

A REPORT ON THE OPERATION OF THE
***Freedom of
Information Act 2016***
FOR 2022–23



OCTOBER 2023

Report by the ACT Ombudsman,

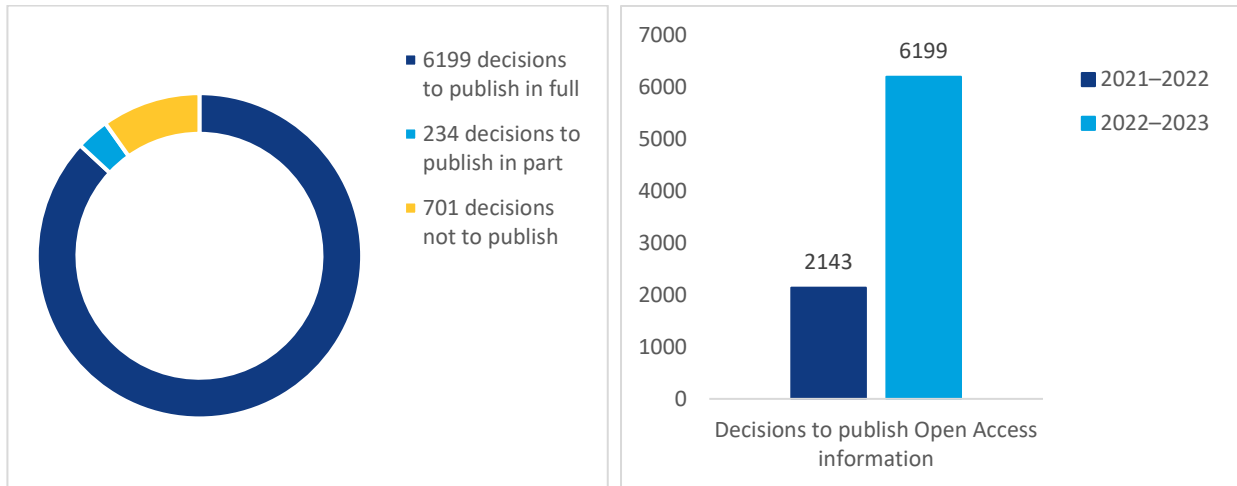
Iain Anderson, under s 67 of the *Freedom of Information Act 2016* (ACT)

2022–23 HIGHLIGHTS



Open Access information decisions

7,134



Access applications in the ACT

1,301

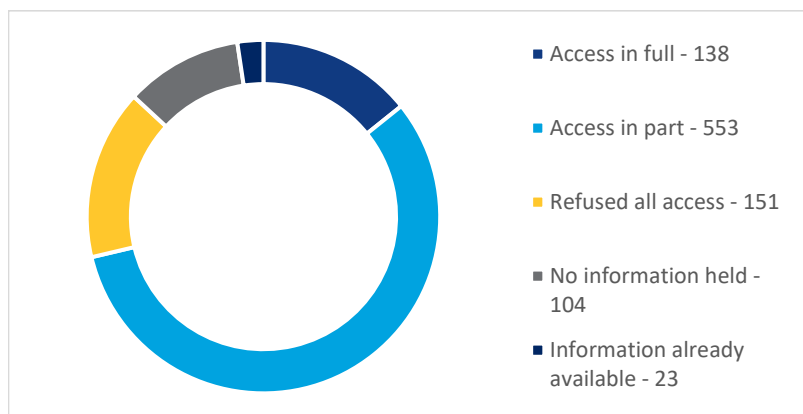
1,087

Received

Finalised

98%

of access decisions made within statutory timeframes



Ombudsman reviews

55

41

Received

Finalised



Complaints

13

13

Received

Finalised

Introduction from ACT Ombudsman



I am pleased to introduce the 2023–23 annual report prepared under s 67 of the *Freedom of Information Act 2016* (ACT) (FOI Act).

1 August 2023 marked the completion of my first year as ACT Ombudsman.

During 2022–23, the ACT Ombudsman continued to promote the pro-disclosure objectives of the FOI Act, working closely with agencies to ensure consistent and timely decision-making.

Transparency and openness are necessary ingredients for the community to have confidence and trust in Government and understand why and how decisions are made. Government decision-makers must ensure they are creating and maintaining records of their decisions and wherever possible making that information available to the public.

In December 2022, we hosted our first in-person FOI round table with senior information officers and followed up in May 2023 with a virtual FOI practitioners' forum. The round table was a great opportunity to meet with relevant stakeholders in person after a lengthy period of working and meeting remotely. The forum was an opportunity for more than 30 information officers and FOI staff from ACT government agencies to come together and share better practices and guidance on dealing with complex FOI issues. The Justice and Community Safety Directorate (JACS) also provided a presentation on the recent amendments to the FOI Act.

For this reporting period, all 9 ACT government directorates provided both mandatory and optional data for ACT Ombudsman reporting, allowing us to build our understanding of the operation of the FOI Act.

This year we completed 41 Ombudsman reviews, of which 20 resulted in formal decisions published on our website. The other 21 were resolved without the need for a formal decision. The 104 Ombudsman review decisions published as of 30 June 2023 contribute to a growing body of guidance on the operation of the FOI Act, to assist practitioners with future decision-making.

In addition to the regular work performed by the ACT Ombudsman by fulfilling our responsibilities for monitoring the FOI scheme, this year we assisted the Board of Inquiry into the Criminal Justice System in the ACT by disclosing documents relating to our investigation of complaints about the Director of Public Prosecutions' (DPP) release under FOI of a letter to the Chief Police Officer of ACT Policing.

Looking ahead, the ACT Ombudsman will continue working closely with agencies to promote consistent and timely FOI Act decision-making in accordance with the legislation's pro-disclosure objectives. In the coming year, we will also focus on providing education and information about Open Access requirements, and guiding agencies to improve their compliance with and approach to providing information proactively.

A handwritten signature in black ink, appearing to read 'Iain Anderson'. The signature is stylized and fluid.

Iain Anderson
ACT Ombudsman

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Part 1: INTRODUCTION

This report outlines the ACT Ombudsman’s insights about the operation of FOI Act in 2022–23, as well as planned priority activities for 2023–24.

The public’s right to access government information, underpinned by properly administered FOI legislation, contributes strongly to the effective working of representative democracy. The FOI Act in the ACT has a pro-disclosure bias and a focus on making government information accessible to the public.

Under the FOI Act every person has a right to access information held by the government where it is not contrary to the public interest for that information to be disclosed.¹

The FOI Act requires agencies and Ministers to publish government information proactively and be transparent about the information they do not publish. This includes information held by government directorates and agencies, ministers, government owned corporations (with some exceptions), public hospitals and health services, public authorities and public universities enacted under ACT laws.²

The FOI Act emphasises access to government information through informal requests without the need for formal processes. Where a formal process is required, an access application can be made under the FOI Act to the relevant agency and decisions are focused on public interest considerations.

The ACT Ombudsman oversees the FOI Act and promotes its objects by:

- monitoring the operation of the FOI Act, including the publication of Open Access information by agencies and Ministers, and agency compliance with the FOI Act
- publishing guidelines which are to be periodically revised
- making open access information declarations
- considering requests for extensions of time to decide access applications
- conducting merits review (Ombudsman review) of FOI decisions, in response to review applications
- investigating complaints about an agency or Ministers’ action in relation to their functions under the FOI Act.

Information on the ACT Ombudsman's own performance under the FOI Act, as an ACT government entity required to report under s 96 of the FOI Act, is included in the *ACT Ombudsman’s Annual Report 2022–23*, which is available on our website.³

¹ This is subject to some exceptions, such as information under the [Health Records \(Privacy and Access\) Act 1997](#) (see s 12 of the FOI Act).

² The FOI Act includes a comprehensive definition of agency (s 15).

³ See:

https://www.ombudsman.act.gov.au/publications?form=simple&profile= default&num_ranks=&query=%21showall&f.Tab%7CannualReports=Annual+Reports&collection=actomb-publications

Part 2: OPEN ACCESS INFORMATION DECISIONS

The intention of the FOI Act is to make government-held information accessible. Formal access applications for information should be a last resort, with information being published proactively wherever possible.⁴ ACT government agencies must publish certain information routinely without the need for a formal application to be made by a member of the public. This includes policy documents, reports, budget papers and agency disclosure logs.⁵

The ACT Government maintains an Open Access portal⁶ to provide the public with a central, searchable interface to access government information. Agencies can publish information on their own website and add a link to this information on the portal.

In June 2020, we finalised our Open Access Guidelines. These guidelines are notifiable instruments available on the ACT Legislation Register⁷ and on the ACT Ombudsman’s website.⁸ The guidelines help ACT agencies to understand and meet their Open Access obligations.

The ACT Ombudsman’s own Open Access Strategy is available online⁹ and sets out:

- what information will be made publicly available
- how it will be made available
- how published information will be reviewed to ensure it remains accurate, up to date and complete
- that we will publish our reasons for decisions when information may not be made publicly available because it is contrary to public interest.

The strategy supports the ACT Ombudsman’s staff to comply with Open Access requirements and may be used to assist directorates and agencies to develop their own strategies.

This year the ACT Ombudsman continued monitoring ACT agencies’ compliance with their Open Access obligations under Part 4 of the FOI Act.

Decisions to publish

During the reporting period, agencies and Ministers continued to publish Open Access information on their respective websites and on the Open Access portal.

A total of at least **6,199 decisions** to publish open access information in full were made. This is a significant increase on the reported 2,143 decisions published in 2021–22, demonstrating agencies continue to take their Open Access obligations seriously and proactively publish Open Access information.

The ACT Ombudsman recognises the above figures reflect agency decisions to publish information:

- on the agency disclosure log
- registered on the Open Access website, or
- on the agency website.

⁴ See page 3 of the Explanatory Statement to the *Freedom of Information Bill 2016* at https://www.legislation.act.gov.au/View/es/db_53834/20160505-63422/PDF/db_53834.PDF

⁵ See s 23 of the FOI Act for the list of categories of Open Access information.

