

	FREEDOM OF INFORMATION PROCEDURE
	DCSB-G-PROC-09.02

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1. Overview

- 1.1. This procedure explains the role of the accredited Freedom of Information (FOI) Officer and their responsibilities under the *Freedom of Information Act 1991* (FOI Act).
- 1.2. FOI is an administrative process that enables members of the public to apply to:
 1. access information held by state and local governments and universities; and
 2. amend incomplete, incorrect, out of date or misleading information about them held by state and local governments and universities.
- 1.3. FOI plays a vital role in the overall transparency of government. It is therefore important for members of the public to be given a right to access information from the Council in order to understand why certain decisions and by-laws are being made and to scrutinise those decisions.
- 1.4. Section 12 of the FOI Act gives ‘a person’ the right to access relevant documents.
- 1.5. All government agencies are subject to the FOI Act. Agencies listed in Schedule 2 of the FOI Act are exempt from the FOI Act. Some agencies are also declared exempt, or partially exempt under the *Freedom of Information (Exempt Agency) Regulations 2008*.
- 1.6. The objects of the FOI Act are set out specifically in section 3(1) and (2) of the FOI Act. In addition, section 3A provides that the provisions of the act should be interpreted so as to further the objects of the Act and as far as is possible, to favour the disclosure of information without infringing the right to privacy.

2. Definitions

Accredited FOI Officer

- 2.1. An accredited FOI Officer is defined in section 4 of the FOI Act. Section 4 provides that an accredited FOI Officer is:
 - the principal officer of an agency (in this case the Chief Executive Officer);
OR
 - an officer who has completed the approved training to become an accredited FOI officer and is designated by the principal officer of the agency as an accredited FOI officerAND
 - is employed in a position that usually reports to the principal officer of the agency or to the deputy or immediate delegate of the principal officer.

Council

- 2.2. The District Council of Streaky Bay

Designation

- 2.3. In order to be recognised as an accredited FOI Officer, the relevant employee (see Accredited FOI Officer) must have first completed the required training as set out in the FOI Act and then been designated the position by the Chief Executive Officer (CEO) in an official document. This document needs to be maintained on the employee's personnel file.

Freedom of Information Management System (FOIMS)

- 2.4. FOIMS is an online tool managed through State Archives. The System is used across government for recording, processing and reporting data about FOI applications.

Principal Officer

- 2.5. The CEO of the Council

3. Considerations (Administrative Law, Policy and Procedure)

3.1 Creation and Disposal of Records

State Records Act 1997

- 3.1.1 The *State Records Act 1997* (the 'SR Act') establishes the office of State Records of South Australia
- 3.1.2 The SR Act gives State Records a range of functions and powers to manage and conserve official records held by South Australian government departments, statutory authorities and local government.
- 3.1.3 The majority of records maintained by State Records remain the responsibility of the Council as creator of those records. Therefore it is important for Council to determine (in consultation with State Records) whether restriction of access should be placed on any records prior to delivery to State Records.
- 3.1.4 Section 17 of the SR Act provides penalties where records are damaged, altered, disposed of or removed from an official records without the permission of State Records. However, alteration of an official record made pursuant to section 34 of the FOI Act where Council is satisfied that the records are incorrect, incomplete, out of date or misleading, does not attract this penalty.
- 3.1.5 Members of the public do not need to apply under the FOI Act to gain access to archived records in the custody of State Records, provided there are no restrictions placed on access by Council through Access Determinations made prior to delivery to State Records.

3.2 Limited Rights to Disclose Information

Privacy Policy

3.2.1 The objects of the FOI Act include:

- [to confer] on each member of the public... the legally enforceable right to be given access to documents held by [Council], subject to such restrictions as are consistent with the [public interest](#)... and the preservation of personal privacy...
- [to enable] each member of the public to apply for the amendment of such government records concerning his or her personal affairs as are incomplete, incorrect, out of date or misleading.

3.2.2 Council staff must therefore have a good understanding of:

- what types of personal information is collected and why;
- to whom this information is disclosed and why;
- whether customers know how their information is handled; and
- what legal requirements exist (if any) to collect or keep information secret.

3.2.3 Privacy provisions must be considered when deciding whether or not it is reasonable or unreasonable to release information concerning the personal affairs of an individual or whether or not to amend personal information in government held records.

Privacy Act 1988 (Cth) and The Information Privacy Principles

3.2.4 There are 10 Information Privacy Principles (IPPs) outlined in the Commonwealth Privacy Act, though these do not currently apply in South Australia.

3.2.5 An amendment to the Commonwealth Privacy Act, which came into effect in February 2018, however requires Council to comply with the Commonwealth's Notifiable Data Breaches Scheme.

3.2.6 The collection, management and use of personal information by Council is however governed by the *Information Privacy Principles Instruction – Premier and Cabinet Circular PC012*.

3.2.7 The Information Privacy Principles Instruction requires everyone who deals with personal information within their role in Council understand their responsibilities and ensure they manage this information in accordance with the IPPs.

The Privacy Committee of South Australia

3.2.8 The Privacy Committee of South Australia administers the IPPs in South Australia and has specific functions such as advising the Minister on privacy issues, overseeing responses to written complaints, granting exemptions from the IPPs, recommending guidelines and so on.

Information Sharing Guidelines

3.2.9 The *Information Sharing Guidelines for promoting safety and wellbeing* (ISG) are an overarching set of principles and practices designed to provide a consistent State-wide approach to appropriate information sharing practice wherever there are threats to safety and wellbeing. They aim to:

- reduce the risk of different service providers adopting conflicting information sharing practise;
- increase the likelihood that the actions taken are based on a complete understanding of a clients' circumstances and needs; and
- respect the privacy of individuals to the extent possible when furthering the aims above.

3.2.10 The ISG applies to the public sector, as defined by the *Public Sector Act 2009* and provide the framework within which to share information about risks to children and adults.

Data Sharing Act 2016

3.2.11 The *Public Sector (Data Sharing) Act 2016* (the Data Sharing Act) is aimed at enabling data sharing agreements between State government agencies and the Commonwealth, other States and Territories, Local Councils and the non-government sector. It also establishes the Office for Data Analytics to co-ordinate data storage, sharing and analysis.

3.2.12 The Data Sharing Act aims to improve information sharing across government in relation to vulnerable children in the child protection system.

Copyright Act 1968 (Cth)

3.2.13 Copyright is a type of legal protection for people who express ideas and information in certain forms. The most common forms are writing, visual images, music and moving images.

3.2.14 The FOI Act refers to Copyright laws in section 22.

3.2.15 When processing an FOI application, accredited FOI Officers should be aware of copyright basics when considering to whether to release copies of certain documents that may contain information to which copyright laws apply (for example many Development Plans are copyrighted) – see *Interaction of the Development Act, State Records Act and Freedom of Information Act with the Copyright Act Policy*.

3.2.16 In limited circumstances, agencies may need to seek permission from the copyright owner to release information under the FOI Act, or provide access in another form (i.e viewing)

3.2.17 Generally, when an employee creates a document as part of their job, the copyright owner is their employer.

3.3 Secrecy

- 3.3.1 Some legislation contains ‘secrecy provisions’. These provisions state that certain information collected by the Council or by a particular person cannot be disclosed except in certain circumstances and that if the information is disclosed when it should not be, then it will be an offence under that Act.
- 3.3.2 If the disclosure of a document would constitute an offence under an Act, then the document is considered exempt under the FOI Act, pursuant to clause 12 in Schedule 1 of the FOI Act.

Public Interest Disclosure Act 2018

- 3.3.3 The object of the *Public Interest Disclosure Act 2018* (‘the PID Act’) is to protect a person from civil or criminal liability and from victimisation on account of making an appropriate disclosure of [public interest](#) information.
- 3.3.4 Section 8 of the PID Act is of particular importance when assessing a relevant FOI Application.
- 3.3.5 The protections imposed by section 8 of the PID Act does not prohibit the accessing and disclosure of any information gathered during the PID Act investigation, including [public interest](#) information, as long as this information does not identify the person making the disclosure.
- 3.3.6 Where an FOI application includes documents created and collected during a PID Act investigation fall within the scope of the application, the accredited FOI Officer must take care not to breach section 8 of the PID Act. Please refer to the Public Interest Disclosure Policy with regards to maintaining the confidentiality of the relevant party.

3.4 Alternative forms of access

Disclosure and subpoenas

- 3.4.1 Where a person is involved in a legal dispute, there are other ways they may be able to gain access to relevant documents other than using the FOI process including disclosure (referred to as discovery) and subpoenas.
- 3.4.2 However, it should be noted that if a person involved in a legal dispute applies to Council either directly, or through their lawyers, for documents under the FOI Act, the agency must still process the FOI application as normal.
- 3.4.3 The fact the applicant may want to access the documents for legal proceeding should not be taken into consideration when the accredited FOI Officer makes a determination.

Other legislation, policies and procedures

- 3.4.4 It is important to consider any other legislation that may provide a process through which access can be requested.

Return to Work Act 2014

3.4.5 Section 180 of the *Return to Work Act 2014* provides a process through which a worker can apply for access to documents relating to their claim.

Council Policy and Procedures

3.4.6 A list of policies and procedures which are affected by FOI provisions are included in [section 8](#) of this procedure.

