ACT Ombudsman

OMBUDSMAN AN OFFICER OF THE ACT LEGISLATIVE ASSEMBLY

Freedom of Information Guidelines

DEALING WITH ACCESS APPLICATIONS

JUNE 2020

Guideline Number. **3 of 6**

Disclaimer

Under s 66 of the *Freedom of Information Act 2016* (FOI Act), the ACT Ombudsman has the function of issuing guidelines about freedom of information ('FOI').

The information in this guideline is not legal advice and additional factors may be relevant in your specific circumstances. Any views expressed in this guideline are general in nature and the ACT Ombudsman remains open to all arguments and evidence on a case by case basis. For detailed guidance legal advice should be sought.

The FOI Act is amended from time to time and you should always read the relevant provisions of the Act to check the current wording. All ACT legislation, including the FOI Act, is freely available online at: https://www.legislation.act.gov.au.

Contents

1. Purpose

This guideline aims to assist agencies and Ministers in dealing with access applications under the *Freedom of Information Act 2016* (ACT) (FOI Act). It provides guidance and practical tips for agency staff and Ministers on how to fulfil their responsibilities under the FOI Act.

2. Introduction

The FOI Act provides a right of access to government information, unless access to that information is, on balance, assessed as being contrary to the public interest. This statutory right of access to government information is considered essential for effective democracy, to facilitate public participation in government process and decision making and to provide accountability for executive conduct.[1]

Where possible, agencies and Ministers are encouraged to pro-actively release government information, including by complying with the Open Access Information Scheme provided for under the FOI Act – see FOI Guidelines *Volume 1 of 6 - Open Access Information* and *Volume 2 of 6 - Informal Requests*. Individuals can, however, also lodge a formal application to obtain access to information.

This document provides practical guidance on how to process and decide access applications, including on:

- who can lodge an application—see s 4 Who can make an access application?
- what information they can request—see s 5 What is government information?
- processing applications, including managing fees and transferring applications to other agencies— see s 6 Processing an access application.
- when agencies must consult before making a decision—see s 7 Consultation requirements.
- how to decide an access application—see s 8 Deciding an access application.
- how to draft a decision notice and release information—see s 9 Decision notices.

All section numbers are references to sections of the FOI Act unless indicated otherwise. References to legislation refer to ACT legislation, unless indicated otherwise. An agency or Minister deciding an access application, consistent with the FOI Act, is referred to as the *respondent* in this document.

The Appendix to this Guideline includes template letters for consultation purposes and decision notices. These are designed with agency use in mind, but could be adapted for use by Ministers.

Note:

- The Ombudsman recognises that while statutory requirements must be met, there is, however, no one way to deal with access applications.
- Each agency is different in size, functions and the volume of access applications received. Therefore, when dealing with applications, agencies need to take into account relevant circumstances, and are encouraged to provide ongoing feedback to the Ombudsman regarding this guideline to ensure it is as practical for all agencies as possible.
- Agencies are reminded that where information is requested that falls within the scope of the FOI Act it must be provided, unless assessed as contrary to the public interest information.
- This guideline should be read in conjunction with *Volume 4 of 6: Considering the Public Interest,* which provides specific guidance for decision-makers on how to assess the public interest when deciding an access application. This includes advice on the pro-disclosure bias of the FOI Act.

[1] Explanatory Statement, *Freedom of Information Bill 2016* (ACT).

3. Guiding principles

When dealing with access applications for government information, agencies should be guided by the following principles in the FOI Act:

- Every person has an enforceable right to government information, unless access to the information is contrary to the public interest (s 7(1)).
- Access to government information should be facilitated promptly and at the lowest reasonable cost (s 6(f)), with formal access applications being a 'last resort'.
- A person's reasons for seeking access to information or a respondent's belief about a person's reasons for seeking access are not relevant (s 17(2)(f)).
- Agencies must take reasonable steps to assist the applicant if the application does not comply with the formal requirements for making an access application (s 31).[2]
- Decision notices must clearly set out any reasons for refusal of access to information (s 54).

4. Who can make an access application?

Any person can make an access application under s 30(1).

'Person' includes an individual as well as a corporation.[3] In practice, this means that an applicant can be, for example:

- a person
- an agent acting on behalf of another person
- a member of the Legislative Assembly[4]
- an incorporated association
- a body corporate

Note:

- The FOI Act does not require an applicant to provide evidence of their identity unless they are requesting access to personal information about themselves, or about another person as that person's agent.[5]
- Evidence of an applicant's identity will vary depending on the nature and sensitivity of the information being requested. While the FOI Act is silent on the evidence required, the Ombudsman is of the view that primary identification documents may be the most reliable (for example, certified copies of birth certificate, Australian passport or driver's licence).
- Section 30(3) provides examples of an agent's authorisations.

[2] See *Jack Waterford and Department of Human Services (Freedom of information)* [2019] AICmr 21 and *Justin Warren and Department of Human Services (Freedom of information)* [2019] AICmr 22.
[3] *Legislation Act 2001* s 160(1).
[4] *Freedom of Information Act 2016* (ACT) (FOI Act) s 107(2)(e).
[5] Ibid s 30(3).

5. What is government information?

A person may make an access application for access to government information from the responsible agency or Minister. This is the case even if the agency no longer exists.[6]

Government information is defined in s 14 as information 'held' by an agency or Minister excluding information related to a Minister's personal or political activities, or created or received by a Minister in the Minister's capacity as a member of the Legislative Assembly.[7]

This includes information contained in a 'record' that is held by the agency or Minister, or that the agency or Minister is entitled to access.[8]

Record is defined broadly to mean any document or other source of information compiled, recorded or stored in written form or by electronic process, or in any other manner or by any other means. It can also include a reference to a copy of a record.[9] Consequently, the FOI Act covers not just written documents, but a wide range of materials, including emails, electronic recordings, photographs, videos and post-it notes.

Examples of government information an agency might hold include personal information about individuals, information relating to policy and public programs, and financial information.

Note:

- Unless specifically identified by the applicant, an access application is taken not to include metadata.[10] If the access application specifies metadata, access to the metadata does not need to be given unless it is reasonably practicable to do so.[11]
- Respondents should not exclude documents that they hold from the scope of an access application merely because they did not create them. This is not a relevant consideration. This is the case even if the applicant has also sought information from the Directorate that created the document.
- Government information does not include information relating to a Minister's personal or political activities, or information created or received by a Minister in their capacity as a Member of the ACT Legislative Assembly (MLA).[12] For example, personal correspondence, political caucusing, campaign documents and constituent representations.
- When a Minister who was responsible for an agency is no longer responsible for that agency, the Minister must give all government information relating to that agency in their possession to the agency.[13]

[6] Section 101 of the FOI Act provides that where an access application for government information is made to an agency that no longer exists, the access application is taken to have been made to:
- the agency that acquired the abolished agency's functions
- where the functions are acquired by more than one agency—whichever agency has acquired the functions most clearly related to the subject matter of the access application or
- if no agency acquired the abolished agency's functions—the agency with the most similar functions.

[7] FOI Act ss 14 and 100.
[8] Ibid s 100.
[9] Ibid s 3 and Dictionary.
[10] Ibid s 98.
[11] Ibid s 98(2).
[12] Ibid s 14(b).
[13] Ibid s 102.

Types of information out of scope of the FOI Act

Agencies and Ministers should, however, be aware there are some types of information which are out of scope of the FOI Act, that is:

- information in a health record under the *Health Records (Privacy and Access) Act 1997* (Health Records Act)[14]
    - For example, information relating to an operation an applicant had at an ACT Health location or a medical certificate held on an agency file for a staff member.
- information relating to early childhood education and care, which is regulated by the National Quality Framework for Early Childhood Education and Care, under the *Education & Care Services National Law (ACT) Act 2011*[15]
    - For example, information relating to most day care, family day care, outside hours care and preschools/kindergartens in the ACT.
- a record of an agency that a person is entitled to access under the *Territory Records Act 2002*[16] or an accessible executive record.[17]

Note:

- If applicants are seeking access to their own health record, agencies and Ministers should advise applicants that this cannot be requested under the FOI Act and a request must be made under the Health Records Act.
- If applicants are seeking access to information about education and care services regulated under the National Quality Framework they are advised that a request must be made under the Commonwealth *Freedom of Information Act 1982.*

Other exclusions from the FOI Act

The FOI Act also does not apply to investigations, operations and records under the following Acts:

Act	Section	What is excluded
Crimes (Assumed Identities) Act 2009	7(a)	activities, documents and records under this Act
Crimes (Controlled Operations) Act 2008	7(5)(a)	investigations, operations, activities and records under this Act
Crimes (Protection of Witness Identity) Act 2011	7(a)	activities, documents and records under this Act
Crimes (Surveillance Devices) Act 2010	7(6)(a)	activities, documents and records under this Act

[14] Ibid s 12.

[15] *Education & Care Services National Law (ACT) Act 2011* s 7(1)(b) provides that the Freedom of Information Act 2016 does not apply to the *Education and Care Services National Law (ACT)* or to the instruments made under that Law. Section 6 provides that the Education and Care Services National Law as set out in the schedule to the Victorian *Education and Care Services National Law Act 2010 (VIC)* applies as a Territory law, and may be referred to as the *Education and Care Services National Law (ACT)*. Section 264 of the *Education and Care Services National Law (ACT)* applies the Commonwealth *Freedom of Information Act 1982* as a law of the Territory for the purposes of the National Quality Framework.

[16] *Territory Records Act 2002* s 26 provides that agency records more than 20 years old and executive records more than 10 years old are open to public access on the next Canberra Day. The FOI Act only applies to agency records up to 20 years old, executive records up to 10 years old, or documents excluded from Part 3 of the *Territory Records Act 2002*.

[17] *Territory Records Act 2002* Part 3A and FOI Act s 13(1).

Education and Care Services National Law (ACT) Act 2011	7(1)(b)	Education and Care Services National Law (ACT) or to the instruments made under that Law
Health (National Health Funding Pool and Administration) Act 2013	31(a)	in relation to the administrator or a function exercised by the administrator
Health Practitioner Regulation National Law (ACT) Act 2010	9(e)	Health Practitioner Regulation National Law (ACT) or to instruments made under that Law
Heavy Vehicle National Law (ACT) Act 2013	9(1)(c)	the Regulator and the Board
Rail Safety National Law (ACT) Act 2014	8(1)(e)	the Regulator

6. Processing an access application

6.1. Who can process an application?

All staff in an agency, subject to any internal arrangements in place, may assist in the processing of the access application,[18] as long as it is recognised that only an *information officer* can make the final decision on the application—see s 8 Deciding an access application.

An access application made to a Minister may be dealt with by the person the Minister directs.[19]

6.2. Requirements of a valid application

The requirements of a valid access application are set out in s 30. These are summarised below.

Valid access application:

- provides enough detail to enable the agency or Minister to identify the information sought, and
- provides an email or postal address for correspondence

If personal information is sought, the following is provided:

- proof of identity for applicant, or
- authority to act and proof of identity in the case of an authorised representative

Agencies and Ministers are reminded that if an access application is not valid, they have an obligation to take reasonable steps to assist the applicant to make the application valid—see s 6.3 Assisting an applicant.

6.3. Assisting an applicant

If an access application is not valid (that is, the minimum requirements under s 30 have not been met), agencies and Ministers have an obligation to take reasonable steps to assist the applicant to make their application valid.[20] In these circumstances, agencies or Ministers should consider:

- contacting the applicant and explaining why their application is unclear or invalid
- explaining to the applicant what sort of information the agency holds
- explaining what information is already available publicly or could be provided informally

[18] FOI Act s 19(2).
[19] Ibid s 33(2).
[20] Ibid s 31.

- suggesting possible changes to the scope to make an appropriate request

Appropriate assistance should be offered at the earliest practicable time. The Ombudsman recommends agencies and Ministers to be open in their discussions with applicants. It may assist agencies to follow up phone discussions in writing to avoid any misunderstandings.

Note:

- While the applicant's reasons for making an access application are irrelevant, being aware of these may assist in making the application valid and then re-scoping the request if required—see s 6.6 Determining the scope of an access application below.

6.4. Application remains invalid

Agencies or Ministers are not required to deal with the invalid request any further where reasonable steps to assist an applicant have been taken, but:

- such assistance is unable to address the deficiencies in the application
- a period of at least three months has passed and the respondent is unable to contact the applicant or the applicant does not respond.[21]

As a matter of good public administration, it is not appropriate for agencies or Ministers to simply cease processing the application, without providing such notification – even though this is not strictly required under the FOI Act. A template letter that can be used for this purpose, in situations where agencies have sufficient contact details for the applicant, is available at Appendix A.

Where this information is communicated out of necessity verbally, agencies and Ministers are reminded they should make it clear to the applicant that their application does not meet the minimum requirements and it will not be processed. An appropriate file note should also be kept of this discussion.

Note:

- Access applications may include a statement of the applicant's view on the public interest in disclosing the information requested, but this is not a requirement.[22]

6.5. Acknowledgement of application receipt

When an access application is valid (that is, the minimum requirements for an access application under s 30 have been met), an acknowledgment letter needs to be sent to the applicant.[23]

The requirements to be met in terms of this written notice of the application receipt are set out in s 32. These are summarised below.

[21] Ibid s 34(6)(b).
[22] Ibid s 30(4).
[23] Ibid s 32.

Acknowledgement letter requirements:

- sent as soon as practicable, and within 10 working days, after the day the application was received
- specify date of receipt (see note below)
- specify the date by which a decision on access is due (subject to any subsequent extensions being given or the processing period being extended under the FOI Act)

Note:

- The day a valid application is received is counted as day 0 and the default period for deciding access applications is 20 working days after receiving it.[24] This will be referred to as the processing period in this guideline—see s 6.11 Processing timeframes.
- Where the applicant needs some assistance for their application to meet minimum requirements, the application is taken to have been made on the day that these requirements are met[25]—s 6.3 Assisting an applicant.

6.6. Determining the scope of an access application

The first step in dealing with an access application is understanding the nature of the request and its scope. The sections below explain why scope is important, and how to clarify and negotiate scope with an applicant where required.

6.6.1. Why is scope important?

It is important that the scope of an application is clear so that agencies and Ministers can meet their obligations:

- in terms of the objects of the FOI Act[26]
- to subsequently identify all government information in scope of the application.[27]

A scope that can be processed is one where:

- you can identify the information being sought
- the relevant business area can search for and locate the information, and
- the information officer can make a decision regarding disclosure of the information.

Where this is not the case, officers may be required to clarify and/or negotiate scope with the applicant as outlined below.

[24] Ibid s 40(1).
[25] Ibid s 31(3).
[26] Ibid s 6.
[27] Ibid s 34(1).

Note:

- It is important that agencies and Ministers broadly and fairly read the scope of the access application. Officers should keep in mind that applicants may not know exactly what government information an agency or Minister may hold, and the FOI Act does not require a precise description of information to be provided.
- Requests must not be interpreted with the exactitude that applies to legislation or a set of pleadings.[28] When reading the access application, officers should have regard to the wording of the access application and the context in which it is made.

6.6.2. Clarifying the scope

Sometimes agencies may receive an access application that is valid (that is, the minimum requirements under s30 have been met), but further clarification is required in order to identify and locate the information sought.

Officers should ask themselves, what information is the applicant seeking access to? If you do not understand the request as written, you need to clarify the scope of the request as soon as practicable to minimise delays to application processing.

Before speaking to the applicant, it is, however, recommended that officers first talk to the relevant business areas, to see if the application makes sense to them.

