Part 3 —

Processing and deciding FOI requests

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OAIC

Contents

Administering the FOI Act — general considerations

Key principles

3.1 The *Freedom of Information Act 1982* (FOI Act) specifies the way agencies and ministers process FOI requests for access to documents. Further information about the agencies subject to the FOI Act and the documents available for access under the FOI Act is in Part 2 of these Guidelines.

3.2 In addition to the detailed guidance discussed in this Part, agencies and ministers should have regard to the principles that underpin the right to obtain access to documents held by government (see Part 1 of these Guidelines). These include:

- subject to the FOI Act, every person[1] has a legally enforceable right to obtain access to government documents (s 11(1))
- a person's reasons for seeking access to a document, or an agency or minister's belief about a person's reasons for seeking access, are not relevant (s 11(2))[2]
- the functions and powers given by the FOI Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost (s 3(4))
- the FOI Act does not limit any power to give access or publish to information or documents under other legislative or administrative arrangements (s 3A(2)).

3.3 The OAIC has developed a 'Self-Assessment Tool' to assist agencies understand the effectiveness of their information access systems and the extent to which these comply with the FOI Act. The Self-Assessment Tool includes sections on proactive release of government held information and processing requests for access and can be found on the OAIC website.[3] The Self Assessment Tool can be used in conjunction with these Guidelines.

3.4 Part 3 of the FOI Guidelines provides agencies and ministers with guidance on processing and deciding requests for access under s 15 of the FOI Act. Guidance on applying charges can be found in Part 4; applying exemptions in Part 5; applying conditional exemptions in Part 6; amendment and annotation of personal records in Part 7; internal review in Part 9; review by the Information Commissioner in Part 10; investigations and complaints in Part 11; vexatious applicant declarations in Part 12; the Information Publication Scheme in Part 13; the disclosure log in Part 14 and reporting in Part 15.

[1] Section 2C(1) of the *Acts Interpretation Act 1901* provides: 'In any Act, expressions used to denote persons generally (such as "person", "party", "someone", "anyone", "no - one", "one", "another" and "whoever"), include a body politic or corporate as well as an individual.'

[2] A person's right to access should not be affected by their reasons for seeking access. However, it may be a relevant consideration when deciding whether the document is exempt.

[3] See: Self-assessment tool for agencies | OAIC on the OAIC website (www.oaic.gov.au).

Access to government information — administrative release

3.5 An agency or minister may choose to provide administrative access outside the formal FOI Act request process.[4] This may be as informal and flexible as providing information or documents when requested by a member of the public, or collating and releasing data or statistics following receipt of a specific FOI request. Alternatively, an agency or minister may choose to establish and notify on its website an administrative access arrangement that is to operate alongside the FOI Act, either generally or for specific categories of information or documents.[5]

3.6 Administrative release can offer benefits to agencies, ministers and members of the public. The advantages of administrative release include that it:

- advances the objects of the FOI Act by facilitating public access to information promptly, and at the lowest reasonable cost
- encourages flexibility and engagement with the public
- can rely on technology to facilitate easy collation, integration and distribution of information
- can offer a lead-in to the FOI process by enabling a person to clarify the type of information they wish to access from an agency
- aligns with the broader movement in public administration to facilitate dialogue and negotiation between parties before formal legal processes are used
- potentially offers cost benefits and quicker processing times.

3.7 Administrative access arrangements should be tailored to the size of an agency, its work, the FOI requests it typically receives, and its regular procedures for public contact and access.[6]

3.8 Administrative access arrangements should operate alongside FOI Act processes. Importantly, there should be an efficient process for referring administrative requests to the formal FOI process where FOI is more appropriate or where the FOI applicant would prefer to apply under the FOI Act.[7] Agencies must comply with obligations arising from the formal FOI process, including the obligation to provide reasons for its decision within the stipulated timeframe when responding to an administrative access request. In circumstances where the FOI applicant has requested documents under the FOI Act, but the agency is minded to release documents under administrative access arrangements, it is expected that the

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4 For more information see the OAIC agency resource *Administrative access* at https://www.oaic.gov.au/freedom-of-information/guidance-and-advice/administrative-access/.

5 In addition to implementing administrative access arrangements, Australian Government agencies should also have regard to Part II of the FOI Act which establishes an Information Publication Scheme (IPS). The IPS requires agencies to publish a broad range of information on their websites and authorises proactive publication of other information. Further information about the IPS can be found in Part 13 of the FOI Guidelines (Part 13: Information Publication Scheme | OAIC).

6 The OAIC has published a resource that explains administrative access and how to establish an administrative access arrangement. See https://www.oaic.gov.au/freedom-of-information/guidance-and-advice/administrative-access/.

7 Where it appears that the document is likely to contain a substantial amount of exempt matter, it will generally be more appropriate to process the request under the FOI Act.

agency will seek the FOI applicant's consent, and withdrawal of the FOI request, before releasing the documents administratively.[8]

3.9 Administrative release of an individual's own personal information must also comply with the minimum requirements set out in Australian Privacy Principle (APP) 12 of the Privacy Act even if the agency has separately formalised a process for applying for access and correction under the Privacy Act. Similarly, arrangements that allow for correction of personal information must comply with the minimum requirements set out in APP 13.[9]

3.10 Agencies should also be mindful of s 15A of the FOI Act which provides that where the agency has established procedures for employees to access their personnel records, the employee cannot make a request under s 15 of the FOI Act unless:

- they first make a request under s 15A and
  - are not satisfied with the outcome of the request or
  - have not been notified of the outcome of their request within 30 days.

Further information about the operation of s 15A can be found in Part 2 of these Guidelines ([2.91]).

3.11 Giving employees access to their personnel records outside of the FOI Act allows agencies to more quickly and efficiently provide access to this category of personal information, without the formal requirements of processing an FOI request under s 15 of the FOI Act.

Right of access

3.12 Every person has the legally enforceable right to apply for access to a document of an agency or an official document of a minister (s 11(1)). An FOI applicant does not have to reside in Australia or be an Australian citizen.[10] The term 'person' also includes a body politic or body corporate, such as a company.[11]

Reasons for a request

3.13 A person's right of access is not affected by any reasons they give for seeking access or an agency's or minister's belief as to the reasons for seeking access (s 11(2)). In general, any use an applicant might make of the documents is not relevant to the decision whether to grant them access. In the decision of *'FG' and National Archives of Australia*, the Information Commissioner explained that s 11(2) is to be read as meaning that a person's right of access is not to be adversely affected or diminished by their stated or assumed reasons.[12] However, the Information Commissioner in *'FG'* also explained that an applicant's reasons for requesting the information may be a relevant consideration for the purposes of considering whether disclosure would be unreasonable where required under an exemption or for the

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8 See *'AOY' and Services Australia (Freedom of information)* [2024] AICmr 229 [18] in which it was found that a reasonable construction of the applicant's FOI request encompassed material that Services Australia had released administratively to the applicant but which the applicant had not withdrawn as part of their request.

9 For more information, see Chapters 12 and 13 of the Information Commissioner's APP Guidelines, available at www.oaic.gov.au.

10 *Re Lordsvale Finance Ltd and Department of the Treasury* [1985] AATA 174.

11 See s 2C of the *Acts Interpretation Act 1901*.

12 [2015] AICmr 26 [40].

purposes of the public interest test for a conditional exemption.[13] For example, when deciding whether the disclosure of personal information about a person under s 47F(1) would be unreasonable, an agency or minister may take into account the likelihood of an FOI applicant publishing the personal information in an article.[14]

3.14 Nothing in the FOI Act limits what an applicant may do with the released documents (although other legal restrictions such as copyright will still apply, see [3.308]—[3.3010]). A decision to give a person access should therefore be made in the knowledge that the applicant may share the content of the documents with others or publish them to a larger audience.[15] However, it would be incorrect for an agency or minister to proceed on the basis that disclosure under the FOI Act is always the same as 'disclosure to the world at large'.[16] Although the FOI Act does not limit further dissemination by the FOI applicant, agencies and ministers should be aware that not every applicant will disseminate information obtained through an FOI request. Agencies and ministers should ensure that each FOI request is examined on its own merits when deciding whether disclosure of the information would be unreasonable under a particular exemption, where unreasonableness is a relevant consideration.

3.15 In addition, the disclosure log provisions require documents released in response to FOI requests to be published on a website within 10 working days of them being released to the FOI applicant, subject to limited exceptions for personal, business and other information (see Part 14 of these Guidelines). Agencies and ministers are encouraged to provide advance notice to FOI applicants and third parties that, if released, the documents will be published in a disclosure log subject to certain exceptions.[17]

The applicant's identity

3.16 The FOI Act does not require an applicant who is a natural person to disclose or provide proof of their identity, nor does it require a body corporate or politic to establish that it is a legal entity. The FOI Act does not prevent a natural person from using a pseudonym.[18]

3.17 An FOI applicant's identity can nevertheless be relevant in deciding if requested documents are exempt from disclosure. Where a person has submitted an FOI request for their own personal information or documents relating to their business affairs, an agency or minister should be satisfied of the FOI applicant's identity before giving them access to the documents, particularly where the FOI applicant purports to seek access to their own personal or business information. The protections under ss 90–92 of the FOI Act for officers

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13 [2015] AICmr 26 [44].

14 [2015] AICmr 26 [41] citing *'BA' and Merit Protection Commissioner* [2014] AICmr 9 [81].

15 *Re Sunderland and the Department of Defence* [1986] AATA 278; *'FG' and National Archives of Australia* [2015] AICmr 26; and *'BA' and Merit Protection Commissioner* [2014] AICmr 9.

16 See *'FG' and National Archives of Australia* [2015] AICmr 26.

17 The relevant exceptions are listed in s 11C(1) and include personal information about any person; information about the business; commercial, financial or professional affairs of any person; other information that the information Commissioner determines would be unreasonable to publish; and any information that would not be reasonably practicable to publish due to the extent of modifications or deletions.

18 This principle is also reflected in APP 2 in the Privacy Act, which provides that an individual has the option when dealing with an entity to which the Privacy Act applies (which includes agencies and ministers) 'of not identifying themselves, or of using a pseudonym'. Two exceptions to APP 2 include where an entity is required or authorised by a law, or a court/tribunal order to deal with an identified individual or it is not practicable to deal with an individual who is not identified. Those exceptions may apply to some FOI requests, but not in all instances.

disclosing documents in good faith may not apply if an agency or minister's office has been negligent in failing to make appropriate enquiries (see [3.3055]—[3.3069]).

3.18 The rise in the use of Artificial Intelligence (AI) brings with it the potential for FOI requests to be made without human intervention. As noted above, the FOI Act does not prevent the use of a pseudonym and an FOI request is not invalid on this basis. To reduce the possibility of AI generated FOI requests, agencies may consider publishing an online FOI request form that includes technology to identify whether the user is a robot.

3.19 The advice given at [3.17] in relation to establishing the identity of the FOI applicant when considering the release of personal information applies equally if an agency or minister suspects an FOI request has been artificially generated. If the identity of the FOI applicant cannot be verified, the agency may decide that disclosure of personal information would be unreasonable and contrary to the public interest in all the circumstances.

3.20 If a need arises to establish an FOI applicant's identity, an agency or minister should only seek personal information that is reasonably necessary for the purpose of deciding the FOI request (consistent with APP 3 in the Privacy Act). The minimum amount of personal information required will vary depending on the nature of the documents sought by the applicant and whether the documents contain sensitive material. An FOI applicant's identity should not be provided to any third party without prior consultation and agreement by the FOI applicant. This also applies if there is a request consultation process under ss 26A, 27 or 27A, or if another agency is consulted. Nevertheless, knowing an FOI applicant's identity may help a third party more easily decide whether to object to disclosure and to frame any specific objections, and this issue can be raised with an FOI applicant in consultation.

Requests by agents and groups

3.21 An FOI request may be made by one person on behalf of another person (who may be a natural person or a body corporate), by an organisation on behalf of a client, or by a person as the agent or representative of a group of individuals or corporate bodies. This is acknowledged in s 29(5)(a), which refers to payment of an FOI charge causing financial hardship 'to a person on whose behalf the application was made'.

3.22 A logical consequence of the principle that a request can be made by a person using a pseudonym (see [3.16]) is that a request may be made by a group of individuals or corporate bodies or an unincorporated association.[19] The FOI Act does not directly state whether a request must be made by a single entity or whether it can be made by a group, a partnership or an unincorporated association. The expression in s 15 is that 'a person' may request access to a document. The presumption is that words in an Act 'in the singular number include the plural', unless there is a contrary legislative intention (see ss 2C and 23 of the *Acts Interpretation Act 1901*).

3.23 Further, the FOI Act is to be administered, 'as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost' (s 3(4)). That object will best be met if, wherever practicable, agencies and ministers accept and respond to FOI

[19] The AAT reached a contrary view in *Re Apache Energy Pty Ltd and National Offshore Petroleum Safety and Environmental Management Authority* [2012] AATA 296. The AAT found that the reference in s 15 of the FOI Act to a request from 'a person' was confined to the singular and that a request could not validly be made by a partnership. A similar view, that a person may not act in concert with others to make a single FOI request, was adopted by the AAT in *CKI Transmission Finance (Australia) Pty Ltd; HEI Transmission (Australia) Pty Ltd and Australian Taxation Office* [2011] AATA 654. The Information Commissioner's reasons for disagreeing with that AAT decision are explained in *Who qualifies as a 'person' eligible to make a request under s 15 of the Freedom of Information Act 1982?*, January 2013, available at www.oaic.gov.au.

requests without any threshold enquiry as to the identity or legal personality of the applicant: the agency or minister's focus should be on the request, not the requester.

3.24 Nor is it exceptional that administrative law rights of request, complaint and review can be exercised by unincorporated groups or associations.[20]

3.25 It may nevertheless be problematic to process (or continue processing) an FOI request that is not made singly by an individual or body corporate unless the agency or minister can obtain further information or the name of a contact person. The following is a non-exhaustive summary of those circumstances.

3.26 Firstly, as discussed at [3.17], the identity of an FOI applicant can be relevant when the documents that have been requested contain personal or business affairs information or are subject to secrecy provisions that prohibit release except to certain persons or in certain circumstances. Where an FOI applicant seeks access to a document on behalf of another person, and the document contains information pertaining to that other person, it may be necessary for the FOI applicant to demonstrate that they have the authority of that person to obtain access and, if necessary, to confirm their right to the information under a secrecy provision (see [5.134]—[5.143]).

3.27 Secondly, an FOI applicant can apply under s 29(5) of the FOI Act for payment of a charge to be reduced or not imposed on the basis that payment of the charge would cause financial hardship to the FOI applicant or to a person on whose behalf the request is made. If an FOI request is made by a group of people, it may be difficult for an agency or minister to decide that issue without receiving more information about the members of the group.

3.28 Thirdly, where the FOI applicant has an affiliation with an organisation but leaves that organisation while the request is being processed (for example, a journalist who leaves a media organisation), it may be necessary to ascertain whether the request was made in a personal or a representative capacity (noting that this should be done when the FOI request is first received by the agency or minister), and whether the FOI applicant wishes the processing of the request to continue. This issue may become more important if a charge is payable, the request has reached the stage of internal or IC review, or a third party objects to disclosure under ss 26A, 27 or 27A of the FOI Act.

The formal requirements of an FOI request

3.29 A request for access to documents under the FOI Act must meet the following formal requirements:

- The FOI request must be in writing (s 15(2)(a)).

[20] The *Administrative Review Tribunal Act 2024* provides that an application to the Tribunal for review of a decision can be made by a person whose interests are affected by a reviewable decision (s 17) and that 'an organisation or association of persons, whether incorporated or not, is taken to be a person whose interests are affected by a decision if the decision relates to a matter included in the objects or purposes of the organisation or association at the time the decision is made and the matter has not been removed from the object or purposes of the organisation or association' (s 15). The *Ombudsman Act 1976* defines the function of the Ombudsman as one of investigating 'action that relates to a matter of administration … in respect of which a complaint has been made to the Ombudsman'; the Act speaks of the complaint to the Ombudsman being made by a complainant at the request of another person or a body of persons' (s 6(5)). The *Australian Human Rights Commission Act 1986* s 46P provides that a complaint of unlawful discrimination may be lodged by a person aggrieved, 'on that person's own behalf [or] on behalf of that person and one or more other persons who are also aggrieved [or] by 2 or more persons aggrieved … on their own behalf [or] on behalf of themselves and one or more other persons who are also aggrieved'.

- The FOI request must state that it is a request for the purposes of the FOI Act (s 15(2)(aa)). This requirement distinguishes an FOI request from a simple enquiry requesting administrative access. Agencies and ministers should nevertheless take a flexible approach when assessing whether an applicant has met this requirement. If an applicant's intention is not clear, the agency or minister should contact them to confirm whether the request was intended to be made under the FOI Act.
- The FOI request must provide such information as is reasonably necessary to enable a responsible officer of the agency or the minister to identify the document that is requested (s 15(2)(b)) (see [3.177]). Before refusing a request for failing to meet this requirement an agency or minister must undertake a 'request consultation process' (see [3.206]—[3.211]).
- The FOI request must give details of how notices under the FOI Act may be sent to the applicant (s 15(2)(c)). The return address may be a physical, postal or electronic address (such as an email address).[21]
- The request must be sent to the agency or minister. This may be done by:
    - delivery of the request in person to a central or regional office of the agency or minister as specified in a current telephone directory
    - sending of the request by pre-paid post to an address of the agency or minister as specified in a current telephone directory; or
    - sending by electronic communication to an email or fax address specified by the agency or minister[22] (s 15(2A)).

3.30 The FOI Act requires an FOI request to be made in writing. Although the FOI Act does not require an FOI applicant to complete a particular form to make a valid FOI request, there can be advantages for agencies in promoting use of an online form or smartform on their website. These forms can assist in capturing information relevant and necessary to the FOI request, including whether the request relates to an existing application or request, proof of identity for requests for the applicant's own personal information or authority to act if made by a representative. Further, such forms can incorporate technology to help identify whether a request has been artificially generated.

3.31 An agency is required, under s 15(3), to take reasonable steps to assist a person to make an FOI request that complies with the formal requirements in s 15(2). This may include situations in which an individual has expressed a wish to make an FOI request to an agency or minister (s 15(3)(a)), or where an individual has made a request that does not comply with s 15(2) (see s 15(3)(b)). This requirement is addressed in further detail below.

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[21] The OpenAustralia Foundation Ltd, a registered charity, has developed a website (www.righttoknow.org.au) that automates the sending of FOI requests to agencies and ministers and automatically publishes all correspondence between the FOI applicant and the agency or minister. Agencies and ministers should consider whether the FOI request involves personal information or business information when dealing with public internet platforms facilitating FOI requests.

[22] The OAIC encourages agencies to use a specified email address (i.e., FOI@agency.gov.au) and to make this email address available on their website. For further information, see OAIC, Guide to the access of information page on an agency's website | OAIC, available at www.oaic.gov.au. Applicants are encouraged to use this address to make the FOI process more efficient for both agencies and the applicant.

Assisting an applicant

3.32 An agency may only refuse an FOI request that does not meet the formal requirements in s 15(2) after it has taken reasonable steps to assist a person to make a request that complies with the formal requirements of the FOI Act (s 15(3)).

3.33 This duty to take reasonable steps applies both when a person wishes to make an FOI request and when they have made an FOI request that does not meet the formal requirements of the FOI Act (s 15(3)(b)). This duty may arise, for example, where a person has expressed a wish to make an FOI request but is prevented from doing so, or would find it difficult to do so, because of their particular circumstances (including health, age or disability; geographical, technological or social isolation; or limited English skills). This duty may also arise where a person has made an FOI request that does not meet all the formal requirements in s 15(2)), for example, where the request does not stipulate that it is a request made under the FOI Act.

