

Fact Sheet

Freedom of Information in Victoria

What government documents are available and how to access them

Getting access to information held by the government can play a crucial role in any campaign to protect the environment. Information held by governments, such as reports, correspondence and other documents, can help you understand the scope of a particular government policy, or the possible impacts of a particular proposal.

This fact sheet contains information about when and how you can access information from Victorian government departments, agencies and local councils under the *Freedom of Information Act 1982*.

This fact sheet does not cover the rules that apply to accessing information from the Commonwealth Government, which is covered by different legislation. If you have a question about this, please contact the Community Environmental Legal Service for more information.

1. What is freedom of information?

Public access to government-held information is vital for government transparency, openness and accountability and all Australian governments have a different scheme in place for providing the community with access to government-held information.

While public access to government-held information is important for democracy and government accountability, we must also respect that certain information held by the government is not appropriate for release. Reasons include personal privacy and the confidentiality necessary to government functions, for example in law enforcement operations.

In Victoria, the public right to access government-held information, subject only to the exceptions which are set out in the Act, is enshrined in the *Freedom of Information Act 1982* (FOI Act) in two ways.

Firstly, under the FOI Act, government agencies are required to make certain information about their rules and practices available to the public for purchase and inspection. This requirement is explained briefly below at section 2.

Secondly, the FOI Act gives every person the right to formally request that a government agency provide you with a copy of a document they hold, or to allow you to inspect it. This is known as a freedom of information request, or an 'FOI request'. The requirements for making a request are set out below at section 4.

2. What documents should I be able to access without making a formal FOI request?

The FOI Act requires that agencies must make certain internal documents about their rules and practices available for public inspection and purchase.¹ The agency must give you access to these documents without requiring you to make an FOI request.

The documents covered by this requirement include:

- documents used by the agency to make decisions or recommendations, or to give advice to people, such as interpretations of particular Acts or schemes administered by the agency;
- manuals, rules or procedures, statements of policy, records of decisions, letters of advice to persons outside the agency, or similar documents containing rules, policies, guidelines, practices or precedents; and
- information on the procedures that the agency is to follow in enforcing particular Acts or schemes.

Agencies are also required to publish a list of certain documents, but not the documents themselves, related to the functions of the agency.² This includes consultants' reports prepared for the agency, results of studies, surveys or tests undertaken for the purpose of informing a government policy or program, reports on the efficiency of the agency, and environmental impact statements prepared within the agency.

If you think a document meets the description of what agencies are required to publish, you should simply contact the relevant government agency and ask them where you can access it. If you are not sure whether a particular document is required to be made public under the FOI Act you should still contact the agency concerned and ask them to provide you with the information. If the agency refuses to provide the information or says that they are not required to make the information available to you, you may wish to contact a lawyer to get further advice on whether the agency is required to provide it. Additionally you may put in an FOI request for the information (see section 4).

In addition to the prescribed list of information that government agencies must make publicly available, you can informally request access to any information that the government agencies hold. You should always ask if the agency will simply give you the information you are seeking without the need to go through the formal FOI process.³ If they refuse to make the information available you can then lodge a formal FOI request.

¹ FOI Act s8.
² FOI Act s11.
³ FOI Act s16.

3. What information can I access under the FOI Act?

The FOI Act gives every person a right to access **documents** of an **agency** or a **Minister**; other than exempt documents:⁴

- A **document** is any document in writing (hand-written or typed), but also includes maps, graphs, photographs, emails, computer disks and other forms of digital data.
- An **agency** includes a government department, local council as well as certain other government authorities and bodies (known as 'prescribed authorities') such as Trust for Nature, Parks Victoria, City West Water Ltd, the University of Melbourne, various Catchment Management Authorities and many others.⁵

The FOI Act gives you a right to access documents in the possession of agencies, not just documents created by them.

Exempt information that you will not be able to access is discussed below at section 10.

To get access to this information you need to make an FOI request (unless it is a document that should be publicly available, or that agencies will provide in response to an informal request as discussed above at section 2).

4. Making an FOI request

If you are unsuccessful in your informal request you will need to make a formal FOI request.