- Subject matter experts are more likely to understand what applicants are seeking if unclear, and may be able to assist you to proceed straight to processing the application.
- Such preliminary conversations will also help ensure that officers come to any subsequent discussions with the applicant well-informed regarding the nature of the information that is available and any challenges that may be involved in collating the information they appear to be seeking.

If the scope still remains unclear, the officer should then contact the applicant to clarify.

This is critical to ensure processing can continue. In addition, if an officer understands what the applicant is actually seeking access to, they may be able to negotiate scope with the applicant – that is, assist them in making a more targeted request to reduce the time, cost and resources otherwise required to process the access application, consistent with the objects of the FOI Act (see s 6.6.3 Negotiating scope below).

Section 34(3) provides that a respondent may contact the applicant to formally clarify the scope of the application at any time. This is known as a 'clarification request'.

Officers are encouraged to contact the applicant informally by phone where possible, as this may enable them to quickly progress to processing the application – with a letter or email to be sent as a follow up to confirm what has been discussed and any agreements reached.

Where this is not possible or this approach is unsuccessful, a clarification request can, however, be sent in writing. A template letter for this purpose is available at Appendix A.

[28] *Re Russell Island Development Association Inc and Department of Primary Industries and Energy* (1994) 33 ALD 683 confirming *Re Gould and Department of Health* [1985] AATA 63.

Note:

- Where a formal clarification request is sent under s 34(3) and all reasonable steps have been taken to contact the applicant, but either the applicant is unable to be contacted or does not respond to the clarification request, a respondent may suspend the processing time until clarification is received. However, the respondent must first write to the applicant to notify them of the suspension and of the matters outlined in s 34(6)—see s 6.12 Suspending the processing period.

6.6.3. Negotiating scope

Even if the scope of an application is clear or as part of the above clarification process, officers may wish to re-negotiate the scope with the applicant to ensure that they can provide them with the information they actually require in the shortest possible timeframe, and at the lowest cost.

This is particularly the case where they have framed the request in broad terms such as "All information concerning…", "…directly or indirectly…", "…including but not limited to…" or do not provide a date range, which would generate a large volume of information that may not actually assist the applicant.[29]

When reading the scope of the access application, officers should consider:

- is the information already publicly available?
- can the information be purchased or inspected elsewhere?
- is this the correct agency or Minister to deal with the application?
- could this information be provided informally without the need for a formal access application?

Officers are then encouraged to contact the applicant by phone to explain any alternative methods for accessing the information, or part of the information requested, and the scope of any residual information sought.

Officers are encouraged to take an enabling approach to such conversations with applicants, and explain that they are not trying to limit the access application scope, but rather to ensure they understand what the applicant is seeking, and negotiate an outcome that provides the applicant with information that is available and useful to the applicant.

They should explain that the applicant is not required to explain their reasons for making the application, but that knowing this can help the agency or Minister determine the scope of the request. This information will not, however, have any bearing on the authority's response.

6.7. Searches

Section 34(1) requires the respondent to take reasonable steps to identify information that falls within the scope of the access application.

The FOI Act is silent on what constitutes 'reasonable steps', only providing guidance that backup systems can, but are not required to be, searched.[30]

[29] Ibid s 34(3).
[30] Ibid s 34(2).

As outlined by the Ombudsman in C*ommunity and Public Sector Union and Chief Minister, Treasury and Economic Development Directorate,*[31] the meaning of 'reasonable', in this context has been construed as not going beyond the limit assigned by reason, not extravagant or excessive, moderate and of such an amount, size or number as is judged to be appropriate or suitable to the circumstances or purpose.[32]

What amounts to reasonable steps may vary in different circumstances. It would, however, include, at a minimum, a search of electronic records and a manual search of physical records, where applicable.[33]

The case study below is one where the Ombudsman recognised an agency had met and even gone beyond its obligations to search for the requested information.

Case study: *'AF' and Community Services Directorate*[34]

The applicant applied to the Community Services Directorate (CSD) for access to all documents mentioning herself in agency records, specifically referencing tenancy issues including ongoing mould issues.

The applicant sought Ombudsman review on the basis that further documents exist that had not been provided to her.

On review, the Ombudsman considered whether CSD had taken reasonable steps to locate the information requested. Based on the facts and from examining the FOI processing file provided by CSD, the Ombudsman was satisfied CSD had taken reasonable steps to identify the information requested.

CSD was able to demonstrate it had undertaken extensive internal enquiries to ensure that all relevant information had been located. These internal enquiries involved undertaking multiple and comprehensive additional searches, including thoroughly searching: files relating to the applicant, searching email correspondence and work orders.

CSD was also able to show that it had undertaken informal consultation with the applicant regarding the information it held, including explaining to the applicant the steps CSD had taken and how the information identified flowed from her earlier 2014 access application.

In considering whether reasonable steps have been taken to identify all relevant information, some relevant factors include:

- the administrative arrangements of government
- the agency structure
- the agency's functions and responsibilities (particularly with respect to the legislation for which it has administrative responsibility and the other legal obligations that fall to it)
- the agency's practices and procedures (including but not exclusive to information management)
- other factors reasonably inferred from information supplied by the applicant including:
  - the nature and age of the requested document/s

[31] [2018] ACTOFOI 7 (14 November 2018).

[32] Considered by the Administrative Appeal Tribunal in relation to s 24A of the F*reedom of Information Act 1982* (Cth) in the decision of *Re Cristovao and Secretary, Department of Social Security* (1998) 53 ALD 138 [19]. More recently, the Tribunal applied this approach in *De Tarle and Australian Securities and Investments Commission (Freedom of information)* [2015] AATA 770 [19].

[33] Explanatory Statement, *Freedom of Information Bill 2016* (ACT) 23.

[34] [2018] ACTOFOI 11 (17 December 2018).

- the nature of the government activity the request relates to.[35]

The Ombudsman considers that reasonable steps would, at a minimum, cover searching:

- records management systems, for example, HP TRIM or Objective
- electronic devices/email accounts
- work-related social media accounts
- office desks and filing cabinets
- computer drives and files
- notepads, diaries and calendars
- audio and visual recordings
- work issued mobile phones
- documents stored at offsite storage locations
- relevant information held in messaging applications.

Note:

- Where an agency has a 'bring your own device' policy, it is particularly important to ensure these devices are captured.

On review, if the searches undertaken are considered insufficient, the Ombudsman may make a direction for the respondent to conduct further searches to locate the information requested.[36]

Record keeping

Applicants are relying on the integrity of the searches conducted by agencies to identify and locate the information requested. Good record keeping systems are essential to ensure agencies are able to comply with the FOI Act.

When searching for the information requested, respondents should make reasonable judgements about how to undertake the search. It may be necessary to consider looking beyond the wording of the access application.

It is the responsibility of agencies and Ministers to manage and store information in a way that enables information to be located for the purposes of an access application.[37]

It is good practice to keep a detailed record of all searches conducted in a format that can be provided to external review bodies to justify the search process on review. This is demonstrated in *'AF' and Community Services Directorate*,[38] where upon review, the agency was able to provide written records of searches undertaken to show that all reasonable steps were taken to locate the information requested.

Contractors

Recognising that the ACT Government increasingly contracts with private operators to perform government services, s 100 specifies that where this occurs an agency is entitled to access information relevant to those services and must consider this in the context of any relevant access application.

[35] See *Nash and Queensland Police Service* [2012] QICmr 45 at [14]-[16]; *PDE and the University of Queensland* [2009] QICmr 7 [37].
[36] FOI Act s 80.
[37] *Langer and Telstra Corporation Ltd* [2002] AATA 341.
[38] [2018] ACTOFOI 11 (17 December 2018).

Where such contractual arrangements are in place, agencies are encouraged to seek agreement up front with the relevant company regarding the sorts of business information they are prepared to release without consultation. This will facilitate quicker processing of such applications.

Duplicates

Respondents are reminded that under the FOI Act, applicants are seeking access to information and not documents. In most cases, an applicant would only seek one copy, where there are exact duplicates of a record containing the information requested.

The Ombudsman is of the view that exact duplicates should be excluded from the scope of an access application unless specifically requested by the applicant. To achieve this, respondents should consider including an explanatory paragraph in the acknowledgement letter or contacting the applicant to confirm this is the approach being taken.

The approach to exclude exact duplicates is in line with the objects of the FOI Act – namely, to provide access to government information at the lowest reasonable cost for all parties involved.

6.8. Transfers of access applications

Respondents must transfer an access application to another agency or Minister if:

- the information sought is not held by them, but they believes it may be held by another agency or Minister (transferee); and
- the transferee agrees it may hold the information. [39]

Before transferring a request, reasonable steps should be taken to confirm that the information is not held—see s 6.7 Searches.

Officers should also consult early with the transferee to confirm whether they hold the information, or some of the information.

The access application is taken to have been made to the transferee at the time it was transferred. Therefore, the date of receipt of the access application by the transferee is the date of transfer.

Upon receiving the transferred access application, within 10 working days after the day the application was received, the transferee must notify the applicant of the date of transfer and the date the decision on the access application is due.

Note:

- The Ombudsman strongly encourages agencies or Ministers contacted to determine whether they hold relevant information to conduct the necessary searches and/or respond promptly. This will help to ensure the timely and efficient processing of requests.

[39] FOI Act s 57.

6.9. Applications where two or more agencies hold relevant information

Where the respondent:

- believes it holds hold all, or some of, the information sought in an access application
- but believe another agency or Minister (other entity) may also hold relevant information,
- a copy of the access application must be given to the other entity. [40]

If the other entity also believes that it may hold relevant information, it must:

- tell the respondent that this is the case
- take all reasonable steps to identify all relevant information within scope of the application
- if relevant information is identified:
    - give the information to the respondent, or
    - tell the respondent and applicant that it will decide the application, as if it were the respondent.[41]

If the other entity gives the information to the respondent, the respondent is taken to hold the information for the purposes of making the decision.[42]

If the other entity is to decide the application, or part of the application, the access application is taken to have been made to the other entity at the time a copy of the access application was provided.

Where this occurs, the other entity must give the applicant a written notice of:

- the day on which it received a copy of the application, and
- the date by which a decision is to be made

as soon as practicable, and no later than 10 working days after the day the application was received.[43]

Note:

- If the other entity believes it does not hold relevant information, it must tell the respondent that received the application of this belief.[44]
- The Ombudsman strongly encourages those agencies or Ministers contacted to determine whether they hold relevant information to conduct the necessary searches and/or respond promptly. This will help to ensure the timely and efficient processing of requests.

[40] Ibid s 58.
[41] Ibid s 58(2).
[42] Ibid s 58(3).
[43] Ibid s 58(5).
[44] Ibid s 58(6).

6.10. Multiple access applications

If a respondent receives two or more access applications from the same applicant, or a group of applicants acting together if the applications are related, they can be combined and treated as a single access application.[45] The Ombudsman considers applications may be related if they relate to the same types of information, agencies and Ministers.

6.11. Processing timeframes

Working Day	Action
0	Day valid request is received[46] (or transferred or received under ss 57 or 58[47])
1	Day the processing 'clock' starts
10	Day acknowledgement is due[48]
20	Day decision on access is due[49]

The above timeframes apply when deciding access applications unless:

- the processing period is extended for a specified period under the FOI Act – that is, the 'clock stops' while the respondent is waiting for further information from the applicant or third party consultation takes place—see s 6.11.1 Circumstances in which the processing period will be extended.
- an extension of time for an agreed period is granted by the applicant or the Ombudsman—see:
    - section 6.11.2 Extension – by agreement with the applicant
    - section 6.11.3 Ombudsman extension – unfinalised application
    - section 6.11.4 Ombudsman extension – deemed refusal

Note:

- Consultation periods also apply where the respondent is considering refusing to deal with an application—see s 7.1 Consultation – with the applicant.
- Where certain additional information requested is not provided by the applicant, a respondent may also suspend processing entirely. Respondents then refuse to deal with an application that has been suspended for a period of three months or longer—see s 6.12 Suspending the processing period.

6.11.1. Circumstances in which the processing period will be extended

Section 40 provides for certain circumstances in which the processing period will be extended by a certain number of working days. These are summarised in the following table.

Action that has occurred	Processing period is extended by:
Respondent consults with a relevant third party	15 working days[50]
Clarification request sent to the applicant	Number of working days the applicant takes to respond[51]
Fee estimate sent to the applicant	Number of working days the applicant takes to confirm the estimate or vary the application[52]
Waiver of estimated fees requested	Number of working days the respondent takes to decide the waiver application[53]

Note:

- Extensions of time can also be granted by the applicant or the Ombudsman in certain circumstances. See s 6.11.2 Extension – by agreement with the applicant, s 6.11.3 Ombudsman extension – unfinalised application and s 6.11.4 Ombudsman extension – deemed refusal.
- Where respondents identify potential problems meeting required processing timeframes, they are encouraged to raise this with the applicant in a timely fashion to avoid applications being deemed to be refused—see s 6.13 Decisions not made in time.
- Agencies can then refuse to deal with an application that has been suspended for a period of three months or longer[54]—see s 6.12 Suspending the processing period.

6.11.2. Extension - by agreement with the applicant

Respondents may negotiate with the applicant for extra time to process an access application. This agreement must be sought before the processing period runs out.[55]

It is the Ombudsman's view that this should be done on a case by case basis, taking into account the complexity of the request. It is not a standard processing step and to treat it as such is not considered to be consistent with the objects of the FOI Act.

An extension of time request is taken to be granted by the applicant where:

- a respondent has requested an extension of time from the applicant
- the applicant has not refused the request within seven working days of receipt of the request, and
- the respondent has not received notice that the applicant has applied for Ombudsman review.[56]

[45] Ibid s 43(2).
[46] Ibid s 32(1) .
[47] Ibid ss 57(3) or 58(4).
[48] Ibid s 32(2).
[49] Ibid s 40(1).
[50] Ibid s 40(2)(a).
[51] Ibid s 40(2)(b).
[52] Ibid s 40(2)(c).
[53] Ibid s 40(2)(d).
[54] Ibid s 34(6)(b).
[55] Ibid s 41(1).
[56] Ibid s 41(3).

Note:

- There is no restriction on asking applicants for an extension of time on more than one occasion in relation to the same access application.[57] However, respondents should be aware that the total agreed extension of time must not exceed 12 months from the date of receiving the valid access application.[58]
- The Ombudsman will also consider whether a request for extension of time is reasonable in investigating a complaint in relation to the handling of a particular FOI matter. Although it will ultimately depend upon the facts of a particular case, it is unlikely that a respondent seeking to extend the total processing period beyond six months would be considered reasonable by the Ombudsman.

6.11.3. Ombudsman extension - unfinalised application

An application for an extension of time to process an access application may be made to the Ombudsman if the:

- respondent has requested an extension of time from the applicant and they have refused the request, or
- applicant has already agreed to an extension of time totalling 12 months, and a further request to the applicant cannot be made because it would result in a processing time of greater than 12 months.[59]

Such applications can, however, only be made if the processing period (including any extensions already granted) has not run out.[60]

Respondents should also be aware that the Ombudsman is only able to grant an extension where satisfied that is not reasonably possible for the application to be dealt with in the time period under s 40 (or as extended) because:

- the application involves dealing with a large volume of information
- the access application is complex, or
- there are other exceptional circumstances.[61]

Complex is not defined, but the FOI Act does provide an example of a 'complex' application as one where multiple, conflicting public interest factors apply to the information covered by the application and extensive third party consultation is required. It will be a matter for the respondent to satisfy the Ombudsman that the access application is complex when applying for more time under s 42(1).

