

A REPORT ON

# THE OPERATION OF THE FOI ACT

# 2018-19

30 September 2019

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

REPORT NO. 4|2019



## Introduction from ACT Ombudsman

I am pleased to introduce the 2018–19 annual report made under s 67 of the *Freedom of Information Act 2016* (FOI Act).

For the first time, this report covers a full financial year of operations under ACT’s Freedom of Information (FOI) scheme, which was introduced on 1 January 2018. Whole-of-government FOI statistics were also provided to my Office this year, by all ACT Government agencies subject to the FOI Act, in order to inform this report.

As reflected in this report, agency activities have matured during 2018–19, now the FOI Act has been in place for more than 18 months, with:

- only a small percentage of access applications finalised outside of statutory timeframes, despite an increase in access application numbers
- decision-makers appearing more confident to engage with the new legislation and in particular, its ‘public interest test’ which can involve the complex balancing of competing public interest factors.

2018–19 was also a year of significant growth in terms of the FOI oversight role for my Office with:

- the drafting of new Ombudsman FOI guidelines now underway
- an FOI practitioners forum established and maintained to promote best practice
- 24 Ombudsman FOI review decisions published on our Ombudsman website
- a new brochure available to educate the ACT community about how to access government information.

In addition to this, my office launched the ACT Ombudsman Facebook page and a separate ACT Ombudsman phone number to ensure our services, as the independent FOI oversight body, are more visible and accessible to the ACT community.

We have also arranged for our FOI review decisions to be published on *AustLII*, facilitating greater public access and awareness of the approach taken to FOI in the ACT.

There is, nevertheless, 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 a time where there is an increased hunger for transparency and accountability in government, access to information is particularly critical to help restore a sense of trust in our public institutions.

As a result, in 2019–20, my Office will continue to work closely with agency decision-makers to ensure they make consistent decisions in line with the pro-disclosure objectives of the FOI Act. We will continue to expand our work with the ACT community—ensuring they understand their right to access government information, and the most efficient ways to do so.

On 1 August 2019, the *Freedom of Information Amendment Bill 2019* was introduced to the ACT Legislative Assembly. If passed, this bill will make significant changes to the FOI Act in terms of how agencies and Ministers process access applications and how my Office conducts FOI review processes. I look forward to working with the ACT Government to ensure that any such changes are implemented effectively.

Michael Manthorpe PSM  
ACT Ombudsman

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## Part 1: INTRODUCTION

The ACT FOI Act is underpinned by the principle that the public's right to government information is essential for the proper working of representative democracy. Its focus is on making government information more readily accessible to the public, and it is intended to be administered with a pro-disclosure bias.

Every person has a right to obtain access to information held by the government under the FOI Act.<sup>1</sup> Agencies and Ministers must give access to government information, except in limited circumstances,<sup>2</sup> unless disclosure would be contrary to the public interest.

- This includes information that is held by government directorates and agencies, ministers, government owned corporations (with some exceptions), public hospitals and health services, as well as, public authorities and public universities enacted under ACT laws.<sup>3</sup>
- Examples of government information an agency may hold include personal information about individuals, information relating to policy and public programs, and financial information.

A number of pathways for accessing information are provided for under the FOI Act. This report outlines how such pathways were used during 2018–19, and analyses the data available to consider whether the pro-disclosure objectives of the FOI Act are being met. As the FOI Act has only been in place for 18 months, the Ombudsman's ability to identify trends or issues of potential concern remains limited. Additional data will be requested from agencies for the 2019–20 annual FOI report to enable more comprehensive data analysis to be undertaken.

Pathways for accessing government information in the ACT include:

- accessing information already available via the pro-active publishing of government information required under the FOI Act—see *Part 2 Open access information decisions*
- making an informal request for information—see *Part 3 Informal requests for information*
- lodging a formal access application under the FOI Act—see *Part 4 Access applications*
- lodging a request to amend personal information—see *Part 5 Amendment of personal information*

Information older than 20 years can also be requested under the public access provisions of the *Territory Records Act 2002*.<sup>4</sup>

Where an individual is unhappy with the actions of an ACT Government agency or Minister under the FOI Act, they can seek assistance from the Ombudsman, which maintains independent oversight of the operation of the FOI Act. This includes the option to:

- lodge an application for review of a decision on an application—see *Part 6 Ombudsman review*, or
- make a complaint about an agency or Minister's actions (or failure to act) under the FOI Act—see *Part 7 FOI complaints*.

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<sup>1</sup> This is subject to some exceptions, such as information under s 12 of the *Health Records (Privacy and Access) Act 1997* where there is no right of access under the FOI Act.

<sup>2</sup> See, for example, paragraphs: 35(1)(b) where the information is not held by the respondent, 35(1)(d) where a respondent can refuse to deal with an application under s 43 and 35(1)(e) where a respondent can refuse to confirm or deny that the information is held by the respondent.

<sup>3</sup> The FOI Act includes a comprehensive definition of agency (s 15).

<sup>4</sup> <https://www.archives.act.gov.au/home>

This report also outlines the Ombudsman’s insights regarding the operation of the FOI Act in 2018–19 and planned priority activities for 2019–20 to help ensure the effective operation of the FOI Act—see:

- *Part 8 The year in review*
- *Part 9 The year ahead.*

Information about the Ombudsman’s FOI oversight role is also included in less detail in the Ombudsman’s 2018–19 Annual Report to ensure the report provides a complete picture of the services we provide to the ACT community. This will be available on the Ombudsman website in October 2019.

## Part 2: OPEN ACCESS INFORMATION DECISIONS

The FOI Act is designed to make information held by the government more accessible. The intention of this scheme is that formal access applications for information should become a last resort, with a much greater focus placed on the **pro-active** disclosure of information.<sup>5</sup>

As a result, the FOI Act requires government to pro-actively release information where possible—that is, they 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, budget papers and agency disclosure logs.<sup>6</sup>

If this ‘push model’ for access to information is working effectively, formal requests for access to some government information will reduce. The ACT community will also be able to access government information promptly and at the lowest reasonable cost.