3.4.7 Where a policy or procedure may appear to be in contradiction to the FOI Act, the FOI Act will prevail, other than where Secrecy provisions apply (see section 3.3 of this procedure).

4. Responsibilities

4.1. Under [section 14](#) of the FOI Act, accredited FOI officers are responsible for dealing with and determining FOI applications received by Council.

4.2. In determining an FOI application, accredited FOI officers must make a determination within 30 (calendar) days of the Council receiving the application, unless an extension of time is sought.

4.3. Accredited FOI officers are required under section 12(2)(b)(i) of the FOI Act to include their name and [designation](#) on the notice of determination provided to the applicant.

4.4 Decision Making and Immunity

Exercising discretion

4.4.1 Accredited FOI Officers must make FOI determinations independently.

4.4.2 Although during the process of making a decision, an accredited FOI officer may be required to seek the views of others within and outside Council, those views and consultations should not amount to seeking direction or accepting direction regarding making a decision.

4.4.3 The CEO can direct the accredited FOI officer to make a particular determination. If this occurs, the notice of determination should clearly state that the determination has been made at the direction of the CEO. Such inclusion will need to outline the change in the right of review in the determination letter.

Immunity

4.4.5 Part 6 of the FOI Act outlines various protections for accredited FOI officers against defamation or breach of confidence, criminal actions, and personal liability.

- 4.4.6 Section 50(1) of the FOI Act ensures the release of documents under the Act does not provide a foundation for certain kinds of legal action against the Council; or an employee of Council, involved in the disclosure of the documents or; in some circumstances, against the author of the document. Protection relates to where the person making the determination honestly believes the Act permits or requires the determination to be made.

4.5 Employee Responsibilities

- 4.5.1 It is important all staff involved in searching for documents relevant to an FOI application understand it is their duty to hand over all relevant documents to the accredited FOI Officer for processing.
- 4.5.2 Where staff members express concerns regarding sensitivity or confidentiality of certain documents and this is the reason they are reluctant to submit documents to the accredited FOI Officer, the accredited FOI Officer should reassure the staff member that their concerns will be taken into consideration when the accredited FOI Officer is making a determination as to whether to provide access or not.

5. Procedure

A flowchart outlining the FOI Process may be found at [Appendix 1](#).

5.1 Receiving an application

- 5.1.1 The employee who receives an application for FOI, must immediately date stamp the request and send it to the accredited FOI Officer. This starts the 30 day clock so the accredited FOI Officer must be made aware the application has been sent to them.
- 5.1.2 An application may be received in writing through the post, by facsimile, or electronically through the email system. Please see section 5.2 of this document when assessing the validity of an application.
- 5.1.3 An application is usually received along with an Application for Access to Documents form, though this is not mandatory as long as the information required in section 5.2 below is included in the application.
- 5.1.4 The accredited FOI Officer must immediately create a file in the Records Management System.
- 5.1.5 The accredited FOI Officer must also immediately create a new application in [FOIMS](#).

5.2 Assessing the validity of an application

- 5.2.1 An application must be made by 'a person' as defined in section 12 of the FOI Act.
- 5.2.2 Section 13 of the FOI Act states a valid application:
- must be in writing; and
 - must specify that it is made under the FOI Act; and
 - must be accompanied by an application fees as may be prescribed; and
 - must contain such information as is reasonably necessary to enable the Council to identify the document(s) requested; and
 - must specify an address in Australia to which notices should be sent; and
 - must be lodged at an office of the agency; and
 - may request that access to the document(s) be given in a particular way.
- 5.2.3 If the document does not meet mandatory must statements above it is not a valid application and the applicant should be advised as such.
- 5.2.4 If the application is not valid and has not been received on an Application to Access Documents form, the accredited FOI Officer is to contact the applicant and refer them to where to find the form and the process for applying for FOI under the FOI Act. The *Application to Access Documents* form may be used.
- 5.2.5 If sending an *Application to Access Documents* form to an applicant, the accredited FOI Officer must include the *FOI Fact Sheet*.
- 5.2.6 Where an application is made for the purpose of amending personal records, a Request to Amend a Document Containing Personal Affairs Information should accompany the request. The *Request to Amend a Document Containing Personal Affairs Information* form may be used. This form should be accompanied by the relevant *FOI Fact Sheet*.
- 5.2.7 If the application is made by a Member of Parliament however, no fee is generally required unless the FOI request is deemed to cost more than \$1,000 to compile the required documents. In such case, the Minister must be notified of the estimated costs immediately.
- 5.2.8 As per section 15 of the FOI Act, Council cannot refuse an application on the basis that they are unable to identify the document(s) required without first taking step to assist the applicant to provide such information.
- 5.3. Once an application is deemed valid, the accredited FOI officer must acknowledge receipt of the application. A template Acknowledgement Letter is provided. An *Application for Internal Review* and *Fact Sheet* should accompany this letter.
- 5.4. Where an application is deemed invalid after the accredited FOI Officer has completed step 5.2.4, a *Notice of Determination* must be sent. This action must be recorded in [FOIMS](#) and the FOI application closed.

5.5 Assessing if the request is with the correct agency

- 5.5.1. Section 16 of the FOI Act provides that an application may be transferred to another agency if the documents sought by the applicant:
- are not held by the Council but are held by another agency (i.e. another Local Council, State Government Agency or university); or
 - are more closely related to the function of the other agency.
- 5.5.2. Just because a document was produce by an agency does not necessarily make that document more closely related to the function of that agency.
- 5.5.3. It is important transfers be undertaken as soon as possible since the application is deemed to have been made to the agency accepting the transferred application 14 days after it was received by the agency that transferred it, or on the day it was transferred (whichever is earlier).
- 5.5.4. The accredited FOI Officer must contact the FOI Officer of the receiving agency prior to the transfer being made and send an advance copy where that is possible.
- 5.5.5. It is possible to partially transfer an application to another agency. A partial transfer mean that the agency that Council will continue to process the application but chooses to transfer part of the application to another agency for processing at the same time.
- 5.5.6. The transfer or partial transfer must be recorded in [FOIMS](#).
- 5.5.7. The accredited FOI Officer should let the applicant know in writing of the partial or full transfer of their application should this occur.

5.6 Identifying relevant documents

What is a document?

- 5.6.1 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. A document may therefore include (but is not limited to):
- hard copy documents and files;
 - notes (including messages on post-it notes);
 - electronic document include databases and emails;
 - DVDs, video tapes, CDs, USB sticks, or film recordings;
 - photos, maps, plans;
 - diary entries; and
 - mobile phone text or SMS messages
- 5.6.2 An application does not have to specify particular documents, rather is may use terms as broad as:
- all documents relating to a particular person; or
 - all document relating to a particular subject matter; or
 - all documents of a specified class that contain information of a particular kind.

- 5.6.3 It is important to not an FOI application is for access to documents, not information. Each request should be read fairly however and as long as the applicant seeks material that constitutes documents it should be treated as such.
- 5.6.4 A request cannot be refused on the ground it does not sufficiently identify the documents sought, unless the applicant is given a reasonable opportunity to provide a more adequate identification as per section 15 of the FOI Act.
- 5.6.5 Where an application is very broad and relates to a large number of documents, the accredited FOI Officer must contact the applicant in an effort to narrow the scope in some way. Any changes to the scope of the FOI must be confirmed in writing in a letter or email to the applicant so there is a record of the agreed change and to avoid misunderstandings.

Document Schedules

- 5.6.6 It is recommended the accredited FOI Officer develops a schedule that identifies all documents located that are relevant to the FOI application and indicates whether or not access to each document is granted.
- 5.6.7 The schedule should also allocate a number to each document and clearly identify the document by date (if applicable) and a brief description of its content.
- 5.6.8 The accredited FOI Officer must ensure not to include anything in the schedule that is exempt information.
- 5.6.9 The document schedule should then be provided to the applicant along with the Notice of Determination.
- 5.6.10 A basic example of a document schedule is available at [Appendix 2](#).

Sufficiency of Search

- 5.6.11 The accredited FOI Officer must make reasonable attempts to locate all documents to which access has been requested as per section 12 of the FOI Act.
- 5.6.12 As per section 4(4) of the FOI Act, Council is held to hold any documents it has immediate access to, which includes documents not in the physical possession of Council. This can therefore extend to document in the possession of external service providers as well as those that have been archived. See Constructive Possession below.
- 5.6.13 A detailed account of all areas searched should be maintained by the accredited FOI Officer. The time spent searching for and locating documents should also be recorded as Council can charge the applicant for this time unless exceptions apply. See Fees and Charges below.
- 5.6.14 When searching for and retrieving records, the accredited FOI Officer should include the *Basic Searching and Retrieving Form*.

5.6.15 The accredited FOI Officer should ensure searches include (where reasonable):

- office desks, filing cabinets or compactus storage;
- computer drives and files – including personal files if necessary;
- computer discs and other electronic storage devices;
- notepads, calendars and diaries;
- tape and video recordings;
- email;
- mobile phones, tablets, and other mobile devices; and / or
- records in temporary or permanent storage.

Constructive Possession

5.6.16 Constructive possession refers to Council’s legal right to possession of a document it does not physically hold at the time the FOI request is received. An example of this might be where a consultant holds documentation surrounding a request for grant funding. Documents held by the consultant are considered to be Council’s constructive possession of those documents.