The FOI Act is also silent on what constitutes 'exceptional circumstances'. The Ombudsman notes the Macquarie Online Dictionary defines 'exceptional' as unusual or extraordinary.

When deciding whether to grant the extension of time request, the Ombudsman will take into account the objects of the FOI Act and the importance of encouraging timely resolution of access applications as required under s 42(4).

[57] Ibid s 41(2).
[58] Ibid s 41(4).
[59] Ibid s 42(1).
[60] Ibid s 42(2).
[61] Ibid s 42(3).

The Ombudsman will also consider:

- the respondent's reasons for applying for an extension of time
- if the applicant has already agreed to an extension of time previously
- the functions and business of the agency
- the work that still needs to be done to finalise the access application.

Respondents should not seek an extension from the Ombudsman unless they are able to justify their request, keeping in mind the objects of the FOI Act and the importance of timeliness.

Respondents should include the following information in their extension of time request:

- an explanation of why the application is voluminous and/or complex if relevant
- an explanation of why there are exceptional circumstances if relevant
- the scope of the access application and the type of information it covers
- which public interest factors may be applicable to the information
- the work already undertaken by the respondent
- whether there is information that may reasonably be expected to be of concern to a relevant third party, and/or
- how the respondent will use the extra time to process the request.

Note:

- It should be noted that agencies and Ministers should not seek extensions of time from the Ombudsman as a matter of course.
- The onus is on agencies and Ministers to demonstrate to the Ombudsman why an extension of time is appropriate in the circumstances. Agencies and Ministers should consider what factors contribute to the exceptional circumstances of the case.
- There is no obligation for the Ombudsman to consult with the applicant about a request for an extension of time under s 42. The Ombudsman may, however, consider such consultation to be appropriate in the circumstances.

A form for requesting an extension of time is available here.

Section 42(5) provides that in granting an extension of time, the Ombudsman may impose conditions on the extension. These include requiring the respondent to:

- provide regular updates on the progress of processing the application
- agree to a timetable to progress the application
- provides information progressively (i.e. making the decision in tranches).

If an extension of time is granted, the Ombudsman will notify the respondent and the applicant.[62] This will include an explanation of any conditions upon which the extension is granted.[63]

[62] Ibid s 42(7).
[63] Ibid s 42(5).

Note:

- It is open to the Ombudsman to amend or cancel an extension of time under 42(6) if the Ombudsman considers it appropriate having regard to the objects of the FOI Act or the importance of encouraging timely resolution of access actions, or where a condition imposed has not been complied with.[64] The Ombudsman will advise both the applicant and the respondent if this occurs.[65]
- More detail regarding the Ombudsman's approach to granting extensions is outlined in *Volume 6 of 6: Ombudsman reviews.*

6.11.4. Ombudsman extension - deemed refusal

As discussed below in section 6.13 Decisions not made in time, where a respondent fails to make a decision within the required time frames and no extension has been granted, the application will be deemed to be refused (deemed refusal).

If the applicant subsequently applies to the Ombudsman for a review of this deemed refusal decision, it is open to the respondent to ask the Ombudsman to consider:

- setting aside the deemed decision, and
- providing an extension of time for it to deal with the original access application.[66]

Note:

- Such extensions are not available if the respondent previously sought an extension from the Ombudsman under s 42—see section 6.11.3 Ombudsman extension – unfinalised application above.

In considering whether to grant an extension of time and the period to extend the processing period by, the Ombudsman will consider the application made by the respondent including:

- the objects of the FOI Act
- the importance of encouraging timely resolution of access applications under s 78(4)
- the details of the access application
- the complexity involved in processing the access application
- the reasons for the delay in making a decision in time
- the functions and business of the agency
- whether the respondent has communicated with the applicant about the delay.

The Ombudsman is also required to have regard to the objects of the FOI Act and the importance of encouraging timely resolution of access applications under s 78(4).

Similar to an Ombudsman extension of time granted under s 42, conditions may be imposed by the Ombudsman in allowing further time for the respondent to process the access application.[67]

[64] Ibid s 42(6).
[65] Ibid s 42(7) .
[66] Ibid s 78.
[67] Ibid s 78(5).

There is no obligation for the Ombudsman to consult with the applicant about a request for an extension of time under s 78. The Ombudsman may, however, consider consultation appropriate.

If a decision is not made within the extended processing period granted by the Ombudsman under s 78, the respondent is taken to have refused access to the access application[68] (see section 6.13 Decisions not made in time).

Note:
- More detail regarding the Ombudsman's approach to granting extensions is outlined in *Volume 6 of 6: Ombudsman reviews.*

6.12. Suspending the processing period

In the limited circumstances outlined below, the processing period may be suspended.

6.12.1. Suspension where scope being clarified

Under s 34(4), a respondent may suspend an access application if they:

- have taken all reasonable steps to contact an applicant to clarify the scope of the application (clarification request) **and**
- they are unable to contact the applicant, or
- the applicant does not respond to the clarification request.

What is reasonable will depend on the circumstances of the case. The Ombudsman considers reasonable steps to have been taken if the respondent has:

- sent a clarification request and not received a response within the specified period (at least seven days) or been advised that the address details provided were not correct
- called the applicant to follow up and still not received a response, or been advised that the telephone details provided were not correct.

Note:
- In circumstances where a clarification request is sent via email, it can be helpful evidence for a respondent to turn the 'read receipt' function on before sending it to the applicant.

If a respondent makes a decision to suspend processing, they must:

- tell the applicant in writing, and
- explain that they:
    - must decide the application if the applicant responds within three months after the request was made, but
    - do need to deal further with the application if it remains suspended for three months or longer.[69]

A template for this purpose is at Appendix A.

[68] Ibid s 78(6).
[69] Ibid ss 34(5) and (6).

Where this occurs, the processing period will then be extended for the number of working days that the applicant takes to respond to the clarification request[70]—see section 6.11 Processing timeframes.

If an application then remains suspended for three months or longer, the respondent need not deal further with the application.

Where this occurs, the Ombudsman takes the view that the respondent should advise the applicant of this in writing and close the application.[71] A template for this purpose is at Appendix A.

Note:

- If a respondent ceases to deal with an application because it has been suspended for three months or longer, this does not prevent the applicant from making another access application for the same information.[72]

6.12.2. Suspension where fee estimate being negotiated

Under s 106(3), a respondent may suspend processing of an access application if it:

- has taken all reasonable steps to contact an applicant about a fee estimate under s 106(1) **and**
- it is unable to contact the applicant, or
- the applicant does not confirm or vary the application.

What are reasonable steps will depend on the circumstances of the case. The Ombudsman considers reasonable steps to have been taken if the respondent has:

- sent advice regarding the fee estimate and not received a response within the specified period (at least seven days) or been advised that the address details provided were not correct, and
- called the applicant to follow up and still not received a response, or been advised that the telephone details provided were not correct.

If the respondent makes a decision to suspend processing it must:

- tell the applicant in writing, and
- explain that it:
  - must decide the application if the applicant confirms or varies the application within three months
  - but will not deal further with the application, if it remains suspended for three months or longer.[73]

A template for this purpose is at Appendix A.

Where this occurs, the processing period will then be extended for the number of working days that the applicant takes to respond to confirm the fees payable or vary the application[74] (s 6.11 Processing timeframes).

[70] Ibid s 40(2)(b).
[71] Ibid s 36(4).
[72] Ibid s 34(7).
[73] Ibid ss 106(5) and (6).
[74] Ibid s 40(2)(c).

If an application then remains suspended for three months or longer, the respondent need not deal further with the application. Where this occurs, the respondent should advise the applicant of this in writing and close the application. A template for this purpose is at Appendix A.

Note:

- If a respondent ceases to deal with an application because it has been suspended for three months or longer, this does not prevent the applicant from making another access application for the same information.[75]

6.13. Decisions not made in time

If the time for making a decision on an access application has expired (including any extensions granted) and the respondent has not given the applicant a decision notice, the respondent is taken to have made a decision refusing access to the information.[76] The consequences of a decision not being made in time are:

- the respondent must refund any fees paid by the applicant relating to the access application[77]
- the respondent must write to the Ombudsman and advise that a decision was not made in time (or within any extended time periods)[78] and
- the Minister or the Minister responsible for the agency must present a copy of the notice to the Ombudsman at the Legislative Assembly within 3 sitting days after a final decision has been made on the access application – unless the Ombudsman grants a further extension (see note below).[79]

It is expected that respondents notify the Ombudsman of decisions not made in time within 5 working days of the original due date. A template for this purpose is available at Appendix A.

Note:

- Where the above occurs, there is nothing preventing the respondent from continuing to process the application and the Ombudsman's expectation is they will do so.[80]
- Where a respondent is deemed to have refused an access application, it may apply to the Ombudsman to set aside the deemed decision and grant an extension of time to deal with the application—as long as the respondent did not previously seek an extension from the Ombudsman under s 42, see section 6.11.3 Ombudsman extension – unfinalised application.
- If an extension of time is granted under s 78, a s 39 notice is only required to be tabled where a decision is not made within the extended processing period.[81]

[75] Ibid s 107(1).
[76] Ibid s 39(1)(a).
[77] Ibid s 39(1)(b).
[78] Ibid ss 39(1)(c) and 39(2).
[79] Ibid ss 39(4) and 39(5).
[80] Ibid s 39(3).
[81] Ibid s 39(5).

6.14. Determining whether fees should be charged

Section 104 outlines the fees that can be imposed for processing an access application. In doing so, it "attempts to strike a balance between recognising the right to information and the costs that are inevitably incurred in retrieving that information."[82] Sections 104(1) and (5), provide for the Minister to determine such fees in consultation with the Ombudsman.

The fees that the Minister has been determined can be charged are currently outlined in the *Freedom of Information (Fees) Determination 2018*. This includes fees for:

- each page of information given (other than the first 50 pages)[83]
- giving information to an applicant by post
- giving a printed copy to the applicant (other than the first 50 pages)
- giving information contained in a sound or visual recording on electronic storage media (e.g. USB)
- information contained in a written transcript of a sound recording or a record in which words are in shorthand writing or in a codified form
- information that is not contained in a written record, and is retrieved or collated using equipment usually available to the respondent.

When considering whether or not to impose a fee, respondents are reminded that s 6(f) provides that one of the objects of the FOI Act is to 'facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of the maximum amount of government information.' As a result, if the cost of calculating and collecting the fee might cost more than the fee itself, agencies and Ministers should reconsider whether to impose a charge at all.[84]

Section 105 also provides for certain circumstances where fees cannot be charged. These are summarised below.

Circumstances where fees do not apply:

- access applications for personal information about the applicant
- making access applications for additional information identified by the respondent under s 36(3)[85]
- deemed decisions

Note:

- Respondents should be aware that fees cannot be charged for search and retrieval of information or decision making.[86]
- Fees can only vary according to the volume of information provided in response to an access application.[87] They cannot vary according to the identity of an applicant, agency or Minister.[88]

[82] Explanatory Statement, *Freedom of Information Bill 2016* (ACT).
[83] FOI Act s 104(4) provides that the first 50 pages of information in response to an access application are to be provided free of charge.
[84] *Australian Associated Press Pty Ltd and Department of Immigration and Border Protection* [2015] AICmr 65 [31].
[85] However, s 105(2) makes clear that a fee can be determined for the access application from which the additional information has been identified.
[86] FOI Act s 104(2)(b).
[87] Ibid s 104(3).
[88] Ibid s 104(2)(a).

6.15. Imposing and waiving fees

If a respondent decides that fees apply, notice must be given to the applicant notifying them of an estimate of the fees payable.[89]

The fees notice should fully explain and justify that fee, and ask the applicant to confirm or vary the access application.[90]

The applicant can either pay the fees or request the fees be waived.[91]

Respondents must waive the fees if the:

- information requested was previously publicly available but is no longer publicly available[92]
- information is of special benefit to the public[93]
    - The Ombudsman considers information is of special benefit to the public if it better informs the public about government or concerns a public issue.[94]
    - For example, the information would add to the public record on an important and recurring aspect of decision making.[95]
- applicant is a concession card holder and demonstrates a material connection with the information requested[96]
    - Concession card is defined under s 107(4) and includes a current health care card, pensioner concession card or veteran's gold card.
    - The Ombudsman considers a material connection to be one which is logical or the information sought is personal information of the applicant. For example, where the applicant is the subject of the information.
- applicant is a not-for-profit organisation and the information requested relates to the objects or purposes of the organisation
    - The Ombudsman considers a not-for-profit organisation to be one which does not operate for the profit, personal gain or other benefit of particular people.[97]
    - For example, the information is to be used by a not-for profit organisation in preparing submissions to a parliamentary or government inquiry, for example, on a law reform, social justice, civil liberties, financial regulation, or environmental or heritage protection issue.[98]
- applicant is a member of the Legislative Assembly.[99]

[89] Ibid s 106(1).
[90] Ibid s 106(2).
[91] Ibid s 106(3).
[92] Ibid s 107(2)(a).
[93] Ibid s 107(2)(b).
[94] This guidance is provided in accordance with the Ombudsman's power to make guidelines on the circumstances in which, for s 107(2), information may be of special benefit to the public generally: s 66(2)(d).
[95] Such as debt waiver; see *'CF' and Department of Finance* [2014] AICmr 73; and *'CW' and Department of Finance* [2014] AICmr 99.
[96] FOI Act s 107(2)(c).
[97] 'Not for profit' (Web page, 21 October 2019).
[98] *Fingal Head Community Association Inc and Department of Infrastructure and Regional Development* [2014] AICmr 70; and *Australian Pain Management Association and Department of Health* [2014] AICmr 49
[99] FOI Act s 107(2)(e).

Fees must also be waived or refunded in situations where information was not publicly available at the time of the access application but is made publicly available before or within three working days of the information being released to the applicant.[100]

Note:

- If all reasonable steps have been taken to contact the applicant to confirm or vary the access application, but either the applicant is unable to be contacted or does not respond, a respondent may suspend the processing time until the applicant responds to the fee estimate notice. However, the respondent must first write to the applicant to notify them of the suspension and of the matters outlined in s 106(5) —see s 6.12 Suspending the processing period.

7. Consultation requirements

The FOI Act sets out a number of circumstances in which a respondent must or can consult with a third party prior to making a decision. Guidance on these situations is provided below for the different types of parties that may be consulted.

7.1. Consultation – with the applicant

Before refusing to deal with an access application for any of the reasons below, the FOI Act requires respondents to formally consult with the applicant:[101]

- dealing with the application would involve an unreasonable and substantial diversion of resources
- the application is frivolous or vexatious
- the application involves an abuse of process
- the access application is expressed to relate to government information of a kind taken to be contrary to the public interest to disclose under Schedule 1, and
- an earlier access application for the same information was made in the 12 months before the current access application, was refused and the public interest factors remain materially the same.

Note:

- For advice on these reasons for refusing to deal with an application—see s 8.6 Refusing to deal with the application.
- There is no such consultation requirement where a respondent decides to refuse to deal with an access application on the grounds that the information is already available—see Already available to the applicant. But in this situation, additional notification requirements apply—see s 9.4 Requirements where decision is to refuse to deal with the application.
- The above requirements to consult with an applicant, prior to refusal, are in addition to the applicant consultation that may occur earlier in the application process.

[100] Ibid s 107(3).
[101] Ibid s 46.

