

A report on the operation of the *Freedom of Information Act 2016* for 2019-20

NOVEMBER 2020

**Report by the ACT Ombudsman, Michael Manthorpe PSM,
under s 67 of the *Freedom of Information Act 2016* (ACT)**

REPORT NO. 5 | 2020

Introduction from ACT Ombudsman

I am pleased to introduce the 2019–20 annual report made under s 67 of the *Freedom of Information Act 2016* (ACT) (FOI Act).

This year has been a challenging one for many reasons and I reflected on the importance of access to government-held information during times of crisis. The proactive release of government-held information underpins our response to COVID-19, bushfires and the other emergencies we have experienced this year.

Government decision-makers should ensure they are creating and maintaining records of their decisions, and where appropriate, for that information to be available to the public. Transparency and openness instils confidence and trust in decision-making and helps the community understand why difficult decisions are made.

This year, all nine ACT government directorates provided both mandatory and optional data for our reporting, allowing us to gain a greater understanding of the operation of the FOI Act than in previous years.

My Office has worked to draft and publish a complete set of six FOI guidelines. These guidelines provide comprehensive, practical guidance on the application of the FOI Act to assist practitioners in the ACT. They are now notifiable instruments and we will review them each year to ensure they remain up to date and relevant for users.

I would like to thank all of the ACT directorates and agencies who contributed to the development of these guidelines, as well as the invaluable advice and input we received from the Office of the Australian Information Commissioner and the Queensland Office of the Information Commissioner.

This year, my Office completed 36 Ombudsman reviews which are published on our website and AustLII. Our 47 published decisions as at 30 June 2020 contribute to a body of precedent on the FOI Act and will guide practitioners in their future decision making.

There is more to be done to ensure the FOI Act contributes to an open and transparent ACT Government, and an engaged and informed ACT community.

In 2020–21, my Office will work closely with directorates and agencies to further improve consistent and timely decision-making, according to the pro-disclosure objectives of the FOI Act. We will focus on providing education and information about Open Access requirements, guiding agencies to improve their compliance.

I look forward to working collaboratively with the ACT Government in the year ahead to achieve openness and transparency in government decision-making.

Michael Manthorpe PSM
ACT Ombudsman

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Part 1: INTRODUCTION

This report outlines the ACT Ombudsman’s insights about the operation of the FOI Act in 2019–20, as well as planned priority activities for 2020–21, to help ensure its effective operation.

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

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

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

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

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

- conducting merits reviews of FOI decisions
- granting extensions of time to decide access applications
- monitoring the operation of the FOI Act, including the publication of open access information by agencies and Ministers, and agency compliance with the FOI Act
- making open access information declarations
- publishing guidelines, which are to be periodically revised
- investigating complaints about an agency’s or Minister’s action in relation to their functions under the FOI Act.

Information about the Ombudsman’s FOI oversight role, as well as data required under s 96 of the FOI Act, is also included in the Ombudsman’s 2019–20 Annual Report, which is available on our website.³

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

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

³ See: <https://www.ombudsman.act.gov.au/publications/reports/annual-reports/act-ombudsman-annual-report-2019-20>

Part 2: OPEN ACCESS INFORMATION DECISIONS

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

The ACT Government maintains an Open Access website (www.act.gov.au/open-access) to provide the public with a central, searchable interface to access government information. Agencies can publish information on their own websites, and add a link to this information on the portal.

In June 2020, the Ombudsman finalised its Open Access Guidelines. These guidelines are notifiable instruments available on the ACT Legislation Register⁶ and on the Ombudsman's website.⁷ The guidelines help ACT agencies to better understand and meet their Open Access obligations.

This year, the Ombudsman continued monitoring ACT agencies' compliance with their Open Access obligations under Part 4 of the FOI Act. In early 2020, participating directorates and agencies completed self-assessments and we conducted desktop audits to assess their compliance. Following this, we provided targeted feedback to directorates and agencies.

Our analysis showed most directorates are aware of their Open Access obligations and publish up to date disclosure logs. While most are publishing functional information about the agency, which is useful for members of the public, the quantity and quality of information proactively published varies. In particular, some agencies do not publish the most up to date versions of their policy documents or all of their relevant policies. Most agencies did not have their own Open Access policy to guide and support staff to meet their obligations.

Due to the COVID-19 pandemic, the Ombudsman decided to postpone the next phase of planned monitoring activities, until the latter part of 2020–21, which includes more formal Open Access audits of particular directorates. We will instead provide feedback and education through quarterly newsletters and forums.

As part of our monitoring process, the Ombudsman conducted a self-assessment of our own Open Access compliance and identified several areas for improvement, notably the need for an Open Access Strategy for the Office.

This strategy has since been finalised and published,⁸ and sets out:

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

The strategy will support our staff to comply with Open Access requirements and can assist directorates and agencies to develop their own strategies.

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

⁵ See s 23 of the FOI Act for the list of categories of open access information.

⁶ See: <https://www.legislation.act.gov.au/ni/2020-368/>

⁷ See: <https://www.ombudsman.act.gov.au/publications/foi-guidelines/open-access-information-01>

⁸ See: https://www.ombudsman.act.gov.au/data/assets/pdf_file/0014/111182/ACTO-Open-Access-Strategy-updated-July-2020.pdf

Decisions to publish

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

A total of **1,430 decisions** to publish were made. This is a considerable increase from the 916 decisions published in 2018–19, indicating that agencies are continuing to proactively publish Open Access information.

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

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

We recognise this may not capture all the information published by agencies. Agencies are not expected to keep formal records or make public interest assessments on the multitude of documents they publish on a daily or weekly basis. To require this would impose an unnecessary administrative burden and be inconsistent with the purpose of the FOI Act, discouraging agencies from publishing government information.

Decisions not to publish

Generally, if Open Access information is not made available because it is contrary to the public interest information, the FOI Act requires the directorate or agency to instead publish:

- a description of the information
- the reason for this nondisclosure.

There has been a significant decrease in decisions made to **not** publish Open Access information, or to **not** publish a description of the information at all—with **11 decisions** made in 2019–20, compared to 240 decisions in 2018–19.

It is unclear if this decrease is due to directorates and agencies making fewer decisions not to publish Open Access information, or a failure to publish these decisions. We will explore this issue further in 2020–21 to ensure directorates and agencies are aware of their obligations and comply with the FOI Act.

Decisions by Directorates and Ministers

The Open Access decisions made by each of the directorates and agencies is outlined in Figure 1.⁹

As reflected in the table, the Office of the Legislative Assembly (OLA) made the highest number of decisions to publish Open Access information, with **475 decisions**, followed by the Justice and Community Safety Directorate (JACS), making **168 decisions** to publish Open Access information.

