Part 3 —

Processing and deciding on requests for access

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Administering the FOI Act — general considerations

Key principles

3.1 The FOI Act closely regulates the way that agencies and ministers must process requests for access to documents. In addition to the detailed rules discussed in this Part, agencies and ministers should have regard to central 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 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))[1]
- 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 Act does not limit any power to give access to information under other legislative or administrative arrangements (s 3A(2)).

Access to government information — administrative release

3.2 An agency may choose to provide administrative access outside the formal FOI Act request process.[2] 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 a specific request. Alternatively, an agency 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.

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

- advances the objects of the FOI Act to foster open government
- 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 an applicant to clarify the type of information requested 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.

[1] 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.

[2] For more information see OAIC, *Administrative access* at www.oaic.gov.au

3.4 An administrative access arrangement should be tailored to the size of an agency, its work, the requests it typically receives for information or documents, and its regular procedures for public contact and access.

3.5 Administrative access arrangements should operate alongside FOI Act processes. Importantly, there should be an efficient process for referral of requests to the formal FOI process where FOI is more appropriate or where the requester would prefer to apply under the FOI Act.[3] Agencies must comply with obligations arising from the formal FOI process, including the obligation to provide reasons for its decision within the stipulated timeframes. In circumstances where the requester has requested documents under the FOI Act, but the agency is minded to release the documents under administrative access arrangements, it is expected that the agency will seek the requester's consent, and withdrawal of the FOI request, before releasing the documents administratively. 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.[4]

Principles of good decision making under the FOI Act

3.6 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 freedom of information requests can have in securing open government.

3.7 Decisions made under the FOI Act must be consistent both with the requirements of the Act and with general principles of good decision making. Those general principles are explained in five best practice guides published by the Administrative Review Council (ARC).[5] 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

3.8 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*.

[3] Where it appears that the document is likely to contain a substantial number of redactions, it would generally be more appropriate for the request to be processed under the FOI Act.

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

[5] See ARC *Best Practice Guides*, 2007, at https://www.arc.ag.gov.au/Publications/Reports/Pages/OtherDocuments.aspx

Decision making under the FOI Act

3.9 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 Act specifies the agencies and documents to which the Act applies, the procedure for making and notifying decisions on FOI requests, and the exempt documents to which access can be refused. Those FOI provisions are discussed below and in other Parts of these Guidelines.

3.10 Decision making under the FOI Act must take into account the objects in s 3. 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 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.

3.11 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 the powers and functions under the FOI Act.[6]

Authorised decision makers

3.12 The FOI Act specifies that a decision relating to a 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)). An officer should confirm that they are authorised before making a decision. A decision on a request made to a court may be made by the principal officer, or an officer acting within their scope of authority (s 23(2)).

3.13 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.[7] 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 of the person acting on the minister's behalf.

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[6] With respect to FOI decision makers and the Administrative Appeals Tribunal (AAT), 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 matters) 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 Guidelines, and in having regard to the 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 Guidelines to the extent that they are consistent with the functions and powers conferred upon it by the FOI Act.

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

3.14 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.[8]

Procedural fairness

General principle

3.15 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*.

3.16 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.[9]

3.17 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.[10] 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

3.18 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 should consider passing the matter to another officer for decision, especially if there is a close or social relationship. Generally, a decision maker is not prevented from making a decision by reason only of former contact with an FOI applicant, which may be a regular occurrence in some agencies.
- An FOI decision maker must approach each decision with an open mind and, for example, consider any submission by an 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 decision by reason of having dealt previously with a similar issue or applicant, or having expressed a view about FOI Act principles or requirements.

3.19 The Australian Public Service Commission has issued guidance material to assist agencies to identify and manage conflicts of interest (available at www.apsc.gov.au).

The hearing rule and FOI decision making

3.20 The FOI Act specifies in detail the procedure to be followed in making decisions on FOI requests. For example, agencies are required to provide reasonable assistance to persons to

[8] See ARC Best Practice Guide No 1, *Decision Making: Lawfulness*, 2007, p 6.

[9] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.

[10] *Kioa v West* (1985) 159 CLR 550; see also ARC Best Practice Guide No 2, *Decision Making: Natural Justice*, 2007, p 1.

make FOI requests (s 15(3)), notify an applicant that a request has been received (s 15(5)), allow an applicant a reasonable opportunity to revise a request before it is refused for a practical refusal reason (s 24AB), allow an applicant to respond before a charge is imposed (s 29), provide to the applicant a written statement of the reasons for the decision (s 26), and advise the applicant of their right to seek internal review or IC review of an adverse decision (s 26(1)(c)). The FOI Act also specifically recognises the right of third parties to be consulted about release of documents that affect their interests in certain circumstances (ss 26A, 27 and 27A — see Part 6 of these Guidelines).

3.21 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 and review by the Information Commissioner, provided 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

3.22 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*.

3.23 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. A statute 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.

3.24 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

3.25 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 [3.177]–[3.179] below).

3.26 The provisions of the FOI Act specify 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 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 implied 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.

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

Reasons

General principle

3.28 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 allows the person affected by the decision the opportunity to have the decision explained and to seek review if they wish. This fundamental theme in administrative law and good decision making is explained further in the ARC Best Practice Guide No 4, Decision Making: Reasons.

3.29 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 by applicants of decisions, with a corresponding reduction in complaints and requests for review.

Reasons under the FOI Act

3.30 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. The 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 (see below at [3.171]–[3.188]).

3.31 The FOI Act also requires the Information Commissioner to provide reasons for a decision on a complaint (s 75(4)) or investigation (s 86(2)) and an application for IC review (s 55K(4)).

Accountability

General principle

3.32 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*.

Accountability arrangements under the FOI Act

3.33 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 Act requires information to be included in the statement of reasons about the applicant's rights to review and the procedures for exercising those rights, and their right to make a complaint to the Information Commissioner.

