

Factsheet

41. Freedom of information under Commonwealth 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 Commonwealth Government departments and authorities. It includes practical suggestions and advice on how these laws can be used to obtain such information. Western Australian Freedom of Information laws are dealt with in **Fact Sheet 40**.

To whom do freedom of information laws apply?

The *Freedom of Information Act 1982* (Cth) ("the FOI Act") provides *any person* with the legal right to access the following information:

Information held by Commonwealth government departments and other government agencies

Bodies established for a public purpose under any Commonwealth Act or regulations are subject to the FOI Act, with the exception of a number of specifically excluded bodies such as:

- Aboriginal Land Councils and Land Trusts; and
- Australian Security Intelligence Organisation.

The "official documents" of Commonwealth Ministers

An "official document" of a Commonwealth Minister is one that:

- is in the possession of a Minister;
- relates to his or her role as Minister; and
- relates to the affairs of a Commonwealth Department or agency.

What information is accessible?

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

Unless the documents contain personal information about you, they are only accessible if created on or after 1 December 1977.

To whom do I apply?

Apply to the agency you think has the document you want. Agencies subject to the FOI Act have FOI Officers who are under a legal duty to help you locate the correct agency, although Ministers do not have such a duty.

How do I apply?

Under the Act, your request for access 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 (if the relevant agency or Minister has an FOI request form you should try to use it, but this is not required);
- contain enough information to enable the requested documents to be identified;
- give an address in Australia to which notices relating to your request can be sent; and
- be lodged at the office of the agency or Minister together with any application fee (see below).

In the event that a request letter is deficient in some way, the agency has a duty to take reasonable steps to assist the applicant with making the request comply with the above requirements. There is no equivalent duty for Ministers.

The application should generally be lodged by hand or by post. If a facsimile is used, it 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 fee for requests seeking an amendment to personal information, but for a document containing other information the minimum charge is \$30.

In addition to this basic request fee, other costs may include:

- \$20 per hour for staff to decide whether to grant a request;
- \$15 per hour for staff to search for or retrieve the document;
- photocopying, at 10 cents per copy;
- the actual cost of postage incurred by the agency or Minister; and
- \$6.25 per half-hour (or part thereof) for staff to supervise if access is given to view documents.

If the agency or Minister decides you are required to pay a charge in addition to the basic request fee, the agency or Minister must first provide you with an estimate of charges.

If the additional charge is estimated to be greater than \$25, a deposit may be required by the agency or Minister before they proceed to process the request.

Agencies and Ministers are required by the Act to help you minimise the cost of the application: where no specific form of access has been requested, the agency may only charge you for the cheapest access option.

The Act provides opportunities to have the application fee refunded and/or the additional charges discussed above reduced. An agency or Minister may have policies reducing charges for any reason, but as a minimum your financial position and the public interest associated with your application must be taken into account. The public interest in the application will be greater where the applicant has a demonstrated expertise in communicating its findings to the public.

If an estimated charge seems unreasonable, or an application fee is not remitted in circumstances where you think it should be, you may apply for an “internal review” of the decision (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
Environment Australia
King Edward Terrace
PARKES ACT 2601

Dear Ms Bloggs

Freedom of Information - Eucla River Piggery

Pursuant to the *Freedom of Information Act 1982*, I apply for access to any correspondence, notes or memoranda made after 1 January 2003 in relation to the above piggery.

I enclose the \$30.00 application fee.

Yours sincerely,

John Smith



How and when should the agency respond?

The Minister or agency must take all reasonable steps to notify you of their receipt of your request as soon as practicable, but within a maximum of 14 days. The agency or Minister must then take all reasonable steps to advise you as to whether the request is approved or refused as soon as practicable after that, but within a maximum of 30 days after which the request was received. In some circumstances these periods may be extended, but there is no power in the Act to shorten them.

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 “substantially and unreasonably divert the resources of the agency from its other operations” or “substantially and unreasonably interfere with the performance of the Minister’s functions”. 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”. Common categories of “exempt documents” are dealt with below.

Personal or commercial information

A request may be refused when it would involve an “unreasonable disclosure” of *personal information* about any person other than the applicant. Factors relevant to deciding what is “unreasonable” in the above sense include the current public knowledge of the personal information, and the extent to which the public is currently aware of a connection between the person to whom the personal information relates and the matters dealt with in the document being sought. Essentially, this requirement operates as a test as to whether or not disclosure is in the public interest. This test must involve a process of consultation with the person to whom the information relates, if that is reasonably practicable. This process does not give the person to whom the information relates a power to veto any proposed disclosure.

