

## Making an application under the *Freedom of Information Act 1982* – an overview

### Your rights under the FOI Act

The Commonwealth *Freedom of Information Act 1982*, as modified by the *Education and Care Services National Law* and associated national regulations – referred to throughout this Guide as the FOI Act – provides members of the public with legally enforceable rights to:

- i. access documents held by the Australian Children’s Education and Care Quality Authority (ACECQA) and each of the state and territory education and care Regulatory Authorities (the **ECS agencies**) unless the documents are exempt (section 11 of the FOI Act); and
- ii. seek an amendment of, or annotation to, their personal information held by an ECS agency (section 48 of the FOI Act).

This Guideline outlines the basic processes associated with seeking access to the documents of ECS agencies under the FOI Act. A separate Guideline deals with seeking an amendment of, or annotation to, personal information held by an ECS agency.

### Purposes of the FOI Act

The objectives of the FOI Act are set out in section 3 of the Act. The Act is built on the principle that government-held information is a public resource and that access to it increases scrutiny, discussion, comment and review of government activities, and promotes better informed decision-making.

Subject to the provisions of the Act, the ECS agencies are required to publish certain information and every person has a right of access to documents held by the agencies. The Act requires the ECS agencies to perform their functions and powers under the Act, as far as possible, to enable and promote public access to information promptly and at the lowest reasonable cost.

### Who can make a FOI request?

Under and subject to the FOI Act, ‘every person’ has a legally enforceable right to obtain access to a document held by an ECS agency, other than an exempt document. The Act

does not require the person making the request to be an Australian citizen or resident. Applicants may also be a company, organisation or another agency.

## Reasons for a FOI request are not required

You are not required to give a reason for your request to access documents held by an ECS Agency, and subject to the provisions of the Act, a person's right of access is not affected by any reason they do give for their request or an agency's belief as to why the person is seeking access (section 11(2) of the Act).

## Anonymity

A FOI applicant does not have to disclose their identity when making a FOI request. They can use a pseudonym or they can have another person make a request on their behalf. However, in some cases the applicant's identity will be important to an ECS agency in determining whether or not to give access to a document – for example, if an applicant is requesting access to a document that contains personal or business information. A person is more likely to be granted access to documents that contain their own personal information and a business is more likely to be granted access to documents that contain information about its own commercial or financial affairs. In such cases an ECS agency may seek to confirm an applicant's identity.

## How to make a FOI request

Sections 15(2) and 15(2A) of the FOI Act sets out the requirements for a FOI request to be valid under the Act. The Act requires an ECS agency to assist applicants to ensure their request meets these requirements.

A request **must**:

- **Be in writing.** For example, it may be made by completing an online application form provided by the ECS agency, a letter, or an email.
- **Identify that the request is made under the Commonwealth Freedom of Information Act.** If this is not done an ECS agency will seek confirmation that the applicant understands the request is made under the Commonwealth FOI Act and is subject to the provisions of the Act.
- **Describe the document(s) sought.** The description does not need not be precise – for example a document does not need to be named by its correct title. However, sufficient information needs to be provided to enable the ECS agency to identify what is being sought. If sufficient information is not provided, the agency will contact the applicant and request further details.
- **Contain the applicant's address for notices from the ECS agency** – this may be an email address.

- **Be sent to the ECS agency in any of the following ways:** either to a postal address of the ECS agency provided in a current telephone directory, by hand delivery to such an address, or electronically to email, facsimile or online lodgement addresses provided by the agency.

## Processing your FOI request

On receipt of a valid FOI request, an officer authorised by the ECS agency will process your request. You should be sent an acknowledgement that your request has been received by the agency within 14 days. In some cases, an agency may ask you for further information about your request and may work with you to narrow its scope if it is unclear or too broad.

## Transferring your FOI request to another agency

In some situations, an ECS agency may decide that another agency is more appropriate to deal with your request. If this is the case the agency will discuss transferring your request with you. If your FOI request is transferred to a second agency your application, including your contact details, will be provided to the second agency.

## Refusing your FOI request – practical refusal

Under section 24 of the FOI Act an ECS agency has the power to refuse to process your request if the agency considers:

- the work involved would substantially and unreasonably divert the resources of the agency from its other operations; and/or
- your application does not provide sufficient information to enable the agency to identify the document you are requesting.

This is called a practical refusal reason. If the agency does decide a practical refusal reason exists, the agency must notify you in writing of the practical refusal reason and provide details of a contact officer with whom you can consult. You have 14 days in which to consider revising your request. The agency must assist you in this process.

## Processing your request within the requirements of the FOI ACT

The ECS agency will assess your FOI request in accordance with the provisions of the FOI Act. While the FOI Act is founded on the principle of making government held information available to members of the public, the Act does recognise that there may be harm done in certain circumstances by the release of documents. Accordingly, under section 11A(4) of the FOI Act, an ECS agency is not required to give a person access to a document at a particular time if, at that time, the document is an “exempt” document.

