Freedom of Information Act

Last change: 08.06.2025

PDF generated on: 06.10.2026

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COMMENTARY ON

Art. 5 FoIA

A commentary by Joséphine Boillat / Stéphane Werly

SUGGESTED CITATION

Joséphine Boillat/Stéphane Werly, Commentary of art. 5 FoIA, in: Jérôme Gurtner/Bertil Cottier/Martine Stoffel (eds.), Online Commentary of the Federal Act on Freedom of Information in the Administration

Short citation: OK-Boillat/Werly, Art. 5 FoIA N. XXX

Art. 5 Official documents

[1] An official document is any information:

a. which has been recorded, regardless of the medium;

b. retained by the authority which issued the same or to which it has been communicated; and

c. which concerns the fulfilment of a public task.

[2] Documents which have been produced by means of a simple computerised process from recorded information which meets the requirements of paragraph 1 letters a, b and c above are also deemed to be official documents.

[3] Not deemed to be official documents are any documents which:

a. are used by an authority in a commercial capacity;

b. are not complete; or

c. are intended for personal use.

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I. PRELIMINARY REMARKS

1 The Federal Act of December 17, 2004, on the principle of transparency in administration (hereinafter: LTrans) applies only to "**official documents**"; other documents are, in principle, excluded from the scope of the text. The term "official document" is defined precisely in Art. 5 para. 1 LTrans, which lists three cumulative conditions: the information must be recorded on any medium whatsoever (letter a); it must be held by an authority (letter b); it must relate to the performance of a public task (letter c).

2 Art. 5 para. 2 LTrans provides further clarification, considering that certain **virtual documents** also constitute official documents.

3 Finally, Art. 5 para. 3 LTrans **excludes from official documents** those documents that are marketed by an authority (letter a), have not reached their final stage of development (letter b), or are intended for personal use (letter c).

II. DEFINITION OF AN OFFICIAL DOCUMENT (ART. 5 PARA. 1)

4 In accordance with its purpose, the **law broadly defines** the concept of official documents, as well as the scope of application *ratione personae* (Art. 2 LTrans) and *ratione materiae* (Art. 3 LTrans), the beneficiaries and the conditions for exercising the right of access (Art. 6 LTrans). In practice, this translates into a broad right of access to official documents held by the administration.

5 Art. 5 para. 1 LTrans defines the concept of document, distinguishing it from the broader concept of information. Subsections b and c clarify the term "official" by referring, on the one hand, to a **personal** requirement (possession by the authority) and, on the other hand, to a **material** condition (performance of a public task).

6 According to the LTrans, the concept of official document is not equivalent to that of document in Art. 3 para. 1 of the Federal Act of June 26, 1998, on **archiving** (hereinafter: LAr). According to this provision, documents are defined as "all information recorded on any medium whatsoever that has been received or produced in the course of the performance of public tasks of the Confederation, as well as all search tools and additional data necessary for the

understanding and use of this information." Unlike the LTrans, the LAr also applies to documents intended for personal use. The LTrans also pursues other objectives than the LAr.

The fact that a document has come into the possession of an authority **legally** or **illegally** does not affect its classification as an official document. 7

The **French-speaking cantons** define official documents as all information carriers containing information relating to the performance of a public task (Art. 22 para. 1 of the Law of the Canton of Fribourg of September 9, 2009, on information and access to documents [hereinafter: LInf/FR]; Art. 25 para. 1 of the Geneva Cantonal Law of October 5, 2001, on public information, access to documents, and personal data protection [hereinafter: LIPAD/GE]; Art. 70 para. 1 of the Intercantonal Agreement of May 8 and 9, 2012 on Data Protection and Transparency in the Cantons of Jura and Neuchâtel [hereinafter: CPDT/JUNE]; Art. 3 para. 2 of the Valais Cantonal Law of October 9, 2008, on public information, data protection, and archiving [hereinafter: LIPDA/VS]; Art. 9 para. 1 of the Vaud Cantonal Law of September 24, 2002, on information [hereinafter: LInfo/VD]). Cantonal legislation refers to messages, reports, studies, approved minutes, statistics, registers, correspondence, directives, position statements, preliminary opinions or decisions (Art. 2 para. 1 of the Ordinance of the Canton of Fribourg of December 14, 2010 on access to documents [hereinafter: OAD/FR]; Art. 25 para. 2 LIPAD/GE; Art. 70 para. 2 CPDT/JUNE; Art. 3 para. 2 LIPDA/VS). 8