⁶ See: <https://www.act.gov.au/open-access>

⁷ See: <https://www.legislation.act.gov.au/ni/2020-368/>

⁸ See:

https://ombudsman.act.gov.au/publications?form=simple&profile=default&num_ranks=&query=%21showall&collection=actomb-publications&f.Tab%7Cguidelines=Guidelines

⁹ See: https://www.ombudsman.act.gov.au/data/assets/pdf_file/0014/111182/ACTO-Open-Access-Strategy-updated-July-2020.pdf

We say ‘at least’ 6,199 decisions to publish information in full were made because we recognise this may not capture all the information published by agencies. Agencies are not expected to keep formal records or make public interest assessments on the multitude of documents they publish on a daily or weekly basis. To require this would impose an unnecessary administrative burden and could potentially undermine the objectives of the FOI Act by discouraging agencies from publishing government information.

Decisions not to publish

Generally, if Open Access information is not made available because it would be contrary to the public interest to do so, the FOI Act requires the agency instead to publish a description of the information and the reason for this nondisclosure, except in limited circumstances.

In 2022–23, ACT government agencies made **935** decisions **not** to publish Open Access information, compared to 278 decisions in 2021–22. This accounted for **13%** of total Open Access decisions in 2022–23, an increase on **11%** of total Open Access decisions in 2021–22.

At first glance, this may appear to suggest an increase in the behaviour of agencies withholding information. However, we consider this increase reflects the continuing development and maturity of agencies’ Open Access strategies, as agencies are considering a wide range of information before deciding not to publish some information. Our engagement with agencies whilst collecting this data also indicates that agencies are more accurately reporting these decisions.

By contrast, a lower number of decisions **not** to publish Open Access information might indicate that agencies simply do not turn their minds to publishing information at all. Additionally, 2022–23 was the first year we requested agencies provide separate data on decisions to publish *in full* and decisions to publish *in part*. Agencies made 695 decisions not to publish open access information *in part* which may mean only a small amount of information, such as personal information, has been withheld in a document, rather than an entire document.

In 2022–23, the number of decisions **not to** publish a description of the information remained steady, with **6** such decisions made in 2022–23, compared to **5** such decisions made in 2021–22.

Decisions by Agencies and Ministers

The number of Open Access decisions made by each of the agencies and Ministers, as reported to the ACT Ombudsman, are outlined in Figure 1.¹⁰ For the first time, in 2022–23, we split the decisions not to publish Open Access information into decisions not to publish at all, and decisions not to publish in part. This provides a clearer picture of the number of decisions to publish Open Access information, as a decision not to publish in part is also a decision to publish some Open Access information.

The Office of the Legislative Assembly (OLA) made the highest number of decisions to publish Open Access information, with **2,634 decisions**, followed by the Chief Minister, Treasury and Economic Development Directorate (CMTEDD) with **1,084 decisions**, and the Justice and Community Safety Directorate (JACS), with **768 decisions**.

Most agencies did not make any formal decisions to withhold information.

In 2022–23, a total of **66 decisions** were made to publish Ministerial information,¹¹ including 36 Ministerial diaries, 27 Ministerial travel reports, and 3 Ministerial hospitality reports. This is double the 33 decisions made in 2021–22, which is not unexpected considering the lifting of COVID-19 restrictions.

¹⁰ This dataset includes information provided by each directorate, not including smaller agencies within their portfolio. Separate data for each agency will be available in their respective annual reports. Agencies that reported nil for all categories have not been included in this table.

¹¹ See: <https://www.act.gov.au/open-access/ministers-information>.

Figure 1: Open Access decisions by agencies that reported decisions

Directorates and agencies	Decisions to publish Open Access information	Decisions not to publish Open Access Information in full	Decisions not to publish Open Access Information in part	Decisions not to publish a description of Open Access information
Office of the Legislative Assembly	2634	24	538	0
Chief Minister, Treasury, and Economic Development Directorate	1084	30	148	0
Environment, Planning and Sustainable Development Directorate	742	74	9	0
Community Services Directorate	256	12	0	0
ACT Health Directorate	199	0	0	0
Canberra Health Services	176	3	0	0
Transport Canberra and City Services	80	0	0	0
Justice and Community Safety Directorate	768	67	0	0
ACT Ministers	66	0	0	0
Education Directorate	57	0	0	0
Canberra Institute of Technology	43	8	0	0
City Renewal Authority	23	1	0	0
Suburban Land Agency	19	1	0	0
ACT Audit Office	16	0	0	0
Electoral Commission	14	0	0	0
ACT Ombudsman	9	0	0	0
Teacher Quality Institute	6	0	0	0
ACT Director of Public Prosecutions	3	7	0	0
Human Rights Commission	2	0	0	0
Independent Competition and Regulatory Commission	1	0	0	0
Office for the Commissioner for Sustainability and the Environment	1	0	0	0
Cultural Facilities Corporation	0	6	0	6
ACT Integrity Commission	0	1	0	0
Total	6199	234	695	6

Part 3: INFORMAL REQUESTS FOR INFORMATION

Information can be requested informally from an agency or Minister, and a decision may be made to release it directly without the need for a formal access application.

Agencies are not required to report on the number of informal requests received, or related outcomes, as to do so would impose an unnecessary administrative burden.

The figures for 2022–23 show an increase in the number of access applications resolved informally, with **111 access applications** reported as resolved outside of the formal FOI process, compared to the 84 access applications reported as resolved outside of the formal FOI process in 2021–21.

While we cannot ascertain if all the matters resolved informally were finalised after information was provided informally, it is positive to continue to see more applications are being resolved outside of the formal FOI process as intended by the FOI Act.

The ACT Ombudsman encourages agencies to release information informally where possible, rather than require applicants to seek information through the FOI process. We will continue to monitor what is being reported by agencies to identify trends or issues.

Part 4: ACCESS APPLICATIONS

An access application is the formal way to request information under the FOI Act. Access applications can be made to an agency or Minister and may be reviewed by the Ombudsman. An agency or Minister will assess the application and may decide to give full or partial access to government information sought under the FOI Act or refuse access.

An agency or Minister can refuse access to information in circumstances where it is assessed as contrary to the public interest to release. They can also refuse to deal with an access application or refuse to confirm or deny that information is held in limited circumstances.¹²

Applications made

In 2022–23, **1,301 access applications** were made to ACT Government agencies and Ministers.

As shown in Figure 2, this is a **9% increase** from the **1,196 access applications** received in 2021–22. Figure 2 also shows the total access applications received in each financial year since 2018–19 (the first full year of the operation of the FOI Act).

¹² These being that the information is contrary to the public interest information and doing so would reasonably be expected to: endanger the life or physical safety of a person, be an unreasonable limitation on a person's rights under the *Human Rights Act 2004* (ACT), or significantly prejudice an ongoing criminal investigation. See s 35 of the FOI Act.

Figure 2: Access applications received by agencies and Ministers

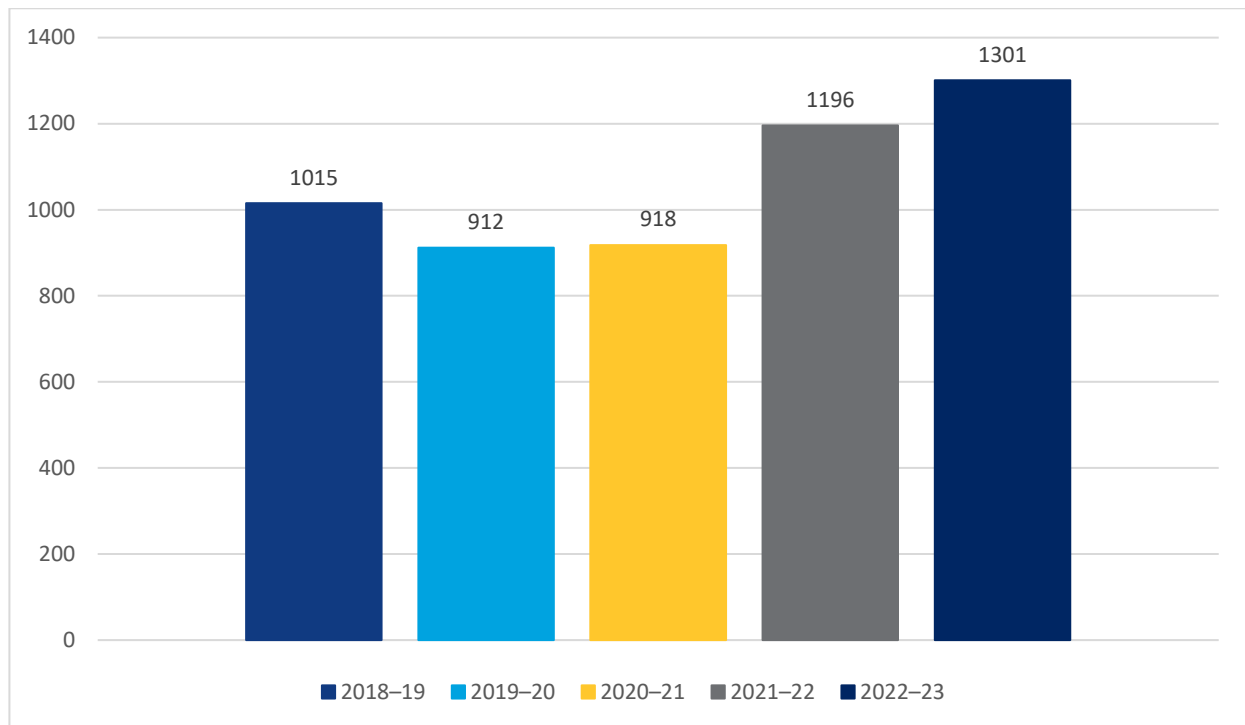
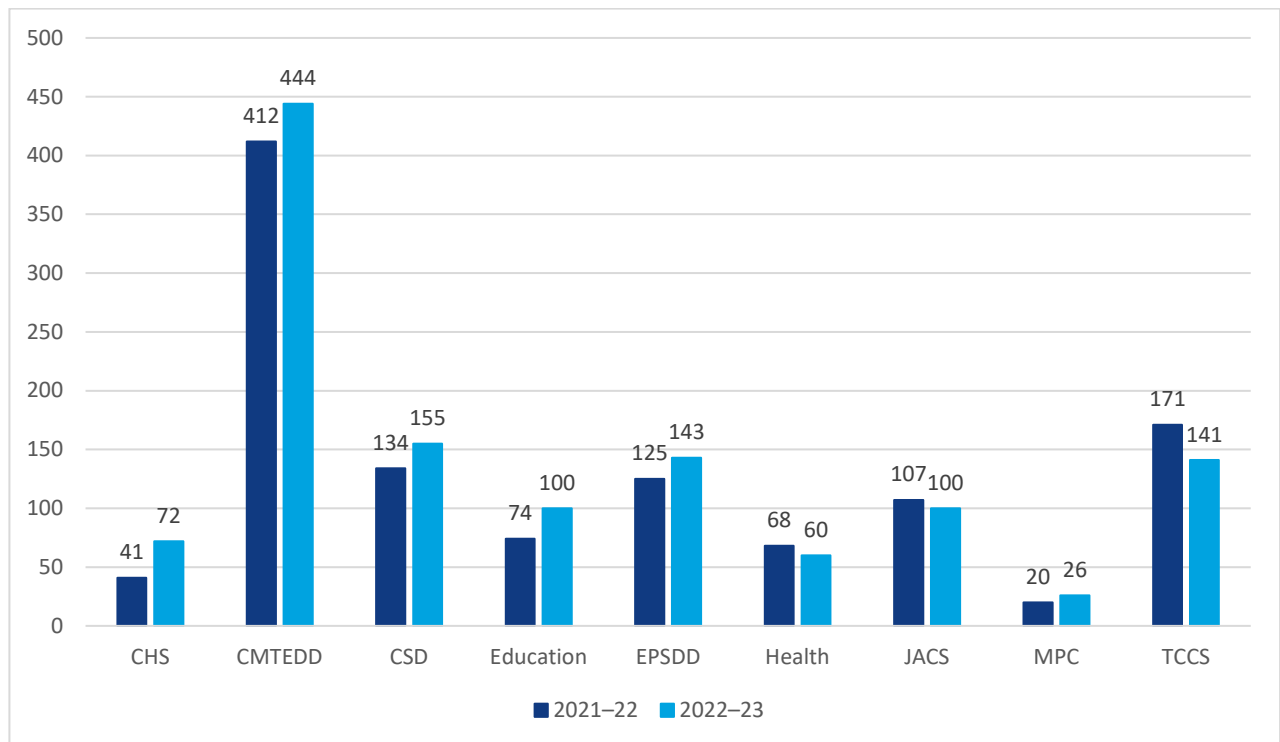


