



Interpreting the Legislation – *Right to Information Act 2009*

What is the right of access in the RTI Act?

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1.0 Overview

The object of the *Right to Information Act 2009* (Qld) (**RTI Act**) is to give a right of access to information in the government's possession or under the government's control unless, on balance, it is contrary to the public interest to give the access. This Guideline explains how this right applies and how its application is limited, in relation to certain entities and documents. Section 23 of the RTI Act states:

Right to be given access to particular documents

- (1) *Subject to this Act, a person has a right to be given access under this Act to—*
 - (a) *documents of an agency; and*
 - (b) *documents of a Minister.*

A 'person' includes an individual and a corporation.¹ The right of access established in section 23 can be exercised by anyone.

¹ Schedule 1 of the [Acts Interpretation Act 1954](#) (Qld).



In considering the scope of the right of access under the RTI Act, the following questions arise:

- which entities² are covered by the RTI Act?
- what is a document?
- what is a 'document of an agency'?
- what is a 'document of a Minister'?
- which documents and entities does the RTI Act not apply to?

2.0 Which entities are covered by the RTI Act?

In determining whether an entity is subject to the RTI Act, it is necessary to consider:

- whether it is a Minister; or
- whether it is an 'agency' under the RTI Act;

If the entity is an 'agency' under the RTI Act it would then need to be considered whether it is specifically excluded from the RTI Act either in full or in relation to particular functions.

2.1 *Is the entity an agency within the meaning of the RTI Act?*

Section 14 of the RTI Act states:

Meaning of agency

- (1) *In this Act, an **agency** means*
- (a) *a department*
 - (b) *a local government*
 - (c) *a public authority*
 - (d) *a government owned corporation*
 - (e) *a subsidiary of a government owned corporation.*

For detailed guidance about whether an entity would be considered an 'agency' for the purposes of the RTI Act see the [Guideline: What is an agency?](#)³

2.2 ***Bodies excluded from the RTI Act***

Certain bodies are excluded, either completely or partially, from the operation of the RTI Act. Where bodies have partial exclusions, the RTI Act does not apply in relation to some of their functions.

² 'Entity' is not defined in the RTI Act but under the [Acts Interpretation Act 1954 \(Qld\)](#), it includes a person and an unincorporated body. In this guideline, it is used to mean a body, person or organisation.

³ See Guideline – What is an agency - <http://www.oic.qld.gov.au/guidelines/for-government/access-and-amendment/receiving-and-assessing-applications/what-is-an-agency>



Section 17 of the RTI Act provides:

17 Meaning of entity to which this Act does not apply

In this Act, an entity to which this Act does not apply means—

- (a) an entity mentioned in schedule 2, part 1; or*
- (b) an entity mentioned in schedule 2, part 2 in relation to the function mentioned in that part.*

These exclusions are based on the status of the entity, rather than its activities or the types of documents in its possession. Applications may not be made to such entities, and they are not required to comply with other obligations under the RTI Act.

However, it should be noted that the fact that a document originates from an entity in schedule 2 does not mean that the document itself is excluded. The exclusions will only apply where the documents are held by the relevant entity. A document which is a 'document of an agency' as defined in section 13 is not excluded from the operation of the RTI Act merely because it was created by or relates to a person or entity excluded in schedule 2.

Example

In relation to section 11 of the repealed *Freedom of Information Act 1992* the Information Commissioner noted in *A Member of the Legislative Assembly and Queensland Corrective Services Commission: a Prisoner (Third Party)* (1997) 4 QAR 100:

...section 11(1) does not operate so as to exclude documents from the operation of the FOI Act merely because they were created by, or relate to, a person or body listed in 11(1)...

There are many persons and organisations to whom or to which the FOI Act does not apply eg, private individuals and private corporations. However, when private individuals or private organisations send correspondence to government agencies which are subject to the FOI Act, that correspondence becomes subject to the operations of the FOI Act. The general objects of the FOI Act include enhancing scrutiny and accountability of government agencies in respect of their operations generally, including (subject to the protections afforded by the exemption provisions) their dealings with private individuals and private corporations. The same treatment should logically extend to dealing with government agencies with persons or bodies listed in section 11(1) of the FOI Act, (except for the Commonwealth agencies with national security functions listed in section 11(1)(j) of the FOI Act, given the clear indication to the contrary in the wording of s. 11(1)(j) of the FOI Act).



2.2.1 Complete exclusions

The entities completely excluded under part 1 of schedule 2 are listed below.