The majority of directorates and agencies did not make any decisions to withhold information which is discussed in more detail below.

As at 30 June 2020, a total of **69 decisions** were made to publish Ministerial information, including 32 Ministerial diaries, 31 Ministerial travel reports, and six Ministerial hospitality reports during the reporting period. This is an increase from the 53 decisions made in 2018–19.

⁹ This dataset includes information provided by each directorate, not including those in their portfolio. Separate data for each agency will be available in their respective annual reports.

Figure 1—Open access decisions by directorates and agencies

Directorates and agencies	Decisions to publish open access information	Decisions not to publish open access information	Decisions not to publish a description of open access information
ACT Electoral Commission	29	–	–
ACT Health Directorate	124	–	–
ACT Human Rights Commission	7	–	–
ACT Ombudsman	0	–	–
Canberra Health Services	125	4	–
Canberra Institute of Technology	83	–	–
Chief Minister, Treasury, and Economic Development Directorate	92	–	–
City Renewal Authority	19	–	–
Commissioner for Sustainability and the Environment	2	–	–
Community Services Directorate	8	–	–
ACT Office of the Director of Public Prosecutions	24	3	–
Education Directorate	29	–	–
Environment, Planning and Sustainable Development Directorate	75	2	2
Independent Competition and Regulatory Commission	27	–	–
Justice and Community Safety Directorate	168	2	–
Legal Aid	23	–	–
Major Projects Canberra	45	–	–
Office of the Legislative Assembly	475	–	–
Suburban Land Agency	30	–	–
Transport Canberra and City Services	94	0	–
University of Canberra	1	–	–

Part 3: INFORMAL REQUESTS FOR INFORMATION

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

While agencies are not required to report on informal requests received or related outcomes, as to do so would impose an unnecessary administrative burden, directorates and agencies reported that **123 formal access applications** were withdrawn and **71 access applications** were resolved outside of the formal FOI process.

While we cannot ascertain if all of these matters were finalised after information was provided informally, it does suggest a large number of applications are being resolved outside of the FOI process, as intended by the FOI Act. The Ombudsman encourages directorates and agencies to informally release information where possible, rather than requiring applicants to seek information through the FOI process.

Part 4: ACCESS APPLICATIONS

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

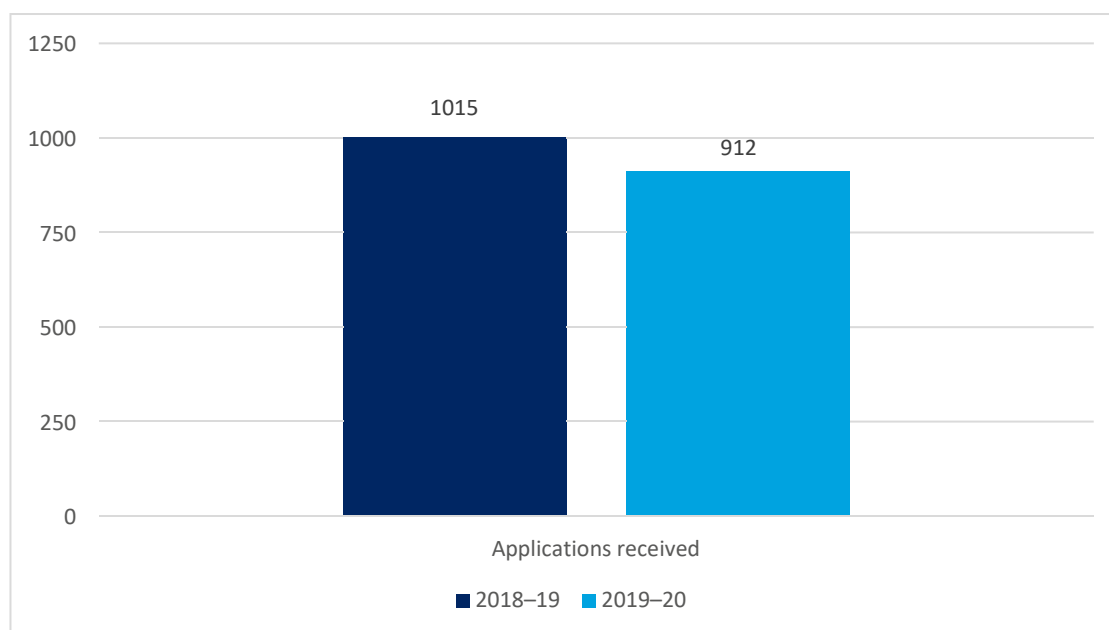
An agency or Minister can refuse access to information in circumstances where it is assessed as contrary to public interest information. They can also refuse to deal with an access application, or refuse to confirm or deny that information is held subject to a range of reasons.¹⁰

Applications made

During this reporting period, **912 access applications** were made to ACT government agencies.

As shown in Figure 2, this is a **10 per cent decrease** from the **1,015 access applications** received in the 2018–19 financial year.