Figure 3 reflects the number of access applications received by the 9 directorates in 2022–23. The number of access applications received by the 9 directorates does not include access applications received by smaller agencies, and access applications received by Ministers.

Figure 3: Access applications received by each directorate



Application outcomes

During the reporting period, agencies and Ministers made **1,087 decisions** on access applications. This is an **11% increase** from the previous financial year when 978 such decisions were made.

As outlined at Figure 4, of the 1,087 decisions on access applications reported by agencies and Ministers:

- *Full access* was granted in **138 decisions (13%)** – with the agency disclosing all information identified within the scope of the access application.
- *Partial access* was granted in **553 decisions (51%)** – with some information redacted prior to the release because it was assessed as contrary to the public interest information.
- *Access was refused* in **151 decisions (14%)** – with the agency deciding the information was contrary to the public interest information.
- Information was assessed as *not being held* by the agency in **104 decisions (10%)** – with an agency required to take reasonable steps to identify all government information within the scope of the application prior to determining that it cannot be located or does not exist.
- Information was assessed as *already available* to the applicant in **23 decisions (2%)**.

These figures show the proportion of decisions to grant full access decreased from **17%** in 2021–22 to **13%** of decisions in 2022–23.

The proportion of decisions to partially release information increased from **43%** in 2021–22 to **51%** in 2022–23.

The proportion of decisions to refuse access in full decreased from **19%** in 2021–22 to **14%** in 2022–23.

The ACT Ombudsman also notes, as outlined further below, one of the reasons given by agencies for the large proportion of partial release decisions is the fact that many decisions require agencies to redact small amounts of personal information. This resulted in what would otherwise be full access decisions becoming partial access decisions. When the full access and partial access decisions are combined, access in some form was granted in **691 decisions (64%)**. The data may indicate a trend in favour of a pro-disclosure culture. We will continue to monitor data on these decisions closely in 2023–24.

Figure 4 does not include the remaining **118 decisions (11%)** that were decided in different ways, such as agencies *refusing to deal* with the application or *refusing to confirm or deny that information was held*. Providing detailed data to the ACT Ombudsman on this category of decisions is optional.

Figure 4 also excludes the **186 access applications** agencies reported were **withdrawn** by the applicant before a decision was made by the agency (a decrease from the 214 reported in 2021–22), and the **130 access applications** reported as **transferred** from one agency to another to deal with.

Our analysis of FOI data from other jurisdictions for 2021–22, being the most recent data publicly available, indicates applicants in Australia are more likely to be granted partial access than full access.¹³ This is consistent with 2022–23 data for the ACT, where the proportion of full access decisions (**13%**) was significantly less than the proportion of partial access decisions (**51%**).

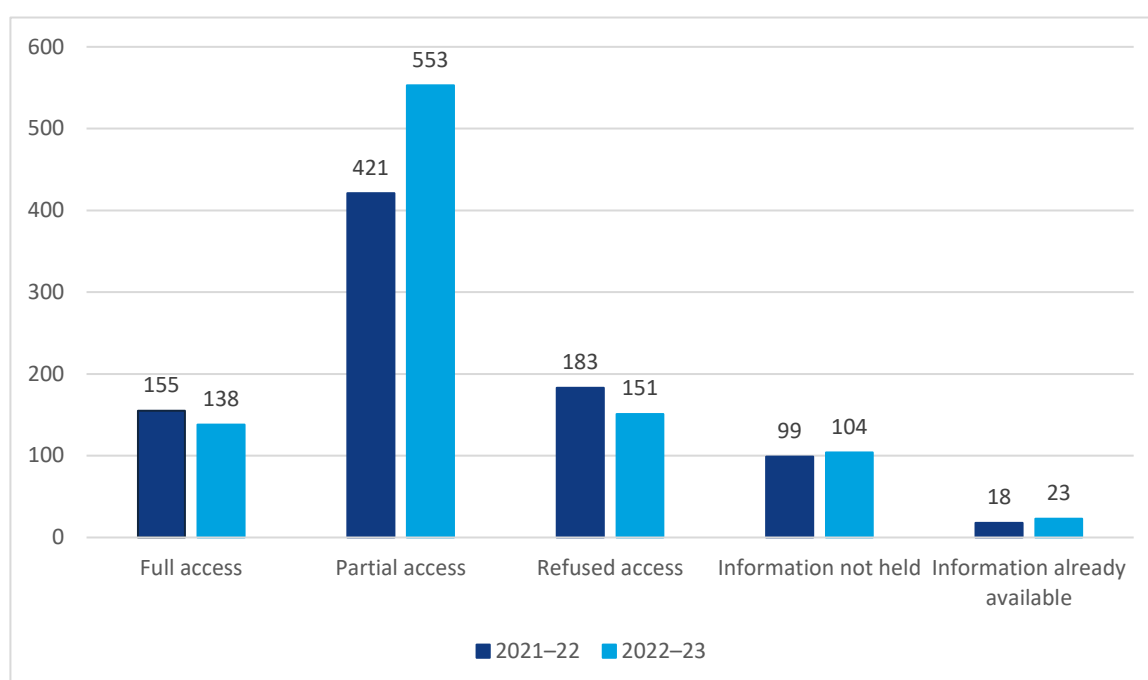
¹³ See, for example, discussion by the NSW IPC in its *Report on the Operation of the Government Information (Public Access) Act 2009* (NSW) | 2021–2022 at <https://www.ipc.nsw.gov.au/information-access/gipa-compliance-reports>

Agencies noted the proportion of partial access decisions is inflated by the large number of decisions where agencies make minor redactions to exclude personal information (such as personal telephone numbers or other direct contact information). This is consistent with the fact that the most common ground reported as relied upon by agencies to withhold information under Schedule 2 of the FOI Act is that the redacted information may prejudice the protection of an individual’s right to privacy or any other right under the *Human Rights Act 2004* (ACT) (Human Rights Act).

We suggest the high proportion of partial access decisions in 2022–23 indicates an opportunity for agencies to improve their initial scoping activities with applicants, for example, to seek the applicant’s agreement to exclude irrelevant information such as inconsequential personal information.

We will continue to monitor this issue in 2023–24.

Figure 4: Outcomes of decided access applications



Reasons for refusal

In this reporting period the 9 directorates provided data about the reasons for refusing access to information in full or in part.

As outlined in Figure 5, in 2022–23, the top 3 grounds relied on by agencies to withhold information under Schedule 1 of the FOI Act were:

- Cabinet information (Schedule 1, section 1.6), which was used in **93 decisions (35%)**
- information subject to legal professional privilege (Schedule 1, section 1.2), which was used in **57 decisions (21%)**
- information disclosure of which is prohibited by law (Schedule 1, section 1.3), which was used in **52 decisions (19%)**.

There has been no change to the top 3 Schedule 1 grounds relied on by agencies in 2021–22 however the rankings shifted, with Cabinet information moving from second to first place, information subject to legal professional privilege (LPP) moving from third to second place, and information disclosure of which is prohibited by law moving from first to third place.

