

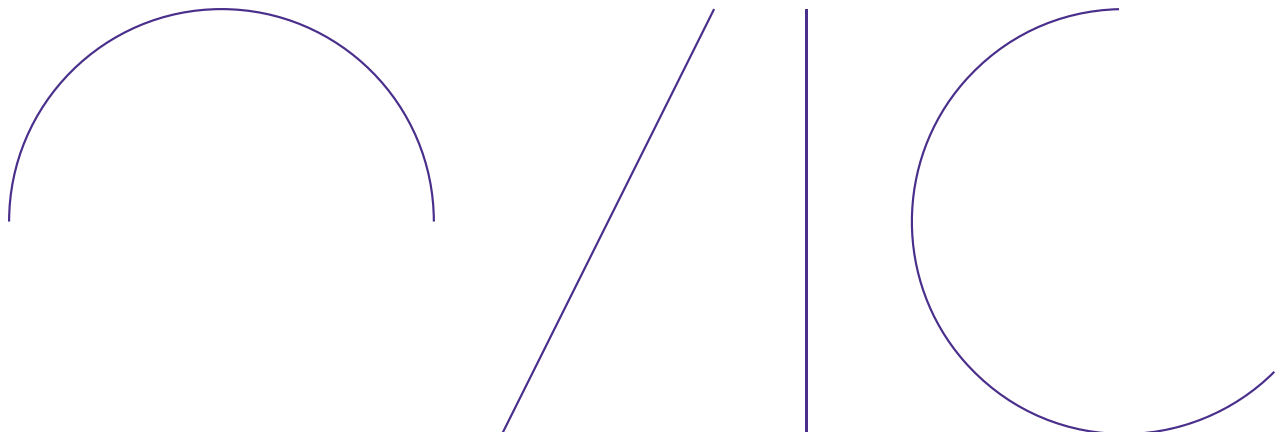


Office of the Victorian  
Information Commissioner

## Part I – Preliminary

Freedom of Information Guidelines

FREEDOM OF INFORMATION



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### References to legislation

All legislative references are to the *Freedom of Information Act 1982* (Vic) (**the Act**) unless otherwise stated.

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# Section 1 – Short title and commencement

## Extract of legislation

### 1 Short title and commencement

- (1) This Act shall be cited as the **Freedom of Information Act 1982**.
- (2) Except for Part II, this Act shall come into operation on a day six months from the day on which it receives the Royal Assent.
- (3) Part II shall come into operation on a day twelve months from the date of commencement provided for in subsection (2).

## Guidelines

### Victoria was the first State or Territory to enact freedom of information legislation

- 1.1. Victoria was the first Australian State or Territory, and the second Australian jurisdiction, to enact freedom of information (**FOI**) legislation. The Act received Royal Assent on 5 January 1983.<sup>1</sup> It came into operation on 5 July 1983 except for Part II, which came into operation on 5 July 1984.<sup>2</sup>
- 1.2. The first Australian FOI legislation was enacted at the Federal level, with the Commonwealth [\*Freedom of Information Act 1982\*](#) receiving Royal Assent on 9 March 1982.

### Transparency and open government

- 1.3. FOI legislation promotes greater transparency and accountability in government and enables the public to better understand the decision-making processes of government. It does this by giving any person the right to request access to documents held by Victorian government agencies and Ministers. It also gives each person the right to request access to, and correction of, information that concerns them and is held by the government.

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<sup>1</sup> Australasian Legal Information Institute (AustLII), 'Freedom of Information Act 1982', *Historical Acts*, available here: [http://www.austlii.edu.au/cgi-bin/viewdb/au/legis/vic/hist\\_act/foia1982222/](http://www.austlii.edu.au/cgi-bin/viewdb/au/legis/vic/hist_act/foia1982222/).

<sup>2</sup> This is per section 1(3) of the Act, which states Part II shall come into operation on a day 12 months from the date of the commencement provided for in section 1(2).

- 1.4. Former Victorian Premier, John Cain, introduced the Act as ‘tangible proof of [his] Government’s commitment to open government in Victoria’.<sup>3</sup> The introduction of the Act and the concept of open government is a ‘central need in a democracy’, with freedom of information closely connected with fundamental principles of a democratic society.<sup>4</sup>
- 1.5. The Act was introduced on three major premises:
- the public have a right to know what information is contained in government records about themselves;
  - a government that is open to public scrutiny is more accountable to the people who elect it; and
  - when people are informed about government policies, they are more likely to become involved in policy making and in government itself.<sup>5</sup>
- 1.6. The Act provides every person with a legally enforceable right to request access to government-held documents. While this formal right exists, since the Act was first introduced, many agencies provide access to information to the public outside of the Act. This helps to reduce the need to make formal FOI requests and increases transparency in, and public scrutiny of, the Victorian public sector.

#### Example

Agencies may provide access to information outside of the Act by:

- publishing information online (for example, on agency websites, [legislation.vic.gov.au](https://www.legislation.vic.gov.au), [data.vic.gov.au](https://www.data.vic.gov.au), [Engage Victoria](#), [Buying for Victoria](#));
- provided over the telephone or by email;
- available for inspection at an agency’s office; and/or
- available through an administrative or informal access scheme outside of the Act.

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<sup>3</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 14 October 1982, 1061 (John Cain, Premier of Victoria) [https://www.parliament.vic.gov.au/images/stories/historical\\_hansard/VicHansard\\_19821014\\_19821020.pdf](https://www.parliament.vic.gov.au/images/stories/historical_hansard/VicHansard_19821014_19821020.pdf).

<sup>4</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 14 October 1982, 1061 (John Cain, Premier of Victoria) [https://www.parliament.vic.gov.au/images/stories/historical\\_hansard/VicHansard\\_19821014\\_19821020.pdf](https://www.parliament.vic.gov.au/images/stories/historical_hansard/VicHansard_19821014_19821020.pdf).

<sup>5</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 14 October 1982, 1061 (John Cain, Premier of Victoria) [https://www.parliament.vic.gov.au/images/stories/historical\\_hansard/VicHansard\\_19821014\\_19821020.pdf](https://www.parliament.vic.gov.au/images/stories/historical_hansard/VicHansard_19821014_19821020.pdf).

## More information

For more information on increasing government transparency through access to information, see:

- Part II – Publication of certain documents and information
- [Section 16 – Access to documents apart from Act](#)
- [Proactive and informal release of information – Guidance for the public](#)
- [Proactive release of information](#)
- [Informal release of information](#)

## Significant changes made to the Act since it came into effect

1.7. There have been two significant suites of changes made to the Act since it came into effect in 1982, including:

- Introduction of the Freedom of Information Commissioner (**FOI Commissioner**):
  - On 1 December 2012, the FOI Commissioner was created to oversee how agencies administer the Act.<sup>6</sup> Amongst other things, the FOI Commissioner was responsible for conducting reviews of agency FOI decisions, handling FOI complaints about agencies, monitoring compliance with FOI professional standards, and reporting to Parliament on the operation of the Act. The FOI Commissioner was also responsible for educating agencies on the Act and how it works. This was the most significant change to Victoria's FOI laws since they were first introduced.<sup>7</sup>
- Introduction of the Victorian Information Commissioner, new regulatory functions and coercive powers, and changes to how agencies process FOI requests:
  - On 1 September 2017, another significant suite of changes to the Act came into effect.<sup>8</sup> The Office of the Victorian Information Commissioner (**OVIC**) combined and replaced the Office of the FOI Commissioner and the Commissioner for Privacy and Data Protection to oversee both the Act and the [Privacy and Data Protection Act 2014 \(Vic\)](#)

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<sup>6</sup> [Freedom of Information Amendment \(Freedom of Information Commissioner\) Act 2012 \(Vic\)](#).