Requests that would involve the disclosure of *commercial information* may be refused if such disclosure:

- could reasonably be expected to diminish the value of the commercial information; or
- could reasonably be expected to unreasonably affect the lawful business or professional affairs of the person to whom the commercial information relates.

As with personal information, access to commercial information may only be granted after a process of consultation with the person to whom the information relates, if that is reasonably practicable.

Cabinet documents

Documents may be exempt where they:

- are produced for the official record of the Government in Cabinet;
- are produced for consideration of Cabinet; or
- otherwise evidence the deliberations of Cabinet.

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. A document is not exempt merely because it was before a Cabinet meeting.

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

This ground of exemption is one of a number of exemption categories where the relevant Minister (in this case, the Prime Minister) may sign a certificate establishing “conclusively” that the document being sought is exempt for the purpose of the section. These Ministerial Certificates make the decision to refuse access much harder to challenge (see below).

Solicitor / client correspondence

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

Internal working documents

Documents revealing the “deliberative process” of an agency may be exempt if such disclosure would be contrary to 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 in a particular case.

The Administrative Appeals Tribunal has found that there is a “considerable (public) interest in being provided with correct information regarding the environmental impact of development proposals.”

The internal working documents exemption is also subject to Ministerial Certificates – this means that a Minister may determine that it is contrary to the public interest that a document be released.

Damage to relations with States

A document is an exempt document if its disclosure:

- would, or could reasonably be expected to, cause damage to relations between the Commonwealth and a State; or
- would divulge material communicated in confidence from a State to the Commonwealth,

unless in either case the disclosure of the document would be in the public interest.

This ground of exemption is also subject to Ministerial Certificates.

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 some of the requested documents, or to documents altered to delete the exempt matter.



What if you disagree with the decision?

If the agency refuses access, or will only provide access on conditions you do not agree with, you may apply for a review of the access decision. This application must be in writing, and submitted within 30 days of receiving notice of the refusal. The applications will result in an internal review (by another person within the agency) of the decision to refuse access. You must be notified about the results of this internal review as soon as practicable after your application is made. This notification must reveal that the earlier decision has been fully re-examined. *There is a charge of \$40 for internal reviews.*

If you are dissatisfied with the results of an internal review, a subsequent written application can be made to the Administrative Appeals Tribunal (AAT). This application must be made within 60 days of receiving notification of the internal review decision, and should include particulars of the decision you want reviewed, a copy of that decision and the reasons given to you by the agency. We suggest you seek legal advice before applying to the AAT.

External reviews by the AAT currently cost \$526.

If the AAT makes an “error of law” during the hearing of the external review, you may appeal to the Federal Court. Such appeals are likely to involve significant legal costs. Once again, you should seek legal advice before pursuing this option.

Sample internal review letter

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

10 November 2003

Chief Executive Officer
Environment Australia
King Edward Terrace
PARKES ACT 2601

Dear Sir

Freedom of Information - Eucla River Piggery

On 10 October 2003 I applied for documents relating to the above matter.

On 28 October, I received notification from your Freedom of Information Contact Officer that access to a set of notes from that file was refused on the ground that the notes were exempt under section 43 of the *Freedom of Information Act 1982*.

Pursuant to section 54 of the *Freedom of Information Act 1992*, I request an internal review of this decision. The \$40 review fee is enclosed.

Yours sincerely,

John Smith

The Commonwealth Ombudsman

An alternative to an AAT review is the Commonwealth Ombudsman, an independent person who reports directly to the Commonwealth Parliament in response to complaints about the fairness or legality of administrative decisions of Common-

wealth agencies. Complaints about the processing of FOI applications may be made to the Ombudsman, but an application cannot then be taken to the AAT until the Ombudsman has made a decision about the complaint.



Challenging exemption certificates

Where Ministerial Certificates have been signed in support of a claim that a document is exempt (see above), such certificates are only overturned if the AAT finds there are no reasonable grounds for the claim. This requires that the claim be shown to be “fanciful, imaginary or contrived”, and has been said in one case to be a “heavy thing” for the AAT to overturn.



Is there an easier way to get the document?

The Freedom of Information (FOI) regime does not limit the ways in which access to government documents can be obtained. 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 or environmental groups may be able to provide you with a copy of the document.

Contacts and further information

Commonwealth Ombudsman, Perth

Tel: (08) 9220 7541
Local call fee: 1300 362 072

Administrative Appeals Tribunal, Perth

Tel: (08) 9327 7200
Local call fee: 1300 366 700

For copies of the legislation considered in this fact sheet, visit the [Australasian Legal Information Institute website](#).

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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