Figure 2—Access applications received by directorates

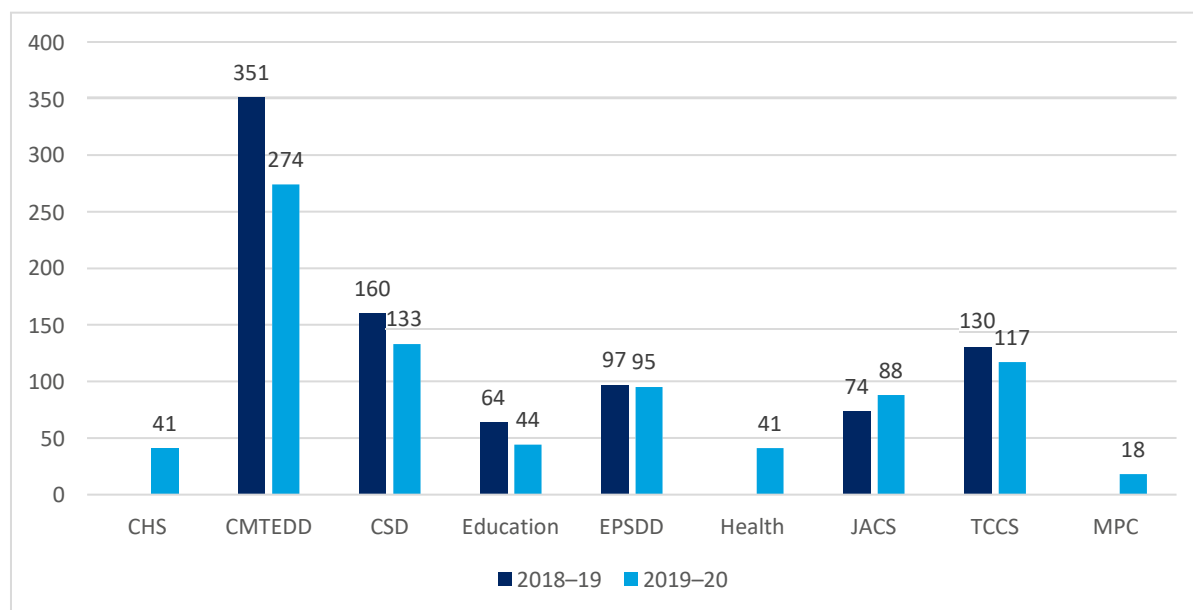


The **10 per cent decrease** from the 2018–19 figures is the result of small decreases in the number of access applications received by all of the directorates, with the exception of JACS, which experienced increases in applications received in 2019–20.

Figure 3 reflects the number of access applications received by directorate in 2019–20.

¹⁰ These being that the information is contrary to the public interest information, and doing so would reasonably be expected to: endanger the life or physical safety of a person, be an unreasonable limitation on a person's rights under the *Human Rights Act 2004*, or significantly prejudice an ongoing criminal investigation. See s 35 of the FOI Act.

Figure 3—Access applications received by each directorate



Note: In 2018–19, we reported Canberra Health Services (CHS) and the Health Directorate (Health) data together (102 access applications received). This year we are reporting the data separately as they are now separate directorates. Major Projects Canberra (MPC) is a new directorate that was established in 2019.

Application outcomes

During the reporting period, **676 decisions** were made on access applications by directorates and agencies. This is a **20 per cent decrease** from the previous financial year when 840 applications were decided under the FOI Act.

As outlined at Figure 4, of the 676 decisions made on access applications:

- *Full access* was granted in 163 decisions (24 per cent)—with the agency disclosing all information identified within the scope of the access application.
- *Partial access* was granted in 387 decisions (57 per cent)—with some information redacted prior to the release because it was assessed as contrary to the public interest to disclose.
- *Access was refused* in 60 decisions (9 per cent)—with the agency deciding the information was contrary to the public interest information or alternatively, refusing to deal with the application, or to confirm or deny that information was held.
- Information was assessed as *not being held* by the agency in 66 decisions (10 per cent)—with an agency expected to conduct all reasonable searches to locate the information requested prior to determining that it cannot be located or does not exist.

It is positive to see an increase in decisions to grant full access and a decrease in the number of decisions to refuse access, indicating a shift towards the pro-disclosure objectives of the ACT.

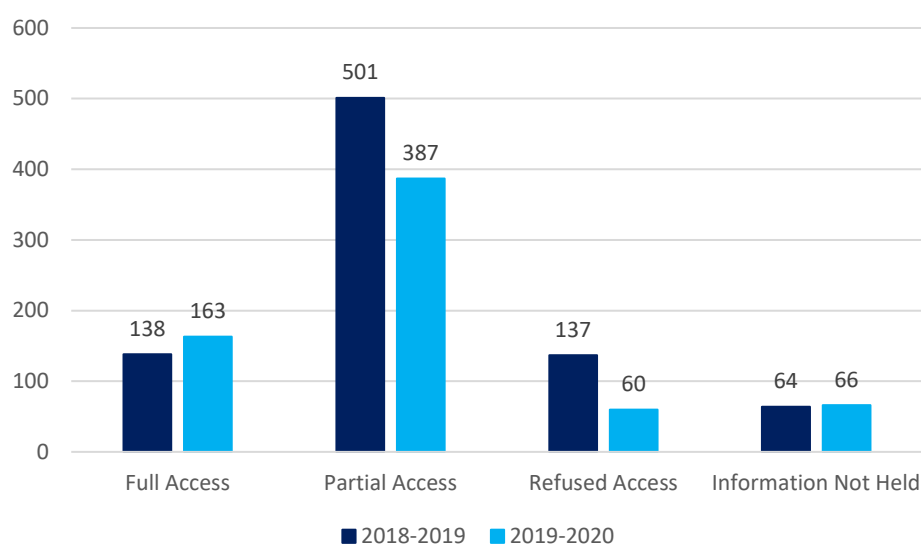
Figure 4 excludes the **123 access applications** that were **withdrawn** by the applicant before a decision was made by the agency, and the **75 access applications** that were **transferred** from one agency to another to deal with.

Our analysis of other jurisdictions in 2018–20 indicated applicants in Australia are more likely to be granted access in part than access in full, and this is a growing trend.¹¹ While we saw increases in the percentage of full access in the ACT this year, it is still significantly less than the partial releases, see Figure 4.

We explored this issue further in 2019–20. Our analysis shows these figures are disproportionately impacted when agencies make minor redactions of personal information (such as personal contact numbers). This results in the decision being classified as a partial release, even if all the substantive information sought was in fact released. If this is the case, where the applicant agrees, agencies could improve their initial scoping activities with the applicant, to ensure only the information they are seeking is included in the scope of the access application. For greater transparency about this issue, we are considering collecting additional data in future periods, regarding the number of decisions where there is a partial release due to minor redactions to personal information.

The Ombudsman will continue to monitor this issue in 2020–21.

Figure 4—Outcomes of decided access applications



Reasons for refusal

This reporting period all directorates provided data about the reasons they refused access to information, in full or in part.

The three factors more commonly relied on by agencies to withhold information under Schedule 1 of the FOI Act were:

- information disclosures prohibited by law in 64 decisions (30 per cent)
- information that is subject to legal professional privilege in 41 decisions (20 per cent)
- law enforcement and public safety information 39 decisions (19 per cent).

¹¹ See, for example, discussion by the NSW IPC in its *Report on the Operation of the Government Information (Public Access) Act 2009 2017–2018* at: https://www.ipc.nsw.gov.au/sites/default/files/2019-05/Report_on_the_Operation_of_the_Government_Information_Act_2009_2017_2018_plus_erratum_1.pdf and in the 2017–18 annual report of the Office of the Victorian Information Commissioner at <https://ovic.vic.gov.au/wp-content/uploads/2018/09/OVIC-2017-18-Annual-Report.pdf>

The three factors most commonly relied on by agencies to withhold information under Schedule 2 of the FOI Act were:

- prejudice the protection of an individual’s right to privacy or any other right under the *Human Rights Act 2004* in 358 decisions (57 per cent)
- prejudice trade secrets, business affairs or research of an agency or person in 89 decisions (14 per cent)
- prejudice an agency’s ability to gain confidential information in 48 decisions (8 per cent).