<sup>7</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 8 December 2011, 6297 (Andrew McIntosh, Minister responsible for the establishment of an anti-corruption commission) [https://www.parliament.vic.gov.au/images/stories/daily-hansard/Assembly\\_2011/Assembly\\_Daily\\_Extract\\_Thursday\\_8\\_December\\_2011\\_from\\_Book\\_20.pdf](https://www.parliament.vic.gov.au/images/stories/daily-hansard/Assembly_2011/Assembly_Daily_Extract_Thursday_8_December_2011_from_Book_20.pdf).

<sup>8</sup> [Freedom of Information Amendment \(Office of the Victorian Information Commissioner\) Act 2017 \(Vic\)](#).

(PDP Act).<sup>9</sup> This significant change brought together independent FOI, information privacy, and information security regulatory functions for the first time in Victoria.

- The changes to the Act gave new FOI functions and powers to the Information Commissioner, such as:
  - to conduct own-motion investigations;
  - new coercive powers;
  - to make agency FOI Professional Standards;
  - to review Minister and Principal Officer FOI decisions;
  - to review decisions relating to Cabinet documents;
  - to handle complaints regarding Principal Officers; and
  - to handle more types of complaints regarding Ministers.
- The Act also introduced a Public Access Deputy Commissioner with similar functions to the Victorian Information Commissioner under the Act.
- The Victorian Government also changed how agencies process FOI requests, such as by:
  - introducing mandatory third-party consultation requirements when considering a range of exemptions (such as under [section 33](#)); and
  - reducing the time an agency has to process a request from 45 days to 30 days.

## More information

For more information on:

- the Information Commissioner and Public Access Deputy Commissioner’s functions, see Part IA – Office of the Victorian Information Commissioner; or
- how to process an FOI request, see Part III – Access to documents.

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<sup>9</sup> The Commission for Privacy and Data Protection was an independent regulator with oversight over the [Privacy and Data Protection Act 2014 \(Vic\)](#).



## Section 3 – Object of Act

### Extract of legislation

#### 3 Object of Act

- (1) The object of this Act is to extend as far as possible the right of the community to access to information in the possession of the Government of Victoria and other bodies constituted under the law of Victoria for certain public purposes by—
  - (a) making available to the public information about the operations of agencies and, in particular, ensuring that rules and practices affecting members of the public in their dealings with agencies are readily available to persons affected by those rules and practices; and
  - (b) creating a general right of access to information in documentary form in the possession of Ministers and agencies limited only by exceptions and exemptions necessary for the protection of essential public interests and the private and business affairs of persons in respect of whom information is collected and held by agencies.
- (2) It is the intention of the Parliament that the provisions of this Act shall be interpreted so as to further the object set out in subsection (1) and that any discretions conferred by this Act shall be exercised as far as possible so as to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information.

### Guidelines

#### Promoting the right to access information

- 1.1. Section 3 outlines the purpose and intent of the Act, which is to promote the public's right to access information held by the Victorian Government, its agencies, and Ministers by:
  - requiring agencies to publish certain information about how they operate, and their rules and practices which affect the public (this refers to the publication requirements in Part II);
  - creating a general right of access to a document held by Ministers and agencies (this refers to the right of access in [section 13](#)); and
  - requiring an agency to favour disclosure of information where a discretion exists (this is supported by [section 16](#)).

- 1.2. The [FOI Professional Standards](#) support and promote the object of the Act by aiming to improve communication between agencies and applicants, ensuring agencies process requests promptly, providing clarity to specific sections of the Act, and making sure agencies give the Act a modern interpretation, both in practice and process.
- 1.3. Section 16(1) promotes the object and intent of the Act by clarifying that an agency or Minister may publish or provide access to an exempt document if it can properly do so.

#### Example

The object of the Act and section 16 facilitate and promote the proactive and informal release of information. It does this by requiring agencies and Ministers to publish certain information, to favour disclosure of information, and by outlining that an agency or Minister may provide access to an exempt document if it can properly do so.

## Considering the object when applying other sections of the Act

- 1.4. Understanding the Act’s object is essential when interpreting other sections of the Act. This is because the Act, the [Freedom of Information \(Access Charges\) Regulations 2014 \(Vic\)](#), and the FOI Professional Standards should be read in a way that promotes the Act’s purpose or object (being access to information).<sup>10</sup>
- 1.5. When deciding whether to provide access to information, the object of the Act requires agencies and Ministers to begin from a position of openness and transparency. Judicial guidance from Australia’s top court and lower courts is that the proper approach to interpreting the Act is to favour access to information, rather than hinder access to information.<sup>11</sup>

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<sup>10</sup> [Interpretation of Legislation Act 1984 \(Vic\)](#), section 35(a).

<sup>11</sup> [Victorian Public Sector Board v Wright](#) [1986] HCA 16 [16]; followed in [Osland v Secretary to the Department of Justice](#) [2010] HCA 24 [14]; applied by the Supreme Court of Victoria in [Monash University v EBT](#) [2022] VSC 651 [66] and [Knight v Corrections Victoria](#) [2010] VSC 338 [18]; applied by the Victorian Civil and Administrative Tribunal in [Kelly v Department of Treasury & Finance](#) [2002] VCAT 1019 [29] “The combined effect of sections 3, 13 and 16 of the FOI Act is to confer upon members of the public a broad and ready right of access to information”. See also [Sobh v Police Force \(Vic\)](#) [1994] 1 VR 41 (Ashley J) “while the issue is ultimately one of statutory construction, the court should lean in favour of disclosure”; [Department of Justice v Western Suburbs Legal Service Inc](#) [2009] VSC 68 [19]-[20] (Beach J) (quoting Kirby J in [Osland v Secretary, Department of Justice](#) [2008] HCA 37 [65]-[66] [75]-[76]) “There can be no issue that the Court should strive to interpret the FOI Act “in a manner harmonious with its objectives, doing so to the fullest extent that the text allows”. Similarly, “[a]n approach hostile to disclosure of information in documentary form” must be eschewed”; [Secretary to the Department of Treasury and Finance v Dalla-Riva](#) [2007] VSCA 11 [13] (Buchanan JA) “...the objects of the Act set out in s 3 appear to me to warrant construing the rights conferred by the Act liberally and the exceptions narrowly”.

1.6. Agencies should therefore aim to approach access to government information from a position of:

- transparency rather than secrecy;
- releasing all information except that to which an exemption under the Act is necessary to protect an essential public, private or business interest;
- providing access to information without an FOI request, where it is proper to do so or required by law;
- providing access to information as promptly and inexpensively as possible; and
- providing applicants with practical assistance in exercising their rights under the Act, including when making a valid FOI request and identifying which documents an applicant seeks or does not require.