Archived Records

5.6.17 Where Council has transferred documents to State Archives or another Archive area or department, Council remains the owner of those documents and is considered to still be in possession of for the purposes of the FOI Act. Archived documents must therefore be considered when performing a search of documents.

Documents not held or otherwise available

5.6.18 When an FOI applicant applies for access to documents which, after reasonable searches by an agency, appear either to not exist or are not capable of being found, the accredited FOI Officer must give written notice to the applicant that it does not hold the document. It is important this written notice include reference to section 23(1)(b) of the FOI Act.

5.6.19 It is important to note that section 23(1)(b) only applies where the document requested is not held by Council, either because the document never existed or it once existed but no longer does. Where the document requested does exist but another agency holds the document, a section 16 transfer should be considered.

5.6.20 When the accredited FOI Officer notifies an applicant that requested document(s) do not exist, the accredited FOI Officer must explain to the best of their ability, the searches and enquiries undertaken and any other considerations relevant to the search.

5.6.21 Where the document requested once existed but now does not, the accredited FOI Officer is required to explain why this is the case.

5.7 Are documents otherwise available

- 5.7.1 Sometimes an applicant may make an FOI application for documents that are available through other means. Section 20(1)(b), (c), and (d) provide that where documents are otherwise available through inspection, purchase or library, and agency may refuse access to the document under FOI.
- 5.7.2 Where an application is refused due to the availability of documents elsewhere, this should be outlined in the determination letter, noting the relevant part of section 20.

5.8 Excessive applications

- 5.8.1 Where identification of documents subject to the FOI reveal an excessive amount of documents for the accredited FOI Officer to process, the accredited FOI Officer must consult with the applicant in an attempt to reduce the scope as per section 18(2) of the FOI Act.

Diversion of Resources

- 5.8.2 Where an applicant refuses to reduce the scope of their request, the accredited FOI Officer must decide, as per section 18(1) of the FOI Act, if fulfilling the application will divert Council's resources substantially and unreasonably.
- 5.8.3 Where Council's resources will be unreasonably diverted in order to address the FOI request, the accredited FOI Officer may choose to either:
- seek an extension of time in order to fulfil the application (see 5.8.4 to 5.8.6);
 - or
 - refuse to deal with the application (see 5.8.7).

Request for Extension

- 5.8.4 If the accredited FOI Officer decides to seek an extension they will need to do so under section 14A of the FOI Act. To apply for an extension the accredited FOI Officer will need to write to the CEO outlining the reasons for seeking an extension and the length of the extension required.
- 5.8.5 Where the CEO accepts the extension, the accredited FOI Officer must notify the applicant in writing of the of the decision as per section 14A of the FOI Act and why the extension was granted.
- 5.8.6 Where an application is granted extension, the applicant must be notified with 20 days of the receipt of the application.
- 5.8.7 If the accredited FOI Officer decides to refuse to deal with the application, as per the provisions of 18(1) of the FOI Act, they will need to ensure Council resources would be substantially and unreasonably diverted regardless of an extension.
- 5.8.8 Where the applicant agrees to narrow the scope of their FOI request, the accredited FOI Officer must record any amendment in the FOI File Notes and outline the change of scope as agreed in writing to the applicant.

5.9 Calculation of fees and charges

- 5.9.1 Section 53 of the FOI Act deals with fees and charges associated with dealing with FOI Applications.
- 5.9.2 Fees and charges must reflect the reasonable administrative costs incurred by Council in exercising its functions under the FOI Act.
- 5.9.3 Section 53(2aa) states fees can only be calculated for the processing of FOI applications in relation to finding, sorting, compiling, copying documents, and undertaking any consultation required by the FOI Act. Council cannot charge for the cost of obtaining legal advice nor for consultation that is not required by the Act.
- 5.9.4 Fees and Charges are set each financial year by the *Freedom of Information (Fees and Charges) Regulations 2018* (the Regulations).
- 5.9.5 Fees may be waived or remitted (reduced) under section 53 of the Regulations where the fees might cause financial hardship to the applicant. The section is to ensure people are not prevented from access documents under the FOI Act.
- 5.9.6 Where an applicant requests a waiver of the FOI fees they must provide evidence to support such request. If the applicant is a concession card holder, a copy of the concession card is required. If the applicant is a full time student at a secondary or tertiary institution, a copy of the current student identification card is required. Where the applicant is claiming financial hardship, they must provide a written application outlining why paying the FOI fees would cause financial hardship.
- 5.9.7 Where the applicant is Member of Parliament, please see [section 5.2.7](#) of this document.
- 5.9.8 Once fees are calculated the applicant must be notified.
- 5.9.9 Under section 17 of the FOI Act, where there are significant documents to produce, the accredited FOI Officer may choose to request an advance deposit. Where an advanced deposit is requested, the “clock” for completion of the application stops until the deposit is received. See the [Time Limits](#) section of the procedure.
- 5.9.10 The applicant must be notified that the time for processing of the FOI application will be paused until the advanced deposit is paid.
- 5.9.11 It is important to note, that should the deposit not be paid within a reasonable timeframe, section 18(3) of the FOI Act states the accredited FOI Officer may refuse to continue to deal with the application. This constitutes a determination under the FOI Act. Therefore a letter of determination should be sent including the ways in which the application is able to seek review of the decision.
- 5.9.12 All Fees and Charges relating to FOI Applications must be recorded in [FOIMS](#).

5.10 Examination of documents

General Approach to Exemptions

- 5.10.1 There are 19 exemption clauses in Schedule 1 of the FOI Act (see [Exemption Clauses](#) below). If a document falls within one of these clauses, the Council may determine not to provide access to the document (or parts of the document).
- 5.10.2 Exemptions are designed to provide a balance between the rights of applicants to disclosure of Council-held documents and the need to protect the legitimate interests of government, agencies and third parties.
- 5.10.3 Although the objects of the FOI Act encourage disclosure of documents to promote open and accountable government, there is no automatic right of access under the FOI Act.
- 5.10.4 When an application is made to Council, the accredited FOI Officer must consider all relevant provisions of the FOI Act before deciding whether or not to provide access.
- 5.10.5 Access to documents under the FOI Act is subject to the exceptions and exemptions necessary to protect essential [public interest](#) (including ensuring the decision-making process of government is not impeded), and the personal privacy of individuals.
- 5.10.6 Where there are ambiguities in the interpretation of provisions of the FOI Act, including exemption provisions, it is proper to apply interpretation that would further, rather than hinder, free access to the information.
- 5.10.7 Section 20(4) of the FOI Act requires the deletion of exempt matter wherever possible so that access may be given to the remaining non-exempt portions of the document.
- 5.10.8 It is possible more than one exemption clause may apply to document. The accredited FOI Officer may therefore claim more than one clause. All applicable exemption clauses should be recorded in the Document Schedule as per [Appendix 9](#).

Public Interest

- 5.10.9 Public interest is considered to be something that is important to or that on balance would benefit the public in general.
- 5.10.10 Each exemption clause that contains a public interest test required the accredited FOI Officer to address whether the disclosure would, *on balance*, be contrary to the public interest.
- 5.10.11 If the accredited FOI Officer considers claiming an exemption provision that contains a public interest test, the onus is on them to ascertain and assess the factors both for and against disclosure. All factors for and against must be identified with an explanation of what specific detriment may or may not occur as a result of disclosure. It is not sufficient to simply list the factors which are contrary to the public interest in a notice of determination.
- 5.10.12 There is not limit on the number of factors an accredited FOI officer can refer to when determining the public interest.

Public interest factors which may favour disclosure

The accredited FOI Officer may consider consulting with the applicant to identify any additional facts which should be considered. This does not necessarily include asking the applicant why they want the information.

- 5.10.13 **Meeting the objectives of the FOI Act** – the objects of the FOI Act impose a bias in favour toward providing documents. Therefore meeting the objects of the FOI Act should be considered as a public interest factor.
- 5.10.14 **Promoting public participation in government** – allowing access to information about issues currently being considered by government is vital for public participation in informed debate. It is important the operations of Council and the thinking processes behind decision-making are open to scrutiny so Council is held accountable for its decision making.
- 5.10.15 **Providing documents of community interest** – disclosure of information about issues or general concern to the community can assist individuals make decisions about their own activities. Information such as how public funds are spent, public health and safety and environmental protection and law enforcement can be of significant value to the community.
- 5.10.16 **Providing an individual with information about their personal affairs** – providing individuals with the information Council holds about them and allowing them to seek amendment if the information is incomplete, incorrect, out-of-date or misleading is an essential right of the public.
- 5.10.17 **Providing an individual with information of special interest to them** – there may be public interest in allowing individuals with a special interest in a particular matter or subject to obtain information of relevance to them (e.g. there may be a public interest in a complainant accessing information about how their complaint was handled).
- 5.10.18 **Facilitating research and innovation** – providing access to research information will often allow reuse of the information that could provide opportunities for economic and social development.

Public interest factors that may favour non-disclosure

The following factors and the points listed may assist accredited FOI Officers in determining why disclosure would not be in the public interest.