3.34 An agency has a separate duty to take reasonable steps to assist a person direct their FOI request to the appropriate agency or minister (s 15(4)). This duty may arise, for example, if the document requested is not in the possession of the agency but is known or likely to be in the possession of another agency or minister. An agency or minister may also transfer an FOI request to another agency or minister under s 16 of the FOI Act if it does not have the document in its possession, or the document requested is more closely connected with the functions of the other agency or minister (see [3.50]—[3.714] below).

3.35 While the FOI Act places an obligation only on agencies, ministers are encouraged to adopt a similar approach to assisting applicants.

3.36 What constitutes 'reasonable steps' will depend on the particular circumstances, including the person's ability to comply with the formal requirements. It is the responsibility of an agency to be able to justify that reasonable steps were taken in each instance.

3.37 Factors that may be relevant in determining what constitutes reasonable steps in the circumstances include the nature of the request, the extent of detail required to clarify the scope of the request, the FOI applicant's knowledge (or lack of knowledge) of the structure of government and the functions of agencies, and whether the FOI applicant needs special assistance because of language or literacy issues or a disability. For example, a reasonable step might include offering to transcribe a verbal request from a person who is unable to submit a written request to the agency so as to record and submit a written FOI request on their behalf. Where the person has limited English skills, a reasonable step may include contacting the person using a translation services provider, who can then relay the person's FOI request to the agency in English.

3.38 If a person has not yet made an FOI request and contacts an agency to ask whether they hold particular information, it is appropriate to explain the agency's functions and the type of information that is held. A person should be advised if the FOI request relates to information that the agency has already published in its disclosure log or as part of the Information Publication Scheme (IPS) (see Parts 14 and 13 of these Guidelines respectively).

3.39 An agency should also be flexible in assisting an applicant to provide the details necessary for a request to fulfil the formal requirements of the FOI Act (for example, notifying the FOI applicant of a missing detail by telephone or email). This contact can be made either before or after an FOI request is formally acknowledged. It should rarely be necessary to require the submission of a fresh written FOI request if only a minor detail, such as a date relevant to a particular document or the applicant's return address, has been omitted from the FOI

request. Once the further information is provided, the agency or minister's office should inform the FOI applicant that their request meets the statutory requirements and that the timeframe for deciding the FOI request has commenced. It is important to keep good records of contact with FOI applicants, such as file notes of conversations, so that the agency can demonstrate, if required, that it has taken reasonable steps in accordance with s 15(3) or (4).

3.40 The requirement to take reasonable steps also arises under s 24AB(4) of the FOI Act, which requires that an agency or minister take reasonable steps to assist the FOI applicant revise the FOI request where a practical refusal reason exists, so that the practical refusal reason no longer exists (s 24AB(3)). Reasonable steps might include providing a breakdown of the time estimated for each step to process the request and suggesting what would be a reasonable request in the circumstances.[23] Further information about the requirements under the request consultation process is outlined below at [3.206]—[3.217].

3.41 For the purposes of the FOI Act, an FOI request should be treated as valid upon receipt even if it does not comply with the formal requirements of s 15(2) or 15(2A). This view arises as a result of the duty agencies have to assist applicants make FOI requests that comply with the formal requirements of the FOI Act. As a result, the processing period under s 15(5) commences on the day after the FOI request is received. Agencies should make a decision on the request and notify the FOI applicant of the decision within the relevant statutory time frame if they conclude the FOI request is invalid.

3.42 If an FOI request does not comply with s 15(2)(b) (identification of documents) it is the agency's duty to take reasonable steps to assist the person make a request than complies with s 15. Further, the note to s 15(3) states that both an agency or minister may only refuse to deal with a request if satisfied that a practical refusal reason exists, after undertaking a request consultation process. As a result, both agencies and ministers must undertake a request consultation process, as set out in s 24AB of the FOI Act, before refusing a request on the basis that it does not satisfy the identification of documents requirement in s 15(2)(b). Agencies and ministers cannot simply tell the applicant the request is invalid because it does not satisfy s 15(2)(b) and refuse to deal with it.

Interpreting the scope of a request

3.43 In making a decision about release of documents, it is implicit that the decision maker must first make findings about the scope of the FOI request and the documents in the agency or minister's possession that fall within that scope.

3.44 The starting point for determining the scope of the FOI request is the wording of the request.[24] An FOI request should be interpreted as extending to any document that might reasonably be taken to be included within the description the FOI applicant has used.[25] An FOI request for a 'file', including a historical or archived file, should be read as a request for all the documents contained in that file, including the inside and outside of a file cover in the case of a physical document.

3.45 An FOI request for all documents relating to a particular subject will also include any document or print which lists the names of all the files the agency or minister may consider relevant to the request. An agency or minister will need to exercise care in relation to any

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23 *Maria Jockel and Department of Immigration and Border Protection* [2015] AICmr 70 [31].

24 *'AKP' and Australian Federal Police (Freedom of Information)* [2024] AICmr 111 [12].

25 *Re Gould and Department of Health* [1985] AATA 63.

sensitive material, such as personal names, that may appear on the list. If in doubt, the agency or minister should consult the FOI applicant to discuss what documents they seek. Other considerations relevant to construing the scope of a request are discussed below at [3.178].

3.46 FOI requests must be read fairly by an agency or minister. A narrow or pedantic approach to construction is not acceptable.[26] Although a request under the FOI Act must be for 'documents' rather than for 'information', a request may be phrased with reference to the information that a document contains. This may be an effective and concise way for an FOI applicant to identify documents.

3.47 An FOI applicant may not know exactly what documents exist and may describe a class of documents, for example, all documents relating to a particular person or subject matter, or all documents of a specified class that contain information of a particular kind. or all documents held in a particular place relating to a subject or person. In all these circumstances, where the FOI request is framed by the FOI applicant in terms that are different to the way an agency or minister records, categorises and stores information, the agency has a responsibility to assist the FOI applicant to understand what information is in the relevant documents. This may assist the FOI applicant to refine the scope of their FOI request to match a specific set of documents. The agency may suggest a revised scope and should work with the FOI applicant to arrive at an appropriate scope of the request.[27]

3.48 The fact that a person may already have a copy of the document they have requested is not a relevant consideration when considering the scope of a person's FOI request. However, an agency or minister may choose to consult the FOI applicant to seek their agreement to exclude such material from the scope of their request.

3.49 There have been instances of agencies using s 22 of the FOI Act to delete the names of government officials below the Senior Executive Service (SES) rank on the basis that those names are irrelevant to the scope of an FOI request. There is no apparent logical basis for treating the names of SES officials as being within the scope of a request, but other officials as being irrelevant to the request.[28] Without further explanation as to why the names of government officials are irrelevant to the scope of a request, it is unlikely that the application of s 22 is appropriately justified. The appropriateness of the deletion of public servants' names and contact details under s 22 of the FOI Act is discussed further at [3.155].

Transferring FOI requests to other agencies

3.50 Section 16 provides for the transfer of FOI requests between agencies, and between agencies and ministers.[29] A transfer can occur in some circumstances by agreement between agencies and ministers; in other circumstances a transfer is mandatory (see [3.70]). As noted at [3.34], an agency also has a duty under s 15(4) to take reasonable steps to assist a person direct their FOI request to the appropriate agency or minister, and this enables the agency to discuss where a request could be directed with the FOI applicant.

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[26] *Jack Waterford and Department of Human Services (Freedom of information)* [2019] AICmr 21; *'QG' and Department of Human Services (Freedom of Information)* [2019] AICmr 23 [32]–[38] and *AQM' and Comcare (Freedom of information)* [2024] AICmr 246 [17]–[20].

[27] Principle derived from [23] in *'QG' and Department of Human Services (Freedom of Information)* [2019] AICmr 23.

[28] *'LK' and Department of the Treasury (Freedom of Information)* [2017] AICmr 47 [79] and *'FM' and Department of Foreign Affairs and Trade* [2015] AICmr 31 [14].

[29] Section 16 refers to agencies, but at s 16(6) states that '*agency*' includes a Minister'.

3.51 An agency or minister may partially or wholly transfer an FOI request (s 16(3A)). When an agency or minister receives an FOI request for documents, some of which are in the possession of different agencies, the request is notionally divided into different FOI requests. Each agency or minister then has an obligation to make their own decision on the FOI request in accordance with the FOI Act. Information about reporting FOI requests that are transferred, either in full or in part, can be found in the FOI Statistics Guide on the OAIC's website.[30]

3.52 The transfer of an FOI request under s 16 can facilitate access by avoiding the need for the FOI applicant to make a new FOI request to another agency or minister and by providing a whole of government approach to making information available to the public. Transfer of an FOI request also allows the decision to be made by the agency or minister best placed to make an informed assessment about disclosure of relevant documents.

3.53 Because the transfer of an FOI request under s 16 affects the obligations of agencies and ministers, consultation between them is essential. Informal consultation is particularly important in the case of complex FOI requests or FOI requests where the FOI applicant has requested the same documents from numerous agencies or ministers. Agencies and ministers' offices are encouraged to consult each other as soon as possible and, where an FOI request may contain more than one part, agree promptly as to who will be responsible for each part. A decision to transfer an FOI request under s 16 is not open to external review because it is neither an access refusal nor an access grant decision.

3.54 If an agency's practice is to process FOI requests on behalf of their minister, rather than transfer the request to the minister under s 16, the agency should publish this arrangement on its website, because it is relevant to the requirement to publish information about its functions and decision-making powers affecting members of the public (under s 11(2) of the FOI Act).

3.55 When there is a change of minister, both the outgoing minister and the incoming minister have responsibilities under the FOI Act if undecided requests or reviews and appeals remain on foot. These responsibilities may give rise to the transfer of documents and are dealt with in more detail in Part 2 of these Guidelines.[31]

3.56 The agency or minister that first receives an FOI request is referred to in the following paragraphs as the 'transferring agency', and the agency or minister that receives the transferred FOI request is referred to as the 'receiving agency'.

Relevant considerations when deciding to transfer an FOI request under s 16

3.57 If a request is deemed to have been refused because it was not decided within the relevant statutory processing time, it cannot be transferred under s 16 of the FOI Act. This is because s 16 provides for transfer of 'a request' (defined in s 4 to mean 'an application made under subsection 15(1)'). If a decision has already been made (including if a decision is deemed to have been made under s 15AC(3)), it is no longer 'a request' to which s 16 applies.[32]

3.58 For a valid transfer to be made, the grounds identified in s 16 need to be met. It is not appropriate to transfer an FOI request on grounds outside those identified in s 16. For

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30 FOI Statistics Guide (oaic.gov.au).

31 See Part 2: Scope of application of the Freedom of Information Act 1982 | OAIC [2.73]—[2.85].

32 See *'ANV' and Minister for Defence (Freedom of information)* [2024] AICmr 202 [6]. An agency or minister may continue to process the request, however they cannot formally transfer the request under s 16 to another agency or minister.

example, an agency or minister cannot transfer an FOI request on the basis that it does not have the resources to deal with it, or would prefer that another agency that shares possession of the requested document deal with the FOI request.

3.59 It is also a requirement of s 16(1) that the agency or minister to whom an FOI request is made obtains the agreement of the receiving agency before transferring it (s 16(1)). If the receiving agency does not agree to accept the FOI request on transfer, the preconditions in s 16(1) are not met and any purported transfer will be ineffective. The requirement for agreement does not apply with respect to transfers under ss 16(2) or 16(3).

3.60 Agencies and ministers should assess FOI requests promptly to ascertain whether it may be appropriate to transfer an FOI request under s 16 so as not to disadvantage the FOI applicant, or the receiving agency, by impacting on the available time to process the request (with additional work potentially required by the receiving agency to apply for an extension of time to decide the request) or causing undue pressure on the receiving agency (because when a request is transferred to an agency, the request is taken to have been received by the receiving agency on the day it was first received by the transferring agency (s 16(5), see [3.64] below).

3.61 It is good practice for ministers to check whether they hold the document(s) requested as soon as they receive a new FOI request (or whether a portfolio department or other agency holds the requested documents). This is because the time for assessing whether a document is an 'official document of a minister' is to be made at the time the FOI request is received.[33] If the relevant document is in an agency's possession, that document is a 'document of an agency'. A document cannot be both a document of a minister and a document of an agency.[34]

3.62 A transfer under s 16 can only be made to an agency or minister, as defined in the FOI Act (s 4). Therefore this excludes State government authorities, private sector organisations and any other persons. Transferring an FOI request under s 16 is also considered a 'disclosure' under the Privacy Act, and therefore it needs to be authorised or required under the FOI Act (in this case, s 16) to be permitted under the Privacy Act (APP 6.2(b)). The lawfulness of a transfer (disclosure) made under s 16 can therefore be considered in the context of a complaint made to the Information Commissioner under the Privacy Act (s 36(1)).

3.63 Where the requested documents, or information contained within the documents, originated with, or was received from, a State government authority, agencies and ministers should instead use the consultation provisions under s 26A of the FOI Act if they consider the circumstances under s 26A(1)(c) are satisfied.[35]

Timeframe

3.64 A transferred request is deemed to have been received by the receiving agency at the time it was received by the transferring agency (s 16(5)(b)). In other words, the decision-making period commences when the FOI request was originally received. The receiving agency or minister is not given extra time as a result of the transfer. It is therefore important that agencies and ministers give early consideration to whether an FOI request should be

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33 *Patrick v Attorney-General (Cth)* [2024] FCA 268 [99]. This was affirmed by the Full Federal Court in *Attorney-General (Cth) v Patrick* [2024] FCFCA 126 [65].

34 See *Patrick v Attorney-General (Cth)* [2024] FCA 268 [18].

35 If it appears to the agency or minister that the State authority might reasonably wish to contend that the document is conditionally exempt under s 47B, and access to the document would be contrary to the public interest.

transferred. This will enable the notices to the applicant under s 15(5)(a) (acknowledgement of receiving an FOI request) and s 16(4) (transfer of FOI request) to be combined and to ensure the receiving agency or minister is not disadvantaged by delay. In these circumstances, the receiving agency may also consider seeking an extension of the processing period under s 15AA, with the agreement of the applicant. For the extension to be valid, the agency must ensure that the requirements under s 15AA are followed. Further information about the timeframes for notifying a decision under the FOI Act is at [3.226]—[3.232].

Notifying the applicant

3.65 The transferring agency must advise the FOI applicant that their FOI request has been transferred (s 16(4)). The notification should state when the request was transferred and why, and the name and contact details of the agency or minister to which the request was transferred. Particular care needs to be taken in relation to certain documents whose existence should neither be confirmed nor denied (see [3.71]). Where it is necessary to enable the receiving agency to deal with the FOI request, the transferring agency should also send a copy of the relevant document to the receiving agency (s 16(4)).

Transfer of requests with agreement

3.66 An agency or minister that receives an FOI request may transfer the request, or part of the request, to another agency or minister with their agreement if:

- the document is not in the agency's or minister's possession but is to their knowledge in the possession of another agency or minister or
- the subject matter of the document is more closely connected with the functions of another agency or minister (s 16(1)).

3.67 It is implicit in these requirements that an FOI request cannot be transferred solely as a matter of administrative convenience, or because another agency or minister produced the document requested or also has a copy of it. Equally, before a decision is made to transfer an FOI request, an agency or minister should take whatever reasonable steps are necessary to ascertain whether they have the document that meets the description in the FOI request (see [3.61]—[3.62]).[36]

3.68 Part 2 of the FOI Guidelines has more detailed information about the transfer of FOI requests when there is a change of government (see [2.73]—[2.85]).

3.69 Documents generated by the joint activities of a number of agencies (such as an interdepartmental committee) might be 'more closely connected' with the agency that chaired the committee or which initiated the production of the document.

Mandatory transfer of requests

3.70 Sections 16(2) and 16(3) provide for the mandatory transfer of certain types of FOI requests, as specified in Table 1 below. These sections relate to requests for access to documents held by an agency but which originated in, or have been received from, agencies exempt from the operation of the FOI Act or agencies that are exempt in respect of specific documents, and the documents are more closely connected with the functions of that other

[36] *Bienstein v Attorney-General* [2007] FCA 1174; (2007) 96 ALD 639.

agency. This requirement partially overlaps with s 7, which provides that all agencies and ministers are exempt from the operation of the FOI Act in relation to intelligence agency documents and defence intelligence documents (see Part 2 of these Guidelines).

Table 1: Transfer requirements for documents originating with or received from an agency listed in Schedule 2 (agencies that are exempt from the operation of the FOI Act and agencies that are exempt from the FOI Act in respect of particular documents)

Document originated with …	and the document is more closely connected with …	the document must be transferred to …
an exempt agency listed in Division 1, Part I, Schedule 2 (e.g., Auditor-General, Australian Secret Intelligence Service or Australian Intelligence Organisation)	the functions of the exempt agency	the responsible portfolio department (s 16(2)(c)).
an exempt agency that is a part of the Department of Defence listed in Division 2, Part I, Schedule 2 (e.g., Australian Geospatial-Intelligence Organisation and the Defence Intelligence Organisation)	the functions of the exempt agency	the Department of Defence (s 16(2)(d)).
an agency exempt in respect of particular documents, as listed in Part II or Part III of Schedule 2 (e.g., documents in respect of commercial activities or program material)	documents in respect of which the listed agency is exempt	the agency (s 16(3)).

Transfer of requests without revealing existence of documents

3.71 Where appropriate, the transferring agency should consult the receiving agency about the possible application of s 25 before completing a transfer. Section 25 makes it clear that an agency or minister does not have to confirm or deny the existence and characteristics of certain documents, that is, documents that are exempt under s 33 (national security, defence or international relations), 37(1) (law enforcement or public safety) or 45A (Parliamentary Budget Office documents). Consultation with the receiving agency is particularly important to prevent inadvertently confirming to an FOI applicant the existence of such a document before the decision maker has had the opportunity to consider whether to rely on s 25.

Consultation

3.72 Prompt and effective consultation with relevant parties involved in dealing with an FOI request is essential to good administration.

Consultation with other agencies

3.73 Each agency or minister is required to make their own decision in relation to an FOI request. However, before making a decision about release of a document it is good practice to consult other relevant agencies, even if the FOI Act does not require consultation and when the agency does not intend to disclose the document. Through consultation the decision

maker may discover that another agency has already disclosed the document in response to an FOI request, or made it publicly available. Consulting other agencies will also assist in managing requests where an FOI applicant has requested access to the same or similar documents from several agencies.

3.74 In some cases, more than one agency will be involved in creating a document, such as through an inter-agency working group. In such circumstances, agencies should ensure there are procedures in place at the time a document is created to determine whether it will be published under the IPS (see Part 13 of these Guidelines) or released in response to an FOI request. This may lessen the need for consultation if an FOI request is later received.

Consultation with the applicant

3.75 Various provisions of the FOI Act require contact with the FOI applicant. However, agencies' and ministers' offices are encouraged, as a matter of good administrative practice, to contact an FOI applicant to discuss their FOI request as soon as practicable after receiving it. This contact provides an early opportunity to assist the FOI applicant address any formal requirements that have not been met (see [3.29]—[3.33] above). Early consultation can also lead to greater efficiency in processing the request. The agency or minister can discuss with the applicant the scope of their request, particularly if a preliminary assessment indicates there may be a practical refusal reason [3.175], or where estimated charges may be high (see Part 4 of these Guidelines). In many cases, an FOI applicant may not be aware of the nature and volume of the agency's records and as a result their request may be expressed in wider terms than is necessary.

3.76 An agency or minister may also wish to seek the FOI applicant's agreement to extend the processing period (including the period as extended under ss 15(6) or (8)) by no more than 30 days to deal with the request (s 15AA).