1.7. Agencies should not take a technical approach to interpreting provisions in the Act, processing a request or applying exceptions or exemptions under the Act.

# Section 5 – Definitions

## Extract of legislation

### 5 Definitions

- (1) In this Act, except insofar as the context or subject-matter otherwise indicates or requires—

*agency* means a department council or a prescribed authority;

*applicant* means a person who has made a request in accordance with section 17 or has applied under section 12(1) for a statement published by a principal officer to be altered;

*assessable disclosure* has the meaning given in section 3 of the **Public Interest Disclosures Act 2012**;

*authorised Hub entity* has the meaning given in the **Family Violence Protection Act 2008**;

*authorised legal representative* of a person means an Australian legal practitioner who has been instructed by a person to receive documents on the person's behalf;

*Board of Inquiry* has the same meaning as in the **Inquiries Act 2014**;

*business day* means a day other than a Saturday, a Sunday or a public holiday or half-holiday appointed under the **Public Holidays Act 1993**;

*child* means a person under the age of 18 years;

*confidentiality notice* means a notice issued by the Information Commissioner under section 61TJ(1);

*council* has the same meaning as in section 3(1) of the **Local Government Act 2020**;

*Court Services Victoria* means Court Services Victoria established under section 5 of the **Court Services Victoria Act 2014**;

*department* means a department within the meaning of the **Public Administration Act 2004** or an office or body specified in section 16(1) of that Act;

*destroy*, in relation to a document provided to the Information Commissioner, or by the Information Commissioner to a person, by secure electronic means, means—

- (a) to permanently delete the electronic communication from—
- (i) all information systems on which the Information Commissioner held or stored that received document; and
  - (ii) all information systems on which the person who was provided with the document from the Information Commissioner held or stored that document; and
- (b) to destroy any hard copy of the document;

**document** includes, in addition to a document in writing—

- (a) any book map plan graph or drawing; and
- (b) any photograph; and
- (c) any label marking or other writing which identifies or describes any thing of which it forms part, or to which it is attached by any means whatsoever; and
- (d) any disc tape sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom; and
- (e) any film negative tape or other device in which one or more visual images are embodied so as to be capable (as aforesaid) of being reproduced therefrom; and
- (f) anything whatsoever on which is marked any words figures letters or symbols which are capable of carrying a definite meaning to persons conversant with them; and
- (g) any copy, reproduction or duplicate of any thing referred to in paragraphs (a) to (f); and
- (h) any part of a copy, reproduction or duplicate referred to in paragraph (g)—

but does not include such library material as is maintained for reference purposes;

**document of an agency** or **document of the agency** means a document in the possession of an agency, or in the possession of the agency concerned, as the case requires, whether created in the agency or received in the agency;

**domestic partner** of a person means—

- (a) a person who is in a registered relationship with the person; or

**Note**

A **registered relationship** is defined in subsection (5).

- (b) a person to whom the person is not married but with whom the person is living as a couple on a genuine domestic basis (irrespective of gender);

**enactment** means an Act or instrument (including rules, regulations, local laws or by-laws) made under an Act;

**exempt document** means—

- (a) a document which, by virtue of a provision of Part IV, is an exempt document; or
- (b) an official document of a Minister that contains some matter that does not relate to the affairs of an agency or of a department;

**exempt matter** means matter the inclusion of which in a document causes the document to be an exempt document;

**family violence** has the meaning given in the **Family Violence Protection Act 2008**;

*Formal Review* has the same meaning as in the **Inquiries Act 2014**;

*health information* has the same meaning as in the **Health Records Act 2001**;

*Health Complaints Commissioner* means the Commissioner within the meaning of the **Health Complaints Act 2016**;

*IBAC* means the Independent Broad-based Anti-corruption Commission established under section 12 of the **Independent Broad-based Anti-corruption Commission Act 2011**;

*Information Commissioner* means the Information Commissioner appointed under section 6C;

*information system* has the same meaning as in the **Electronic Transactions (Victoria) Act 2000**;

*Integrity Oversight Victoria* has the same meaning as in the **Integrity Oversight Victoria Act 2011**;

*investigation* means an investigation under Part VIB;

*legal practitioner* means an Australian legal practitioner;

*member of staff*, of the Office of the Victorian Information Commissioner, means a person employed or engaged under section 6Q;

*Ministerial Council* means a body (however described) that consists of the Minister of the Commonwealth and the Minister of each State and Territory, each of whom is principally responsible for companies and securities;

*Ministerial professional standards* means professional standards adopted under section 6Y(1);

*notice to produce or attend* means a notice to produce or attend issued under section 49KB, 61I(4) or 61P(2), and includes a notice as varied under section 61V;

*Office of the Victorian Information Commissioner* means the Office of the Victorian Information Commissioner established under section 6B;

*officer*—

- (a) in relation to an agency, other than a council, includes a member of the agency, a member of the staff of the agency, and any person employed by or for the agency, whether that person is one to whom the provisions of the **Public Administration Act 2004** apply or not; and
- (b) in relation to a council, includes a member of the council, a member of the staff of the council and any person employed by or for the council;

*official document of a Minister* or *official document of the Minister* means a document in the possession of a Minister, or in the possession of the Minister concerned, as the case requires, that relates to the affairs of an agency, and, for the purposes of this interpretation, a Minister shall be deemed to be in possession of a document that has

passed from his possession if he is entitled to access to the document and the document is not a document of an agency;

***Ombudsman*** means the Ombudsman appointed under the **Ombudsman Act 1973**;

***prescribed authority*** means—

- (a) a body corporate established for a public purpose by, or in accordance with, the provisions of an Act, or a body unincorporate created by the Governor in Council or by a Minister, other than—
  - (i) an incorporated company or association;
  - (ii) a body that, under subsection (2), is not to be taken to be a prescribed authority for the purposes of this Act;
  - (iii) a Royal Commission, Board of Inquiry or Formal Review;
- (b) any other body, whether incorporated or unincorporated, declared by the regulations to be a prescribed authority for the purposes of this Act, being—
  - (i) an incorporated company or association or unincorporated body which is supported directly or indirectly by government funds or other assistance or over which the State is in a position to exercise control; or
  - (ii) a body established by or under an Act of Parliament;
- (c) subject to subsection (3), the person holding, or performing the duties of, an office established by an Act; or
- (d) the person holding, or performing the duties of, an appointment declared by the regulations to be an appointment the holder of which is a prescribed authority for the purposes of this Act, being an appointment made by the Governor in Council, or by a Minister, otherwise than under an Act;

***principal officer*** means—

- (a) in relation to a department, the person employed as or performing the duties of the Department Head within the meaning of the **Public Administration Act 2004**; and
- (aa) in relation to a council, the person holding, or performing the duties of, the office of chief administrative officer of the council (by whatever name called); and
- (b) in relation to a prescribed authority—
  - (i) if the regulations declare an office to be the principal office in respect of the authority—the person holding, or performing the duties of, that office; or
  - (ia) in the case of Court Services Victoria—the person holding the office or performing the duties of the Chief Executive Officer of Court Services Victoria; or