We will monitor this data in the coming years to identify trends and compare with the factors that arise in decisions that are subject to Ombudsman review.

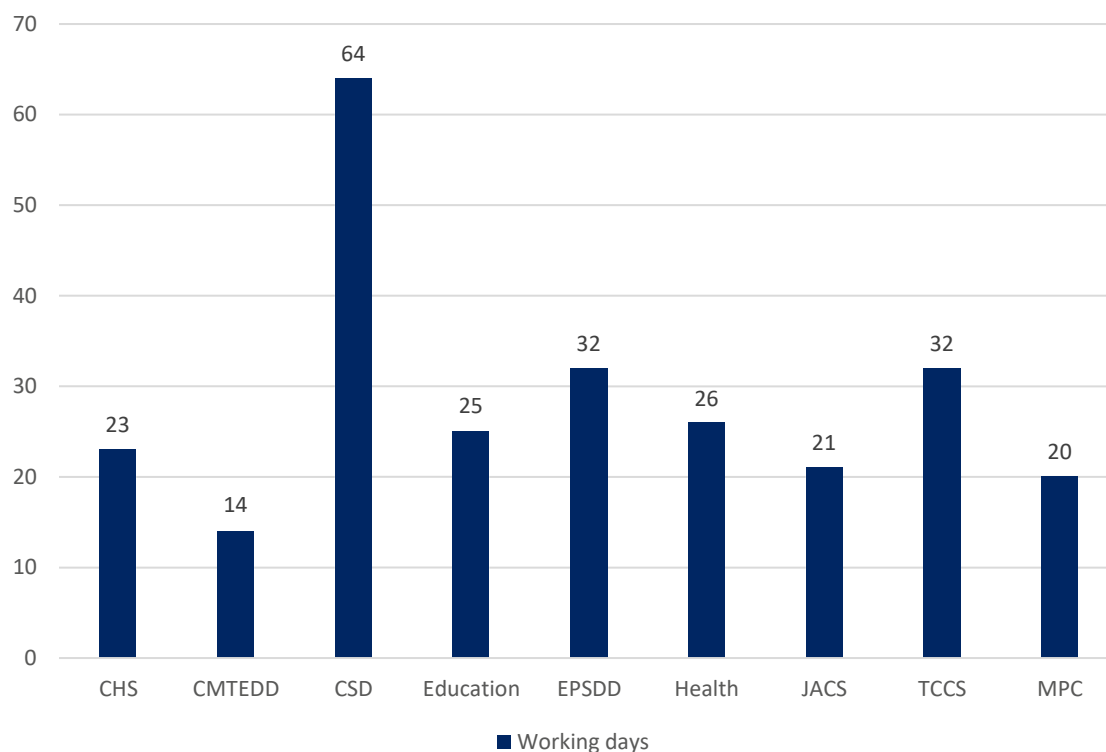
Processing times

Under the FOI Act, an access application must be decided within 20 working days, unless an extension of time is granted, or a third party needs to be consulted. Where a third party is consulted, agencies have an additional 15 working days to decide the access application.

Extensions of time will apply where an agency or Minister has requested further time from an applicant or the Ombudsman, and the request is approved. Agencies can seek extensions of time for **up to 12 months** from the date of the application from the applicant. Any longer extensions must be sought from the Ombudsman. If an applicant refuses an extension request, the agency can also seek an extension from the Ombudsman.

Figure 5 below shows the average processing times, in working days, by each directorate.

Figure 5—Average processing time by each directorate



Access applications processed within time

During the reporting period, **96 per cent of decisions** on access applications were decided within the statutory timeframes—that is, within the standard timeframe or where an extension was granted by the applicant or the Ombudsman.

Access applications decided without any extensions of time accounted for **65 per cent**. A further **30 per cent** of applications were processed where the applicant approved an extension request. Applications processed with an Ombudsman extension of time accounted for **1 per cent**. The remaining **4 per cent** of access applications became deemed refusal decisions, which are discussed in more detail below.

There were **120 access applications** ‘on hand’ at the end of the reporting period however the Ombudsman does not have visibility over the length of time these application have been open.

Extensions of time by the Ombudsman

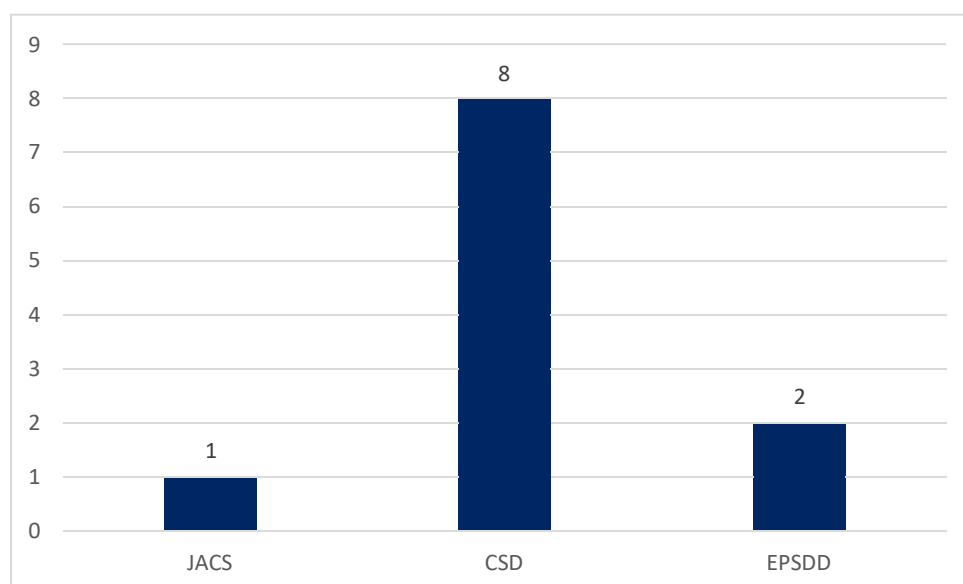
Following amendments to the FOI Act in 2019, the Ombudsman now has further discretion to grant an extension of time to an agency to decide an access application. An extension can be granted if the Ombudsman believes it is not reasonably possible for the access application to be dealt with within the timeframe, because the application:

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

The amendments to the FOI Act removed the cap on the length of time the Ombudsman can grant an extension and allows the Ombudsman to impose conditions to the extension granted. Once granted, the Ombudsman can cancel or amend the extension if the directorate does not comply with the conditions imposed.

