



# Dealing with requests for documents related to an 'exempt agency'

## FOI process guide

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An access application may include a request for documents that relate to an 'exempt agency' as listed in [Schedule 2](#) to the *Freedom of Information Act 1992* (WA) (**the FOI Act**).

The fact that a document relates to, or originated from, an exempt agency does not necessarily mean that the document is an exempt document under the FOI Act. If an agency holds a document that relates to an exempt agency, the document is still a document of the agency. An agency is required to make a decision regarding access to that document in accordance with the FOI Act.

### **What is an exempt agency?**

The Glossary to the FOI Act provides that an exempt agency is a person or body mentioned in Schedule 2 to the FOI Act and includes staff under the control of the person or body.

An access application cannot be made directly to an exempt agency under the FOI Act.

### **The requirement to notify the exempt agency**

If the requested documents originated with or were received from an exempt agency, an agency has to notify the exempt agency that the access application has been made ([section 15\(8\)](#)).

The purpose of the notification is to obtain the benefit of the exempt agency's views as to the status of the requested document and whether there would be any harm in disclosing the documents. However, section 15(8) does not give an exempt agency a right to veto giving access to a document.

An exempt agency is not a third party for the purposes of the consultation provisions of the FOI Act.

### **Are documents that relate to an exempt agency exempt?**

A document that relates to an exempt agency may or may not be exempt under the FOI Act. An agency's decision-maker may consider whether the document includes information that is exempt under any of the clauses in Schedule 1 to the FOI Act.

### **Is personal information about an officer of an exempt agency exempt?**

The personal information of an officer of an exempt agency may or may not be exempt under the FOI Act.

An officer of an exempt agency is an 'officer of an agency' as defined in the [Glossary](#) to the FOI Act. Personal information about an officer of an exempt agency does not necessarily have a different status under the FOI Act to personal information about an officer of a non-exempt agency.

Under clause 3(3) of Schedule 1 to the FOI Act, information that is merely 'prescribed details' relating to an officer of an agency is not exempt personal information under clause

3(1) of Schedule 1. However, in *I v Department of Agriculture and Food* [No 2] [2016] WASC 272 the Supreme Court decided that the limitation on the exemption in clause 3(3) applies only to personal information that consists of the prescribed details of a person who is or has been an officer of the agency to which an access application is made and that such information is not exempt under clause 3(1). On this basis, clause 3(3) does not apply to prescribed details relating to an officer of an exempt agency. Nonetheless, an agency's decision-maker should still consider whether disclosure of information of that kind relating to an officer of an exempt agency would, on balance, be in the public interest. For more information about this see: [Dealing with personal information about an officer of an agency](#) and [The Exemptions](#).

## **What if the exempt agency says the agency is prohibited from disclosing the document?**

An exempt agency may advise an agency's decision-maker that they are prohibited from disclosing the document. The decision-maker may consider this advice but must make a decision about access in accordance with the FOI Act.

Clause 12(b) of Schedule 1 to the FOI Act provides that information is exempt if its disclosure would contravene any order or direction of a person or body having power to receive evidence on oath. Certain exempt agencies have the power to make such direction, including the Coroner and the Corruption and Crime Commission.

An exempt agency may advise your agency that specific legislation prohibits disclosure of the information. [Section 8](#) of the FOI Act provides that the access provisions of the FOI Act apply despite any prohibitions or restrictions imposed by other enactments<sup>1</sup> (whether enacted before or after the commencement of the FOI Act) on the communication or divulging of information, and a person does not commit an offence against any such enactment merely by complying with the FOI Act UNLESS the enactment is expressly stated to have effect despite the FOI Act.

Even if another enactment does not state that it applies despite the FOI Act, the existence of a prohibition in an exempt agency's legislation or policies may be a relevant consideration for an agency's decision-maker when deciding whether the requested document contains information that is exempt under one of the clauses in Schedule 1 to the FOI Act.

## **Relevant Cases**

*Information Commissioner for Western Australia v Ministry of Justice* [2001] WASC 3

*Re Birney and Attorney General* [2002] WAICmr 22, at [30]:

*[E]xcept for the specific and limited exemption in clause 5(2) (which arises because the exempt agencies mentioned in that clause are actually part of other agencies), the FOI Act is not concerned with the source of documents or with their creation, but with their possession. That is, as long as documents are in the possession or under the control of an agency, then those documents are documents of that agency, regardless of where they originated or were created ... section 10 of the FOI Act provides a right of access to documents in the possession or under the control of an agency, but not to documents in the possession or under the control of an exempt agency ... it is immaterial to the exercise of that right whether the documents were in fact created by an exempt agency. However, that does not mean that documents*

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<sup>1</sup> An enactment is defined in the Interpretation Act 1984 as 'a written law or any portion of a written law'

*created by an exempt agency, but in the possession of another agency, are not exempt. They might well be. It only means that an applicant has a right to apply to a non-exempt agency for access to documents and if that non-exempt agency holds documents covered by the terms of the access application, then it must deal with those documents and process the request according to the provisions of the FOI Act.*

If you have any general enquiries about the FOI process, please see our website or contact our office.

**Note:** This Information Sheet is intended as a general guide only and should not be viewed as legal advice. The Information Commissioner considers each complaint on its merits and according to the relevant circumstances.

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