- (ii) in any other case—the person who constitutes that authority or, if the authority is constituted by two or more persons, the person who is entitled to preside at any meeting of the authority at which he is present;

**professional standards** means standards published under section 6V(1), but does not include Ministerial professional standards;

**Public Access Deputy Commissioner** means the Public Access Deputy Commissioner appointed under section 6D;

**public interest complaint** has the meaning given in section 3 of the **Public Interest Disclosures Act 2012**;

**record** means a document containing information relating to the personal affairs of a person and includes a document containing information relating to the personal affairs of a deceased person;

**request** means a request made in accordance with section 17;

**responsible Minister** means—

- (a) in relation to a department—the Minister administering the relevant department;
- (b) in relation to a prescribed authority referred to in paragraph (a) of the interpretation of “prescribed authority”—the Minister administering the Act by which, or in accordance with the provisions of which, the prescribed authority is established;
- (c) in relation to a prescribed authority referred to in paragraph (c) of that interpretation—the Minister administering the Act by which the office is established; or
- (d) in relation to any other prescribed authority—the Minister declared by the regulations to be the responsible Minister in respect of that authority—or another Minister acting for and on behalf of that Minister;

**restricted matter** means—

- (a) any evidence or information given to, or obtained by, the Information Commissioner;
- (b) the contents of any document produced to, or obtained by, the Information Commissioner;
- (c) the existence of, or any information about, a confidentiality notice or a requirement under section 61U(1)(a) to attend an examination before the Information Commissioner;
- (d) the subject matter of an investigation by the Information Commissioner;
- (e) any information that could enable a person who has been, or is proposed to be, examined by, or who has produced, or may produce, any document to the Information Commissioner, to be identified or located;



- (f) the fact that a person has been, or is proposed to be, examined by, or has produced, or may produce, any document to, the Information Commissioner;
- (g) the fact that a disclosure or related disclosure has been notified to an appropriate entity for assessment under Part 3 of the **Public Interest Disclosures Act 2012**;
- (h) the fact that a disclosure or related disclosure has been determined under Part 3 of the **Public Interest Disclosures Act 2012** to be a public interest complaint;
- (i) the fact that the Information Commissioner intends to conduct an investigation on a public interest disclosure;

**Royal Commission** means—

- (a) a Royal Commission established under the **Inquiries Act 2014**; or
- (b) a Royal Commission established under the prerogative of the Crown;

**spouse** of a person means a person to whom the person is married;

**Tribunal** means the Victorian Civil and Administrative Tribunal established by the **Victorian Civil and Administrative Tribunal Act 1998**.

- (2) An unincorporated body, being a board, council, committee, sub-committee or other body established by, or in accordance with the provisions of, an Act for the purpose of assisting, or performing functions connected with, a prescribed authority shall not be taken to be a prescribed authority for the purposes of this Act, but shall be deemed to be comprised within that prescribed authority.
- (3) A person shall not be taken to be a prescribed authority by virtue of his holding, or performing the duties of—
  - (a) a prescribed office;
  - (b) an office the duties of which he performs as duties of his employment as an officer of a department or as an officer of or under a prescribed authority;
  - (c) an office or member of a body; or
  - (d) an office established by an enactment for the purposes of a prescribed authority.
- (4) For the purposes of this Act, Victoria Police shall be deemed to be a prescribed authority.
- (5) For the purposes of the definition of **domestic partner** in subsection (1)—
  - (a) **registered relationship** has the same meaning as it has in the **Relationships Act 2008**; and
  - (b) in determining whether persons who are not in a registered relationship are domestic partners of each other, all of the circumstances of their relationship are to be taken into account, including any one or more of the matters referred to in section 35(2) of the **Relationships Act 2008** as may be relevant in a particular case.

## Guidelines

### Agency

- 1.1. An 'agency' includes a Victorian government [department](#), a [council](#), or '[prescribed authority](#)'.<sup>12</sup> It does not include a Commonwealth or other State or Territory agency.

#### Example

An agency includes:

- government departments;
- local councils;
- public hospitals;
- public schools, universities and TAFEs;
- statutory authorities; and
- authorities prescribed under the Act.

- 1.2. Another Act may also deem a person to be an agency for the purpose of the Act in some circumstances. This means they are an agency under the Act, and a person may make an FOI request to that person.

#### Example

Persons who are deemed to be an agency for the purpose of the Act include, but are not limited to:

- an approved inspection service under the *Plant Biosecurity Act 2010 (Vic)*;<sup>13</sup>

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<sup>12</sup> To find an agency, use OVIC's Find an Agency tool, available here: <https://ovic.vic.gov.au/freedom-of-information/for-the-public/find-an-agency/>; information about agencies subject to the Act is also in Appendix A, Part 1 and Part 2 in OVIC's [Annual Reports](#).

<sup>13</sup> [Plant Biosecurity Act 2010 \(Vic\)](#) section 73(1).

- a contractor in its capacity as a provider of services under the *Corrections Act 1986* (Vic), or to a sub-contractor in its capacity as a manager of a prison or police gaol under a sub-contract agreement.<sup>14</sup>

1.3. Conversely, another Act may deem that a particular person cannot be declared to be an agency or prescribed authority for the purpose of the Act. This means that person cannot be an agency or prescribed authority under the Act, and an FOI request cannot be made to that person.

#### Example

Persons who cannot be declared to be an agency or [prescribed authority](#) for the purpose of the Act include, but are not limited to:

- the Victorian Funds Management Corporation;<sup>15</sup>
- a public gas company;<sup>16</sup>
- the Treasury Corporation of Victoria; and<sup>17</sup>
- companies who generate, distribute or transmit electricity, and the Victorian Energy Networks Corporation.<sup>18</sup>

## Applicant

1.4. Any person may make an FOI request, however, an ‘applicant’ is a person who has:

- made a valid request under [section 17](#) (if the request is not valid, the person will not be an applicant for the purpose of the Act unless or until the request becomes valid); or
- applied under [section 12\(1\)](#) for a statement published by a Principal Officer to be updated to specify a document not previously specified.

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<sup>14</sup> [Corrections Act 1986 \(Vic\)](#) sections 9F(a) and 9F(d).

<sup>15</sup> [Victorian Funds Management Corporation Act 1994 \(Vic\)](#) section 39.

<sup>16</sup> [Gas Industry \(Residual Provisions\) Act 1994 \(Vic\)](#) section 101A.

<sup>17</sup> [Treasury Corporation of Victoria Act 1992 \(Vic\)](#) section 40.

<sup>18</sup> [Electricity Industry \(Residual Provisions\) Act 1993 \(Vic\)](#) section 91A.