During the reporting period, there were 11 applications made to the Ombudsman for an extension of time. The applications made by agency are shown in Figure 6.

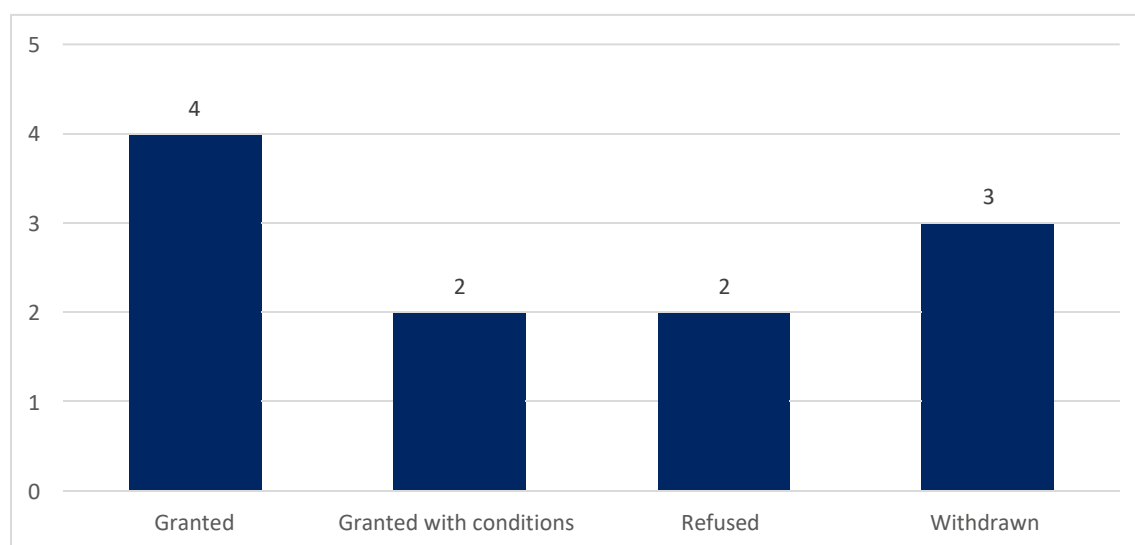
Figure 6—Extension of time requests to the Ombudsman



As shown in Figure 7, after assessing these requests, the Ombudsman granted six requests and refused two. Of the applications granted, the Ombudsman imposed additional conditions on two requests. The remaining three requests were withdrawn by the agency before a decision was made.

Of the requests made that were decided by the Ombudsman, the additional time requested varied. JACS and the Environment, Planning and Sustainable Development Directorate (EPSDD) requested an additional 10 working days to process each application, and the Community Services Directorate (CSD) requested 45 working days (three applications), 90 working days (one application) and 111 working days (one application).

Figure 7—Extension of time outcomes



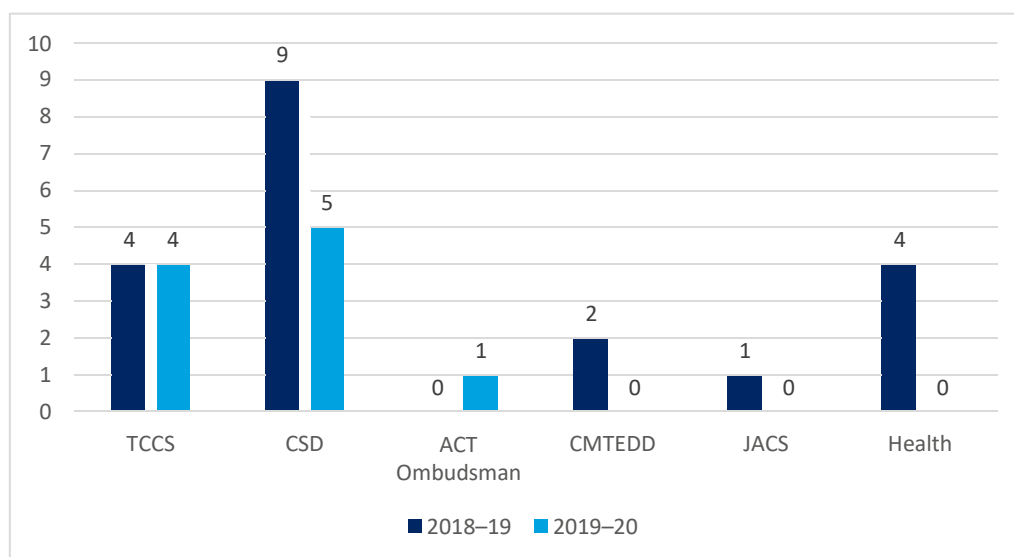
Deemed refusal decisions

Where the statutory timeframes are not met, and an extension of time has not been obtained, an agency or Minister’s decision is taken (deemed) to be a refusal to give access to the government information requested. Under the FOI Act, the Ombudsman must be notified of this ‘deemed refusal’, and a copy of the notice tabled in the Legislative Assembly. This enables the applicant to apply for Ombudsman review.

During this reporting period, the Ombudsman was notified of **20 decisions** not made within time, which were deemed to be refused by four directorates, including EPSDD, CSD and TCCS and the ACT Ombudsman’s Office. The agencies notified the Ombudsman and tabled a decision notice in the Legislative Assembly. This is a small increase when compared with 16 decisions notified to the Ombudsman in 2018–19.

Directorates and agencies reported **10 deemed refusal decisions**, from CSD, Transport Canberra and City Services (TCCS) and the ACT Ombudsman, as shown in Figure 8.

Figure 8—Deemed refusal decisions reported



We analysed the discrepancy between the number of deemed refusals reported compared to the number of deemed refusals notified to our Office in the same reporting period. This appears to be a result of the timing of Ombudsman notifications, which can sometimes occur in the financial year following the decision, particularly if the deemed refusal occurred at the end of one financial year.

While s 39 of the FOI Act does not provide clear timeframes on when the Ombudsman notification should occur, we consider it is best practice to complete this notification as soon as practical after a deemed refusal decision occurs, particularly as this is a reviewable decision.

Our recently published FOI Guidelines provide details about these reporting requirements and draft templates for reporting to assist agencies.