Right of access

3.34 Any person has the right to apply for access to a document of an agency or an official document of a minister (s 11(1)). An applicant does not have to reside in Australia or be an Australian citizen.[11] The term 'person' also includes a body politic or body corporate, such as a company.[12]

Reasons for a request

3.35 A person's right of access is not affected by any reasons they give for seeking access or any belief the agency or minister may have 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 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.[13] However, the 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.[14] For example, when deciding whether the disclosure of personal information about a person under s 47F(1) would be unreasonable, an agency may take into account the likelihood of an FOI applicant publishing the personal information in an article.

3.36 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 [3.222]). 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 to proceed on the premise 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 applicant, agencies should be aware that not every applicant would disseminate information obtained via an FOI request. Agencies should ensure that each case 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.

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

[12] See s 2C of the *Acts Interpretation Act 1901*.

[13] [2015] AICmr 26 [40].

[14] [2015] AICmr 26 [44]

[15] *Re Sunderland and 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.

3.37 In addition, the disclosure log provisions require general publication within 10 working days of information being released to individual applicants, 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

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

3.39 An applicant's identity can nevertheless be relevant in deciding if requested documents are exempt. Where a person has submitted an FOI request for their own personal information or documents relating to their business affairs, an agency or minister's office should be satisfied of the applicant's identity before giving the applicant access to the documents, particularly where the applicant purports to seek access to their own personal or business information. The protections under ss 90–92 of the FOI Act for officers 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 [3.219]-[3.220]).

3.40 If a need arises to establish an FOI applicant's identity, an agency should seek only the minimum amount of personal information required (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 applicant's identity should not be provided to any third party without prior consultation and agreement by the 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 applicant's identity may help a third party decide more easily whether to object to disclosure and to frame any specific objections, and this issue can be raised with an applicant in consultation.

Requests by agents and groups

3.41 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'.

3.42 A logical consequence of the principle that a request can be made by a person using a pseudonym (see [3.38]) is that a request may be made by a group of individuals or corporate

[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.

bodies or an unincorporated association.[19] This is consistent with s 23 of the Acts Interpretation Act 1901, which provides that 'words in the singular number include the plural' (that is, a reference to 'person' in s 11(1) of the FOI Act can have a singular or plural meaning).

3.43 It may nevertheless be problematic to process (or continue processing) a 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.

3.44 Firstly, as discussed at [3.39], the identity of an 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 applicant seeks access to a document on behalf of another person, and the document contains information pertaining to that person, it may be necessary for the 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 the secrecy provision (see [5.118]-[5.125]).

3.45 Secondly, an FOI applicant can apply under s 29(5) of the Act for payment of a charge to be reduced or not imposed for the reason that payment of the charge would cause financial hardship to the applicant or to a person on whose behalf the application 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.

3.46 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 was first received by the agency), and whether the FOI applicant wishes the processing of the request to continue. This issue may become more important if an access 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 access request

3.47 A request for documents under the FOI Act must meet the following formal requirements:

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

[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 ruled that the reference in FOI Act s 15 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 ruling 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

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 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 [3.109]). Before refusing a request for failing to meet this requirement an agency or minister must undertake a 'request consultation process' (see [3.127]–[3.132]).
- The 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).[20]
- 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[21] (s 15(2A)).

Assisting an applicant

3.48 An agency or minister may refuse a request that does not meet the formal requirements set out in s 15 (subject to conducting a request consultation process before basing a decision on s 15(2)(b)). However, an agency also has a duty to take reasonable steps to assist a person to make a request that complies with the formal requirements of the FOI Act (s 15(3)). This duty applies both when a person wishes to make a request and when they have made a request that does not meet the formal requirements. While the Act places an obligation only on agencies, ministers' offices may adopt a similar approach to assisting applicants.

3.49 An agency has a separate duty to take reasonable steps to assist a person to direct their 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 a request to another agency or minister under s 16 of the 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 [3.57]–[3.68] below).

3.50 The nature of the duty to take 'reasonable steps' to assist an applicant to make a request, and to direct the request to the appropriate agency or minister, will depend on the circumstances of each request. For example, where a practical refusal reason exists and the

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

[21] The OAIC encourages agencies to use a specified email address (ie FOI@agency.gov.au) and to make this email address available on their website. For further information, see OAIC, *Guidance for agency websites: 'Access to information' web page*, 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.

applicant responds to a notice under s 24AB(2), the agency or minister must take reasonable steps to assist the applicant to revise the request so that the practical refusal reason no longer exists (s 24AB(3)). Reasonable steps in this scenario might include providing a breakdown of the time estimated for each step of the process and suggesting what would be a reasonable request in the circumstances.[22]

3.51 Other factors that may be relevant include the nature of a request, the extent of detail required to clarify the scope of a request, an applicant's knowledge (or lack of knowledge) of the structure of government and the functions of agencies, and whether an applicant needs special assistance because of language or literacy issues or a disability.

3.52 If a person has not yet made a request and contacts an agency or minister's office to enquire 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 request relates to information that the agency or minister's office 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).

3.53 An agency or minister 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 applicant of a missing detail by telephone or email). This contact can be made either before or after a 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 access request. Once the further information is provided, the agency or minister's office should inform the applicant that their request meets the statutory requirements and that the timeframe for deciding the request has commenced. It is important to keep good records of contact with applicants, such as file notes of conversations, so that an agency can demonstrate if required that it has taken reasonable steps in accordance with s 15(3) or (4).

Interpreting the scope of a request

3.54 A request should be interpreted as extending to any document that might reasonably be taken to be included within the description the applicant has used.[23] A request for a 'file' should be read as a request for all of the documents contained in the file, including the file cover. There have been instances of agencies using s 22 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.[24] Without further explanation as to why the names of government officials are irrelevant to the scope of an applicant's request, it is unlikely that the application of s 22 is appropriately justified.

3.55 A request for all documents relating to a particular subject would also include any document or print-out which lists the names of all of the files the agency may consider relevant to the request. An agency will need to exercise care in relation to any sensitive material, such as personal names, that may appear on the list. If in doubt, the agency or

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

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

[24] *'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].

minister should consult the applicant to discuss exactly what documents are being requested. Other considerations relevant to construing the scope of a request are discussed below at [3.110].

3.56 It is irrelevant in making a decision on an FOI request whether or not the applicant already has copies of the documents they have requested. However, an agency or minister may choose to consult with the applicant to seek their agreement to exclude such material from the scope of the request.