The ACT Government maintains an Open Access website ([www.act.gov.au/open-access](http://www.act.gov.au/open-access)) to provide the public with a central, searchable interface to access government information.

Draft Ombudsman FOI guidelines on Open Access Information are now available for ACT agencies to help them meet their obligations in this area. This includes a self-assessment tool to enable them to consider their levels of compliance and areas for possible improvement.

### Decisions to publish

During the reporting period, agencies and Ministers have continued to publish open access information on their websites and on the Open Access website.<sup>7</sup>

A total of **916 decisions** to publish were made. This is a significant reduction from the first six months of the operation of the Open Access Information Scheme when 2,774 decisions to publish were made.

It is anticipated that a large number of the documents published in the initial implementation phase would still be current, and hence, the decrease in decisions is expected. Future reporting periods will, however, allow for identification of annual trends in this area.

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<sup>5</sup> 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](https://www.legislation.act.gov.au/View/es/db_53834/20160505-63422/PDF/db_53834.PDF)

<sup>6</sup> See s 23 of the FOI Act for the list of categories of open access information.

<sup>7</sup> Only information that came into existence on or after 1 January 2018 needs to be published as open access information.

The Ombudsman also recognises the above figures are reflective of the decisions made by agencies to publish information, as opposed to the number of documents that were published by an agency or Minister, with agency reporting on decisions to publish restricted to documents that were:

- published on the agency disclosure log
- registered on the Open Access website
- any other documents where a formal assessment of whether it would be contrary to the public interest to release the information was made i.e. in situations where there are possible factors against disclosure to be considered.

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 do so would impose an unnecessary administrative burden and be inconsistent with the purpose of the FOI Act, discouraging agencies from publishing government information.

Agency attitudes to publication will be explored further as part of open access compliance monitoring activities undertaken by our Office in 2019–20. In the interim, a recent survey of community attitudes to FOI in the Act, seems to reflect a positive culture of pro-active release of information in the ACT.

## Decisions not to publish

There has, however, been a significant increase in decisions made to withhold information, or to not publish a description of the information at all—with **240 decisions** made in 2018–19, compared to two decisions in the first six months of the operation of the scheme.

This may reflect more complex assessment decisions being delayed beyond the original first six months of implementation. This matter will be further explored as part of open access compliance monitoring activities undertaken by our Office in 2019–20, to ensure that decisions being made are consistent with the pro-disclosure objectives of the FOI Act.

## Decisions by Directorates and Ministers

The Open Access decisions made by each of the directorates is outlined in the graph below.<sup>8</sup>

As reflected in the graph, the Chief Minister, Treasury and Economic Development Directorate (CMTEDD) made **351 decisions** to publish Open Access Information, the most of any agency or Minister. They also made the most decisions to withhold information—with 11 decisions not to publish information, and 160 decisions to not publish a description of the open access information.

The Education Directorate did not report any decision made during this reporting period.

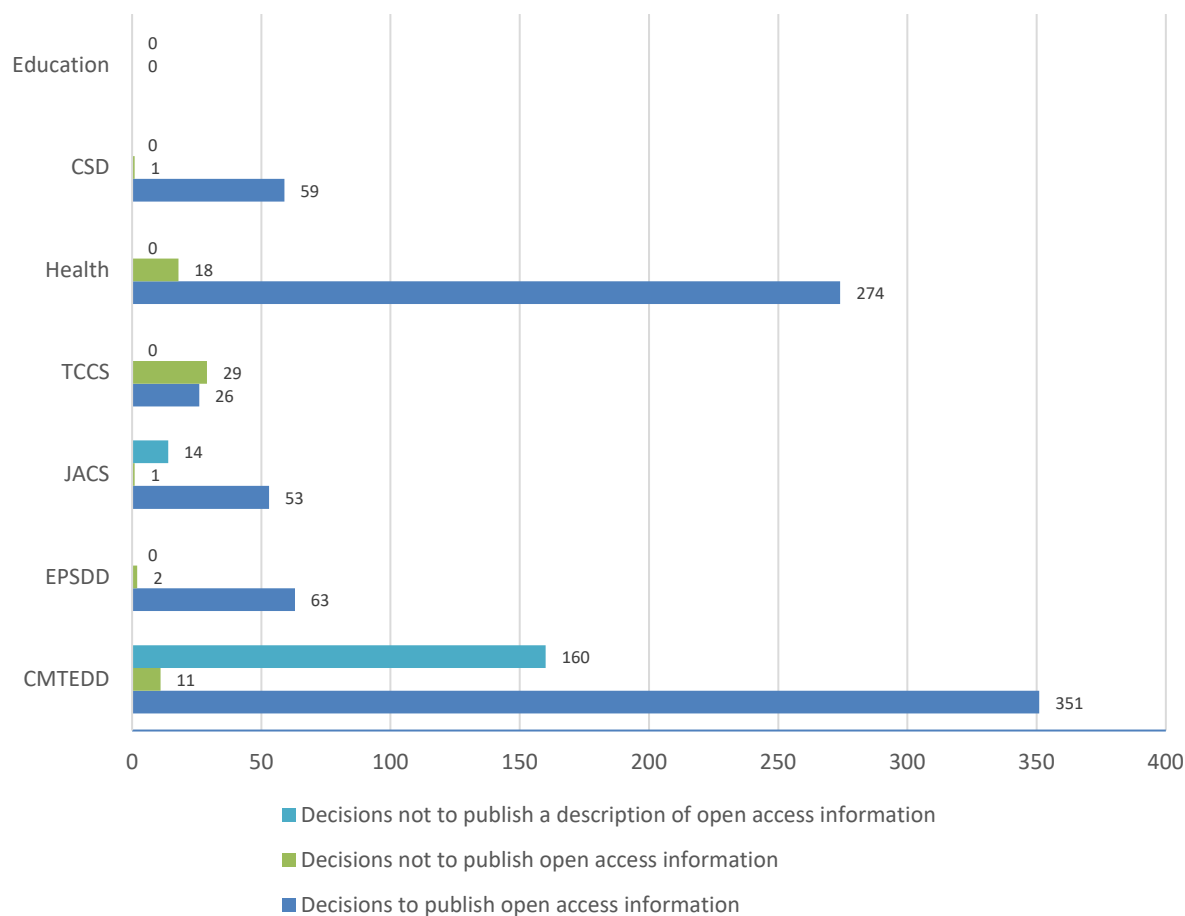
As at 30 June 2019, 24 Ministerial Diaries, 22 Ministerial travel reports, and seven Ministerial hospitality reports were published for the reporting period.<sup>9</sup>

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<sup>8</sup> This dataset includes information provided by each directorate, not including those in their portfolio. Health datasets in this report capture the combined data provided by ACT Health and Canberra Health Services. Separate data for each agency will be available in their respective annual reports.