- 1 *the Governor*
- 2 *the Assembly, a member of the Assembly, a member of a committee of the Assembly, a parliamentary commission of inquiry or a member of a parliamentary commission of inquiry*
- 3 *the Parliamentary Judges Commission of Inquiry appointed under the expired Parliamentary (Judges) Commission of Inquiry Act 1988*
- 4 *a commission of inquiry issued by the Governor in Council whether before or after the commencement of this schedule*
- 5 *the parliamentary service established by the Parliamentary Service Act 1988*
- 6 *a quality assurance committee established under the Hospital and Health Boards Act 2011, section 82*
- 7 *a parents and citizens association under the Education (General Provisions) Act 2006*
- 8 *a grammar school to which the Grammar Schools Act 2016 applies.*

2.2.2 Partial exclusions

The following entities are those to which the RTI Act does not apply in relation to a particular function or activity. Where entities are listed in this schedule, the RTI Act does not apply to the entity in relation to documents received, or brought into existence by it, in performing that function, or carrying on that activity. These entities are listed in part 2 of schedule 2.

The list in part 2 of schedule 2 also includes a number of GOCs and their subsidiaries which are excluded from the RTI Act, except in relation to their community service obligations.



3.0 Applications cannot be made under the RTI Act to the Information Commissioner

An access application under the RTI Act may not be made or transferred to the Information Commissioner, the RTI Commissioner or the Privacy Commissioner.⁴

Where documents created by, or provided to, the Information Commissioner, the RTI Commissioner and the Privacy Commissioner are held by other agencies, they will be considered by those agencies if they fall within the scope of an application. In such cases, they will be available in the same manner as other documents, which is, that they are subject to the exemptions, public interest balancing test considerations and other limitations in the RTI Act.

4.0 What is a 'document'?

'Document' is not defined in the RTI Act. However, it is defined broadly in schedule 1 of the [Acts Interpretation Act 1954 \(Qld\)](#) to include:

- any paper or other material on which there is writing
- any paper or other material on which there are marks, figures, symbols or perforations having a meaning for a person qualified to interpret them; and
- any disc, tape or other article, or any material from which sounds, images, writings or messages are capable of being produced or reproduced (with or without the aid of another article or device)

Many documents exist in paper form, but material stored in computers, optical imaging systems, on CD-ROMs or audio tapes is also covered by the definition. A document is not required to be a 'final copy' to be subject to the RTI Act – as a result, a document also includes a draft.

In *Price and Director of Public Prosecutions* (1997) 4 QAR 157, the applicant applied for access to, among other things, three pairs of tinsnips that had been removed from his property under a search warrant. The Information Commissioner, after considering the definitions of 'document' under schedule 1 of the [Acts Interpretation Act 1954 \(Qld\)](#) and section 7 of the repealed FOI Act stated:

Although neither definition is exhaustive, it is clear that word 'document' is intended to refer to something whose purpose is to record or convey information, sounds, images etc. I am satisfied that the tinsnips, or other cutting tools seized from the applicant's

⁴ Section 26 of the RTI Act.



property, are not 'documents' to which access may be requested under the FOI Act.⁵

4.1 'Documents' compared to 'pages'

In *Price and Surveyors' Board of Queensland* (1997) 4 QAR 181, the Information Commissioner made a distinction between 'documents' and 'pages' when considering whether charges were payable. He noted:

A paper document to which access has been requested under the FOI Act may comprise one page, or multiple pages (not infrequently, dozens or hundreds of pages). Documents, especially longer documents, may deal with multiple topics...⁶

4.2 Right of access confined to documents

In some instances, applicants may make an application seeking answers to specific questions, or access to a specific piece of information.

In *Hearl and Mulgrave Shire Council* (1994) 1 QAR 557 (at paragraph 30) the Information Commissioner stated:

The FOI Act is not an Act which gives persons a legally enforceable right to obtain answers to questions asked of government agencies, or even to have government agencies extract answers to questions from documents in their possession. The legally enforceable right conferred by section 21 of the FOI Act is a right to be given access under the Act, and subject to the Act, to documents of an agency and official documents of a Minister.

The Information Commissioner went on to state that it was not improper for an agency to respond to questions asked of it, or to extract answers from its documents to assist members of the public.

The right provided in section 23 of the RTI Act is a right to be given access to particular documents. However, the RTI Act does not prevent agencies providing responses to questions. Providing such information is consistent with the primary object of the RTI Act, which is to *provide a right of access to information in the government's possession or under the government's control unless, on balance, it is contrary to the public interest to do so.*

⁵ At paragraph 73.

⁶ At paragraph 26.



5.0 Which documents are subject to the RTI Act?

In determining whether a document is subject to the RTI Act, it is necessary to consider:

- whether it is a ‘document of an agency’ or a ‘document of a Minister’ under the RTI Act; and
- if so, whether it is specifically excluded from the operation of the RTI Act by a particular provision of the Act.

5.1 *Document of an agency*

In considering the scope of the right of access under section 23 it is important to understand that the right of access only extends to ‘documents of an agency’ and ‘documents of a Minister’. The key issue is the possession or control of the documents. Its source, content or relevance to the agency’s functions are not relevant considerations - see the discussion of *A Member of the Legislative Assembly and Queensland Corrective Services Commission: a Prisoner (Third Party)* (1997) 4 QAR 100 in the example at section [2.2](#).