There may be any number of reasons to make an FOI request. The information may be about you or affect you, or you may be interested or concerned about something the government has done or is proposing to do.

Significantly, when making a FOI application you do not have to state your reasons for the request.

To make a formal FOI request, you must meet the following three requirements:

1. *The request must be in writing*⁶

You must make your FOI request in writing either by email, fax or letter. You cannot make a request over the phone or verbally at a government office. Agencies often have their own FOI request form, which is available on their website – although you don't have to use this form.

Remember you do not need to provide any reason for your request.

You may include in your application any relevant information or arguments to support the release of the information to you.

2. *The request must include the application fee*⁷

The application fee is the same for all agencies. The amount is set at 2 fee units.⁸ From 1 July 2014, the fee is set at \$26.50.⁹

The agency can waive the application fee, if you can demonstrate that it would cause hardship to you.¹⁰ You may be able to demonstrate that the fee would cause you hardship by providing proof of unemployment, or evidence of receipt of social security benefits.

⁴ FOI Act s 13. You can browse through the various Victorian agencies at www.foi.vic.gov.au.

⁵ FOI Act s 5.

⁶ FOI Act s 17(1).

⁷ FOI Act s 17(2A).

⁸ Ibid.

⁹ You can check the applicable fee at <http://www.foi.vic.gov.au/home/costs/>.

¹⁰ FOI Act s 17(2B).

3. *The request must be specific enough to enable the minister or agency to identify the documents you want*¹¹

Your request should be for specific documents or a group of documents that can be defined. For example ‘all documents related to cattle grazing in the alpine national park’. If you request every document in a very broad category, for example ‘all documents related to environmental protection’ it will not be reasonably possible for the agency to know which documents you intend to cover and they may reject your request.

If you are not sure exactly how to describe the documents you are after, you can specify the date or range of dates that the document was created in, or the author. For example ‘all correspondence from the EPA to proponents concerning works approvals between 1 July 2014 and 30 August 2014’.

Once you have completed your FOI request, you should send it to the FOI officer of the relevant agency.

Make sure you include your details on the request, and keep a copy of the request and the date that you sent it. It is also a good idea to request confirmation from the agency that they have received a request because the time limit that applies to FOI requests begins when the agency receives your request, not when you sent it.¹² Finally, your request should specify the way you want to get access to the document: do you want a hard copy of the document or are you happy with a digital copy? Or would you simply like to inspect the document at the agency’s office?¹³

5. What happens if my request is non-compliant?

Once you have lodged your FOI request the agency may find that your request is non-compliant (for example, because it is too vague) or has been sent to the wrong agency. The agency has a responsibility to help you to make your request compliant, or direct your request to the right place.¹⁴

- If your request **does not identify the documents sufficiently**, the agency must give you a reasonable opportunity to consult with the agency to make the request compliant. Only then can the agency state that the request is invalid.¹⁵
- If your request is **for documents in the possession of another agency or relates more closely to another agency’s functions**, the agency may transfer your request to that other agency.¹⁶

6. Can the agency refuse to process my request?

The agency can refuse to process your request if:

- it does not meet the requirements specified above (and you have been given a reasonable opportunity to consult);
- you have requested the same documents previously and the request has been refused and the Victorian Civil and Administrative Tribunal (VCAT) has confirmed this decision, and there are not ‘reasonable grounds’ for making the request again;¹⁷
- the request seeks only exempt documents, for example if the request is for ‘all legal advice’, which is clearly exempt under section 32 of the FOI Act;¹⁸ or
- processing the request would substantially and unreasonably divert the resources of the agency from its other operations – usually referred to as an unreasonably ‘voluminous’ request.¹⁹ If the agency wishes to refuse your request on this basis, it must send you a written notice specifying this, and given you an opportunity to consult.²⁰

11 FOI Act s 17(2).
12 FOI Act s 21.
13 FOI Act s 23(2).
14 FOI Act s 17(3).
15 FOI Act s 17(4).
16 FOI Act s 18.
17 FOI Act s 24A.
18 FOI Act s25A(5).
19 FOI Act s25A(1).
20 FOI Act s 25A(6).