<sup>9</sup> See <https://www.act.gov.au/open-access/ministers-information/ministerial-diaries-disclosure>.

## Open access information decisions by directorates



### 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.

Agencies are not required to report on informal requests received or related outcomes as to do so would impose an unnecessary administrative burden and be inconsistent with the purpose of the FOI Act, discouraging agencies from publishing government information.

Feedback from agencies is that informal requests are regularly utilised to provide access to information, with applicants encouraged to withdraw formal access applications where no longer required.

Legislative changes being considered as part of the *Freedom of Information Amendment Bill 2019* are expected to further facilitate such requests, removing the need for agencies to negotiate withdrawal of formal access applications in situations where information can simply be provided informally and more efficiently.



## Part 4: ACCESS APPLICATIONS

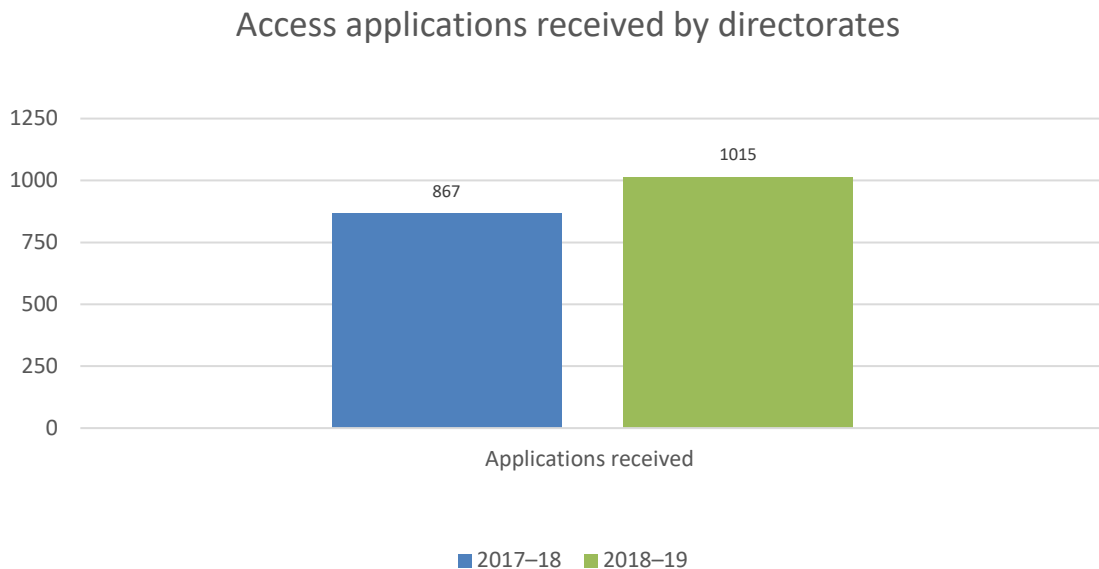
An access application is the formal way to request information under the FOI Act, and can be made to an agency or Minister, and reviewed by the Ombudsman. An agency or Minister will assess the application and may decide to give full or partial access to government information sought under the FOI Act,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

An agency or Minister can refuse access to information in particular circumstances where it is assessed as contrary to the 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.<sup>10</sup>

### Applications made

During this reporting period, **1015 access applications** were made to ACT government agencies.

As reflected in the graph below, this is a **17 per cent increase** from the previous financial year, where a total of 867 applications were made (473 access applications under the FOI Act and 394 access applications under the previous *Freedom of Information Act 1989* (1989 FOI Act)).<sup>11</sup>



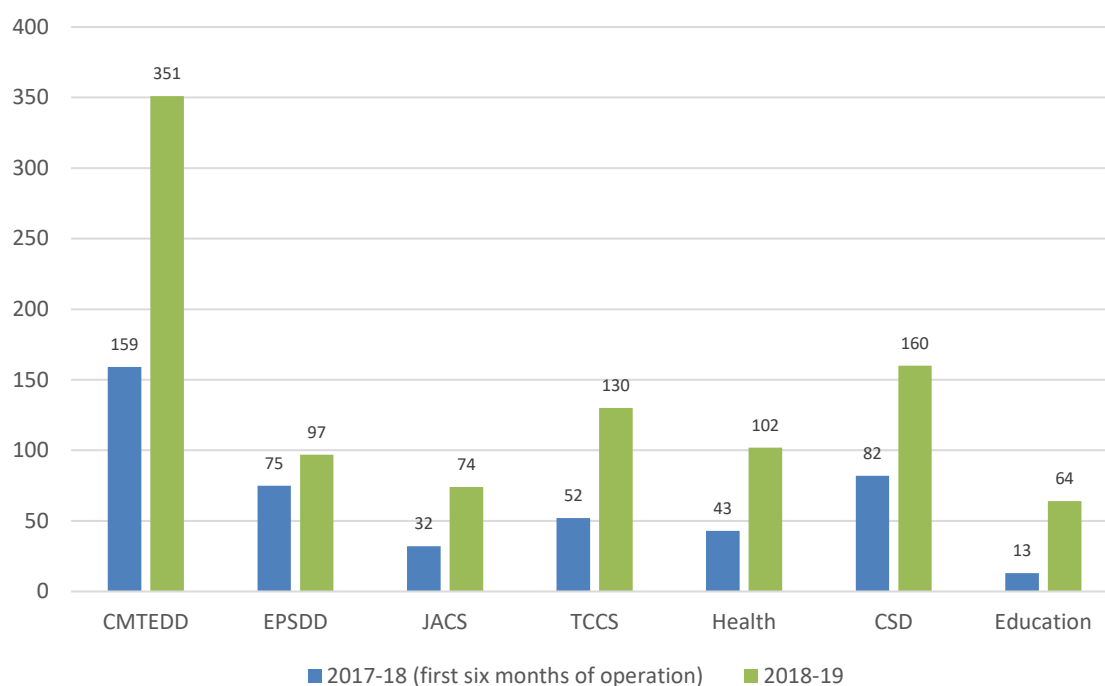
It is recognised this has put significant pressure on some ACT agencies, including smaller agencies or those who have less resources allocated to FOI processing, to meet their obligations under the FOI Act. Despite this, as outlined below, it is positive to see that the number of applications processed outside of statutory timeframes remains small, and more decisions were made than the previous year.

