



Freedom of Information Procedure

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Related Policy *Freedom of Information Policy (ES03001)*

Scope

Information and documentation produced by and available to CFA are subject to public access under the *Freedom of Information Act 1982*. As a statutory authority CFA is required to conduct itself in an open and accountable manner, and is therefore required to disclose certain information upon request.

CFA's Freedom of Information (Fol) Officer deals with applications for access to CFA information that is received under the Freedom of Information Act.

Definitions

The following definitions apply specifically to this policy:

Fol

Freedom of Information.

The Act

The *Freedom of Information Act 1982*.

Agency

For the purposes of the Freedom of Information Act, *agency* means 'department, council or prescribed authority'. CFA, as a statutory authority, is therefore included under the term agency.

Ombudsman

The Ombudsman referred to within the *Freedom of Information Act 1982* and this procedure is Victoria's Ombudsman appointed under the *Ombudsman Act 1973*.

VCAT

The Victorian Civil and Administrative Tribunal (VCAT) is the tribunal responsible for hearing and determining appeals under the *Freedom of Information Act 1982*.

Procedure Objective

The *Freedom of Information Act* directs agencies to administer it with a view to making the maximum amount of information available promptly and inexpensively.

This procedure outlines how CFA meets the requirements of the Act and deals with information requests under the Act.

Procedure

1 The Freedom of Information (Fol) Environment

Working in the Fol environment means acknowledging and understanding the intention and scope of the *Freedom of Information Act 1982* (the Act), and adopting work practices which support compliance with both the letter and spirit of the law and minimise anxiety over the disclosure of information.

1.1 Freedom of Information (Fol) legislation

The Act covers all aspects of Fol decision making in Victoria. The Act is the legal authority under which Fol decisions must be made and it imposes legal responsibilities on government departments and agencies in its administration.

The Act can be accessed on the internet at <http://www.dms.dpc.vic.gov.au>

1.2 The Right of Access

The right of access conferred by the Act is legally enforceable. It applies to every person and all documents held by state government departments and agencies subject to specific exceptions provided for by the Act. The right of access under the Act does not extend to documents that are generally available to the public for inspection or purchase.

The Act specifies the types of documents that must be made available to the public for inspection or purchase. These include guidelines and instructions used in making decisions that affect the public.

The Act also entitles persons to request that information concerning their personal affairs be amended where it is inaccurate, incomplete, out of date or would give a misleading impression.

1.3 What is a Document?

The Act grants access to *documents*. The definition of a document in the Act included written documents as well as books, maps, plans, graphs, drawings, photographs, email messages, computer tapes, and disks (including hard drives), video and audio tapes. It also includes draft documents and notes.

1.4 Document of an Agency

The Act grants access to *documents of an agency*. This means documents in the agency's possession including *constructive possession*. Constructive possession refers to documents which may not be in the physical possession of the agency but which the agency can legally access at any time. This could include documents held by consultants or staff members 'off site'.

1.5 CFA's Obligations

The Act imposes obligations on CFA to:

- 1.5.1 carry out a thorough and diligent search for documents that fall within the scope of a request;
- 1.5.2 grant access to discovered documents, unless they fall within any of the exemptions provided for by the Act;
- 1.5.3 advise the applicant, with forty-five **45 days** of the request being received at CFA, whether or not access will be granted;
- 1.5.4 assist an applicant to make a valid request that provides the necessary information required to identify the document(s) sought;
- 1.5.5 advise the applicant of their right to internal review or appeal, or their right to complain to the Ombudsman where access is refused or documents cannot be located.

1.6 Administration of the Freedom of Information Act 1982

The Act directs agencies to administer it with a view to making the maximum amount of information available promptly and inexpensively. Furthermore, the Act cannot be used to prevent or discourage disclosure of a document where it is proper or required by law. This extends even to exempt documents.

This reflects the effect of the exemption provisions of the Act that do not prohibit disclosure but merely release an agency from any compulsion to disclose exempt documents. It also leaves the way open to disclose documents other than under the provision of the Act where it is appropriate or where it is required by other legislation.

Relevant sections of the *Freedom of Information Act 1982*:

- Objective of the Act Section 3
- Definitions Section 5
- Right of Access Section 13
- Administration of the Act Section 16
- Request for Access Section 17

2 Working in a Freedom of Information (Fol) Environment

2.1 Myths and Misconceptions

We need to have an accurate understanding of the scope and impact of the Act in relation to CFA documents. The following dispel some incorrect assumptions.

2.1.1 *There is no such thing as a 'Fol proof' document or class of documents*

Every document must be considered on its merits – word by word, line by line. There is no way to guarantee the future exemption of a document. A heading such as *Confidential or Internal working document* may help to clarify a document's status in some cases, but in the end the decision will be made on the basis of its content.