- 5.10.19 **Satisfying all elements of the exemption clause** – although satisfying one or more exemptions clauses which contain a public interest test do not represent a public interest factor favouring non-disclosure, satisfying the elements of an exemption clause is not enough on its own to form the basis of an argument that disclosure would be contrary to the public interest.
- 5.10.20 **Ensuring efficient and effective conduct of government functions** – it may not be in the public interest to disclose information what would adversely affect the efficient and effective conduct of Council functions (e.g. when access is sought to preliminary or draft documents which, if released, would likely impair the integrity and viability of the agency's decision making process). It should be

noted however, once a decision is made the argument not to provide access to preliminary or draft document that show how decisions developed, the argument of non-disclosure is considerably weaker.

- 5.10.21 **Protection of personal information of an individual** – giving the applicant access to personal information that is not their (i.e. a third party) is generally not considered to be in the public interest.
- 5.10.22 **Protecting the commercial and / or financial interests of third parties** – the confidentiality of information held by government of a commercial nature may need to be maintained. Contract provisions excluding certain information needs to be checked prior to releasing contract documents. Similarly consideration needs to be given to documents such as tender documents which may reveal information of a commercial in confidence nature.
- 5.10.23 **Maintaining the flow of information to law enforcement and regulatory authorities** – it is important to ensure disclosure of information does not interfere with or threaten the way law enforcement or other regulatory authorities perform their functions.

Important note

- 5.10.24 It is important documents are not deemed as against the public interest where release of the documents:
- may possibly embarrass, or inconvenience the Council;
 - may have the potential for the public to lose confidence in the Council;
 - may be misinterpreted or misunderstood by the applicant or the community because the information is incomplete or confusing; or
 - were authored by senior staff, the CEO or Elected Members.

Recurring Themes

There are three recurring themes found in the exemption clauses. These are discussed below:

Could reasonably be expected to

- 5.10.25 Clauses 4, 5, 7, 8, 14, 15, and 16 require the accredited FOI Officer to determine whether a specified harm *could reasonably be expected to* result from disclosure.
- 5.10.26 The words ‘could reasonably be expected to’ should be applied with their ordinary meaning.
- 5.10.27 For there to be a reasonable expectation that harm could result from disclosure, the accredited FOI Officer must have real and substantial grounds for the expectation.
- 5.10.28 The accredited FOI Officer cannot rely on grounds which are merely speculative, imaginable or theoretically possible.
- 5.10.29 Something which is reasonable expected is an expectation that is based on reason, one for which real and substantial grounds exist when looked at objectively which are not irrational, absurd, ridiculous, fanciful, imaginary or contrived.

- 5.10.30 Accredited FOI Officers must keep in mind that they considering the reasonableness of the alleged effect, not the reasonableness of the claim of such effect.

Substantial adverse effect

- 5.10.31 Clause 14(a)(i), clause 15 and clauses 16(1)(a)(iii), (iv), and (v) require the accredited FOI Officer to determine whether or not disclosure will have a substantial adverse effect before the exemption can be claimed.
- 5.10.32 The adverse effect must be sufficiently serious or significant to cause concern to a properly informed and reasonable person.

Merely factual or statistical material

- 5.10.33 The accredited FOI Officer cannot apply the exemption clauses 1(1) (Cabinet documents) and clause 9(1) (Internal working documents) where the information in those documents is of a [factual or statistical](#) nature.
- 5.10.34 It is therefore necessary to have regard to both the content and the context of the document and the context forming part of the deliberative process. Material which contains elements of judgment or opinion concerning purely factual matters may still be capable, depending on its context and its purpose in that context, or properly being characterised as purely or [merely factual](#) matter.

Exemption Clauses

- 5.10.35 Section 20(1)(a) provides agencies the discretion as to whether or not to apply an exemption clause. Where an exemption clause is expressed in absolute terms (such as the exemption relating to Cabinet documents), the accredited FOI Officer has no discretion and cannot provide the documents.
- 5.10.36 Exemptions that are not expressed in absolute terms are to be claimed only where the disclosure of relevant information would cause genuine harm.
- 5.10.37 The following exemption clauses should be considered. An understanding of each can be found at [Appendix 3](#):
- [Clause 1](#) – Cabinet documents
 - [Clause 2](#) – Executive Council documents
 - [Clause 3](#) – Exempt documents communicated by another government
 - [Clause 4](#) – Documents affecting law enforcement and public safety
 - [Clause 5](#) – Documents affecting inter-governmental or local governmental relations
 - [Clause 6](#) – Documents affecting personal affairs
 - [Clause 6A](#) – Exempt electoral records
 - [Clause 7](#) – Documents affecting business affairs
 - [Clause 8](#) – Documents affect the conduct of research
 - [Clause 9](#) – Internal working documents
 - [Clause 10](#) – Documents subject to legal professional privilege
 - [Clause 11](#) – Documents relating to judicial functions
 - [Clause 12](#) – Documents the subject of secrecy provisions

- [Clause 13](#) – Documents containing confidential information
- [Clause 14](#) – Documents affecting the economy of the State
- [Clause 15](#) – Documents affecting financial or property interests
- [Clause 16](#) – Documents concerning operations of agencies
- [Clause 17](#) – Documents subject to contempt etc
- [Clause 18](#) – Documents arising out of companies and securities legislation
- [Clause 19](#) – Private documents in public libraries or archival collections

5.11 Seeking expert opinions

5.11.1 Expert opinions may include legal advice, or advice from professionals in a particular field. Advice should be with regards to the effect of the FOI Act on disclosure of particular documents. See consultation below.

5.12 Consultation

5.12.1 Section 26 of the FOI Act requires the accredited FOI officer to consult with any third part concerned in the disclosure of personal affairs information and must take the views of the third party into account when reaching a determination. Where a decision is taken to disclose information against the third party's objection under clause 6, the third party has the right of review.

5.13 Assessing exemptions

5.13.1 See [5.10.35 – 5.10.37](#) above and [Appendix 3](#).

5.14 Deciding form of access

5.14.1 Access may be given in any of the following ways:

- inspection;
- provision of a copy of the document;
- provision of a means of viewing a film or videotape or hearing a sound recording;
- provision of a transcript of a sound recording or of shorthand notes; or
- provision of a computer print-out.

5.14.2 The way in which the document has been requested to be accessed may not be practical. The accredited FOI Officer must then contact the applicant to discuss alternatives prior to preparing the determination.

5.15 Preparation of determination

5.15.1 The primary purpose of Council providing a notice of determination to the applicant it to inform them of Council's decision.

5.15.2 When an accredited FOI Officer makes a determination they are effectively exercising a statutory power. This places determinations within administrative law. The underlying principle of administrative law is 'procedural fairness' which

is achieved through applying various rules including those of natural justice (i.e. hearing and considering all sides) and taking into account relevant considerations as discussed throughout this procedure. It is important when exercising procedural fairness the decision maker shows no bias in coming to their decision.

- 5.15.3 It is therefore very important to provide adequate, fair and unbiased reasons for any determination made under the FOI Act.
- 5.15.4 It is also important as part of the determination to inform the applicant, and any interested third parties, of their rights of review.

Types of Determinations

- 5.15.5 There are several types of notices of determination that may be made under the FOI Act. These include:

- [Section 14A determination](#) – extension of time;
- [Section 18\(1\) determination](#) – a refusal to deal with an application because to do so would be a substantial and unreasonable diversion of resources;
- **Section 18(2a) determination** – a refusal to deal with an application because it is a pattern of conduct that amounts to an abuse of the FOI Act or the application is made for a purpose other than to obtain access;
- [Section 18\(3\) determination](#) – a refusal to continue to deal with an application because the requested payment of an advance deposit was not paid within a specified period;
- [Section 23 determination](#) – applications for access where documents are fully released, partially released, deferred or access is refused;
- **Section 29 determination** – internal review re applications for access
- **Section 36 determination** – applications for amendment of personal records
- **Section 38 determination** – internal review re applications for amendment.

Making a decision

- 5.15.6 Before an accredited FOI Officer can begin to write a determination, they must first:
- identify the relevant factors to take into account when making a decision;
 - draw reasonable conclusions regarding those factors;
 - apply the legislation when reaching conclusions; and
 - explain how the decision was arrived at.
- 5.15.7 Deciding whether or not to provide access to documents and assessing [exemption clauses](#) are discussed above.

Exercising discretion

- 5.15.8 Administrative law requires that where an authorised officer has power to make a decision involving a discretionary power, only that officer can exercise that power.
- 5.15.9 Section 29(6) of the FOI allows the CEO or the Elected Members of Council to direct an accredited FOI Officer to make a determination. Where this happens the notice of determination must clearly state that the determination was made at the direction of the CEO or the Elected Members, whichever is the case. This will impact on the applicant's review rights since the applicant will not be able to apply for internal review.
- 5.15.10 If the CEO directs the accredited FOI Officer to make a determination, it should be considered whether or not the CEO make the decision on that occasion.
- 5.15.11 During the process of making a decision it may be useful to [consult](#) with others either within or outside Council. Taking relevant views into account while making a decision is an important part of the decision making process however, undertaking consultation should not amount to seeking direction regarding making a decision.