1.5. Part V refers to a 'claimant' in the context of requesting an amendment to a document containing the person's personal information, rather than 'applicant'.<sup>19</sup>

## Assessable disclosure

- 1.6. 'Assessable disclosure' is defined in section 3 of the [Public Interest Disclosure Act 2012 \(Vic\) \(PID Act\)](#) and means:
- a disclosure that, under sections 21(2) or (3) of the PID Act, must be notified to the Independent Broad-based Anti-corruption Commission (**IBAC**), Integrity Oversight Victoria or the Victorian Parliament's Integrity and Oversight Committee;
  - a disclosure that, under section 36(2) of the PID Act, must be notified to the IBAC, Integrity Oversight Victoria or the Victorian Parliament's Integrity and Oversight Committee;
  - a disclosure made to the IBAC in accordance with Division 2 of Part 2 of the PID Act;
  - a disclosure made to Integrity Oversight Victoria under section 14(b) of the PID Act;
  - a disclosure made to the Victorian Parliament's Integrity and Oversight Committee under section 14(a) of the PID Act;
  - a police complaint disclosure that, under section 22 of the PID Act, must be notified to the IBAC;
  - a police complaint disclosure made to the IBAC.
- 1.7. Assessable disclosures are relevant to the Information Commissioner's powers in Division 3, Part VIB, to investigate public interest complaints referred to the Information Commissioner by IBAC.

## Authorised Hub entity

- 1.8. 'Authorised hub entity' is defined in section 144SB of the [Family Violence Protection Act 2008 \(Vic\) \(FVP Act\)](#) and means:
- a person or body declared under section 144SC of the FVP Act to be an authorised Hub entity;

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<sup>19</sup> However, in the second reading speech for the Freedom of Information Bill 1982, former Victorian Premier John Cain refers to a person who requests an amendment under Part V as an 'applicant'. Nonetheless, section 46 in Part V outlines a review process for a *claimant* where an agency or Minister has refused to amend a record.

- the Department of Health and Human Services;
- Family Safety Victoria;
- and includes an officer, employee or contracted service provider of such an entity.

1.9. The fact that an agency is an authorised hub entity can be a relevant consideration in applying the exemption in [section 33\(1\)](#) for documents affecting an individual’s personal privacy.

## Council

1.10. ‘Council’ is defined in section 3(1) of the [Local Government Act 2020 \(Vic\)](#) to mean “a municipal Council (including the Melbourne City Council and the Greater Geelong City Council) whether constituted before or after the commencement of this section”.

1.11. A council is an agency for the purposes of the Act. This means a person can make an FOI request to a council under [section 17](#).

## Department

1.12. ‘Department’ means:

- a Department existing by virtue of an Order made under section 10 of the [Public Administration Act 2004 \(Vic\)](#) (PA Act);<sup>20</sup> and
- the offices and bodies set out in section 16(1) of the PA Act.

1.13. A department is an agency for the purposes of the Act. This means a person can make an FOI request to a department under [section 17](#).

To see current Victorian Government departments, visit the Victorian Government [website](#).

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<sup>20</sup> A list of Victorian government departments can be found [here](#).

## Document

1.14. The definition of ‘document’ in section 5(1) is broad.<sup>21</sup> It captures any record of information in any form and however stored, whether a draft or final version, physical or electronic.<sup>22</sup> It also includes a copy, reproduction, or duplicate of a document, or any part of a copy, reproduction or duplicate of a document.<sup>23</sup>

### Example

A document may include:

- emails and letters;
- Excel, Word, or PDF documents;
- diary and calendar entries;
- SMS and WhatsApp messages;<sup>24</sup>
- CCTV footage;
- handwritten notes, file notes, or sticky notes;
- policy guides or manuals;
- maps and photographs;
- files;
- fingerprint records;<sup>25</sup>
- telephone call or interview recordings; and
- voice messages.

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<sup>21</sup> [Monash University v EBT](#) [2022] VSC 651 [14].

<sup>22</sup> [Monash University v EBT](#) [2022] VSC 651 [7], [14], [88], [103], [105]-[132].

<sup>23</sup> *Freedom of Information Act 1982* (Vic) section 5(1), definition of ‘document’ sub-sections (g) and (h).

<sup>24</sup> [‘EW6’ and Development Victoria](#) [2022] VICmr 234 [28].

<sup>25</sup> *Lawless v Department, Chief Commissioner of Police & Director of Public Prosecutions* (1985) 1 VAR 42.

1.15. The Act does not cover information that is not recorded. For example, a verbal conversation between two employees of an agency would not fall under the Act. However, any informal written records or file notes about the conversation would be considered a document. Similarly, an audio recording of the conversation would be a document for the purpose of the Act.

## Creating a document

1.16. An agency or Minister may have to create a document in specific instances. This is where the applicant requests information that does not exist in a discrete form (for example, statistical data from a case management system), but the agency can create a document containing that information.<sup>26</sup> The same will apply where the agency can make a transcript for a sound recording it holds.

See [section 19](#) for more information on creating a document in response to a request.

## Document of an agency

1.17. A ‘document of an agency’ is a record of information in the possession or control of an [agency](#), regardless of the way it is stored, and whether the agency created or received the document.<sup>27</sup>

1.18. The focus of the definition is on ‘possession’ as opposed to ownership. It does not matter if the document was created by another agency, belongs to someone else, or is stored electronically.<sup>28</sup> If it is in the possession of the agency, it is subject to access under the Act.

## ‘In the possession of’

1.19. A document is ‘in the possession’ of an agency if the agency has:

- actual possession of the document, meaning it has physical possession (for example, in a case or records management system, on a shared drive, on the local drive of an agency computer, or a hard copy complaint file) and control of the document; or

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<sup>26</sup> [Monash University v EBT](#) [2022] VSC 651.

<sup>27</sup> [Monash University v EBT](#) [2022] VSC 651 [7], [83].

<sup>28</sup> See [Williams v Victoria Police \(General\)](#) [2005] VCAT 2516.

- constructive possession of the document, meaning it has a legal right to obtain actual possession or the power to deal with the document (for example, a contractual or legal right to require someone to provide the document to the agency).<sup>29</sup>

1.20. Whether an agency is in possession of a document depends on each matter’s facts and circumstances. Considerations include:

- whether the agency physically possesses the document or has an intention to possess the document;
- any contractual arrangements that exist in relation to the document;
- whether the agency has a right to control the document; or
- the purpose for which the document was created and by whom.

1.21. Having physical custody of a document alone may not necessarily mean an agency is ‘in the possession’ of a document. For example, in [Colonial Range Pty Ltd v Victorian Building Authority](#), an agency was considered to have physical access to a requested document, but not control of the document. Judge Harbison noted:

*I accept that the document is properly described as being in the physical custody of the respondent. I do not accept that this by itself means that the document is in the possession of the respondent for the purposes of this FOI application. Were this the case, any document inadvertently obtained could be described in this way.*

*I accept that what is required is evidence of an intention to possess the document, and or a right to control the document.<sup>30</sup>*

## A document of the agency or a personal document

1.22. A document created by an agency officer in a personal capacity (or for personal reasons), that the agency does not control, is not a document of that agency. That is, unless the agency officer created the document as part of, and for the purpose of, their duties at the agency.

### Example

An agency officer uses a mobile phone for both personal and work purposes, and an FOI request is received by the agency for documents relating to a project involving the officer.

<sup>29</sup> [Office of the Premier v Herald and Weekly Times \[2013\] VSCA 79](#); [Colonial Range Pty Ltd v Victorian Building Authority \[2017\] VCAT 1198](#).

<sup>30</sup> [Colonial Range Pty Ltd v Victorian Building Authority \[2017\] VCAT 1198](#) [174]–[175].