2.1.2 *Exemption does not protect a document from disclosure*

In many cases, the Victorian Civil and Administrative Tribunal (VCAT) has the power to order disclosure of exempt documents where there is an overriding public interest in their disclosure.

2.1.3 *Internal working documents are not automatically exempt*

They can only be exempt in so far as they do not contain purely factual information and their disclosure is contrary to the public interest. The onus is on CFA to prove that disclosure is contrary to the public interest and CFA is required to explain the public interest grounds in the decision.

2.1.4 *Documents held off site are still covered by the Act*

These documents are still considered to be in the possession of CFA and may be disclosed.

2.1.5 *Documents of a commercial nature do not automatically attract an exemption*

These are subject to a test as to whether they would expose a business or CFA unreasonably to disadvantage and also subject to a public interest test in a VCAT Appeal.

Bearing the above in mind we need to carefully consider our document management practices.

2.2 Document Management

There are four aspects of responsible document management – creation, destruction, storage and content.

2.2.1 *Document Creation*

Often the documents that cause the greatest anxiety are those that did not need to be created or kept. Whenever you create a document, consider whether it is necessary in the first place. This particularly applies to email messages but may also apply to file notes, telephone messages, and communications between individuals.

2.2.2 *Document Destruction*

When a document is superseded there is usually little point in keeping earlier drafts. If they are not actually needed, they should be destroyed. Similarly, where a document does not serve to enlighten or explain any particular matter for posterity it should also be destroyed. However there are legal constraints on the destruction of documents.

The destruction of government documents is covered under the *Public Records Act 1973*. Any document forming part of an audit trail in satisfying legal or financial requirements should not be destroyed. If there is any doubt about whether a particular document may be destroyed you should consult the Manager Administrative Services. A copy of the current *General Disposal Schedule for Common Administrative Records*, issued by the Public Records Office, is also available from Administrative Services.

2.2.3 Document Storage

Before attaching any document to file, consider:

- a. Is it necessary in order to make sense of the issue it relates to?
- b. Does it have any direct critical relationship to any other document on the file?
- c. Will it help readers to understand the matter in the future or is its relevance very limited?
- d. Does it have any official status?

2.2.4 Document Content

Always assume anything you write will find its way into the public arena. If not through FoI, it could be disclosed under discovery in the course of litigation or even through unauthorised disclosure. Some tips to avoid unnecessary pain in the case of disclosure are:

- a. Never make gratuitous or personal comments. Try to ensure that any opinion you record can be supported by other documentary evidence.
- b. Do not make comments you are not qualified to make, for example, medical opinions such as: "He became hysterical". These can be better expressed by recording the facts of the behaviour such as: "He seemed to become agitated and raised his voice". Think about how you would like your behaviour to be recorded in a government record.
- c. Avoid making handwritten annotations on typed documents especially if they record a personal opinion.
- d. Avoid emotional displays in your handwriting – heavy underlining, multiple exclamation marks and the like may give greater significance to a document or comment than it deserves.
- e. Indicate the status of a document – whether it is a draft, submission, confidential etc. This may limit the interest it has for a third party or the use to which it might be put.

3 Progress of a Freedom of Information (FoI) Request

If you are ever involved in a FoI request, either as an applicant or as someone involved in the processing, it will help to understand the essential steps in the progress of a request to finalisation. Of course some variations occur depending on the circumstances of each request.

3.1 Processing the Request and Making the Decision

3.1.1 Receipt of Request

The Freedom of Information Officer ensures that the request complies with the legislative requirements and sends an acknowledgement of receipt to the applicant.

To comply, the request must be in writing, provide sufficient information to identify the documents sought and be accompanied by a \$22.70 application fee. Any outstanding issues are followed up with the applicant.

The applicant may make their request by sending a letter or a completed *FoI Request for Information Form* to CFA's Freedom of Information Officer.

3.1.2 *Search for Documents*

The Freedom of Information Officer sends search requests to responsible Directors and/or General Managers who advise what documents they have that meet the terms of the request. A search is also done of registry files.

Where documents require extraction of computer data, consultation is undertaken with the IT Department.

3.1.3 *Examination of Documents*

The documents produced by the search are examined by the Freedom of Information Officer to identify relevant documents and exempt material. This can be a very time consuming process depending on the volume and content of the documents.

3.1.4 *Decision*

The Freedom of Information Officer prepares the decision letter. This includes whether access is to be granted, the form of access, details of any exemptions claimed, explanation of any access charges applicable under the Act and an explanation of the applicant's rights.

3.2 **Applicant's Response**

The applicant may pay access charges, seek internal review within twenty-eight **28 days** of receipt of decision or complain to the Ombudsman. The applicant may do all of these.