An “exempt” document is one which is exempt, or conditionally exempt where disclosure would be contrary to the public interest, under Part IV of the FOI Act.

## Exempt documents

Division 2 of Part IV of the FOI Act sets out 10 categories of documents that are exempt from disclosure if they meet the criteria to establish the particular exemption. The exemption categories and the relevant sections of the Act are:

- documents affecting national security, defence, or international relations (s33)
- Cabinet documents (s34)
- documents affecting the enforcement of law and the protection of public safety (s37)
- documents to which secrecy provisions of enactments apply (s38)
- documents subject to legal professional privilege (s42)
- documents obtaining material obtained in confidence (s45)
- parliamentary budget office documents (s45A)
- documents the disclosure of which would be in contempt of parliament or the courts (s46)
- documents disclosing trade secrets or commercially valuable information (s47)
- electoral rolls and related documents (s47A).

## Conditionally exempt documents

Division 3 of Part IV of the FOI Act sets out 8 categories of documents that are conditionally exempt from disclosure. If a document meets the criteria of a conditional exemption the decision maker must apply “a public interest test” to determine if giving access to the document would be contrary to the public interest. Access cannot be refused simply because a document falls within a conditional exemption category. It must also be contrary to the public interest to release the document, otherwise access must be granted. The FOI Act is weighted towards disclosure of information and a document may be edited to remove certain information to enable its partial release.

If an ECS agency does decide that, on balance, it is not in the public interest to disclose a conditionally exempt document, the decision maker must include the public interest factors that they took into account in the decision notice they provide to the FOI applicant (section 26(1)(aa)).

The conditional exemption categories and the relevant sections of the Act are:

- Commonwealth–State relations (s47B)
- deliberative processes (s47C)
- financial or property interests of the Commonwealth (47D)
- certain operations of agencies (s47E)
- personal privacy (47F)
- business (other than documents to which the exemption under s47 applies) (s47G)

- research (s47H)
- the economy (s 47J)

## Processing timeframes

ECS agencies must operate within the timeframes set out in the FOI Act when processing a FOI request. Section 15(5(b)) of the FOI Act stipulates that agencies must notify an FOI applicant of a decision on their request as soon as practicable but no later than 30 days after the FOI request has been received. However, the FOI Act also allows that processing time to be extended by the following periods:

- **30 days** to enable the agency to consult with any third parties who are affected by your request – for example individuals or businesses whose information is included in the documents you have requested (see section below for further information);
- **up to 30 days** with your written agreement where an agency is unable to meet the initial timeline;
- **30 days or another period** determined by the National Education and Care Services FOI Commissioner due to the volume and complexity of your request. ECS agencies must apply to the Commissioner for this extension to the processing time and set out their reasons for their application. The Commissioner may not agree to grant an extension. However, if they do decide an extension of time is justified, they will inform you directly of the extended period agreed to. The Commissioner may also consult you before deciding whether to grant the agency further time to process your request;
- **a period of time determined** by the National Education and Care Services FOI Commissioner where there has been a “deemed refusal decision” by the ECS agency – that is, the agency has not provided you with a decision about your FOI request within the 30 days period under section 15(5)(b) of the FOI Act, or that period as extended in one of the ways listed above. An ECS agency may apply to the Commissioner for further time to process the request.

Further information about processing timeframes under the FOI Act is available on the NECSOPIC website at <https://necsopic.edu.au/advice-guidance/advice-for-agencies/>

## ECS Agency consultation with affected third parties

In processing your FOI request an ECS agency may need to consult with a third party where documents subject to your FOI request affect Commonwealth–State relations, or are business documents, or are documents that affect another person’s privacy.

Where an agency finds that disclosure of a document would likely affect Commonwealth–State relations the agency **must** consult with the relevant jurisdiction before giving access to a document (section 26A of the FOI Act).

Where an agency finds that disclosure of a document could affect a person’s business or professional affairs, an organisation’s business, professional or financial affairs, or another person’s privacy, the agency must consult with the relevant third parties **if it is reasonably practical to do so** (sections 27 and 27A of the FOI Act).

If consultation is required, the processing time for the ECS agency to decide your FOI request is automatically extended by 30 days.

## Fees and charges associated with making an FOI request

There is no application fee for making an FOI request. However, an ECS agency does have the discretion to impose a charge, or not, for activities related to processing your FOI request or providing you with access to documents as a result of your request. The activities and maximum levels of charges that may be imposed are set out in Schedule 1 of the *Freedom of Information (Charges) Regulations 2019*. The most common charges are summarised in Table 1 below.