The officer must search for and provide a copy of any text messages (from all messaging platforms used), insofar as any text message concerns the specific project and were created for the purpose of or in the course of the officer carrying out their professional duties at the agency.

In this example, relevant text messages might include arranging meetings with stakeholders or providing instructions to contractors or other agency officers in relation to the project.

## Health information

1.23. 'Health information' is defined in section 3 of the [Health Records Act 2001 \(Vic\)](#) and includes, among other things, information or opinion about:

- the health (physical, mental or psychological) of an individual;
- an individual's disability;
- a health service provided, or to be provided, to an individual, that is also personal information; or
- other personal information collected to provide, or in providing, a health service.

1.24. The Act contains special provisions that may be enlivened when an FOI request is made for a document containing an applicant's health information. In broad terms, the provisions relate to:

- special forms of access, where access is granted ([section 23](#));
- special procedures for refusing access, where access is refused ([sections 27](#) and [33](#)); and
- special review rights ([sections 49B](#) and [49Q](#)).

## Officer

1.25. The term ‘officer’ is defined broadly and has been found to cover independent contractors and consultants employed or engaged by an [agency](#) to carry out work or provide services.<sup>31</sup> It also includes:

- a member of the agency or [council](#);
- a member of staff of the agency or council; and
- a person employed by or for the agency or council whether or not under the [Public Administration Act 2004 \(Vic\)](#).

### Example

Officers may include:

- independent investigators contracted to undertake investigations for an agency,<sup>32</sup>
- independent legal advisors,<sup>33</sup>
- independent consultants or contractors who provide opinion, advice, or recommendation;<sup>34</sup> and or
- servants of the Crown who are appointed by the Governor-in-Counsel and holders of public office.<sup>35</sup>

## Official document of a Minister or official document of the Minister

1.26. An ‘official document of a Minister’ means a document in the possession of a [Minister](#) that relates to the affairs of an [agency](#), but is not a document of an agency.

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<sup>31</sup> See, for example, [Thwaites v Department of Human Services \(No 2\) \(1998\) 14 VAR 347](#); [Mees v University of Melbourne \(General\) \[2009\] VCAT 782](#); [Koch v Swinburne University \[2004\] VCAT 1513](#).

<sup>32</sup> [QEX v Department of Health \(Review and Regulation\) \[2022\] VCAT 349 \(8 April 2022\)](#) at [37].

<sup>33</sup> [Thwaites v Department of Human Services \(No 2\) \(1998\) 14 VAR 347](#) at [31].

<sup>34</sup> [Mees v University of Melbourne \(General\) \[2009\] VCAT 782](#) at [31].

<sup>35</sup> [Hennessy v Minister Responsible for the Establishment of an Anti-Corruption Commission & Anor \(Review and Regulation\) \[2013\] VCAT 822 \(24 May 2013\)](#) citing J Preuss Member in re [Cole and Department of Justice \(1994\) 8 VAR 114](#) at 127.

- 1.27. For the purposes of the Act, a Minister will be in possession of a document that has passed from the Minister’s possession if they are entitled to access the document, so long as the document is not a document of an agency.
- 1.28. A document of a Minister that contains matters unrelated to the affairs of an agency, such as in the Minister’s capacity as a member of a political party, as a parliamentarian or in a personal diary, is not an ‘official document of a Minister’ for the purposes of the Act and therefore cannot be requested under the Act.

## Prescribed authority

1.29. ‘Prescribed authority’ is defined as:

- a body corporate established for a public purpose by an Act;
- an unincorporated body created by the Governor in Council or a Minister;
- any other incorporated or unincorporated body declared by the [Freedom of Information Regulations 2019 \(Vic\)](#) (FOI Regulations) to be a prescribed authority for the purposes of the Act;<sup>36</sup>
- subject to section 5(3), the person holding, or performing the duties of, an office established by an Act; or
- the person holding, or performing the duties of, an appointment declared by the FOI Regulations to be a prescribed authority for the purposes of the Act, being an appointment made by the Governor in Council, or by a Minister, otherwise than under an Act.

1.30. Schedule 1 of the FOI Regulations lists prescribed authorities for the purposes of the Act.

### Example

Prescribed authorities under Schedule 1 of the FOI Regulations include:<sup>37</sup>

- Appeal Costs Board
- Denominational hospitals listed in Schedule 2 to the *Health Services Act 1988* (Vic)

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<sup>36</sup> See ‘Schedule 1 – Prescribed authorities’ of the [Freedom of Information Regulations 2019 \(Vic\)](#) for a list of bodies declared to be a prescribed authority for the purposes of the Act.

<sup>37</sup> Refer to the [Freedom of Information Regulations 2019 \(Vic\)](#) for a list of the most up to date prescribed authorities.

- Disciplinary Appeals Boards
- Electoral Boundaries Commission
- Firearms Appeals Committee
- Food Safety Council
- Land Tax Hardship Relief Board
- Medical Panels
- Mental Health Tribunal
- Merit Protection Boards
- Professional Boxing and Combat Sports Board
- Public Records Advisory Council
- Racing Victoria within the meaning of the *Racing Act 1958*
- Royal Society for the Prevention of Cruelty to Animals
- TAFE institutes created under section 3.1.11 of the *Education and Training Reform Act 2006*
- Victoria Grants Commission
- Victorian Independent Remuneration Tribunal
- Victorian Legal Admissions Board
- Victorian Legal Services Board
- Victorian Multicultural Commission
- Victorian Veterans Council
- WorkCover Advisory Committee
- Yooralla Society of Victoria

- 1.31. Victoria Police is deemed to be a prescribed authority.<sup>38</sup>
- 1.32. Other laws may deem certain bodies to be prescribed authorities.
- 1.33. A prescribed authority is an [agency](#) for the purposes of the Act.<sup>39</sup> This means a person may make an FOI request under [section 17](#) to that prescribed authority.

## Bodies, offices and appointments which are not a public authority

- 1.34. Some bodies, offices, and appointments are expressly excluded from the definition of ‘prescribed authority’ and are not an agency for the purposes of the Act. This means a person may not make an FOI request under [section 17](#) to these bodies, offices, or appointments.

### Example

Bodies, offices, and appointments expressly excluded from the definition of ‘prescribed authority’ include:

- an incorporated company or association;
- a Royal Commission, Board of Inquiry or Formal Review;
- a school council;
- the Director of Public Prosecutions;
- the Public Advocate; and
- the Solicitor General.

- 1.35. Some legislation expressly excludes certain persons from being declared a prescribed authority under the Act.

### Example

Under the [Public Interest Monitor Act 2011 \(Vic\)](#), the Public Interest Monitor is not and cannot be declared a prescribed authority for the purposes of the Act.<sup>40</sup>

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<sup>38</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 5(4).

<sup>39</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 5(1) ‘agency’.

<sup>40</sup> [Public Interest Monitor Act 2011 \(Vic\)](#), section 18.

