Under the Act, an access application needs to:

#### **Important disclaimer:**

This Fact Sheet is for general information purposes. Important legal details have been omitted to provide a brief overview of this area of the law. If you require legal advice relating to your specific circumstances you should contact the Environmental Defender's Office WA (Inc) or your solicitor. The EDO takes no responsibility for any loss or damage resulting from any error in this Fact Sheet.

- be in writing (you are not required to use the agency's FOI application form);
- contain enough information to identify the requested documents;
- give an address in Australia to which notices relating to your request can be sent;
- be lodged at the office of the agency holding the document or documents, with the application fee.

An application may be made by facsimile. Such applications should include an undertaking to deliver the application fee as soon as possible.

Applications by unincorporated associations should be made in the name of one of the members, as the association has no separate legal existence.



### How much will it cost?

There is no application fee for personal information, but for a document containing other information the application fee is \$30.

In addition to the application fee, the following charges may be made by the agency:

- photocopying, at 20 cents per copy, plus \$30 per hour if the photocopying work is done by staff at the agency;
- the actual cost of postage incurred by the agency;
- \$30 per hour for staff to conduct a routine search for the documents requested (these charges do not apply to searching for lost or misplaced documents);
- \$30 per hour for staff to otherwise “deal with” the request, ie, considering whether or not to grant access and providing notice of the decision; and
- \$30 per hour for staff to supervise if access is given allowing documents to be viewed by the applicant.

If the extra charges listed above are likely to exceed \$25, the agency is required to contact you, before expenses are incurred, with an estimate of charges and ask whether you would like to proceed with the application. You may want to ensure that you receive an estimate by requesting one in any case.

In some cases, an advance deposit may be required by the agency before they proceed to process the request. Such deposits are generally only required to be 25% of the estimated charges in excess of the application fee. These requests are at the discretion of agencies and are not regulated.

The agency is required to help you minimise the cost of the application. One way to minimise costs, if you are unsure of how many documents in a file you may need, is to request supervised access to the file with the opportunity to photocopy documents as needed.

*Financially disadvantaged people and non-profit conservation groups may be able to obtain a discount of 25% on the total charges in excess of the application fee that would otherwise be applicable.* This is usually at the discretion of agencies, but holders of a currently valid pensioner concession card will definitely be able to obtain this discount.

If an estimated charge seems unreasonable, you may apply for an “internal review” of the charge (see below).

### Sample application letter

John Smith  
Eucla River Action Group  
3 River Road  
EUCLA WA 6443

10 October 2003

Ms Jan Bloggs  
Freedom of Information Officer  
Department of Environmental Protection  
141 St Georges Terrace  
PERTH WA 6000

Dear Ms Bloggs

**Freedom of Information - Eucla River Piggery, Licence No. 2114**

Pursuant to the *Freedom of Information Act 1992*, I apply to inspect and selectively copy the file relating to the above licence.

I enclose the \$30.00 application fee.

If charges associated with this application are likely to exceed \$25.00, please contact me before those charges are incurred.

Yours sincerely,

John Smith



## How, and when, should the agency respond?

Agencies must deal with an application “as soon as is practicable”, but they must assess the request and give a written response within 45 days, advising whether the request is approved or refused. “Day one” for this period commences on the day after the application is lodged.

If the document is needed as a matter of urgency, a request for a shorter response period may be made to the agency or to the Information Commissioner.

If the request is refused, or only partial access is given, the agency must give you written reasons for the decision.



## Are there documents I cannot access?

Documents may be inaccessible where a request for them would divert “a substantial and unreasonable portion of the agency’s resources away from its other operations”. This would normally only be the case where the request is for a large number of documents, or documents that are very old.

Access to documents may also be denied by the agency where the document is an “exempt document”, namely one that contains “exempt matter”. There are 16 categories of exempt matter. Some of the most common categories are dealt with below.

### Personal or commercial information

A request may be refused when the public interest in the protection of the personal or business affairs of “third parties” outweighs the public interest in the disclosure of a particular document.

If access is granted to such documents, it will only be given after a process of consultation with the parties whose interests will potentially be affected. This process, in itself, may be time-consuming as the relevant third party may challenge the agency’s decision regarding the public interest.

### Cabinet documents

The documents produced by the Government in Cabinet will be inaccessible if they reveal the deliberations or decisions of that body. Documents in this category may include draft legislation, a brief to a Minister regarding a possible Cabinet decision or the minutes of the decisions of Cabinet.

If the deliberations or decisions of Cabinet are revealed by the documents in question but the documents contain only factual, technical or statistical information, they will not be exempt from disclosure unless the deliberation or decision has not yet been officially published.

### Solicitor/client correspondence

The agency may decide not to disclose documents if they were produced by or on behalf of the agency with the sole purpose of obtaining legal advice, unless the matter has since been published in an internal manual of the agency.

### Deliberative process of an agency

Matter revealing the “deliberative process” of an agency is exempt, unless disclosure, on balance, would be in the public interest. Documents may be considered to contain exempt matter of this nature if they reveal the agency’s *process* of weighing up or evaluating courses of action. However, if those processes are contained in the agency’s internal manual this document will not be exempt. Thus documents relating to purely procedural or administrative processes will not generally be exempt from disclosure under this heading.

“Public interest” factors include the principle that people who are affected by decisions should have relatively unimpeded access to information about how these decisions were made. More importantly, it has been held that there is a “considerable (public) interest in being provided with correct information regarding the environmental impact of development proposals”.