**Table 1**

Activity	Maximum allowable charge
<b>Search and retrieval</b> – the time an ECS agency spends searching for or retrieving a document	\$15.00 per hour
<b>Decision making</b> – the time an ECS agency spends in deciding to grant or refuse a FOI access request, including examining documents, consulting with other parties, and making deletions	\$20 per hour after the first 5 hours (which are free)
<b>Preparing a written transcript</b> from a sound recording, shorthand or codified form	\$4.40 per page of transcript
<b>Making photocopies</b>	\$0.10cents per page
<b>Supervising Inspection</b> – supervision by an agency officer of you inspecting documents or listening to or viewing an audio or visual recording at the agency’s offices	\$6.25 per half hour or part thereof
<b>Postage or delivery</b> of a hard copy of a document at the applicant’s request	Cost of post or delivery

If an ECS agency does decide to impose a charge they must give you a written notice under section 29(1) of the FOI Act containing at least the following information:

- an estimate of the charge payable and the basis for it;
- the amount of any deposit payable by you – note that under the Charges regulations, where an estimated charge is between \$20 and \$100, the agency can ask you to pay a \$20 deposit; if the estimated charge exceeds \$100, the agency can ask you to pay a 25% deposit before it processes your request;

- your right to contend the charge and request that it be waived or reduced;
- the requirement for the agency to consider whether the payment of the charge would cause financial hardship to you and whether giving access to the document without charge would be in the public interest;
- your obligation within 30 days (or a further period agreed to by the agency) to agree to pay the charge, contend the charge, or withdraw the FOI request;
- advice that the FOI request will be taken to have been withdrawn if you do not respond to the notice within the designated period.

Any deposit you may pay is not refundable unless the agency subsequently waives the charge or fails to assess your FOI request within the statutory timeframes referred to above.

An agency cannot levy processing charges for requests for access to documents that contain only your personal information.

### Notifying you of a decision on your FOI request

After considering your FOI request under the requirements of the FOI Act, the ECS agency must advise you in writing of the outcome. In general, the agency may decide to:

- grant you access to all the documents you requested in full; or
- grant you access to some of the documents you requested while withholding access to others;
- grant you partial access to the documents you requested by providing you with edited copies of documents after removing exempt or irrelevant material;
- refuse you access to any of the documents you requested on the basis that they are exempt;
- refuse access under section 24A of the FOI Act on the basis that the documents you seek do not exist, cannot be found, or were not received from a contractor to the agency;
- defer access to the requested documents until a later date under section 21 of the FOI Act;

### Notice must include a statement of reasons for the decision

If an ECS agency refuses any part of your FOI request, or defers giving you access to the documents you requested, the FOI Act requires the agency to provide you with a “statement of reasons” for the refusal (section 26(1) of the Act). The statement must include at least details of:

- the decision;
- the findings on any material questions of fact;
- the evidence or basis for the findings;

- the reasons for the decisions, including any public interest factors that were taken into account in deciding to refuse access to a conditionally exempt document;
- the name and designation of the person making the decision;
- details about your rights to seek both an internal agency, and a NECS FOI Commissioner, review of the decision, or make a complaint about the agency's handling of your matter and the procedures for doing so;

## Providing you with access to the documents

If the ECS agency decides to give you access to a requested document(s), that access should be given as soon as practicable, but only after:

- you have paid any charges the agency has advised you of; and
- all opportunities a third party may have to seek a review of the ECS agency's decision have run out and the decision still stands or is confirmed.

## Your right to seek a review of the decision on your FOI request

Under the FOI Act you have the right to seek a review of the ECS agency's decision on your FOI request. You may seek **either or both** an internal review by the agency itself and an external review by the NECS FOI Commissioner if the agency refuses to grant access to the document you requested – an access refusal decision. An access refusal decision is defined in section 53A of the FOI Act. It includes a decision by the agency that:

- a document you are seeking does not exist;
- grants you only partial access to a document you requested;
- refuses access to a document you requested in full;
- defers access to a document for a specified period under section 21; or
- is made under section 29 of the FOI Act relating to the imposition or amount of a charge to be paid with respect to processing your FOI request or providing access to documents.

A third party to a FOI request, who has been consulted by the ECS agency in accordance with the provisions of the Act during the decision-making process, may also seek a review of a FOI decision to grant you access to a document – an access grant decision. An access grant decision is defined in section 53B of the FOI Act. Third party consultation by ECS agencies is required with:

- the Commonwealth or a state under section 26AA;
- a business entity under section 27;
- or an individual or legal representative of a deceased person under section 27A

For further information about seeking a review of an ECS agency decision see the NECS FOI Commissioner Guide “Your review rights” at [Advice for Individuals - National Education & Care Services, FOI & Privacy Commissioners & Ombudsman \(necsopic.edu.au\)](https://necsopic.edu.au/Advice-for-Individuals-National-Education-Care-Services-FOI-Privacy-Commissioners-Ombudsman)

## Document Currency

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*The information in this Guideline is of a general nature. It is not a substitute for legal advice.*

*Additional information on the operations of the FOI Act can be found in the FOI Guidelines issued by the Australian Information Commissioner. Those Guidelines provide information and guidance on the interpretation, operation, and administration of the Act. They have been formally adopted by the NECS FOI Commissioner. ECS agencies must have regard to those Guidelines when exercising their powers under the FOI Act. A copy is available at <https://www.oaic.gov.au/freedom-of-information/foi-guidelines/>*