Transferring requests to other agencies

3.57 Section 16 provides for the transfer of FOI requests between agencies and ministers.[25] A transfer can occur in some circumstances by agreement between agencies or ministers; in other circumstances a transfer is mandatory (see [3.67]). As noted at [3.49], an agency also has a duty under s 15(4) to take reasonable steps to assist a person to direct their request to the appropriate agency or minister, and this enables an agency to discuss with an applicant where a request could be directed.

3.58 An agency or minister may partially or wholly transfer a request (s 16(3A)). When an agency or minister receives a request for documents, some of which are in the possession of different agencies, the request is notionally divided into different requests. Each agency or minister then has obligations to make their own response to the request in accordance with the Act.

3.59 The transfer of a request under s 16 can facilitate access by avoiding the need for the applicant to make a new request to another agency or minister and by providing a whole of government approach to making information available to the public. Transfer of a 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.

3.60 As 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 requests or requests where an 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 a request may contain more than one part, agree promptly as to who will be responsible for which part. A decision to transfer a request under s 16 is not open to external review as it is neither an access refusal nor access grant decision.

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

Timeframe

3.62 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 request was originally received, and the receiving agency or minister is not given extra time. It is therefore important that agencies and ministers give early consideration to whether a request should be transferred. This will enable the notices

[25] Section 16 refers to agencies, but provides in s 16(6) that '***agency*** includes a Minister'.

to the applicant under s 15(5)(a) (acknowledgement of receipt) and s 16(4) (transfer of request) to be combined and ensure that the receiving agency or minister is not disadvantaged by delay. In these circumstances, the receiving agency may also wish to consider seeking an extension with the agreement of the applicant under s 15AA. In order for the extension to be valid, the agency must ensure that the requirements under s 15AA are followed. Further information about the timeframe for notifying a decision under the FOI Act is below at [3.137].

Notifying the applicant

3.63 The transferring agency must advise the applicant that the 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 whom the request was transferred. Particular care needs to be taken in relation to certain documents whose existence should neither be confirmed nor denied (see [3.68]). Where it is necessary to enable the receiving agency to deal with the 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

3.64 An agency or minister who receives a 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 first agency 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)).

3.65 It is implicit in those requirements that a 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 a request an agency or minister should take whatever reasonable steps are necessary to ascertain whether they have the documents that may meet the description in the FOI request.[26]

3.66 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

3.67 Section 16 provides for the mandatory transfer of requests of certain types specified in Table 1. 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).

[26] *Bienstein v Attorney-General* (2007) 96 ALD 639.

Table 1: Transfer requirements for documents originating with or received from an agency listed in Schedule 2

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 (eg, Auditor-General, Australian Government Solicitor, or security intelligence agency)	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 (eg, Australian Signals Directorate)	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 (eg, documents in respect of commercial activities)	documents in respect of which the listed agency is exempt	the agency (s 16(3)).

Transfer of requests without revealing existence of documents

3.68 Where appropriate, the transferring agency should consult with 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 applicant the existence of such a document before the decision maker has had the chance to consider whether to rely on s 25.

Consultation

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

Consultation with other agencies

3.70 Each agency or minister is required to make their own decision in relation to a request for access under the FOI Act. However, before making a decision about release of a document it is good practice to consult with other relevant agencies, even when 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 access request or made it publicly available. Consulting with other agencies will also assist in managing requests where an FOI applicant has requested access to the same or similar documents from several agencies.

3.71 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 that there are procedures in place to determine at the time a document is created whether it will be published under the IPS (see Part 13 of these Guidelines) or released in response to FOI requests. This may lessen the need for consultation between agencies if an FOI request is later received.

Consultation with the applicant

3.72 Various provisions of the FOI Act require contact with an applicant. However, agencies and ministers' offices are encouraged, as a matter of good administrative practice, to contact an applicant to discuss their request as soon as practicable after receiving the request. This contact provides an early opportunity to assist the applicant to address any formal requirements that have not been met (see [3.47] above). Early consultation can also lead to greater efficiency in the process. 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 or estimated charges may be high (see [3.108]–[3.135] below and Part 4 of these Guidelines). In many cases, an applicant may not be aware of the nature and volume of the agency's records, and, as a result, their request might be expressed in wider terms than is necessary.

3.73 An agency or minister may also wish to seek the 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 a large or complex request (s 15AA).

Consultation with third parties

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

3.75 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.

3.76 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 consultations 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.

3.77 There must be some rational basis which the agency or Minister can discern, based on the face of the document or from anything 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.[27] The mere appearance of a person's name in the document, in the

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

absence of anything more, may not be sufficient for it to be apparent that a person might reasonably wish to make an exemption contention.[28]

3.78 Where an agency or minister is required to consult with 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 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)).

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

3.80 If an affected third party does not agree with a decision by an agency or minister to give an applicant access to a document, the agency or minister should also explain to the third party that a submission[29] must be made in support of the exemption contention before the third party's review rights would apply.[30] 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 applicant (ss 27(8) and 27A(7)).

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

3.82 More information on consultation with third parties is in Part 6 of these Guidelines. The third party should also be made aware that the agency or minister is generally required to publish the documents that are released in response to an access request unless an exception applies (see Part 14 of these Guidelines). Agencies should also be mindful when consulting with third parties that consultations are undertaken in accordance with the Privacy Act and that the requester's personal information is not provided to the third party without their consent.

Decisions on requests for access to documents

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

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[28] *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].

[29] '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.

[30] For more information about third party review rights, see OAIC, *Personal and business information — third-party review rights*, at www.oaic.gov.au

- refuse a request that does not meet the formal requirements for making a request in s 15 (see [3.47])
- 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 [3.85])
- allow access to all documents as requested, even if some are exempt (s 3A(2)(a))
- withhold all requested documents as exempt, or withhold some documents and allow access to others (discussed in Parts 5 and 6 of these Guidelines)
- provide access to the personal information of the 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 [3.95])
- defer access to the requested documents until a later date under s 21 (see [3.101])
- refuse under s 25 to confirm or deny that a document which would be exempt under s 33, 37(1) or 45A exists (see [3.103])
- refuse a request if a practical refusal reason exists under s 24AA, following a request consultation process (see [3.108])
- 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)
- amend or annotate a record of the applicant's personal information as requested under s 48 (see Part 7 of these Guidelines)
- decline to amend or annotate a record of the applicant's personal information as requested under s 48 (see Part 7 of these Guidelines).

