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Freedom of Information Act 1982

NOTICE OF PROFESSIONAL STANDARDS ISSUED BY THE INFORMATION COMMISSIONER UNDER PART IB OF THE FREEDOM OF INFORMATION ACT 1982

Section 6U of the **Freedom of Information Act 1982** (FOI Act) enables the Information Commissioner to develop Professional Standards relating to the conduct of an agency in performing functions under the FOI Act, and the administration and operation of the FOI Act by an agency.

Section 6V(1)(a) of the FOI Act requires the Information Commissioner to cause any Professional Standards developed under section 6U of the FOI Act to be published as soon as practicable after being finalised in the Government Gazette.

The Professional Standards commence on 2 December 2019.

SVEN BLUEMMEL
Information Commissioner
Office of the Victorian Information Commissioner

PROFESSIONAL STANDARDS – ISSUED UNDER PART IB OF THE FREEDOM OF INFORMATION ACT 1982

INTRODUCTION AND INTERPRETATION

About

The Professional Standards (Standards) have been prepared in accordance with Part IB of the Freedom of Information Act 1982 (the Act).

Section 6U of the Act enables the Information Commissioner to develop Standards relating to the conduct of an agency in performing its functions under the Act, and the administration and operation of the Act by an agency.

The purpose of the Standards is to ensure the Act is administered by agencies consistently with:

- the Act's object – to extend as far as possible the right of the community to access information in the possession of an agency subject to the Act; and
- Parliament's intention – that the provisions of the Act are interpreted so as to further its object and any discretions conferred by the Act are to be exercised as far as possible to facilitate and promote the prompt disclosure of information at the lowest reasonable cost.

Commencement

The Standards commence on 2 December 2019.

References to legislation

All legislative references are to the **Freedom of Information Act 1982** unless otherwise specified.

Structure

There are 33 Standards based on 10 themes. Each theme includes:

- a statement – describing the general principles and sections of the Act on which the Standards are based;
- the Standards – setting out the obligations of an agency and principal officer; and
- notes – providing further information to assist interpretation when necessary.

Application

The Standards apply to every Victorian agency subject to the Act. This includes government departments, statutory authorities, public hospitals, councils, TAFEs and universities.

The Standards do not apply to Ministers.

SPECIAL

Section 6W(1) of the Act states the principal officer of an agency, and any officer or employee of the agency concerned in the operation of the Act, must comply with the Standards.

It is the responsibility of a principal officer of an agency to ensure any officer or employee concerned with the operation of the Act complies with the Standards.

Non-compliance with the Standards may result in the Information Commissioner:

- receiving and dealing with a complaint under section 61A(1)(a) or 61A(1)(ab) of the Act; or
- conducting an own motion investigation under section 61O(1) of the Act.

Definitions

All terms in the Standards have the same definition as in section 5 of the Act, including the following:

agency means a department council or prescribed authority;

document includes, in addition to a document in writing –

- (a) any book map plan graph or drawing; and
 - (b) any photograph; and
 - (c) any label marking or other writing which identifies or describes any thing of which it forms part, or to which it is attached by any means whatsoever; and
 - (d) any disc tape sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom; and
 - (e) any film negative tape or other device in which one or more visual images are embodied so as to be capable (as aforesaid) of being reproduced therefrom; and
 - (f) anything whatsoever on which is marked any words figures letters of symbols which are capable of carrying a definite meaning to persons conversant with them; and
 - (g) any copy, reproduction or duplicate of any thing referred to in paragraphs (a) to (f); and
 - (h) any part of a copy, reproduction or duplicate referred to in paragraph (g) –
- but does not include such library material as is maintained for reference purposes.

exempt matter means matter the inclusion of which in a document causes the document to be an exempt document.

Information Commissioner means the Information Commissioner appointed under section 6C of the Act;

officer –

- (a) in relation to an agency, other than a council, includes a member of the agency, a member of the staff of the agency, and any person employed by or for the agency, whether that person is one to whom the provisions of the **Public Administration Act 2004** (Vic) apply or not; and
- (b) in relation to a council, includes a member of the council, a member of the staff of the council and any person employed by or for the council;

prescribed authority means –

- (a) a body corporate established for a public purpose by, or in accordance with, the provisions of an Act, or a body unincorporated created by the Governor in Council or by a Minister, other than –
 - (i) an incorporated company or association;
 - (ii) a body that, under subsection (2), is not to be taken to be a prescribed authority for the purposes of the Act;
 - (iii) a Royal Commission, Board of Inquiry or Formal Review;

* * * * *
- (v) a school council;