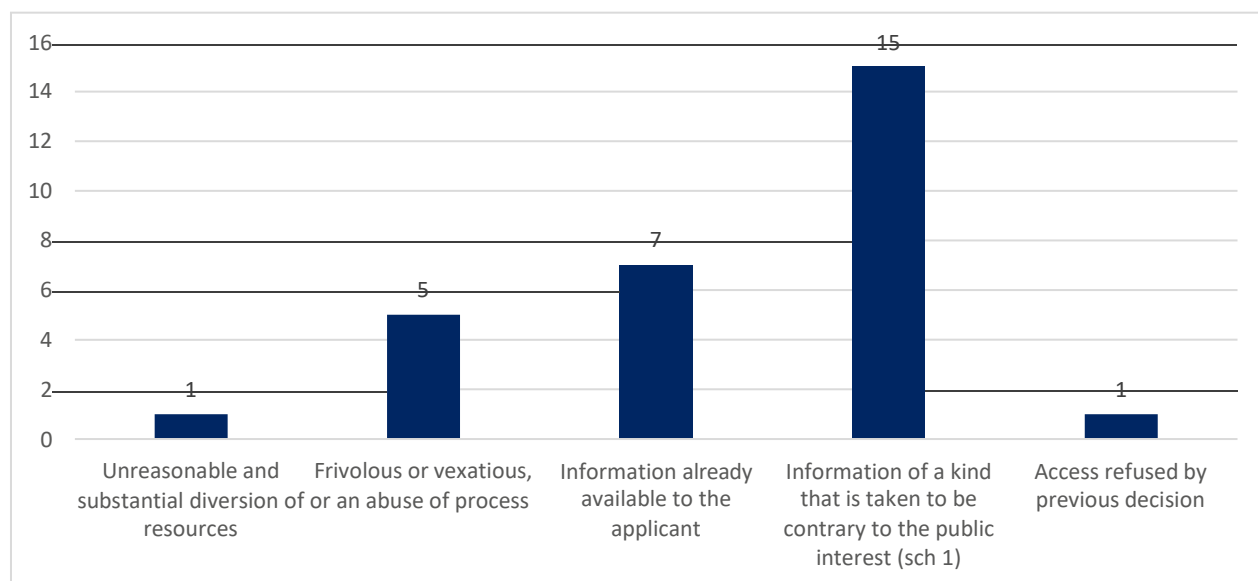
Refusing to deal with access applications

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

In 2019–20, six directorates relied on this provision to refuse to deal with access applications including the Chief Minister, Treasury and Economic Development Directorate (CMTEDD), JACS, CHS, Health, CSD and TCCS.

Figure 9 shows the reasons decision-makers decided not to deal with an access application, the most common being, the information sought is of a kind that is taken to be contrary to the public interest to disclose under Schedule 1 of the FOI Act (52 per cent), followed by information that is already available to the applicant (24 per cent).

Figure 9—Reasons for refusing to deal with an access application



Fees

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

The fees that can be charged where considered appropriate have been determined by the Attorney-General and are outlined in the *Freedom of Information (Fees) Determination 2018*.¹²

The only agency to charge fees in 2019–20 was the Suburban Land Authority, charging a total of \$112.70 for one access application. No other fees or charges in relation to processing access applications were collected by agencies or Ministers.

The ACT Ombudsman similarly did not charge any fees for processing access applications received in 2019–20.

Part 5: AMENDMENT OF PERSONAL INFORMATION

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

In this reporting period, no formal applications were made to amend or annotate personal information under the FOI Act.

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

¹² See: <https://www.legislation.act.gov.au/di/2018-197/>.

Part 6: OMBUDSMAN REVIEWS

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

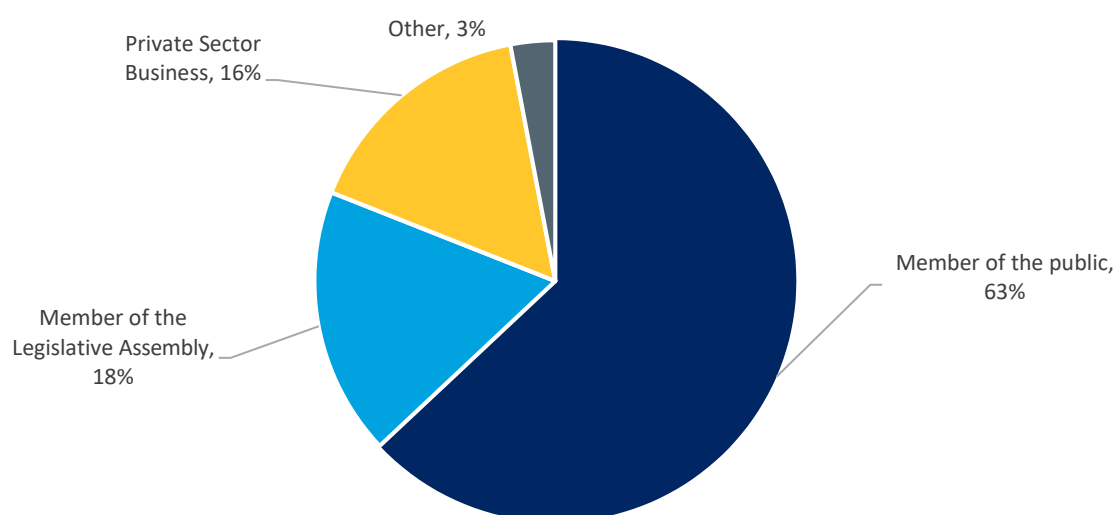
Applications received

During the reporting period, the Office received 38 applications for Ombudsman review—two less than the 40 received in 2018–19.

Types of review applicants

The majority of Ombudsman review applications received in 2019–20 were made by members of the public (63 per cent), followed by Members of the Legislative Assembly (18 per cent) and private sector businesses (16 per cent).

Figure 10—Who applied for review



Reviews to date involved consideration of a variety of public interest factors including personal privacy, business affairs and trade secrets and deliberative processes of government.