Refusing access to an exempt document

3.84 An agency or a minister is not required to give a person 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 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 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

3.85 An agency or minister may refuse a request if it has taken 'all reasonable steps' to find the document requested, and is satisfied that the document cannot be found or does not exist

(s 24A(1)).[31] There are two elements that must be established before an agency or minister can refuse a request for access to a document under s 24A:

- the agency or minister must have taken all reasonable steps to find the document, and
- the agency or minister is satisfied that the document cannot be found or does not exist.

3.86 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 and find the requested document.

3.87 An agency or minister can also refuse a request for access if it has taken contractual measures to ensure it receives a document from a contracted service provider but has not done so after taking all reasonable steps to receive the document in accordance with the contractual measures (s 24A(2)).[32]

3.88 The Act is silent on what constitutes 'all reasonable steps'. The meaning of 'reasonable' in the context of s 24A(1)(a) has been construed as not going beyond the limit assigned by reason, not extravagant or excessive, moderate and of such an amount, size or number as is judged to be appropriate or suitable to the circumstances or purpose.[33]

3.89 Agencies and ministers should undertake a reasonable search on a flexible and common sense interpretation of the terms of the request. What constitutes a reasonable search will depend on the circumstances of each request and will be influenced by the normal business practices in the agency's operating environment or the minister's office.[34] At a minimum, an agency or minister should take comprehensive steps to locate 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 the location of documents, and
- the age of the documents.[35]

3.90 It may also be prudent for agencies and ministers to explain in its decision the steps that were taken to search for the document, including the dates as to when the searches were conducted, the search parameters used, the time taken to conduct the search and whether any relevant backups were examined.[36] This may assist the applicant in understanding how the searches were conducted and whether there is any merit in seeking further review of the

[31] *Cristovao and Secretary, Department of Social Security* (1998) AATA 787.

[32] For further information on contracted service providers see OAIC, *Documents held by government contractors: Agency obligations under the Freedom of Information Act 1982*, available at www.oaic.gov.au.

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

[34] *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'.

[35] *'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.

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

decision by the agency or minister. The OAIC has developed a checklist and sample notice to assist agencies with the content of a statement of reasons.[37]

3.91 Agencies and ministers are responsible for managing and storing records in a way that facilitates finding them for the purposes of an FOI request.[38] 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 locate the documents.[39]

3.92 Whether it is necessary for an agency or minister to conduct a search of its backup systems for documents will depend on the circumstances. For example, if the agency is aware that its backup system merely duplicates documents that are easily retrievable from its main records system, a search of the backup system 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 would not be necessary to undertake a search of the backup system.[40]

3.93 On the other hand, if an agency or minister is aware that its backup system may contain relevant documents not otherwise available or if the applicant clearly includes backup systems in the request, a search of the backup system may be required (provided it does not involve a substantial and unreasonable diversion of agency resources, see [3.111]).

3.94 Agencies and ministers should assist applicants to identify the specific documents they are seeking. To do so would facilitate and promote public access to information in accordance with the objects of the Act. If the document still cannot be located, the statement of reasons given to the applicant should sufficiently identify the document, explain why it cannot be found or is known not to exist or to be in the agency's possession, describe the steps the agency took to search for the document, and note the limitations of any search. If a record is known or likely to have been destroyed under an agency's Records Disposal Authority, or in the course of normal administrative practice,[41] this should be explained, if possible by a 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 search for a document will be useful, particularly when managing complex requests for many documents or in later explaining the search that was undertaken. The OAIC has developed a checklist and search minute which sets out the steps that an agency or minister should follow to locate documents within the scope of an FOI request and the steps taken when searching for documents.[42]

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[37] The checklist can be found on the OAIC website — https://www.oaic.gov.au/assets/freedom-of-information/guidance-and-advice/processing-foi-requests-reasonable-steps-checklist.pdf
The sample access refusal notice can also be found on the OAIC website — https://www.oaic.gov.au/assets/freedom-of-information/guidance-and-advice/sample-foi-notices/FOI-sample-notice-access-refusal-decision.rtf

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

[39] 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.

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

[41] Normal administrative practice allows 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/information-management/managing-information-and-records/destroying/NAP/index.aspx

[42] The checklist and search minute can be found on the OAIC website — https://www.oaic.gov.au/freedom-of-information/guidance-and-advice/processing-foi-requests-taking-all-reasonable-steps-to-find-documents/

Deleting exempt or irrelevant content from a document

3.95 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 (s 22). It is important for agencies 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 material that can readily be deleted, and that an applicant has either agreed or is likely to agree that the material is irrelevant.[43]

3.96 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 request.[44] Deleting irrelevant information from a document that is to be released can have advantages for both agencies and applicants. An agency may not have to consider whether the deleted information is exempt or if a third party should be consulted, and can more quickly reach a decision to provide access to the non-exempt information, and perhaps at a lower access charge. An applicant who disagrees that information deleted from a document is irrelevant to the request can make a fresh FOI request, as an alternative to seeking internal or IC review of the agency's decision.

3.97 The obligation to prepare an edited copy of a document so that it does not contain exempt or irrelevant content 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
- it is not apparent, from an applicant's request or consultation with the applicant, that the applicant would decline access to the edited copy (s 22(1)(d)).

3.98 Applying those 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. Similarly, the purpose of providing access to government information under the FOI Act may not be served if extensive editing is required that leaves only a skeleton of the former document that conveys little of its content or substance.[45]

3.99 Consideration should be given to consult the applicant before making a decision to edit a document to delete exempt or irrelevant content. An applicant may be willing to alter the scope of the request to a specific part of the document,[46] or to be given administrative access to particular information in the document (see [3.2]).