- (b) any other body, whether incorporated or unincorporated, declared by the regulations to be a prescribed authority for the purposes of the Act, being –
 - (i) an incorporated company or association or unincorporated body which is supported directly or indirectly by government funds or other assistance or over which the State is in a position to exercise control; or
 - (ii) a body established by or under an Act of Parliament;
- (c) subject to subsection (3), the person holding, or performing the duties of, an office established by an Act; or
- (d) the person holding, or performing the duties of, an appointment declared by the regulations to be an appointment the holder of which is a prescribed authority for the purposes of this Act, being an appointment made by the Governor in Council, or by a Minister, otherwise than under an Act;

principal officer means –

- (a) in relation to a department, the person employed as or performing the duties of the Department Head within the meaning of the **Public Administration Act 2004** (Vic); and
- (aa) in relation to a council, the person holding, or performing the duties of, the office of chief administrative officer of the council (by whatever name called); and
- (b) in relation to a prescribed authority –
 - (i) if the regulations declare an office to be the principal office in respect of the authority – the person holding, or performing the duties of, that office; or
 - (ia) in the case of Court Services Victoria – the person holding the office or performing the duties of the Chief Executive Officer of Court Services Victoria; or
 - (ii) in any other case – the person who constitutes that authority or, if the authority is constituted by two or more persons, the person who is entitled to preside at any meeting of the authority at which he is present;

request means a request made in accordance with section 17 of the Act;

Tribunal means Victorian Civil and Administrative Tribunal established by the **Victorian Civil and Administrative Tribunal Act 1998** (Vic).

Calculation of days

Both the Standards and the Act (except for sections 49N(4) and 49M(4) of the Act) refer to ‘days’.

For the avoidance of doubt, any reference to ‘days’ means ‘calendar days’ and includes weekends and public holidays.

In calculating timeframes, such as a due date or when a certain action must be taken or completed, agencies should refer to the **Interpretation of Legislation Act 1984** (Vic) (IOL Act). The provisions of the IOL Act apply to all Acts and subordinate instruments, which includes the Standards, unless a contrary intention appears in the relevant Act or subordinate instrument under consideration. Part of section 44 of the IOL Act is extracted below.

Section 44 – Time

- (1) Where in an Act or subordinate instrument a period of time is expressed to begin on, or to be reckoned from, a particular day, that day shall not be included in the period.
- (2) Where in an Act or subordinate instrument a period of time is expressed to end on, or to be reckoned to, a particular day, that day shall be included in the period.
- (3) Where the time limited by an Act or subordinate instrument for the doing of any act or thing expires or falls on a day that is a holiday, the time so limited shall extend to, and the act or thing may be done on, the day next following that is not a holiday.

- (4) In subsection (3) holiday means –
- (a) a Saturday or Sunday;
 - (b) a day appointed under the **Public Holidays Act 1993** as a public holiday in the place in which the act or thing is to be or may be done.

PROFESSIONAL STANDARDS

1. Access to government information

Statement

The Act creates a general right of access to a document in the possession of an agency, limited only by the exemptions and exceptions necessary for the protection of essential public interests and the private and business affairs of persons – section 3(1) of the Act. An agency must also administer the Act with a view to making the maximum amount of government information available promptly and inexpensively – section 16(1) of the Act.

Professional Standards

- 1.1 An agency must consider whether a document in its possession, that is requested under the Act, can properly be provided to an applicant outside the Act.
- 1.2 Where a document in the possession of an agency can properly be provided to an applicant outside the Act, the agency must either:
- (a) facilitate access to the document; or
 - (b) advise the applicant how the document can be accessed.

Note: facilitating access to a document may include providing a copy, arranging inspection or viewing or otherwise providing access to the document. An applicant may otherwise be advised that access to a document can be obtained via another method such as a statutory release scheme or for purchase.

- 1.3 A principal officer must ensure information statements published in accordance with Part II of the Act are available on their agency's internet site, where one exists.

2. Receiving a request

Statement

An agency has a duty to assist an applicant to make a request in a manner that complies with section 17 of the Act – section 17(3) of the Act. An agency is also required to provide an applicant with a reasonable opportunity to consult where the request does not provide sufficient information, as is reasonably necessary, to enable the agency to identify the requested document – section 17(4) of the Act.

Professional Standards

- 2.1 An agency must provide an applicant with an option to make a request by email.
- 2.2 An agency requiring payment of an application fee must take reasonable steps to provide options for payment of that fee in line with accepted payment methods the agency provides for other services of a similar financial sum.
- 2.3 An agency must not refuse to accept a request where an applicant has not utilised an agency's pro forma application form.

Note: a request must still meet the requirements of section 17 of the Act to be a valid request.

- 2.4 An agency that receives a request that is not valid, must take reasonable steps to notify the applicant of the following information within 21 days of receiving the request:
- (a) why the request is not valid;
 - (b) provide reasonable assistance or advice to the applicant about how to make the request valid; and
 - (c) advise the applicant that the agency may refuse to comply with the request if it does not comply with section 17 of the Act.