Consultation with third parties

3.77 An agency or minister may need to consult a third party where requested documents affect Commonwealth-State relations (s 26A), contain business information (s 27) or are documents affecting another person's privacy (s 27A).

3.78 In deciding whether to undertake third party consultation, an agency or minister must first decide if consultation is required by making a judgement about whether a third party might reasonably wish to make an exemption. In doing so, there is no obligation on the decision-maker to search for things not apparent from the face of the document to which access is sought, or not known to the decision-maker, before deciding whether consultation is needed.[37]

3.79 There must be some rational basis which the agency or Minister can discern, based on the face of the document or from something else actually known to the decision-maker, indicating that disclosure of the document would, or could be expected to, unreasonably affect the person adversely in relation to his or her personal information, lawful business or professional affairs.[38] Consultation is only required where there is some rational basis upon which the person involved could *reasonably* seek to rely on the actual terms of the exemption (as distinct from, for example, a mere preference or even a strong preference, for

[37] See *Attorney-General v Honourable Mark Dreyfus* [2016] FCAFC 119 [65].

[38] *Dreyfus and Attorney-General (Commonwealth of Australia) (Freedom of information)* [2015] AATA 995 [42]-[49].

document or information not to be disclosed). The mere appearance of a person's name in the document, in the absence of anything more, may not be sufficient for it to be apparent that a person might reasonably wish to make an exemption contention.[39] The decision-maker is not otherwise obliged to make inquiries or search for some basis upon which it might appear that a person might reasonably wish to make an exemption contention.[40]

3.80 As discussed in *Chris Drake and Australian Transaction Reports and Analysis Centre (Freedom of information*[41] the consultation requirements in ss 27 and 27A are designed to ensure that third parties are given an opportunity to make submissions in support of a contention that a relevant exemption applies. The same considerations apply to the consultation requirement in s 26A. However, the consultation requirement does not apply if the agency has itself formed the view that a relevant exemption or exemptions apply such that access should be denied.[42]

3.81 Where an agency or minister finds that disclosure of a document would likely affect Commonwealth-State relations, the agency or minister must not decide to give the applicant access to the document unless consultation has taken place in accordance with arrangements entered into between the Commonwealth and the State about consultation under s 26A.

3.82 One of the conditions that must be met for consultation to be undertaken between the Commonwealth and a State under s 26A, is that arrangements have been entered into between the Commonwealth and a State about consultation (s 26A (1)(a)). This condition has been satisfied, as arrangements have been entered into between the Commonwealth and the States to facilitate Commonwealth-State consultation under s 26A of the FOI Act.

3.83 The terms of these arrangements, which are held by the Attorney-General's Department,[43] are outlined below:

> **Administrative arrangements with regard to consultation with State Governments**
>
> Arrangements have been put in place to facilitate consultation with State Government agencies where consultation is required pursuant to section 26A.
>
> Agreement has been obtained from the States that all correspondence and communication should, at first instance, go through the delegated FOI contact officer of the particular agency and not directly to the author or action officer whose name may appear on the document. This procedure has been put in place to ensure FOI requests are appropriately received and monitored, and to minimise inconsistency across jurisdictions where an applicant makes FOI requests across several Commonwealth and State agencies.

3.84 As noted at [3.81] above, s 26A(2) of the FOI Act provides that an agency or minister cannot decide to give access to a document unless consultation with a State has taken place in accordance with the arrangements entered into under s 26A of the FOI Act. To avoid

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39 *Dreyfus and Attorney-General (Commonwealth of Australia) (Freedom of information)* [2015] AATA 995 [49]. See also *Attorney-General v Honourable Mark Dreyfus* [2016] FCAFC 119 [65].

40 See *Attorney-General v Honourable Mark Dreyfus* [2016] FCAFC 119 [56]–[57].

41 [2023] AICmr 6 [26]–[29]. Although the discussion in Drake is about consultation under ss 27 and 27A, the points made apply equally to consultation under s 26A.

42 *Chris Drake and Australian Transaction Reports and Analysis Centre (Freedom of information* [2023] AICmr 6 [26]–[27].

43 Arrangements with regard to consultation with state governments under s 26A of the FOI Act is held by the Attorney-General's Department in its 1996 FOI Memorandum. The 1996 FOI Memorandum can be found on the National Library of Australia's TROVE website: 17 Mar 2012 - Freedom of Information Guidelines - Trove.

confusion as to whether consultation has taken place if a State does not respond to the consultation notice, agencies and ministers are advised to include in the consultation notice a due date for response and advice to the effect that if no response is received it will be assumed the State has no objection to release of the document, and that a decision may be made on that basis.

3.85 The consultation requirements in relation to documents that are business documents (s 27) or documents affecting personal privacy (s 27A) only require an agency or minister to undertake consultation if it is reasonably practicable to give that person a reasonable opportunity to make submissions in support of the exemption contention (ss 27(5) and 27A(4)). In determining whether it would be reasonably practicable to consult, the agency or minister should have regard to all circumstances, including the time limits for processing the request.

3.86 Where an agency or minister is required to consult a third party:

- the timeframe for making a decision is extended by 30 days (s 15(6))
- the agency or minister must give the third party a reasonable opportunity to make submissions in support of the exemption contention (ss 27(4)(a) and 27A(3)(a))
- any submissions by the third party must be considered (ss 27(4)(b) and 27A(3)(b))
- the third party must be given notice of the decision and their review rights (ss 27(6) and 27A(5)) and
- the FOI applicant will only be given access to a document when the third party's opportunities for review have run out (ss 27(7) and 27A(6)).

3.87 The extension of the processing period by 30 days referred to in s 15(6) does not apply to internal review or IC review. Where an agency identifies, during an internal review, a need to consult a third party who had not previously been consulted, the timeframe for processing the internal review request is not extended.

3.88 If an affected third party does not agree with a decision by an agency or minister to give an FOI applicant access to a document, the agency or minister should also explain to the third party that a submission[44] must be made in support of the exemption contention before the third party's review rights will apply.[45] If the third party does not make a submission in support of the exemption contention, the agency or minister is not required to provide written notice of the decision to the third party concerned, nor is the agency or minister required to wait until the third party's review rights have expired before providing access to the document to the FOI applicant (ss 27(8) and 27A(7)).

3.89 If a third party is consulted, they should be told that if a response is not received within the time specified the agency or minister may proceed to make an access grant decision.

3.90 When consulting a third party, the agency or minister should frame the consultation notice in a way that does not suggest a response, but rather places the onus on the third party to frame their own response and provide their own reasons. For example, this can be done by asking questions such as 'do you object to disclosure of the document, and why?', rather

[44] Submission' is not defined in the FOI Act. However, any submission should support the exemption contention to which the third party was consulted in accordance with ss 27 and 27A.

[45] For more information about third party review rights, see the OAIC website: Personal and business information: third-party review rights | OAIC.

than framing the question in a way that invites a particular response, such as 'do you agree that disclosure of the document would cause damage to your business?'.

3.91 The third party should also be made aware that the agency or minister is generally required to publish documents that are released in response to an FOI request unless an exception to the publication requirement applies (see Part 14 of these Guidelines). Agencies should also be mindful when consulting third parties that consultation is undertaken in accordance with the Privacy Act and that the FOI applicant's personal information is not provided to the third party without the FOI applicant's consent.

3.92 More information on consultation with third parties is in Part 6 of these Guidelines.

Decisions on requests for access to documents

Principles of good decision making under the FOI Act

3.93 The public expects agencies and ministers to act fairly, transparently and consistently in their administrative decision making and to be accountable for the decisions they make. The quality of decisions under the FOI Act is particularly important given the integral role FOI requests can have in securing open government.

3.94 Decisions made under the FOI Act must be consistent both with the requirements of the FOI Act and with general principles of good decision making. Those general principles are explained in 5 best practice guides published by the Administrative Review Council (ARC).[46] This Part discusses how those principles can be relevant to decisions made under the FOI Act. In summary, as the ARC guides explain, the general principles require that decisions are lawfully made, that procedural fairness is observed, that decisions are based on findings of fact, reasons are given for decisions, and that people directly affected by administrative decisions are informed of their review rights.

Lawfulness

General principle

3.95 A decision that is made under legislation must conform to the requirements of the legislation and be made by an authorised decision maker. This requirement is explained in further detail in the ARC Best Practice Guide No 1, *Decision Making: Lawfulness*.[47]

Decision making under the FOI Act

3.96 The FOI Act specifies in detail how decisions are to be made and the criteria and principles on which decisions are to be based. For example, the FOI Act specifies the agencies and documents to which the FOI Act applies, the procedure for making and notifying decisions on FOI requests, and the documents to which access may be refused. These FOI provisions are discussed below and in other Parts of these Guidelines.

3.97 Decision making under the FOI Act must take into account the objects in s 3 of the FOI Act. As discussed in further detail in Part 1 of these Guidelines, the objects embody a policy — or presumption — of open government that is relevant to all FOI decision making. This is emphasised in s 3(4), which states Parliament's intention 'that functions and powers given

[46] See ARC *Best Practice Guides* 2007, at Administrative Review Council publications | Attorney-General's Department (ag.gov.au).

[47] Available at: Administrative Review Council Best Practice Guide 1 - Lawfulness | Attorney-General's Department.

by this Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost'. Another specific object, stated in s 3A, is that agencies and ministers retain an administrative discretion (subject to other legislation) to provide access to information and documents other than under the FOI Act.

3.98 Decision makers must also have regard to these Guidelines when making decisions under the FOI Act (s 93A). The Guidelines are not a legislative instrument (s 93A(3)) and, by contrast with the provisions of the FOI Act, do not have binding force. However, it is well established that decision-makers should, at a minimum, have regard to the Guidelines in discharging powers and functions under the FOI Act.[48]

Authorised decision makers

3.99 The FOI Act specifies that a decision relating to an FOI request made to an agency may be made by the responsible minister or the principal officer of the agency, or by officers who are properly authorised (s 23(1)).

3.100 FOI instruments authorising staff to make decisions under s 23 of the FOI Act should be in writing. FOI authorising instruments must be published on an agency's website because they fall within the definition of 'operational information' in s 8A(1) of the FOI Act and so should be included on an agency's IPS entry. Officers should confirm that they are authorised before making a decision in response to an FOI request.

3.101 Where all FOI decisions are made by the agency head, this needs to be stated on the agency's website so that it is clear staff are not authorised to make decisions in response to FOI requests.

3.102 A decision on an FOI request made to a court may be made by the principal officer, or an officer acting within their scope of authority (s 23(2)).

3.103 Agencies should ensure a sufficient number of officers are authorised at appropriately senior levels to make both original and internal review decisions. The capabilities and work level standards of APS employees may assist agencies to ensure they authorise officers who have the necessary skills.[49]

3.104 A decision made on a request to a minister may be made by the minister personally or by someone the minister has authorised to act on their behalf, either a member of their staff or an officer of an agency. It would be prudent for a minister to make an authorisation in writing, as the decision will be a decision of the minister, not the person acting on the minister's behalf.[50]

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[48] With respect to FOI decision makers and the Administrative Review Tribunal (ART), in *Francis and Department of Defence* [2012] AATA 838, applied in *Bradford and Australian Federal Police (Freedom of Information)* [2016] AATA 775, the AAT explained that FOI decision-makers (including members of the Tribunal reviewing FOI decisions) should 'apply the Guidelines unless there is a cogent reason to do otherwise'. However, in *Wood; Secretary, Department of Prime Minister and Cabinet and (Freedom of Information)* [2015] AATA 945, the AAT noted that insofar as the second level of external merits review, s 93A of the FOI Act only requires the AAT to 'have regard' to the FOI Guidelines, and in having regard to the FOI Guidelines, the AAT must be tempered by its obligation to make correct decisions under the FOI Act. In *Utopia Financial Services Pty Ltd and Australian Securities and Investments Commission (Freedom of information)* [2017] AATA 269, it was further explained that the AAT is only required to have regard to the FOI Guidelines to the extent that they are consistent with the functions and powers conferred on it by the FOI Act.

[49] For more information about these standards see the Australian Public Service Commission's website at www.apsc.gov.au.

[50] For further information about ministerial decision making see [2.40]-[2.41] of these Guidelines (Part 2: Scope of application of the Freedom of Information Act 1982 | OAIC).

3.105 Authorised officers may obtain assistance from other officers, and take advice and recommendations into account, but they are nevertheless responsible for reaching an independent decision and exercising any discretion.[51]

Procedural fairness

General principle

3.106 A decision that directly affects the rights or interests of a person or organisation must be made in accordance with the principles of natural justice (also known as procedural fairness). The decision maker is required to follow a fair decision-making process, complying with the 'bias rule' and the 'hearing rule'. These requirements are explained in further detail in the ARC Best Practice Guide No 2, *Decision Making: Natural Justice*.[52]

3.107 The bias rule requires a decision maker to be impartial and have no personal stake in the decision to be made. The decision maker must be free of both actual and apparent bias, that is, of conduct that might appear to a fair-minded observer to affect their impartiality in reaching a decision.[53] For example, a fair minded observer may perceive there to be a conflict of interest if a person who made an administrative decision affecting the FOI requestor's rights was also to make a decision on an FOI request seeking access to documents relating to that administrative decision.

3.108 The hearing rule requires that a person who could be adversely affected by a decision be notified that a decision may be made and is given an opportunity to express their views before that occurs.[54] The nature of this 'notice and comment' procedure can vary from one decision or context to another. The minimum requirement, however, is that a person should be given sufficient information and a reasonable opportunity to comment, to ensure that procedural fairness is upheld.

The bias rule and FOI decision making

3.109 The bias rule is relevant to all decision making under the FOI Act. Two examples of where caution is needed are:

- An authorised FOI decision maker who knows an FOI applicant personally, especially if there is a close or social relationship. Generally, a decision maker is not prevented from making a decision by reason only of previous contact with an FOI applicant in the context of their work, which may be a regular occurrence in some agencies.
- An authorised FOI decision maker should exercise case in making decisions about material or documents they have been personally involved with, or had oversight of. In some situations it may be more appropriate that another authorised FOI decision maker decide the FOI request.

3.110 An FOI decision maker must approach each decision with an open mind and, for example, consider any submission made by an FOI applicant as to why a document is not exempt or a charge should be reduced. Generally, a decision maker is not prevented from making a

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[51] See ARC Best Practice Guide No 1, *Decision Making: Lawfulness* 2007 at p 6 available at Administrative Review Council Best Practice Guide 1 - Lawfulness | Attorney-General's Department (ag.gov.au).

[52] Available at: Administrative Review Council Best Practice Guide 2 - Natural Justice | Attorney-General's Department.

[53] *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337.

[54] *Kioa v West* [1985] HCA 81; (1985) 159 CLR 550; see also ARC Best Practice Guide No 2, *Decision Making: Natural Justice* 2007, p 1 available at Administrative Review Council Best Practice Guide 2 - Natural Justice | Attorney-General's Department (ag.gov.au).

decision by reason of having dealt previously with a similar issue or applicant, or having expressed a view about FOI Act principles or requirements.

3.111 The Australian Public Service Commission has issued guidance material to assist agencies to identify and manage conflicts of interest.[55]

The hearing rule and FOI decision making

3.112 The FOI Act specifies in detail the procedure to be followed in making decisions on FOI requests. For example agencies and ministers :

- are required to provide reasonable assistance to persons to make FOI requests (s 15(3)) (this subsection does not apply to ministers)
- must notify an FOI applicant that an FOI request has been received (s 15(5))
- must give an applicant a reasonable opportunity to revise a request before it is refused for a practical refusal reason (s 24AB)
- must allow an applicant to respond before a charge is imposed (s 29)
- must provide the applicant with a written statement of reasons for the decision (s 26)
- must advise the applicant of their right to seek internal review or IC review of an adverse decision (s 26(1)(c)).

3.113 The FOI Act also specifically recognises the rights of third parties to be consulted about the release of documents that affect their interests in certain circumstances (ss 26A, 27 and 27A — see Part 6 of these Guidelines).

3.114 A person who disagrees with a decision on access to documents, or amendment or annotation of personal records, has the right to apply for internal review by the agency (internal review is not available if the decision was made personally by the principal officer of the agency or the responsible minister (s 54(1)), as long as the application is made within the relevant statutory timeframes (see Parts 9 and 10 of these Guidelines). The review processes provide an opportunity for an affected person to be heard, and to that extent, for natural justice to be observed.

Facts and evidence

General principle

3.115 An administrative decision must be based on facts. A central obligation of a decision maker is therefore to identify and separate the 'material questions of fact'; gather and assess information or evidence to support each finding of fact; and explain how each finding of fact was reached. These requirements are explained in further detail in the ARC Best Practice Guide No 3, *Decision Making: Evidence, Facts and Findings*.[56]

3.116 A material question of fact is one that is necessary to a decision — or, put another way, the existence or non-existence of the fact can affect the decision to be made. Legislation will ordinarily set out the factual matters that must be considered, but sometimes these will be present more by implication than by direct legislative statement.

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[55] Available at www.apsc.gov.au.

[56] Available at Administrative Review Council Best Practice Guide 3 - Evidence Facts and Findings | Attorney-General's Department (ag.gov.au).

3.117 The obligation rests on a decision maker to be reasonably satisfied that a finding of fact can or cannot be made on the available evidence. Unless legislation states otherwise, there is no onus or burden on a party to prove that a fact does or does not exist. In discharging the obligation to be reasonably satisfied, the decision maker may have to draw inferences from the available evidence or information known to the decision maker. The evidence should be logically capable of supporting the decision maker's findings of fact.

Fact finding in FOI decision making

3.118 The obligation on FOI decision makers to base each decision on facts is captured in s 26(1)(a). The statement of reasons for a decision to refuse or defer access to a document 'shall state the findings on any material question of fact, referring to the material on which those findings were based, and state the reasons for the decision' (see below [3.2691]—[3.271] below).

3.119 The FOI Act specifies the material facts that must be examined in deciding whether to grant access to documents in response to an FOI request. Similarly, it is implicit in many provisions of the FOI Act that findings, including inferences from known facts, may need to be made. The following examples are illustrative:

- a material fact in considering whether a document is exempt under s 33(a)(ii) is whether release of the document would cause damage to the defence of the Commonwealth
- a material fact in considering whether a document is exempt under s 34 is whether the document was created for the dominant purpose of consideration by Cabinet
- in making a decision about release of documents, it is implicit that the decision maker must first make findings about the scope of the request and the documents in the agency's possession that fall within that scope
- in deciding whether payment of a charge would cause financial hardship to an applicant (s 29(5)(a)), a decision maker may need to consider the financial position of an applicant, including, for example, whether the applicant receives income support.

3.120 It follows from the above, that a decision maker must search for and consider all relevant documents within the scope of the request before deciding that the documents are exempt from disclosure. To decide that the documents are exempt based on the type of document requested does not accord with administrative law principles (unless s 25 applies – see [3.165]—[3.174] below).[57]

3.121 The standard principle in administrative proceedings — that no party bears the onus of proof, and the decision maker must be reasonably satisfied of the matters to be decided — does not apply to IC reviews (see Part 10 of these Guidelines).

Reasons

General principle

3.122 Members of the public are entitled to know the reasons why an administrative decision that affects them has been made. Giving reasons promotes fairness, transparency and accountability. It gives the person affected by the decision the opportunity to have the decision explained and to seek review if they wish. This fundamental theme in

[57] See also, *'AVD' and Department of Home Affairs (Freedom of information)* [2025] AICmr 68 [24]-[26].

administrative law and good decision making is explained further in the ARC Best Practice Guide No 4, Decision Making: Reasons.[58]

3.123 The stated reasons should be meaningful and accurate, setting out what the decision maker considered and why, including addressing arguments put to the decision maker. Providing good statements of reasons can lead to greater acceptance of decisions by FOI applicants, with a corresponding reduction in complaints and applications for review.