Where consultation is required, respondents must notify the applicant in writing of their intention to refuse to deal with the access application. As outlined under s 46, this written notice must outline:

- the intention to refuse the access application[102]
- the proposed reason for refusing the access application, as outlined in one or more of the following sections of the FOI Act:[103]
    - s 43(1)(a)
    - s 43(1)(b)
    - s 43(1)(c)
    - s 43(1)(e), or
    - s 43(1)(f)
- that the period during which the applicant may consult with the respondent is 10 working days after the applicant is given the consultation notice, unless otherwise agreed.[104]

Section 46(1)(b) also requires agencies to ensure they give the applicant a reasonable opportunity to consult with them and provide any additional information. They are also required to give the applicant any information which would assist them to make the application in a form that would remove the ground for refusal.[105]

These consultation requirements are designed to give applicants the opportunity to revise or narrow their access application so that it may be processed. After consultation, the applicant may give the respondent an amended application.[106] In this case, the original application will be taken to have been made at the time the amended application is given.[107]

The Ombudsman encourages agencies to take a broad approach to assisting applicants during this consultation period in order to avoid the need to refuse the access application. In assisting the applicant and giving them a reasonable opportunity to consult, agencies should consider:

- speaking with the applicant, if appropriate, to try to better understand what they are looking for and to help them amend or frame their application accordingly
- describing the information the respondent considers the applicant might want
- providing suggestions to the applicant such as reducing the time period covered
- asking the applicant to be more specific.

Note:

- If the applicant amends their access application following a formal consultation notice, the processing period restarts from the date the revised access application is made.[108]
- From this date, agencies have 20 working days to provide a decision on the revised access application.[109]

[102] Ibid s 46(1)(a)(i).
[103] Ibid s 46(1)(ii).
[104] Ibid ss 46(1)(a)(iii) and s 46(4).
[105] Ibid s 46(1)(b)(ii).
[106] Ibid s 46(2).
[107] Ibid s 46(3).
[108] Ibid s 46(3).
[109] Ibid s 40(1).

7.2. Consultation – with third parties

Before releasing information which *may reasonably be expected to be of concern* to *a relevant third party*, s 38 provides that the respondent must take reasonable steps to consult with the third party.

Such consultation processes are important as they ensure that third parties have an opportunity to express any concerns they may have about the disclosure of the information—that is, to explain why the information may in fact be contrary to the public interest information for reasons not otherwise apparent.

They are designed to ensure the decision-maker balances the interests of the FOI applicant with the rights of the third party. A third party, who is consulted under s 38, also has review rights in respect of a decision adverse to their interests.

Note:

- Consultation is not required if the information officer has already formed a clear view that all of the information reasonably expected to be of concern to the third party is contrary to the public interest information.[110]
- Agencies are, however, reminded of the pro-disclosure bias within the FOI Act, and that it is not appropriate to refuse access to information simply to avoid consultation. Where this is an issue, agencies are instead encouraged to negotiate the scope of the application with the applicant, and seek their agreement to exclude any information of concern to a third party—particularly if the information is not central to the purpose of the applicant's request.

A *relevant third party* is defined by s 38(1)(b) as a person or another entity other than the Territory to whom disclosure of the information may reasonably be expected to be of concern.

The FOI Act then sets out specific circumstances where government information may reasonably be expected to be of concern—that is, situations where consultation will be required if the decision-maker considers that in the circumstances, disclosure may reasonably be of concern to the third party.

'Concern' is not defined in the FOI Act and hence, should be given its ordinary meaning—that is, a matter that engages a person's attention, interest, or care, or that affects a person's welfare or happiness.[111]

The Ombudsman considers that disclosure would, however, need to be more than of mere interest to the relevant third party for consultation to be required. There must also be some sort of rational basis for potential concern.

The consultation scenarios provided for under the FOI Act are outlined below, as well as examples of situations in which information may reasonably not be expected to be of concern.

[110] Ibid s 38(1)(a) and Explanatory Statement, Freedom of Information Bill 2016 (ACT) 25.
[111] The Macquarie Online Dictionary, Macquarie Dictionary Publishers, 2019.

Note:

- When consulting with third parties, the decision-maker is obtaining the third party's views—not seeking their permission to disclose the information consulted on. The purpose of consultation is to assist the decision-maker in deciding whether to disclose the information in response to an access application.
- In the event the decision-maker decides to release the information against the objections of the third party, the third party has rights to seek review of the decision.[112]

Individuals

If the third party is an individual, the FOI Act provides that government information may reasonably be expected to be of concern if:

- it is personal information about the individual, or
- the disclosure would, or could reasonably be expected to, affect the person's rights under the *Human Rights Act 2004* (HR Act).[113]

'Personal information' is defined in the Dictionary to the FOI Act as:

- information or an opinion (including information forming part of a database), whether true or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion; but
- for an individual who is or has been an officer of an agency or staff member of a Minister, does not include information about the individual's positions or functions as an officer or staff member, or things done by the individual in exercising functions as an officer or staff member.

The Ombudsman considers that where personal information about the individual is included and the decision-maker is considering releasing this information, consultation would generally be required.

There may, however, be cases in which the disclosure of personal information about an individual could not reasonably be expected to be 'of concern' to the person. For example, where:

- the information about the person is already publicly well known, and
- CCTV footage is pixelated to protect the identities of those depicted in it from everyone other than a small cohort who is already aware of the identities.[114]

The Ombudsman takes the view that respondents should generally start from the position that information may reasonably be expected to be of concern to an individual, unless there is clear evidence to support a contrary view.

For guidance on the circumstances in which the disclosure of the information would, or could reasonably be expected to, affect the person's rights under the HR Act, see *Volume 4 of 6: Considering the public interest.*

[112] FOI Act s 73 and Sch 3.
[113] Ibid s 38(3)(a).
[114] *Australian Broadcasting Corporation and Department of Child Safety, Youth and Women* [2018] QICmr 47 [32].

Note:

- Please note that due to the dictionary definition above, there is no requirement to consult with agency staff or a Minister under s 38, where the information sought includes information about their position or function, or how they have exercised those functions.

Governments or government agencies

If the third party is a government or government agency, the FOI Act provides that government information may reasonably be expected to be of concern if it concerns the affairs of the government or agency.[115]

This scenario is quite broad and consequently consultation will be required unless the decision-maker is aware the government or agency is not concerned by the possible release and/or has agreed that formal consultation is not required.

Other third parties

Section 38(3)(c) provides that disclosure of government information may reasonably be expected to be of concern to a third party if the information 'concerns the trade secrets, business affairs, or research' of the third party.

- For guidance on the meaning of 'trade secrets, business affairs, or research' see *Volume 4 of 6: Considering the public interest.*

In determining whether disclosure of information may reasonably be expected to be of concern, information officers should ask themselves, 'Would the third party be likely to have any grounds under the FOI Act to object to disclosure?'

Consultation with third parties may also be appropriate where:

- there is doubt about release without consultation
- the information officer does not propose to disclose the information subject to consultation and would like their views confirmed

How should third parties be consulted

The FOI Act requires respondents to take reasonable steps to consult with relevant third parties. What constitutes 'reasonable steps' will depend on the circumstances of each access application.

The precise nature of the duty to take 'reasonable steps' may depend on the circumstances in each case, including the identity and situation of the relevant third party.

For example, in most cases taking reasonable steps is likely to involve undertaking all reasonably practicable enquiries to try to locate a third party, and to attempt to contact them even in circumstances where they may be located overseas. What is regarded as 'reasonable steps' must, however, also be considered in light of the time limits for processing the FOI request.[116]

Where consultation is required, respondents are required to:

- ask the relevant third party whether it objects to disclosure
- if it does, invite it to provide its views within 15 days on whether the information is contrary to the public interest information

[115] FOI Act s 38(3)(b).

[116] In circumstances where consultation is undertaken under s 38, the period for deciding the access application is extended by 15 working days: see FOI Act s 40(2).

- explain that if access is given, the information may be made available publicly on their disclosure log.[117]

While the FOI Act is silent on how formal the consultation needs to be, it is good practice to consult with third parties in writing via a consultation letter. Information officers may, however, find it useful to contact the third party to explain the process before sending a consultation letter.

The Ombudsman notes that where consultation is done via less formal means such as a telephone call, email or meeting, a detailed file note of any consultation discussions should be kept.

The consultation letter should include:

- a brief explanation of the consultation process
- a copy of the information which is subject to the consultation, or if this is not practicable (i.e. because of the privacy of other third parties such as the FOI applicant), a summary of the information
- a copy of the relevant provisions of the FOI Act: s 17, Schedules 1 and 2
- notice about the disclosure log requirements of the FOI Act
- the relevant information officer's contact details, and
- a date for when the third party should provide a consultation response.

How long should third parties be given to respond?

While the FOI Act provides for an additional 15 working days to process the access application for third party consultation, it should be noted this does not automatically mean third parties are given 15 working days to respond.

Agencies should use their discretion to determine how long a third party is given to respond to the consultation, taking into account:

- the time it will take for the third party to receive and provide a response to the consultation letter
- the volume of information the third party is being consulted on

Consultation reminders

Things to be mindful of when consulting with third parties include:

- If the FOI applicant is an individual, the applicant's identity may only be disclosed to a relevant third party in accordance with the requirements of the Territory Privacy Principles set out in the *Information Privacy Act 2014* (for example, where the applicant consents to the disclosure of their identity in accordance with Territory Privacy Principle 6.1(a)).
- The processing period is extended by a total of 15 working days for all required consultation.[118]
- Records should be kept of all correspondence to and from the third party, copies of the consulted material, and the consultation response.
- If consultation occurred, this should be detailed in the decision notice to the applicant including the identification of any material facts which emerged from the consultation that were or were not relied on - see more in s 9 Decision notices.

Respondents should also make sure they consult with third parties regarding all relevant information in scope of the application (noting that duplicate copies of information should be removed from scope of the application – see Duplicates).

[117] FOI Act s 38(5).
[118] Ibid s 40(2)(a).

In *Canberra Metro Construction and Chief Minister, Treasury and Economic Development Directorate,*[119] the Chief Minister, Treasury and Economic Development Directorate consulted a relevant third party in relation to some information of concern to the third party, but not in relation to other information later identified as within the scope of the access application that was also of concern to the third party. The Ombudsman considered it was not sufficient for the decision-maker to simply consider the third party's earlier submissions. Instead, it was necessary to consult the third party again in relation to the additional information located.[120]

Following consultation

It should be noted that submissions by third parties are not binding on the decision-maker, but must be taken into consideration in deciding whether or not to disclose the information consulted on.

The table summarises what is required depending on the response of the third party.

Response	Next steps
No response	Proceed to a decision. Decision-maker should not automatically decide in favour of disclosure but must make the decision based on the information and facts before them.
No objection	Proceed to a decision. If the decision-maker decides to grant access to the information, the applicant can access the information immediately, pending payment of fees if applicable. However, the decision-maker should still inform the third party of the decision on the access application.[121]

Objection	If the decision-maker decides to grant access, they must:
	• provide the applicant a decision notice advising that access to the requested information has been deferred because a relevant third party objected to its disclosure
	• provide the third party with written notice of the decision and detail the third party's review right
	  o It is recommend the third party be simply provided with a copy of the decision (with the applicant's details removed, if applicable) and a covering letter—see Appendix A.
	• defer giving the applicant access to the information the third party objected to until the third party's review rights have been dealt with[122]—see s 8.3.2 Deferred access.
	
	If the decision-maker agrees with the third party's objections and refuses access to the information consulted on, they must:
	• provide the applicant a decision notice explaining why access has been refused
	• provide the third party with written notice of the decision
	  o It is recommended the third party be simply provided with a copy of the decision and a covering letter—see Appendix A.

[119] [2019] ACTOFOI 8 (5 June 2019).
[120] Ibid [22]-[24].
[121] FOI Act s 38(6)(a).
[122] Ibid s 38(6)(b).

Note:

- The relevant third party has 20 working days from the date of the decision to apply for a review by the Ombudsman.

Review by the FOI applicant

If a respondent receives a notice of an Ombudsman review, they must tell each relevant third party they consulted under s 38.[123]

They also have an obligation under s 76(2) to tell 'any other person or entity' about the Ombudsman review if a decision by the Ombudsman to disclose information may reasonably be expected to be of concern to them.

A respondent should therefore take reasonable steps to tell any other person or entity about an Ombudsman review if the decision may reasonably be expected to be of concern to them, even if the respondent has not previously consulted the third party for some reason.

For an individual, this would be where the information:

- is personal information about the individual, or
- the disclosure would, or could reasonably be expected to, affect an individual person's rights under the HR Act.[124]

Note:

- If the person is deceased, s 76(2) applies as if an *eligible family member* of the person were the person[125]—for guidance on the definition of eligible family member see *Volume 4 of 6: Considering the public interest*.

For an entity, this would be where the information concerns:

- its affairs as a government or agency,[126] or
- the trade secrets, business affairs, or research of the entity.[127]

8. Deciding an access application

8.1. Who can decide an access application?

The principal officer of each agency is required to appoint an information officer and this appointment is a notifiable instrument.[128]

[123] Ibid s 76(1).
[124] Ibid s 76(2)(a).
[125] Ibid s 76(3).
[126] Ibid s 75(2)(b).
[127] Ibid s 75(2)(c).
[128] Ibid s 18(1).

Under the FOI Act, information officers are required to:

- deal with access applications made to their agency[129]
- if requested to do so by another agency, deal with access applications made to other agencies[130]
- actively consider whether public access may be given to other government information and if so, how access can be provided[131]
- deal with amendment applications made to their agency[132]
- ensure their agency complies with its open access obligations.[133]

Access applications made to a Minister may be dealt with by the person the Minister directs.[134]

Note:

- All agency decisions made under the FOI Act must be made by the appointed information officer/s.
- In performing their functions under the FOI Act, information officers are not subject to the direction of any person, other than a direction from the Minister or the principal officer of the agency (i.e. Director-General) to disclose information.[135]
- Under s 21, an information officer of an agency may, at the request of the principal officer of another agency, deal with an access application made to the other agency.
- Section 22 also provides for information officers to consult with each other.
- It is an offence under s 90 to direct an officer to engage in conduct that is contrary to the requirements under the FOI Act, including with the intention of preventing disclosure of government information that could reasonably be expected under the FOI Act.

8.2. How applications are decided

Section 35 outlines the possible decisions that can be made on access applications:

- to give access to the information—s 35(1)(a)
- that the information is not held by the respondent—s 35(1)(b)
- to refuse to give access because the information is contrary to the public interest information—s 35(1)(c)
- to refuse to deal with the application—s 35(1)(d)
- to refuse to confirm or deny the information is held—s 35(1)(e)

Each of these outcomes is explained in more detailed below. It should, however, be noted that an application may be decided in more than one way[136]—for example:

- some information may be released and access to some information may be refused on the grounds that it is contrary to the public interest (this is known as *partial access* and will involve giving access to a copy of the record with some information redacted)

[129] Ibid ss 33(1)(a) and s 19(1)(a).
[130] Ibid s 33(1)(b).
[131] Ibid s 19(1)(e).
[132] Ibid s 19(1)(c).
[133] Ibid s 19(1)(d)-(f).
[134] Ibid s 33(2).
[135] Ibid s 20(1).
[136] Ibid s 35(2).

- a respondent may refuse to deal with part of the access application because the information is publicly available, but agree to release the residual information requested.

Regardless of the outcome, a decision notice must be prepared and sent[137]—see s 9 Decision notices. Decision notices and templates are available at Appendix A.

Note:

- Section 30(4) also allows for applicants to include their views on the public interest. If such a statement of the applicant's views is included, decision-makers should take this into account when making a decision on the access application.
- A person commits an offence under s 89 if they make a decision, or purport to make a decision, under the FOI Act, and knows the decision cannot not be made under the FOI Act.

8.3. Giving access to the information

A decision-maker can decide to give access to information under s 35(1)(a)—this can occur immediately in a number of forms, or access may need to be deferred as explained below.