The graph below provides the number of access applications received by directorate.

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<sup>10</sup> 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.

## Access applications received by each directorate



During 2018-19, only **three** access applications were received by Ministers.

### Application outcomes

During the reporting period, **840 decisions** were made on access applications by agencies. This is a **33 per cent increase** from the previous financial year where 275 access applications were decided under the FOI Act, and 351 access applications were decided under the 1989 FOI Act.

As outlined in the graph below, of the 840 decisions made on access applications:

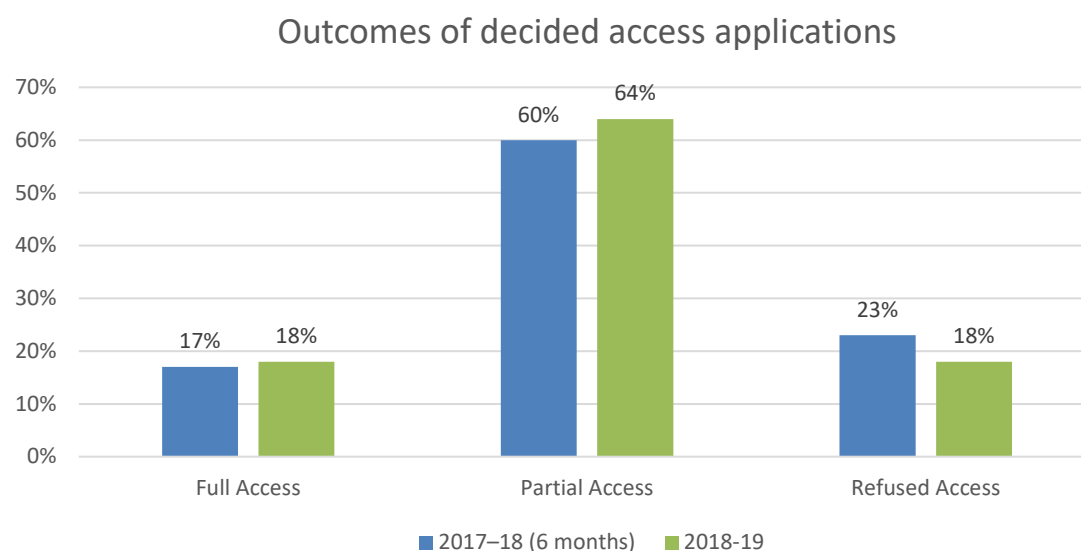
- *Full access* was granted in 138 decisions (18 per cent) — with the agency disclosing all information identified within the scope of the access application.
- *Partial access* was granted in 501 decisions (64 per cent) — with some information redacted prior to the release because it was assessed as contrary to the public interest to disclose.
- *Access was refused* in 137 decisions (18 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.
- The information was assessed as *not being held* by the agency in 64 decisions (7.6 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.

As reflected in the graphs below, decision outcomes under the FOI Act on access applications for this reporting period are broadly comparable in percentage terms with decisions made in 2017–18 during the first six months of the new FOI Act.

It is positive that the percentage of applications where access was entirely refused has decreased, but this appears to have transferred into more partial access outcomes, as opposed to full access being granted.

It is of concern that despite the pro-disclosure objectives of the FOI Act, full access outcomes remain low.

An analysis of other jurisdictions appears to indicate that applicants in Australia are more likely to be granted access in part than access in full, and this is a growing trend.<sup>12</sup> While full access decisions are less common in the ACT than in other Australian jurisdictions, the difference is not substantial in terms of application outcomes for information held by the government sector.<sup>13</sup> The Ombudsman will continue to monitor this issue in 2019-20.



In 2018-19, only one decision was made on an access application by a Minister, with partial access granted.

**Note:**

- The above figures do **not** include applications that were otherwise finalised by the agency or Minister, because, for example, the access application was transferred to another agency or the request was withdrawn by the applicant.
- For specific agency statistics regarding access application outcomes, please refer to the individual agency's annual report.
- As this was the first financial year of the Ombudsman collating annual FOI statistics, information relating to access applications which were transferred to another agency, or where the access application was withdrawn by the applicant were only part of the optional data for this reporting period.
- Seven agencies, nevertheless, returned the optional data which indicated that:
  - 38 access applications were transferred to another agency
  - 42 decisions refused access because the information requested was not held by the agency
  - 49 access applications were withdrawn by the applicant including 20 which were resolved outside of the FOI process.

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<sup>12</sup> 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\\_%28Public\\_Access%29\\_Act\\_2009\\_2017\\_2018\\_plus\\_erratum\\_1.pdf](https://www.ipc.nsw.gov.au/sites/default/files/2019-05/Report_on_the_Operation_of_the_Government_Information_%28Public_Access%29_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>

<sup>13</sup> The NSW IPC reports that, in 2017-18, 25 per cent of all outcomes granted access in full in the Government sector; for Ministers the figure was lower at 18 per cent. Outcomes for 2017-18 in Victoria were similar at 20 per cent of outcomes.

