

## Proactive and informal release of government information

### A guide for agencies and the public

This guide discusses how proactive and informal release of information by agencies complements and is consistent with their obligations under the *Freedom of Information Act 1982 (FOI Act)*. It also reflects best practice by modern governments that are committed to increasing the transparency of the public service and the accountability of government.

The Information Commissioner encourages agencies to identify their information holdings and to examine opportunities to proactively release information and, when requested, informally release information outside the FOI Act where possible.

The Information Commissioner considers that proactive and informal release, while requiring a shift in the way in which Victorian agencies approach access to information and open government, can have important benefits, including:

- delivering significant benefits to the public;
- reducing the need for FOI requests by making information available;
- providing agencies with more flexibility in the way in which they respond to information access requests; and
- increasing the public's trust in government.

This guide:

- outlines what is meant by 'proactive' and 'informal' release and their considerations;
- looks at the benefits and limitations of proactive and informal release; and
- outlines tips for the public and agencies.

### Proactive release

Proactive release involves an agency making available to the public information it holds or collects (e.g. via publication on its website).

Increasingly in Australia, amendments to access to information legislation has led to 'push' rather than 'pull' mechanisms to prompt agencies to proactively and informally release information to the public.<sup>1</sup> While such legislation still provides for an FOI scheme based on a 'pull' model, emphasis is placed on proactive and informal release in the first instance.

This shift recognises the benefits of proactive release, which are discussed later in this guide.

### Considerations

Agencies generate and collect large amounts of information in carrying out their functions. The FOI Act recognises the importance of agencies identifying what information it holds and communicating that to the public.

For example, Part II of the FOI Act sets out a number of obligations requiring agencies to publish and make available a range of information and documents about and used by the agency in carrying out its functions.

Agencies should consider whether its information could be released to the public or whether access should be limited in order to protect *essential* public interests and the private and business affairs in respect of whom the information has been collected and held by that agency.<sup>2</sup> The use of 'essential' is an indication that Parliament intended any limits on information release to be interpreted narrowly.

<sup>1</sup> See for example, the *Government Information (Public Access) Act 2009 (NSW)*.

<sup>2</sup> Section 3(1)(b) of the *Freedom of Information Act 1982*.

## Informal release

Informal release involves an agency receiving an information access request (either under or outside the FOI Act) and releasing the requested information, either in full or in part, without utilising the formal processes under the FOI Act.

Victoria's FOI Act recognises that access to information may be informal. Section 16(2) states that nothing in the FOI Act should prevent an agency from providing a person with access to documents outside the FOI Act, where it is possible and lawful to do so.

### Considerations

A number of agencies in other jurisdictions encourage members of the public to make informal requests for information in the first instance and to use the formal FOI process as a last resort.

As with proactive release of information, it is open to an agency to informally release information unless non-disclosure is necessary to protect essential public interests and the private and business affairs of persons.<sup>3</sup>

In addition, where an agency receives a request for information, either under or outside of the FOI Act, agencies may give regard to who is requesting a document and for what purpose when determining if informal release is available in the first instance. Such considerations are generally not relevant in relation to making a formal decision on access under the FOI Act, but may be taken into account when determining whether to provide informal access.

The Information Commissioner considers that information created or obtained by an agency that relates to its usual functions and operations and is not a sensitive document created specifically in relation to an individual's personal circumstances, should be critically examined with a view to making it available without resorting to FOI. Where a document relates to a commercial matter (e.g. an active tender process or procurement) it may still be appropriate to make it publicly available, potentially with redactions.

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<sup>3</sup> Section 16(2).

### Time frames

There are no time limits for an agency to provide access to documents outside of the FOI Act.

Notwithstanding this, agencies should endeavour to respond to informal requests promptly and provide an estimated time frame to the individual making the request.

Agencies may also consider reaching an agreement with the individual making the request about the time in which the agency will provide access to the document.

If an agency decides that meeting an informal request for information would take a substantial amount of time, it should discuss with the individual other options for access, including making an FOI request.

### Fees and charges

There is no generally prescribed application fee for requesting information outside of the FOI Act.

In addition, agencies should try and release information for free. However, there may be instances where this is not appropriate (for example where there is a large volume of documents).

In those circumstances, an agency may suggest that the individual attend its offices to view the documents and it may permit the individual to make copies of the documents at their own expense.