Deferral of access

- 5.15.12 Section 21 of the FOI Act allows Council to defer access to a document where:
- the document is required by law to be published but is yet to be published; or
 - the document has been prepared for presentation to Parliament but is yet to be presented; or
 - the document has been prepared for submission to a particular person or body but is yet to be submitted.
- 5.15.13 Where the document is deferred because it is required by law to be published and has not yet been published, the Council may not defer access beyond the time the document is required by law to be published.
- 5.15.14 Section 25-28 of the FOI Act allow for the deferral of documents until such time as all reviews lodged by interested parties are concluded or the time for lodging a review has lapsed.
- 5.15.15 In all other circumstances, Council must not defer access to the document for more than a reasonable time after the preparation of the document.

5.16 Issue of Notice of Determination

- 5.16.1 Under the FOI Act, notices of determination must be in writing.
- 5.16.2 The primary aim of providing a written determination is for Council to explain to the applicant, and any other interested parties, the reasons for making the determination.
- 5.16.3 When an applicant reads the determination, they should clearly understand the decision, why it was made and who made it. The only exception to this is if the determination is to refuse access to a document and to include the full

explanation into the written determination would defeat the use of the exemption.

5.16.4 The second aim of a written determination is to justify Council's decision to a relevant review authority.

5.16.5 An adequate notice of determination should:

- fulfil Council's responsibility to inform the person affected of the real basis for the decision;
- assist the Council to identify the reasons which motivate specific decisions and to consider carefully the correct and proper outcome in all circumstances;
- serve as a check on Council's decision making process;
- avoid the appearance of an arbitrary decision lacking a proper rational basis;
- ensure better quality decisions by stating all relevant considerations;
- enable the person affected not only to understand in detail why the decision was made, but also to determine whether they should challenge the decision;
- assist a person reviewing the decision to identify quickly what was decided and why, and to undertake the making of a new decision from an informed position;
- serve as a firm basis for defending a review.

Requirements of section 23 – written determinations

5.16.6 Section 23(1) of the FOI Act, requires Council to provide a written determination of its decision to the FOI applicant.

5.16.7 The written determination must specify a number of things including:

- the day on which the determination was made;
- the name and [designation](#) of the officer who made the determination;
- the rights of review conferred by the FOI Act;
- the procedures to be followed for the purposes of exercising review rights;
- if access is to be given (either immediately or subject to deferral), the amount of any charges payable in giving access;
- the amount of any charges for dealing with the application together with a statement indicating the amount payable by the applicant and / or any amount refundable to the applicant, taking into consideration any advance deposits paid.

5.16.8 Written notice of a determination to grant access to a document that was subject of one or more consultation provisions under the FOI Act (section 25-258) must also be provided to any interested person who was consulted and objected to the release of the document or whose views were unable to be obtained. Determination in this circumstance may be provided via a copy of the

determination sent to the applicant together with a cover letter outlining their rights of review and the procedures to be followed to exercise those rights.

[Determinations concerning refusal of access](#)

5.16.9 Section 23 also deals with the requirements of a determination where Council determines to refuse access to a document including where an exemption is claimed with respect to one or more documents (or parts of documents).

5.16.10 Good reasons are those which consider each requirement (or element) of the relevant exemption clause, and explain in terms of evidence and other considerations why each requirements is met.

5.16.11 The ‘material questions of fact’ discussed in section 23(2)(f)(ii) are the matters upon which the decisions were made. The ‘findings’ made on such ‘material questions’ are the conclusions reached on those points, and how they were reached in terms of what was considered and how the matter was analysed.

5.16.12 The ‘sources of information’ referred to in section 23(2)(f)(ii) are the various types of evidence the decision maker relied on, and may include reference to:

- the documents and files involved;
- the result of any internal Council or across agency consultations;
- any Council guidelines or policy directions relied on;
- any submissions by the applicant;
- the result of any third party consultations required by the Act.

[Determinations concerning documents with deletions](#)

5.16.13 Section 23(2)(d) sets out the requirements for a notice of determination where the decision involved is one to release a document subject to deletions (partial disclosure).

5.16.14 Such determination must specify the fact the document is a copy with deletions and why a particular clause applies and why.

[Exempt information](#)

5.16.15 Section 23(3) concerns the giving of a notice of determination in a form that ‘neither admits nor denies the existence of a document’ where to do otherwise would give rise to concerns pertaining to ‘criminal investigation or law enforcement’.

5.16.16 Section 24(4) allows Council to leave out of a notice of determination any information which would result in the notice itself being an exempt document.

[Addressing the elements of sections and clauses](#)

5.16.17 The word ‘element’ is used to describe all the different parts, or requirements, of a course of action, a section of an Act or a clause of a schedule to an Act. To comply with a section or a clause of the FOI Act, each element must be addressed.

[Determinations of amendment applications](#)

5.16.18 Section 36 of the FOI Act provides that Council must give written notice to the applicant if the determination is to either amend the record in question, refuse

to amend the record, or if the record is not held by Council, the fact that Council does not hold the record.

Document schedules

5.16.19 It is strongly recommended accredited FOI Officers develop a document schedule that numbers, lists and describes all documents located that are relevant to the application. See [Appendix 9](#).

5.16.20 No exempt documents should be listed in the document schedule.

5.16.21 It should be noted the document schedule only summarises Council's decision and does not satisfy the Council's obligation to provide detailed reasons for its decision in a notice of determination.

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

6. Time Limits

- 6.1. The FOI Act imposes certain time limits in respect of applications. See [Appendix 4](#).
- 6.2. Section 14 of the FOI Act provides that an application for access must be dealt with as soon as practicable, and in any case, within 30 (calendar) days, after the application is received by Council.
- 6.3. Counting of the time frame commences the day after receipt of a [valid](#) FOI application.
- 6.4. While the 30 day limit applies only to dealing with the application (including making the determination) and not to the actual provision of access to the documents sought, access should be provided as soon as practicable after the determination has been made and any charge has been paid. Section 22(5) provides that Council may refuse to give access to a document if a charge payable in respect of the application or the giving of access has not been paid.
- 6.5. Where Council decides to request an [advance deposit](#) in accordance with [section 17](#) of the FOI Act, the time the agency has to deal with the application is suspended until the deposit is paid ([section 17\(6\)](#)). Time recommences the day after the deposit is paid.

Time extensions

- 6.6. As per section 14A of the FOI Act, the CEO of Council may extend the time limit for responding to an application for a reasonable period having regard to the following circumstances:
 - the application is for access to a large number of documents or necessitates a search through a large quantity of information and dealing with the application within that period would unreasonably divert the agency's resources from their use by Council in the exercise of its functions (section 14(1)(a)); or

- the application is for access to a document in respect of which consultation is required pursuant to section 25-28 of the FOI Act.
- 6.7. The power to grant time extensions cannot be delegated to an accredited FOI Officer.
- 6.8. The applicant must be notified in writing of the time extension.
- 6.9. An extension is a determination for the purposes of the FOI Act and a person who is dissatisfied with the determination may apply to for review to the Ombudsman or SACAT. They cannot apply for internal review as the decision is that of the CEO.
- 6.10. It is possible however, for an accredited FOI Officer to negotiate directly with the applicant, outside of the FOI Act, for more time to process the application. However the applicant should be advised that such an extension is not made in accordance with the FOI Act. Therefore if the applicant changes their mind they are still entitled to revert to the 30 day time frame.

Deemed Refusal

- 6.11. Where an agency fails to determine an application within 30 days, or within the period extended, then according to section 19(2) of the FOI Act, Council is taken to have determine the application by refusing access to the documents requested.
- 6.12. The applicant has the right to review immediately the 30 day period expires and does not have to wait for written notice.

7. Reporting Requirements and Other Obligations

- 7.1. The inability of Council to locate a record quickly may mean the accredited FOI officer has a considerably reduced period in which to consider documents.
- 7.2. Council must ensure its records are kept according to its Records Management Policy at all times to ensure documents are available in order to respond to any FOI application received.

Freedom of Information Management System

- 7.3. Accredited FOI Officers are required to input data directly relating to all FOI Applications into [FOIMS](#). This information is used for statistical reporting purposes at State level.

FOI Annual Reporting

- 7.4. All data relating to all FOIs must be entered into [FOIMs](#) by the end of July each year. State Archives will send out a reminder to those listed as accredited FOI Officers for Council. If one is not received the Manager, Corporate Services must contact State Records in order to receive said email and comply with requirements.

Contracts with Confidentiality Clauses

- 7.5. Pursuant to clause 13(7) of Schedule 1 of the FOI Act, the total number of contracts containing an approved confidentiality clause for each financial year must be reported in the FOI Annual Report. These statistics are taken from [FOIMS](#).

FOI Information Statements

- 7.6. Council must publish an up to date information statement at least every 12 months which adheres to the requirements of section 9 of the FOI Act.

Operating outside of the FOI Act

- 7.7. Section 3(3) of the FOI Act encourages agencies to publish, give access to and amend records where it is required by or under another Act or where it is proper and reasonable to do so in ways other than under the FOI Act.
- 7.8. Council publishes its policies on the Council website to ensure such information is available proactively to the public.
- 7.9. Council may prefer to provide access to documents under the FOI Act where the subject matter in the documents is controversial or confidential to some degree. Disclosure of these documents is possible under section 3 of the FOI Act.

