



Information Act Guideline

FOI and "old" information (pre-July 1993)

In brief

The Freedom of Information (FOI) scheme applies to:

- all information created or received on or after 1 July 1993;
- personal information about an individual whenever it was created or received;
- other information created or received before July 1993 ("old" information) if —
 - the information is reasonably necessary to enable a person to properly understand information to which the person has been provided with access under the *Information Act*; or
 - the Information Commissioner has decided (on application) that the information falls within a class of information in respect of which competing interests are likely to be balanced in favour of disclosure.

FOI applies to personal information whenever created

The FOI provisions apply to personal information held by a public sector organisation regardless of when it was created or received.

Personal information is government information from which a person's identity is apparent or is reasonably able to be ascertained. It includes information about staff of an organisation.

Old information needed to understand information to which access has been granted

The FOI provisions apply to non-personal government information created or received before 1 July 1993, if the information is reasonably necessary to enable a person to properly understand information to which the person has been provided with access under the *Information Act*.

For example, written reasons for a decision made in October 1993 may rely on or incorporate by reference, a submission, letter or report produced in March 1993. If a decision is made to grant access to the reasons for decision, the organisation would have to consider whether the submission, letter or report is reasonably necessary to give a proper understanding of the reasons for decision.

If it is reasonably necessary, the March 1993 document would be subject to the FOI access provisions. However, that finding would not necessarily require disclosure. It would still be necessary to consider whether all or part of the document should be disclosed, taking into account any relevant provisions of the *Information Act*.

Old information of a kind where balance in favour of disclosure

An application can be made to the Information Commissioner to decide that the FOI access provisions apply to non-personal information created or received before July 1993 that falls within a class of information in respect of which competing interests are likely to be balanced in favour of disclosure.

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Approach the organisation first

An FOI access applicant who is seeking access to old information should first approach the public sector organisation that holds the information, to establish its attitude to disclosure. This may be done either informally or in parallel with an FOI access application that seeks more recent information about the same subject.

An organisation may well be willing to provide access to old information outside the terms of the *Information Act*, either based on its assessment of the circumstances or on previous decisions of the Commissioner in relation to classes of old information that are subject to the Act.

Organisations are encouraged to disclose information, whenever created or received, if there is no prejudice to essential public or private interests, and if there is no other legal impediment to disclosure (eg, restrictions on disclosure under the privacy provisions).

What is the test?

If an application is made, the test for the Commissioner to consider is whether:

... the information is in a class of information ... in respect of which the competing interests of giving members of the Territory community a right of access to the information and of preventing a prejudicial effect on essential public interests or on the private and business interests of persons in respect of whom information is held by the organisation are likely to be balanced in favour of giving the right of access. (s.13(2)(b))

It will be necessary to:

- identify the class of information into which the particular information sought falls;
- identify any factors that favour disclosure of information in that class;

- identify any prejudicial effects that might flow from disclosure of information in that class on essential public interests or on private or business interests;
- decide whether those competing interests are likely, in respect of the class of information, to be balanced in favour of disclosure.

The test requires balancing of interests in relation to a class of information, rather than the particular information sought. Questions that relate specifically to the information sought are not likely to be relevant. For example, potential difficulties in locating the information are not likely to be relevant at this stage, although they may be relevant at a later stage when dealing with an FOI access application for the particular information.

If the Commissioner decides that the competing interests in respect of the relevant class of information are likely to be balanced in favour of disclosure, the information will be subject to the FOI access provisions.

However, that finding does not mean that access will be granted. It will still be necessary for the public sector organisation to consider whether all or part of the particular information sought should be disclosed, taking into account any relevant provisions of the *Information Act*, including exemptions.

Making an application

A person who wants to access old information should first contact the organisation that holds the information. The organisation may be in a position to provide access outside the scope of the *Information Act*.

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If it is necessary to make an application, the application should include —

- submissions that —
 - identify the class of information into which the information sought falls;
 - identify any factors favouring disclosure of information in that class;
 - identify any prejudicial effects that might flow from disclosure of information in that class on essential public interests or on private or business interests;
 - establish that those competing interests are likely, in respect of the class of information, to be balanced in favour of disclosure; and
- evidence in the form of sworn affidavits or statutory declarations that establish the facts relied on in the submissions.

How is an application dealt with?

The Act does not specify procedures for dealing with an application to make old documents subject to the Act. The Commissioner will decide the appropriate procedure to be followed in each case.

Because an application does not decide questions of access to individual information, participation will usually be limited to the person seeking access and the organisation that holds the records sought. A third party with an interest in the information sought may be consulted and take objection to disclosure in the course of the ensuing FOI access application (if any).

Any information, submissions and evidence lodged by a party (including the application and supporting materials) may be exchanged with other parties, unless we accept that there are good reasons why parts should be withheld.

One good reason for not disclosing information would be if it would disclose information that is claimed to be exempt. There may also be other reasons why disclosure of information would not be appropriate. However, even in such cases, we will consider options for disclosure in some other way, eg, in summary form, if disclosure is required to explain the substance of the arguments of a party or is otherwise likely to advance the prospects of resolution.

If you object to disclosure of any information you provide, you should make that clear to us at or before the time you provide the information.

The Office may also need to consult, or obtain information from, staff of the organisation or other people who may be affected in some way by the application, or who can provide information relevant to the application.

Once the parties have had an opportunity to put forward their respective cases in relation to any issues that may be decided against them, the Commissioner will make a decision.

The decision and written reasons for decision will be distributed to the person seeking access and to the organisation. They will also be published.

What happens next?

The Commissioner does not make a decision about access to the information at the time a decision is made under s.13(2).

If the Commissioner decides that the information is subject to the FOI provisions, a person can then make an FOI application to the relevant organisation for access to the particular information sought. That application will then proceed in the normal course for initial FOI access applications.

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This guideline is produced by the Information Commissioner to promote awareness and understanding about the *Information Act*. It is **not a substitute for the Act**. You should read the relevant provisions of the Act to see how it applies in any particular case. Any views expressed in this guideline about how the Act works are **preliminary** only. In every case, the Commissioner is open to argument by a member of the public or a public sector organisation that a different view should be taken.