Other examples of persons who cannot be declared to be an agency or prescribed authority for the purpose of the Act include but are not limited to:

- the Victorian Funds Management Corporation;<sup>41</sup>
- a public gas company;<sup>42</sup>
- the Treasury Corporation of Victoria; and<sup>43</sup>
- Companies who generate, distribute or transmit electricity, and the Victorian Energy Networks Corporation.<sup>44</sup>

## Body may comprise part of the prescribed authority

1.36. Where an unincorporated body such as a board, council, committee, sub-committee or other body is established by an Act to assist with or perform functions connected with a prescribed authority, that unincorporated body will not be a standalone ‘prescribed authority’.

1.37. Instead, such bodies are deemed to comprise part of the relevant prescribed authority.<sup>45</sup>

## Body corporate established for a public purpose

1.38. ‘Prescribed authority’ includes a body corporate ‘established for a public purpose by, or in accordance with, the provisions of an Act’.

1.39. In the Second Reading Speech for the Freedom of Information Bill 1982, former Victorian Premier John Cain noted:

*The term “public purposes” means Government purposes, and a body established for public purposes is one that carries on an undertaking of a public nature for the benefit of the community or of some sectional or geographical division of the community, with Governmental authority to do so, and with the support of Government finance. A body which conducts itself for private profit is not a public authority.*

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<sup>41</sup> [Victorian Funds Management Corporation Act 1994 \(Vic\)](#), section 39.

<sup>42</sup> [Gas Industry \(Residual Provisions\) Act 1994 \(Vic\)](#), section 101A.

<sup>43</sup> [Treasury Corporation of Victoria Act 1992 \(Vic\)](#), section 40.

<sup>44</sup> [Electricity Industry \(Residual Provisions\) Act 1993 \(Vic\)](#), section 91A.

<sup>45</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 5(2).

## Example

The Supreme Court of Victoria considered the meaning of ‘established for a public purpose’ in [\*Municipal Association of Victoria v The Victorian Civil and Administrative Tribunal\* \[2004\] VSC 146](#).<sup>46</sup>

Habersberger J held that when determining whether a body was established for a public purpose, consideration should be given to four key factors:<sup>47</sup>

- The legislation that created the body rather than the current form of that legislation, or the current functions or activities of the body.
- When looking at a body’s ‘purpose’, the objects and aims for establishing that body, and the powers, functions or duties given to the body by Parliament – what was the purpose for creating that body, according to its establishing legislation?
- The overall nature of the body. A body cannot be said to be ‘established for a public purpose’ if only one or more minor purposes are a public purpose, while the majority or dominant purposes are of a private nature.
- What constitutes a ‘public’ purpose. His Honour noted that trying to define the meaning of a ‘public’ purpose precisely or exhaustively is neither desirable nor feasible. However, it is clear the meaning is not as narrow as purely ‘governmental’ purposes.

## Principal officer

1.40. A principal officer of an [agency](#) will depend on the type of agency concerned (for example, whether the agency is a [department](#), [council](#) or [prescribed authority](#)). However, a principal officer generally includes a departmental secretary (in relation to departments), the heads of agencies or authorities, chief executive officers, and chairpersons.

1.41. In some instances, another Act may require a contracted service provider to identify an office holder who will act as the service provider’s principal officer for the purpose of the Act.

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<sup>46</sup> [Municipal Association of Victoria v The Victorian Civil and Administrative Tribunal](#) [2004] VSC 146.

<sup>47</sup> [Municipal Association of Victoria v The Victorian Civil and Administrative Tribunal](#) [2004] VSC 146 [20-40].

### Example

Some examples of where an Act requires a contracted service provider to identify an office holder to act as the provider's principal officer for the purpose of the Act include:

- an inspection service under the *Plant Biosecurity Act 2010* (Vic);<sup>48</sup> and
- contractors providing correctional services under the *Corrections Act 1986* (Vic).<sup>49</sup>

1.42. Principal officers have responsibilities and obligations under the Act and the FOI Professional Standards.

For more information, see OVIC's Practice Note on [Principal Officer Responsibilities and Obligations under the Act](#).

## Request

1.43. 'Request' means a request made in accordance with the requirements in [section 17](#). This is also referred to as a 'valid request'.

1.44. A request that does not meet the requirements of section 17 is not a 'request' for the purposes of the Act. This is also referred to as an 'invalid request' or a request that has not been validly made under the Act.

1.45. An agency or Minister is not required to process an invalid request. However, they are required to assist a person to make a valid request.<sup>50</sup>

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<sup>48</sup> [Plant Biosecurity Act 2010](#) (Vic), section 66(2)(g).

<sup>49</sup> [Corrections Act 1986](#) (Vic), section 8C.

<sup>50</sup> [Freedom of Information Act 1982](#) (Vic), section 17(3); [Professional Standard 2.4](#) and [2.5](#).



## Section 6 – Act not to apply to courts etc.

### Extract of legislation

#### 6 Act not to apply to courts etc.

For the purposes of this Act—

- (a) in relation to its or his judicial functions, a court or the holder of a judicial office or other office pertaining to a court in his capacity as the holder of that office, is not to be taken to be a prescribed authority or to be included in a department; and
- (b) in relation to those matters which relate to the judicial functions of the court, a registry or other office of a court, and the staff of such a registry or other office in their capacity as members of that staff, shall not be taken to be part of a department.

### Guidelines

#### Application of the FOI Act to courts and other judicial offices

1.1. The Act has a limited application to courts and other judicial offices:

- Courts and holders of a judicial office are not [prescribed authorities](#), or part of a [department](#), in relation to their judicial functions.<sup>51</sup>
- A registry or other office of a court, and the staff of those bodies, are not considered to be part of a department in respect of matters relating to the judicial functions of a court.<sup>52</sup>

1.2. These bodies and persons are not subject to the Act, in relation to their judicial functions (for example, functions relating to hearing and deciding cases). However, the Act will apply to documents relating to non-judicial functions, such as administrative matters or employee records.

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<sup>51</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 6(a).

<sup>52</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 6(b).

## ‘Judicial functions’

- 1.3. The concept of ‘judicial functions’ is not defined in the Act. However, some assistance on its meaning can be found by looking to the High Court of Australia’s interpretation<sup>53</sup> of section 6A(1) in the Commonwealth [Freedom of Information Act 1982 \(Cth\)](#) (**Commonwealth FOI Act**).<sup>54</sup> Section 6A(1) of the Commonwealth FOI Act limits the right of access from courts to documents relating to ‘matters of an administrative nature’ only.
- 1.4. In [Kline v Official Secretary to the Governor General](#),<sup>55</sup> the High Court held that:
  - matters of an administrative nature means the ‘apparatus’ supporting the exercise or performance of substantive powers or functions (including judicial functions);<sup>56</sup>
  - ‘apparatus’ includes logistical support, infrastructure, physical necessities, resources or the platform that enables judicial functions to occur;<sup>57</sup> and
  - matters preparatory to the exercise of substantive powers or functions are not administrative in nature.<sup>58</sup>
- 1.5. The outcome of *Kline* is that documents about matters preparatory to the exercise of judicial functions cannot be requested under the Commonwealth FOI Act, whereas documents relating to the ‘apparatus’ supporting the exercise of judicial functions can.
- 1.6. The High Court’s analysis in *Kline* may assist in interpreting what ‘judicial functions’ mean in section 6 of the Victorian FOI Act. Where a document relates to the body’s administrative functions, it is likely not exempt from the operation of the Act.