Section 12 of the RTI Act defines a document of an agency:

12 Meaning of document of an agency

In this Act, document, of an agency, means a document, other than a document to which this Act does not apply, in the possession, or under the control of the agency whether brought into existence or received in the agency, and includes—

- (a) *a document to which the agency is entitled to access; and*
- (b) *a document in the possession, or under the control, of an officer of the agency in the officer’s official capacity.*

5.1.1 Possession

Possession refers to physical possession of a document.⁷

Example

In *Tait and Burdekin Shire Council*,⁸ the applicant applied for a document which was the property of an external consultant. Although the document was in the physical possession of the council for a period of 14 days for the purpose of legal display and consultation, the consultant asserted its legal right to recall the document after that time, and the document was no longer in the possession of the council.

⁷ *Holt, Reeves and Education Department; Others (third parties)* 1998 4 QAR 310.

⁸ Unreported, Queensland Information Commissioner, 22 March 2002.



5.1.2 Control

Control refers to a situation where a document is not in the actual physical possession of the agency, but the agency has the legal right to determine what happens with the document. This definition includes documents held outside the agency, for example, at an officer's home, or those which are stored at Queensland State Archives.

Examples

Documents in the possession of solicitors and loss assessors retained by the agency were found to be documents in respect of which the agency had legal ownership and a present legal entitlement to take possession: *Price and the Nominal Defendant* (1999) 5 QAR 80.

Books and reports acquired by an officer before he commenced work at the respondent agency (and used by him in compiling a published report) remained his personal property when he ceased employment with the agency and took the books and reports with him. The books and reports were not 'documents of an agency' and were not subject to the Act: *Ainsworth and Criminal Justice Commission; A and B (third parties)* (1999) 5 QAR 284.

5.2 Document of a Minister

Section 13 of the RTI Act states:

13 Meaning of document of a Minister

In this Act, document, of a Minister, means a document, other than a document of an agency or a document to which this Act does not apply, in the possession or under the control of the Minister that relates to the affairs of an agency, and includes—

- (a) a document to which the Minister is entitled to access; and*
- (b) a document in the possession, or under the control of, a member of the staff of, or a consultant to, the Minister in the person's capacity as member or consultant.*

It should be noted:

- The RTI Act only applies to documents held by Ministers, rather than members of Parliament generally.⁹
- The term 'Minister' includes an Assistant Minister.¹⁰

⁹ As outlined in schedule 2, part 1, item 2 of the RTI Act which clarifies that the RTI Act does not apply to members of the Assembly or members or committees of the Assembly.

¹⁰ As defined in schedule 5 of the RTI Act.



- Documents of past Ministers or previous governments are not covered by the RTI Act unless such documents are in the possession of, or under the control of, a current Minister.
- Only documents relating to the affairs of an agency in the Minister's portfolio are covered – for more information see the [Guideline: Documents of an agency and documents of a Minister](#).¹¹

Conversely, documents such as files, notes or diaries held by members of Ministers' staff which are not part of the agency's filing system may be considered 'documents of a Minister' if they contain information which relates to the affairs of an agency.

Note that this definition expressly covers documents in the possession or control of a consultant to the Minister.

6.0 Documents to which the RTI Act does not apply

Documents to which the RTI Act does not apply are listed in schedule 1 of the RTI Act. For detailed guidance see the [Guideline: Documents to which the RTI Act and IP Act do not apply](#).¹²

7.0 Documents held at Queensland State Archives and in libraries

Where documents have been placed with Queensland State Archives, they are nevertheless taken to be in the agency's possession when they are not reasonably available for inspection by members of the community at State Archives. Persons wishing to inspect such documents should therefore apply to the relevant agency. The onus will be on the agency to arrange retrieval of the documents from Queensland State Archives.

¹¹ See Guideline – Documents of an agency and documents of a Minister at <http://www.oic.qld.gov.au/guidelines/for-government/access-and-amendment/receiving-and-assessing-applications/documents-of-an-agency-and-documents-of-a-minister>

¹² See Guideline – Documents to which the RTI Act and IP Act do not apply at <http://www.oic.qld.gov.au/guidelines/for-government/access-and-amendment/decision-making/outside-scope-of-act/documents-to-which-the-rti-act-and-ip-act-do-not-apply>



Office of the Information Commissioner
Queensland

For additional information and assistance please see the following Guidelines: 'What is an agency?', 'Documents of an agency and documents of a Minister' and 'Documents to which the RTI Act and IP Act do not apply' or contact the Enquiries Service on 07 3234 7373 or email enquiries@oic.qld.gov.au.

This guide is introductory only, and deals with issues in a general way. It is not legal advice. Additional factors may be relevant in specific circumstances. For detailed guidance, legal advice should be sought.

If you have any comments or suggestions on the content of this document, please submit them to feedback@oic.qld.gov.au

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