Reasons under the FOI Act

3.124 Section 26 of the FOI Act requires an applicant to be given the reasons for a decision to refuse or defer access to a document. This section specifies the matters that must be included in the statement of reasons, including the findings on material questions of fact, the public interest factors taken into account in applying a conditional exemption, the name and designation of the agency officer making a decision, and information about the applicant's review rights.

Accountability

General principle

3.125 Decision makers are accountable for their decisions. There are many different forms of accountability, including political, ethical and legal accountability. The system of administrative law ensures both legal accountability and good decision making, through external scrutiny, review and transparency measures. Administrative law accountability is explained in further detail in the ARC Best Practice Guide No 5, *Decision Making: Accountability*.[59]

Accountability arrangements under the FOI Act

3.126 The FOI Act contains detailed provisions for review and oversight of FOI decision making by the OAIC (see Parts 10 and 11 of these Guidelines). Section 26(1)(c) of the FOI Act requires information to be included in the statement of reasons about the FOI applicant's rights to review and the procedures for exercising those rights, as well as their right to make a complaint to the Information Commissioner. Further, s 26(1)(b) requires an agency decision maker to state their name and designation in the statement of reasons for decision (for more information about this requirement see [3.263]).

3.127 In response to a request for access to documents under the FOI Act, a decision-maker may decide to:

- refuse a request that does not meet the formal requirements for a request in s 15 (see [3.29]—[3.31])
- refuse access under s 24A on the basis that the document sought does not exist, cannot be found or was not received from a contractor (see [3.129]—[3.146])
- allow access to all documents as requested, even if some are exempt (s 3A(2)(a))
- refuse access to the requested documents on the basis they are exempt, or refuse access to some documents and give access to others (discussed in Parts 5 and 6 of these Guidelines)

[58] Available at: Administrative Review Council Best Practice Guide 4 - Reasons | Attorney-General's Department.

[59] Available at: Administrative Review Council Best Practice Guide 5 - Accountability | Attorney-General's Department.

- provide access to the personal information of the FOI applicant through a qualified person under s 47F(5) (discussed in Part 6 of these Guidelines)
- delete exempt or irrelevant material from documents and provide access to edited copies under s 22 (see [07]—[3.160])
- defer access to the requested documents until a later date under s 21 (see [3.161]—[3.164])
- under s 25 refuse to confirm or deny the existence of a document that would be exempt under s 33, 37(1) or 45A (see [3.165]—[3.174])
- refuse a request under s 24 if a practical refusal reason exists under s 24AA, following a request consultation process (see [3.175]—[3.217])
- impose a charge for processing a request or for access to a document to which a request relates under s 29 (see Part 4 of these Guidelines)
- decline to amend or annotate a record of the FOI applicant's personal information under s 48 (see Part 7 of these Guidelines).

Refusing access to an exempt document

3.128 An agency or minister is not required to give access to a document at a particular time if at that time the document is an 'exempt document' (s 11A(4)). An 'exempt document' is:

- a document that is exempt or conditionally exempt where disclosure would be contrary to the public interest under Part IV of the FOI Act (see Parts 5 and 6 of these Guidelines)
- a document in respect of which an agency, person or body is exempt from the operation of the FOI Act under s 7 (see Part 2 of these Guidelines)
- an official document of a minister that contains some matter that does not relate to the affairs of an agency or of a Department of State (s 4(1)).

Refusing a request for a document that does not exist, cannot be found or is not received from a contractor

3.129 An agency or minister may refuse an FOI request if it has taken 'all reasonable steps' to find the document requested and is satisfied the document cannot be found or does not exist (s 24A(1)).[60] There are 2 elements that must be established before an agency or minister can refuse an FOI request under s 24A:

- the agency or minister must have taken all reasonable steps to find the document and either:
  - the agency or minister is satisfied that the document is in the agency's or minister's possession but cannot be found or
  - the agency or minister is satisfied that the document does not exist.[61]

[60] *Cristovao and Secretary, Department of Social Security* [1998] AATA 787 [19].

[61] In *Attorney-General (Cth) v Patrick* [2024] FCAFC 126 [60] the Full Federal Court clarified that the words 'does not exist' in s 24(1) indicates 'that the document *does not exist at all*'. The Full Court said there was no need to depart from the

3.130 Although the FOI Act is silent on what constitutes 'all reasonable steps', it is not enough for an agency or minister to simply assert that the document cannot be found or does not exist before taking any demonstrable steps to try to find the requested document. Rather, a thorough and systematic search must be undertaken and documented.[62]

3.131 Agencies and ministers should undertake a reasonable search based on a flexible and common-sense interpretation of the terms of the FOI request. What constitutes 'all reasonable steps' will depend on the circumstances of each FOI request and will be influenced by the normal business practices in the agency's operating environment or the minister's office.[63] To ensure reasonable searches are undertaken, agencies and ministers are encouraged to engage with the FOI applicant in relation to the terms of their FOI request.

3.132 'Reasonable' in the context of s 24A(1)(a) has been construed as not going beyond the limits 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.[64]

3.133 The interpretation of the scope of an FOI request impacts search and retrieval of documents within the scope of the request. It is therefore critical that agencies and ministers fully understand the scope of the FOI request, and adopt a reasonable approach to the interpretation of the request, before undertaking a search for relevant documents. See for example, *'ADN' and the Australian Taxation Office*[65] and *Joshua Badge and Department of Health and Aged Care.*[66]

3.134 Agencies and ministers should assist FOI applicants to identify the specific documents they seek. Doing so will facilitate and promote public access to information in accordance with the objects of the FOI Act. If the document still cannot be found, the statement of reasons should sufficiently identify the document, explain why the agency or minister is satisfied the document is in the agency's or minister's possession but cannot be found or is known not to exist, describe the steps the agency took to find the document, and note the limitations of any search. If a record is known to have been, or is likely to have been, destroyed under an agency's Records Disposal Authority, or in the course of normal administrative practice,[67] this should be explained, if possible, by reference to the date of destruction and the agency's records management policy. A record of searches to plan and keep track of the steps taken to find a document will be useful, particularly when managing complex requests for many documents or when later explaining the search undertaken. The OAIC has developed a checklist and search minute which sets out the steps that an agency or minister

ordinary meaning of the words, read in context. As a result, the words 'does not exist' in s 16(1) does not cover the situation in which a document is no longer in the possession of the agency or minister.

62 *De Tarle and Australian Securities and Investments Commission (Freedom of Information)* [2015] AATA 770, *applying Re Cristovao and Secretary, Department of Social Security* [1998] AATA 787; (1998) 53 ALD 138.

63 *Chu v Telstra Corporation Limited* [2005] FCA 1730 [35], Finn J: 'Taking the steps necessary to do this may in some circumstances require the agency or minister to confront and overcome inadequacies in its investigative processes'.

64 *De Tarle and Australian Securities and Investments Commission (Freedom of information)* [2015] AATA 770, applying *Re Cristovao and Secretary, Department of Social Security* [1998] AATA 787; (1998) 53 ALD 138.

65 *'ADN' and the Australian Taxation Office (Freedom of information)* [2023] AICmr 44.

66 *Joshua Badge and Department of Health and Aged Care (Freedom of Information)* [2023] AICmr 46.

67 Normal administrative practice permits agencies to destroy certain types of records which are not needed to document business decisions or are not significant records of an agency's business. For further guidance see the National Archives of Australia website at www.naa.gov.au Normal administrative practice (NAP) | naa.gov.au.

should follow to find documents within the scope of an FOI request and the steps taken when searching for documents.[68]

3.135 If an agency or minister has taken contractual measures to obtain a document from a contracted service provider but has not been able to obtain that document after taking all reasonable steps, the agency or minister may refuse the FOI request (s 24A(2)).[69]

3.136 As a minimum, an agency or minister should take comprehensive steps to find documents, having regard to:

- the subject matter of the documents
- the current and past file management systems and the practice of destruction or removal of documents
- the record management systems in place
- the individuals within an agency or minister's office who may be able to assist with finding documents and
- the age of the documents.[70]

3.137 The OAIC has developed an agency resource '*Taking all reasonable steps to find documents in a freedom of information request*' to help agencies and ministers undertake effective and reasonable searches for requested documents. Agencies and ministers should search all possible locations for documents even if it is considered unlikely that any documents will be found there.[71] These locations may include:

- Case Management Systems
- Records Management Systems (for example TRIM or HPE Content Manager)
- Electronic documents saved on computers, tablets, smart phones and Apps (for example emails on Outlook, text messages etc)
- Electronic documents saved on portable media devices
- Hardcopy files stored in safes, compactus, tambours, desk drawers, etc
- If applicable, backup systems.

3.138 If applicable, agencies may need to consider whether contractual measures have been taken to ensure the agency receives a document from a contracted service provider.

3.139 Ensuring that the search is conducted by the officers most likely to be able to find requested documents, rather than the FOI officer, will increase the effectiveness of the search.[72]

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[68] The checklist and search minute can be found on the OAIC website: *'Taking all reasonable steps to find documents in a freedom of information request'.*

[69] For further information on contracted service providers see 'Documents held by government contractors' on the OAIC website.

[70] *'KE' and Cancer Australia* [2016] AICmr 87; *John Singer and Comcare* [2016] AICmr 63; and *De Tarle and Australian Securities and Investments Commission (Freedom of information)* [2015] AATA 770, applying *Langer and Telstra Corporation Ltd* [2002] AATA 341.

[71] For example see *'RN' and Department of Veterans' Affairs (Freedom of information)* [2020] AICmr 2 [23]–[24].

[72] In *'RL' and Aged Care Quality and Safety Commission* (Freedom of Information) [2019] AICmr 74, where the agency's decision to refuse access under s 24A was affirmed, 'the ACQSC … provided evidence that all documents relating to the applicant's complaint … are stored in the NCCIMS database. This database, along with others identified by ACQSC as locations where documents are stored, were searched using relevant search parameters. It is also apparent that the ACQSC's FOI officers

Advising FOI applicants of the relevant business areas that conducted the searches may assure them that all reasonable steps were taken to identify and retrieve the documents they seek and assist in their consideration of whether to accept the agency's or minister's initial decision.[73]

3.140 Agencies and ministers are responsible for managing and storing records in a way that facilitates finding them for the purposes of an FOI request.[74] The steps taken to search for documents should include the use of existing technology and infrastructure to conduct an electronic search of documents, as well as making enquiries of those who may be able to help find the documents.[75]

3.141 Whether it is necessary for an agency or minister to search its backup systems or physical archives for documents will depend on the circumstances. For example, if the agency is aware that its backup or archive system merely duplicates documents that are easily retrievable from its main records systems, a search of the backup system or archive would be unnecessary. Similarly, if an agency retains its backed-up data for a maximum period of 12 months, and the applicant is seeking documents that are older than 12 months, it will not be necessary to undertake a search of the backup system.[76]

3.142 On the other hand, if an agency or minister is aware that its backup system or archive may contain relevant documents not otherwise available or if the FOI applicant clearly includes backup systems in their request, a search of the backup system may be required (provided it does not involve a substantial and unreasonable diversion of agency resources, see [3.180]—[3.199).[77]

3.143 Because 'possession' of a document is not limited to actual or physical possession, but can also include constructive possession, where an agency or minister has the right and power to deal with a document, regardless of where and by whom it is stored, the FOI Act may extend to records retained on personal devices or communicated through messaging apps.[78] Further, information created or received by officials constitutes Commonwealth records for the purposes of the *Archives Act 1983* (s 3(1)) and needs to be handled in accordance with the National Archives of Australia's standards and guidance. This extends to official information sent or received via messaging apps, including disappearing messages.[79]

3.144 As a result, agencies and ministers should ensure they have policies and procedures in place to ensure that all 'documents of an agency' and 'official documents of a minister' are not

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sought assistance from relevant officers to search for documents within the scope of the request.' See also *'RN' and Department of Veterans' Affairs (Freedom of information)* [2020] AICmr 2 [15].

73 See *'RD' and Comcare (Freedom of Information)* [2019] AICmr 61 [13].

74 See *Langer and Telstra Corporation Ltd* [2002] AATA 341.

75 See *Smith and Australian Federal Police (Freedom of information)* [2016] AATA 531; *'MC' and Department of Defence (Freedom of information)* [2017] AICmr 74; *William Yabsley and Australia Post (Freedom of information)* [2017] AICmr 35; *'JG' and Department of Human Services* [2016] AICmr 53; *'JF' and Family Court of Australia* [2016] AICmr 50; *John Singer and Comcare* [2016] AICmr 63; and *John Mullen and Australian Aged Care Quality Agency* [2016] AICmr 51.

76 *'HL' and Department of Defence* [2015] AICmr 73.

77 See also, *Trevor Kingsley Ferdinands and Department of Defence (Freedom of information)* [2024] AICmr 182 [20]–[21] and *'AOT' and Department of Home Affairs (Freedom of information)* [2024] AICmr 221 [15]–[17].

78 See [2.50] of the FOI Guidelines (Part 2: Scope of application of the Freedom of Information Act 1982 | OAIC) citing *McLeod and Social Security Appeals Tribunal* [2014] AICmr 34 [20].Further, any record made or received in connection with discharging a minister's ministerial responsibilities is a ministerial record even if it is on a personal device. See National Archives of Australia, *General Records Authority 38*. The definition of 'Ministerial office' includes all members of staff employed by the Minister.

79 See Managing social media and instant messaging (IM) | naa.gov.au

only retained but can be readily searched for and found to satisfy FOI requests. Also, where appropriate, FOI sections should ask staff to search messaging apps to find requested documents.

Advising the FOI applicant of the steps taken to find documents

3.145 In their decision, agencies and ministers should explain the steps taken to find documents within the scope of the FOI request, including the dates the searches were conducted, the search parameters used, the time taken to conduct the search and whether any backup databases were examined.[80] This explanation will help the FOI applicant understand how searches were conducted and whether there is any merit in seeking further review (internal or IC review). A Search Memo template is available to assist agencies to document searches.[81] The OAIC template letters include search descriptions to assist agencies and ministers to advise applicants of search measures taken

3.146 Providing information describing the historical and current recordkeeping environment and the types of records stored in each electronic database may further assist applicants to see whether all reasonable steps have been taken to locate their documents.[82]

Deleting exempt or irrelevant content from a document

3.147 An agency or minister may refuse access to a document on the ground that it is exempt. If so, the agency or minister must consider whether it would be reasonably practicable to prepare an edited copy of the document for release to the applicant, that is, a copy with relevant deletions made (s 22).[83]

3.148 An agency or minister is under the same obligation to consider preparing an edited copy of a document by deleting information that would reasonably be regarded as irrelevant to the FOI request.[84] It is important for agencies and ministers to keep in mind that the implicit purpose of s 22 is to facilitate access to information promptly and at the lowest reasonable cost through the deletion of information that can readily be deleted, and that an applicant has either agreed or is likely to agree is irrelevant to their request.[85]

3.149 In some circumstances, deleting irrelevant information can have advantages for both agencies and ministers and FOI applicants. For example, an agency or minister may not have to consider whether the deleted information is exempt, or if a third party should be consulted. However, it can also increase processing time if large amounts of information need to be deleted. It is also important to note that when access is granted to a document edited under s 22, the decision is reported as a partial access grant when reporting the agency's FOI statistics.[86]

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80 *Ben Fairless and Minister for Immigration and Border Protection (Freedom of information)* [2017] AICmr 115 [21].

81 The search minute template can be found on the OAIC website: *'Taking all reasonable steps to find documents in a freedom of information request'*.

82 See *'RD' and Comcare (Freedom of Information)* [2019] AICmr 61 [14].

83 See also, *Bachelard v Australian Federal Police* [2025] FCAFC 5 [287]-[289].

84 Re *Russell Island Development Association Inc and Department of Primary Industries and Energy* [1994] AATA 2; (1994) 33 ALD 683; Re *LJXW and Australian Federal Police and Another* [2011] AATA 187; (2011) 120 ALD 516.

85 *'FM' and Department of Foreign Affairs and Trade* [2015] AICmr 31 [15].

86 See s 31(3)(a) of the *Australian Information Commissioner Act 2010*.

3.150 Section 22 does not apply to a document that contains only irrelevant information, which should be treated as beyond the scope of an applicant's FOI request.[87]

3.151 In general, it will only be appropriate to delete public servants' names and contact details as irrelevant under s 22 of the FOI Act if the FOI applicant clearly and explicitly states that they do not require this information, either in their FOI request or in subsequent correspondence.[88] Where it is not apparent from the terms of the FOI request that the names and contact details of staff can be excluded, an agency or minister should not treat this information as irrelevant to the FOI request without first obtaining the consent of the FOI applicant.

3.152 It is not appropriate for an agency or minister to assume that the FOI applicant has consented to the exclusion of this information based on agency policy or the applicant's non-response to advice that, unless told otherwise, the agency or minister will treat this information as being irrelevant to the FOI request.[89]

3.153 Where the agency or minister has identified general work health and safety risks associated with the disclosure of the names and contact details of their staff, or a particular staff member, the agency or minister should consider asking the FOI applicant whether they seek this information as part of their FOI request. This can be done by phone or email, or by inviting a response from the FOI applicant in the letter acknowledging receipt of the FOI request (under s 15(5)(b)). In any event, processing of the FOI request should not be delayed because of any consultation with the FOI applicant about whether this information can be excluded.

3.154 If agencies and ministers adopt a practice of asking FOI applicants whether they wish to exclude this kind of information from the scope of FOI requests, for example, by giving the FOI applicant the option to exclude this information through the use of a check box in an FOI request form, this practice should be published on the agency's or minister's website to ensure transparency.

3.155 Deleting the names and contact details of public servants can increase the time it takes to process an FOI request and may also significantly impact processing time estimates which inform whether processing an FOI request would substantially and unreasonably divert an agency's resources from its other operations or would substantially and unreasonably interfere with the performance of a minister's functions (s 24AA) or calculation of the preliminary assessment or final charge (s 29).

3.156 The obligation to prepare an edited copy of a document so that it does not contain exempt or irrelevant information is subject to the following conditions:

- it is possible for the agency or minister to prepare an edited copy of the document (s 22(1)(b))
- it is reasonably practicable to prepare an edited copy, having regard to the nature and extent of the modification required, and the resources available to modify the document (s 22(1)(c)) and

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87 *Nikjoo and Minister for Immigration and Border Protection* [2013] AATA 921 [44].

88 *'ZT' and the Department of Home Affairs* [2022] AICmr 4 [16] – [19]; *AIN' and Services Australia (Freedom of information)* [2024] AICmr 59 [38].

89 *'ZT' and the Department of Home Affairs* [2022] AICmr 4 [16]; *'ACQ' and Australian Federal Police (Freedom of information)* [2022] AICmr 79 [15]-[17]; *'AIJ' and Services Australia (Freedom of information)* [2024] AICmr 55 [24]-[25], [28], [31]-[32] and *Paul Farrell and Australian Federal Police (No.3) (Freedom of information)* [2024] AICmr 79 [11]-[19].

- it is not apparent from an applicant's FOI request or consultation with them, that the applicant would decline access to the edited copy (s 22(1)(d)).

3.157 Applying these considerations, an agency or minister should take a common sense approach in considering whether the number of deletions would be so many that the remaining document would be of little or no value to the applicant.[90] Similarly, the purpose of providing access to government information under the FOI Act may not be served if such extensive editing is required that it leaves only a skeleton of the former document that conveys little of its content or substance.[91] However merely because a document is heavily redacted does not mean it would not be of any interest to the FOI applicant.[92]

3.158 Consideration should be given to consulting the FOI applicant before deciding to edit a document to delete exempt or irrelevant content. An applicant may be willing to alter the scope of their request to a specific part of the document,[93] or to be given administrative access to particular information in the document (see [3.5]—[3.11]).