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

[44] Re *Russell Island Development Association Inc and Department of Primary Industries and Energy* [1994] AATA 2; Re *LJXW and Australian Federal Police and Another* [2011] AATA 187. 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 request: *Nikjoo and Minister for Immigration and Border Protection* [2013] AATA 921 [44].

[45] *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.

[46] 'Document' is defined in s 4 to include 'any part of a document'.

3.100 If a decision is made to delete or edit exempt or irrelevant content, an agency or minister must give the 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 on which matter the agency or minister claims to be exempt was deleted. It is generally helpful to an applicant to mark on the document where text has been deleted and the grounds for the deletion.

Deferring access to a document

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

- where 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))
- where 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))
- where 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[47] (s 21(1)(c))
- where 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)).

3.102 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)). 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

3.103 The act of confirming or denying the existence of a document can sometimes cause damage similar to disclosing the document itself. For example, merely knowing that an agency has a current telecommunications interception warrant in connection with a specific telephone service would be sufficient warning to a suspect who could modify their behaviour and possibly undermine an investigation into serious criminal activity.

3.104 Section 25(2) allows an agency or minister to give an applicant notice in writing that does not confirm or deny the existence of a document but instead tells the applicant that, if it existed, such a document would be exempt.

3.105 The agency or minister does not have to search for or conduct an inquiry into the nature of the document being sought. Rather, s 25(2) requires only an assessment of whether a document of the kind requested is, 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

[47] For example, in *Wellard Rural Exports Pty Ltd and Department of Agriculture* [2014] AICmr 131, as disclosure of the documents at issue might prejudice an investigation, access to those documents was deferred until the conclusion of the investigation.

(Parliamentary Budget Office documents).[48] In answering this question, the decision maker must first turn their mind to whether the document sought is of such a kind that it would fall within the scope of the FOI request by considering the terms of the request and the technical expertise of the decision maker.[49] Where a document of the kind requested is, or would be, exempt under ss 33, 37(1) or 45A, the agency or minister is entitled to rely on s 25 in neither confirming or denying the existence of the document.

3.106 Similarly, where a decision is made to refuse access to a document in accordance with the request, agencies and ministers should keep in mind not to inadvertently disclose in its reasons for decision the existence of a document where that disclosure would reveal exempt matter (s 26(2)).[50] The other requirements of a notice under s 26 still apply (see [3.172] below).

3.107 Agencies and ministers should use s 25 only in exceptional circumstances. For the purposes of 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 s 33, 37(1) or 45A, as the case may be (s 25(2)).

Refusing access when a practical refusal reason exists

3.108 An agency or minister may refuse a request if a 'practical refusal reason' exists. These are of two types: a request does not sufficiently identify the requested documents (s 24AA(1)(b)); or the resource impact of processing the request would be substantial and unreasonable (s 24AA(1)(a)). In either instance, the agency or minister must first follow a 'request consultation process' before refusing the request.

Request does not sufficiently identify documents

3.109 A formal requirement of making an FOI request is that the 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 Act as a 'practical refusal reason' for which a request consultation process is required.

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

- A 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.[51]
- An 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. Where the applicant has requested a class of documents, it may be useful for the agency to explain to the applicant the information that is contained in those documents, as this

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

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

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

[51] *'BI' and Professional Services Review* [2014] AICmr 20, applying *Re Anderson and AFP* [1986] AATA 79.

may assist the applicant to narrow the scope of his or her request to a specific set of documents, resulting in less time spent on processing irrelevant material.

- Although a request under the FOI Act must be for 'documents', rather than for 'information', a request may be phrased by reference to the information that a document contains. This may in fact be an effective and concise way for an FOI applicant to identify documents.
- A request does not need to quote a file or folio number.

Resource impact of processing request would be substantial and unreasonable

3.111 A 'practical refusal reason' exists if:

- in the case of an agency — the work involved in processing the 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)).

3.112 An important similarity in both tests is that they require consideration of whether processing a request would have a 'substantial' and 'unreasonable' effect. There may be circumstances where the processing of an applicant's request would have a substantial effect on an agency or minister, but may not necessarily be unreasonable in the circumstances. For example, an agency that is particularly large may not necessarily find that the processing of a request to be unreasonable, despite the fact that processing the request would have a substantial effect on the agency. Such agencies are likely to have dedicated resources to ensure that it can appropriately handle requests and reduce the impact of the requests on other business areas of the agency through the establishment of a permanent FOI team, as well as assigning additional temporary resources to handle a peak in the number or complexity of requests.[52]

3.113 Similarly, where there is significant public interest value in the disclosure of the information contained in the documents, and/or where an individual has been significantly personally affected by decisions of government, the agency 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.

3.114 Another similarity is that the Act specifies the same non-exhaustive list of matters that must be considered in applying both tests, and 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 'whether a request would interfere with the performance of a minister's functions'.[53] This means that different considerations may arise in applying the tests.

3.115 The evident purpose of this practical refusal ground is to ensure that the capacity of agencies and ministers to discharge their normal functions is not undermined by processing FOI requests that are unreasonably burdensome. On the other hand, it is

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

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

implicit in the objectives of the FOI Act that agencies and ministers must ensure that appropriate resources are allocated to dealing with FOI matters. This may include assigning additional temporary resources to handle a peak in the number or complexity of requests or to overcome inadequate administrative procedures. Poor record keeping or an inefficient filing system would not of themselves provide grounds for a claim that processing the request would be a substantial and unreasonable diversion of resources.[54] Similarly, although a broadly worded request is more likely to constitute an unreasonable diversion of resources than a request that is narrowly focused,[55] the fact that a large number of documents lies within the scope of a request may not be determinative if the documents can be easily identified, collated and assessed.

3.116 In deciding if 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 minister
- examining the documents
- deciding whether to grant, refuse or defer access
- consulting with other parties
- redacting exempt material from the documents
- making copies of documents
- notifying an interim or final decision to the applicant.

3.117 Other matters that may be relevant in deciding if a practical refusal reason exists include:[56]

- 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 an 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 an 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.

[54] 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].

[55] *Philip Morris Ltd and Department of Health and Ageing* [2013] AICmr 49 [35].

[56] 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.

3.118 The 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 applicant gives for requesting access
- the agency or minister's belief as to the 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)).