A. Information recorded on a medium (letter a)

According to Art. 5 para. 1 letter a LTrans, an official document is defined as **any information recorded on any medium**. The concept is thus defined independently of the physical medium: it includes reports, statements, expert opinions, decisions, draft legislation, statistics, drawings, plans, sound or visual recordings, documents on computer media (e.g., e-mails or web pages), and documents created to identify and refer to these documents. The document does not need to be produced by human beings; it may be produced by purely technical means, so that the definition includes documents generated by artificial intelligence. 9

The document must have an **informational character**: it must provide "information." Thus, the public cannot have the right to access blank media (un- 10

formatted paper or diskettes). The situation is different for document templates on paper or computer media (such as style sheets for editing and designing electronic texts), provided that they have material content directly related to the performance of a public task. In the case of **electronic media**, it is not the computer hard drives, databases or technical data management systems that are subject to the right of access, but the data they contain, which provide information that is readable by humans. The Federal Court considered that an applicant who had precisely identified the owner of an Outlook calendar and the period concerned had formulated his request in a sufficiently clear manner: he was not seeking access to the calendar as a database, but rather to consult the entries recorded in it, i.e. the content of the calendar. Finally, the relevance or irrelevance of the information is irrelevant.

11 The **information must be documented**. It is therefore not possible to request general information about the activities of the administration that is not based on a document. It is also not possible to find out how a person reacted when reading a document or the content of an unrecorded conversation, as this information is far too uncertain to form the basis of a right that can be invoked in court. In practice, this condition carries the risk that the administration will no longer document its work in order to avoid the LTrans. It should be noted that the cantonal law of Vaud provides for a different solution, as it allows a simple request for information (Art. 8 para. 1 LInfo/VD).

12 The official document **must exist in some form**, as the administration cannot be compelled to produce a document that does not exist. For example, an individual cannot demand that the administration draft a summary note on a given subject, provide a legal opinion on a controversial issue, deliver a translation of a document written in a single language, or compile statistics that do not exist. The appellant cannot, of course, prove the existence of an official document if they do not have access to the data itself. If the existence of a document is disputed, it is therefore up to the respondent authority to prove that a fact does not exist, which is generally difficult. That being said, the opposing party is required, in accordance with the rules of good faith, to cooperate in the taking of evidence, in particular by providing counter-evidence or, at least, by presenting concrete indications of the existence of data. However, an **exception** is provided to guarantee the right of access to certain official documents that exist only in virtual form (Art. 5 para. 2 LTrans). If an applicant questions the accuracy of the administration's finding that a document

does not exist, both the Federal Data Protection and Transparency Commissioner and the appeal body must attempt to clarify whether the documents exist or not, weighing up the plausibility and seriousness of the applicant's and the administration's claims.

It may be in the administration's interest to draw up a document, as this is the least time-consuming solution: in two separate requests, a journalist asked the AI Office of the Canton of Solothurn (OAI) to provide him with written information on the number of cases in which two medical experts had found a work capacity of less than 40%, entitling the person concerned to disability benefits (the first request concerned 161 expert opinions and the second 75). The OAI did not respond to these requests. The Administrative Court of the Canton of Solothurn upheld these decisions. However, the Federal Court upheld the appeals and referred the cases back to the Administrative Court of the Canton of Solothurn for new decisions in accordance with the considerations. According to the Federal Supreme Court, while anonymizing more than 100 reports or decisions would entail a great deal of work and an extraordinary burden for the OAI, the transmission of an abridged version of the reports (one or two pages) could suffice, provided that the extent of the work required to decide on the appellant's right of access was not known and did not appear from the file. Finally, in response to the OAI's argument that similar requests had been made in other proceedings, the Federal Court emphasized that it was up to the OAI to find the least costly overall solution. Thus, in its view, it may be justified in future to keep the statistics requested by the appellant, even if there is in principle no individual right to demand them. The Administrative Court of the Canton of Solothurn then upheld the appeals, overturned the FAIO's decisions, and ordered the FAIO to provide the appellant with the redacted results of 161 and 75 expert reports. 13

If the requested document is lost, the authority must do everything in its power to find a copy. 14

B. Information held by the authority (letter b)

According to the second condition, the information must be held by the authority from which it originates or to which it has been communicated. In other words, it is not necessary for the requested entity to have produced the requested document in which the information is contained, but it must be **actually in its possession**. This means that the authority must itself be able to 15

access the information in order to then grant access to the applicant. If it does not hold the document even though it is the author or the main addressee, it must take all necessary measures to access it or, if it knows who holds it, inform the applicant accordingly. If it has already transferred the document in question to the archives, it must decide whether to grant access in agreement with the Federal Archives. If an authority disposes of documents to avoid the LTrans, it would be justified to impose an obligation to recover those documents. This is not just a theoretical case: the 2023/2024 activity report of the Federal Data Protection and Transparency Commissioner mentions the existence of a press article in which it was reported that, in the context of the attempted blackmail of Federal Councilor Alain Berset, emails could not be found or had been deleted within the General Secretariat of the Federal Department of Home Affairs (SG-DFI), and that this matter was the subject of a mediation procedure before the Commissioner. The report also notes that it was not possible for the commission investigating the matter to determine with certainty to what extent the missing emails had existed and whether some of them might have been destroyed. However, an obligation to recover a document cannot be imposed if the authority has lawfully destroyed it, in particular because the task for which it was intended has been completed.