Note:

- Where access is given, it must be unconditional.[138]
- Where access is given, s 103 protects the decision-maker from any civil or criminal liability for releasing the information, as long as they engaged their functions under the FOI Act honestly and without recklessness.

8.3.1. Forms of access

As outlined in s 47(1), access to government information may be provided in one of the following ways:

- providing a copy of an electronic record or printed copy containing the information requested
- if the information is a sound recording or a record in which words are in shorthand writing or in a codified form—giving a written transcript of words contained in the record
- if the information is not contained in a written record (e.g. only exists electronically)—collating or retrieving the information and creating a document using 'equipment usually available'.

If the applicant has requested access in a particular format (for example, an electronic copy), the information should be provided in this format unless doing so would:

- interfere unreasonably with the exercise of the respondent's functions, or
- involve an infringement of copyright (for someone other than the ACT).[139]

[137] Ibid s 51(1).
[138] Ibid s 48.
[139] Ibid s 47(5).

Where access is given in a form different to the form requested, the applicant must not be charged a higher fee than would otherwise have been payable if access were given in the form requested.[140]

Under s 47(3), the information must also be given in a way that complies with web content accessibility guidelines, level AA.[141]

8.3.2. Deferred access

The three scenarios in which a decision-maker may grant, but then defer access to information under the FOI Act are explained below.

Deferral while awaiting public release

A decision-maker can defer giving access to information for a period no longer than three months if it was prepared for formal publication within a stated time, but this has not occurred as intended.[142]

Formal publication includes:

- a formal release of a report at an event
- release to the media
- presentation to the ACT Legislative Assembly.

Deferral while awaiting fee payment

Where an access application is subject to fees payable by the applicant, a decision-maker may defer giving access to information if the fee has not been paid by the applicant.[143]

Deferral due to third party objection

As discussed above in terms of consultation requirements (s 7 Consultation requirements), access will also need to be deferred when a consulted third party has objected to the release of all, or part of the information, and the decision-maker decides to disclose the information contrary to the third party's objections.

Access must be deferred until either the third party:

- advises the respondent they do not intend to apply for Ombudsman review,
- does not apply for Ombudsman review within 20 working days of the date of the decision, or
- any review commenced by the Ombudsman has been completed.[144]

[140] Ibid s 47(6).
[141] Or in another way if prescribed by regulation – see FOI Act s 47(3) and 'Web Content Accessibility Guidelines (WCAG) 2.0' (Web page, 21 October 2019).
[142] FOI Act s 49(1).
[143] Ibid s 49(2).
[144] Ibid s 38(6)(b).

8.4. Information not held by the respondent

A decision-maker can decide under s 35(1)(b) that the information is not held by the respondent.

If this is the case, s 53 requires the decision notice to state that the information is not held. This can occur in circumstances where the information:

- should exist, but cannot be found
- is known to have been destroyed, or
- never existed.

Cannot be located

To be satisfied the information cannot be located, the decision-maker should first consider whether the information is of a type that has been or should be in the respondent's possession.

They must be satisfied that reasonable steps to locate the information have been taken[145]—see s 6.7 Searches.

For example, there may be information that has been, or should have been, in the respondent's possession but cannot be located because the information has been destroyed in accordance with relevant disposal policies. If this is the case, this should be explained to the applicant, if possible, by a reference to the date of destruction and the relevant records management policy.

Does not exist

To be satisfied the information does not exist, the respondent should consider:

- its structure, functions, responsibilities, practices and procedures
- the nature and age of the requested documents
- other factors that are relevant in the circumstances.

For example, information does not exist if it was never created by the respondent.

[145] Ibid s 34(1).

Note:

- If the information is not held by the respondent because it is held by another agency or Minister, the access application must be transferred to the relevant agency or Minister—see more at s 5.8 Transfer of access applications.
- In an Ombudsman review, the respondent may be directed to undertake further searches for the information to determine whether there are reasonable grounds to believe the requested information exists or should exist and is, or should be, held by the agency, and if so, whether the agency has taken reasonable steps to find the information.[146]
- Decision-makers are likely to rely heavily on other officers in the relevant business areas to provide sufficient information and should consult extensively internally to ensure they are meeting the obligation to take reasonable steps to find the information.
- Officers are reminded that under s 92 a person commits an offence if they intentionally fail to identify information, or any part of it, within scope of an access application.
- The decision notice must outline the reasons why the information officer believes the information cannot be located despite reasonable steps being taken to find it. An explanation of the reasonable steps the respondent took to locate the information must be included such as details of the locations searched, why those locations were chosen, and a description of how the searches were conducted.

Case study: *Karen Paxton and Chief Minister, Treasury and Economic Development Directorate*[147]

The applicant sought access to documents supporting a 305% increase in her property's valuation, and valuations on other similar properties. The agency refused access to some information on the grounds it was prohibited by a secrecy provision of a law.

The Ombudsman considered that the information refused by the agency, while within scope, did not explain the rationale for the increased property value. Therefore, the issue considered by the Ombudsman was whether the agency had taken reasonable steps to locate the information requested, that is, information that would explain the decision for the increase in the value of the applicant's property.

The agency provided advice that it had undertaken document searches consistent with its FOI protocols, including searches of all relevant databases, and by the ACT Valuation Office, as well as by the agency more broadly.

It further advised that no individual reports were available which provided reasons or rationale for the decisions to increase the valuation on the property. At the request of the Ombudsman, the agency also provided additional documentation regarding valuations processes.

Based on the facts, the Ombudsman concluded the agency had taken reasonable steps to locate the information requested, but no such information existed.

[146] Ibid s 80.
[147] [2019] ACTOFOI 1 (9 January 2019).

8.5. Refusing to give access to contrary to the public interest information

A decision-maker can decide under s 35(1)(c) that the information is contrary to the public interest information. This could involve one of two outcomes:

- *Partial access*—where the information officer decides the record contains contrary to the public interest information, but it is practicable to give access to a copy of the record with the contrary to the public interest information redacted.
- *Access refused*—where the information officer decides the record contains contrary to the public interest information, but it is not practicable to give access to a copy of the record with the contrary to the public interest information redacted.

Note:

- If **only** out of scope information has been removed from relevant records and all information considered in scope of the access application has been disclosed, this is a full access decision.

What is contrary to the public interest information?

Contrary to the public interest information is defined at s 16. It includes:

- categories of information outlined in Schedule 1 that are taken to be contrary to the public interest—see Ombudsman FOI Guideline *Volume 4 of 6: Considering the Public Interest*
- information the disclosure of which would, on balance, be contrary to the public interest under the public interest test set out in s 17.

As a result, if the information under consideration is not an identified class of information listed in Schedule 1, decision-makers will need to assess whether or not it is appropriate to release the information under the public interest test in s 17, taking into account the non-exhaustive list of public interest factors:

- favouring disclosure at Schedule 2, s 2.1—that is factors, that where relevant may add weight to a decision to grant access to government information
- favouring nondisclosure at Schedule 2, s 2.2—that is factors, that where relevant may add weight to a decision to refuse access to government information.

Ombudsman FOI Guideline *Volume 4 of 6: Considering the Public Interest* provides guidance on each of these factors as well as:

- how to balance these factors and apply the public interest test, and
- irrelevant factors that should not be taken into account.

Partial access and redacting some information

Where a respondent decides to refuse access to contrary to the public interest information, that information must be deleted before access to the information is given to the applicant.

Where information is deleted from the record, agencies should indicate, whether in the margin or other appropriate area, which section under the FOI Act the information was removed. This ensures that applicants can decide whether or not to appeal and, in doing so, whether to appeal redactions applied to all, or only part, of the information sought.

8.6. Refusing to deal with the application

A decision-maker can decide under s 35(1)(d) to refuse to deal with an application.

Section 43(1) sets out the circumstances where this can occur—that is, where:

- dealing with the application would involve an unreasonable and substantial diversion of resources
- the application is frivolous or vexatious
- the application involves an abuse of process
- the government information is already available to the applicant
- the access application is expressed to relate to government information of a kind taken to be contrary to the public interest to disclose under Schedule 1, and
- an earlier access application for the same information was made in the 12 months before the application, was refused and the public interest factors remain materially the same.

Guidance for decision-makers on each of these scenarios is provided below.

Note:

- Agencies are reminded that where refusing to deal with an access application in most cases they must consult with the applicant before doing so—see s 7.1 Consultation – with the applicant.
- Section 43(2) also provides for agencies to consider two or more access applications as one application if they are related and made by the same applicant or people acting together—see s 6.10 Multiple access applications.

Unreasonable and substantial diversion of resources

A decision-maker can refuse to deal with an application under s 35(1)(c) where, as outlined in s 43(1)(a), they are satisfied the application would require an unreasonable and substantial diversion of the respondent's resources.

This refusal reason seeks to ensure the capacity of respondents to discharge their normal functions is not undermined by processing unreasonably burdensome access applications. Decision-makers are, however, encouraged to use these powers only when absolutely required, and to ensure that where possible they engage pro-actively with the applicant to instead reduce the scope of their application.

Section 44 outlines when it can be considered that processing an application would require an unreasonable and substantial diversion of resources – that is where:

- the resources required to identify, locate, collate and examine any information held by the respondent, including the resources required in obtaining the views of relevant third parties under s 38, would s*ubstantially inhibit the ability of the respondent to exercise its functions,* and
- the extent to which the public interest would be advanced by giving access to the information does not justify the use of the required resources.

This assessment must be made on an individual basis by the decision-maker. The Ombudsman's view is there should be no set level of information and processing time that should be considered to result in an unreasonable and substantial diversion of resources.

Processing a request must be both an unreasonable and substantial diversion of resources for s 43(1)(a) to apply. In some cases, processing a request may be a substantial burden, but it may not also be unreasonable.

A substantial diversion is one that is 'real or of substance and not insubstantial or nominal.'[148]

To determine whether the diversion of resources is also unreasonable, all other relevant circumstances and considerations in a case may be weighed against the workload considerations.

Agencies are reminded that the FOI Act must be applied with a view to facilitating and promoting the disclosure of the maximum amount of government information, promptly and at the lowest reasonable cost.[149]

The decision-maker must assess each access application on its own merits and the relevant circumstances at the time the application is made. For example, where an applicant is seeking access to:

- all correspondence about a particular topic—this may be large, but in some circumstances, could in fact be straight forward in terms of processing
- limited documents—this may still prove unreasonable if significant consultation would be required prior to disclosure, and agreement has not been reached to limit the scope of the application.

What would be an unreasonable and substantial diversion of resources?

When considering whether the resources required for processing would be unreasonable, respondents should have regard to resources required to:

- identify, locate and collate information held
- review and assess information held
- consult with relevant third parties
- make copies of documents
- prepare a final decision on the application

Further, to assess what constitutes an 'unreasonable' diversion of resources, agencies should consider the non-exhaustive list considered in *Smeaton v Victorian WorkCover Authority:*[150]

> *a) whether the terms of the request offer a sufficiently precise description to permit the agency, as a practical matter, to locate the documents sought within a reasonable time and with the exercise of reasonable effort*
> *b) the public interest in disclosure of documents relating to the subject matter of the request*
> *c) whether the request is a reasonably manageable one, giving due but not conclusive, regard to the size of the agency and the extent of its resources usually available for dealing with access applications*
> *d) the agency's estimate of the number of documents affected by the request, and by extension the number of pages and the amount of officer time*
> *e) the reasonableness or otherwise of the agency's initial assessment and whether the applicant has taken a cooperative approach in redrawing the boundaries of the application*
> *f) the timelines binding on the agency*
> *g) the degree of certainty that can be attached to the estimate that is made as to the documents affected and hours to be consumed; and in that regard, importantly whether there is a real possibility that processing time may exceed to some degree the estimate first made; and*
> *h) whether the applicant is a repeat applicant to that agency, and the extent to which the present application may have been adequately met by previous applications to the agency.*[151]

[148] *Re Langer and Telstra Corporation Ltd* (2002) 68 ALD 762 at 766 [115].
[149] FOI Act s 6(f).
[150] [2013] VCAT 2210.
[151] Ibid [39].

It is not necessary that respondents demonstrate that processing an access application would require such resources so as to disrupt the delivery of its primary business functions or that the 'unreasonableness is overwhelming'.[152]

It is acceptable that they demonstrate that processing the access application would substantially and unreasonably interfere with the performance of any of their functions including the processing of other access applications.[153]

Estimates of how much time and resources would be required to process the application are acceptable, as to require more precision would mean the respondent would have to do the very work that s 44 is designed to prevent.[154] An accurate estimate may include sampling a reasonable selection of representative information as an indication of the time and resources that would be required to deal with the access application.

Examples of scenarios where resources have been considered substantial and unreasonable in other jurisdictions have included where:

- access to all documents relating to a particular person covering an 11 year period was sought (in excess of 4300 pages that would take more than 25 business days for a person full time to process)[155]
- all correspondence regarding messy and/or untidy and/or visually polluted properties, show cause notices, enforcements notices and complaints was requested (more than 2000 documents assessed as being at least 80 hours work)[156]

The Ombudsman considered this issue in *Burdon and Suburban Land Agency*.[157]

In this case, the Ombudsman agreed the estimated resources were substantial and unreasonable, due to the significant consultation with third parties the agency demonstrated would be required to process the access application—that is, an anticipated 100 hours of work.[158] In making this decision, the Ombudsman took into account the size of the agency concerned and decided that, in this particular case, the public interest factors in favour of disclosure did not justify the significant resources required.

This case also includes the following non-exhaustive list of considerations:

- the terms of the request, especially if the request was expressed globally
- the demonstrated importance of the documents
- the size of the agency and extent of its resources
- the agency's estimate of number of documents, pages, processing time and cost (salary of FOI staff)
- the reasonableness of the initial assessment and whether the applicant has been cooperative in refining the scope, and
- whether the processing time is more than 40 hours' work.[159]

[152] *Angelopoulos and Mackay Hospital and Health Service* [2016] QICmr 47.
[153] *Chief Commissioner of Police and McIntosh* [2010] VSC 439 [23].
[154] *McIntosh v Victoria Police (General)* [2008] VCAT 916 (16 May 2008) [10]
[155] *Angelopoulos and Mackay Hospital and Health Service* [2016] QICmr 47.
[156] *Thomson and Lockyer Valley Regional Council* (Unreported, Queensland Information Commissioner, 23 September 2010).
[157] [2019] ACTOFOI 12 (19 June 2019).
[158] Ibid.
[159] Ibid citing *Cianfrano and Premier's Department* [2006] NSWADT 137.

Is the diversion of resources justified in the public interest?

The second element respondents must consider is whether the public interest in providing access justifies the resources required to deal with the access application. Such considerations should include whether the wider public interest would be promoted by disclosure of the information requested.

While this exercise requires consideration of the public interest, it does not require decision-makers (nor is it possible) to apply the public interest test set out in s 17. If the subject of the access application is of significant importance to the public, then it may be appropriate to allocate additional resources to make government-held information about the matter available to the public.

For example, respondents should consider whether the information:

- was relied on to make a particularly controversial decision
- was a reason for a change in the law
- relates to government action that adversely affected a person's human rights or significantly damaged the environment.

Frivolous or vexatious

A decision-maker can refuse to deal with an application under s 35(1)(d) where, as outlined in s 43(1)(b), they are satisfied the application is frivolous or vexatious.