## Damage to inter-governmental relations

Sensitive, high-level documents passing between the Western Australian government and either other States' governments or the Federal government may be exempted by the agency to protect relations between those governments. Relations may not be considered to be put at risk if the document in question is sufficiently old, or concerns relatively routine matters.

## Law enforcement procedures

This exemption protects documents which reveal the strategies for investigating, detecting and preventing contravention of the law. This exemption has been relied upon in the context of FOI requests for Department of Conservation and Land Management documents relating to the procedures for dealing with forest protesters.

### NOTE: Partial disclosure

In all of the above cases, the consideration of the exempt matter in the documents requested may result in access being given to only some of the requested documents, or to documents being altered to delete the exempt matter.



## What if I disagree with the decision?

If the agency refuses access, or will only provide access on conditions with which you do not agree, you may apply for an internal review of the access decision. This application must be in writing, and be submitted within 30 days of receiving notice of the refusal. The review will be carried out by a more senior person within the agency. You must be notified about the results of this internal review within 15 days of the application being made. This notification must reveal that the earlier decision has been fully re-examined.

If you are dissatisfied with the results of the internal review, a subsequent application can be made to the Information Commissioner (an "external review"). The application should be in writing and include an address to which notices may be sent to you, particulars of the decision you want reviewed and a copy of the decision and reasons given to you by the agency. The application must be made within 60 days of receipt of notice of the internal review decision.

The standard procedure for the resolution of external reviews includes the following steps:

- a legal officer makes a preliminary assessment of the agency's reasons for decision;
- a preliminary conference is held to define the dispute between the parties and explore possibilities for negotiation;
- the Commissioner formulates a written preliminary view on the matter;

## Sample internal review letter

John Smith  
Eucla River Action Group  
3 River Road  
EUCLA WA 6443

10 November 2003

Chief Executive Officer  
Department of Environmental Protection  
141 St Georges Terrace  
PERTH WA 6000

Dear Sir

**Freedom of Information - Eucla River Piggery, Licence No. 2114**

On 10 October 2003 I applied to inspect and selectively copy the file relating to the above licence.

On 28 October, I received notification from your Freedom of Information Officer that access to a set of notes from that file was refused on the ground that the notes were exempt under Clause 7 of the *Freedom of Information Act 1992* (legal professional privilege).

Pursuant to section 39 of the *Freedom of Information Act 1992*, I request an internal review of this decision.

Yours sincerely,

John Smith

## Sample external review letter

John Smith  
Eucla River Action Group  
3 River Road  
EUCLA WA 6443

5 December 2003

Office of the Information Commissioner  
Level 21 Exchange Plaza  
2 The Esplanade  
PERTH WA 6000

Dear Commissioner

**Complaint - Department of Environmental Protection**

On 10 October 2003 I applied to the Department of Environmental Protection to inspect and selectively copy the file held by that agency relating to the Eucla River Piggery, Licence No. 2114.

On 28 October 2003 I received notification from the Department's Freedom of Information Officer that access to a set of notes from that file was refused on the ground that the notes were exempt under Clause 7 of the *Freedom of Information Act 1992* (legal profession privilege).

On 10 November, I applied for internal review of that decision, which was unsuccessful.

Pursuant to section 65 of the Act, I wish to lodge a complaint against the Department's decision to refuse access to the set of notes in question.

I enclose a copy of my original application, together with copies of the initial response and the internal review decision.

Should someone from your office wish to contact me, my daytime telephone number is 9221 3030.

Yours sincerely,

John Smith

- if the parties are still unable to resolve their dispute, the complaint will go before the Commissioner for a formal decision.

Contact details for the Office of the Information Commissioner are set out below.

There are no charges for either internal reviews or subsequent external reviews by the Information Commissioner.



### Can I appeal the Commissioner's decision?

If the Commissioner makes an "error of law" during the hearing of the external review, you may appeal to the Supreme Court. The appeal must be commenced within 21 days of the Commissioner's decision.

Note that there are no appeals allowed from decisions to defer access, to set charges for dealing with applications, or to require the payment of a deposit.



### Is there an easier way to get the document?

You should always try to find out if the document you are seeking is publicly available through a particular body, or whether you are able to obtain a copy with a simple, informal request.

Alternatively, appropriate politicians, local councillors or environmental groups may be able to provide you with a copy of the document.

## Contacts and further information

Office of the Information Commissioner, Perth

Tel: (08) 9220 7888  
Freecall: 1800 621 244

State Law Publisher, Perth (for copies of legislation)

Tel: (08) 9321 7688

## The Environmental Defender's Office WA (Inc)

The Environmental Defender's Office WA (EDO) is a community legal centre specialising in public interest environmental law.

The objects of the EDO include:

- ◆ to provide community groups and individuals with legal advice and representation to help protect the environment;
- ◆ to promote law reform that improves environmental protection; and
- ◆ to provide community education about environmental law.

The EDO is a non-profit, non-government organisation. The EDO receives its principal funding from the Federal Attorney-General's Department. However, these funds are limited and donations from the public provide a vital source of funds for many of our activities. Donations over \$2 are fully tax deductible. The EDO also welcomes people with a commitment to the environment to join as members.

If you require legal advice on an environmental issue or wish to find out more about the EDO, please contact us at the following address:

Environmental Defender's Office WA (Inc)  
Second Floor, Kings New Office Tower  
533 Hay Street, PERTH WA 6000

Tel: (08) 9221 3030 Fax: (08) 9221 3070

Email: edowa@edo.org.au Web: www.edo.org.au/edowa

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