Figure 5: Reasons for refusal under Schedule 1 of the FOI Act

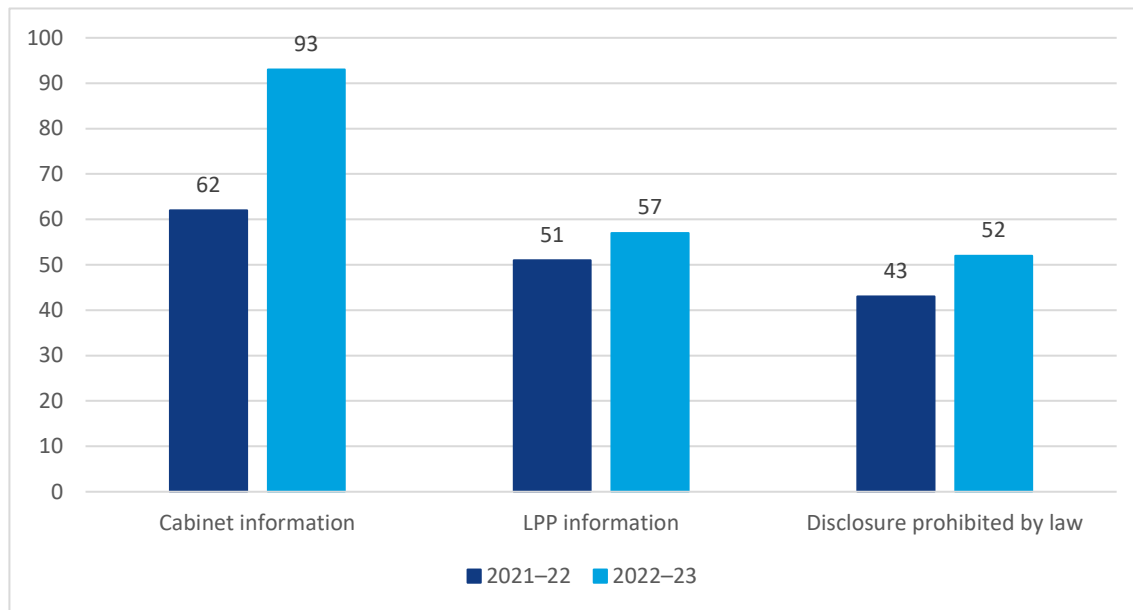


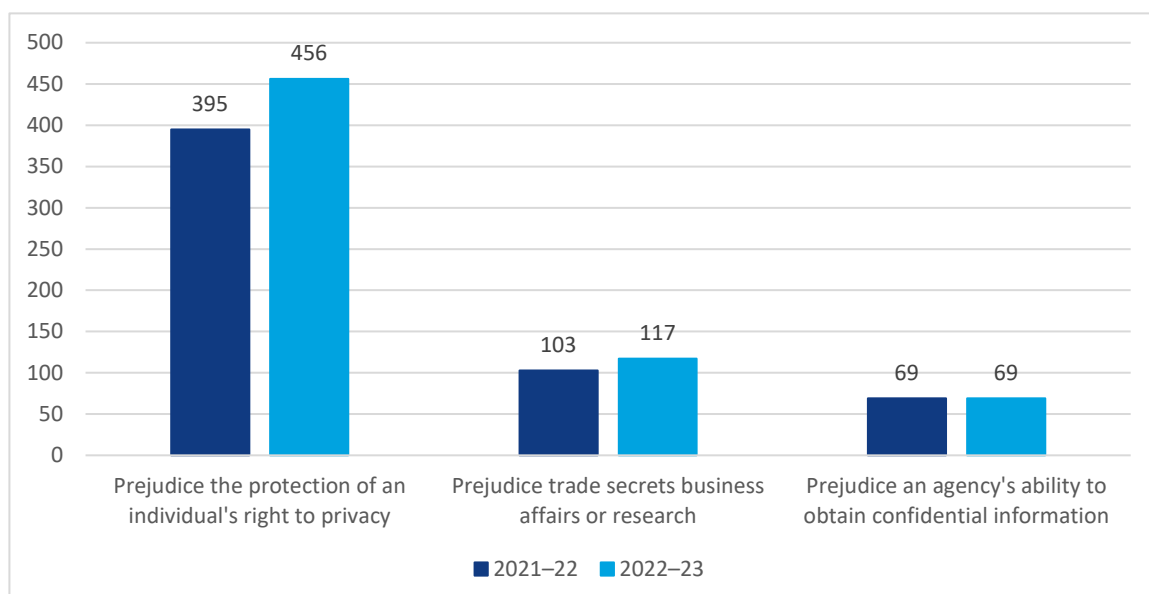
Figure 6 shows in 2022–23, the top 3 factors favouring non-disclosure relied on by agencies to withhold information under Schedule 2 of the FOI Act were:

- prejudice the protection of an individual’s right to privacy or any other right under the Human Rights Act (Schedule 2, section 2.2(a)(ii)), which was used in **456 decisions (52%)**
- prejudice trade secrets, business affairs or research of an agency or person (Schedule 2, section 2.2(a)(xi)), which was used in **117 decisions (13%)**
- prejudice an agency’s ability to gain confidential information (Schedule 2, section 2.2(a)(xii), which was used in **69 decisions (8%)**.

This is consistent with 2021–22, where the same top 3 Schedule 2 factors were reported.

We will continue to monitor this data in future years to identify trends and compare grounds and factors arising in decisions subject to Ombudsman review.

Figure 6: Reasons for refusal under Schedule 2 of the FOI Act



Processing times

Amendments to the FOI Act including additional time for agencies to process applications commenced on 24 May 2023.

For access applications received **prior to 24 May 2023**, an access application was required to be decided within 20 working days - unless an applicant agreed to an extension of time, an extension was granted by the Ombudsman, or a third party was required to be consulted. Where a third party was consulted, agencies had an additional 15 working days to decide the access application.

Agencies were able to seek an applicant’s agreement to an extension of time for **up to 12 months** from the date of the application. If an applicant refused an extension request, the agency was also able to seek an extension from the Ombudsman. An extension beyond 12 months must be sought from the Ombudsman.

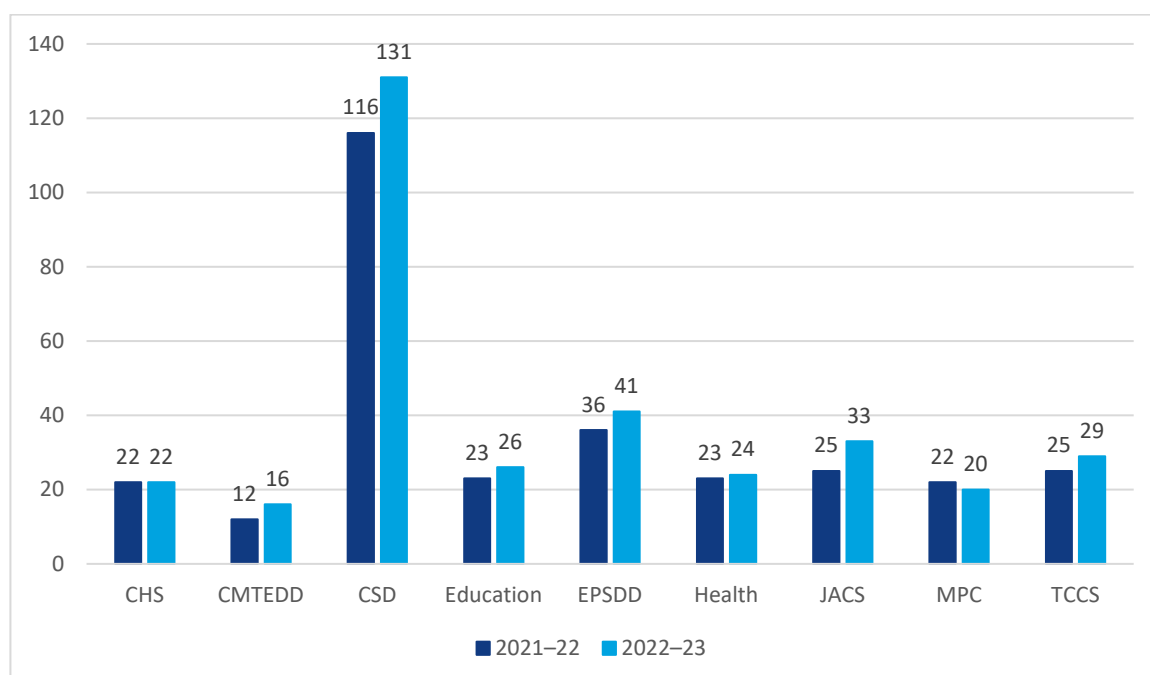
For access applications received **on or after 24 May 2023**, an access application is required to be decided within 30 working days - unless an applicant agrees to an extension of time, an extension is granted by the Ombudsman, or a third party must be consulted. Where a third party must be consulted, agencies continue to have an additional 15 working days to decide the access application.

Agencies can seek an applicant’s agreement to an extension of time for **up to 24 months** from the date of the application. If an applicant refuses an extension request, the agency can also seek an extension from the Ombudsman. An extension of time beyond 24 months must be sought from the Ombudsman.

Noting the changes to processing times apply only to access applications received on or after 24 May 2023, for this report we only requested data in line with the previous processing times set out in the FOI Act. In 2023–24, we will request data in line with the new processing times.

Figure 7 below shows the average processing times, in working days, by each directorate, compared to the average processing times in 2021–22.

Figure 7: Average processing time in working days by each directorate



Access applications processed within time

During the reporting period, **98%** of decisions on access applications were decided within the statutory timeframes – that is, within the standard timeframe or within an extension granted by the applicant or the Ombudsman.

Access applications decided without any extension of time accounted for **70%** of decisions. A further **28%** of applications were processed where the applicant approved an extension request. Applications processed with an Ombudsman extension of time accounted for **less than one per cent** of decisions. The remaining **2%** of access applications became deemed refusal decisions and are discussed below.

There were **192 access applications** ‘on hand’ at the end of the reporting period. However, the ACT Ombudsman does not have visibility over the length of time these applications have been open.