The terms *frivolous* and *vexatious* are not defined in the FOI Act and should therefore be given their ordinary meaning:

- frivolous—of little or no weight, worth or importance or characterised by lack of seriousness or sense.[160]
- vexatious—instituted without sufficient grounds, and serving only to cause annoyance.[161]

This refusal reason seeks to ensure the capacity of respondents to discharge their normal functions is not undermined by processing unnecessary access applications. Respondents are, however, encouraged to use this power only when absolutely required, and when the applicant is engaging in unreasonable client behaviour.[162]

In considering this section, respondents may have regard to whether the access applications form part of a pattern of manifestly unreasonable access applications.

In determining whether an access application is frivolous or vexatious, respondents should have regard to the relevant individual circumstances including, but not limited to:

- the number of access applications made by the applicant
- the overall number of access applications received by the respondent during the relevant period
- the subject matter and/or nature of the access applications made by the applicant
- the applicant's dealings with the respondent
- whether the applicant has previously received some or all of the information requested, either under the FOI Act or otherwise
- the purposes of the access applications and whether the access application is made for a purpose other than the seeking of access to information.

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[160] The Macquarie Online Dictionary, Macquarie Dictionary Publishers, 2019.
[161] Ibid.
[162] For further guidance on unreasonable behaviour, see: https://www.ombudsman.gov.au/__data/assets/pdf_file/0022/35617/GL_Unreasonable-Complainant-Conduct-Manual-2012_LR.pdf.

Note:

- An applicant submitting a significant number of access applications does not automatically make an application frivolous or vexatious. For example, major newspapers could be expected to 'use FOI as part of their investigative journalism toolkit', and members of the opposition also tend to repeatedly use FOI.[163]

Abuse of process

A decision-maker can refuse to deal with an application under s 35(1)(d) where, as outlined in s 43(1)(c), they are satisfied the application is an abuse of process.

An abuse of process is defined to include the following:

- harassment or intimidation of a person
- unreasonable request for personal information about a person.[164]

Harassment or intimidation of a person

As the FOI Act is silent on the meaning of *harassment* or *intimidation*, these terms should be given their ordinary meaning.

To 'harass' a person is to disturb them persistently or torment them; and to 'intimidate' a person is to use fear to force or deter the actions of the person, or to overawe them.[165]

As outlined in the Office of the Australian Information Commissioner's (OAIC) FOI Guidelines:

> *The occurrence of harassment or intimidation must be approached objectively. The issue to be resolved is whether a person has engaged in behaviour that could reasonably be expected on at least some occasions to have the effect, for example, of tormenting, threatening or disturbing agency employees. An agency will be expected to explain or provide evidence of the impact that a person's access actions have had on agency employees, though this evidence must be considered in context with other matters.*[166]

Examples of harassment and intimidation could include:

- unsubstantiated, derogatory and inflammatory allegations against agency staff[167]
- requests of a repetitive nature that are apparently made with the intention of annoying or harassing agency staff[168], or a third party
- requests that are intended to overwhelm agency staff and force them to negotiate with the applicant about other matters or issues.[169]

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[163] *The Age Company Pty Ltd v CenITex* [2013] VCAT 288.
[164] FOI Act s 43(4).
[165] The Macquarie Online Dictionary, Macquarie Dictionary Publishers, 2013.
[166] 'Vexatious applicant declarations' (Web page, 21 October 2019).
[167] *Department of Defence and 'W'* [2013] AICmr 2 [28]-[32]; *Comcare and Price* [2014] AICmr 24 [16]-[20]; *Re Sweeney and Australian Securities and Investments Commission* [2014] AATA 531 [60].
[168] *Ford v Child Support Registrar* [2009] FCA 328.
[169] *Commonwealth Ombudsman and 'S'* [2013] AICmr 31 at [19].

Unreasonable request for personal information about a person

For advice about what is personal information, see *Volume 4 of 6: Considering the public interest*.

To determine whether a request is unreasonable, respondents may want to consider whether a reasonable person would describe the access application as an unreasonable request for personal information about a person.

For a request to be considered unreasonable, the Ombudsman considers that the personal information would be that of another person (i.e. not the applicant's own information). Additional considerations may include:

- the extent the applicant knows the information
- whether the person to whom the information relates is known to be (or to have been) associated with the information
- whether the personal information is sensitive information.

Already available to the applicant

A decision-maker can refuse to deal with an application under s 35(1)(d) where, as outlined in s 43(1)(d), they are satisfied the government information sought is already available to the applicant.

These provisions are designed to encourage applicants to consider whether information is already available under the Open Access Scheme—see *Volume 1 of 6: Open Access Information*, and enable respondents to focus their processing resources on information that is not already available.

Under s 45, information is considered to be *already available* to the applicant if the information:

- is made publicly available by the agency or another agency or Minister
- is available to the applicant from, or for inspection at, a place the agency or another agency/Minister operates, free of charge
- is available as part of a public register established under a territory law
- is available to the applicant because it has been produced in accordance with a subpoena or court order
- has previously been given to the applicant in response to an access application
- has otherwise previously been given to the applicant (e.g. via an informal request)
- is usually available for purchase (e.g. birth certificate, marriage certificate)

Note:

- Where a respondent decides to refuse to deal with an access application on this ground, they are not required to consult with the applicant first.[170] Additional obligations do, however, apply in terms of the decision notification—see s 9.4 Requirements where decision is to refuse to deal with the application.
- Respondents are encouraged to have triage arrangements in place so where information requested is publicly available, the applicant is advised of this as soon as possible, and the application finalised.
- Under s 43(3), the applicant is not entitled to a refund where the respondent refuses to deal with the application in accordance with s 43(1).

[170] FOI Act s 46(1).

The information request is of a kind taken to be contrary to the public interest to disclose under Schedule 1

A decision-maker can refuse to deal with an application under s 35(1)(d) where, as outlined in s 43(1)(e), the access application is expressed to relate to government information of a kind that is taken to be contrary to the public interest to disclose under Schedule 1. For example, a request framed as being for 'all information obtained through an examination under s 20 of the *Australian Crime Commission (ACT) Act 2003*' could potentially be refused on this basis.

However, respondents are reminded that they must consult with the applicant before refusing to deal with an application on these grounds. Alternatively, they could proceed to process the application and make a decision under s 35(1)(c) to refuse access on public interest grounds where the information is assessed as falling within Schedule 1 provisions.

Same information was previously requested and access was refused and the same public interest factors apply

A decision-maker can refuse to deal with an application under s 35(1)(d) where, as outlined in s 43(1)(f), the government information sought was previously requested and refused in the last 12 months, and the relevant public interest factors are materially the same as those considered at that time.

Respondents thus need to establish that:

- the access application is asking for exactly the same information that was previously requested in the last 12 months
- access was refused, and
- the relevant public interest factors considered in deciding the earlier application are materially the same to those that apply in relation to the current access application.[171]

8.7. Refusing to confirm or deny the information is held

A decision-maker can decide under s 35(1)(e) to refuse to confirm or deny that the information is held by the respondent because:[172]

- the information is contrary to the public interest—see *Volume 4 of 6: Considering the public interest*, and
- to do so would, or could reasonably be expected to:
    - endanger the life or physical safety of a person (see *Volume 4 of 6: Considering the public interest*), or
    - be an unreasonable limitation on a person's rights under the HR Act (see *Volume 4 of 6: Considering the public interest*), or
    - significantly prejudice an ongoing criminal investigation.

If it is obvious from the words of the access application that confirming or denying that any information exists would satisfy the elements described above, there is no need to search and identify the information. If it is, however, unclear, then searches will need to be conducted for the information officer to be satisfied the information satisfies s 35(1)(e).

The Ombudsman recommends that use of this refusal reason should be reserved for circumstances where any other response would disclose information that could cause harm to the community.

[171] Ibid s 46.

[172] See *Brooks and Secretary, Department of Defence (Freedom of information)* [2017] AATA 258 (14 February 2017).

Examples of where refusal on these grounds may be appropriate include where:

- an applicant applies for information regarding a complaint made under the *Human Rights Commission Act 2005* which is subject to on ongoing criminal investigation.
- knowing that an agency has a current warrant in connection with a specific business would be sufficient warning to the business to modify their behaviour and possibly undermine an ongoing criminal investigation.

9. Decision notices

Under the FOI Act, applicants must be given written notice of the decision on their access application—that is, they must be sent a decision notice.[173]

The requirements for decision notices depending on the type of decision made are outlined below. Templates for use by agencies are also included at Appendix A.

Note:

- Agencies are reminded that under the Open Access Information scheme they also have obligations to publish decision outcomes and documents where appropriate on their disclosure log—see *Volume 1 of 6: Open Access Information*.

9.1. Requirements where decision is to grant access

Section 52 sets out what must be included in a decision notice where access to information is given. This includes:

- an itemisation of any fee payable
- an explanation that the application/information given in response to the application (other than personal information) will be made available to the public through the disclosure log, and
- where any redactions have taken place—an explanation that the record is a copy of a document with redactions applied to any information that is contrary to the public interest to disclose.

If the giving of access is deferred under s 38(6), a statement must also be included to explain:

- that a relevant third party objected to disclosure
- that the third party may apply for review
- the period for which access may be deferred.[174]

If the giving of access is deferred under s 49, a statement must also be included to explain the reason and when access will be given.

A template that can be used when drafting a decision notice to grant access is included Appendix A.

Note:

- For more information about granting access to information see s 8.3.1 Forms of access and s 8.3.2 Deferred access.
- For more information about disclosure logs, see *Volume 1 of 6: Open Access Information*.

[173] Ibid s 51(1).
[174] Ibid s 52(2).

9.2. Requirements where decision is that information is not held

Section 53 sets out what must be included in a decision notice where access to information is refused on the grounds that it is not held by the respondent.

In this scenario, the notice must clearly state the information is not held. A template that can be used when drafting this decision notice is included at Appendix A.

9.3. Requirements where decision is to refuse access on public interest grounds

Section 54 sets out what must be included in a decision notice where access to information is refused on the basis that it is contrary to public interest information.

There are separate requirements depending on whether or not the decision was made on the basis of Schedule 1, or following application of the public interest test in s 17 as outlined below.

In either case, the notice does not need to include any information assessed as being contrary to the public interest.[175] Nevertheless, it should provide comprehensive information to explain why access has been refused on the basis that it is contrary to public information – that is, agencies should not just list relevant factors or sections under Schedule 1, but should explain why they are relevant, so the applicant and any other third parties can understand the basis on which the decision is made.

Essentially, the applicant should be able to understand the decision-maker's thought process when dealing with the access application. From reading the decision notice, where relevant, the applicant should be able to understand how the factors favouring disclosure and nondisclosure were applied and weighted by the decision-maker.

Respondents are encouraged to go beyond merely repeating extracts of the FOI Act and instead explain how they came to their decision in plain English with reference to relevant provisions of the Act (which may be included as an appendix to the decision notice).

Requirements for Schedule 1 decisions

Where the information was taken to be contrary to the information under Schedule 1, in accordance with s 54(1) the decision notice must include:

- a description of the information
- the ground for refusal under Schedule 1, and
- the findings on any material questions of fact referring to evidence or other material on which the findings were based.

For example, to the extent it is possible to do so, the decision should explain how the relevant factor for refusal under Schedule 1 applies to the information, by considering each element of the factor.

The Ombudsman appreciates the above can be a complex task, particularly where describing the information could itself reveal information that is contrary to the public interest (for example, Cabinet information). Agencies are, nevertheless, reminded of their legislative obligations in this area.

A template that can be used when drafting a notice of decision is included at Appendix A.

[175] Ibid s 51(3).

Requirements for Schedule 2 decisions

Where the information was taken to be contrary to the public interest information under the test set out in s 17, in accordance with s 54(2) the decision notice must include:

- a description of the information
- a statement of reasons setting out:
    - the findings on any material questions of fact referring to evidence or other material on which the findings were based
    - the relevant factors favouring disclosure
    - the relevant factors favouring nondisclosure
    - how the factors were balanced, and
    - the harm to the public interest that can be reasonably expected to occur from disclosure.

A template that can be used when drafting a notice of decision is included at Appendix A.

9.4. Requirements where decision is to refuse to deal with the application

Section 55 sets out what must be included in a decision notice where a respondent refuses to deal with an application after having consulted with an applicant pursuant to s 46.

These requirements are summarised below.

Decision notice content—refuse to deal:

- specifies ground for refusal (see s 43)
- sets out the findings on material questions of fact
- refers to evidence or other material on which those findings are based
- if s 43(1)(d), details how the applicant can access the information
- if fees have been paid, explains that the applicant is not entitled to a refund.

A template that can be used when drafting a notice of decision is included at Appendix A.

9.5. Requirements where decision is to refuse to confirm or deny existence of information

Section 56 sets out what must be included in a decision notice where the respondent refuses to confirm or deny the existence of information.

The notice must include a statement setting out why, if the information did exist, it would be contrary to the public interest and disclosure would, or could be reasonably 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*, or
- significantly prejudice an ongoing criminal investigation.

A template that can be used when drafting a notice of decision is included at Appendix A.

Appendix A – Templates

1. Acknowledgement of access application

[Date]

Our reference: [agency reference]

[Name]
[Address]
Via email only: [Email address]

Dear [Name]

ACKNOWLEDGEMENT OF YOUR ACCESS APPLICATION

I am writing to acknowledge receipt of the access application you made under the *Freedom of Information Act 2016* (FOI Act) dated [date of access application].

This application requested access to:

'[quote scope of application]'

Timeframe

Your application was received by the [agency name] on [date received]. Under the FOI Act, we have 20 working days from this date to process your access application.

As a result, you should expect a decision from us by [due date]. This period may, however, be extended if we need to consult third parties or for other reasons set out in the FOI Act. We will notify you if this is the case.

Charges

You will not be charged unless we advise you that charges are payable in relation to your access application, and you choose to proceed.

Disclosure Log

Please note that section 28 of the FOI Act requires publication of access applications and any information subsequently released on our disclosure log [insert link].

This means that if you are granted access to the information requested, it will also be made publicly available on our website, unless your access application is for personal information, or information about your business, commercial, financial or professional affairs where the publication of the information would be unreasonable in the circumstances.

Further assistance

If you have any questions in relation to your access application, please contact me on [insert telephone number] or email [insert positional email address].

Yours sincerely

[INSERT SIGNATURE BLOCK]

2. Acknowledgement of extension

[Date]

Our reference: [agency reference]

[Name]
[Address]

Via email only: [Email address]

Dear [Name]

AGREEMENT TO EXTENSION OF PROCESSING TIME

I am writing to you regarding the access application you made under the *Freedom of Information Act 2016* (FOI Act) dated [date of access application].

This application was received by the [agency name] on [date received].

Under the FOI Act, we generally have 20 working days from this date to process your access application. However, due to the complex nature of your request, we contacted you on [date] to seek your agreement to an extension of time to decide your application under section 41 of the FOI Act.

You agreed to an extension of [number] days. As a result, a decision on your access application is now due to be made by [final due date].

The processing period may, however, be further extended if we need to seek further information from you about your request, or consult with relevant third parties. If this is the case, you will be advised of this in writing.

If you have any questions in relation to your access application, please contact me on [insert telephone number] or email [insert positional email address].

Yours sincerely

[INSERT SIGNATURE BLOCK]

3. Application not valid and will not be processed

[Date]

Our reference: [agency reference]

[Name]
[Address]

Via email only: [Email address]

Dear [Name]

ACCESS APPLICATION FOR GOVERNMENT INFORMATION UNABLE TO BE PROCESSED

I am writing to you in relation to your correspondence dated [date of access application], in which you sought access to [quote information requested].

[Agency name] is unable to consider this an access application under the *Freedom of Information Act 2016* (FOI Act), as it does not contain enough detail to enable us to identify the government information you are seeking.