16 The authority may either be the author of the document in its possession or have received it. It is therefore possible that it holds a **third-party document** that is not subject to the principle of transparency. Personal or purely private information may be covered by a request for access if the document in which it is contained concerns the performance of a public task. Thus, the origin of the documents is also irrelevant.

17 The term "**authority**" covers the federal administration as well as bodies and persons governed by public or private law outside the federal administration, insofar as they issue acts or make decisions in the first instance within the meaning of Art. 5 of the Federal Act of December 20, 1968, on Administrative Procedure (hereinafter: PA), as well as the Parliamentary Services (Art. 2 para. 1 LTrans).

18 If the request has been addressed to an authority that is **not in possession of the document**, it must forward it spontaneously and without delay to the competent authority.

C. Information concerning the performance of a public task (letter c)

For a document to be classified as official, the information it contains must relate to the performance of a public task. It is the **use** to which the information is put that is decisive; if this use serves to perform a public task, then the document is considered official. The scope of application of the LTrans must be understood in a broad sense: a relatively distant connection with a public task is sufficient. 19

It must be a **public task of the Confederation**. This concept, taken from Art. 3 para. 1 LAr, should not be confused with the concept of public interest. Certain private tasks may be of public interest without constituting public tasks. 20

The obligation of **bodies and persons governed by public or private law** within the meaning of Art. 2 para. 1 lit. b LTrans is limited to areas in which they act as authorities vested with public power, i.e. when they take decisions within the meaning of Art. 5 PA[49]. 21

Information may also be **of a private nature**. A private document held by the administration may constitute an official document if it is used to perform a public task, for example if it plays a role in a decision-making process, such as documents required for the granting of a permit and provided by the applicant, or documents submitted by a private individual to the authority in the context of a supervisory report. The same applies if the document is useful for forming the opinion of an administrative unit in the context of performing a public task. According to the case law of the Federal Administrative Court, information provided by private individuals to the federal administration that meets the conditions of Art. 5 LTrans must be classified as official documents and therefore fall within the scope of the LTrans. In general, the Confederation remains subject to the principle of transparency when acting under private law, in particular when managing its financial assets or acquiring equipment and supplies necessary for the performance of its activities. Furthermore, the Federal Court, in a case concerning the application of Geneva law on transparency, upheld a distinction between administrative assets directly assigned to the performance of a public task and assets of the State when the latter acts as a private individual managing its financial assets and does not 22

perform a public task. Documents relating to the former are subject to transparency, whereas documents relating to the latter are not.

23 If an administrative unit is authorized to carry out activities falling within the scope of the **private economy**, in particular to provide services (e.g., the Intellectual Property Institute), that part of its activities is not a public task.

24 **Public registers** relating to private legal relationships (e.g., commercial register, land register, or civil register) also fall within the scope of the law, but the specific provisions governing them must be interpreted as *lex specialis*. Article 4(b) LTrans expressly reserves the special provisions of other federal laws that declare certain information accessible under conditions that derogate from the law. Article 970 of the Swiss Civil Code of December 10, 1907 (hereinafter: CC) introduces such a special rule within the meaning of this provision.

25 Handwritten or electronic **personal notes** on an official document are related to the performance of a public task, provided that they are not intended solely for personal use and that the document is not incomplete.

26 **Information of a purely technical nature** falls within the definition of an official document. However, information for which the connection with a public task is too loose is excluded, since such information has no material link with the performance of a public task, but only a purely formal connection. Thus, an employee of an authority cannot be compelled to disclose to the public the computer file in which his or her work preferences are stored, i.e., the file showing, in particular, that he or she uses a specific language or type of characters by default, cookies, or e-mail connection files.

27 Case law has considered the following to fall within the definition of the **performance of a public task**:

- Documents relating to rent control introduced by the general law of the canton of Geneva of December 4, 1977, on housing and tenant protection.
- The performance, on behalf of another, of an administrative inquiry.
- A memorandum classified as confidential by its author, a colonel in the general staff.
- Emission data (EMI data) from the chimney of the Leibstadt nuclear power plant.