## Reasons for refusal

The data provided by agencies and Ministers did not indicate the reasons for refusing in full or in part as this was part of the optional data for this reporting period. This information will, however, be sought in future to enable the Office to monitor these trends over a longer period.

Five agencies completed the optional data. The top five reasons why access was refused either in full or in part included:

- prejudice the protection of an individual's right to privacy or any other right under the *Human Rights Act 2004* (47 per cent)
- prejudice trade secrets, business affairs or research of an agency or person (12 per cent)
- Cabinet information (7 per cent)
- prejudice an agency's ability to obtain confidential information (4 per cent)
- legal professional privilege information (4 per cent)

## Processing times

Under the FOI Act, an access application must be decided within 20 working days, unless an extension of time applies, or a third party needs to be consulted. Where a third party is consulted, an access application must be decided within 35 working days.

Extensions of time will apply where an agency or Minister has requested further time from an applicant and their request is not refused. Where an applicant has refused the agency or Minister's request, the Ombudsman can also grant an extension of time of up to 15 working days in particular circumstances.

### ***Access applications processed within time***

During the reporting period, **98 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.

It is noted that based on current data sets, the Ombudsman does not have visibility of applications that remain on hand at the end of 2018-19, and whether or not they remain within legislative processing times.

ACT agencies are also not currently required to report on how many extensions are requested and granted when processing an access application. As a result, the Ombudsman does not have visibility of the average time taken to process access applications in the ACT. Further data will be sought from ACT agencies from 2019–20 to provide for greater analysis in this area.

### ***Extensions of time by the Ombudsman***

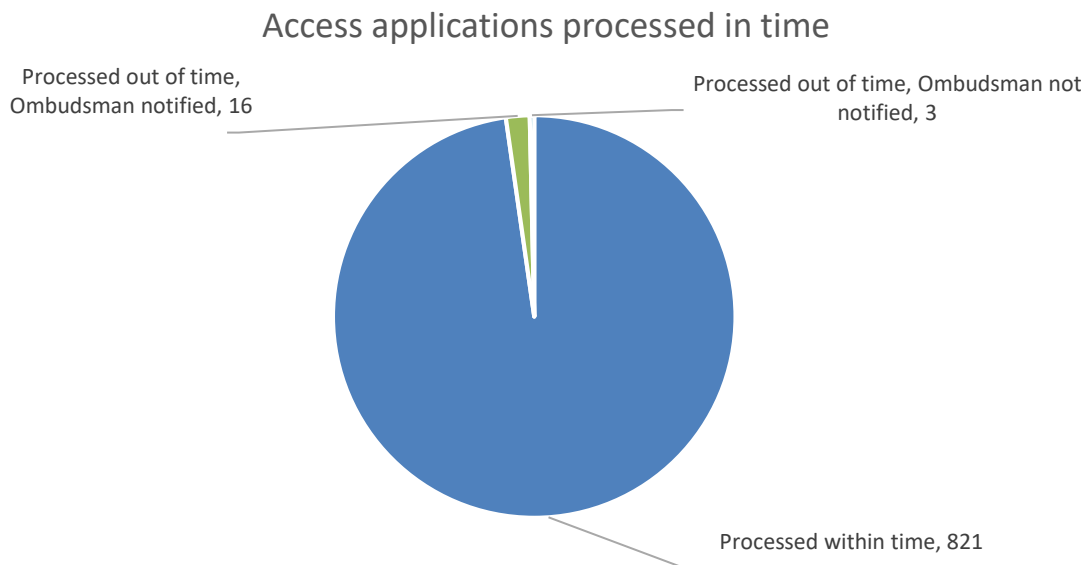
There are strict grounds on which the Ombudsman may grant an extension for deciding an access application. An extension can only be granted if the Ombudsman believes it is not reasonably possible for the access application to be dealt with within the timeframe, because of the large volume of information, or, because of complex and potentially conflicting public interest factors.

During the reporting period, there were **four applications** made to the Ombudsman for an extension of time to process an access application on the grounds that there was a large volume of information within scope of the access application and/or processing the access application was complex due to conflicting public interest factors. In all four applications, the Ombudsman granted the extension of time requests.

### ***Applications processed out of time***

A total of 19 decisions (two per cent) of access applications were processed out of time.

Under the FOI Act, these are taken to have been refused (see *Deemed Refusals* below). In three matters, however, the Ombudsman did not receive notice that the matter was processed out of time, as required under legislation.



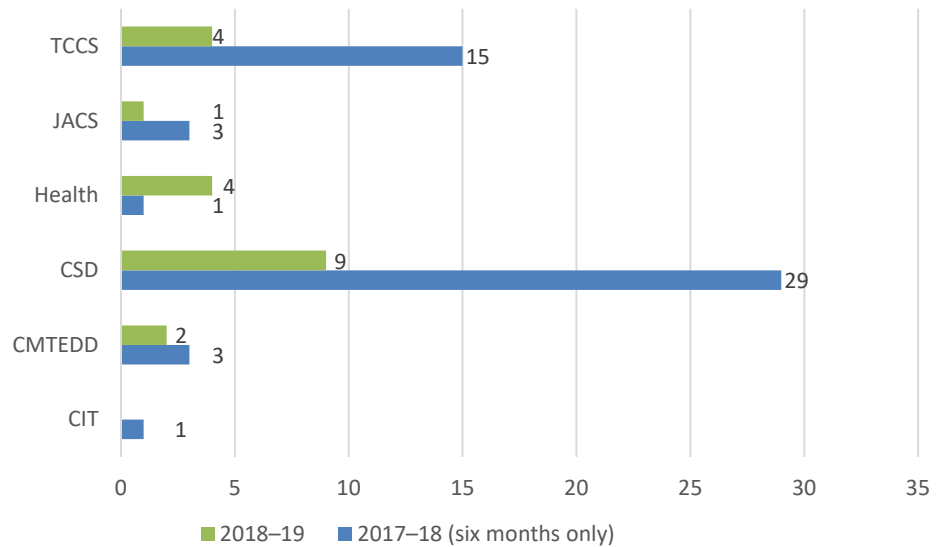
### ***Deemed refusal***

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 then enables the applicant to apply for Ombudsman review.