Extensions of time by the Ombudsman

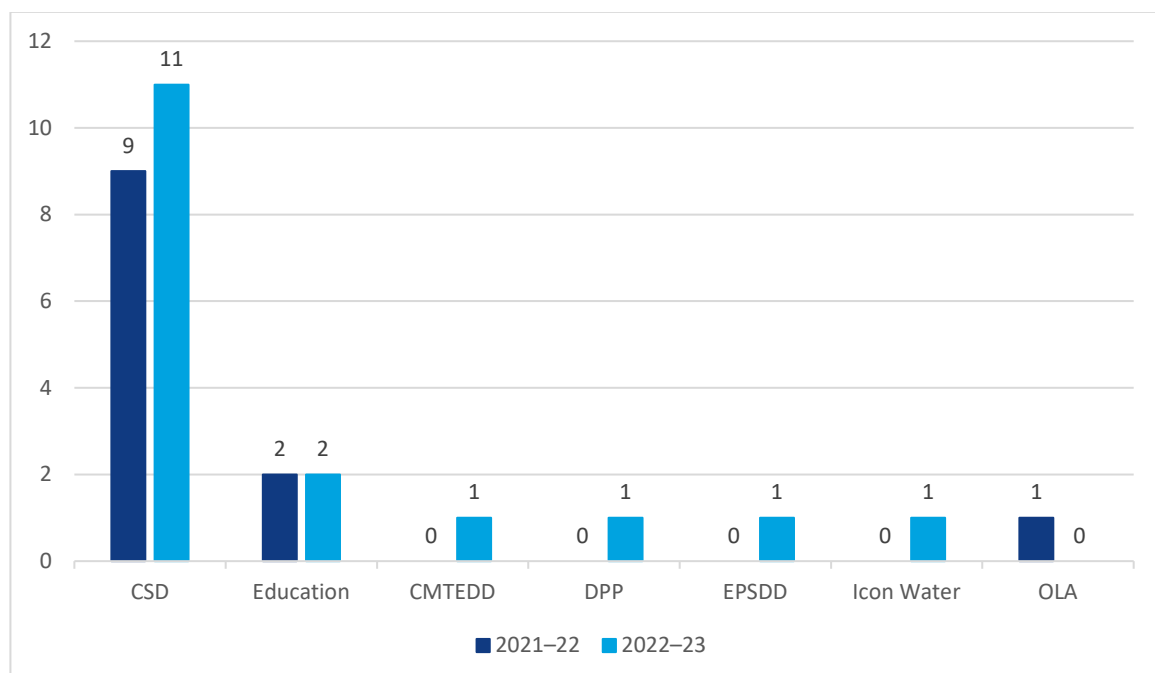
The Ombudsman has discretion to grant an extension of time to an agency to decide an access application. An extension can be granted if the Ombudsman believes it is not reasonably possible for the access application to be dealt with within the timeframe, because the application:

- involves dealing with a large volume of information
- is complex, or
- other exceptional circumstances apply.

There is no cap on the length of time the Ombudsman can grant an extension and the FOI Act allows the Ombudsman to impose conditions to the extension granted. Once granted, the Ombudsman can cancel or amend the extension if the directorate does not comply with the conditions imposed.

During the reporting period **17 applications** were made to the Ombudsman for an extension of time. The applications made by agencies are shown in Figure 8.

Figure 8: Extension of time applications to the Ombudsman



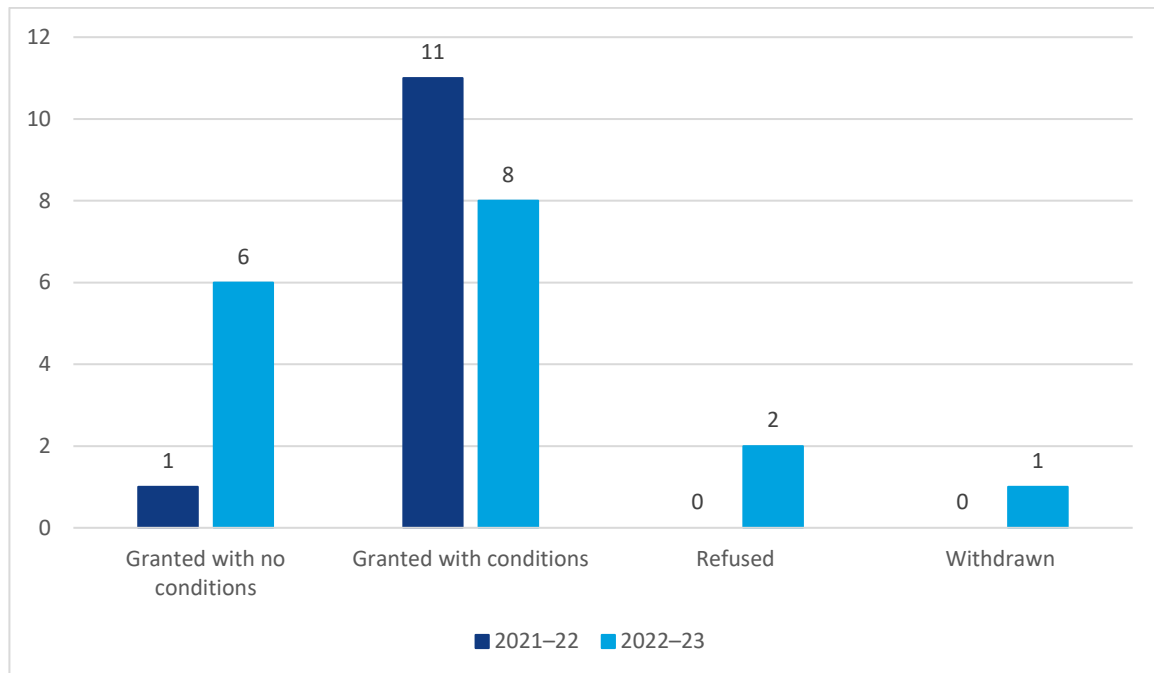
As shown in Figure 9, after assessing these requests, the Ombudsman granted **14 applications**. The Ombudsman imposed additional conditions on **8 of these 14 applications**. These conditions required incremental releases of information throughout the processing period.

The Ombudsman refused **2 applications** (**one** each from the Community Services Directorate (CSD) and the DPP) because they did not meet the criteria set out under s 42 of the FOI Act. **One** application was withdrawn by CSD.

The length of additional time requested and granted varied. The extension granted to CMTEDD was for 15 working days, EPSDD was granted 10 working days and Icon Water (Icon) was granted 5 working days. The Education Directorate (Education) was granted extensions for 14 and 20 working days. CSD requested, and was granted longer extensions, ranging from 40 to 611 working days.

The lengthier extensions requested by CSD reflect the complexity and sensitivity of the access applications received by CSD, as well as the large volume of, most often, personal information sought. The long extensions requested by CSD are conditional upon the incremental release of information occurring throughout the processing period, so that applicants are not waiting the full extension period to receive all of the information requested.

Figure 9: Extension of time outcomes



Deemed refusal decisions

Where statutory timeframes have not been met and an extension of time has not been obtained, an agency or Minister’s decision is taken (deemed) to be a refusal to give access to the government information requested.

Section 39 of the FOI Act requires agencies to notify the Ombudsman of a deemed refusal and, after the access application including any review or appeal is finally decided, table a copy of that notice in the Legislative Assembly. Most agencies continue to process an access application and make a formal decision in deemed refusal cases, despite the statutory timeframe having expired, which is preferable to agencies stopping and waiting for the applicant to seek review of the deemed refusal.

As shown in Figure 10, during 2022–23 agencies reported **18 deemed refusal decisions**. This is an increase on 2021–22, when agencies reported 12 deemed refusal decisions.

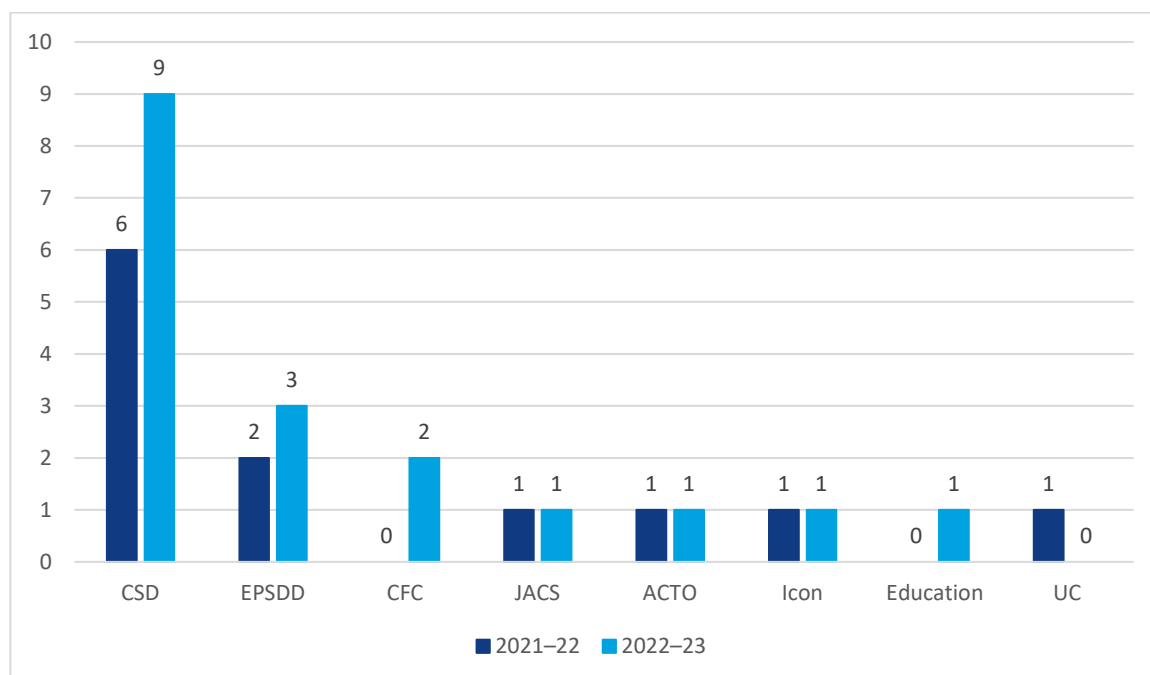
Of the 18 deemed refusal decisions, the Ombudsman was formally notified of **13 deemed refusal decisions**. The ACT Ombudsman identified an additional **5 deemed refusal decisions** during collection of data for this report.

While s 39 of the FOI Act does not specify when agencies must notify the Ombudsman of a deemed refusal, the ACT Ombudsman considers it is best practice for agencies to give notice as soon as practicable after a deemed refusal occurs.

We engaged with the agencies that did not formally notify the Ombudsman of deemed refusal decisions to remind them of their obligations under the FOI Act and offer assistance.

The ACT Ombudsman’s published FOI Guidelines¹⁴ provide details about these reporting requirements and draft templates to assist agencies.

Figure 10: Deemed refusal decisions



Refusing to deal with access applications

Under s 43 of the FOI Act, agencies can refuse to deal with an access application in limited circumstances.