- Documents containing information on the financial consequences of the unlawful dismissal of a civil servant.
- The way in which the city of Geneva defined its policy on the content of posters that it allows to be displayed on its billboards.
- A settlement agreement between Geneva Industrial Services and other parties concerning the development of wind power projects.
- The detailed list of financial risks taken into account by the Vaud State Council in drawing up the 2023 state budget.

D. Examples

The following, in particular, constitute **official documents**: 28

- A report commissioned by a federal councilor in his capacity as head of department.
- A list of the Confederation's 40 main suppliers for 2011, given the need to ensure transparency in the awarding of public contracts, in particular to prevent any suspicion of cronyism.
- The Outlook calendar of the head of the Federal Office for Armament (armasuisse), insofar as it has a decisive influence on all the administrative activities of that office.
- Certain documents concerning negotiations between Switzerland and the European Union.
- Emission data (EMI data) from the Leibstadt nuclear power plant.
- A working document for staff of the State Secretariat for Migration (SEM) to assist them in processing asylum applications from Eritrean applicants.
- An administrative investigation report on the asylum seekers' reception center in Perreux.

III. VIRTUAL DOCUMENTS (ART. 5 PARA. 2)

In principle, only **official documents that already exist** are accessible. 29
However, an exception is provided for in order to guarantee the right of access to official documents that exist only in latent form and can be easily obtained by simple computer processing (virtual documents).

30 Art. 5 para. 2 refers to **electronic databases**, and more specifically to extracts that the administration will have to produce ad hoc in order to satisfy a new request. This document will be accessible provided that simple computer processing allows it to be produced on the basis of the information recorded. If the computer system does not allow such a request to be easily met, the obligation to produce an ad hoc document does not apply.

31 The concept of **simple computer processing** refers to an average user, so it is likely to evolve with technological developments. An example of simple computer processing is as follows: information available to an authority, which has simply compiled it in a table in an Excel document, where the information has only been gathered in standard software after a basic search. A problem could arise in assessing the level of complexity of the processing if it is a highly technical matter about which only the authority has knowledge and the latter maintains that the manipulation is not elementary.

32 Apart from the creation resulting from the simple computer processing of existing information, the right of access does **not include the right to create a document that does not exist**.

IV. DOCUMENTS THAT ARE NOT OFFICIAL DOCUMENTS (ART. 5 PARA. 3)

33 Documents that are marketed by an authority, have not reached their final stage of development, or are intended for personal use are **not considered official documents**.

34 The **canton of French-speaking Switzerland exclude** from official documents notes for personal use, internal documents, drafts or other unfinished texts, documents that are marketed, documents that are exempt from the right of access to files in non-contentious or contentious proceedings, and minutes that have not yet been approved (Art. 22 para. 3 LInf/FR; Art. 25 para. 4 LIPAD/GE; Art. 70 para. 3 CPDT/JUNE; Art. 3 para. 2 LIPDA/VS; Art. 9 para. 2 LInfo/VD and Art. 14 of the Vaud Cantonal Regulations implementing the Law of September 24, 2002, on information of September 25, 2003).

A. Documents marketed by an authority (letter a)

According to Art. 1 para. 1 of the Federal Ordinance of May 24, 2006, on the principle of transparency in administration (hereinafter: OTrans), a document marketed is **any information provided by an authority in return for payment**, including information that is directly useful for the development of a product. This exception does not exist in the Bernese cantonal law of November 2, 1993, on public information (LIn/BE). 35

The documents must be **actually marketed**. When they are no longer available, for example when the print run is exhausted, the exception no longer applies and the authority must determine whether the document is an official document subject to the principle of transparency. 36

The concept of a **commercially available document** also extends to documents that are not formally marketed but form the direct basis for such documents, such as geographical databases used for map production. Commercially available documents originating from third parties are subject to the law, but only if they relate to the performance of a public task. Consequently, books in an administrative library are not, in principle, covered by the law, as they relate only indirectly to the performance of a public task. The special provision in Art. 19 LAr, which makes the use of archives for commercial purposes subject to authorization and allows the Confederation to participate in the profits, applies only to documents defined as archives within the meaning of Art. 3 para. 2 LAr. 37

B. Documents that have not reached their final stage of development (letter b)

For a document to be considered official, it is not sufficient that the conditions of Art. 5 para. 1 LTrans are met if the document cannot be classified as a document that has reached its final stage of development within the meaning of Art. 5 para. 3 let. b LTrans. To be official, a document must be **final**. 38

The term "unfinished document," which is preferred to "internal document," is a legally undefined concept, so the Federal Council has provided a more precise definition in Art. 1 para. 2 OTrans: a document has reached its final stage of preparation when the authority from which it originates has signed it, or when its author has definitively submitted it to the addressee, in particular for 39

information purposes or for the addressee to take a position or make a decision. The elements mentioned in this provision are important indicators for determining when a document should be considered final. Other indicators of the finalization of a document include its approval, its registration in an administrative classification, organization, or information system, and its purpose or importance.

