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# Freedom of Information and Sufficiency of Search

Guideline

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## Table of Contents

<b>1. Introduction .....</b>	<b>3</b>
1.1 Definition of a document.....	3
<b>2. Sufficiency of search .....</b>	<b>3</b>
2.1 Common places to search.....	3
2.2 Documents from electronic sources .....	4
2.3 Creating new electronic documents .....	5
2.4 Records in the custody of State Records .....	6
<b>3. Documents not held by the agency.....</b>	<b>6</b>
<b>4. Document schedules .....</b>	<b>7</b>
<b>5. Cooperation of agency staff .....</b>	<b>7</b>
<b>6. The Ombudsman and sufficiency of search .....</b>	<b>7</b>
<b>7. For more information .....</b>	<b>8</b>



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## 1. Introduction

The purpose of this guideline is to advise agencies of their obligations under the *Freedom of Information Act 1991* (FOI Act) to ensure sufficient searches are carried out for documents requested by FOI applicants.

### 1.1 Definition of a document

Section 4(1) of the FOI Act defines a document as including “... anything in which information is stored or from which information may be reproduced”. This definition is intended to capture documents and information stored in formats other than paper and includes all forms of media and storage devices such as audio tapes, video recordings, and electronic files. Electronic data and information might reside on servers both internal and external to government, computer disks, smartphones, portable storage devices, and with cloud based storage providers.

## 2. Sufficiency of search

Section 12 of the FOI Act provides that “A person has a legally enforceable right to be given access to an agency’s documents in accordance with this Act”. Therefore, agencies must be able to demonstrate that they have searched sufficiently for the documents so that compliance with section 12 of the FOI Act can be achieved.

It is advisable that agencies retain a detailed account of all the places, both physical and electronic, they have searched. This will ensure that in the event of an external review by the Ombudsman or Police Ombudsman, or a review by the South Australian Civil and Administrative Tribunal (SACAT), the agency can explain what attempts were made to locate all relevant documents. The time spent searching for and locating documents should also be recorded since an agency can charge the applicant for this time unless the applicant is entitled to a fee waiver or the agency chooses not to charge the applicant. It is however inappropriate to charge for costs associated with extensive searching due to poor recordkeeping.

Individual FOI officers or other staff involved in searching may also have to swear affidavits, make statutory declarations, or if the matter is reviewed by SACAT, answer questions confirming they have conducted a thorough search for documents.

A template of a basic form for staff to use to record their searches can be found on the State Records website.

### 2.1 Common places to search

Common places that agencies should search to locate documents include:

- office desks, filing cabinets and compactus storage;
- records management systems and business systems;
- computer drives and files – including personal drives and files if necessary;
- computer discs and other portable storage devices including portable computers;
- notepads, diaries and calendars;

- audio and video recordings;
- offsite storage locations;
- State Records SA archival collection;
- email accounts;
- home computers where staff may be working from home; and
- government mobile devices, and personal mobile devices used for business purposes.

Section 4(4) of the FOI Act makes it clear that an agency is said to hold any documents to which it has an immediate right of access. Immediate right of access means that even documents not in the physical possession of an agency can be subject to FOI. This can extend to documents in the possession of external service providers, as well as those in the custody of State Records.

Examples of immediate right of access include:

- where a document has been removed from the files of an agency and the agency is entitled to recover the document;
- where a consultant or external service provider is employed by an agency under a contract which provides that the agency is entitled to immediate possession of all (or some) documents held by the consultant or provider;
- where the agency has transferred records to a third party storage provider in accordance with the *State Records Act 1997*; and
- documents scheduled or approved for destruction but not yet destroyed - the documents would need to have their retention reassessed if identified as falling within scope of the application.

For more information about documents held by contracted service providers, please refer to the Contracting and Official Records Standard which can be found on the State Records website.

## 2.2 Documents from electronic sources

Section 4(5) of the FOI Act provides:

*Where—*

- (a) *an agency holds information in computer storage; and*
- (b) *a particular document is capable of being produced by the computer on the basis of information so stored,*

*the agency is to be taken to hold that document.*

The Act clearly extends to electronic information and to documents which can be created from an existing database using current software.

Section 51 of the South Australian *Acts Interpretation Act 1915* provides that where a person is required under an Act to produce information or a document kept by computer or other process, the person is required to produce or make available for inspection a document that

reproduces the information in a form capable of being understood. Therefore, if the agency is providing access to information from a computer database to an applicant, the agency must ensure that it reproduces the information in a form that can be understood by the applicant.

An applicant may apply for information that is scattered across several databases, electronic folders or files. This may make it difficult for an agency to provide the applicant with the exact information they require in an easy to understand format. In addition there may be so much information that providing printouts of different databases may unreasonably divert the agency's resources. If this occurs, the agency should contact the applicant and discuss narrowing the scope of the application or discuss the alternative formats in which the information could be provided.

As well as section 51 of the *Acts Interpretation Act*, section 22(2) of the FOI Act provides that if an applicant has requested that access to documents be provided in a particular way, an agency is obliged to provide access in that way unless one of the exceptions applies:

*22(2) If an applicant has requested that access to a document be given in a particular way, access to the document must be given in that way unless giving access as requested—*

- (a) would unreasonably divert the resources of the agency (or, if the document is in the custody of State Records, the resources of State Records) from their use for other official purposes; or*
- (b) would be detrimental to the preservation of the document or (having regard to the physical nature of the document) would otherwise not be appropriate; or*
- (c) would involve an infringement of copyright in matter contained in the document,*

*in which case access may be given in some other way.*

If an applicant asks to inspect the information held in an electronically stored document by requesting 'on-line access' rather than requesting a copy of that information, an agency may be required to give this access, by giving the person 'a reasonable opportunity to inspect the document' under section 22(1)(a), or in the case of a document from which sounds or visual images are capable of being reproduced, whether or not with the aid of some other device – 'by making arrangements for the person to hear or view those sounds or visual images', under section 22(1)(c).