I note that I have contacted you [by phone/by email] on [X] occasions, but after a period of more than three months, your application still does not meet the minimum requirements of section 30(2) of the FOI Act.

As a result, I have closed this matter and [agency name] will not be dealing with it any further as provided for under section 31(4) of the FOI Act.

It is open to you to submit a new access application at any time. I would encourage you to ensure that you provide sufficient detail to enable the information that you are after to be identified.

If you would like more information about how to access government information in the ACT, you can find further advice on the website of the ACT Ombudsman at: http://www.ombudsman.act.gov.au/improving-the-act/freedom-of-information/access-government-information

Yours sincerely

[INSERT SIGNATURE BLOCK]

4. Clarification request

[Date]

Our reference: [agency reference]

[Name]
[Address]

Via email only: [Email address]

Dear [Name]

CONFIRMATION OF THE SCOPE OF YOUR ACCESS APPLICATION

I refer to the access application you made under the *Freedom of Information Act 2016* (FOI Act) dated [date of access application].

This application originally requested access to:

'[quote scope of application]'

We discussed this matter by phone on [date] and clarified the information you are seeking from [agency name]. Consequently, I am writing to confirm that the information that you are seeking access to is:

'[quote revised/clarified scope of application]'

We will now proceed to process your access application on this basis.

You should expect a decision from us by [due date]. This period may, however, be extended further if we need to consult third parties or for other reasons set out in the FOI Act. We will notify you if this is the case.

If you have any questions in relation to your access application or the above, please contact me on [insert telephone number] or email [insert positional email address].

Yours sincerely

[INSERT SIGNATURE BLOCK]

5. Confirmation of scope

[Date]

Our reference: [agency reference]

[Name]
[Address]

Via email only: [Email address]

Dear [Name]

CLARIFICATION OF THE SCOPE OF YOUR ACCESS APPLICATION

I am writing to you regarding the access application you made under the *Freedom of Information Act 2016* (FOI Act) dated [date of access application].

As discussed on the telephone on [date], under section 34(3) of the FOI Act, I am seeking to clarify the scope of this application.

In particular, I would be grateful if you could [clarify/confirm]:

- [insert list of questions or statements to confirm]

Could you please respond to this correspondence by [date], otherwise it may be necessary for [agency name] to suspend your access application.

If you have any questions in relation to your access application or the above, please contact me on [insert telephone number] or email [insert positional email address].

Yours sincerely

[INSERT SIGNATURE BLOCK]

6. Fee estimate

[Date]

Our reference: [agency reference]

[Name]
[Address]

Via email only: [Email address]

Dear [Name]

ESTIMATE OF FEES PAYABLE FOR YOUR ACCESS APPLICATION

I refer to the access application you made under the *Freedom of Information Act 2016* (FOI Act) dated [date of access application].

I am writing to advise you that I have determined that a fee is payable in order for the information that you requested to be provided. This fee is estimated to be $X.

The Attorney-General has determined fees payable on access applications under section 104 of the FOI Act, which can viewed here: *Freedom of Information (Fees) Determination 2018*.

In relation to your particular access application, the estimated fee has been calculated as follows:

A fee is payable for each page of information given in response to an application, excluding the first 50 pages, whether provided in printed or electronic format. The estimate is $xx.xx for xxx pages charged at $0.35 per page.

I note that the first 50 pages of information will be provided to you free of charge.

Before I proceed with processing your application, I require your confirmation that you wish to proceed given the fees now involved. Alternatively, it is open to you to:

- vary the scope of your application which may reduce the fees payable, and/or
- seek a waiver of the fee.

A response to this letter is requested by [due date]. You are, however, encouraged to respond as soon as possible to ensure that processing of your application is not significantly delayed. This is because, consistent with section 40 of the FOI Act, processing of your access application will not proceed until a response is received.

If you do wish to seek a total or partial waiver of fees, please provide an explanation of why you believe a waiver is appropriate and any supporting evidence you consider relevant to support your request.

You should be aware that agencies are required to waive the fee associated with an access application if the information requested:

- was previously publicly available
- has been made publicly available since the access application was received, or
- is considered of special benefit to the public (that is, it would better inform the public about government or concerns a public issue).

Fees must also be waived where the applicant is:

- a concession card holder (i.e. a current Commonwealth health care card, gold card or pensioner concession card) and demonstrates a material connection to the information requested
- a not-for-profit organisation and the information relates to the organisation's activities or purposes
- a member of the Legislative Assembly

If you believe that one of the above scenarios applies in your circumstances, please advise us of this in your written response.

If you have any questions in relation to your access application or the above, please contact me on [insert telephone number] or email [insert positional email address].

Yours sincerely

[INSERT SIGNATURE BLOCK]

7. Application processing suspended

[Date]

Our reference: [agency reference]

[Name]
[Address]
Via email only: [Email address]

Dear [Name]

ACCESS APPLICATION PROCESSING SUSPENDED

I am writing to you regarding the access application you made under the *Freedom of Information Act 2016* (FOI Act) dated [date of access application].

S 34(4)
This notice is to advise you that processing of this application has been suspended under section 34(4) of the FOI Act.

This is because I sent you a clarification request on [date], but I have not received a response from you regarding this matter. This is despite [insert explanation of subsequent attempts to contact applicant].

If you can provide the outstanding information requested before [due date, i.e. three months from the date of this letter], we will continue to process your application.

OR

S 106(3)
This notice is to advise you that processing of this application has been suspended under section 106(3) of the FOI Act.

This is because I sent you advice regarding the estimated fees payable on your application on [date], but I have not received a response from you regarding this matter. This is despite [insert explanation of subsequent attempts to contact applicant].

If you can provide a response to the estimated fees payable before [due date, i.e. three months from the date of this letter], we will continue to process your application.

If your application remains suspended for a period of three months or longer, [agency name] will close this matter and cease to deal with this application further.

It is open to you to submit a new access application at any time.

S 34(4) - I would encourage you to ensure that you provide sufficient detail to enable the information that you are after to be identified.

If you would like more information about how to access government information in the ACT, you can find further advice on the website of the ACT Ombudsman at:
http://www.ombudsman.act.gov.au/improving-the-act/freedom-of-information/access-government-information

If you have any questions in relation to your access application or the above, please contact me on [insert telephone number] or email [insert positional email address].

Yours sincerely

[INSERT SIGNATURE BLOCK]

8. Application closed – suspended for more than three months

[Date]

Our reference: [agency reference]

[Name]
[Address]

Via email only: [Email address]

Dear [Name]

ACCESS APPLICATION FINALISED FOLLOWING SUSPENSION PERIOD

I am writing to you regarding the access application you made under the *Freedom of Information Act 2016* (FOI Act) dated [date of access application].

Processing of this application has been suspended under section 34(4) for more than three months.

As the outstanding information requested has still not been received, under section 34(6)(b), [agency name] is no longer required to deal with this application. As a result, this matter has now been closed

OR

Processing of this application has been suspended under section 106(3) for a period of three months or more.

As a response to the estimated fees payable on your application has still not been received, under section 106(5)(b), [agency name] is no longer required to deal with this application. As a result, this matter has now been closed

It is open to you to submit a new access application at any time.

If you would like more information about how to access government information in the ACT, you can find further advice on the website of the ACT Ombudsman at: http://www.ombudsman.act.gov.au/improving-the-act/freedom-of-information/access-government-information

If you have any questions in relation to your access application or the above, please contact me on [insert telephone number] or email [insert positional email address].

Yours sincerely

[INSERT SIGNATURE BLOCK]

9. Email to business unit – information search request

Applicant name:	*Applicant name*
Access application scope:	*Quote request*

Action/information required	Details/response
Searches undertaken *Please indicate which systems and other document types were searched to identify relevant information and the results of those searches.* *Systems include: records management systems, email accounts, social media accounts, and any other systems your business unit has access*	
Information identified *Please advise the total number of records (documents) identified that fall within scope of the request above.* *Please remember to attach all relevant records (documents) when responding to this request.*	
Sensitivities/concerns about disclosure of some, or all, of the information *Please advise the FOI team of any concerns you/your business unit have about disclosure of some, or all, of the information under the FOI Act.* *Business units are the subject matter experts in their respective areas. The FOI team may need to rely on business units for assistance in making a decision about the release of the information. This may include seeking more information about the context in which the information was received, created or provided to other individuals or the agency. Based on the information you provide, the FOI team will be better placed to make a decision in relation to whether to grant access to the information.*	

I confirm the information above is correct and true.

Signed: _____ **Date:**

Manager signature: _____ **Date:**

10. Access application transfer – letter to transferee

[Date]

Our reference: [agency reference]

[Name]
[Address]
Via email only: [Email address]

Dear FOI coordinator

TRANSFER OF ACCESS APPLICATION

I am writing to you to seek your agreement that [agency name] holds information that relates to an access application made under the *Freedom of Information Act 2016* (FOI Act), dated [date of access application].

A copy of this application, which our agency received on [date received] is at Attachment A.

As you will see, the applicant is seeking access to:

'[quote scope of access application]'

To our knowledge, the information requested is not held by [agency name], but may be held by your agency. As a result, we seek your agreement that you hold this information under section 57(1)(c) of the FOI Act.

Please advise me in writing at [insert positional email address] if you agree that you hold the information by [date].

If you agree, we will transfer the application to you in accordance with section 57(2) of the FOI Act. Your agency will then have an obligation to notify the applicant in writing of the matters listed in section 57(4) of the FOI Act within 10 working days.

If you have any questions or wish to discuss, I can be contacted on (02) XXXX XXXX.

Yours sincerely

[INSERT SIGNATURE BLOCK]

11. Access application transfer – letter to applicant

[Date]

Our reference: [agency reference]

[Name]
[Address]

Via email only: [Email address]

Dear [Name]

NOTICE OF TRANSFER OF ACCESS APPLICATION TO ANOTHER AGENCY

I refer to the access application you made under the *Freedom of Information Act 2016* (FOI Act) dated [date of access application]. This application requested access to:

'[quote scope of application]'

I am writing to tell you that [name of receiving agency] has transferred your access application to [name of transferee agency] because we hold [all/some] of the information requested, as provided for under section 57 of the FOI Act. We will now continue to process your application.

You should expect a decision from us by [due date]. This period may, however, be extended further if we need to consult third parties or for other reasons set out in the FOI Act. We will notify you if this is the case.

If you have any questions in relation to your access application or the above, please contact me on [insert telephone number] or email [insert positional email address].

Yours sincerely

[INSERT SIGNATURE BLOCK]

12. Information held by two or more agencies

[Date]

Our reference: [agency reference]

[Name]
[Address]
Via email only: [Email address]

Dear FOI coordinator

ACCESS APPLICATION – INFORMATION HELD BY [AGENCY NAME]

IF information not held

I am writing to advise that [agency name] does not hold information that relates to the access application made under the *Freedom of Information Act 2016* (FOI Act) at Attachment A that your agency provided us with a copy of on [date of receipt]. Consequently, we will not be making contact with the FOI applicant or providing you with any further information.

OR

IF information held and being provided

I am writing to confirm that [agency name] holds information that relates to the access application made under the *Freedom of Information Act 2016* (FOI Act) at Attachment A that your agency provided us with a copy on [date of receipt].

I am providing you with the attached information so that you can consider when processing the application together with any other relevant information held by your agency.

OR

IF information held and to be processed by other agency

I am writing to confirm that [agency name] holds information that relates to the access application made under the *Freedom of Information Act 2016* (FOI Act) at Attachment A that your agency provided us with a copy on [date of receipt].

I can also confirm that our agency will proceed to decide the application/[explain which part of the application], and will advise the applicant of this as required under section 58(4) of the FOI Act.

If you have any questions or wish to discuss, I can be contacted on (02) XXXX XXXX.

Yours sincerely

[INSERT SIGNATURE BLOCK]

13. Access application transfer – letter to applicant

[Date]

Our reference: [agency reference]

[Name]
[Address]

Via email only: [Email address]

Dear [Name]

ACCESS APPLICATION – INFORMATION HELD BY MORE THAN ONE AGENCY

I refer to the access application you made under the *Freedom of Information Act 2016* (FOI Act) dated [date of access application]. This application requested access to:

'[quote scope of application]'

[name of receiving agency] provided [name of new agency] with a copy of this application as required under section 58(1) of the FOI Act, because they believed we held relevant information within the scope of your access application.

I can confirm that this is the case and as a result, it has been agreed that [name of new agency] will process your application/[explain part of application] being processed.

We will now continue to process your application/the part of your application specified above.

You should expect a decision from us by [due date]. This period may, however, be extended further if we need to consult third parties or for other reasons set out in the FOI Act. We will notify you if this is the case.

If you have any questions in relation to your access application or the above, please contact me on [insert telephone number] or email [insert positional email address].

Yours sincerely

[INSERT SIGNATURE BLOCK]

14. Third party consultation – file note

Third parties identified:

Type of third party	Names of third parties
Individuals	
Businesses	
Government agencies	
Other	

Considered it reasonable or unreasonable to consult with third parties because:

Name of third party	Decided to consult? (Y/N)	Reason
	Yes ☐ No ☐	
	Yes ☐ No ☐	
	Yes ☐ No ☐	

Steps taken to consult with third parties:

Name of third party	Steps taken to consult	Response received
		Object ☐ - file ref: No objection ☐ - file ref: No response☐
		Object ☐ - file ref: No objection ☐ - file ref: No response☐

15. Third party consultation – Notice to third party

[Date]

Our reference: [agency reference]

[Name]
[Address]
Via email only: [Email address]

Dear [Name]

THIRD PARTY CONSULTATION UNDER THE *FREEDOM OF INFORMATION ACT 2016*

I am writing to tell you that our agency received an access application under the *Freedom of Information Act 2016* (**FOI Act**) on [date received].

As information relating to [your personal information or the business affairs of *name of business*] is within the scope of the application, I am required to consult with you about this matter.

The information is [attached or extracted below if it is not possible to attach the information (i.e. because it also contains information regarding other third parties or the FOI applicant which cannot be easily redacted)] (**Attachment A**).

Opportunity to make a submission

I invite you to tell me of any objection [you/name of business] may have to the disclosure of any of the [attached/extracted] information.

If [you/name of business] object, it is important that you explain why and what impact disclosure could have on [you/your business]. Supporting evidence may also be helpful.

You should be aware that information will be released unless it is found to be contrary to the public interest information under the FOI Act. This will be the case if the decision-maker decides that:

- it falls within one of the categories of information included in Schedule 1 of the FOI Act, or
- when considering the factors for and against disclosure outlined in Schedule 2, on balance, it would be contrary to the public interest to release the information.

I have included copies of Schedules 1 and 2 of the FOI Act which you may wish to consider when explaining any objections (**Attachment B**). Further information about these Schedules are available in the Guidelines issued by the ACT Ombudsman, available at [insert link].

What will happen then

While your comments will be taken into account, the final decision about whether to release the information rests with the decision-maker in our agency.

If the decision-maker decides to disclose the information contrary to your submissions, we will give you written notice of the decision and you will have the opportunity to seek a review of the decision by the ACT Ombudsman before that information is disclosed.

Disclosure log

Please note that section 28 of the FOI Act requires publication of access applications and any information subsequently released on our disclosure log [insert link].

This means that if access to the information is granted, it will also be made publicly available on our website unless the access application is an application for your personal, business, commercial, financial or professional information.

How to make your submission

Please send us your comments in writing by [insert date] to [positional email] or [postal address]. If no response is received by this date, the decision-maker will assume you do not object to the release of the information.

If you have any questions in relation to this matter, please contact me on [insert telephone number] or email [insert positional email address].