The agency can also transfer the request to another agency if the document is no longer in possession of the agency or the subject matter of the document is more closely connected with the other agency.²¹

7. When must the agency respond to my FOI request?

If your request is valid, the agency has **45 days** from the date it received your request to notify you of its decision.²²

If the agency fails to provide you with a decision within 45 days, the agency is taken to have refused your request on the last day available for deciding the request.²³

8. Can the agency charge me for processing my request, other than the application fee?

The agency can charge you for the time it takes to search for the documents you have requested (but not the extra time to find the document if it is lost), and for making a copy of the documents.²⁴

If the agency considers that the charge will be greater than \$50, then it must tell you and ask whether you wish to proceed with your request.²⁵ If the agency notifies you of its estimate, it will also require a deposit of \$25, if the amount of the charge does not exceed \$100 or 50% of the charge, if the amount of the charge exceeds \$100.²⁶

Agencies are required to waive access charges if the request is a 'routine' request for a document and waive the cost of making copies of the document or for making arrangements for the viewing of the document if you are 'impecunious' and the request is for information relating to your own personal affairs.²⁷

Importantly, if the agency requires you to pay a deposit, the 45-day time limit described above begins again on the day you pay the deposit.²⁸ Potentially this means that the timeframe for deciding the request may be considerably longer if the agency informs you of the cost estimate and requirement for the deposit late in the initial 45-day timeframe.

9. What response to my request can I expect?

If your request is valid, an agency can respond to your request in three ways:

- granting your request;
- refusing your request; or
- granting part and refusing part of your request.

In each case, the agency must give you a written notice of its decision. Where all or part of the request is refused the notice must include the agency's reasons for its decision.²⁹

If your request is approved, the agency must tell you the manner in which access to the document is to be granted: this could be by providing you with a copy of the document, or by giving you the opportunity to inspect the document. Importantly, unless it would interfere with the operations of the agency, be detrimental to the document or infringe

21 FOI Act s 18(2).

22 FOI Act s 21.

23 FOI Act s 53(1).

24 FOI Act s 22; The standard charges the agency may apply are set out at Schedule 1 of the *Freedom of Information (Access Charges) Regulations 2014* and are available at <http://www.foi.vic.gov.au/find/legislation/>.

25 FOI Act s 22(3) as prescribed by the *Freedom of Information (Access Charges) Regulations 2014* regulation 8.

26 FOI Act s22(4) as prescribed by regulation 9 of the *Freedom of Information (Access Charges) Regulations 2014*.

27 FOI Act s 22(1)(g).

28 FOI Act s 22(5).

29 FOI Act s 27

copyright, the grant must be in the form that you requested.³⁰ The agency can also defer access to the documents to a later date if the document has been prepared for presentation to Parliament, a council or for release to the press.³¹

If your request is refused in whole or in part, it is because the document is an exempt document.³² These grounds are explained in section 10, below. The agency must explain its reasons for refusing access. If the agency has refused entire documents, it will usually simply not provide this document. If the agency has refused access to part of a document, but granted access to the rest of the document, and the agency considers that the applicant would wish to be given access to an edited copy and it is practicable to do so, the refused portion will be ‘blacked out’ or ‘redacted’.³³

A refusal notice must also explain that you may request a review of the decision.³⁴ The notice must specify the authority to which the application for review should be made and applicable time limits.³⁵ The particular method of reviewing the decision may depend upon the officer who makes the decision and the basis for the decision. The process for reviewing decisions is outlined below in Section 11.