During this reporting period, the Ombudsman was notified of 16 decisions not made within time, which were deemed to be refused. The agencies notified the Ombudsman and tabled a decision notice in the Legislative Assembly. This compares with only four such decisions notified to the Ombudsman between 1 January and 30 June 2018.

As outlined in the graph below, the deemed refusal decisions in 2018–19 concerned access applications processed by four agencies.

### Deemed refusals by ACT agency



While deemed refusal levels remain low, it is noted that some such decisions were only identified following contact from the Ombudsman as part of the annual statistics collation process—with a further three decisions not notified or tabled. It is concerning that some agencies are not meeting their requirements under s 39 of the FOI Act.

The Office has alerted the agencies concerned to their obligations and will continue to monitor this issue, particularly in relation to the processes in place to deal with access applications. Additional guidance will also be provided in the upcoming Ombudsman FOI guidelines to assist agencies to meet these requirements, including template notifications and guidance regarding appropriate timeframes for notification.

### 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 have been outlined in the *Freedom of Information (Fees) Determination 2018*.<sup>14</sup>

Under the FOI Act to 30 June 2019, the ACT Health Directorate charged a total of \$129.50 for two access applications. No other fees or charges in relation to processing access applications were collected by agencies or Ministers. This is a decrease in fees collected by agencies and Ministers compared to the first six months of operation of the FOI Act in which the Environment, Planning and Sustainable Development Directorate (EPSDD) charged a total of \$338.10 for a single access application.

<sup>14</sup> See: <https://www.legislation.act.gov.au/di/2018-197/>.

This is positive and consistent with the intention of the FOI Act that information be available at the lowest reasonable cost.

The Ombudsman similarly does not charge a fee for processing an access application made to the Office or for applications for Ombudsman review.

## **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, a request to have this information amended can be made.

In this reporting period, there were only two applications made to amend or annotate personal information under the FOI Act. These applications were made to the Community Services Directorate and in both cases, the agency granted the request to amend or annotate.

These numbers are low but this is not unexpected, as it is our understanding that ACT agencies generally manage such requests for amendment via other informal channels.

## **Part 6: OMBUDSMAN REVIEWS**

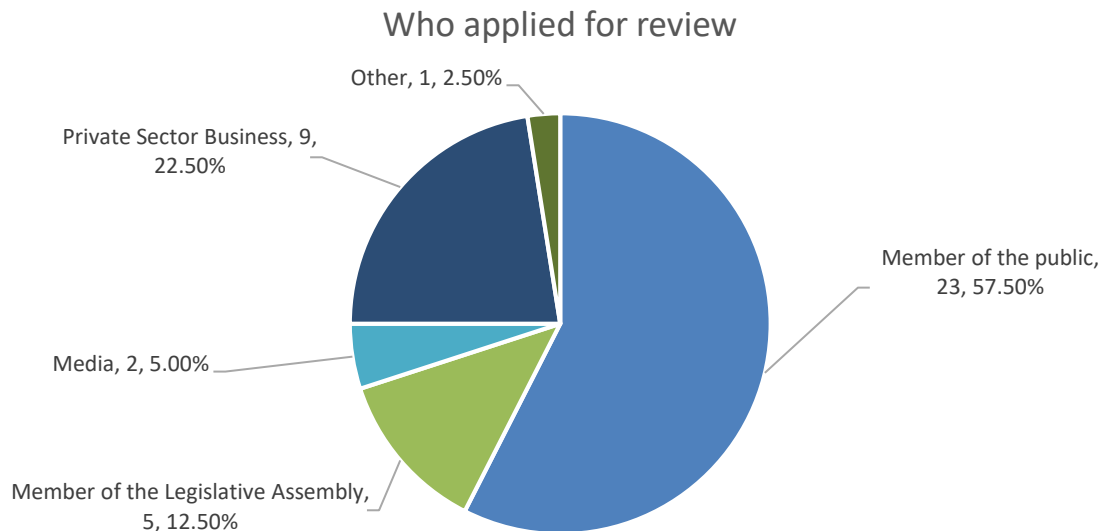
The Ombudsman conducts independent merits reviews of decisions on access applications made by agencies and Ministers under the FOI Act. In reviewing a decision, the Ombudsman can confirm or vary the original decision, or set it aside and substitute it with a new decision. Ombudsman review decisions are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

### ***Applications received***

During the reporting period, the Office received 40 applications for Ombudsman review of decisions. This is more than double the number of applications the Ombudsman received in the first six months of the operation of the FOI Act (17 applications received between 1 January 2018 and 30 June 2019).

### ***Types of review applicants***

Of the Ombudsman review applications received in 2018–19, the large majority were made by members of the public (57 per cent), followed by private sector businesses (23 per cent).



Reviews to date have involved consideration of a variety of public interest factors including personal privacy, Cabinet document confidentiality, the management function of an agency, business affairs and deliberative processes of government.

#### ***Agency participation in reviews***

The graph below provides a breakdown of received review applications by ACT agency for 2018–19, compared with the first six months of operation of the scheme.