3.119 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, it is not possible to specify an indicative number of hours of processing time that would constitute a practical refusal reason. Agencies should not adopt a 'ceiling' in relation to processing times; for example, deciding that a practical refusal reason exists once the estimated processing time exceeds 40 hours.[57] Rather, each case should be assessed on its own merits, and the findings in individual AAT and IC review decisions which discuss estimated processing times should be viewed in that light.[58]

3.120 It is nevertheless expected that an agency or minister will provide a breakdown of the time estimated for each stage in processing a 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 practical refusal decision.[59]

3.121 An estimate of processing time is only one consideration to be taken into account when deciding whether a practical refusal reason exists.[60] It is recommended that agencies examine a sample of the documents to assess the complexity of the material against whether the work involved in processing the request would constitute a substantial and unreasonable diversion of resources from the agency's other operations. A representative

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

[58] For examples of relevant factors in IC review and AAT decisions affirming practical refusal reasons, see: *Tate and Director, Australian War Memorial* [2015] AATA 107 (estimate of 150 hours to process request of 1003 pages; small agency with one staff member available as a Freedom of Information 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 request of approximately 6500 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 relate to financial grant to a University and processing the request would not cast light on a decision that has 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 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 is 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).

[59] *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.

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

sample of between 10 to 15% of the documents[61] within the scope of the request has been considered to be an appropriate sample size for the purposes of calculating processing time when deciding whether a practical refusal reason exists.[62] A person with appropriate knowledge or expertise should assess the sample of the documents, looking at each document as if they were making a decision on access, including indicating the number of documents that could be released in an edited form.[63] The assessment of the sample would provide an indication of the complexity of the potential decision, that is, the number of exemptions required, the topic and content of the documents, and the number of consultations required and effort required to contact third parties based on available contact details.[64]

Multiple requests

3.122 In deciding whether a practical refusal reason exists, two or more 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)).

3.123 The most common circumstance in which 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 two 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.[65] 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 three requests relate to three different chapters of one report.

3.124 Where 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, it is not open to an agency or minister to combine the FOI request with another under s 24(2).[66] Section 24(2) allows an agency to combine multiple requests where the agency or Minister is satisfied that a practical refusal reason exists, but only during the statutory processing period, as such this power is not available where a decision refusing the request is deemed to have been made under s 15AC(3).

3.125 Where multiple requests from different applicants are being treated as a single request, an agency must still follow the request consultation process with each applicant, unless an applicant has agreed to another arrangement. An agency's power to treat two or more

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[61] Where the number of documents are not high, it may be more appropriate for a sampling of more than 20% of the documents to 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.

[62] *'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; *Farrell and Department of Immigration and Border Protection (No. 2)* [2014] AICmr 121; *'DC' and Department of Human Services* [2014] AICmr 106; and *'AP' and Department of Human Services* [2013] AICmr 78.

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

[64] See *Dreyfus and Attorney-General (Commonwealth of Australia) (Freedom of information)* [2015] AATA 995 [57].

[65] *Farrell and Department of Immigration and Border Protection* [2014] AICmr 74 [19].

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

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.[67] Consequently, agencies are obliged to deal individually with each request that is not withdrawn or revised before the end of the consultation period.

3.126 If an FOI applicant requests access to multiple documents, an agency 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.[68] But the agency cannot undertake a consultation process in relation to all of 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 on practical refusal grounds. It is open to an agency to give administrative access to a document that was part of a request that was refused on practical refusal grounds, but that decision is not a decision under the FOI Act and FOI review rights will not apply.[69]

Request consultation process

3.127 Where an agency or minister is satisfied that a practical refusal reason exists, they must undertake a request consultation process with the applicant before making a decision to refuse the request (s 24AB).

3.128 Before commencing a formal request consultation process, agencies and ministers' offices are encouraged to discuss the request with the applicant. This is often a more efficient way of obtaining further information from the applicant and helping them to refine a request that is too large or vague. However, if the 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.

3.129 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
- 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)).

3.130 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 to revise the scope of the request so that a practical refusal reason no longer exists (s 24AB(3)). Failure to adhere to the requirements under s 24AB would amount to a procedural defect and may invalidate the practical refusal decision.[70]

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

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

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

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

3.131 An agency or minister may wish to state how an applicant is to consult with the contact person, such as by telephone. However, agencies should consider adopting a flexible approach. The consultation period may be extended by 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 timeframe for making a decision on the request (s 24AB(8)), that is, the process 'stops the clock'.

3.132 Agencies and ministers are only obliged to undertake a request consultation process once for any particular request (s 24AB(9)), but they may choose to continue discussions with an applicant in order to refine a request that is still too large or vague.

Assisting the applicant during a request consultation process

3.133 If an applicant contacts a contact officer during the consultation period, the contact officer must take reasonable steps to help them revise the request so that 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 will have in dealing with the request and suggest what would be a reasonable request in the circumstances.[71]

Consultation outcome

3.134 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)).

3.135 The request[72] is taken to have been withdrawn if the applicant does not contact the contact person 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.

3.136 Where an agency has treated multiple requests as a single request under s 24(2), (see [3.122]), 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.[73]

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[71] 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].

[72] Section 4 provides that a 'request' means an application made under subsection 15(1). This does not include an application for internal review or IC review.

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

Timeframe for notifying a decision

Default period for requests for access

3.137 The obligation on an agency or minister to notify an applicant that a request has been received, and to make and notify a decision on the request within the statutory timeframe, commences upon receipt of a request that meets the formal requirements in ss 15(2),(2A) (see [3.47]). These Guidelines refer to this period as the processing period.

3.138 An agency or minister must, as soon as practicable, and within 14 days of receiving a request, take all reasonable steps to enable the applicant to be notified that the request has been received (s 15(5)(a)). 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.

3.139 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)). Section 15(5)(b) provides that 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), (2A). An agency should act promptly to assist an applicant whose request does not meet the formal requirements in keeping with its obligations under s 15(3). Table 2 below sets out the time of receipt.

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[74]
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

3.140 An email or similar electronic communication is received at the time it is capable of being retrieved by the addressee.[75] This is assumed to be the time it reaches the addressee's nominated electronic address[76] (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).