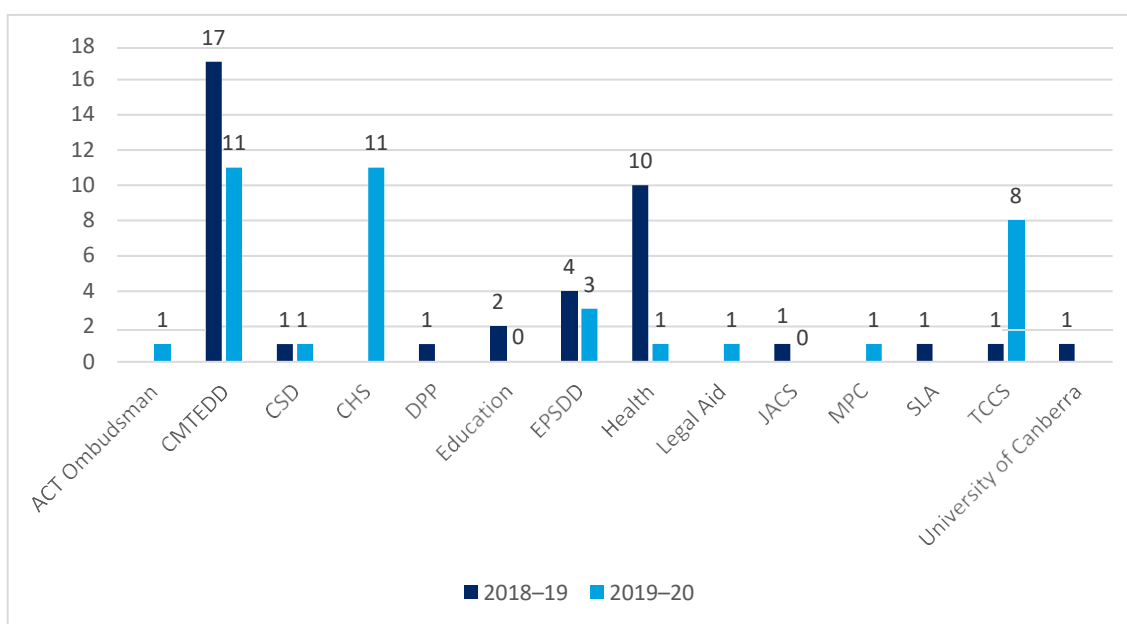
Agency participation in reviews

Figure 11 provides a breakdown of the review applications received by ACT agency for 2019–20, compared with 2018–19.

The numbers reflect that review applications increased for TCCS, but other agencies saw a reduction in reviews, including CMTEDD, JACS and EPSDD.

Legal Aid, MPC and the ACT Ombudsman also received reviews for the first time this year.

Figure 11—Review applications by ACT agency



Applications finalised

During the reporting period, **36 review matters** were finalised:

- 22 formal decisions were made¹³
- 10 were withdrawn, following informal resolution processes
- four were closed due to no reasonable prospects of success.

These outcomes are explained in more detail below.

Informal resolution

Where possible, before proceeding to a formal decision, the Ombudsman seeks to resolve reviews through informal resolution.

This involves clarifying, and in some cases, refining the scope of an application for review and working with both parties to resolve the dispute. For example, if the applicant is focused on one particular document, we may ask the agency for their view on the release of that particular document, rather than review the whole matter.

Where cases are assessed as unlikely to result in a change of outcome, we use case officer assessments to attempt to resolve matters before progressing to a final decision, by presenting the parties with information on the likely outcomes of the review and options for resolution. This approach has reduced the overall timeframe for our reviews, and saves the applicant additional legal fees where they have a legal representative.

¹³ See: <https://www.ombudsman.act.gov.au/improving-the-act/freedom-of-information/foi-review-decisions>

Formal decision outcomes

As of 30 June 2020, a total of **47 Ombudsman review decisions** were published.¹⁴ These decisions provide agencies and applicants with guidance on the FOI Act including the application of the public interest test.

Of the 22 reviews finalised with a decision in 2019–20, the Ombudsman:

- confirmed the agency’s decision in 10 cases
- set the decision aside and substituted a new decision in six cases
- varied the decision in six cases.

Review timeframes

The FOI Act requires Ombudsman reviews to be completed within 30 working days, however up to 30 additional working days is provided to undertake informal resolution of a review matter, or if a matter is referred by the Ombudsman for mediation.

In 2019–20, of the 36 review matters that were finalised:

- 25 per cent were finalised within 6 weeks
- 42 per cent were finalised within 12 weeks
- 100 per cent of reviews were finalised in less than six months.

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

Case study

An applicant lodged an Ombudsman review after an agency refused access to information about the valuation of a block of land. The agency refused access to two documents on the basis that disclosure would prejudice the economy of the Territory, the trade secrets, business affairs or research of a person and the competitive commercial activities of an agency.

Our review clarified the scope of the applicant’s request and found the information at issue could not reasonably be expected to prejudice the economy of the Territory, as a result of disclosing the valuation of a single property. We found the competitive commercial activities of an agency could not reasonably be expected to be prejudiced and trade secrets, business affairs and research was not applicable to the re-scoped information at issue.

The decision also clarified that information which may hold commercial value at one point in time must be considered in the current context.

¹⁴ See: <http://www8.austlii.edu.au/cgi-bin/viewdb/au/cases/act/ACTOFOI/>

Part 7: COMPLAINTS

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

During this reporting period, the Office received 11 complaints relating to an agency’s functions under the FOI Act, an increase from the five complaints received in 2018–19.

These complaints were about agencies’ actions performed under the FOI Act including, the time taken to process access applications, potential conflicts of interest and failing to publish Open Access information.

Out of 11 complaints, the Office decided to investigate four complaints.

The outcomes from these complaints included: better explanations for the complainants (two matters), an agency reconsidering a decision (one matter) and Open Access information being published (one matter).

Case Study

A complainant contacted the Ombudsman after being unable to access a copy of an agency’s policy document they considered to be Open Access information.

We commenced an investigation of this complaint and found the policy document had not been published under the Open Access scheme, as required. We recommended the agency review its Open Access practices and provide access to the applicant of an updated version of the policy document.

As a result of this complaint, the agency developed its own Open Access policy to support its staff to identify and meet Open Access requirements under the FOI Act.

Part 8: THE YEAR IN REVIEW

Oversight agency activities

In addition to our delivery on our statutory functions under the FOI Act, our Office undertook additional educational and engagement activities, which are discussed in more detail below.

Ombudsman FOI guidelines

This reporting period we finalised and published six Ombudsman FOI guidelines, as provided for under the FOI Act.

The guidelines were finalised in May 2020 and subsequently published as notifiable instruments¹⁵ and they are also available on the ACT Ombudsman website:¹⁶

- Open Access Information (guideline 1)
- Dealing with informal requests for government information (guideline 2)
- Dealing with access applications (guideline 3)
- Considering the public interest (guideline 4)
- Amending personal information (guideline 5)
- Ombudsman reviews (guideline 6).

These guidelines give guidance on the interpretation, operation and administration of the FOI Act to help ACT government decision-makers promote its pro-disclosure objectives. The Office will continue to monitor and update the FOI Guidelines to ensure they remain a useful resource for FOI practitioners.