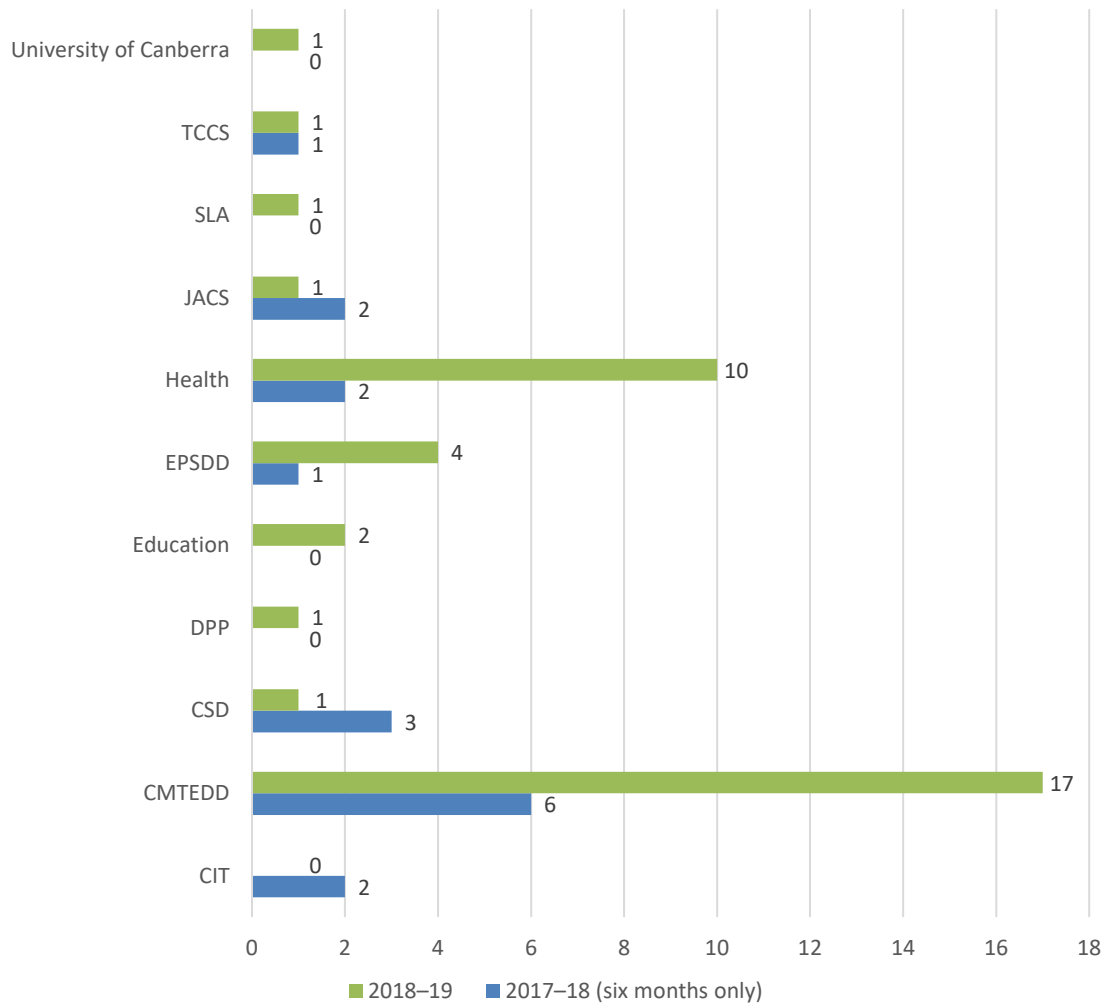
It reflects that review applications have increased for a number of agencies, including CMTEDD, the Health Directorate and EPSDD.

For the first time in 2018–19, review applications were received in relation to decisions made by the University of Canberra, the Suburban Land Agency, the Education Directorate, the Director of Public Prosecutions (DPP) and Canberra Health Services.

Some agencies have seen a reduction in reviews, including the Community Services Directorate (CSD), the Justice and Community Safety Directorate (JACS) and the Canberra Institute of Technology (CIT).



## Review applications by ACT agency



### ***Applications finalised***

During the reporting period, **43 review matters** were finalised:

- 24 formal decisions were published
- 14 were withdrawn, following informal resolution processes
- 2 were closed due to no reasonable prospects of success
- 3 were closed due to insufficient information.

These outcomes are explained in more detailed below.

### ***Informal resolution***

Where possible, before proceeding to a formal decision, the Office 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 seek an efficient resolution of the dispute. For example, if the applicant is focused on one particular document, the Office 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, case officer assessments are also being used 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 is saving the applicant additional legal fees where they have a legal representative.

### ***Formal decision outcomes***

As of 30 June 2019, **24 Ombudsman review decisions** were published.<sup>15</sup> These decisions provide agencies and applicants with guidance on the FOI Act including the application of the public interest test.

Of the 24 published decisions the Ombudsman:

- confirmed the agency's decision in 13 cases
- set the decision aside and substituted a new decision in eight cases
- varied the decision in three cases.

### ***Review timeframes***

The FOI Act requires Ombudsman reviews to be completed within 30 working days. This has not generally been possible due to the Office's preference to try and resolve matters via informal resolution, prior to proceeding to a formal decision. For matters that can be informally resolved, we have usually been able to do so in less than 30 working days.

To 30 June 2019, of the 43 review matters that were finalised this reporting period:

- 12 were closed within 30 working days
- 8 were closed between 31 and 60 working days
- 23 took longer than 60 working days to finalise.

The changes proposed in the *Freedom of Information Amendment Bill 2019* will provide the Ombudsman with the ability to extend the review period for up to 30 working days while undertaking informal resolution or mediation processes. Improved processing arrangements are also being progressed to streamline processing times where possible.

## **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 five complaints relating to an agency's functions under the FOI Act.

These complaints dealt with agencies' actions performed under the FOI Act including deemed refusals, third party consultation processes, searches undertaken for the information requested and processing access applications.

Out of five complaints, two were withdrawn following contact from the Office. The Ombudsman made comments and recommendations in relation to the remaining three complaints.

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<sup>15</sup> See: <http://ombudsman.act.gov.au/Freedom-of-Information> .

Outcomes from these complaints included an apology being issued to the complainant, and recommendations being made to agencies about their actions and functions under the FOI Act.

A particular case of interest from 2018–19 is included below as a case study.

An agency consulted with a complainant on information that it was considering releasing in relation to an access application made by another party.

The agency advised the complainant of the anticipated disclosure date, and asked that they provide advice of any concerns regarding disclosure prior to this date.

The complainant objected to disclosure of some of the information the day before the anticipated disclosure date. The agency subsequently released the information, despite the complainant's objections.

Following the Ombudsman's request for information, the agency conceded s 38 requirements were not followed correctly.

The Ombudsman made several recommendations following the complaint investigation regarding:

- ensuring clear communication between the agency and third parties when processing an access application
- effectively considering any identified risks.