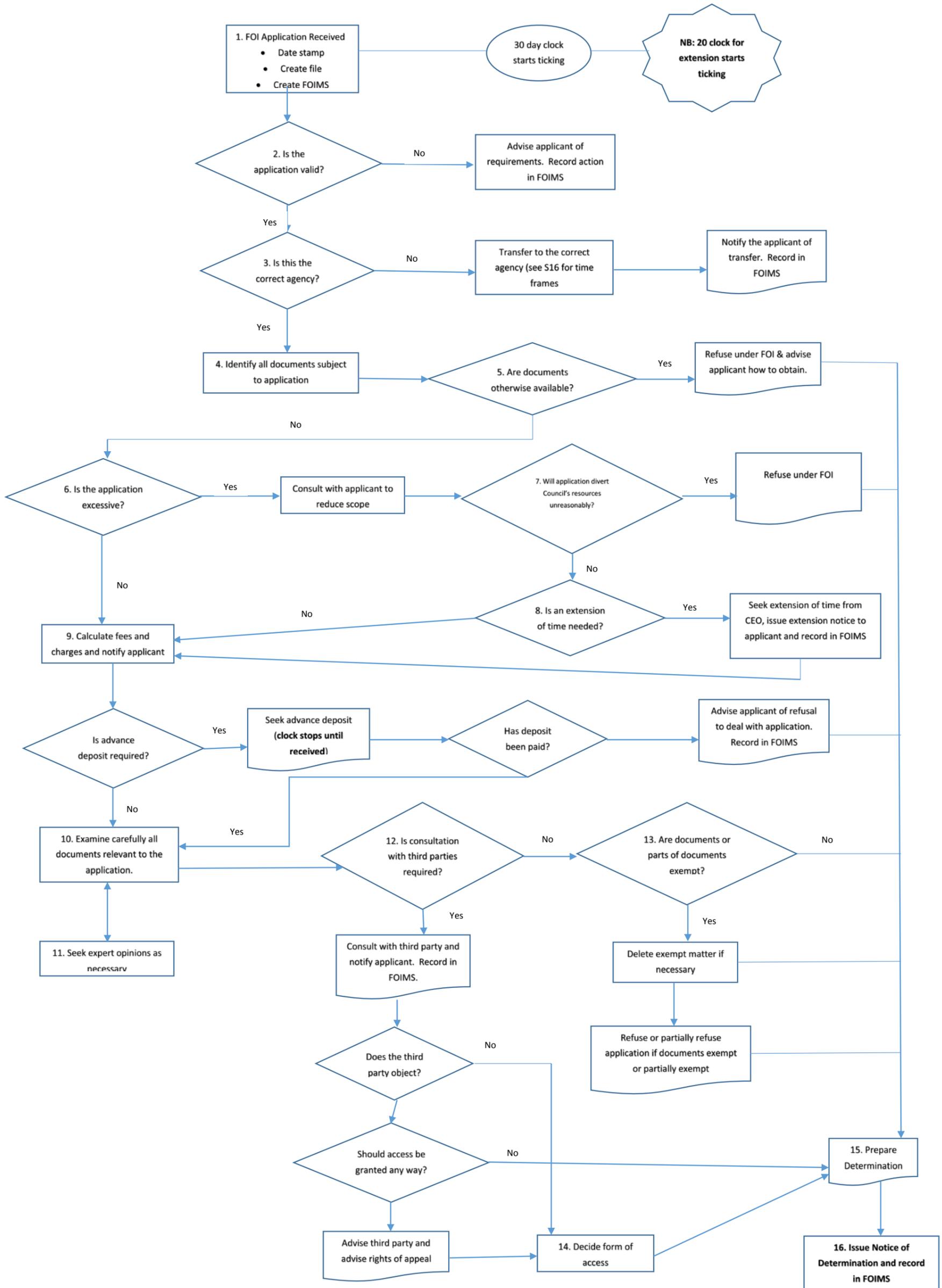
8. Related Documents

- 8.1 Freedom of Information Statement
- 8.2 Interaction of The Development Act, State Records Act and Freedom of Information Act with the Copyright Act Policy
- 8.3 Information Privacy Principles Instruction
- 8.4 Information Sharing Guidelines for promoting safety and wellbeing
- 8.5 Public Interest Disclosure Policy
- 8.6 Personal Information Security Policy
- 8.7 Notifiable Data Breach Procedure
- 8.8 Records Management Policy

Procedure Details

VERSION	DATE ENDORSED	VERSION REFERENCE
V 1.0	XXXX	XXXX

Appendix 1 – FOI Process Flow Chart



Appendix 3 – Exemption Clauses

Clause 1 – Cabinet Documents

See points [5.10.33](#) and [5.10.34](#) above.

The confidentiality necessary for effective government requires the deliberations of Cabinet should be protected from mandatory disclosure under the FOI Act.

If a document satisfies one or more of the elements of clause 1, then it is exempt from release. It is not appropriate for an accredited FOI Officer to exercise discretion to release documents that have been determined exempt under clause 1.

Clause 1(a) should be claimed where a document has been *specifically prepared for submission to Cabinet* whether or not it has in fact been submitted. To attract the exemption, the document must have been created for that purpose.

Clause 1(b) should be claimed where a document is a *preliminary draft* of a document that satisfies the description of clause 1(a).

Clause 1(c) should be claimed where a document *is a copy of or part of documents* described in (a) or (b) or contains an extract from documents described in (a) or (b).

Clause 1(e) should be claimed where they will disclose any *deliberation or decision of Cabinet*. The document itself need never have been prepared for submission to Cabinet and may have been created before or after Cabinet considers the matter.

Clause 1 (f) should be claimed where a document is a *briefing paper specifically prepared for the use of a Minister* in relation to a matter submitted, or proposed to be submitted to Cabinet.

Once **20 years** have passed since the end of the calendar year in which the document came into existence, the Cabinet exemption no longer applies.

Disclosure of Cabinet documents between **10 and 20 years** old needs to be processed through the Department of Premier and Cabinet through the FOI process.

Clause 2 – Executive Council documents

The provisions of clause 2 mirror clause 1 above. The 10 year rule however, does not apply.

Clause 3 – Exempted documents communicated by another government

Clause 3 allows for exemption of documents which contain information from an intergovernmental communication to the South Australian Government or a Council and that information would be exempt under a corresponding law of the Commonwealth or another State.

Clause 4 – Documents affecting law enforcement and public safety

Clause 4 has potential application to a wide range of documents created in Council's investigative and compliance activities as well as to major law enforcement activities.

Applying this exemption requires particular sensitivity because of the need to balance concern that individuals may be endangered against care that the exemption is not used unnecessarily.

The term 'law' is not limited to criminal law but extends to laws including civil and regulatory laws.

Documents relating to, for example, child welfare laws, taxation, public health and safety legislation and laws regulating businesses all fall within the definition of law enforcement documents. The 'law' can also relate to South Australia, Federal, another State or Territory and laws of foreign countries.

Clause 4 allows exemption when one of the three following outcomes [could reasonably be expected](#) following disclosure of the document(s):

- danger to the life or physical safety of any person;
- prejudice to the fair trial of any person, or the impartial adjudication of any case; or
- facilitate the escape from lawful custody of any person.

Clause 5 – Documents affecting inter-governmental or local governmental relations

This exemption recognises the importance of good relations between Federal, State and Local government.

Where it is intended information affecting intergovernmental relations may be disclosed, section 25 first requires consultation with the government or council concerned. The views of that agency are to be taken into account by the accredited FOI Officer.

Should the accredited FOI Officer decide to disclose the material against the objection of the third party government or council, the agency has an independent right of review.

Where the FOI request concerns only the affairs of the District Council of Streaky Bay, then there is no need to consult (**section 25(2a)**).

The [public interest](#) test must be separately satisfied if an exemption under clause 5 is to apply. See [public interest](#) above.

Clause 6 – Documents affecting personal affairs

The term 'personal affairs' is defined in section 4 of the FOI Act and includes a person's:

- financial affairs such as bank details, property and other assets, taxation information etc;
- criminal records;
- marital or other personal relationships;
- employment information;
- education records;
- records about a person's behaviour, personality or reputation;
- health related information; and
- private addresses, or private telephone numbers

but does not include the personal affairs of a body corporate.

Where an applicant is seeking information about themselves which Council holds, then information regarding ONLY their personal affairs may be provided to them (**section 6(3)**).

Where the personal information sought by the applicant also contains personal information regarding a third party, the accredited FOI Officer must consider **clause 20(4)** of the FOI Act which says that if it is practicable to provide the applicant with access to a copy of a document from which exempt matter is deleted, then this should occur.

Where exempted information cannot be redacted, the third party must be consulted and the matter resolve on the basis of [reasonableness](#) as outlined below.

Where an applicant is seeking information about a third party which Council holds, then the applicant must provide a written statement signed by the third party, stating that the third party consents to the applicant attaining such information. This may be where a solicitor requires information on behalf of a client. Where a person is seeking the information of a child, child protection legislation must be considered, even if the applicant is the child's parent.

Where an application includes documents which include information related to a third party, but was not specifically asked for in the application, the accredited FOI Officer must assess whether the document is relevant to the application after redaction of the personal information.

In determining whether information concerns a person's personal affairs, the source of the information is irrelevant. It does not therefore matter if the source of the information is the person themselves or another. It also does not matter if the information is private or confidential. Even if the information is widely known or rumoured in the press, this does not affect its status as being information concerning the personal affairs of a person.