3.141 The processing period refers to calendar days, not business (working) days. This will include any public holidays that fall within the processing period.[77] If the last day for notifying a

[74] Acts Interpretation Act s 29.

[75] Electronic Transactions Act 1999 s 14A.

[76] 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).

[77] See OAIC, *Public holidays and agency shut-down periods — Calculating timeframes under the Freedom of Information Act 1982* at www.oaic.gov.au

decision falls on a Saturday, Sunday or a public holiday, the timeframe will expire on the first business day following that day.[78] The 30-day processing period does not include:

- the time that an agency may take in a request consultation process to decide if a practical refusal reason exists (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.

Timeframe applying to requests for amendment or annotation of personal records

3.142 A decision on amendment or annotation of personal records must be made within 30 days after the day the application was received (s 51D). The extension of time provisions set out above for access requests do not apply to amendment and annotation requests. An agency or minister can informally seek an applicant's agreement to an extension of time, or apply to the Information Commissioner for an extension of the processing period after the initial period has expired and there is a deemed refusal (s 51DA(3)). For more information, see Part 7 of these Guidelines.

Internal review

3.143 An agency must make an internal review decision within 30 days after the day the application for review was received (initial decision period) (s 54C(3)). Where an internal review decision is not made within this timeframe, the principal officer of the agency is taken to have made a decision to personally affirm the original decision on the last day of the initial decision period (s 54D(2)(a)) (see below at [3.1660]). The agency can apply to the Information Commissioner for an extension of time to finalise the review (s 54D(3)) (for more information, see Part 9 of these Guidelines).

Extending the decision notification period

3.144 The FOI Act contains extension of time provisions which are set out in Table 3 below.[79] 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.

[78] Acts Interpretation Act s 36.

[79] Further guidance is available in OAIC, *Extension of time for processing requests* at www.oaic.gov.au

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 applicant of extension as soon as practicable (s 15(6)(b))
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))

3.145 The extension of time provisions outlined above only apply to the processing time available to an agency or minister in deciding an FOI request, or a request for internal review of an FOI decision. There are no extensions 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

3.146 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 written agreement is provided to the OAIC with the written notice.

3.147 It is not sufficient to advise the applicant that the processing period will be extended under s 15AA. The processing period can only be extended under s 15AA with written agreement from the applicant. The applicant's written agreement must be sought prior to the expiration of the processing period referred to in s 15(5)(b). An agreement under s 15AA cannot be made once an FOI request has become a deemed refusal under s 15AC.

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

3.149 If the agency or minister does not notify the Information Commissioner of the applicant's written agreement under s 15AA, the extension is invalid. This can affect an agency or minister's ability to seek further extensions of time under s 15AA or 15AB, or to impose a charge.

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

3.150 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.[80]

3.151 An agency or minister should only seek an extension of time under s 15AB after the agency or minister has first obtained, or attempted to obtain, the applicant's agreement to providing an extension of time under s 15AA, and the agency or minister has fully utilised the 30 day period available under s 15AA (to the extent the applicant has agreed to this).

3.152 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

[80] For guidance about applying for an extension of time, see OAIC, *Extension of time for processing requests* at www.oaic.gov.au

discretion in s 15AB cannot be exercised to provide a 'blanket' extension of time to a cohort of cases; each request needs to be made and considered on its individual merits.

3.153 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.

3.154 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 Commissioner must be made before the expiration of the processing period referred to in s 15(5)(b). An extension of time application under s 15AB can only be requested if the processing time has not expired. 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, provided the application was made within the period referred to in s15(5)(b).

3.155 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

3.156 A 'deemed refusal' occurs if the time for making a decision on a request for access to a document has expired and an 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).

3.157 Similarly, where the time for making a decision on a request for amendment or annotation of a record has expired and the applicant has not been given a notice of decision, the principal officer of the agency or the minister is taken to have personally made a decision refusing to amend or annotate the record (s 51DA).

3.158 In internal review, a 'deemed affirmation' of the initial decision occurs when the time for making an internal review decision (30 days) has expired and the applicant has not been given a notice of the internal review decision. If this occurs, the principal officer of the agency is taken to have personally affirmed the original decision (s 54D(2)(a)).

3.159 A notice of the deemed decision under s 26 is taken to have been given on the last day of the decision period (ss 15AC(3)(b), 51DA(2)(b) and 54D(2)(b)).

3.160 The consequence of a deemed refusal is that an 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 time has expired and there is a deemed decision, the agency or minister cannot impose a charge for access (see Part 4 of these Guidelines).

3.161 Where an access refusal decision is deemed to have been made before a substantive decision is made, the agency or minister continues to have an obligation to provide a statement of reasons on the FOI request. This obligation to provide a statement of reasons on the FOI request continues until any IC review of the deemed decision is finalised. The

competing view — that a decision maker is *functus officio* if a deemed decision arises — would have the consequence that an applicant's right of access under the FOI Act would be impeded through delay on an agency's part and could only be revived by an application for IC review. This result would be contrary to the objectives and requirements of the FOI Act.

Information Commissioner's power to grant an extension of time following a deemed decision

3.162 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 (ss 15AC(4), 51DA(3), 54D(3)). The Information Commissioner may allow further time for the decision maker to deal with the request (ss 15AC(5), 51DA(4), 54D(4)). If the Information Commissioner allows further time to deal with the request under s 15AC(5), it would not be open to the agency to extend the processing time further under s 15(6). Any application under s 15AC(4) should include the time required to undertake any consultations with affected third parties.

3.163 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 Commissioner will also consider the total elapsed processing time and the desirability of the decision being decided by the agency or minister rather than by IC review.

3.164 There is no obligation upon the Information Commissioner to seek the views of an applicant about a request for an extension of time under s 15AC following a deemed decision.[81] 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 the request for an extension of time.

3.165 In allowing further time the Information Commissioner may impose conditions (ss 15AC(6), 51DA(5) and 54D(5)). 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.

3.166 If the 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 (ss 15AC(7), 51DA(6) and 54D(6)). However, if this occurs the agency or minister remains unable to impose charges (reg 5(2) of the Charges Regulations).