10. On what basis can the agency refuse to provide documents?

The agency can refuse to provide a document if it is exempted under the FOI Act. Exemptions under the FOI Act include:

- *internal working documents*: documents prepared by an officer or Minister for the purpose of deliberative processes involved in their functions;³⁶
- *trade secrets*: documents that contain trade secrets, or other information of a business, commercial or financial nature, disclosure of which is likely to expose the business unreasonably to disadvantage;³⁷
- *confidential information*: a document that contains material obtained in confidence, which would harm the agency’s ability to obtain that information in future, or which would be exempt if it was produced by an agency;³⁸
- *public interest*: a document may be exempt on the basis that it is contrary to the public interest to release if the premature disclosure of the information would be likely to have a substantial adverse effect on the economy of Victoria (or in the case of a council have an effect on a municipal district), or that it would disclose instructions issued by the agency relating to the agency’s financial property or personnel management.³⁹

11. How can I challenge FOI decisions?

If the agency responds to your request within the time limit but refuses access to all or part of your request, you can request **review** of the decision by making an application to either the **Freedom of Information Commissioner** (the Commissioner) or **VCAT** depending on who decided the request and on what basis access was refused.

For most decisions an applications for review must be made to the Commissioner. However, applications must be made directly to VCAT where the decision:⁴⁰

- was made by a Minister or principal officer of an agency (that is, a government department head),⁴¹ or
- refuses to grant access on the basis of section 28 (cabinet documents) or section 29A (national security, defence or international relations).⁴²

³⁰ FOI Act s 23(2),(3).

³¹ FOI Act s 24.

³² FOI Act s 20(2).

³³ FOI Act s 25.

³⁴ FOI Act s 27(1)(d)(i).

³⁵ FOI Act s 27(1)(d)(ii) and (iii).

³⁶ FOI Act s 30.

³⁷ FOI Act s 34.

³⁸ FOI Act s 35.

³⁹ FOI Act s 36.

⁴⁰ FOI Act s 49A.

⁴¹ FOI Act s 49A(3).

⁴² FOI Act s 49A(4).

Applications to the Commissioner

You must apply for review within 28 days after the day on which notice of the decision was given to you.⁴³

There is no fee for making an application to the Commissioner.

If an application for review is made to the Commissioner, the Commissioner can:

- determine not to accept the application, or dismiss the review if the application is frivolous or vexatious, the applicant fails to cooperate with the review or the review would be more appropriately undertaken by VCAT.⁴⁴ If the Commissioner does decide not to accept or to dismiss the application the Commissioner's notice of the decision must include the reasons for the decision;⁴⁵
- after having made 'preliminary inquiries',⁴⁶ and only with the agreement of the applicant, refer the decision back to the agency for reconsideration.⁴⁷ If the agency makes a fresh decision and you do not agree with the fresh decision, the Commissioner must recommence the review on the basis of the fresh decision;⁴⁸
- refer the matter to a relevant authority where the matter is within the jurisdiction of the authority and the commissioner considers it appropriate to do so;⁴⁹
- facilitate a negotiated agreement between the agency and an applicant in relation to a decision that is the subject of a review.⁵⁰ In which case, the Commissioner may make a decision on review of the basis of the agreement; or
- review the decision, in which case, the Commissioner must make a fresh decision on the original application. The Commissioner's decision will have the same effect as a decision of the agency and the Commissioner must provide reasons for their decision on the review.⁵¹

If the Freedom of Information Commissioner decides to refuse to grant access to a document, you may apply to VCAT for review of the decision.⁵²

Applications to VCAT

If the original decision is made by the principal officer of an agency or a Minister (including when there is a deemed decision because the agency has not responded to your request) or the decision to refuse access to the documents is on the basis that they are Cabinet documents, matters affecting other states, or national security,⁵³ you must apply directly to VCAT for review of the decision.⁵⁴ You cannot apply to VCAT if a fresh decision has been made by the agency or a decision was made by the Commissioner under a negotiated agreement.⁵⁵

The relevant time limits within which you must make your appeal to VCAT are as follows.

- If the agency failed to respond to your original FOI request, you must make your application to VCAT within **60 days of the final day of the 45-day time limit**.⁵⁶
- If the Freedom of Information Commissioner reviews a decision of an agency and refuses to grant access to the document, you must apply within **60 days after the Commissioner gave you notice of the decision**.⁵⁷

43 FOI Act s 49B.

44 FOI Act s 49G.

45 FOI Act s 49G(4).

46 FOI Act s 49K.

47 FOI Act s 49L.

48 FOI Act s 49L(7).

49 FOI Act s 49O. Relevant authorities are set out in regulation 7 and Schedule 2 of the [Freedom of Information Regulations 2009](#) and include the Auditor-General, the Independent Broad-based Anti-corruption Commission and the Ombudsman.