3.2.1 *Payment of Access Charges and Release of Documents*

In almost all cases payment of the access charges is required before access may be given, that is before the documents are released. Once payment is received access is given as soon as possible following preparation of the documents, for example deletion of exempt material, photocopying, preparation of electronic data on disk etc.

If the amount of the access charge requires a deposit to be paid then preparation of the documents will take place on receipt of the deposit and access given on receipt of the balance.

3.2.2 *Request for Internal Review*

The Act requires that the principal officer (Chief Executive Officer (CEO)) make a new decision on the FoI request within fourteen **14 days** of receipt of an internal review request. The CEO may decide to affirm, set aside or vary the original decision. The internal review decision must advise the applicant of their right to appeal to VCAT within sixty **60 days** of receipt of the decision.

3.2.3 *Ombudsman Complaint*

The applicant may complain to the Ombudsman about the way the request has been handled or, more specifically, where the decision advises that the requested documents do not exist or cannot be located or regarding the amount of access charges.

CFA will need to provide a comprehensive report to the Ombudsman on what has taken place. Where the Ombudsman investigates claims that documents cannot be found or do not exist, a full report on all action taken to find the documents must be provided. In some cases the Ombudsman may want to carry out another search.

If the complaint is about access charges, the Ombudsman may issue a certificate to the applicant to the effect that the matter is of sufficient importance to be dealt with by VCAT, thus enabling the applicant to lodge an appeal concerning the charges.

Ombudsman complaints must be dealt with urgently.

3.3 Appeal to Victorian Civil and Administrative Tribunal (VCAT)

The applicant may lodge an appeal to VCAT within sixty **60 days** of receipt of the internal review decision. The appeal process can be protracted involving a number of administrative mentions and directions hearings before the appeal is actually heard. CFA's main concern is with preparing the *Section 49 statement* and witness statements.

3.3.1 Preparation of Section 49 Statements

Section 49 of the *Victorian Civil and Administrative Tribunal Act* requires that a statement must be lodged with the tribunal within twenty-eight **28 days** of receipt of notification of the appeal application. It involves:

- a statement of the reasons for the decision and findings on material questions of fact;
- copies of all documents relevant to the decision under review including correspondence between CFA and the applicant and all documents for which exemption is claimed.

The Freedom of Information Officer will provide copies of relevant documents to CFA's lawyers who will then prepare the Section 49 statement.

3.3.2 Preparation of Witness Statements

Witness statements are required to be served no later than twenty-eight **28 days** prior to the hearing date.

Typically CFA will have one or two witnesses appearing and each will need to prepare a witness statement. This is always done with assistance from CFA's lawyers. Appropriate witnesses will be decided in consultation between the Freedom of Information Officer and relevant Directors and/or General Managers. The choice of witness will depend on the issues central to the grounds for appeal and the exemptions claimed.

Drafting a witness statement can take considerable time, often requiring two meetings with lawyers and ongoing communication by phone, fax and email to finalise the statement. The witness statement forms the body of evidence for the witness and must be as complete as possible as no new evidence may be introduced at the hearing.

When the witness statement is served, it is served on both the Tribunal and the applicant. The applicant will also serve witness statements and any statement of public interest. Generally CFA will have seven **7 days** to provide further evidence from our witnesses in response to the applicant's statements.

3.3.3 The Appeal Hearing

At the hearing, the witness will be asked to swear to the truth of the content of the witness statement and may then be cross examined by counsel for the applicant. The Tribunal will generally take about a month to hand down its decision. While CFA may appeal the Tribunal's decision to the Supreme Court, it would need to have very strong grounds to do so. The Minister is required under the Act to give an explanation to Parliament for any decision to appeal a VCAT Fol decision.

4 Statutory Time Frames

The main statutory time frames that relate to Fol are:

Event	Time Frame
Notify applicant of decision on access to documents	45 days from receipt by CFA of the request. There is some variation where a request is transferred from another agency
Notify applicant of decision on amendment of personal information	30 days from receipt of request for amendment.
Applicant may request internal review	28 days from receipt of original decision.
Notify applicant of internal review decision	14 days from receipt of request for internal review.
Applicant may lodge appeal with VCAT	60 days from receipt of internal review decision.

Table 1: Fol Statutory Time Frames

If a decision is not notified within the statutory time frame, the applicant may appeal directly to VCAT. No application fee is payable and VCAT deems that a decision to refuse access has been made. Significant legal costs are incurred by CFA in running such a case.

5 Search Requests

Generally search requests will be distributed to responsible Directors and General Managers within two **2 days** of receipt of the Fol request. The deadline for response will usually be set at fourteen **14 days** from the date of the search request. If no relevant documents are held in the directorate/area, it is imperative that the Freedom of Information Officer is advised of this immediately to allow time to make further enquiries. For this reason it is important to deal with each search request urgently rather than waiting until closer to the deadline.