### Example

In [AV8 v Court Services Victoria \(Freedom of Information\) \[2019\] VICmr 198](#), the Public Access Deputy Commissioner found that memoranda addressed to the Acting, Deputy or Chief Magistrates held by Court Services Victoria related to the exercise of a judicial or quasi-judicial function of a court for the purpose of [section 29B](#) (an exemption relating to documents of Court Services Victoria which relate to

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<sup>53</sup> [Kline v Official Secretary to the Governor General \[2013\] HCA 52](#).

<sup>54</sup> [Freedom of Information Act 1982 \(Cth\)](#), sections 5 and 6.

<sup>55</sup> [Kline v Official Secretary to the Governor General \[2013\] HCA 52](#).

<sup>56</sup> [Kline v Official Secretary to the Governor General \[2013\] HCA 52](#) [71]-[72] of [Bienstein v Family Court of Australia \[2008\] FCA 1138](#).

<sup>57</sup> [Kline v Official Secretary to the Governor General \[2013\] HCA 52](#) [74].

<sup>58</sup> [Kline v Official Secretary to the Governor General \[2013\] HCA 52](#) [76].

the exercise of a judicial or quasi-judicial function of a court or the Victorian Civil and Administrative Tribunal).

The Deputy Commissioner, referring to [\*Bienstein v Family Court of Australia\*](#) [2008] FCA 1138 and *Kline*, found the memoranda are documents that relate to judicial independence and were not merely documents that relate to logistical support or the administrative processes of the Magistrates Court.

# Section 6AA – Act not to apply to access to certain documents of Office of the Victorian Information Commissioner

## Extract of legislation

### **6AA Act not to apply to access to certain documents of Office of the Victorian Information Commissioner**

This Act does not apply to access to a document that is in the possession of—

- (a) the Information Commissioner or the Public Access Deputy Commissioner; or
- (b) a member of staff of the Office of the Victorian Information Commissioner; or
- (c) a contractor, agent or other person acting for or on behalf of the Information Commissioner or the Public Access Deputy Commissioner—

to the extent that the document is the subject of, or discloses information that relates to—

- (d) a review under Part VI; or
- (e) a complaint to the Information Commissioner under Part VIA; or
- (f) an investigation.

## Guidelines

### The Act does not apply to OVIC review, complaint, or investigation documents

- 1.1. The Office of the Victorian Information Commissioner (**OVIC**) is an agency subject to the Act, meaning FOI requests may be made to OVIC for access to documents in its possession.

- 1.2. However, the right of access in section 13 does not apply to documents in OVIC's possession<sup>59</sup> to the extent that the document is the subject of, or discloses information relating to, an FOI review,<sup>60</sup> complaint,<sup>61</sup> or investigation.<sup>62</sup>
- 1.3. This means OVIC cannot provide access to documents that are the subject of, or disclose information relating to, FOI reviews, complaints, or investigations.

#### Example

##### [Djalalian-Assl v Office of the Victorian Information Commissioner \(Review and Regulation\) \[2019\] VCAT 304 \(4 March 2019\)](#)

The Applicant made two FOI requests to the University of Melbourne, which the University did not respond to on time. The Applicant made delay complaints to OVIC, which OVIC accepted. After some time, the Applicant told OVIC they received decisions from the University and the complaints were resolved.

The Applicant made an FOI request to OVIC for access to communications about the complaint.

OVIC decided the access provisions did not apply to the complaint documents because of section 6AA, and refused the request.

At the Victorian Civil and Administrative Tribunal, Senior Member Dea found OVIC was correct to decide that the requested documents fell within section 6AA. Senior Member Dea considered the terms of the request, the fact that OVIC accepted the FOI complaints under section 61B, and that OVIC had decided to make preliminary inquiries and engage in consultation under section 61G. The Senior Member was satisfied this process fell within Part VIA.

Senior Member Dea dismissed the application under section 75(1)(a) of the VCAT Act on the grounds that it was misconceived. Because of section 6AA of the FOI Act, the application was bound to fail and in that sense was hopeless.

- 1.4. Section 6AA does not apply to a document in the possession of an agency or Minister, even if that document is the subject of or discloses information relating to an OVIC review, complaint, or investigation. This is because section 6AA only applies to a document in the possession of OVIC. This means an agency or Minister cannot rely on section 6AA to exclude documents from the Act.

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<sup>59</sup> This includes in the possession of the Information Commissioner, the Public Access Deputy Commissioner, OVIC staff or OVIC contractors.

<sup>60</sup> [Freedom of Information Act 1982 \(Vic\)](#), Part VI.

<sup>61</sup> [Freedom of Information Act 1982 \(Vic\)](#), Part VIA.

<sup>62</sup> [Freedom of Information Act 1982 \(Vic\)](#), Part VIB.

## Section 6A – Relationship with other laws

### Extract of legislation

#### 6A Relationship with other laws

- (1) This Act does not affect the operation of any other law (including, but not limited to, the **Public Records Act 1973**, the **Privacy and Data Protection Act 2014** and the **Health Records Act 2001**)—
  - (a) that requires information concerning documents of an agency or official documents of a Minister to be made available to the public; or
  - (b) that enables a person to obtain access to a document of an agency or an official document of a Minister.
- (2) Nothing in this section limits or affects section 15 or 16.

#### Note

Section 10A of the **Public Records Act 1973** provides that nothing in that Act prevents a person from giving access to records otherwise than in accordance with that Act where the person can properly do so or is required by law to do so. See also sections 6 and 14 of the **Privacy and Data Protection Act 2014** and sections 7 and 16 of the **Health Records Act 2001**.

### Guidelines

#### Relationship of the Act with other laws

- 1.1. The Act is the primary mechanism for accessing and correcting documents held by the Victorian government and its agencies. However, other laws also provide the public with the right to access and correct documents.
- 1.2. Section 6A outlines that the Act does not affect the operation of other laws that provide access and correction rights (or that require an organisation to make information about the documents it holds publicly available). In other words, other avenues for access and correction continue to be available where applicable, notwithstanding the operation of the Act.

- 1.3. For example, Information Privacy Principle (IPP) 6 in the [Privacy and Data Protection Act 2014 \(Vic\)](#) enables individuals to access and correct personal information held by a Victorian public sector organisation,<sup>63</sup> but only where the FOI Act does not apply.<sup>64</sup>
- 1.4. Similarly, Health Privacy Principle (HPP) 6 in the [Health Records Act 2001 \(Vic\)](#) enables individuals to access and correct health information held by certain organisations,<sup>65</sup> but only where the FOI Act does not apply.

See [section 39](#) for information on when to use the FOI Act, IPP 6, or HPP 6 to access and correct information.

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<sup>63</sup> As defined in section 13 of the [Privacy and Data Protection Act 2014 \(Vic\)](#).

<sup>64</sup> For more information on the relationship between the FOI Act and Information Privacy Principle 6, see [Chapter 6 of OVIC's Guidelines to the Information Privacy Principles](#).

<sup>65</sup> As outlined in sections 10 and 11 of the [Health Records Act 2001 \(Vic\)](#).

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