50 FOI Act s 49N.

51 FOI Act s 49P.

52 FOI Act s 50(1)(b)

53 FOI Act ss 28, 29 29A.

54 FOI Act s 50.

55 FOI Act s 50(3G)

56 FOI Act s 52(1).

57 FOI Act s 52(5).

- If the decision is **NOT reviewable by the Commissioner** (a decision by a Minister or principal officer of an agency or a decision refusing to grant access on the basis of section 28 (cabinet documents) and section 29A (national security, defence or international relations)), **you must apply within 60 days of the notice.**⁵⁸

The application fee for a VCAT review of an FOI decision is, at 1 July 2014, \$380.00. There is no fee if the agency has failed to make a decision within the 45-day time limit and so is deemed to have refused the request. The application form is also available on the VCAT website.

Grounds for reviewing a decision

When challenging a decision to deny an FOI request it is important to look carefully at why the request was refused in the first place (recall that the agency must give a reason for deciding that the document is an exempt document). Try to directly challenge the reasoning behind the decision and explain why the decision is incorrect and the document is not an exempt document. These can sometimes be very technical arguments; if you are unsure about how to approach the review, particularly in VCAT, you should seek legal advice.

12. Where can I get more information?

More information about the FOI Act and the FOI request process is available on the State Government's FOI website, www.foi.vic.gov.au. Information related to the Freedom of Information Commissioner can be found at the Freedom of Information Commissioners website, www.foicommissioner.vic.gov.au.

If you require specific legal advice about getting access to information, making an FOI request, or appealing an FOI request, you can contact:

- **Community Environmental Legal Service:** A program of Environmental Justice Australia, the Community Environmental Legal Service can provide legal advice and sometimes representation in Victorian matters which may have a significant impact on the environment or where the matter raises important issues of public policy or with respect to the operation of environmental laws.
Phone: 8341 3100 (metropolitan) or 1300 336 842 (regional)
Website: www.envirojustice.org.au/cels
- **Victoria Legal Aid:** Victoria Legal Aid is a state-wide organisation that can provide legal assistance to socially and economically disadvantaged people in Victoria.
Phone: 9269 0120 or 1800 677 402
Website: www.legalaid.vic.gov.au
- **Community Legal Centres:** Community Legal Centres are independent community organisations that provide legal advice to the public, particularly for those facing economic and social disadvantage. Victoria has 49 Community Legal Centres based all around the State. To find your nearest Community Legal Centre, contact the Federation of Community Legal Centres.
Phone: 9652 1500
Website: www.communitylaw.org.au

⁵⁸ FOI Act s 52(1).

About the Community Environmental Legal Service (CELS)

Providing legal help to Victorians as part of the Community Environmental Legal Service (CELS) program is one of the many ways Environmental Justice Australia pursues access to justice.

The CELS program provides legal help for Victorians through the publication of kits, fact sheets and videos which provide accessible and practical environmental law information to the Victorian community. Through the CELS program we also conduct legal workshops in Victoria, run by one of our expert environmental lawyers to suit the needs of community groups or groups of individuals concerned about or impacted by environmental issues.

Environmental Justice Australia believes that all Australians have a right to clean air, clean water, and intact ecosystems. It's also crucial that our communities have a real say over what happens to our environment, and that means participating in decision-making processes. We're working to pursue environmental justice for communities affected by environmental harm by supporting their right to information, their right to participate in the legal and legislative process, and their right to participate in decision-making about their communities and the places where they live.

If you have a query about anything in this Fact Sheet, or would like the Community Environmental Legal Service to assist you to protect the environment, please call us:

8341 3100 (metropolitan) or 1300 336 842 (regional)

Donate at: www.envirojustice.org.au/donate

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While all care has been taken in preparing this publication, it is not a substitute for legal advice in individual cases. For any specific questions, seek legal advice. Environmental Justice Australia accepts no responsibility for any loss or damage suffered by people relying on the information on this fact sheet.

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