3.159 Care and diligence should be exercised when editing a document to delete exempt or irrelevant content under s 22. Inconsistent editing of a document (for example, deleting information from one page but retaining it on another) compromises the right of access to information.[94] It also creates confusion for FOI applicants, who may be more likely to seek review of the FOI decision.

3.160 If a decision is made to delete or edit exempt or irrelevant matter, an agency or minister must give the FOI applicant notice in writing that the edited copy has been prepared (s 22(3)). This notice must include the grounds for the deletions, including any specific provisions about which matter the agency or minister claims to be exempt was deleted. It is generally helpful to the FOI applicant if the document is marked where text has been deleted and the grounds for the deletion added at the point of deletion.

Deferring access to a document

3.161 Where an agency or minister decides to grant access to a document, they may defer access:

- if publication of the document is required by law — until the expiration of the period within which the document is required to be published (s 21(1)(a))
- if the document has been prepared for presentation to Parliament or for the purpose of being made available to a particular person or body, or with the intention that it should be so made available — until the expiration of a reasonable period after its preparation for it to be so presented or made available (s 21(1)(b))

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90 *Paul Farrell and Australian Customs and Border Protection Service* [2015] AICmr 52 [28].

91 *Paul Farrell and Australian Customs and Border Protection Service* [2015] AICmr 52; *'JL' and Department of the Prime Minister and Cabinet* [2016] AICmr 58; and *Parnell & Dreyfus and Attorney-General's Department* [2014] AICmr 71.

92 *Bachelard v Australian Federal Police* [2025] FCAFC 5 [178], [287]-[289]. The decision in Bachelard can be contrasted with *Paul Farrell and Department of Home Affairs (No. 3) (Freedom of information* [2023] AICmr 55 [54]–[57] in which the relevant 'documents' were video footage files containing personal information. The Acting Freedom of Information Commissioner considered whether the footage could be edited to remove the personal information, as well as the extent of personal information to be removed. It was found that to prepare an edited copy of the video footage files under s 22, faces, bodies and voices of each individual would have to be obscured. As a result it was not considered to be reasonably practicable to prepare an edited copy because if the footage was edited to remove all the personal information it would leave only a skeleton that would convey little of its content or substance.

93 'Document' is defined in s 4 of the FOI Act to include 'any part of a document'.

94 *AJB' and Department of Home Affairs (Freedom of information)* [2024] AICmr 67 [13].

- if the premature release of the document would be contrary to the public interest — until an event occurs or the period of time expires after which the release of the document would not be contrary to the public interest[95] (s 21(1)(c))
- if a minister considers that the document is of such general public interest that the Parliament should be informed of the contents of the document before the document is otherwise made public — until the expiration of five sitting days of either House of Parliament (s 21(1)(d)).

3.162 A decision under s 21 does not empower an agency or minister to defer deciding whether to grant access to requested documents. Rather, it authorises a decision to grant access with deferral of the operation of that decision.[96]

3.163 The agency or minister must inform the applicant of the reasons for deferring access and, as far as practicable, indicate how long the deferment period will be (s 21(2)).

3.164 A decision to defer access is an access refusal decision that is reviewable by the Information Commissioner (other than where a minister considers that Parliament should first be informed of the contents of the document) (s 53A(d)).

Refusing to confirm or deny existence of a document

3.165 The act of confirming or denying the existence of a document can sometimes cause damage similar to disclosing the document itself. For example, knowing that an agency possesses a particular document, coupled with knowledge that the document could originate from only one source, might disclose a confidential source resulting in the effective loss of important information. Another example could involve a person being able to confirm, through an FOI request refusing access to information about a telephone intercept, that an agency has a current telecommunications interception warrant in connection with a specific telephone service. This would be sufficient warning to a suspect who could modify their behaviour and possibly undermine an investigation into serious criminal activity.

3.166 Section 25(2) allows an agency or minister to give an applicant a notice in writing that neither confirms or denies the existence of a document but instead tells the applicant that, if it existed, such a document would be exempt under ss 33, 37(1), 45A(1), 45A(2) or 45A(3).

3.167 Section 25 is not framed as an 'exception'[97] or an 'exemption'.[98] It operates in relation to the FOI Act as a whole to protect, in a particular and exceptional way, certain information 'that the Parliament has specifically identified as meriting protection'.[99]

3.168 The agency or minister does not have to search for the requested document because a decision as to whether s 25 applies can be made based on the form of the request.[100] Section 25(2) requires only an assessment of whether a document of the kind requested is,

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95 For example, see *Robinson and Department of Employment and Workplace Relations* [2002] AATA 715 in which the AAT was not satisfied that release of a submission to the Remuneration Tribunal was contrary to the public interest. See also, *Wellard Rural Exports Pty Ltd and Department of Agriculture* [2014] AICmr 131 in which disclosure of the documents at issue might prejudice an investigation so as a result access to those documents was deferred until the conclusion of the investigation.

96 Re *Dr Geoffrey W Edelsten and Australian Federal Police* [1985] AATA 350 [35]–[36].

97 *Department of Health and Ageing v iNova Pharmaceuticals (Australia) Pty Ltd* [2010] FCA 1442 [53]; (2010) 191 FCR 573 [53].

98 *Brooks and Secretary, Department of Defence (Freedom of information)* [2017] AATA 258 [27].

99 *Department of Health and Ageing v iNova Pharmaceuticals (Australia) Pty Ltd* [2010] FCA 1442 [64]; (2010) 191 FCR 573 [64].

100 *Secretary Department of Health and Ageing v iNova Pharmaceuticals (Australia) Pty Limited* [2010] FCA 1442 [8]; *Paul Farrell and Australian Federal Police (Freedom of information)* [2017] AICmr 113 [35]. It is important to note that it is only in relation to s 25 that the FOI Act permits a decision to be made without searching for and collating relevant documents.

or would be, an exempt document under ss 33 (documents affecting national security, defence or international relations), 37(1) (documents affecting enforcement of law and protection of public safety) or 45A (Parliamentary Budget Office documents).[101]

3.169 In making a decision, the decision-maker must first turn their mind to whether the requested document is of such a kind that it would be an exempt document under ss 33, 37(1) or 45A. A decision-maker must then think about the kind of document that would fall within the scope of the request.[102]

3.170 Subsection 25(2) does not require the agency or minister to determine that the requested document, if it does exist, would be exempt under ss 33, 37(1) or 45A.[103] Nor does the agency or minister have to consider whether there are, in fact, documents which are exempt under ss 33, 37(1) or 45A.[104] It is enough that a response confirming or denying the existence of the requested documents would itself be exempt under ss 33, 37(1) or 45A.[105]

3.171 Agencies and ministers should only use s 25 if they conclude that the notional document referred to in s 25(1) would genuinely give rise to the relevant exemption applying (on the basis that if the notional document referred to in s 25(1) is exempt then the underlying document to which it relates would also be exempt). For the purposes of an IC review, a notice under s 25 is deemed to be notice of a decision to refuse access on the grounds that the document sought is exempt under ss 33, 37(1) or 45A as the case may be (s 25(2)).

3.172 Circumstances may arise where a notice under s 25(2) is given after the expiry of the statutory timeframe for notifying the FOI applicant of a decision. When a notice is given under s 25 of the FOI Act, s 25(3)(b) operates to deem the making of a decision to refuse to grant access to the requested document because the document would, if it existed, be an exempt document by virtue of s 33, 37(1) or s 45A of the FOI Act. Such a decision does not indicate, expressly or by implication, whether or not such a document exists. The statutory context in which such a decision arises indicates that no searches have been undertaken. In contrast, a deemed decision under s 15AC(3), being a refusal to give access to a document, may be taken to indicate that such a document exists or does not exist, and therefore giv[ing] information as to the existence or non-existence of [the requested] document' for the purposes of s 25(1). The statutory context suggests that in circumstances where s 15AC(3) has operated to deem a decision to refuse access to the document, and where subsequently the agency invokes s 25 in a valid way (noting that no timeframe is stipulated for the issuing of a s 25 notice) the resulting decision under s 25(3)(b) subsumes the deemed decision under s 15AC(3). Therefore, if the FOI applicant applies for IC review, the IC reviewable decision is the decision made under s 25(3)(b).[106] This interpretation is consistent with the Parliamentary intention and the express purpose and operation of s 25(1).[107]

3.173 When a decision is made to refuse access to a document in accordance with a request, agencies and ministers should be careful not to inadvertently disclose in its reasons for decision the existence of a document where that disclosure would reveal exempt matter

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101 *Paul Farrell and Australian Federal Police (Freedom of information)* [2017] AICmr 113 [35].

102 *Paul Farrell and Australian Federal Police (Freedom of information)* [2017] AICmr 113 [36].

103 *Brooks and Secretary, Department of Defence (Freedom of information)* [2017] AATA 258 [29].

104 *Brooks and Secretary, Department of Defence (Freedom of information)* [2017] AATA 258 [30].

105 *Brooks and Secretary, Department of Defence (Freedom of information)* [2017] AATA 258 [29]. See also *'ABP' and Australian Taxation Office (Freedom of information)* [2022] AICmr 51 [18].

106 *Jeremy Kirk and the Australian Federal Police (Freedom of Information)* [2023] AICmr 61 [6]–[7].

107 *Jeremy Kirk and the Australian Federal Police (Freedom of Information)* [2023] AICmr 61 [footnote 2 to [6]).

(s 26(2)).[108] The other requirements of a notice under s 26 still apply (see [3.262]—[3.262] below).

3.174 As noted above, s 26(2) provides that a notice under s 26 is not required to contain any matter that is of such a nature that its inclusion in a document of an agency would cause that document to be an exempt document. As a result, s 26(2) ensures that any notice of a decision to refuse access does not contain information that is of such a nature that the s 26 notice itself would become an exempt document. Importantly, s 26(2) does not apply limit its application to ss 33, s 33A and s 37(1) as s 25 does.[109] Any matter that is exempt is not required to be included in a s 26 notice of reasons.[110]

Refusing access when a practical refusal reason exists

3.175 An agency or minister may refuse an FOI request if satisfied that a 'practical refusal reason' exists. There are of 2 types of practical refusal:

- an FOI request that does not sufficiently identify the requested documents (s 24AA(1)(b))
- the resource impact of processing the FOI request would be substantial and unreasonable (s 24AA(1)(a)).

In both cases, the agency or minister must first follow a 'request consultation process' before refusing the request. Further information about the request consultation process can be found at [3.206]—[3.217].

3.176 The requirement for an agency or minister to be 'satisfied' for the purposes of s 24(1) means that the decision-maker must 'feel' an 'actual persuasion' that the reason exists; they cannot be satisfied simply as a result of a 'mere mechanical comparison of probabilities independently of any belief in its reality'.[111] This means that the decision maker must feel an actual persuasion that the relevant practical refusal reason exists before refusing the FOI request.

Request does not sufficiently identify documents

3.177 One formal requirement for an FOI request is that the FOI request must provide 'such information as is reasonably necessary to enable a responsible officer of the agency, or the Minister, to identify' the document that is requested (s 15(2)(b)). This differs from other formal requirements, in that a failure to comply with this requirement is classified by the FOI Act as a 'practical refusal reason' for which a request consultation process is required.

3.178 An agency or minister should not wait until the practical refusal stage to help an FOI applicant clarify their FOI request.[112] The following considerations should also be borne in mind before a request consultation process is commenced:

[108] *TFS Manufacturing Pty Limited and Department of Health* [2016] AICmr 73.

[109] *Secretary, Department of Health and Ageing v iNova Pharmaceuticals (Australia) Pty Ltd* [2010] FCA 1442 [17]; (2010) 191 FCR 573.

[110] *Josh Taylor and the Commonwealth Ombudsman (Freedom of information)* [2024] AICmr 44 [17].

[111] '*ACW' and Australian National Maritime Museum (Freedom of information)* [2023] AICmr 4 [14].

[112] Agencies have a duty to take reasonable steps to assist a person make an FOI request that complies with the formal requirements of ss 15(2) and 15(2A) (s 15(4)).

- An FOI request can be described quite broadly and must be read fairly by an agency or minister, being mindful not to take a narrow or pedantic approach to its construction.[113]
- An FOI applicant may not know exactly what documents exist and may describe a class of documents, for example, all documents relating to a particular person or subject matter; all documents of a specified class that contain information of a particular kind; or all documents held in a particular place relating to a subject or person. Where the FOI applicant has requested a class of documents it may be useful for the agency or minister to explain to the applicant the information that is contained in those documents because this may assist them narrow the scope of their FOI request to a specific set of documents, resulting in less time spent processing irrelevant matter.
- Although a request under the FOI Act must be for 'documents' rather than 'information', an FOI request may be phrased with reference to the information that a document contains. This may be an effective and concise way for an FOI applicant to identify documents.
- An FOI request does not need to quote a file or folio number.

3.179 The 'Note' to s 15(3) makes it clear that an agency or minister may refuse to deal with an FOI request that does not meet the formal requirements in s 15(2) (in this case, the identification requirements in s 15(2)(b)) only if satisfied that a practical refusal reason exists after undertaking a request consultation process. As a result, agencies cannot refuse to deal with an FOI request on the basis that it is invalid because it does not meet the identification requirements in s 15(2)(b) – they must undertake a request consultation process under s 24AB before doing so.[114]

Resource impact of processing a request would be substantial and unreasonable

3.180 A 'practical refusal reason' exists if:

- in the case of an agency — the work involved in processing the FOI request would substantially and unreasonably divert the resources of the agency from its other operations (s 24AA(1)(a)(i))
- in the case of a minister — the work involved in processing the request would substantially and unreasonably interfere with the performance of the minister's functions (s 24AA(1)(a)(ii)).

3.181 An important similarity in both tests (for agencies and for ministers) is that they require consideration of whether processing an FOI request would have both a 'substantial' and an 'unreasonable' effect.

3.182 Another similarity between the 2 tests is that the FOI Act specifies the same non-exhaustive list of matters that must be considered, as well as matters that cannot be considered. An important textual difference between the tests is that for agencies it is whether a request would divert an agency's resources from its other operations whereas for ministers it is

[113] *Re Anderson and AFP* [1986] AATA 79; *'BI' and Professional Services Review* [2014] AICmr 20.

[114] See for example, *'AUC' and Services Australia (Freedom of information)* [2025] AICmr 34.

whether a request would interfere with the performance of the Minister's functions.[115] This means that different considerations may arise in applying the tests.

3.183 In deciding whether a practical refusal reason exists, an agency or minister must have regard to the resources required to perform the following activities specified in s 24AA(2):

- identifying, locating or collating documents within the filing system of the agency or office of the minister
- examining the documents
- deciding whether to grant, refuse or defer access
- consulting with other parties[116]
- redacting exempt material from the documents
- making copies of documents
- notifying an interim or final decision to the applicant.

3.184 Other matters that may be relevant in deciding whether a practical refusal reason exists include:[117]

- the staffing resources available to an agency or minister for FOI processing
- whether the processing work requires the specialist attention of a minister or senior officer, or can only be undertaken by one or more specialist officers in an agency who have competing responsibilities
- the impact that processing a request may have on other work in an agency or minister's office, including FOI processing
- whether the FOI applicant has cooperated in framing a request to reduce the processing workload
- whether there is a significant public interest in the documents requested
- other steps taken by an agency or minister to publish information of the kind requested by the applicant
- as to a request to a minister — other responsibilities of the minister and demands on the minister's time, and whether it is open to the minister to obtain assistance from an agency in processing the request.

3.185 The FOI Act also specifies matters that an agency or minister must not have regard to in deciding if a practical refusal reason exists:

- any reasons that the FOI applicant gives for requesting access
- the agency's or minister's belief as to the FOI applicant's reasons for requesting access
- any maximum amount, specified in the regulations, payable as a charge for processing a request of that kind (s 24AA(3)).

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115 *Dreyfus and Attorney-General (Commonwealth of Australia) (Freedom of information)* [2015] AATA 995 [14].

116 Consultation is only required if a consultation requirement arises under the FOI Act. Including consultation in an agency's or minister's estimate of time if the requirement to do so does not arise under the FOI Act would defeat the purposes of the FOI Act. See *Dreyfus and Attorney-General (Commonwealth of Australia) (Freedom of information)* [2015] AATA 995 [15].

117 See *Davies and Department of the Prime Minister and Cabinet* [2013] AICmr 10; *Fletcher and Prime Minister of Australia* [2013] AICmr 11; and *Langer v Telstra Corporation Ltd* [2002] AATA 341.

3.186 Not all of the matters identified in the paragraphs above will be relevant in all cases in which a practical refusal decision is being considered. As noted in the IC review decision of *Chris Drake and Australian Transaction Reports and Analysis Centre,*[118] the need to consult affected third parties under ss 27 and 27A will not arise if the agency or minister has already decided that a document, or part of a document, is exempt from disclosure.[119] As a result, in such cases it will not be appropriate to include the time that it would take to consult third parties when calculating the resources needed to process an FOI request for the purpose of deciding whether a practical refusal reason exists.[120]

3.187 Whether consultation is needed will depend on the information contained in the requested documents. Where the third-party information is limited and generalised it may be that staff with knowledge of the subject matter can adequately assess whether an exemption applies from reviewing the documents (without third party input).[121]

3.188 The evident purpose of the practical refusal ground is to ensure that the capacity of agencies and ministers to discharge their usual functions is not undermined by processing FOI requests that are unreasonably large or complex. On the other hand, it is implicit in the objects of the FOI Act that agencies and ministers must ensure appropriate resources are allocated to deal with FOI requests. This may include assigning additional temporary resources to handle an increase in the number or complexity of requests, or to overcome inadequate administrative procedures. Poor record keeping or inefficient filing systems will not of themselves be grounds for a claim that processing an FOI request would involve a substantial and unreasonable diversion of resources.[122] Similarly, although a broadly worded request is more likely to constitute an unreasonable diversion of resources than a request that is narrowly focused,[123] the fact that a large number of documents are within the scope of a request may not be determinative if the documents can be easily identified, collated and assessed.

'*Substantially*'

3.189 The first element to consider when deciding whether a practical refusal reason exists is whether the work involved in processing the FOI request would 'substantially' divert the resources of agency from its other operations or 'substantially' interfere with the performance of a minister's functions.

3.190 The word 'substantial' is not defined in the FOI Act and therefore should bear its ordinary meaning 'of ample or considerable amount, quantity, size, etc'.[124]

3.191 Whether a practical refusal reason exists will be a question of fact in the individual case. Bearing in mind the range of matters that must and can be considered (see [3.183]—[3.185]), it is not possible to specify an indicative number of hours of processing time that would be 'substantial' for the purpose of a practical refusal reason. Agencies should not adopt a 'ceiling' in relation to processing time. For example, deciding that a practical refusal reason

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118 *(Freedom of information)* [2023] AICmr 6 [25]–[31].

119 *Chris Drake and Australian Transaction Reports and Analysis Centre (Freedom of information)* [2023] AICmr 6 [26]–[27].

120 *Chris Drake and Australian Transaction Reports and Analysis Centre (Freedom of information)* [2023] AICmr 6 [31].

121 See for example, *Josh Taylor and Department of Health and Aged Care (Freedom of information)* [2024] AICmr 164 [18].

122 See *'AP' and Department of Human Services* [2013] AICmr 78 [38]; and *Paul Farrell and Department of Immigration and Border Protection (Freedom of information)* [2017] AICmr 116 [38].

123 *Philip Morris Ltd and Department of Health and Ageing* [2013] AICmr 49 [35] and *'AMT' and Department of Home Affairs (Freedom of information)* [2024] AICmr 170.