### Conditions on access and use

Informal release of information allows an agency to decide how information may be released. For example, an agency may convey information by telephone, email, letter or in person. Similarly, an agency may provide access to information in full or in edited form.

Under the FOI Act, no condition can be imposed on the further use or dissemination of information. Similarly, there is no stipulated limit on how information may be used if it was released informally.

However, the agency and the individual making the request may reach an agreement on any conditions or limitations on the use of the information.

Note that the information Commissioner highlights that enforcing such agreements may be difficult and costly and, therefore, the agency should give careful consideration to if any conditions are imposed.

### **Authority to release information**

The agency officer providing access to a document or information should ensure that they are authorised by their agency to provide access to that document or information.

### **Review rights**

Informal release does not provide the individual making the request with any review rights that are available under the FOI Act.

### **Protection from liability**

The protections available to agencies under section 62 of the FOI Act (protection against actions for defamation or breach of confidence) are not available to an agency outside of the FOI Act.

### **Privacy**

Where an informal request for information is made, the relevant agency must ensure that any privacy rights under the *Privacy and Data Protection Act 2014 (PDP Act)* are considered before releasing personal information.

### **Recording decisions to informally release information**

An agency should keep a written record of information it informally makes available to a member of the public, including any conditions attached to its release and any relevant considerations to support the decision to provide informal release.

### **What happens if a request cannot be dealt with informally?**

In some circumstances, it may not be possible for an agency to deal with a request informally. For example, the request may be complex or too voluminous. In those cases, an agency may ask the requester to make a formal FOI request.

## **Benefits of proactive and informal release**

Some of the benefits are that proactive and informal release of information:

- increases access to information;
- promotes a culture of open government by strengthening transparency and accountability between government and the public;
- are flexible and dynamic processes that can be adapted depending on the circumstances of the request;
- saves time and resources in dealing with FOI requests, and may also reduce the number of FOI requests;
- can be made subject to conditions or limitations on the subsequent use of the document;
- does not require an agency to provide formal written reasons; and
- is not subject to statutory time limits.

## **Tips for the public**

To assist members of the public to make informal requests for information to Victorian agencies, the Information Commissioner recommends that individuals:

- Engage with the agency to identify the document or information you seek so that the agency can easily identify the information and assess whether informal access can be provided.
- Demonstrate flexibility in seeking access to documents. For example, be open to the possibility of:
  - receiving a document in part;
  - excluding sensitive information, such as personal or commercial information;
  - obtaining access to the information in a discreet and practical manner (e.g. you may view the documents);

- agreeing to limitations regarding the use or further disclosure of the documents by way of a written agreement between you and the agency.
- Inform the agency of your reason for seeking access to the document or information, or if you plan to use the document or information for a specific purpose. This information may be helpful for the agency to know when considering how to best provide you with access.
- Engage with the agency to reach an agreement about a reasonable period of time to receive the document or information.
- Note that informal release means that you do not have to make a request under the FOI Act and pay an application fee. However, you will not have any right to seek review of the agency's decision by the Information Commissioner or the Victorian Civil and Administrative Tribunal.
- Note that you will still have the right to make an FOI request and the agency will also retain discretion to advise you to make an FOI request if it is not possible to provide you with informal access.

## Tips for agencies

To make FOI a last resort, the Information Commissioner recommends that:

- Agencies proactively make available as much information as possible to members of the public.
- Agencies promote the availability of informal access to information via its website.
- Agencies review their Part II statements to increase the level of detail about the types or

categories of documents the agency holds to assist a member of the public in identifying the information they seek to access.

- Agencies consider whether a formal FOI request could be dealt with informally, and contact the applicant accordingly.
- Agencies consider discussing with the requester other options for access, including making an FOI request, where an agency decides that meeting an informal request for information would take an substantial amount of time.
- Agencies give the requester an estimate of the time frame within which their request for information will be dealt with.
- The agency officer providing access to a document or information ensure that they are authorised by the agency to provide access to a document or information.
- The agency keeps a written record of information it informally makes available to a member of the public.
- The agency ensure that any privacy rights under the PDP Act are considered before releasing personal information.
- Agencies take note of any repeated requests for the same type of information, as this is likely to be an indication that this information is of general interest to the public and should be made publicly available.

Agencies are welcome to consult with the Information Commissioner about their specific circumstances to discuss how to implement pathways for the proactive and informal release of information.

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## Further Information

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