In 2022–23, 10 agencies reported they relied on this provision to refuse to deal with a total of **81** access applications: the ACT Health Directorate (Health), CMTEDD, CSD, Education, EPSDD, Canberra Health Services (CHS), JACS, the Transport Canberra and City Services Directorate (TCCS), the ACT Integrity Commission (ACTIC) and the Cultural Facilities Corporation (CFC). This is an increase on the 7 agencies that reported they relied on s 43 to refuse **59** access applications in 2021–22.

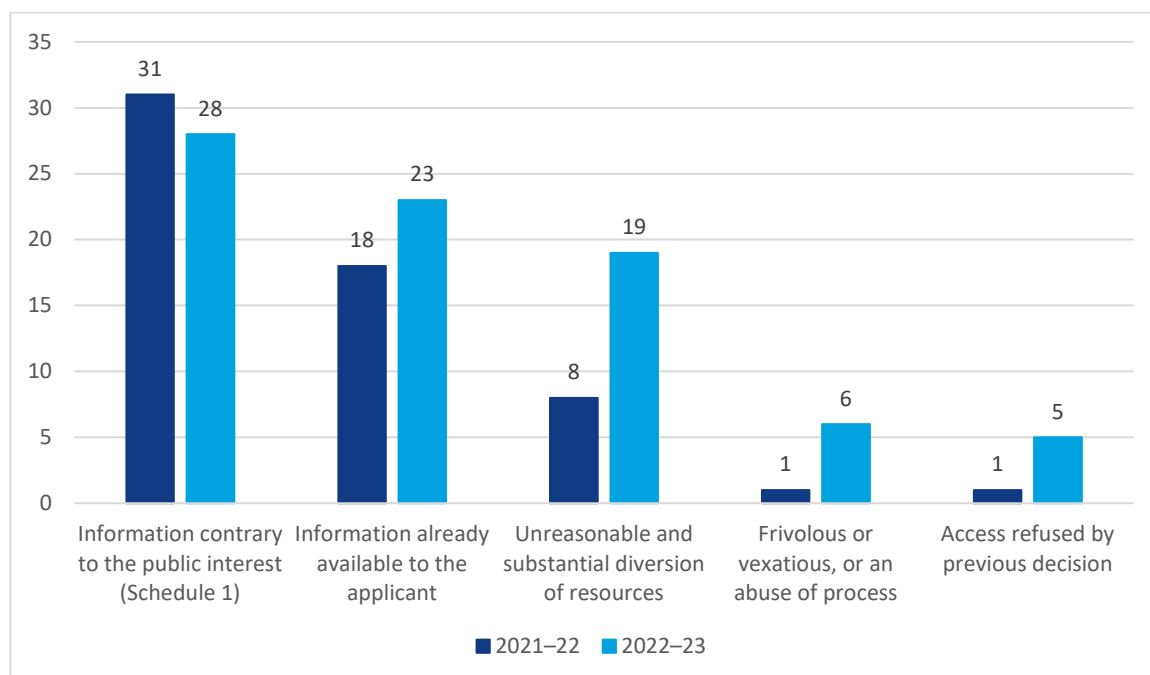
Figure 11 shows the reasons decision-makers decided not to deal with an access application, the most common being that the information sought is taken to be contrary to the public interest to disclose under Schedule 1 of the FOI Act (**35%**), followed by information that is already available to the applicant (**28%**).

¹⁴ See:

https://ombudsman.act.gov.au/publications?form=simple&profile= default&num_ranks=&query=%21showall&collection=a cto mb-publications&f.Tab%7Cguidelines=Guidelines

Compared with 2021–22, there was a decrease in the percentage of access applications refused on the basis the information sought is taken to be “contrary to the public interest” information under Schedule 1 of the FOI Act (**53%** in 2021–22) and in the percentage of applications refused because the information was already available to the applicant (**31%** in 2021–22). We observed a significant increase in the number of applications refused on the basis that it would be an unreasonable and substantial diversion of an agency’s resources to process the application – **23%** in 2022–23 compared to **14%** in 2021–22.

Figure 11: Reasons for refusing to deal with an access application



Fees

The objects of the FOI Act outline that access should be granted at the lowest reasonable cost to applicants. A fee may be charged when more than 50 pages of information are provided in response to an access application, except in certain circumstances – for example, where an access application for personal information about the applicant is made.

The fees that can be charged – where considered appropriate – are determined by the Attorney-General and are outlined in the *Freedom of Information (Fees) Determination 2018* (ACT).¹⁵

No agencies reported charging for processing an access application in 2022–23. This is a change from 2021–22, where one agency reported a single charge for processing an access application. The data is consistent with the pro-disclosure objects of the FOI Act, with cost not being an obstacle to access.

¹⁵ See: <https://www.legislation.act.gov.au/di/2018-197/>

Part 5: AMENDMENT OF PERSONAL INFORMATION

If an individual has access to an ACT Government record or file or other government held information that contains their own personal information, and they believe their information is incomplete, incorrect, out of date or misleading, they can request this information be amended.

In this reporting period no formal applications were made to amend or annotate personal information under the FOI Act. This is consistent with 2021–22, where no such formal applications were made.

We understand ACT agencies generally manage such requests for amendment through other informal channels, rather than the FOI Act.

Part 6: OMBUDSMAN REVIEWS

The Ombudsman may conduct independent merits review of decisions on access applications made by agencies and Ministers under the FOI Act. In reviewing a decision, the Ombudsman can confirm or vary the original decision or set it aside and substitute a new decision. Ombudsman review decisions may be reviewed by the ACT Civil and Administrative Tribunal (ACAT).

Applications received

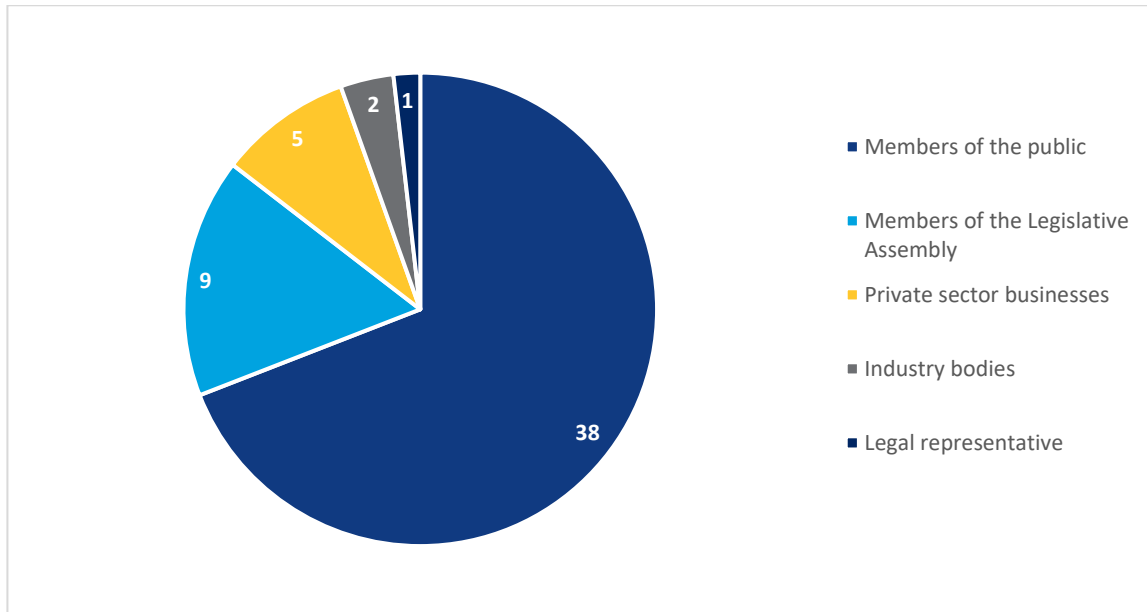
During the reporting period, the ACT Ombudsman received **55 applications** for Ombudsman review – 29 more than the 26 received in 2021–22.

Types of review applicants

Figure 12 shows most Ombudsman review applications received in 2022–23 were made by members of the public (**38 applications or 69%**), followed by members of the Legislative Assembly (**9 or 16%**) and private sector businesses (**5 or 9%**). **Two applications (4%)** were received from industry bodies and **1 application (2%)** was received from a legal representative. The Ombudsman did not receive any review applications from the media in 2022–23.

The figures show some minor differences compared to 2021–22, when most Ombudsman review applications were made by members of the public (**88%**), followed by the media (**8%**) and members of the Legislative Assembly (**4%**).

Figure 12: Who applied for review

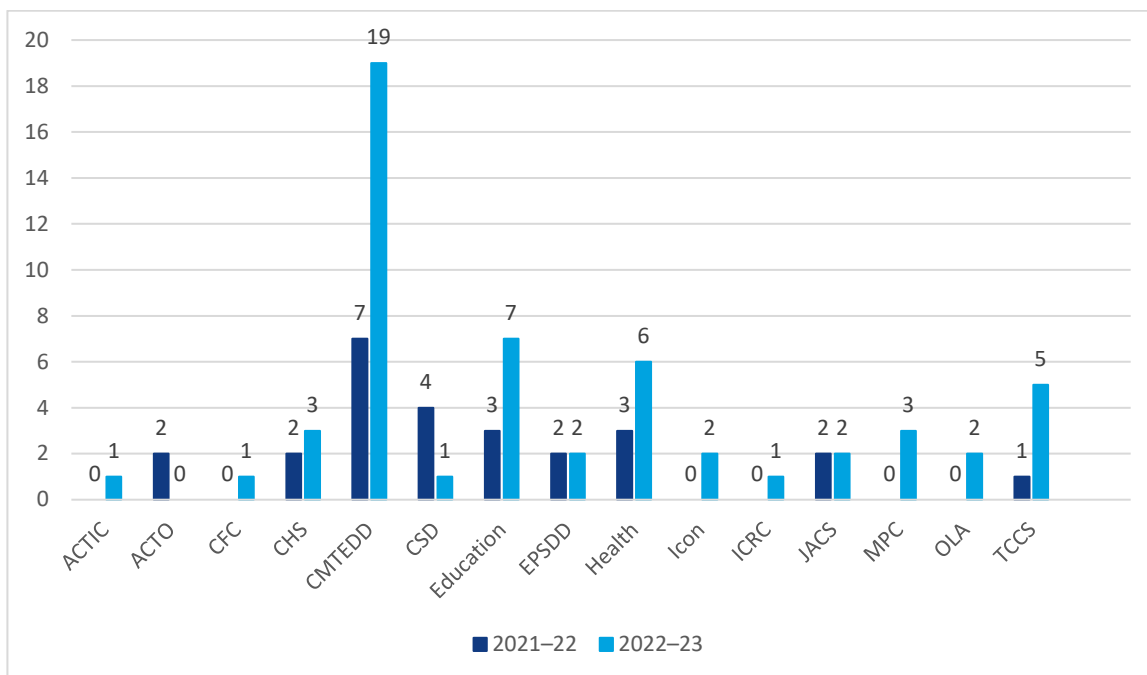


Agency participation in reviews

Figure 13 shows the Ombudsman review applications received in 2022–23 (and 2021–22 for comparison), broken down by agency.