Yours sincerely

[INSERT SIGNATURE BLOCK]

16. Third party consultation – Notice to applicant

[Date]

Our reference: [agency reference]

[Name]
[Address]

Via email only: [Email address]

Dear [Name]

THIRD PARTY CONSULTATION UNDER THE *FREEDOM OF INFORMATION ACT 2016*

I refer to your access application under the *Freedom of Information Act 2016* (**FOI Act**), dated [date of access application].

I am writing to tell you that we have identified information relevant to your application that concerns the affairs of [a third party/third parties]. This information is expected to be of concern to the third party because it relates to their personal or business affairs, or the affairs of a government or government agency.

Under section 38 of the FOI Act, we are required to consult with the [third party/parties] before making a decision on the release of this information.

For this reason, as provided for under section 40 of the FOI Act, the period for processing your application has been extended by 15 working days in order to allow us to consult with the [third party/parties].

A decision on your access application is now due on [date].

The decision-maker will take into account any comments we receive from the [third party/parties]. However, the final decision on whether to grant you access to the information requested rests with the decision-maker.

If you have any questions, please contact me on [insert telephone number] or email [positional email].

Yours sincerely

[insert signature block]

17. Third party consultation – Decision notice covering letter

[Date]

Our reference: [agency reference]

[Name]
[Address]

Via email only: [Email address]

Dear [third party]

DECISION TO GRANT/REFUSE ACCESS TO INFORMATION SUBJECT TO ACCESS APPLICATION

I am writing to tell you of my decision to [grant/refuse] access to information subject to an access application under the *Freedom of Information Act 2016* (**FOI Act**). I previously sought your comments on their release on [date of consultation notice].

Authority

I am an information officer appointed by the Director-General of the [agency name] to make decisions about access to government information, in accordance with section 18 of the FOI Act.

Background

On [date of consultation notice], I consulted with you under section 38 of the FOI Act, as information relating to [your personal or business affairs or *name of business*] was identified within the scope of an access application. I attached the relevant information to my consultation notice.

On [date consultation response received], you wrote to the [agency name] outlining your objections to the release of the information

In particular, you contended:

[quote objections]

Decision and reasons for my decision

I [have considered your submission[s] and] have decided to grant/refuse access to the information. Please find attached a copy of the decision notice which explains the reasons for my decision (Attachment B).

Note: the personal information of any third party has been redacted.

[IF deciding to grant access]

What happens now

We will defer disclosure of the information to give you an opportunity to request a review of my decision.

Your review rights are set out below. If you advise us that you do not wish to seek a review or do not do so in the available period, we will proceed to disclose the information as outlined in my decision.

If you do not intend to make an application for review, please advise us in writing as soon as possible so that the disclosure of the information is not unnecessarily delayed.

Your review rights

You may apply to the ACT Ombudsman to review my decision under section 73 of the FOI Act

An application for review by the ACT Ombudsman must be made in writing within 20 days of my decision being published in the disclosure log on [date].

You may submit a request for a review of my decision to the ACT Ombudsman by writing in one of the following ways:

Email (preferred): actfoi@ombudsman.gov.au

Post: The ACT Ombudsman
GPO Box 442
CANBERRA ACT 2601

More information about ACT Ombudsman review is available on the ACT Ombudsman website at: http://www.ombudsman.act.gov.au/improving-the-act/freedom-of-information.

Further assistance

If you have any questions, please contact me on [insert telephone number] or email [positional email].

Yours sincerely

[INFORMATION OFFICER]

18. Consultation notice to applicant – refusal to deal

[Date]

Our reference: [agency reference]

[Name]
[Address]

Via email only: [Email address]

Dear [Name]

NOTICE OF INTENTION TO REFUSE TO DEAL WITH YOUR ACCESS APPLICATION

I am writing to advise you that I intend to refuse to deal with your access application made under the *Freedom of Information Act 2016* (**FOI Act**), dated [date of access application], and received by the [agency name] on [date received].

This application requested access to:

'[quote scope of application]'

[Insert any revisions the applicant made, any correspondence extending the processing time].

Authority

I am an information officer appointed by the Director-General of the [agency name] to make decisions about access to government information, in accordance with section 18 of the FOI Act.

Why I intend to refuse your request

I intend to refuse to deal with your access application, under section 43 of the FOI Act, because [choose]:

- dealing with the application would require an unreasonable and substantial diversion of resources
- the application is frivolous or vexatious
- the application involves an abuse of process
- the government information is already available to you
- the access application is expressed to relate to government information of a kind that is taken to be contrary to the public interest to disclose under Schedule 1 of the FOI Act
- an earlier application for the same information:
    - was made in the 12 months before this application was made, and
    - access to the information was refused, and
    - the relevant public interest factors are materially the same as those considered in deciding the earlier access application.

I have decided your application is [insert reason from above] because:

[insert explanation why]

What happens next?

Before I make a decision, you have an opportunity to provide me with an amended application or any additional information relevant to your application that would address the concerns with your

application outlined above. If you do so, I recommend that you address my reasons outlined above for intending to refuse your application.

If you decide not to provide any further information or submit a revised application by [3 MONTHS DATE], your access application will be taken as withdrawn.

I have 20 working days to give you a decision about your access application however, the time taken to clarify the access application now is not included in the 20 working days time period.

Further assistance

If you have any questions in relation to your access application, please contact me on [insert telephone number] or email [insert positional email address].

Yours sincerely

[INFORMATION OFFICER]

19. Access application decision notice

[Date]

Our reference: [agency reference]

[Name]
[Address]

Via email only: [Email address]

Dear [Name]

DECISION ON YOUR ACCESS APPLICATION

I refer to your access application made under the *Freedom of Information Act 2016* (**FOI Act**), dated [date of access application], and received by the [agency name] on [date received].

This application requested access to:

> '[quote scope of access application]'

[Insert any revisions the applicant made, any correspondence extending the processing time].

Authority

I am an information officer appointed by the Director-General of the [agency name] to make decisions about access to government information, in accordance with section 18 of the FOI Act.

[include where deemed refusal]

I note that you have not been provided with a decision notice within the statutory processing period.

This means that the decision on your access application is now a 'deemed refusal' by operation of section 39(1)(a) the FOI Act.

Nonetheless, we have continued to process your access application and my notice of decision is set out below.

Decision

[CHOOSE THE APPROPRIATE ONE]

1. [GIVING FULL/PARTIAL ACCESS]

I have identified [number of documents] documents containing information within the scope of your access application. These are outlined in the attached *Schedule of documents*.

I have decided to:

- grant full access to [X document/s]
- grant part access to [X document/s]
- refuse access to [X document/s]

For the reasons outlined in the attached *Reasons for decision*, I have refused access to some of the information that you have requested under section 35(1)(c) of the FOI Act. This is because it is contrary to the public interest information.

2. [REFUSE ACCESS TO ALL]

I have identified [number of documents] documents holding information within the scope of your access application. These are outlined in the in the attached *Schedule of documents.*

For the reasons outlined in the attached *Reasons for decision*, I have decided to refuse access to all these documents under section 35(1)(c) of the FOI Act. This is because they contain contrary to the public interest information.

3. [INFORMATION NOT HELD]

For the reasons outlined in the attached *Reasons for decision*, I have decided to refuse your access application under section 35(1)(b) of the FOI Act on the basis that the information sought is not held by our agency.

4. [REFUSE TO DEAL]

For the reasons outlined in the attached *Reasons for decision*, I have decided to refuse to deal with your access application under section 43 of the FOI Act because [insert grounds for refusal and explanation].

5. [REFUSE TO CONFIRM OR DENY]

For the reasons outlined at in the attached *Reasons for decision*, I have decided to refuse to confirm or deny the existence of the requested information under section 35(1)(e) of the FOI Act.

This is because the information, if it did exist, would be contrary to the public interest information, and confirming or denying that the information is held by the agency would, or could reasonably be expected to [insert relevant reasoning under 35(1)(e)(ii)].

Please also find relevant sections of the FOI Act attached.

Disclosure of information

The documents are attached.

[IF DEFERRING ACCESS]

[Third party objection]

Despite my decision, I have not yet provided you with a copy of the relevant documents. This is because a relevant third party has objected to disclosure of [some/all] of the identified information.

I am required to defer access to this information to give the third party the opportunity to apply for a review of my decision. They will have 20 working days to do so from when my decision is published on our disclosure log (see below).

I will provide you with a copy of the document when access is no longer deferred or advise you that a review process is underway so you can participate if you wish.

[Information to be made available shortly]

Despite my decision, I have not yet provided you with a copy of the relevant documents. This is because I have decided to defer access to the information requested under section 49 of the FOI Act.

I have done this because [reasons/explanation].

Access to the requested information will be provided by [date access will be provided – no longer than 3 months]. You will be sent a copy of the relevant documents on or before this date.

Disclosure log

Please note that section 28 of the FOI Act requires publication of access applications and any information subsequently released on our disclosure log [insert link].

This means that if access to the information is granted, it will also be made publicly available our website, unless the access application is an application for your personal, business, commercial, financial or professional information.

Review rights

You may apply to the ACT Ombudsman to review my decision under section 73 of the FOI Act.

An application for review must be made in writing within 20 days of my decision being published in the disclosure log on [date] [OR] An application for review must be made within 20 days of receipt of this decision notice.

You may submit a request for review of my decision to the ACT Ombudsman by writing in one of the following ways:

Email (preferred):	actfoi@ombudsman.gov.au
Post:	The ACT Ombudsman GPO Box 442 CANBERRA ACT 2601

More information about ACT Ombudsman review is available on the ACT Ombudsman website at: http://www.ombudsman.act.gov.au/improving-the-act/freedom-of-information.

Yours sincerely

[INFORMATION OFFICER]

Schedule of documents

[APPLICANT NAME] – [AGENCY REFERENCE NUMBER]

Document reference number	Page number	Date	Description	Decision	Category or Factor
1.	[insert page numbers]	Click or tap to enter a date.	[insert document description]	Choose an item.	[insert schedule 1 or 2 reference]
2.	[insert page numbers]	Click or tap to enter a date.	[insert document description]	Choose an item.	[insert schedule 1 or 2 reference]
3.	[insert page numbers]	Click or tap to enter a date.	[insert document description]	Choose an item.	[insert schedule 1 or 2 reference]

Reasons for decision

What you requested

'[quote access application]'

What I took into account

In reaching my decision, I took into account:

- your original access application dated [date of access application]
- your revised access application dated [date of revised scope]
- correspondence between you and the agency dated [date of relevant correspondence, for example, clarifying the request]
- the documents containing the information that fall within the scope of your access application
- consultation with [a third party/third parties] about information concerning them
- consultation with other [ACT] Government agencies
- consultations with agency officers about:
    - the nature of the documents
    - the agency's operating environment and functions
- the FOI Act
- the ACT Ombudsman FOI Guidelines

Reasons for my decision

I am authorised to make decisions under section 18 of the FOI Act.

I have decided that [all/some] documents OR [parts of documents] that contain the information you requested contain information that is taken to be contrary to the public interest to disclose under Schedule 1 of the FOI Act OR would, on balance, be contrary to the public interest to disclose under the test set out in section 17 of the FOI Act. My findings of fact and reasons are discussed below.

[Factor 1]

I have applied [factor] of the FOI to [parts/all] of [document reference].

[Factor] of the FOI Act provides that:

'[quote the FOI Act]'

[Element 1 of factor 1]

Refer to any evidence/materials you used to base your decision on.

Explain the rational connection between findings of fact, evidence and the conclusion/decision you arrived at.

[Element 2 of factor 1]

[Element 3 of factor 1]

[Factor 2]

[Factor 3]

Example

Schedule 2, section 2.2(a)(ii)

I have applied Schedule 2, section 2.2(a)(ii) to parts of document 1.

Schedule 2, section 2.2(a)(ii) is a factor favouring nondisclosure if:

> disclosure of the information could reasonably be expected to prejudice the protection of an individual's right to privacy or any other right under the Human Rights Act 2004.

Would disclosure of the information prejudice the protection of an individual's right to privacy?

I am satisfied the disclosure of some information contained in document 1 could reasonably be expected to prejudice the protection of an individual's right to privacy.

The information I have decided not to disclose includes an individual's personal contact phone numbers and medical information. In particular, I consider the information is not well-known or publicly available and the information was provided by the individual to the agency in their personal capacity.

On this basis, I am satisfied disclosure of some information contained in document 1 could reasonably be expected to prejudice the protection of an individual's right to privacy.

Public interest considerations

The public interest test set out in section 17 of the FOI Act involves a process of balancing public interest factors favouring disclosure against public interest factors favouring nondisclosure to decide whether, on balance, disclosure would be contrary to the public interest.

When weighing up the public interest for and against disclosure under Schedule 2 of the FOI Act, I have taken into account relevant factors in favour of disclosure. In particular, I have considered the extent to which disclosure would promote the objects of the FOI Act and promote open discussion of public affairs and enhance the government's accountability.

Based on the above, I have decided that in this instance, the public interest in disclosing the information in document 1 is outweighed by the public interest against disclosure because the disclosure of information of this nature would significantly prejudice the relevant individual's privacy.

I have not taken into account any of the irrelevant factors set out in section 17(2) of the FOI Act in making this decision.

Summary of my decision

In conclusion, I have decided to:

- grant you full access to [X] document/s (document [doc ref number from schedule])
- grant you part access to [X] document/s (document [doc ref number from schedule])
- refuse access to [X] document/s (document [doc ref number from schedule])

Relevant sections of the FOI Act

[include sections 7, 16, 17, and relevant sections of Schedule 1 and/or Schedule 2]

20. Decision not made in time - letter to the Ombudsman

[Date]

Our reference: [agency reference]

Dear Ombudsman

ACCESS APPLICATION – NOTICE OF DECISION NOT MADE IN TIME

On [date received], the [name of agency] received an access application made under the *Freedom of Information Act 2016* (**FOI Act**).

The scope of the access application relates to [insert brief description of information requested].

I am writing to notify you that a decision on this access application was not made within the statutory processing period. This was because:

[insert brief processing history].

Despite the time to decide having expired, the [name of agency] will continue to deal with the application and make a decision on the access application.

The [name of agency] has also written to the applicant to advise of the deemed refusal process.

We will table this notice in the Legislative Assembly within 3 sitting days after a decision has been made on the access application.

Yours sincerely

[INSERT SIGNATURE BLOCK]

21. Third party consultation – Notice of Ombudsman review

[Date]

Our reference: [agency reference]

[Name]
[Address]

Via email only: [Email address]

Dear [Name]

NOTICE OF ACT OMBUDSMAN REVIEW APPLICATION

I am writing to tell you that an application has been made for ACT Ombudsman (**Ombudsman**) review of my decision to refuse access to information under the ACT *Freedom of Information Act 2016* (**FOI Act**) that I advised you about on [date of decision notice covering letter].

If you would like to participate, as a relevant third party, in the review process, please contact the Ombudsman's office, providing any information you would like the Ombudsman to take into account in deciding this application for Ombudsman review.

You may contact the Ombudsman by writing in one of the following ways:

Email (preferred):	actfoi@ombudsman.gov.au
Post:	The ACT Ombudsman GPO Box 442 CANBERRA ACT 2601

More information about Ombudsman review is available on the Ombudsman website at: http://www.ombudsman.act.gov.au/improving-the-act/freedom-of-information.

Please note I will give the Ombudsman a copy of your correspondence to us of [date] in which you previously outlined your objections to disclosure.

If you have any questions, please contact me on [insert telephone number] or email [positional email].

Yours sincerely

[insert signature block]