Note: 'refuse to comply' reflects the language of section 17(4) of the Act. An agency may also consider this to mean the request to have lapsed, been refused or otherwise finalised without being processed.

- 2.5** Before refusing to comply with a request that is not valid, an agency must provide the applicant with a minimum of 21 days from the date the agency notified the applicant of the information in Standard 2.4 to:
- (a) pay the application fee;
 - (b) provide evidence of hardship, if seeking a fee waiver or reduction;
 - (c) begin consulting with the agency to clarify the request or provide an amended request; or
 - (d) otherwise make the request compliant with section 17 of the Act.

3. Extensions of time

Statement

An agency must take all reasonable steps to notify an applicant of a decision, as soon as practicable, but no later than 30 days after the day on which a valid request is received, or if the 30 day period is extended or further extended under section 21(2) of the Act, the day after the extended period ends – section 21(1) of the Act.

Professional Standards

- 3.1** An agency must not extend the time under section 21(2)(a) of the Act to make a decision unless third party consultation:
- (a) is being undertaken; or
 - (b) will be undertaken.
- 3.2** A notification under section 21(4) of the Act advising an applicant of an extension to the time for making a decision must state:
- (a) under which subsection of section 21(2) of the Act the time has been extended or further extended;
 - (b) the particular reasons for the extension; and
 - (c) the number of days by which the agency is extending the due date.

Note: section 21(4) of the Act requires an agency to notify an applicant in writing where the time is extended or further extended.

4. Charges for access

Statement

Charges for access to documents, or ‘access charges’, are imposed in accordance with section 22 of the Act and any regulations made under sections 22(1A) and 66 of the Act.

Professional Standards

- 4.1** When providing a notification under section 22(3) of the Act, in addition to any other requirements of section 22, an agency must include the following details:
- (a) the estimated access charges;
 - (b) how the estimated access charges were calculated;
 - (c) the required access charges deposit amount;
 - (d) the date by which the deposit must be paid (which must be no less than 60 days after an applicant receives the deposit notice);

Note: an applicant has 60 days from the day they receive a notification requesting a deposit to apply to the Tribunal for a review of the access charges amount where the Information Commissioner has issued a certificate – section 52(1)(g) of the Act.

- (e) information outlining the applicant may contact the agency to discuss practicable alternatives for altering the request or reducing the anticipated access charges; and

Note: where an agency requires an applicant to pay an access charges deposit, the agency must, if requested by the applicant, discuss with the applicant practicable alternatives for altering the request or reducing the anticipated charge – section 22(6) of the Act.

- (f) information outlining the agency may or will finalise the request without processing it if the applicant does not do either of the following:
 - i. contact the agency to discuss options to reduce the anticipated charges; or
 - ii. pay the deposit by the date specified in the notification.

- 4.2 An agency must take reasonable steps to provide a notification under section 22(3) of the Act to an applicant within 21 days of receiving a valid request.
- 4.3 An agency requiring payment of an access charges deposit or access charges must take reasonable steps to provide options for payment of the relevant charge in line with accepted payment methods the agency provides for other services of a similar financial sum.

5. Substantial and unreasonable diversion of resources

Statement

An agency cannot rely on section 25A(1) of the Act unless it has provided an applicant with a reasonable opportunity to consult with the agency, and as far as reasonably practicable, provided any information that would assist the applicant to make a request in a form that removes the ground for refusal – section 25A(6) of the Act.

Professional Standards

- 5.1 An agency must take reasonable steps to notify an applicant under section 25A(6) of the Act of its intention to refuse a request under section 25A(1) within 21 days of receiving a valid request.
- 5.2 When providing a notice under section 25A(6) of the Act, in addition to the requirements of that section, an agency must:
 - (a) explain why the applicant's request would substantially and unreasonably divert the resources of the agency from its other operations; and
 - (b) provide a minimum of 21 days from the date of the agency's notice, for the applicant to respond.
- 5.3 Where an agency consults with an applicant under section 25A(6) of the Act, it must ensure it keeps a record of consultation including:
 - (a) any responses received from the applicant; and
 - (b) if amended, the final terms of the request.

6. Searching for documents

Statement

Where an agency undertakes a search for documents in response to a request it must ensure the search is thorough and diligent.

Professional Standard

- 6.1 Where a search for documents is conducted, an agency must ensure it keeps a record of the searches undertaken, including information relating to:
 - (a) the locations searched by the agency;
 - (b) the method or type of searches undertaken; and
 - (c) where applicable, the key words used in the searches.

Note: a record may include a completed proforma template, email response, or file note.

7. Practicability of consulting third parties

Statement

Under sections 29(2), 29A(1D), 31(5), 31(6), 31A(2), 33(2C)(b), 34(3), and 35(1B)(b) of the Act, an agency may be required to consider the practicability of notifying and seeking the views of a third party.