## 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 commenced drafting new Ombudsman FOI guidelines, as provided for under the FOI Act. These are designed to implement and improve processes under the FOI Act.

The first two guidelines on the topics 'Open Access Information' and 'Dealing with informal requests for government information' are now available in draft—with a total six guidelines to be developed and finalised by early 2020.

#### **FOI practitioners forum**

This forum was established in November 2018 to promote best practice amongst ACT Government agencies in terms of managing their obligations under the FOI Act, with two forums held during the reporting period.

Our Office received excellent feedback from attendees on these events, particularly the March 2019 forum where they were able to learn from expert presenters including Ms Dana Sutton, Assistant Secretary at the Department of Finance and Mr Daniel Stewart, Senior Lecturer in Information Law at the Australian National University.

These forums have been essential for the development of the Ombudsman FOI guidelines, ensuring that they are as practical for agency decision-makers as possible.

## Community outreach and accessibility improvements

In addition our Office:

- designed and published a new brochure available to educate the ACT community about how to access government information<sup>16</sup>
- launched the ACT Ombudsman Facebook page which promotes the ACT FOI scheme to the community, and ensure they are aware of how to access government information
- implemented a separate ACT Ombudsman phone number to ensure our services, including as the independent FOI oversight body, are more visible and accessible to the ACT community.

## Community attitudes survey

We also continued to work with our partner jurisdictions via the Association of Information Access Commissioners (AIAC). This included participating in a survey of community attitudes on FOI in the ACT, with the agreement of the ACT Government.

The survey results indicated a high level of awareness of the FOI scheme— although less respondents (only 40 per cent) were aware they could access information from Ministers, as opposed to ACT Government agencies (76 per cent). Respondents also placed a high value on having the right to access government information.

The results do, however, suggest we may have some more work to do in encouraging the use of informal access channels ahead of formal access applications—with 56 per cent of respondents who had made a formal application in the past, not having tried other pathways first.

While 77 per cent of respondents surveyed, who attempted to access government information were at least partially successful—a positive outcome for a new legislative framework, a comparison with other jurisdictions suggests we can aim higher.

Fewer than one in five respondents who contacted ACT Government agencies were unable to obtain any information.

It was also positive that where individuals were successful in attempting to access information, 43 per cent of respondents accessing information held by an ACT Government agency, and 53 per cent of those accessing information from a Minister, were able to access the information because it was already available online or via an informal request.

## ***Insights regarding agency decisions and behaviours***

As this is only the first full financial year report on the operations of the FOI Act and a limited data set was available, the Ombudsman remains limited in our ability to highlight particular trends in FOI decision-making or concerns about agency compliance with the Act.

Some preliminary comments regarding areas where improvements may be required have, nevertheless, been provided below.

These comments are made taking into account the data available, as well as feedback from engagement with ACT government agencies and the ACT community during the reporting period.

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<sup>16</sup> See: [http://www.ombudsman.act.gov.au/\\_data/assets/pdf\\_file/0022/97600/ACT-Commonwealth-Ombudsman\\_FOI\\_Brochure\\_PRINTno\\_crop\\_or\\_bleed.pdf](http://www.ombudsman.act.gov.au/_data/assets/pdf_file/0022/97600/ACT-Commonwealth-Ombudsman_FOI_Brochure_PRINTno_crop_or_bleed.pdf)

### **Open access culture and reporting**

In drafting and consulting on the Open Access Information guideline, it was identified that the requirement to report on decisions to publish information may be having unintended consequences by formalising what would otherwise have been 'business as usual' decisions to publish information by ACT Government agencies.

Requirements in this area have since been clarified in the draft guideline, with agencies encouraged to view the Open Access Information scheme as complementary to existing voluntary arrangements for releasing information to the public, and disclosure requirements under other ACT legislation.

Engagement with agencies also highlighted that while FOI areas of agencies were very aware of their obligations under the FOI Act, some faced challenges in terms of ensuring such knowledge was spread across their organisations. Discussions also highlighted the importance of senior agency management promoting a positive FOI culture.

### **Consultation**

In some FOI reviews, we have identified that some ACT agencies have not met the third party consultation requirements under the FOI Act. This is not surprising as the legislative provisions are broad. Consultation requirements were the subject of discussions at a recent FOI practitioner's forum and will be clarified in the upcoming Ombudsman FOI guidelines.

### **Decision-making**

The Ombudsman has noticed an improvement in the decisions on access applications drafted by agencies. We believe there is still work to do to ensure that decisions are well-reasoned and well-documented. In our review work, we continue to see applications where the decision by the agency is arguably correct, but the reasons as to why a particular public interest factor applies or does not apply to the information at issue are not clearly articulated.

The Office will continue to work with agencies to improve the application of the public interest test in their decision notices, with guidance provided via FOI practitioners forums and revised decision templates to be made available as part of the Ombudsman FOI guidelines.

### **Applying the public interest test**

Agencies generally appear to be correctly identifying relevant factors for and against disclosure and applying the public interest test, though this may not be clearly articulated in their decisions as explained above.

Some inconsistency of approach has been identified in assessing privacy considerations under the FOI Act—particularly in the context of disclosure of public servant names included in information sought. The forthcoming Ombudsman FOI guidelines are expected to deliver increased consistency in this area. They will also assist agencies when making difficult assessments where complex competing public interest factors are involved, including where information at issue may be Cabinet information or disclosure could prejudice public affairs.

## **Part 9: THE YEAR AHEAD**

The Ombudsman will continue to work with agencies and Ministers to encourage more proactive release information in the spirit of the FOI Act's pro-disclosure bias.

A priority for the Office will be finalising the six Ombudsman FOI Guidelines to assist agencies to implement the FOI Act by early 2020.

A significant focus for 2019–20 will be the development of an Open Access Information compliance strategy, now that the draft Ombudsman FOI guideline is available. This is expected to include agency participation in a self-assessment program, and targeted audit activities.

In addition, we will continue to:

- conduct reviews independently, efficiently and, wherever possible, informally
- promote best practice via our FOI practitioners' forum
- raise awareness of the public's right to access government information and the nature of the Ombudsman's oversight functions.