Open Access monitoring

In 2019–20, our Office worked with participating agencies to monitor their compliance with Open Access requirements, including a self-assessment, followed by desktop audits by our Office. The aim of these activities is to ensure ACT agencies are:

- proactively publishing information in the specified categories, or explain their reasons not to publish where required
- publishing the information in an accessible manner
- ensuring published information is up to date and complete.

The Ombudsman provided targeted feedback to directorates and agencies and we will consider more formal audits in 2020–21.

Details of our findings are discussed above, in *Part 2* of this report.

Ombudsman FOI practitioners' forums

The Office conducts forums for ACT FOI practitioners to promote best practice in ACT Government agencies.

In 2019–20, we conducted two forums, which gave participants the opportunity to discuss the operation of the FOI Act and best practice approaches, including applying the public interest test.

The forums were also used to consult with agencies about the development of the Ombudsman FOI guidelines. For agency representatives, the forums are an opportunity to build their FOI

¹⁵ See: <https://www.legislation.act.gov.au/ni/2020-368/>

¹⁶ See: <https://www.ombudsman.act.gov.au/improving-the-act/freedom-of-information/information-for-government-agencies>

networks, share their experiences with others and gain an insight into how the Ombudsman views the operation of the FOI Act and lessons learnt from our review work. For the Ombudsman's Office, they provide an opportunity to share our observations about the FOI Act's implementation and facilitate discussion to help us identify challenges, opportunities and areas of capability development in the agencies we oversee.

Additional forums were planned for early and mid-2020, but were unable to proceed due to COVID-19. The Office is considering alternative ways to continue these forums, either virtually, or in smaller groups in 2020–21. We will continue to circulate our FOI newsletter¹⁷ to FOI practitioners.

Insights regarding agency decisions and behaviours

Following the second full year of the operation of the FOI Act, we make observations below on trends in FOI decision-making and agency compliance with the FOI Act. These observations are based on the data provided by directorates and agencies, our review function, as well as feedback from our engagement with ACT government agencies and the ACT community during the reporting period.

Open Access culture and reporting

This year we engaged further with agencies about their Open Access compliance, following the finalisation of our FOI guidelines. As detailed in *Part 2* of this report, we found some smaller agencies were not aware of all of their Open Access requirements. Directorates and agencies had areas for improvement, which includes developing ways to consistently identify, publish and update policy documents and developing Open Access policies to guide and support staff.

We consider there is more work to do in promoting and supporting an Open Access culture in the ACT through education and individualised feedback, which we commenced this year and intend to continue in 2020–21.

Open Access portal

During 2019–20, we received feedback from several directorates and agencies that the portal can be difficult to navigate and time-consuming to upload documents. We were advised that links to documents published through the portal can quickly become out of date. We experienced similar issues when searching for specific information through the portal.

For this reason, we understand a number of directorates and agencies prefer to publish documents on their own websites instead of the portal. In our FOI guidelines, we advise that as long as agencies publish information in one location—either through the portal, or on their website and it is accessible, we consider the requirements to publish information under the FOI Act are met.

The ACT Government may wish to consider if any improvements can be made to the Open Access portal to make it easier for agencies and members of the public to use and find information as intended by the FOI Act.

Third party consultation

Similar to 2018–19, we again identified in a number of FOI reviews, that agencies are not meeting the third party consultation requirements under the FOI Act. There continues to be variances in how individual directorates and agencies carry out third party consultation.

Last year, we noted this outcome is not surprising as the legislative provisions about third party consultation are broad. This year, we provided further clarification about this topic in our

¹⁷ <https://www.ombudsman.act.gov.au/news-and-events/news/first-act-foi-newsletter-released>

guidelines, in particular, guideline three—dealing with access applications.¹⁸ We encourage decision-makers to record their decisions regarding consultation, including identifying who should be consulted. This means if the matter is reviewed, there are records to evidence what consultation occurred.

We will continue to discuss best practice tips in our future newsletters and forums for practitioners to provide additional guidance on this topic.

Decision-making and the public interest balancing test

In 2019–20, we observed through our reviews, further improvements in decisions on access applications prepared by agencies.

When agencies are deciding if information is contrary to the public interest to disclose, they are required to conduct a public interest test, set out in s 17 of the FOI Act. This test requires the decision-maker to identify all factors favouring disclosure, and the factors favouring non-disclosure, and conduct a balancing test to determine if information is in the public interest to disclose.

Most agencies are correctly identifying the relevant factors favouring *non-disclosure* when applying the public interest balancing test. We observe that not all agencies are identifying all of the factors favouring *disclosure*, or where they do, how these factors apply to the information at issue. In recent reviews, additional factors favouring disclosure changed the outcome of the balancing test, and consequently, the agency's decision regarding the access application.

The Office will continue to work with agencies to improve FOI decision-making and the application of the public interest test in their decision notices.

Part 9: THE YEAR AHEAD

The Ombudsman will continue to work with agencies and Ministers to encourage the proactive release of government information, according to the spirit and objectives of the FOI Act objectives and to promote best practice in FOI decision-making.

One priority for the Office will be to develop education tools, including forums and newsletters, to complement the FOI guidelines to further support FOI practitioners in the ACT.

Another focus will be to continue monitoring Open Access compliance in the ACT, through education and more formal audits, based on the tailored feedback provided to agencies and directorates in mid-2020. In addition, we will continue to:

- conduct reviews independently, efficiently and, wherever possible, informally resolve disputes
- promote best practice in our decision-making and case management during reviews
- raise awareness of the ACT community's right to access government information and the Ombudsman's oversight function.

¹⁸ See: <https://www.ombudsman.act.gov.au/publications/foi-guidelines/3.-ombudsman-guidelines-dealing-with-access-applications>

Part 10: GLOSSARY

Acronym	Agencies and directorates
CHS	Canberra Health Services
CIT	Canberra Institute of Technology
CMTEDD	Chief Minister, Treasury and Economic Development Directorate
CRA	City Renewal Authority
CSD	Community Services Directorate
DPP	ACT Office of the Director of Public Prosecutions
EC	ACT Electoral Commission
Education	ACT Education Directorate
EPSDD	Environment, Planning and Sustainable Development Directorate
Health	ACT Health
HRC	ACT Human Rights Commission
ICRC	Independent Competition and Regulatory Commission
JACS	Justice and Community Safety Directorate
LA	Legal Aid
MPC	Major Projects Canberra
OLA	Office of the Legislative Assembly
S&E	Commissioner for Sustainability and the Environment
SLA	Suburban Land Authority
TCCS	Transport Canberra and City Services Directorate
UC	University of Canberra