Professional Standards

- 7.1** In determining whether it is practicable to notify and seek the views of a third party, an agency must consider all relevant factors which may include:
- the likelihood of a third party consenting to disclosure of the information or document;
 - the relative age of the information or document;
 - the number of third parties to be notified; and
 - whether the agency has, or is reasonably able to ascertain, current contact details for a third party.

- 7.2** If an agency determines it is not practicable to notify and seek the views of a third party, it must keep a record of why it is not practicable.

Note: a record does not need to specify every individual third party and may be general in nature.

- 7.3** Where an agency notifies and seeks the views of a third party, it must ensure it keeps a record of:

- who was notified;
- whether the third party did or did not respond to the notification;
- if the third party responded, whether they consented or objected to disclosure of the information or document; and
- where provided, the third party's reasons for objecting.

Note: an agency should ensure a third party is aware of the applicable exemption and what must be established for the exemption to apply to the information or document.

8. Decisions and reasons for decisions

Statement

Where a decision is made that an applicant is not entitled to access a document in accordance with a request, or no such document exists, an agency must explain to the applicant the findings on any material questions of fact, refer to the material on which those findings were based, and state the reasons for the decision – section 27(1)(a) of the Act.

Professional Standards

- 8.1** An authorised officer must not be directed to make a particular decision under the Act, when properly exercising their statutory decision making power.
- 8.2** In a written decision, other than in accordance with sections 27(2) or 33(6) of the Act, where an agency relies on an exemption or exception, the agency must:
- explain its reasons for why each exemption or exception applies; and
 - address each limb of the relevant exemption or exception.
- 8.3** In a written decision, other than in accordance with sections 27(2) or 33(6) of the Act, an agency must take reasonable steps to:
- identify whether documents are being released in full, released in part, or denied in full; and
 - describe the documents or types of documents discovered.

Note: an agency may consider a page or pages as a document, a file containing multiple records as a document or however else an agency typically describes a document in the agency.

- 8.4** In a written decision, other than in accordance with sections 27(2) or 33(6) of the Act, where an agency cannot locate a document or a document does not exist in relation to a request or part of a request, the agency must:
- (a) where a search is conducted, provide a summary of the searches undertaken for the document, which may include:
 - i. the locations searched by the agency;
 - ii. the method or type of searches undertaken; and
 - iii. where applicable, the key words used in the searches; and
 - (b) where practicable, explain why the relevant document does not exist or could not be located.

9. Resources, training and awareness

Statement

An agency must administer the Act with a view to making the maximum amount of government information available to the public promptly and inexpensively – section 16(1) of the Act. This requires a principal officer to ensure their agency and its officers have the resources and training to administer the Act.

Professional Standards

- 9.1** A principal officer must ensure their agency has the necessary resources and procedures in place to be able to meet their agency's statutory obligations under the Act, including:
- (a) being sufficiently resourced to receive and process requests, as and when required, within the required statutory time;
 - (b) the necessary software or systems to enable officers to process requests;
 - (c) internal policies to enable officers to carry out their functions across the agency; and
 - (d) anything else reasonably necessary for the agency to carry out its statutory obligations in an effective and efficient manner.
- 9.2** A principal officer must ensure, or must be actively working towards ensuring, all officers who are responsible for responding to requests have the appropriate skills and training to perform their responsibilities.
- 9.3** A principal officer must ensure officers who make decisions under the Act are authorised in accordance with section 26(1) of the Act.
- 9.4** A principal officer must ensure all officers are informed about the agency's statutory obligations under the Act.
- 9.5** A principal officer must ensure all officers are aware they have a duty to assist and cooperate with officers who process requests under the Act.

10. Working with the Information Commissioner

Statement

An agency has an obligation under section 49I of the Act to assist the Information Commissioner to conduct a review under Part VI of the Act. Under section 61E of the Act, an agency must cooperate with the Information Commissioner in dealing with a complaint under Part VIA of the Act.

Professional Standards

- 10.1** An agency must assist the Information Commissioner or Public Access Deputy Commissioner in their attempt to informally resolve a review or complaint.
- 10.2** An agency must give consideration to a preliminary view issued by, or on behalf of, the Information Commissioner or Public Access Deputy Commissioner during a review.

- 10.3** An agency must respond to a request for documents and information by, or on behalf of, the Information Commissioner or Public Access Deputy Commissioner within requested or agreed timeframes.
- 10.4** When providing documents subject to review by the Information Commissioner or Public Access Deputy Commissioner, an agency must markup documents clearly and legibly to indicate exempt matter and the applicable exemption or exemptions.

Note: section 5 of the Act defines 'exempt matter' to mean matter the inclusion of which in a document causes the document to be an exempt document.

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