The data reflects that Ombudsman review applications received increased for most agencies. We observed a significant increase in applications for review of decisions made by CMTEDD – from 7 in 2021–22 to 19 in 2022–23. We did not identify any specific reason for this increase – such as, for example, a decline in the quality of decisions made by CMTEDD. This may be simply a statistical outlier for 2022–23.

Figure 13: Review applications by ACT agency



Applications finalised

As shown in Figure 14, during the reporting period **41 Ombudsman reviews** were finalised. This is a 37% increase on the 30 Ombudsman reviews finalised in 2021–22. Of the 41 Ombudsman reviews finalised in 2022–23:

- **20** were resolved with a formal decision
- **11** were withdrawn following informal resolution processes
- **10** were closed with no review, of which:
 - **5** were closed on the ground there was no reasonable prospect that the original decision would be varied or set aside (s 82(5)(b))
 - **2** were closed after the agency subsequently decided to release additional information (s 82(5)(c))
 - **2** were closed because they were invalid applications, and
 - **1** was closed because the ACT Ombudsman was unable to contact the applicant despite making reasonable efforts (s 82(5)(e)).

These outcomes are explained below.

The number of review matters withdrawn following informal resolution processes in 2022–23 compared to 2021–22 increased, with **11 matters (27%)** withdrawn in 2022–23 compared to **5 (16%)** in 2021–22. The number of formal decisions remained constant, with **18** formal decisions made in the previous year compared to **20** made in the current reporting period. However, as a percentage, there is a notable difference, with **49%** of finalised applications resulting in a formal decision in 2022–23 compared to **60%** in 2021–22.

There was a significant difference in the number of review matters withdrawn following informal resolution processes in 2022–23 (**11, or 27%**) compared to 2021–22 (**5 or 16%**).

Closed with no review

Ten Ombudsman reviews were closed by the Ombudsman with no review taking place. Under s 82(5) of the FOI Act, the Ombudsman may decide not to review a decision if:

- the applicant has not given the ACT Ombudsman enough information to review the decision
- there is no reasonable prospect that the original decision would be varied or set aside
- the agency or Minister makes a subsequent decision on the access application or otherwise resolves the application
- the Ombudsman is satisfied the review application is frivolous or vexatious or involves an abuse of process, or
- the Ombudsman is unable to contact the review applicant despite making reasonable efforts.

Under s 78 of the FOI Act, the Ombudsman may extend the time to decide an access application if an application for review of a deemed decision has been made.

Informal resolution

Where possible, before proceeding to a formal decision, we seek to resolve reviews through informal resolution.

This involves clarifying and, in some cases, refining the scope of an application for review, and working with both parties to resolve the dispute. For example, if the applicant is focused on one particular document, the ACT Ombudsman may ask the agency for its view on the release of that document, rather than review the whole matter. Informal resolution assists the ACT Ombudsman to provide a satisfactory outcome for review applicants in a timely manner.

Where a matter is assessed as unlikely to result in a change of outcome, the ACT Ombudsman uses case officer assessments to attempt to resolve the matter before progressing to a final decision. Parties are given information on the likely outcomes of the review and options for resolution. This approach reduces the overall

timeframe for our reviews and saves the applicant additional legal fees where they have a legal representative.

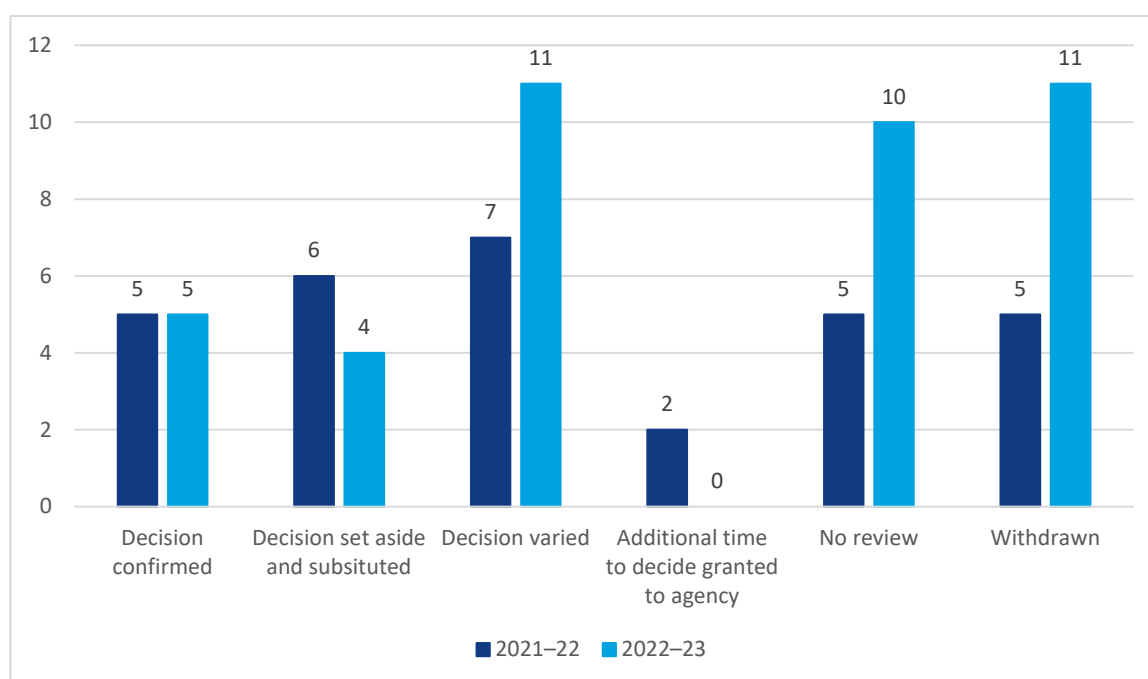
Formal decision outcomes

From the commencement of the FOI Act on 1 January 2018 to 30 June 2023, a total of **104 Ombudsman review decisions** have been published.¹⁶ In 2022–23, **19** Ombudsman review decisions were published.¹⁷ These decisions provide agencies and applicants with guidance on the FOI Act, including the application of the public interest test.

Figure 14 shows of the 20 Ombudsman reviews finalised with a formal decision in 2021–22, the Ombudsman:

- varied the original decision in **11 Ombudsman reviews**
- confirmed the agency’s decision in **5 Ombudsman reviews**
- set the original decision aside and substituted a new decision in **4 Ombudsman reviews**.

Figure 14: Review applications finalised by outcome



Review timeframes

The FOI Act requires Ombudsman reviews be completed within 30 working days. Up to 30 additional working days are allowed to undertake informal resolution or if a matter is referred by the Ombudsman for mediation.

The ACT Ombudsman also has internal service standards for Ombudsman review applications.¹⁸ In 2022–23, we did not meet these internal service standards. Of the 41 Ombudsman reviews finalised:

- **22 per cent** were finalised within 6 weeks (target 30 per cent)
- **41 per cent** were finalised within 12 weeks (target 60 per cent)
- **73 per cent** of reviews were finalised within 6 months (target 95 per cent).

¹⁶ See: <https://www.ombudsman.act.gov.au/improving-the-act/freedom-of-information/foi-review-decisions>

¹⁷ 20 Ombudsman reviews were finalised with a decision – one decision was finalised in 2022–23 but was not published until after the end of the 2022–23 financial year.

¹⁸ See: <https://www.ombudsman.act.gov.au/improving-the-act/freedom-of-information/foi-complaints-and-reviews>

While we aim to progress Ombudsman reviews as quickly as possible, timeframes can vary, particularly when a matter is complex or involves a large volume of documents for assessment. Timeframes can also extend if any of the parties seek additional time to make their submissions.

In the reporting period, the ACT Ombudsman managed several Ombudsman reviews involving a large volume of documents, with novel and complex issues concerning multiple parties. This resulted in 30 per cent of Ombudsman reviews taking longer than 6 months to finalise. In 2023–24, we will continue to review our performance against internal service standards, with a view to reducing the time taken to complete Ombudsman reviews.

Ombudsman review requests received during the reporting period required the Ombudsman to consider a range of issues including Cabinet information, the right to privacy under the Human Rights Act, trade secrets and business affairs, and information subject to LPP.

Case study – ‘CB’ and Education Directorate [2023] ACTOFOI 9 (20 June 2023)

This Ombudsman review raised a question about the Ombudsman’s ability to compel the production of information subject to LPP for the purposes of conducting a review under the FOI Act.

An applicant applied for Ombudsman review of Education’s decision to refuse access to records relating to the applicant’s employment with Education. In making their decision to refuse access to some of the information, Education had identified that a number of records were subject to LPP.

In the course of conducting the review, Education originally refused to provide the Ombudsman with information subject to LPP, both when the information was initially requested by the ACT Ombudsman and following a notice issued under s 79 of the FOI Act compelling the production of the information subject to LPP. The documents were eventually provided after an agreement was reached between Education and the ACT Ombudsman.

Apart from issuing a s 79 notice, the Ombudsman cannot otherwise compel the production of information for a review under the FOI Act. For this reason, we rely on the cooperation of respondent agencies to receive relevant information.

In all other Australian jurisdictions, the Ombudsman or Information Commissioner has a legislated power to compel the production of all relevant information for the purpose of a review, including information subject to LPP, to independently evaluate and decide whether information is contrary to the public interest information under the FOI Act, and this does not waive LPP.