124 Macquarie Dictionary Online.

exists if the estimated processing time exceeds 40 hours.[125] Rather, each FOI request should be assessed on its own merits and the findings in individual ART and IC review decisions which discuss estimated processing times should be viewed in that light.[126]

3.192 An estimate of processing time is only one consideration to be taken into account when deciding whether a practical refusal reason exists.[127] It is recommended that agencies and ministers examine a sample of the documents to assess the complexity of the material to determine whether the work involved in processing the request would constitute a substantial and unreasonable diversion of resources from the agency's other operations or would substantially and unreasonably interfere with the performance of a minister's functions. The sample needs to be large enough for it to be representative of the documents within the scope of the request.[128] Previous guidance has been to the effect that a representative sample of between 10 to 15% of the documents[129] is appropriate for the purposes of calculating processing time when deciding whether a practical refusal reason exists.[130] However a representative sample may be smaller than this in certain circumstances, for example where the number of documents within scope of the request is very large and a 10% sample may not be practicable.[131] A person with appropriate knowledge or expertise should assess the sample, looking at each document as if they were making a decision on access, including by indicating the number of documents that could be released in an edited form.[132] The assessment of the sample will provide an indication of the complexity of the potential decision, that is, the number of exemptions required, the topic and content of the documents, the number of consultations required, and the effort required to contact third parties based on available contact details.[133]

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125 *Aloysia Brooks and Department of the Prime Minister and Cabinet* [2015] AICmr 66.

126 For examples of relevant factors in IC review and AAT/ART decisions affirming practical refusal reasons, see: *Tate and Director, Australian War Memorial* [2015] AATA 107 (estimate of 150 hours to process a request of 1,003 pages in the context of a small agency with one staff member available as an FOI resource and assigning staff from other areas of the agency to assist with processing the request would effectively mean that resources would be diverted from important priority operations and projects); *'FF' and Australian Taxation Office* [2015] AICmr 25 (estimate of 94.16 hours to process a request of approximately 6,500 pages); *Gurjit Singh and Attorney-General's Department* [2015] AICmr 20 (estimate of 74 hours to process a request of 1800 pages; the documents sought related to a financial grant to a University and processing the request would not cast light on a decision that had a significant personal impact on the applicant). For examples of relevant factors where practical refusal reasons were set aside see: *Dreyfus and Attorney-General (Commonwealth of Australia) (Freedom of information)* [2015] AATA 995 (estimate of 228–630 hours to process a request for the Attorney-General's diary was found to be unrealistic as there was no rational basis upon which it could appear that every person named in the diary might reasonably wish to make an exemption contention for the purposes of consultation under ss 27 and 27A); *'JH' and Australian Securities and Investments Commission* [2016] AICmr 55 (where the agency was willing to process a separate but identical request in exchange for a charge, they would not be able to continue to claim that a practical refusal reason exists); *Paul Farrell and Prime Minister of Australia (Freedom of information)* [2017] AICmr 44 (where it was not established that the documents were sufficiently complex or voluminous to justify the existence of a practical refusal reason).

127 *'JC' and Department of Health* [2016] AICmr 47; and *'FX' and Department of Prime Minister and Cabinet* [2015] AICmr 39.

128 *Cash World Gold Buyers Pty Ltd and Australian Taxation Office (Freedom of information)* [2017] AICmr 20 [30].

129 Where the number of documents is not high, it may be appropriate for a sample of more than 20% of the documents be conducted. See *Paul Farrell and Prime Minister of Australia (Freedom of information)* [2017] AICmr 44 where the sample size used for estimating processing time was small and the Information Commissioner was not satisfied that the estimated processing time was reasonable.

130 *'GD' and Department of the Prime Minister and Cabinet* [2015] AICmr 46; *Farrell and Department of Immigration and Border Protection (No. 2)* [2014] AICmr 121; *'DC' and Department of Human Services* [2014] AICmr 106; *'AP' and Department of Human Services* [2013] AICmr 78.

131 *Cash World Gold Buyers Pty Ltd and Australian Taxation Office (Freedom of information)* [2017] AICmr 20 [30].

132 *Paul Farrell and Prime Minister of Australia (Freedom of information)* [2017] AICmr 44 [25].

133 See *Paul Farrell and Prime Minister of Australia (Freedom of information)* [2017] AICmr 44 [26].

3.193 It is nevertheless expected that an agency or minister will provide a breakdown of the time estimated for each stage in processing an FOI request. As discussed in Part 4 of the Guidelines, a commonly used tool for estimating processing time is a 'charges calculator'. Some versions of charges calculators contain a number of predetermined parameters based on assumptions as to how long an FOI request should take to process. Agencies should be mindful that the use of a 'charges calculator' with these predetermined parameters only provides a rough estimate of how long FOI decision-making will take and is not suitable for estimating the processing time for the purposes of a practical refusal decision.[134]

3.194 Agencies and ministers should also take care to ensure estimates of the number of documents within the scope of the request are accurate and that their calculations are correct. Agencies and ministers need to ensure that their estimates of processing time reflect the actual processing time, based on the actual documents within scope of the request.[135] Agencies and ministers should also keep records of the searches conducted so they are able to verify their estimates of the number of documents are correct (in their statement of reasons, and when required on internal and IC review).

'Unreasonably'

3.195 As well as specifying that the work involved in processing an FOI request must be substantial, s 24AA(1) requires the work involved in processing the request to either unreasonably divert an agency's resources from its other operations, or to unreasonably interfere with the performance of a minister's functions, for a practical refusal reason to exist.

3.196 An agency or minister's decision to rely on s 24 to refuse access to documents for a practical refusal reason is discretionary. In considering whether the work involved in processing a request would involve an unreasonable diversion of resources, agencies and ministers need to balance the objects of the FOI Act, which are to make information available to the public so there can be increased public participation leading to better-informed decision-making and increased scrutiny and review of the government's activities, against the public interest in ensuring that government functions effectively and efficiently.[136]

3.197 There may be circumstances where processing an FOI request would have a substantial effect on the agency or minister, but that effect may not necessarily be unreasonable in the circumstances. For example, an agency that is particularly large may not necessarily find the processing of an FOI request to be unreasonable, even though processing the request would have a substantial effect on the agency. Such agencies are likely to have dedicated resources to ensure they can appropriately handle requests and thereby reduce the impact of processing the request on other business areas of the agency through the establishment

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[134] *Cash World Gold Buyers Pty Ltd and Australian Taxation Office (Freedom of information)* [2017] AICmr 20; *'KT' and Department of Foreign Affairs and Trade (Freedom of information)* [2017] AICmr 15; *'JC' and Department of Health* [2016] AICmr 47; and *Rita Lahoud and Department of Education and Training* [2015] AICmr 41.

[135] See for example, *'ANO' and Department of Health and Aged Care (Freedom of information)* [2024] AICmr 197 [18] in which the Department's calculations were incorrect and did not reflect the work that would be needed to process the request (a 109 page document was listed 8 times with the same estimate of time to examine, redact and consult each of the 8 documents, when no additional time was needed to examine, redact and consult with respect to the 7 copies). See also, *Paul Farrell and Department of Home Affairs (No. 6) (Freedom of information)* [2024] AICmr 184; *Diane Lee and Department of the Prime Minister and Cabinet (No. 2)* (Freedom of information) [2024] AICmr 179; and *'AMX' and Department of Foreign Affairs and Trade (Freedom of information)* [2024] AICmr 177.

[136] *Morgan and Australian Building and Construction Commissioner* [2020] AATA 651.

of a permanent FOI team, as well as by assigning additional temporary resources to handle peaks in the number or complexity of FOI requests.[137]

3.198 In *Farrell; Chief Executive Officer, Services Australia and (Freedom of information),*[138] the AAT did not accept that the work involved in processing an FOI request would substantially and unreasonably divert Services Australia's resources from its other operations. While the AAT described the resources involved in processing the request as 'not insignificant', it was satisfied that it was well within the capacity of the agency to process the request given its size and the resources available to it.

3.199 Similarly, where there is significant public interest value in the disclosure of the information in the documents, or where an individual has been significantly personally affected by government decisions, the agency or minister may find it difficult to justify that a practical refusal reason exists on the basis that processing the request would have an unreasonable effect on the agency even where the FOI processing burden is substantial.[139]

Multiple requests

3.200 In deciding whether a practical refusal reason exists, 2 or more FOI requests may be treated as a single request if the agency or minister is satisfied that:

- the requests relate to the same document or documents (s 24(2)(a))
- the subject matter is substantially the same for the requests (s 24(2)(b)).

3.201 The most common circumstance in which FOI requests may be combined under s 24(2) is likely to be multiple requests from a single applicant. However, s 24(2) can also apply to 2 or more requests from different applicants. An example is where different applicants made more than 100 requests for documents relating to individual incidents reported on a single spread sheet published on an agency's disclosure log.[140]

3.202 Multiple requests can only be combined as a single request under s 24(2) if there is a clear connection between the subject matter of the requested documents. Straightforward examples are where one request is for folios 1–100 of a file, and another request for folios 101–200 on the same file; or where 3 requests relate to 3 different chapters of one report.

3.203 When a decision on the FOI request is not made within the statutory processing period, the agency or minister is deemed to have made a decision refusing access. Once there is a deemed refusal decision, it is not open to an agency or minister to combine an FOI request with another under s 24(2).[141]

3.204 Where multiple FOI requests from different applicants are being treated as a single request, an agency or minister must still follow the request consultation process with each applicant, unless an applicant has agreed to another arrangement. An agency's or minister's power to treat 2 or more requests as a single request for the purpose of making a practical refusal reason decision does not override the legally enforceable right of each applicant under s 11 to obtain access to documents in accordance with the FOI Act.[142] Consequently, agencies

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137 *'AP' and Department of Human Services* [2013] AICmr 78 [54].

138 [2020] AATA 2390.

139 See for example, *'AGN' and the Department of the Prime Minister and Cabinet (Freedom of information)* [2024] AICmr 10 [87]–[94].

140 *Farrell and Department of Immigration and Border Protection* [2014] AICmr 74 [3]–[5] and [19].

141 *Paul Farrell and Department of Immigration and Border Protection (Freedom of information)* [2017] AICmr 116 [9].

142 *Farrell and Department of Immigration and Border Protection* [2014] AICmr 74 [24]–[26].

and ministers are obliged to deal individually with each request that is not withdrawn or revised before the end of the consultation period.

3.205 If an FOI applicant requests access to multiple documents, an agency or minister can choose to undertake a practical refusal consultation process in relation to some but not all of the documents, while still processing the remainder of the request.[143] But the agency or minister cannot undertake a consultation process in relation to all the requested documents and then, if the applicant does not withdraw or revise the request, unilaterally decide to give access under the FOI Act to some of the requested documents and refuse access to others for a practical refusal reason. It is open to an agency to give administrative access to a document that was part of a request refused for a practical refusal reason, but that decision is not a decision under the FOI Act and FOI review rights do not apply.[144]

Request consultation process

3.206 Where an agency or minister considers that a practical refusal may reason exist, they must undertake a request consultation process with the FOI applicant before making a decision to refuse the request (s 24AB).

3.207 Before commencing a formal request consultation process, agencies and ministers' offices are encouraged to discuss the request with the FOI applicant. This is often a more efficient way of obtaining further information to help the FOI applicant refine a request that is too large or vague. However, if the FOI applicant cannot be contacted promptly, or the discussion does not elicit information that allows relevant documents to be identified, the request consultation process should be commenced.

3.208 The agency or minister must give the applicant a written notice that states:

- an intention to refuse access to a document in accordance with a request
- the practical refusal reason
- the name and contact details of an officer with whom the applicant may consult during the process, and details of how the applicant may contact them[145]
- that the consultation period during which the applicant may consult the contact person is 14 days after the day the applicant is given the notice (s 24AB(2)).

3.209 Agencies should also ensure that all relevant steps specified in s 24AB are followed when undertaking a request consultation process, including by ensuring that the contact person, as far as possible, is available for the entire consultation period specified in the request consultation notice (s 24AB(2)(e)), and by ensuring that the contact person is aware of their obligation to take all reasonable steps to assist the applicant revise their request so that a practical refusal reason no longer exists (s 24AB(3)). Failure to adhere to the requirements under s 24AB amounts to a procedural defect and may invalidate the practical refusal decision.[146] An FOI request should not be treated as withdrawn in circumstances where the FOI applicant has

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143 See *Fist and Australian Broadcasting Corporation* [2014] AICmr 14 [10]–[11].

144 See *'AR' and Australian Federal Police* [2013] AICmr 80.

145 In *'AOR' and Department of Health and Aged Care (Freedom of information)* [2024] AICmr 219 [12] a request consultation notice was found to be inconsistent with ss 24AB(2)(c) and (d) (name and contact details of contact person and how they may be contacted) because the notice did not name a contact person and as a result did not provide details of how the applicant may contact that person.

146 See *Maria Jockel and Department of Immigration and Border Protection* [2015] AICmr 70.

responded to the request consultation notice during the consultation period, regardless of whether the applicant revises the request or not. A request should only be treated as withdrawn where the applicant explicitly states this, or the applicant fails to consult the contact person or provide a response to the agency or minister during the consultation period (s 24AB(7)).

3.210 An agency or minister may wish to state how an FOI applicant is to consult the contact person, such as by telephone. However, agencies should adopt a flexible approach. The consultation period may be extended with agreement between the contact officer and applicant, in which case the contact officer must give the applicant written notice of the extension (s 24AB(5)). The request consultation process period is disregarded in calculating the time for making a decision on the request (s 24AB(8)), that is, the process 'stops the clock'.

3.211 Agencies and ministers are only obliged to undertake a request consultation process once for any particular request (s 24AB(9)). However the fact that an agency or minister has received a revised request does not absolve them of the obligation to undertake 'reasonable steps' for the purposes of s 24AB(3) of the FOI Act. As has been discussed in IC review decisions, where an applicant has made a revised request that does not remove a practical refusal reason, the agency may be required to take further steps to satisfy the 'reasonable steps' obligation.[147]

3.212 Where an access refusal decision is deemed to have been made before a substantive decision is made, the agency or minister is still able to process the request and provide a statement of reasons. If a practical refusal reason arises during the processing of the request, but after the decision is deemed to have been made, the agency or minister still needs to follow the consultation process in s 24AB before providing a statement of reasons based on a practical refusal reason. However, the agency or minister cannot use ss 24AB(7) and 24AB(8) of the FOI Act to treat a request as withdrawn if it receives no response from the applicant to its request consultation notice (s 24AB(7)), or to extend the processing period as a result of the request consultation process (s 24AB(8)), because it has already exceeded the statutory timeframe for processing the request. In some instances, agencies have been incorrectly telling FOI applicants in the request consultation notice, where the decision is deemed, that a failure to respond to the agency will be taken as a withdrawal of the FOI request by the applicant.

Assisting the applicant during a request consultation process

3.213 If an applicant contacts a contact officer during the consultation period, the contact officer must take reasonable steps to help them revise their request so the practical refusal reason no longer exists (s 24AB(3)). For example, a contact officer could provide a breakdown of the time estimated for each step of the process, explain the difficulties the agency would have dealing with the request and suggest what would be a reasonable request in the circumstances.[148]

3.214 What constitutes 'reasonable steps' to assist the applicant revise their request to remove the practical refusal reason will depend on the factual circumstances. However, where an

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147 *Alcoa of Australia Limited and Australian Taxation Office (Freedom of information)* [2024] AICmr 137 [22] and *Justin Warren and Department of Human Services (Freedom of information)* [2019] AICmr 22 [40].

148 See *'AP' and Department of Human Services* [2013] AICmr 78 [21]-[25]; *Maria Jockel and Department of Immigration and Border Protection* [2015] AICmr 70 [31] and *'AOR' and Department of Health and Aged Care (Freedom of information)* [2024] AICmr 219 [13].

applicant revises their request in accordance with suggestions made by the contact officer but the estimate of processing time remains unchanged it may be that the contact person has not taken reasonable steps as required by s 24AB(3).[149]

Consultation outcome

3.215 Before the end of the consultation period the applicant must by written notice to the agency or minister:

- withdraw the request
- revise the request or
- indicate that they do not wish to revise the request (s 24AB(6)).

3.216 The request[150] is taken to have been withdrawn if the applicant does not consult the contact person during the consultation period to discuss revising the scope or provide the required written notice during the consultation period (s 24AB(7)). This includes where a verbal agreement is reached with the applicant to revise the request but the applicant does not do so in writing. However, if the applicant has taken steps to consult the contact person about revising scope and the agency or minister does not respond, the request is not taken to be withdrawn.

3.217 Where an agency has treated multiple requests as a single request under s 24(2), (see [3.200]—[3.205]), they must deal individually with any requests that have not been withdrawn or revised at the end of the consultation period. This could include refusing any or all of these requests because a practical refusal reason exists.[151]

Information stored in electronic form

3.218 Section 17 requires an agency to produce a written document of information that is stored electronically and not in a discrete written form, if it does not appear from the request that the applicant wishes to be provided with a computer tape or disk on which the information is recorded.[152] Examples include a transcript of a sound recording, a written compilation of information held across various agency databases, or the production of a statistical report from an agency's dataset. The obligation to produce a written document arises if:

- the agency could produce a written document containing the information by using a 'computer or other equipment that is ordinarily available' to the agency for retrieving or collating stored information (s 17(1)(c)(i)), or making a transcript from a sound recording (s 17(1)(c)(ii)) and
- producing a written document would not substantially and unreasonably divert the resources of the agency from its other operations (s 17(2)).

If those conditions are met, the FOI Act applies as if the applicant had requested access to the written document and it was already in the agency's possession.

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149 See '*AOR' and Department of Health and Aged Care (Freedom of information)* [2024] AICmr 219 [13]–[14].

150 Section 4 of the FOI Act provides that a 'request' means an application made under s 15(1). This does not include an application for internal review or IC review.

151 See, for example, *Farrell and Department of Immigration and Border Protection* [2014] AICmr 74 [28]–[30].

152 For discussion of s 17 not applying because the applicant requested an edited copy of an agency's database rather than a new document containing information from the database, see *Diamond and Australian Curriculum, Assessment and Reporting Authority* [2013] AICmr 57 [19]–[22].

3.219 The reference in s 17 to information recorded on a 'computer tape or disk' should be taken to include information recorded in an email or on electronic storage media.

3.220 In *Collection Point Pty Ltd v Commissioner of Taxation* the Full Federal Court held that the 2 conditions specified in [3.218] are distinct and to be applied sequentially.[153] That is, a computer may not be ordinarily available to an agency even though it could be obtained without an unreasonable diversion of agency resources and, conversely, an agency may encounter an unreasonable diversion of resources to produce a written document using a computer that is ordinarily available.

3.221 The Federal Court further held that the reference in s 17(1)(c)(i) to a 'computer or other equipment that is ordinarily available' means 'a functioning computer system including software, that can produce the requested document without the aid of additional components which are not themselves ordinarily available … [T]he computer or other equipment … must be capable of functioning independently to collate or retrieve stored information and to produce the requested document.'[154] This will be a question of fact in the individual case, and may require consideration of 'the agency's ordinary or usual conduct and operations'.[155] For example, new software may be ordinarily available to an agency that routinely commissions or otherwise obtains such software, but not to an agency that does not routinely do such things. Similarly, where additional hardware and/or software adaption or creation is required in order to produce a document that is intelligible, such work may go beyond what s 17 obliges.[156]

3.222 Applying that test, the Federal Court in *Collection Point* held that the Australian Taxation Office (ATO) did not ordinarily have the required software to satisfy the applicant's request to produce a document containing consolidated details of persons listed in 2 unclaimed money registers maintained electronically by the ATO. A new computer program would have to be produced by the ATO to transfer the information from the database into a discrete written format. Accordingly, as new software was necessary to produce the requested document, ATO was not able to do so by the use of a computer that was ordinarily available to it, and therefore the obligation under s 17(1) did not arise.[157]

3.223 Having regard to the current strong policy emphasis on digitisation of Commonwealth records, agencies are encouraged to develop guidelines and procedures for the efficient storage and retrieval of information held on servers, hard disks, portable drives and mobile devices. Agencies are encouraged to consult applicants about administrative release on a flexible and agreed basis of information extracted from databases.