It is important to note the context in which information is sought so as to not inadvertently reveal a person's personal information. For example, although a list of addresses with no other information included, would not ordinarily reveal a person's personal information, if the application is with regards to a specific complaint, provision of such addresses may make it possible to identify the person(s) involved.

Unreasonable Disclosure

Unreasonable disclosure requires the accredited FOI Officer to consider balancing where it is in the [public interest](#) or not to continue to withhold personal information.

The test of unreasonableness is an objective one requiring the accredited FOI Officer to draw on all that is known or may be reasonably inferred about the surrounding circumstances. It is not a subjective test where one merely follows the wishes of the third party.

Factors to be considered in establishing whether or not disclosure of personal affairs information is reasonable or not may include:

- the nature of the information requested;
- the circumstances in which the information was obtained by Council;
- the current relevance of the information;
- whether or not the individual concerned (the third party) objects to the disclosure
- whether the damage likely to be suffered by the person whose personal affairs are disclosed would result in some unfairness, embarrassment or hardship;

- the relationship between the applicant and the person whose personal affairs may be disclosed
- whether the disclosure of the information would only serve to excite or satisfy the curiosity of the applicant; and / or
- whether or not the information is already in the public arena.

Unproved criminal allegations

Clause 6(2) provides a document is exempt if it contains allegations or suggestions of criminal or other improper conduct of an individual and the truth of those allegations or suggestions has not been established by judicial process.

Disadvantaged or vulnerable persons

Clause 6(3a) requires exemption of information about or received from a minor or person suffering a mental illness, impairment or infirmity, or where the person's family or circumstances would make disclosure of information unreasonable having regard to the need to protect that person's welfare.

Exempt electoral records

Clause 6A exempts information about electors being obtained in the course of administering the *Electoral Act 1985*. It does not apply in relation to the details of electors recorded on an electoral roll.

Clause 7 – Documents affecting business affairs

To satisfy the exemptions in this clause the accredited FOI officer will need to demonstrate the document(s) relate to a business or commercial activity.

This exemption cannot be claimed when the information is the business affairs of the FOI applicant.

Blanket protection for business and commercial information was never intended by this clause. There is no right to total corporate privacy. Business corporations are created under federal and state laws and are subject to regulation by governments for common good. A consequence of this is the public's right to know how well that regulation is being carried out on its behalf.

Trade secrets – Clause 7(1)(a)

A trade secret is information 'useable in the trade' that is kept secret. Information covered under trade secret includes:

- the extent to which the information is known outside of the business of the owner of that information;
- the extent to which the information is known by persons engaged in the owner's business;
- measures taken by the owner to guard the secrecy of the information;
- the value of the information to the owner and their competitors;
- the effort and money spent by the owner in developing the information; and
- the ease or difficulty with which others might acquire or duplicate the secret.

There is no [public interest](#) test of **clause 7(1)(a)** but it does contain an obligation to consult third parties prior to access being given to documents falling within the ambit of clause 7 – see **section 27** of the FOI Act.

Commercially valuable information – Clause 7(1)(b)

The exemption in **clause 7(b)** must meet all three following criteria:

- The information has commercial value; and
- It [could reasonably be expected](#) that disclosure of the information would destroy or diminish the commercial value of the information; and
- Disclosure would, on balance, be contrary to the [public interest](#).

Information has commercial value if:

- it is valuable for the purposes of carrying on the commercial activity in which the business or person is engaged;
- it is important or essential to the profitability or the viability of a continuing business operation; or
- an arms length buyer is prepared to pay to obtain that information from the business or person.

Commercially valuable information may include:

- client lists;
- an agreement containing profit and loss sharing between parties; or
- an unusual methodology for managing a project.

Information which is aged, out of date, or publically available may have no remaining value and is therefore no longer exempt.

Business affairs – Clause 7(1)(c)

To claim **clause 7(1)(c)**, the following criteria must be met:

- the document must contain information concerning the business, profession, commercial or financial affairs of the business or person; and
- it [could reasonably be expected](#) that disclosure of the information would:
 - have an adverse effect on those affairs; or
 - prejudice the future supply of such information to the government or to another business; and
- disclosure would, on balance, be contrary to the [public interest](#)

Business affairs – is information relating to how the business is conducted with the purpose of obtaining profits or gains, whether or not those profits or gains are actually obtained.

Commercial or financial affairs – includes agencies of organisations that do supply goods and services on a commercial basis.

Professional affairs – is information relating to a profession or vocation. This does not include the performance of salaried professionals performing duties in the service of the public sector.

Adverse effect – applies if disclosure [could reasonably be expected](#) to adversely affect a business or person in relation to their business affairs. In judging whether disclosure would have an adverse effect, the view of the business or person consulted will be one factor to take into consideration.

Prejudice the future supply of information – evidence is required to show that prejudice is reasonably likely to occur to the supply of business information to government or to another business (i.e. where specific information is deemed and listed as confidential in a contract). This may not extend to tender documents as tenderers are deemed to know the provisions of the FOI Act.

Contracts entered into from 1 January 2005 – a clause 7 exemption does not apply to a contract entered into by Council after 1 January 2005. See [Clause 13](#) exemptions below.

Clause 8 – Documents affecting the conduct of research

Clause 8 allows exemption of documents which relate to the purpose or results of research, including research which has not commenced or is in progress, other than public opinion polling which does not related directly to a contract or commercial transaction.

An overriding [public interest](#) test is required to be met for clause 8 to apply.

Clause 9 – Internal working documents

The general purpose of this exemption clause is to protect documents concerning the decision-making functions of Council, if their disclosure would be contrary to the [public interest](#). The exemption should not be used as grounds for denying access to documents which relate purely to the administrative function of Council.

Documents which may be included in this exemption included those which relate to any opinion, advice or recommendation, consultation or deliberation in the course of the decision-making functions of Council.

The decision-making functions of Council are the process that the Council go through leading up to a decision, even if no decision is ultimately made.

This clause applies irrespective of whether the documents were produced within Council, received from another agency or received from some outside person or body, provided the elements of the clause are satisfied.

The degree of confidentiality of internal working documents will generally lessen with the passage of time and it may be that a document containing preliminary advice concerning Council's decision-making functions may cease to attract a clause 9 exemption after a final decision is made.

Clause 9(2) excludes any document which contains a document that merely consists of matter that appears in a Council policy document, or that is [merely factual or statistical](#) in nature.

Clause 10 – Documents subject to legal professional privilege

Clause 10 operates to exempt communications between Council and their legal advisers where that communication would be subject to legal professional privilege.

To decide if a document is subject to legal professional privilege the accredited FOI officer must consider:

- whether there is a solicitor – client relationship;
- whether the document in question was created for the dominant purpose of giving or receiving legal advice or for use in actual or anticipated litigation;
- whether the advice given was independent; and
- where the advice given is confidential.

Solicitors may include:

- solicitors from the Crown Solicitor’s Office;
- solicitors from private legal firms;
- Director of Public Prosecutions and lawyers attached to that office;
- Parliamentary Counsel;
- barristers; and / or
- ‘in-house’ lawyers – where communication sent or received by the in-house lawyer was as a professional legal advisor and there is a solicitor/client relationship.

Legal professional privilege is the Council’s privilege to assert or waive. Before considering whether to waive privilege the accredited FOI Officer of Council should obtain legal advice from its legal advisor.

Generic legal advice may not fall within the subject of legal professional privilege because seeking advice on the development of such things as policy documents for example may fall more within the definitions of section 4 of the FOI Act.

Clause 11 – Documents relating to judicial functions

Clause 11 provides that a document is exempt if it contains matter relating to existing or future proceedings before a court or tribunal. It also allows exemption of material prepared for or on behalf of a court or tribunal in relation to proceedings that are being or have been heard.

There is no public interest test applied to this clause.

Clause 12 – Documents the subject of secrecy provisions

Where the disclosure of particular information is an offence against a particular Act (i.e. the disclosure of a Whistleblower’s identity in the *Whistleblowers Protection Act 1993*) the secrecy provision of the FOI Act applies.

Clause 13 – Documents containing confidential information

Two exemptions exist under clause 13:

- where a person who gave confidential material to Council could succeed in a breach of confidence action against Council should the FOI office disclose the material; and
- where disclosure might [reasonably be expected](#) to prejudice the future supply of confidential information to government bodies or Council, and would, on balance, be contrary to the [public interest](#).

It should be noted that the law of confidentiality apply to clauses 4(1)(a)(ii) and 5(1)(a)(ii) is the same as under clause 13.

Confidential communications

An action for breach of confidence refers to legal action brought in relation to one or more of the following causes of action:

- breach of contractual obligation of confidence;
- breach of an equitable duty of confidence; or
- breach of fiduciary duty of confidence and fidelity.

Council does not need to prove that an action would actually be brought or that it would succeed in this circumstance.