40 The reason for this exception is to enable the administration, as far as possible, to **form its opinion calmly** and preserve its autonomy of action. It also serves to prevent the risk of misunderstanding resulting from the provisional nature of the document, or external pressure that could ensue.

41 Examples of documents that have **not reached their final stage of development** include:

- A text that has been crossed out or annotated (by hand or electronically) before its final correction, a summary table in the process of being drawn up, the provisional version of a report, a project outline, meeting drafts, informal working notes, draft texts, summary notes for a meeting, notes made during internal reviews that form the basis for a review report.
- An authorized interview that still contains visible corrections.

42 The following, on the other hand, are considered **final documents**:

- A draft decision by the Federal Office of Public Health (FOPH) on the inclusion of a drug in the list of specialties.
- An unfinished document that has become a finished document over time, when the administration's opinion has been formed and can no longer be influenced. An (unsigned) draft may therefore also constitute a finished document, provided that the document is available in its final version and the opinion-forming process has been completed.
- A decision-making aid, provided that it is a guideline that lists examples and establishes criteria for the assessment of the specific case by the competent authority.
- A list of proposals made in a working group that is not forwarded to the individual members of that group for review, but serves only as a basis for their decision on how to proceed and constitutes a complete document that cannot be amended.

- The Outlook calendar of the former CEO of armasuisse, insofar as the requested calendar extract relates to a period that has already ended.
- The latest version of an interview, i.e. the authorized interview without visible corrections.

Unfinished documents should not be confused with **preparatory documents**, which may also be finished if they have reached their final stage of development. Examples include: the various successive stages of a national road plan, draft studies relating to railway lines, partial or provisional drafts of a document (provided they are complete in themselves), the various documents relating to a public procurement negotiation procedure (such as draft contracts prior to signature), or a preliminary report ready to be submitted to its recipient. 43

C. Documents intended for personal use (letter c)

Documents intended for personal use are not considered official documents. According to Art. 1 para. 3 OTrans, a document intended for personal use is any information created for professional purposes but used exclusively by its author or a limited group of people as an aid, such as notes or working copies. According to legal doctrine, the administrative practice of an authority does not fall within the exception for documents intended for personal use; however, condolence cards would be considered personal documents. 44

The **content** or **purpose of the document is decisive**, not its title (e.g., "memo"), so that personal notes may constitute official documents if they have been submitted to third parties for opinion or if they have served as the basis for a decision. 45

According to the Federal Council's message, case law, and doctrine, the following also fall into the category of **documents intended for personal use**: 46

- Draft texts, summaries intended for use in a report, minutes of meetings and notes to be used in the drafting of minutes.
- Personal tables decorating an office.
- A postcard sent by an employee to his colleagues from his vacation destination.

- The diary of the former public prosecutor of the Republic and Canton of Geneva, which, according to the findings of the judicial authority, was intended for the exclusive use of its holder and played no role in the organization, conduct, or communication of his jurisdiction or office.

47 However, the following documents **are not intended for personal use**:

- A document addressed to around 20 members of a working group.
- A list of proposals that is not a simple auxiliary list from a brainstorming session, drawn up as an aid to reflection, but a final document resulting from systematic reflection, classifying and sorting the various proposals.
- The electronic diary of the former director of armasuisse, even if the circle of persons authorized to consult it is limited to senior managers of this public enterprise.
- A document referred to by the acronym APPA (Asylpraxis/Pratique en matière d'asile/Prassi in materia d'Asilo) concerning Eritrea, intended for a large number of SEM employees and guiding its activities.
- Messages sent by employees to an internal working group responsible for dealing with staff concerns (anonymous letters; emails).

48 Three **cantons in French-speaking Switzerland** define notes for personal use as working notes taken with a view to the future drafting of a document, meeting notes taken in the absence of a legal or regulatory obligation to draw up minutes, notes taken during an interview, or annotated copies (Art. 2 para. 3 OAD/FR; Art. 6 of the Geneva Cantonal Regulations implementing the Law on Public Information, Access to Documents and Personal Data Protection of December 21, 2011 [hereinafter: RIPAD/GE]; Art. 13 para. 2 RELIPDA/VS).

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