3.224 As noted at [3.218] above, an agency is not required to produce a written document using a computer or other equipment ordinarily available if doing so would substantially and unreasonably divert the agency's resources from its other operations. This means that the

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153 [2013] FCAFC 67 [39]-[40].

154 [2013] FCAFC 67 [43]-[44].

155 [2013] FCAFC 67 [48].

156 *Stephen Cox and Australian Federal Police* [2015] AICmr 45. However, see the decision *'ANN' and Comcare (Freedom of information)* [2024] AICmr 196 [25]–[31] in which computer equipment was considered 'ordinarily available' for the purposes of s 17(1)(c)(i) even though the agency was required to create a new Structured Query Language query to retrieve the relevant information from the database.

157 [2013] FCAFC 67 [53]. See also *Neilson and Secretary, Services Australia (Freedom of Information)* [2020] AATA 1435 in which the Tribunal affirmed the agency's decision to refuse to produce a written document pursuant to s 17 of the FOI Act, on the basis that the documents sought were not 'ordinarily available,' by reason that access to the documents would involve a departure from the agency's ordinary or usual conduct and operations.

agency must engage in a request consultation process under s 24AB if it intends to refuse the request for a practical refusal reason.

3.225 The provisions set out at s 17 of the Act apply only to agencies. Ministers and their offices must, however, have regard to s 20 (discussed above at [3.298]—[3.302]) when considering the form of access to be given.

Timeframe for notifying a decision

Default period for requests for access

3.226 As noted at [3.41], an FOI request should be treated as valid upon receipt even if it does not comply with the formal requirements of s 15(2) or 15(2A). Agencies and ministers are required to notify an applicant that an FOI request has been received, and to make and notify a decision on the request within the relevant statutory timeframe, commences on the day after the day the request is received (see [3.29]—[3.31]). These Guidelines refer to this period as the processing period.

3.227 An agency or minister must, as soon as practicable, and within 14 days of receiving an FOI request, take all reasonable steps to enable the applicant to be notified that the request has been received (s 15(5)(a)).[158] This requirement will be met by sending a notice of receipt to the contact address provided by the applicant. The 14-day timeframe commences on the day after the request is received by or on behalf of an agency or minister's office (s 15(5)(a)).

3.228 An agency or minister must, as soon as practicable, and no later than 30 days after receiving a request, take all reasonable steps to enable the applicant to be notified of a decision on the request (s 15(5)(b)). The 30-day processing period commences on the day after the day the agency or minister is taken to have received a request that meets the formal requirements of s s15(2) and (2A). Table 2 below sets out the time of receipt.

3.229 An agency should act promptly to assist an applicant whose FOI request does not meet the formal requirements in the FOI Act, in keeping with its obligations under s 15(3). If the request does not satisfy the requirement in s 15(2)(b) (identification of documents) the request consultation process in s 24AB needs to be followed.

3.230 The processing period refers to calendar days, not business (working) days. This will include any public holidays, or agency shutdown periods, that fall within the processing period.[159] If the last day for notifying a decision falls on a Saturday, Sunday or a public holiday, the timeframe for notifying the decision will expire on the first business day following that day.[160] The 30-day processing period does not include:

[158] A sample acknowledgement letter can be found on the OAIC website: Sample freedom of information notices | OAIC.

[159] See Public holidays and agency shutdown periods: calculating the processing period.

[160] *Acts Interpretation Act* s 36. Note: the statutory timeframe of 30 days for processing an FOI request is not extended under s 36, but rather the timeframe to notify the decision is extended to the next business day due to s 36 of the *Acts Interpretation Act* (s 36(2)). A matter which has deemed is a 'state of affairs' that is a criterion relevant to whether an EOT under s 15AA or 15AB is valid. The decision in *Minister for Immigration and Border Protection v Kumar & Ors* ([2017] HCA 11 [25] provides that s 36(2) of the *Acts Interpretation Act* does not operate to deem a state of affairs that existed on a weekend or public holiday to instead be in existence on the later date.

- the time that an applicant may take in a request consultation process to make a revised request or indicate in writing that they do not wish to revise the request (s 24AB(8))
- the time elapsing between an applicant being notified that a charge is payable and either the applicant paying the charge (or a deposit on account of the charge) or the agency varying the decision that a charge is payable (s 31).

In summary, the time spent on those matters is to be disregarded in calculating the processing period.

3.231 The OAIC has developed a calculator to assist FOI practitioners calculate the period during which they are required to process FOI requests.[161] The calculator takes into account all the factors that may change the default processing period in s 15(5)(b) of the FOI Act.

3.232 In some instances, agencies have incorrectly altered the statutory processing timeframe to commence from the date the scope of the FOI request is clarified with the FOI applicant. Where an agency or minister receives a request that meets the formal requirements of s 15(2), the statutory processing timeframe commences from the next calendar day, regardless of any steps the agency or minister may wish to take to clarify the precise scope of a request with an applicant.

[161] The FOI processing period calculator is available on the OAIC's website: Freedom of Information processing period calculator | OAIC.

Table 2: Time of receipt based on mode of delivery

Mode of delivery	Time of receipt (processing period commences on following day)
Pre-paid post to a specified address of the agency or minister	The date the letter is delivered in the ordinary course of post[162]
Delivery to a central or regional office	The date of delivery
Electronic communication to a specified email or fax address	The date the communication is capable of being retrieved by the agency at the specified email or fax address

3.233 An email or similar electronic communication is received at the time it is capable of being retrieved by the addressee.[163] This is assumed to be the time it reaches the addressee's nominated electronic address[164] (this day could be a weekend or public holiday). This rule may be varied by a voluntary and informed agreement between the sender (the applicant) and the addressee (the agency or minister).

Extending the decision notification period

3.234 The FOI Act requires agencies and ministers to comply with a 30-day statutory timeframe for processing FOI requests (s 15(5)(b)). However in some limited circumstances the statutory timeframe may be extended, for example, with the agreement of the applicant or with the approval of the Information Commissioner. The extension of time provisions are set out in Table 3 below.[165]

3.235 Agencies and ministers are encouraged to build into their FOI process an early and quick assessment of whether an extension of time may be required, to ensure that decisions are made within the statutory processing period.

Table 3: Extension of time provisions

Reason for extension	Extension period	Determined by	Notification requirement
Third party consultation: consultation with a state, or a person or business concerning personal or business information (s 15(6))	30 days	by default if agency or minister determines ss 26A, 27 or 27A apply	agency or minister must inform FOI applicant of extension as soon as practicable (s 15(6)(b))

[162] *Acts Interpretation Act* s 29.

[163] *Electronic Transactions Act 1999* s 14A.

[164] This does not require the addressee to open the communication for it to be taken to have been received. In general, an electronic communication should be taken to have been received by the addressee on the same day it was sent, as may be nominated by the applicant under s 15(2)(c).

[165] Further guidance is available in the OAIC agency resource 'Apply for an extension of time to process a freedom of information request'.

Reason for extension	Extension period	Determined by	Notification requirement
Consultation with foreign entity required to determine if 33(a)(iii) or 33(b) exemptions apply (s 15(7), (8))	30 days	by default if agency or minister determines consultation is needed	agency or minister must inform applicant of extension as soon as practicable (s 15(8)(b))
By agreement between applicant and agency or minister (s 15AA)	up to 30 days, as either a single extension or a series of shorter extensions. This may be in addition to an extension for third party consultation	agency or minister but only with written agreement of applicant	agency or minister must give written notice of the extension to the Information Commissioner as soon as practicable (s 15AA(b))
Complex or voluminous request (s 15AB)	30 days or other period	Information Commissioner, upon request from agency or minister	Commissioner must inform applicant and agency or minister of an extension period as soon as practicable where a decision is made to grant the extension (s 15AB(3))
Following a deemed refusal (s 15AC(4))	as determined by the Information Commissioner	Information Commissioner, upon request from agency or minister	no legislative requirement but Commissioner may require agency or minister to notify applicant or third party as a condition of granting the extension (s 15AC(6))

3.236 The extension of time provisions outlined above only apply to the processing time available to an agency or minister in deciding an FOI request. There are no extension of time provisions available under the FOI Act for alternative purposes, including to meet a timeframe stipulated by the Information Commissioner in a s 55K decision. An agency or minister must comply with a decision of the Information Commissioner, including any timeframes stipulated in the IC review decision under s 55K (s 55N). If an agency or minister fails to comply with s 55N, an application may be made by the Information Commissioner or the IC review applicant to the Federal Court of Australia for an order directing the principal officer of an agency or minister to comply. Further information about compliance with the Information Commissioner's decision is available in Part 10 of these Guidelines.

Extension of time with agreement under s 15AA

3.237 An agency or minister may extend the timeframe for dealing with a request by a period of no more than 30 days if:

- the applicant agrees to the extension in writing and
- the agency or minister gives written notice of the extension to the Information Commissioner as soon as practicable after the agreement is made. It is desirable that a

copy of the applicant's written agreement is provided to the OAIC with the written notice.

3.238 To validly extend the processing period under s 15AA agencies and ministers must:

- seek the FOI applicant's agreement to extend the time to make a decision on the request (this must be done before the processing period has expired)[166]
- receive the applicant's written agreement to the extension of time[167]
- send the applicant's written agreement to the OAIC.[168]

3.239 The agency or minister can also ask the FOI applicant for further extensions under s 15AA, as long as the combined length of all agreed extensions does not exceed 30 days.

3.240 A s 15AA agreement cannot be made once an FOI request has become a deemed refusal under s 15AC.

Applying to the Information Commissioner for an extension of time under s 15AB

3.241 An agency or minister applying to the Information Commissioner for an extension of time under s 15AB should explain why the applicant's FOI request is complex or voluminous, including details about:

- the scope of the request and the range of documents covered
- work already undertaken on the request
- any consultation with the applicant concerning length of time
- whether other agencies or parties have an interest in the request
- measures to be taken by the agency or minister to ensure a decision is made within the extended time period and to keep the applicant informed about progress.[169]

3.242 An application for an extension of time under s 15AB may only be made in relation to a specific FOI request. The complexity or volume described in a s 15AB application relates to the particular request for which an extension of time is sought. It does not relate to the complexity and volume of the aggregated FOI caseload of the agency or minister. The discretion in s 15AB cannot be exercised to provide a 'blanket' extension of time to a cohort of cases; each request needs to be considered on its individual merits.

3.243 In considering an application to extend the processing time under s 15AB, the Information Commissioner may share the agency or minister's submission with the FOI applicant and any other affected third parties.

3.244 Where an agency or minister intends to apply for an extension of the timeframe for processing the applicant's FOI request under s 15AB, the application to the Information

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166 An agreement under s 15AA cannot be made after an FOI request has become a deemed refusal under s 15AC.

167 Some agencies have, during shutdown periods, inappropriately extended the processing period under s 15AA to reflect the impact of the shutdown period, without first obtaining the FOI applicant's written agreement. An extension under s 15AA is invalid in these circumstances

168 The OAIC accepts notification of s 15AA agreements by way of webform: OAIC Web Form. If the agency or minister does not notify the Information Commissioner of the FOI applicant's written agreement under s 15AA, the extension is invalid.

169 For guidance about applying for an extension of time see the OAIC agency resource 'Apply for an extension of time to process a freedom of information request | OAIC'.

Commissioner must be made before the expiry of the processing period referred to in s 15(5)(b). The processing period under s 15AB can be extended even if the Information Commissioner decides to grant the application after the date in which the request was originally due to expire, as long as the application was made within the period referred to in s15(5)(b).

3.245 Staff absences due to public holidays or agency shutdown periods may be relevant to whether an extension should be granted if the particular staff members have skills or knowledge that may be required to process the request in the normal statutory timeframe. However a lack of staff because of inadequate allocation of resources to FOI processing or failure to assign additional temporary resources to FOI processing at peak times will not normally justify an extension in the absence of other extenuating circumstances.

Deemed decisions

3.246 A 'deemed refusal' decision occurs when the statutory time for making a decision on an FOI request has expired and the FOI applicant has not been given a notice of decision. If this occurs, the principal officer of the agency or the minister is taken to have personally made a decision refusing to give access to the document on the last day of the 'initial decision' period (s 15AC).

3.247 A notice of the deemed decision under s 26 is taken to have been given on the last day of the decision period (s 15AC(3)(b)).

3.248 The consequence of a deemed refusal is that the FOI applicant may apply for IC review (s 54L(2)(a)). An applicant or third party can also apply for IC review of a deemed affirmation of a decision on internal review (ss 54L(2)(b), 54M(2)(b)). In addition, once the statutory time to make a decision has expired and there is a deemed refusal decision, the agency or minister cannot impose a charge for access (see Part 4 of these Guidelines). It is not open to an agency or minister to conduct an internal review of a deemed decision.

3.249 In some cases FOI applicants will not be aware that a deemed access refusal decision has been made and that they can apply for IC review of the refusal. It is good practice for agencies and ministers to include information in their s 15(5)(a) acknowledgement letters that advise FOI applicants about their right to seek IC review if their FOI request is not processed within the statutory timeframe.[170] Further, agencies and ministers should consider notifying FOI applicants if their FOI request has become deemed so they can apply for IC review within the statutory timeframe.

3.250 Where an access refusal decision is deemed to have been made, the agency or minister is still able to process the request and provide a statement of reasons. If the applicant applies for IC review of the deemed access refusal decision the statement of reasons will be taken as submissions in the IC review.

3.251 As noted at [3.212], where a request consultation process is initiated after the expiry of the statutory timeframe, the FOI applicant is not subject to the requirements of s 24AB(6), or to the legal consequences of not responding as outlined in s 24AB(7), which provides that the applicant is taken to have withdrawn their FOI request if they do not respond in one of the ways identified in s 24AB(6).

[170] See a sample acknowledgement letter on the OAIC's website which includes this information: Sample freedom of information notices | OAIC.

Information Commissioner's power to grant an extension of time following a deemed decision (s 15AC)

3.252 Where there has been a deemed decision, the decision maker may apply to the Information Commissioner in writing for further time to deal with the request (s 15AC(4)). The Information Commissioner may allow further time for the decision- maker to deal with the request (s 15AC(5))). If the Information Commissioner allows further time to deal with the request under s 15AC(5), it is not open to the agency to further extend the processing time under s 15(6) (to undertake third party consultation). Any application under s 15AC(4) should include the time required to undertake any consultation with affected third parties.

3.253 In considering what further time may be appropriate, the Information Commissioner will take into account the details in the agency's application, which should address the scope and complexity of the request, the reasons for delay in making an initial decision, the extension sought, the estimated total processing time, and whether discussions with the applicant about the delay and extension application have occurred. The Information Commissioner will also consider the total elapsed processing time and the desirability of the decision being decided by the agency or minister rather than through IC review.

3.254 There is no obligation on the Information Commissioner to seek the views of an applicant about an application for an extension of time under s 15AC following a deemed decision.[171] However, the Information Commissioner is not precluded from seeking the views of an applicant where it is a relevant consideration in deciding whether to grant an application for an extension of time.

3.255 In allowing further time the Information Commissioner may impose conditions (s 15AC(6)). For example, the Commissioner may require the decision maker to:

- notify the applicant of the further time allowed
- provide regular progress reports to the Information Commissioner and the applicant
- provide a copy of the notice of decision when made to the Information Commissioner.

3.256 If a decision is made in the further time allowed and any conditions imposed by the Information Commissioner are met, the deemed refusal decision no longer applies and is taken never to have applied (s 15AC(7)). However, if this occurs the agency or minister remains unable to impose charges (reg 5(2) of the Freedom of Information (Charges) Regulations 2019).

3.257 If a decision is not made within the extended time, or any imposed conditions are not met, the deemed access refusal decision continues to apply (s 15AC(8)). The Information Commissioner cannot provide further time for the decision maker to make the decision or comply with the conditions (s 15AC(9)). The FOI applicant can seek IC review of the deemed access refusal (see Part 10 of these Guidelines).

3.258 If a person applies for IC review of a deemed decision, the Information Commissioner allows the decision maker further time, and a decision is made within that further time, that decision is substituted for the deemed decision under review (s 54Y(2)).[172]

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[171] *O'Donoghue v Australian Information Commissioner (No. 3)* [2012] FCA 1244 [23].

[172] While an agency can technically request an extension of time under s 15AC after an applicant has sought IC review, it may be more practical for requests for additional processing time to be addressed within the IC review process.

3.259 Alternatively, at any time during an IC review, an agency or minister may substitute a deemed access refusal decision with a decision to favour the FOI applicant by:

- giving access to a document in accordance with the request (s 55G(1)(a)) or
- relieving the IC review applicant from liability to pay a charge (s 55G(1)(b)) (see Part 10 of these Guidelines).

3.260 The agency or minister must notify the Information Commissioner in writing of the substituted decision as soon as practicable, and that substituted decision becomes the decision under review (s 55G(2)) (see Part 10 of these Guidelines).

Statement of reasons

3.261 An agency or minister must give the FOI applicant written notice of the decision that contains reasons and other particulars of the decision (referred to in these Guidelines as a 'statement of reasons') if they refuse any aspect of the FOI request or defer access to documents (s 26(1)). Specifically, a statement of reasons must be provided to the FOI applicant for a decision where:

- access to a requested document is refused, including when:
  - a requested document is exempt from release (Part 4 of the FOI Act)
  - the document has not been sufficiently identified in the request (s 15(2))
  - the document does not exist or cannot be found (s 24A)
  - a practical refusal reason exists (s 24)
  - the access provisions do not apply to the document (for example, it is a document to which ss 12 or 13 apply, or the requested document is not a document of an agency or an official document of a minister as defined under s 4(1))
  - access to the requested document is deferred (s 21)
  - access will be given in a different form to that requested by the FOI applicant (s 20)
  - a request to amend or annotate a record is refused (s 51D)
  - any of the above decisions is made on internal review (ss 53A and 54C(4)).

Content of a s 26 statement of reasons

3.262 A statement of reasons is a notice in writing of:

- the decision
- the findings on any material questions of fact
- the evidence or other material on which those findings are based
- the reasons for the decision (including any public interest factors taken into account in deciding to refuse access to a conditionally exempt document)
- where the decision relates to a document of an agency, the name and designation of the person making the decision

- information about the FOI applicant's rights to make a complaint or seek a review and the procedure for doing so (s 26(1)).

3.263 As outlined above, s 26 requires agencies to include the name and designation of the person who made the decision in their statement of reasons (s 26(1)(b)). Clearly, providing both the given name and family name of a decision maker satisfies this requirement. However, providing the given name of the decision maker and their designation may satisfy this requirement if there is sufficient information to allow the FOI applicant to identify the decision maker and thereby verify that person's authority to make a decision.[173] Further information, such as an FOI or case management database reference number or position number, may assist in verifying decision making authority.

3.264 This requirement exists separately to s 26(2), which provides that a statement of reasons should not include any information that, if it were in a document, would cause that document to be exempt.[174] Section 26(2) does not enable the requirements outlined in s 26(1) to be disregarded or invalidated.

3.265 There is no specified form for a statement of reasons. A letter to the applicant may be sufficient as long as it contains all the required information. Where the FOI request involves numerous documents or complex issues relating to exemptions, a statement of reasons and a schedule of documents attached to a letter to the FOI applicant may be more appropriate. The OAIC has developed a checklist and a sample notice to assist agencies and ministers with the content of a statement of reasons.[175]

3.266 Section 26(2) provides that a s 26 notice is not required to contain any matter that is of such a nature that its inclusion in a document of an agency would cause the document to be exempt (for further information about s 26(2) see [3.174] above).