If a person is to succeed in an action for breach of confidence the following five criteria must be satisfied:

1. the information must be specifically identified and not merely global in nature;
2. the information must be ‘inherently confidential’, that is, known only to the limited parties and not more broadly;
3. the information must have been communicated and received on the basis of a mutual understanding of confidence. If, for example, Council routinely publishes such information, the communication cannot satisfy this requirement because there would be no receipt of the details in confidence – this issue must be judge according to the understanding *at the time of the communication*, not in retrospect;
4. disclosure of the information, if it were to occur, must be an ‘unauthorised use’ of the information. This may require an examination of the *nature* of the confidential relationship, that is, whether it can be said to encompass an additional party beyond those to the original communication, disclosure to whom could be deemed to be ‘authorised’; and
5. disclosure is likely to cause detriment to the confider if disclosed.

The marking of documents as confidential or commercial-in-confidence is not enough to satisfy the above 5 criteria.

Evidence of carefully thought out segregation and control of confidential information is significant in assessing whether information is received on a confidential basis.

An unauthorised leak of information does not destroy its confidential character.

Prejudice supply of confidential information

Clause 13(1)(b) covers situations where disclosure, or threatened disclosure, would not form the basis for breach of confidence **but** the disclosure might be reasonably likely to prejudice the future supply of confidential information to government **and** that disclosure would be contrary to [public interest](#).

In some cases it may not be enough to show that disclosure might deter a particular person from supplying information in the future, since Council may be able to obtain the information from other suitably qualified persons. In this case, it may be required that the FOI Office show disclosure would deter all relevantly qualified persons from providing such information.

Disclosure must also consider the [public interest test](#) when applying this clause.

Clause 13 and contracts

Clause 13 does not apply to a contract entered into by Council after 1 January 2005 unless the following applies:

- the contract contains matter the disclosure of which would, under a term of the contract, constitutes a breach of the contract or found an action for breach of confidence (clause 13(2)(a)); and
- that term has been approved by either the Minister or the agency – depending on what body entered into the contract (clause 13(2)(b)).

The ‘term’ (also referred to as a confidentiality clause) must be approved before the contract is executed.

Approval of a confidentiality clause needs to be sought only where the contract is imposing an obligation of confidence on Council. If the contract imposes confidential obligations on other parties to the contract such as a private consultant, contractor or supplier, the FOI Act does not require approval of a confidentiality clause.

Council may delegate the authority to approve confidentiality clauses in contracts as well as the Minister or their delegate. For example, where the Elected Members are appointed as the appropriate body to give approvals, they may delegate this authority to the CEO, or other officers within Council. Check the delegations manual for more information. If delegation to approve confidentiality clauses does occur, it is important the delegation process be documented and recorded appropriately.

Legal advice should be sought in regard to exercising an extension to a contract. In some cases, particularly where the terms of the contract are renegotiated, the contract may be considered a new contract and may require approvals to be sought for confidentiality clauses from the CEO.

Clause 14 – Documents affecting the economy of the State

Clause 14 exempts documents where disclosure *could reasonably be expected* to have a *substantial adverse effect* on the management of the **State’s** economy. It does not exempt documents which effect management of the local economy.

Clause 15 – Documents affecting financial or property interests

Clause 15 will apply if the disclosure of a document would have a *substantial adverse effect* on the financial or property interests of Council.

The exemption aims to allow Council to engage in candid and uninhibited discussions and dealings about financial interests and activities, without the concern that opinions, plans or recommendations relating to financial activities will be published prematurely resulting in serious financial consequences for Council.

A document which simply relates to the financial or property interests of Council is not sufficient to bring the document within exemption.

Financial or property interests are not limited to expenditure involving or relating to buildings or land. The exemption may also have application where Council is engaged in revenue generating activities or has property interests other than buildings or land.

Cause 16 – Documents concerning operations of an agency

Clause 16 will apply if disclosure of a document would have [substantial adverse effect](#) on Council and disclosure would on balance be contrary to the [public interest](#). There are five separate exemptions within this clause. Stringent evidence is required for the claim of [substantial adverse effect](#) and the [public interest test](#) and both must be addressed separately.

Tests, audits and exams

Clause 16(1)(a)(i) and (ii) requires the accredited FOI Officer to assess if the conduct or objects of the audits, tests, examinations etc would be prejudiced in a particular instance. To work out if this may be the case, the accredited FOI Officer must be satisfied that:

- there is a reasonable expectation that the effect of disclosure will occur; and
- the effect will be to prejudice the conduct or objects of the audit test or examination; and
- disclosure would be contrary to the [public interest](#).

What will amount to prejudice will depend on the circumstances of the case. An example would be where disclosure of the document would advantage or disadvantage a person in relation to the test or examination about to be conducted by Council.

Examples of documents may include:

- personality tests such as intelligence, aptitude, psychological and personality tests – especially where used to assess applicants for vacant positions;
- academic, professional, technical and trade examinations;
- guidelines and standards for carrying out tests and examinations where prior knowledge of the testing would defeat the purpose or objects of the test; or
- financial audits, compliance or efficiency audits.

Management or assessment of personnel

Clause 16(1)(a)(iii) is not concerned with protecting the content of the document, rather with the effect of its disclosure and to that extent its contents are immaterial. Examples may include:

- workplace harassment complaint investigations;
- disclosure of statement of fellow employees as to an applicant's misbehaviour where disclosure would create reluctance for staff to provide statements in the future, further disclosure may impact detrimentally on staff morale and loss of trust in management to protect their safety and welfare.

Embarrassment to officers from disclosure is not a [substantial adverse effect](#).

Agency functions

Exemption under clause 16(1)(a)(iv) requires the following tests to be satisfied:

- there will be a reasonable expectation of the effect;

- the effect must be both substantial and adverse (not beneficial);
- the way in which Council discharges or performs its functions will require to be changed to its disadvantage; and
- in addition to the identified disadvantage, it would be contrary to the [public interest](#) for the document to be disclosed.

Industrial relations

Clause 16(1)(a)(v) requires a similar test to be applied to those outlined in 16(1)(a)(iii) and (iv) but with regard to the conduct of industrial relations.

Public interest

Even where a [substantial adverse effect](#) can be shown, clause 16(1)(b) must be separately satisfied. If it cannot the document is required to be disclosed.

Agencies commercial activities

Clause 16(2) will exempt documents relating to the competitive commercial activities of Council where disclosure could prejudice Council's competitiveness in those activities.

Clause 17 – Documents subject to contempt etc

This provision will exempt a document if its *public* disclosure would be a contempt of course, be contrary to an order of or direction of a person or body with power to receive evidence on oath, or infringe the privileges of the Parliament of South Australia.

The words *public disclosure* exempt any document where disclosure were made to the public generally rather than to an FOI applicant. Whether such disclosure would be contempt of court must be determined by supposing that Council had disclosed the document to the public generally.

Contempt of court

It is contempt of court to publish any material a court has ordered not to be published. A court may order the following types of information not be published, or not be published except to specified persons, such as:

- names of witnesses appearing before the court;
- evidence given by a witness to court;
- a transcript of proceedings;
- the names of parties to an action before court.

Any document containing information identified in this way would therefore be exempt under this clause.

Order of a person or body having power to receive evidence on oath

An example of what might fall within this clause is a Royal Commission. A Royal Commission may direct that evidence given before it or the contents of any documents produced at an inquire shall not be published in South Australia.

Privilege of Parliament

Activities which could be subject to parliamentary privilege include:

- debates in the two chambers of Parliament;
- questions asked and answered in the chambers;
- proceeding before parliamentary committees.

It is not appropriate of an accredited FOI officer to exercise discretion to release document that have been determined exempt under clause 17(c) because the privilege being protected is that of Parliament and not Council.

Clause 18 – Documents arising out of companies and securities legislation

This provision concerns certain documents relating to the Ministerial Council for Corporations and the Australian Securities and Investments Commission. Examples of documents exempted under this clause include:

- documents which would disclose deliberations or decisions of the Ministerial Council which have not been officially published;
- documents submitted to ASIC that relate solely to the functions of ASIC; or
- documents held by ASIC relating solely to its functions.

There is no public interest test for this exemption clause.

Clause 19 – Private documents in public library or archival collections

This clause allows exemption of private documents held in public libraries or archived collections (including State Records, universities or tertiary institutions) and are prohibited from disclosure to the public or certain members of the public. The exemption does not apply to documents created by Council.

Appendix 4 – Summary Table of Time Limits

s14	Dealing with an access application	Within 30 days
s14	Notifying the applicant of the determination	Within 30 days
s14A	Notifying the applicant of a time extension	Within 20 days
s16	Transfer of application receipt	On the day the application is transferred; or 14 days after the day it was received by the original agency, whichever is earlier
s19	Agency deemed to have determined application by refusing access to document(s)	If the application is not determined within 30 days of receipt and no extension of time obtained pursuant to section 14A
s32	Dealing with an amendment application	Within 30 days
s29(2)(e)	Lodging an internal review application*	Within 30 days after the day on which notice of the determination was given
s29(5)	Agency deemed to confirm an original determination on internal review	If the application for internal review is not determined within 14 days of its receipt
s39(3)(a), (b)	Making an external review application to a relevant review authority**	Within 30 days after notice of the decision on review is given. If no review, within 30 days after the date of the determination.
s40(3)	Applying to SACAT for review	Within 30 days after notice of determination.

* Section 29(2)(e) also provides that the CEO can allow more time for an application for internal review to be lodged.

** Section 39(4) provides that relevant authorities can exercise their discretion and extend time for an applicant to apply for a review.