The *front page* of a search request provides for:

- certification by the Director and/or General Manager that CFA's obligations under the Act are understood and that a diligent search has been undertaken;
- information needed to calculate access charges in relation to search time;
- suggestion of other possible areas to search.

Completing the front page is important. It records our search efforts and may form the basis of dealing with any enquiries from the Ombudsman concerning documents that are claimed not to exist or have not been located.

The final decision on the relevance or otherwise of any document will be made by the Freedom of Information Officer following examination of the document and consultation with the relevant Director and/or General Manager. Documents must not be withheld from the Freedom of Information Officer simply because their relevance is uncertain. Where access is requested to a file, the entire file must be provided to the Freedom of Information Officer.

The *back page* of a search request contains instructions and information about CFA's obligations under the Act.

6 Customer Service

Freedom of Information is a customer service issue and should be dealt with accordingly. Fol applicants are customers of CFA and should expect to receive the highest standards of service, encompassing:

- prompt, accurate and impartial decision making
- full explanation of decisions and applicants' rights of review and appeal
- minimisation of bureaucratic officiousness
- full and helpful responses to enquiries
- proper consideration of requests for the waiver of fees and charges
- quick and practical problem resolution
- observance of duty of care

7 Public Accountability

The *Freedom of Information Act 1982* operates in conjunction with the *Administrative Law Act 1978*, the *Victorian Civil and Administrative Tribunal Act 1998* and the *Ombudsman Act 1973* to form an administrative law package designed to increase the openness and accountability of government. As such it demands high priority and needs to be seen as an integral and essential part of our business. The Attorney General's covering letter to the *Guidelines to Assist the Administration of the Freedom of Information Act*, makes Government's intention in this respect very clear.

Responsibilities

All staff share responsibility for meeting CFA's obligations under the Act. In most cases this will mean carrying out thorough searches for documents within specified time frames. The following explains the main roles.

1 Principal Officer

In CFA this is the Chief Executive Officer (CEO). The CEO is responsible for:

- the overall administration of the Act and is charged by the Attorney General to ensure that all CFA staff are aware of their obligations under the Act and the Attorney General's *Guidelines for the Administration of the Freedom of Information Act*,
- conducting internal reviews of Fol decisions.

2 Freedom of Information Officer

CFA's Manager – FOI, Privacy & Appeals is the appointed Fol Officer for CFA, and as such is authorised to make decisions under the Act and takes immediate responsibility for the quality of Fol decisions and the processing of requests.

CFA's Freedom of Information Officer is responsible for:

- coordinating the FoI process including acknowledging requests, requesting searches, examining documents for exempt material and decisions;
- advising the Manager – Government Liaison and Protocol of any topical, Ministerial requests.
- coordinating VCAT appeals with CFA's legal advisors and CFA witnesses;
- providing advice on some matters concerning the application of the Act in particular cases and dealing with queries from staff and the public;
- advising the Executive Manager Public Affairs in advance of release of documents where necessary.

3 Directors and General Managers

Directors and General Managers are responsible for:

- ensuring that search requests are responded to within the specified time frame;
- certifying that a thorough and diligent search for documents has been carried out;
- certifying that they have sighted all of the documents that are to be disclosed;
- identifying issues which may arise from the disclosure of information and developing an appropriate response in consultation with the Executive Manager Public Affairs who will also consult with Manager – Government Liaison and Protocol to prepare Ministerial briefing notes if required.

4 All Staff

All CFA staff members are responsible for:

- familiarising themselves with the *Attorney General's guidelines*.
- adopting appropriate document management practices.
- prioritising search request to ensure that statutory time frames are met.
- cooperating fully with the Freedom of Information Officer.

Links and References

- Charges for Reports Policy (SS09001)
- Code of Conduct Policy (*to be issued*)
- Communications Policy (*to be issued*)
- Document Management Policy (*to be issued*)
- Public Relations Policy (*to be issued*)
- *Freedom of Information Act 1982* (Vic)
- *Ombudsman Act 1973* (Vic)
- *Victorian Civil and Administrative Tribunal Act 1998* (Vic)
- *Administrative Law Act 1978* (Vic)
- Attorney General's Guidelines for the Administration of the Freedom of Information Act
http://intra/exec_services/pdfs/foi_guidelines.pdf

- Public Records Office Victoria
<http://www.prov.vic.gov.au/gservice/standard/diposal.htm>
 - Freedom of Information Process Flowchart (attached)
 - Freedom of Information Request Form (attached)
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Procedure Manager

Freedom of Information Officer

Directorate: Executive Services

Procedure Stakeholders

- Chief Executive Officer
- Freedom of Information Officer

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Freedom of Information Process Flowchart