The decision

3.267 The statement of reasons must set out the decision made in relation to each document (or part of document) and address all relevant legislative provisions. The ARC suggests that decision makers should quote from the actual legislative provisions rather than paraphrasing to avoid inadvertently changing the meaning.[176]

3.268 The decision needs to identify clearly the documents considered by the decision maker for release (without disclosing exempt material if exemptions are claimed). Preparing a schedule of documents is often helpful in the decision-making process. When the decision is made, the schedule (minus any exempt mater considered during the process) can be attached to the statement of reasons.

Findings of fact and the evidence or other material on which they are based

3.269 The notice of decision should make it clear how the decision was reached, based on findings of fact. General points about evidence and findings of fact are set out at [**Error! Reference source not found.**]—[**Error! Reference source not found.**]. The documents that are the

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[173] See *Paul Farrell and Services Australia (Freedom of information)* [2022] AICmr 41 [24].

[174] See *News Corporation Ltd v National Companies and Security Commission* [1984] AATA 144; (1984) 57 ALR 550; and *TFS Manufacturing Pty Limited and Department of Health* [2016] AICmr 73.

[175] See the following agency resources on the OAIC website (www.oaic.gov.au) 'Statement of reasons checklist' and 'Sample freedom of information notices'.

[176] See Administrative Review Council Best Practice Guide 4 - Reasons | Attorney-General's Department (ag.gov.au) p 7.

subject of an FOI request will often contain evidence that would need to be considered. For example, a decision maker considering whether to release a document that contains information about Commonwealth-State relations will need to consider whether releasing the document may damage those relations.

3.270 When referring to material or evidence it is important to describe it so it can be easily identified. Merely providing a list of documents that the decision maker considered is unlikely to be sufficient.[177] The decision maker needs to explain how each finding was rationally based on the evidence.

3.271 The statement of reasons should also set out how any conflicting evidence was considered, which evidence was preferred and why.[178] If the decision maker considered recommendations or reports in making their decision, references to those should also be included.

Relevant and irrelevant considerations

3.272 In considering the evidence to make findings of fact, a decision maker must examine and weigh all relevant considerations. For many FOI decisions, the FOI Act sets out the relevant considerations. For example, in making a decision about whether a document is exempt because it is subject to legal professional privilege, a decision maker must consider whether that privilege has been waived (s 42(2)).

3.273 The decision maker must also ensure they do not take into account any irrelevant considerations. The FOI Act specifies irrelevant considerations in relation to some decisions, including the public interest test that applies to conditionally exempt documents (s 11B(4) — see Part 6 of these Guidelines). Similarly, the FOI applicant's reason(s) for making a request are also irrelevant in making a practical refusal decision (s 24AA(3)(a)).

The reasons for the decision

3.274 The notice of decision must state the reasons for the decision (s 26(1)(a)). The reasons should show a rational connection between the findings of material fact, the decision maker's understanding of the relevant statutory provisions and the decision itself. Where a statutory provision requires an agency to be satisfied that disclosure of a document would result in a substantial adverse effect, it is not sufficient for an agency to simply declare that a substantial adverse effect will occur without any further details or reasons. Similarly, it is not enough for the decision maker to state that he or she is satisfied that a document or parts of a document is exempt. Agencies must provide adequate justification as to why an exemption applies by reference to the provisions in the FOI Act, having regard to these Guidelines. In an IC review, s 55D places the onus on the agency or minister in establishing that its decision in relation to a request or application is justified, or that the Information Commissioner should give a decision adverse to the IC review applicant. Similarly, where an application for review is made to the ART, s 61 places the onus on the agency or minister to establish that the decision is (or is not) justified and that the ART should give a decision adverse to the applicant (see Part 10 of these Guidelines).

3.275 If the decision is to refuse access to a conditionally exempt document, the reasons must include any public interest factors the decision maker took into account (s 26(1)(aa)). In considering the public interest factors, the decision maker must weigh factors for and

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177 See *ARM Constructions Pty Limited v Deputy Commissioner of Taxation* [1986] FCA 97 [18]; (1986) 65 ALR 343.

178 See Administrative Review Council Best Practice Guide 4 - Reasons | Attorney-General's Department (ag.gov.au) p 8 and *Dornan v Riordan* [1990] FCA 264 [7], [18]; (1990) 95 ALR 451.

against disclosure to determine whether access would, on balance, be contrary to the public interest (see Part 6 of these Guidelines). Evidence of the harm that may result from release would need to be considered as part of that process.

3.276 When explaining the reasons, the decision maker should refer to the specific documents requested and set out the reasoning process that led to the decision based on the material findings of fact. They must explain the relevant legislative provisions and, if appropriate, can refer to these Guidelines or IC review, AAT/ART and court decisions in support of their interpretation of the provisions.

3.277 Where a document is released with deletions under s 22, the grounds on which the deletions have been made should be provided, setting out the findings on material questions of fact and referring to the evidence or other material on which those findings were based (see [3.160]—[3.121] above).

3.278 A draft statement of reasons may be prepared by someone other than the decision maker. However, the decision maker must carefully consider the draft to ensure that it is satisfactory and that they personally endorse the reasoning and conclusions.

Other required information

3.279 The statement of reasons should also include:

- the name and designation of the decision maker (where the decision relates to a document of an agency) (s 26(1)(b) and [3.263]). Information about the authorisation should also be included (see [**Error! Reference source not found.**]—[3.105])
- the applicant's review rights, including how to apply for internal and IC review (see Parts 9 and 10 of these Guidelines)
- the applicant's right to complain to the Information Commissioner (see Part 11 of these Guidelines).

3.280 The notice of decision should also explain (if applicable) that the document will be published or notified on a disclosure log (see Part 14).

Other notices of decision

3.281 Other provisions of the FOI Act require that notices of particular kinds be given to applicants and third parties. Some of these provisions expressly require the decision maker to give reasons for the decision under either s 26 of the FOI Act or s 25D of the *Acts Interpretation Act 1901*.[179] If no express requirement of that kind applies, a decision maker may nevertheless be guided by s 26 in deciding the nature of the information to include in a notice.

3.282 The provisions of the FOI Act that require a notice of decision are:

- to the applicant:
  - a notice that an applicant is liable to pay a charge (s 29(1))
  - a notice of decision to an applicant as to the charge payable, following a submission by the applicant that a charge should be reduced or not imposed (s 29(6)). If the decision is to reject the applicant's contention in whole or part, the

[179] Section 25D of the *Acts Interpretation Act* requires that the statement of reasons must give the reasons for the decision and set out the findings on material questions of fact and refer to the evidence or other material on which those findings were based.

notice must provide a statement of reasons that complies with *Acts Interpretation Act* s 25D (s 29(8) and (9))

- a notice of decision to provide access to a document following consultation with the Commonwealth or a State about whether the document would be exempt under s 47B (intergovernmental relations) (s 26A(3)(b))
- a notice of decision to provide access to a document following consultation with a person or organisation about whether the document would be exempt under s 47 or 47G (trade secrets, business information) (s 27(6)(b))
- a notice of decision to provide access to a document following consultation with a person about whether the document would be exempt under s 47F (personal information) (s 27A(5)(b))

- to a third party:
  - a notice of decision to the Commonwealth or a State that a document about which either was consulted is not exempt under s 47B (intergovernmental relations) (ss 26A(3)(a))
  - a notice of decision to a person or organisation that a document about which the person or organisation was consulted is not exempt under s 47 or 47G (trade secrets, business information) (s 27(6)(a))
  - a notice of decision to a person that a document about which the person was consulted is not exempt under s 47F (personal information) (s 27A(5)(a)).

3.283 It is also open to an applicant or third party (in relation to any of the decisions above) to request a statement of reasons under s 13 of the *Administrative Decisions (Judicial Review) Act 1977*.

Giving applicants access to documents

3.284 Where a decision has been made to give an FOI applicant access to a requested document, access should be given as soon as practicable, but only after:

- any charges the applicant is liable to pay are paid (s 11A(1)(b) and reg 11, Freedom of Information (Charges) Regulations 2019) and
- all opportunities a third party may have to seek review of the decision have run out, and the decision stands or is confirmed (ss 26A(4), 27(7) and 27A(6)).

3.285 Where a third party has review rights in relation to only some of the documents falling under the access grant decision, an agency or minister should provide the FOI applicant with access to the remaining documents as soon as practicable. Similarly, if a third party has a review right in relation to multiple documents but seeks review of the decision to release only some of those documents, the agency or minister should release the remaining documents to the FOI applicant as soon as practicable once the third party's opportunity to seek review has run out.

3.286 Undue delay in providing access to documents is considered an access refusal decision under s 53A(c) and the applicant may apply for IC review.

3.287 An agency or minister may choose to add an FOI reference number or page numbers to a document before it is released to the FOI applicant. If an agency does this, it is important that those additions are included in the margins or other clear space in the document, so

they do not obscure the text. If an agency or minister chooses to add a watermark (for example, to indicate that the document is being released under the FOI Act) it is important that the watermark does not impact the ability of a reader to read all of the document.

3.288 Section 15(2)(c) requires FOI applicants to provide details of how notices may be sent to them. Although FOI applicants cannot dictate how access is to be provided, if an applicant specifies a postal address (rather than an email address) agencies should do what they can to satisfy the applicant's request that documents be sent by post. While the use of SIGBOX and other forms of secure file sharing/delivery can be used with the FOI applicant's agreement, agencies and ministers need to be mindful of the Australian Privacy Principles, in particular, if using file sharing/delivery systems necessitates people providing additional personal information or when the method of transmission may increase privacy risks.

Charges

3.289 The applicant must pay all charges before being given access, except where the charge relates to supervisory time for the applicant to inspect documents (reg11(2) of the Freedom of Information (Charges) Regulations 2019). Where a charge was notified, but the decision on the request was not made within the statutory time limit, the charge cannot be imposed (regs 5(2) and 5(3)). More information about charges is in Part 4 of these Guidelines.

Third party review opportunities

3.290 The review rights of a third party depend on the provision under which they were consulted. A third party who was consulted about the release of a document affecting Commonwealth-State relations (s 26A) may seek internal review or IC review of a decision to grant access (ss 53B, 53C, 54A and 54M).

3.291 Similarly, a third party who was invited to make a submission about the release of a document affecting business information (s 27) or documents affecting personal privacy (s 27A) and who made a submission in support of the relevant exemption contention may seek internal review or IC review of a decision to grant access (ss 53B, 53C, 54A and 54M).

3.292 A business entity or person who was invited to make a submission under s 27 or s 27A but did not do so, is neither required to be notified of an access grant decision nor entitled to apply for internal review or IC review of that decision.

3.293 A third party who was not invited to make a submission, but believes they should have been invited under s 27 or s 27A, may complain to the Information Commissioner (s 70 — see Part 11 of these Guidelines).

3.294 'Run out' times are defined in s 4(1), as set out in Table 4 below.

Table 4: When time runs out for third party review

Circumstances	When time runs out	Maximum time period for third party to apply (in calendar days)
Third party does not apply for either internal or IC review	The latest time for applying for internal review or IC review has ended	i) 30 days to apply for internal review from notification of initial decision (or deemed notification) (agency can extend s 54B(1)) ii) 30 days to apply for IC review from notification of initial decision (the Information Commissioner can extend s 54T(2))

Circumstances	When time runs out	Maximum time period for third party to apply (in calendar days)
Third party applies for internal review	Internal review has ended (review either completed or decision deemed) and time for applying for IC review has ended	Internal review must be completed within 30 days (decision deemed to have been affirmed after 30 days s 54D), unless Information Commissioner grants an extension (s 54D(4)) 30 days from that point to apply for IC review (s 54S(2)) (Information Commissioner can extend s 54T(2))
Third party applies for IC review	IC review has concluded and the time for applying to the ART (for review) and appealing to the Federal Court (on a question of law) has ended, and the person has not applied or appealed	Must apply to ART and Federal Court within 28 days after the IC review decision is given to the IC review applicant (s 5(3) of the Administrative Tribunal Rules 2024 and s 56(2) FOI Act)
Third party applies for ART review	ART proceedings have concluded, and i) the time for appealing to the Federal Court has ended and the person has not appealed, or ii) if an appeal has been instituted, the proceedings have concluded	28 days after the ART's decision is given to the third party applicant (s 174 ART Act), or if an appeal has been lodged, when appeal proceedings have concluded

3.295 Agencies and ministers should check directly with any affected third parties if the agency or minister has not received notice that a third party intends to apply for internal or IC review. Noting that the FOI applicant has the legally enforceable right to access the documents they requested when the time to apply for review has run out, the agency or minister should include a date by which the third party should respond and advice that if the affected third party does not respond by that date, the agency or minister will proceed to give the FOI applicant access to the documents on the basis that the affected third party has not applied for internal or IC review. It is suggested that 3 working days is an appropriate timeframe to give the affected third party to respond.

Providing access in stages

3.296 Where the request relates to a large number of documents, it is open to an agency or minister and an FOI applicant to consult and agree on a staged approach to the release of the documents.[180] A staged approach may also be appropriate if access to some (but not all) documents is to be deferred under s 21 (see [3.161]—[3.164]). Where an agency or minister agrees with the applicant that the documents at issue are to be released in stages, it is recommended they obtain the appropriate extensions of time under the FOI Act for processing the request. For example, the agency or minister would need to obtain a written

[180] See *Re Eastman and Department of Territories* [1983] AATA 141; (1983) 5 ALD 182 and *Re William Richard Clifford Geary and Australian Wool Corporation* [1987] AATA 370.

agreement from the applicant and to provide written notice of the extension to the Information Commissioner in accordance with s 15AA. If necessary, an agency or minister may also consider applying to the Information Commissioner under s 15AB for an extension of time, providing evidence of the agreement between the parties in its application.

3.297 A staged approach can assist agencies and ministers manage their resources and avoid a practical refusal reason from arising by allowing more time to consider and process the request. For example, the agency or minister may propose to process part of the request by a certain date, and the remainder of the request by a date agreed between the agency or minister and the FOI applicant.

Form of access

3.298 Subject to limited exceptions, an applicant who requests access to a document in a particular form has a right to be given access in that form (s 20(2)). Available forms of access are:

- providing a copy of the document (the most common form of access)
- giving a reasonable opportunity to inspect the document
- where the document is an article or thing from which sounds or visual images are capable of being reproduced, making arrangements for the person to hear or view those sounds or images
- where words are recorded in a manner capable of being reproduced in the form of sound or where words are in the form of shorthand writing or in code, providing a written transcript of the words recorded or contained in the document (s 20(1)).

3.299 The right to access a document in a particular form may be refused and access given in another form in the following circumstances:

- where access would interfere unreasonably with the agency's operations or the performance of a minister's functions (s 20(3)(a)) — for example, if an applicant asks to inspect documents that an agency requires for everyday operations or where the applicant is subject to a restricted access arrangement and allowing them to inspect the documents would conflict with the restricted access arrangement and prejudice the agency's ability to meet its obligations under the *Work Health and Safety Act 2011*.[181]
- if it would be detrimental to the preservation of the document or not appropriate given the physical nature of the document (s 20(3)(b)) — for example, if a document is fragile or if giving access outside its normal environment might result in damage, or the document cannot be photocopied due to its condition or because it is a painting, model or sculpture.
- if giving an applicant access to a document in a certain form would, but for the FOI Act, involve an infringement of copyright in relation to the matter contained in the document (s 20(3)(c)). This provision does not apply where the matter contained in the document relates to the affairs of an agency or department of state or if the copyright holder is the Commonwealth, an agency, or a State.

[181] *'AQP' and Services Australia (Freedom of information)* [2024] AICmr 250 [13].

3.300 Agencies and ministers are expected to make reasonable use of available technology to facilitate access to documents — for example, by providing copies by electronic transmission, or to provide access in a particular form that is possible only through technology. Access to documents by means that do not require physical inspection in an agency office should generally be preferred.

3.301 The FOI Act gives a legally enforceable right of access to documents that already exist, and an agency is not required to create a new document to satisfy an FOI request. However, agencies and ministers should consult an applicant as to the most effective way of providing access to the information they seek, including by administrative release of information that has been compiled from documents or a database (see [3.5]—[3.12]).

3.302 An FOI applicant can seek internal or IC review of a decision not to provide access in the form requested by the applicant where all documents to which the request relate have not been provided (s 53A(c)).

Charges for alternative forms of access

3.303 If an agency or minister decides to provide a document in a form different to that requested by the applicant, the charge payable cannot exceed the charge that would have applied if access had been given in the form the applicant requested (s 20(4)).

Protections when access to documents is given

3.304 The FOI Act provides protection from civil action and criminal prosecution for those involved in giving access to documents under the Act. These protections are designed to ensure that potential legal action does not impede the Act's operation.

Actions for defamation, breach of confidence or infringement of copyright

3.305 Section 90 of the FOI Act provides that no action for defamation or breach of confidence or infringement of copyright lies against the Commonwealth, a minister, an agency or an agency officer solely on the ground of having given access, or having authorised access, to a document. The protection applies only in the context of the operation of the FOI Act and requires a decision maker to act in good faith with a genuine belief that publication or access is either required or permitted under the Act. Similar protection applying in particular situations (noted below) is given by s 91.

3.306 The protection afforded by ss 90 and 91 extend to:

- giving access in response to an FOI request under the Act (s 90(1)(b))
- publishing information under s 11C (disclosure log) and as part of the IPS (s 90(1)(a))
- publishing or giving access to a document 'in the belief that the publication or access is required or permitted otherwise than under this Act (whether or not under an express legislative power)' (s 90(1)(c))
- showing a document to a third party in the course of consultation under ss 26A, 27 or 27A (s 91(1C)).

3.307 If a document is disclosed in any of the ways mentioned in [3.306], protections in respect of that disclosure also extend to the person who supplied the document to the agency or minister (s 90(2)). If consultation under ss 26A, 27 or 27A occurs, protection extends to the

author of the document and to any other person because of that author or other person having shown the document (s 91(1C)).

3.308 Disclosure of a document to a person under the FOI Act (whether to an applicant or during consultation) does not, for the purpose of the law of defamation or copyright, constitute an authorisation or approval to republish the document or to do an act comprised within the copyright in the document (s 91(2)). That is, an FOI applicant who disseminates defamatory or copyright material in any document received following an FOI Act request has no FOI Act protection against an action for defamation or breach of copyright.

3.309 A decision maker who is aware that a document released under the FOI Act contains defamatory material is encouraged to draw this to the applicant's attention. Similarly, an agency or minister may advise an applicant that copyright permission may be needed from another party for any reuse of the material. A statement such as the following could be used:

> To the extent that copyright in some of this material is owned by a third party, you may need to seek their permission before you can reuse or disseminate that material.

3.310 For further guidance on agency copyright notices in connection with the IPS and the disclosure log, see Parts 13 and 14 of these Guidelines.

Offences

3.311 Section 92 operates in a similar way to s 90 to provide that neither a minister nor a person authorising access to a document, or being involved in providing access, is guilty of a criminal offence by reason only of that action. For example, where a secrecy provision in other legislation would otherwise prohibit the disclosure of a document, s 92 will relieve any minister or authorised officer of an agency from criminal liability if they authorise or give access under the FOI Act.[182] This immunity extends to disclosures for the purposes of undertaking consultation under ss 26A, 27 or 27A of the FOI Act (s 92(2)). To benefit from the immunity, the minister or authorised officer must act in good faith with a genuine belief that disclosure is required or permitted under the FOI Act.

[182] Secrecy provisions that are listed in Schedule 3 of the FOI Act or are expressed to be applicable for the purposes of s 38 of the FOI Act operate as an exemption under s 38 — see Part 5 of these Guidelines.