## **2.3 Creating new electronic documents**

Although an agency is under no obligation to create a new document in order to satisfy an FOI application, sometimes it is easier to cut and paste the relevant information from several electronic sources into a new document and provide this to the applicant. If this is the preferred approach by the agency, the agency should negotiate this with the applicant.

## 2.4 Records in the custody of State Records

When an agency transfers a document into the custody of State Records for permanent storage, the agency remains the owner of the document and is considered to continue to possess the document for the purposes of the FOI Act. Therefore, the agency must include documents in the custody of State Records when undertaking searches in relation to FOI applications.

When records are transferred to State Records agencies are required to give them public access determinations to ensure that appropriate access is given. A public access determination does one of three things:

- declares a record to be immediately open to public access;
- declares a record to be open only after a certain period (e.g. open after 20 years); or
- declares a record to be indefinitely closed.

Where a FOI request is made for a document in the custody of State Records which has an 'open' public access determination, an agency may refuse the application and direct the applicant to State Records to seek access because the document is publically available.

Where a FOI request is made for a document in the custody of State Records which has a 'closed' public access determination, the agency must make a determination as to whether access to the documents is to be granted, in line with FOI legislation.

## 3. Documents not held by the agency

When an FOI applicant applies for access to documents which, after reasonable searches by an agency, are unable to be found, section 23(1) of the FOI Act provides:

- (1) *An agency must notify an applicant in writing—*
- (a) *of its determination of his or her application; or*
  - (b) *if the application relates to a document that is not held by the agency—of the fact that the agency does not hold such a document.*

Where the document requested is not held by the agency but is known to be held by another agency, consideration should be given to transferring the application in accordance with section 16(1) of the FOI Act. Before transferring an FOI application, the transfer should be discussed with the agency that will receive the application to ensure that the decision to transfer is appropriate.

When an agency determines that it does not hold a document, the agency should explain in its determination the searches, enquiries and considerations that were undertaken. If the document once existed but no longer does, such as documents legally destroyed in accordance with a Records Disposal Schedule approved under the *State Records Act 1997*, this explanation should form part of the agency's notice of determination.

## 4. Document schedules

Although not required by the FOI Act, it is recommended that agencies develop a document schedule that identifies all the documents that have been located relevant to the FOI application indicating whether or not access to each document is granted. Each document should be allocated a number in the schedule and clearly identified by a date (if applicable) and a brief description of its content. The agency should, however, be careful not to include anything in the schedule that is exempt information as determined by the agency.

The document schedule should be provided to the applicant along with the agency's notice of determination.

The benefits of creating a document schedule include that it:

- allows both the agency and the applicant to see at a glance what documents were located and whether access was granted;
- shows that the agency is being transparent;
- allows for easy identification of those documents should a request be received for access to documents not previously released; and
- assists a reviewer to identify documents quickly and the reasons why access to some or all documents were restricted, should the application be reviewed by the agency or by a relevant review authority.

A template for a basic document schedule can be found on the State Records website.

## 5. Cooperation of agency staff

All staff involved in searching for documents relevant to an FOI application are obligated to provide relevant documents to the FOI officer for processing unless doing so would be an offence under an Act.

In past annual reports of the Ombudsman, comment has been made on the responsibility of accredited FOI officers to search for, and locate documents, which will invariably necessitate a call for all relevant documents and for the cooperation of agency staff. If cooperation is not forthcoming it prevents FOI officers from doing their job and according to the Ombudsman, is not only unacceptable, but may be a breach of relevant codes of conduct and may even be unlawful.

If staff members have concerns about the sensitivity or confidentiality of certain documents which have been requested under FOI, they should discuss this with the accredited FOI officer, the principal officer, or their Agency Security Adviser. If the staff member believes that the accredited FOI officer does not have the appropriate authority to view the information, then the determination regarding access may have to be made by the principal officer.

## 6. The Ombudsman and sufficiency of search

The Ombudsman has discussed sufficiency of search issues in a number of annual reports. It is not uncommon for an applicant to assert that an agency holds documents in its possession that it has not located, or perhaps the documents have been located, but the agency is

‘hiding’ them. Unfortunately it is the case that agencies occasionally fail to locate all relevant documents and that these documents are found during a review conducted by the Ombudsman.

In 2009-10 the Ombudsman noted that “... in this document-rich society, agencies faced with large applications will in my view benefit from exploring with applicants the possibility of using defined search terms when conducting their electronic searches. It is relevant to note, however, that manual searches may still be required”.

The Ombudsman has also developed an information sheet on sufficiency of search for applicants. This information sheet can be downloaded from the Ombudsman’s website at [www.ombudsman.sa.gov.au](http://www.ombudsman.sa.gov.au).

## 7. For more information

The following documents may assist an agency to conduct sufficient searches for documents and can be accessed via the State Records website:

- Processing FOI Applications Guideline
- Contracting and Official Records Standard

Please contact State Records if you require more information about sufficiency of search by email [foi@sa.gov.au](mailto:foi@sa.gov.au) or by telephone (08) 8204 8786.