To resolve any possible inconsistency between the Ombudsman’s ability to compel the production of relevant government information and claims of LPP, the Ombudsman wrote to JACS, as the respective policy agency for the FOI Act, requesting legislative amendment to clarify our power to compel the production of this information, and bring the FOI Act into line with other Australian jurisdictions.

Appeals to ACAT

Under s 84 of the FOI Act, participants in an Ombudsman review may apply to ACAT for a review of the decision. Since the FOI Act commenced operation on 1 January 2018, no applications to ACAT for a review of an Ombudsman decision have been made.

¹⁹ [Manteena Commercial Pty Ltd and Major Projects Canberra \[2021\] ACTOFOI 9 \(8 September 2021\)](#).

Part 7: COMPLAINTS

The Ombudsman can investigate complaints about an agency or Minister’s functions under the FOI Act.

During this reporting period, the ACT Ombudsman received **13 complaints** about an agency’s functions under the FOI Act, a significant increase from the 3 complaints received in 2021–22.

These complaints were about agencies’ actions performed under the FOI Act, including the time taken to process access applications and the decisions made by agencies.

Thirteen complaints were finalised in 2022–23, including one complaint received in 2021–22. **Six** of those complaints were finalised without further investigation. Of the **7** complaints investigated and finalised in 2022–23, additional information or a better explanation was provided to the complainant by the agency in **5** cases, and in **2** cases the agency issued an apology; agreed to undertake additional training for all its staff and updated its policies and procedure relating to the processing of access applications.

At the end of 2022–23, one complaint remained open.

Case study – Complaints about the DPP’s handling of an FOI access application

In December 2022, the ACT Ombudsman received 2 complaints about the DPP’s handling of an FOI access application. Following an investigation, the ACT Ombudsman provided comments to the DPP under s 15(4) of the *Ombudsman Act 1989* (Ombudsman Act) on the following areas of concern:

- Processing time – the decision was made and information released within 2 days without consultation
- Internal communications – communication about processing the access application was unclear
- Consultation requirements – the DPP did not properly consult with a relevant third party thus depriving the third party of seeking Ombudsman review of the decision
- Lack of response to the third party – following the publication of the decision and release of the information, the DPP was not responsive to the third party’s attempts to engage
- Identification of errors and re-making the decision – having identified that errors had been made with the original decision and attempting to rectify those errors, the DPP effectively re-made the decision, which is not provided for under the FOI Act.

The ACT Ombudsman recommended:

- The DPP issue an apology to ACT Policing for failing to consult prior to releasing information
- The DPP update its policies and procedures and provide thorough relevant training to all its staff (including the Director and senior staff) about the processing of access applications and obligations under the FOI Act.

The DPP accepted the recommendations and promptly apologised to ACT Policing.

During the course of the ACT Ombudsman’s complaint investigation, the Chief Minister and Attorney-General announced the establishment of a Board of Inquiry (the Inquiry) into the Criminal Justice System in the ACT. The Inquiry commenced on 1 February 2023 and reported to the Chief Minister on 31 July 2023. Specifically, the Inquiry examined the conduct of criminal justice agencies involved in the trial of *R v Lehrmann*.

The terms of reference for the Inquiry included the circumstances around, and decisions which led to, the public release of the ACT Director of Public Prosecutions' letter to the Chief Police Officer of ACT Policing dated 1 November 2022.

The Board of Inquiry requested from the Ombudsman 'any documents relating to a complaint to, and the investigation by, the ACT Ombudsman, of freedom of information breaches by the Office of the Director of Public Prosecutions in relation to the matter of *R v Lehrmann*.'

Section 34 of the Ombudsman Act allows the Ombudsman to disclose information held by the ACT Ombudsman if he considers it is in the public interest to do so. Considering it was in the public interest to disclose information, the ACT Ombudsman assisted the Board of Inquiry by disclosing relevant documents relating to the complaints.

Part 8: THE YEAR IN REVIEW

Oversight agency activities

In addition to delivering on the Ombudsman's statutory functions under the FOI Act, the ACT Ombudsman undertook educational and engagement activities during 2022–23.

Open Access monitoring

In 2022–23, due to competing priorities, the ACT Ombudsman did not progress the specific open access monitoring strategy originally planned for this reporting period. We will re-evaluate the progression of the open access monitoring strategy in 2023–24.

We continued to monitor open access in the ACT through our participation in the Community Attitudes Survey on Information Access in 2023. The NSW Information Privacy Commissioner conducts this survey on a regular basis. Members of the public in NSW and other participating jurisdictions, including the ACT, are surveyed on their awareness of, and attitudes to, government information, with survey results released in time for International Access to Information Day in September of each year.

The ACT Ombudsman monitored information published on agencies' disclosure logs, following a request for Ombudsman review of a decision by an agency to initially refuse access to information that the FOI applicant considered should have been published on the agency's disclosure log.

We continued to consult with stakeholders and provide assistance to agencies on areas to improve freedom of information practices.

Engagement activities

Throughout 2022–23, the ACT Ombudsman engaged with stakeholders in a variety of ways. We continue to communicate informally with agencies, providing advice and clarification on FOI matters.

To mark International Access to Information Day on 28 September 2022, the ACT Ombudsman released a joint statement with Information Commissioners and Ombudsmen across Australia.²⁰ The joint statement highlighted the importance of enabling digital access to support members of the public to effectively access government-held information.

The ACT Ombudsman circulated a newsletter to ACT FOI practitioners in December 2022, providing updates on current events and trends and advising practitioners on dealing with access applications. We hosted an in-person FOI roundtable with senior information officers in the ACT Government and a virtual FOI practitioner forum in May 2023, with more than 30 information officers from agencies attending. The forum was an

²⁰ Office of the Australian Information Commissioner [Information commissioners and ombudsmen hail importance of enabling digital access](https://www.oaic.gov.au/newsroom/information-commissioners-and-ombudsmen-hail-importance-of-enabling-digital-access), <https://www.oaic.gov.au/newsroom/information-commissioners-and-ombudsmen-hail-importance-of-enabling-digital-access>

opportunity to connect with ACT agencies and involved discussion on the recent amendments to the FOI Act, insights on Ombudsman reviews including data and timeframes, and other topics of interest to forum participants.

The ACT Ombudsman attended 2 meetings of the Association of Information Access Commissioners, in December 2022 and June 2023.

Insights regarding agency decisions and behaviours

Following the fifth full year of the operation of the FOI Act, the ACT Ombudsman can make some observations on trends in FOI decision-making and agency compliance with the FOI Act. These observations are based on the data provided by agencies, the Ombudsman’s review function, as well as feedback from engagement with agencies and the ACT community during the reporting period.

Increase in review applications and complaints

In 2022–23, agencies reported an increase in the number of FOI access applications for the second year in a row. While we did not see a corresponding increase in Ombudsman review applications in 2021–22, there has indeed been a significant increase in Ombudsman review applications received by the ACT Ombudsman in 2022–23.

We also observed a significant increase in the number of complaints we receive about the way an agency has processed an FOI access application, compared to previous years.

The reasons for these increases are not immediately discernible, however we observed that the complexity of Ombudsman reviews continues to increase. The number of multiple access applications and Ombudsman review requests made by single applicants has increased, as has the number of Ombudsman review requests of access applications that were broken down into several parts.

Agencies should carefully consider how they initially scope access applications, as well as engaging early with applicants. When notifying applicants of an access decision, agencies should be conscious of clearly articulating why they have made the decision they have, with clear reference to the FOI Act. Clear scoping and clear decisions may assist applicants to better understand the decision that has been made.

Large volumes of information

We are seeing an increase in the number of access applications with a wide scope resulting in a large volume of information being considered for release. Agencies differ in how they manage these applications on a case-by-case basis and may attempt to narrow the scope under s 34(3) of the FOI Act or decide to refuse to deal with an application on the basis that it would require an unreasonable and substantial diversion of resources within the meaning of s 44 of the FOI Act.

Part 9: THE YEAR AHEAD

In 2023–24, the Ombudsman will continue to work with agencies and Ministers to encourage the proactive release of government information, and better practice in FOI decision-making, in accordance with the objectives of the FOI Act.

One priority for the ACT Ombudsman is to continue to develop and use education tools, including forums and newsletters, to complement the FOI guidelines in supporting FOI practitioners in the ACT. Having hosted successful practitioner events in 2022–23, we are confident it we continue to work with agencies in person or remotely.

Another focus in 2023–24 will be to continue monitoring Open Access compliance in the ACT and support ongoing improvement through education.

Further, the ACT Ombudsman will continue to:

- conduct reviews independently, efficiently and, wherever possible, informally resolve disputes
- promote better practice in FOI decision-making
- review and improve performance against our internal service standards for Ombudsman review
- raise awareness of the ACT community’s right to access government information and the Ombudsman’s oversight and review functions, and
- engage with interstate and Commonwealth counterparts to promote better practice and share information.

Part 10: GLOSSARY

Acronym	Agencies
AAO	ACT Audit Office
ACAT	ACT Civil and Administrative Tribunal
ACTIC	ACT Integrity Commission
ACTO	ACT Ombudsman
BCITF	Building and Construction Industry Training Fund
CFC	Cultural Facilities Corporation
CHS	Canberra Health Services
CIT	Canberra Institute of Technology
CMTEDD	Chief Minister, Treasury and Economic Development Directorate
CRA	City Renewal Authority
CSD	Community Services Directorate
CSE	Commissioner for Sustainability and the Environment
DPP	ACT Director of Public Prosecutions
EC	ACT Electoral Commission
Education	ACT Education Directorate
EPSDD	Environment, Planning and Sustainable Development Directorate
Health	ACT Health Directorate
HRC	ACT Human Rights Commission
ICRC	Independent Competition and Regulatory Commission
JACS	Justice and Community Safety Directorate
LA	Legal Aid Commission
LSA	Long Service Leave Authority
MPC	Major Projects Canberra
OLA	Office of the Legislative Assembly
SLA	Suburban Land Agency
TCCS	Transport Canberra and City Services Directorate
TQI	Teacher Quality Institute
UC	University of Canberra