3.167 If the decision is not made within the extended time or any imposed conditions are not met, the deemed refusal decision continues to apply (ss 15AC(8), 51DA(7) and 54D(7)). The Information Commissioner cannot provide further time in which the decision maker may make the decision or comply with the conditions (ss 15AC(9), 51DA(8) and 54D(8)). The applicant can seek IC review of the deemed refusal (see Part 10 of these Guidelines).

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

3.168 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)).[82]

3.169 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 applicant by:

- giving access to a document in accordance with the request (s 55G(1)(a))
- relieving the IC review applicant from liability to pay a charge (s 55G(1)(b)), or
- requiring a record of personal information to be amended or annotated in accordance with the application (s 55G(1)(c)) (see Part 10 of these Guidelines).

3.170 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

3.171 A decision maker must give the applicant 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 applicant for a decision where:

- access to a requested document is refused, including because:
  - 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 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, 54C(4)).

Content of a s 26 statement of reasons

3.172 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

[82] 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.

- the reasons for the decision (including any public interest factors taken into account in deciding to refuse access to a conditionally exempt document)
- the name and designation of the person making the decision
- information about the applicant's rights to make a complaint or seek a review and the procedure for doing so (s 26(1)).

3.173 A statement of reasons should not include any information that, if it were in a document, would cause that document to be exempt (s 26(2)).[83] It may be necessary to use s 25 to neither confirm nor deny the existence and characteristics of a document (see [3.103]-[3.107] above).

3.174 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 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 applicant may be more appropriate. The OAIC has developed a checklist and a sample notice to assist agencies with the content of a statement of reasons.[84]

The decision

3.175 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.[85]

3.176 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 material 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

3.177 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 [3.22]-[3.27]. The documents that are the 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.

3.178 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.[86] The decision maker needs to explain how each finding was rationally based on the evidence.

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

[84] See OAIC, *Statement of reasons checklist* and OAIC, *Sample FOI notices* at www.oaic.gov.au

[85] See ARC Best Practice Guide No 4, *Decision Making: Reasons*, 2007, p 7.

[86] See *ARM Constructions Pty Limited v Deputy Commissioner of Taxation* (1986) 65 ALR 343.

3.179 The statement of reasons should also set out how any conflicting evidence was considered, which evidence was preferred and why.[87] If the decision maker considered recommendations or reports in making their decision, references to those should also be included.

Relevant and irrelevant considerations

3.180 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)).

3.181 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 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

3.182 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 AAT, s 61 places the onus on the agency or minister to establish that the decision is (or is not) justified and that the AAT should give a decision adverse to the applicant (see Part 10 of these Guidelines).

3.183 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 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.

3.184 When explaining the reasons, the decision maker should refer to the specific documents requested (or records for amendment/annotation requests) 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 and/or IC review, AAT and court decisions in support of their interpretation of the provisions.

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[87] See ARC Best Practice Guide No 4, *Decision Making: Reasons*, 2007, p 8 and *Dornan v Riordan* (1990) 95 ALR 451.

3.185 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 [3.100] above).

3.186 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 he or she personally endorses the reasoning and conclusions.

Other required information

3.187 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)). Information about the authorisation should also be included (see [3.12])
- 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).

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

Requirement to provide better reasons

3.189 During an IC review, the Information Commissioner may require a decision maker to provide a statement of reasons if they have not done so, or a better statement of reasons if what they provided was inadequate (s 55E).

3.190 An applicant in proceedings before the AAT may also apply to the AAT for a declaration that the statement of reasons provided to them does not contain adequate particulars of:

- findings on material questions of fact
- the evidence
- other material on which those findings were based
- the reasons for the decision (s 62).

If the AAT makes such a declaration, the decision maker must provide those particulars to the applicant within 28 days (s 62(2)).

Other notices of decision

3.191 Other provisions of the FOI Act require that notices of particular kinds be given to applicants and third parties. Some of those 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.[88] 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.

3.192 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 notice must provide a statement of reasons that complies with Acts Interpretation Act s 25D (s 29(8),(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) (ss 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)).

3.193 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

3.194 Where a decision has been made to give an applicant access to a requested document, that 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, Charges Regulations), and
- all opportunities a third party may have to seek review of the decision have run out, and the decision still stands or is confirmed (ss 26A(4), 27(7) and 27A(6)).

[88] 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.

3.195 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 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 some only of those documents, the agency or minister should release the remaining documents to the applicant as soon as practicable once the third party's opportunity to seek review has run out.

3.196 Where there is undue delay in providing access to documents, an applicant may consider making a complaint to the Information Commissioner (s 70(1) — see Part 11 of these Guidelines).

Charges

3.197 The applicant must pay all charges before being given access, except where the charge relates to supervisory time for the applicant to inspect documents (reg 11(2) of the Charges Regulations). 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

3.198 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).

3.199 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). 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. 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).

3.200 '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 AAT (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 AAT and Federal Court within 28 days after the IC review decision is given to the IC review applicant (s 29(2) of the AAT Act, s 56(2) FOI Act)
Third party applies for AAT review	AAT 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 AAT's decision is given to the third party applicant (s 44(2A) AAT Act), or if an appeal has been lodged, when appeal proceedings have concluded

3.201 Agencies should check with the OAIC as to whether an application has been made for IC review before they give the applicant documents whose release a third party may wish to oppose. This is particularly important because the Information Commissioner may extend the time a person has to apply for IC review.

3.202 It is also good practice to check directly with an affected third party if the agency has not received any indication as to whether that third party intends to seek internal or IC review.

Providing access in stages

3.203 Where the request relates to a large number of documents, it is open to an agency and an applicant to consult and agree on a staged approach to the release of the documents.[89] A staged approach may also be appropriate if access to some (but not all) documents is to be deferred under s 21 (see [3.101]). Where an agency agrees with the applicant that the documents at issue are to be released in stages, it is recommended that the agency obtains the appropriate extensions of time under the FOI Act for processing the request. For example, the agency would need to obtain a written 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 may also consider applying to the Information Commissioner

[89] See *Re Eastman and Department of Territories* (1983) 5 ALD 187 and *Re William Richard Clifford Geary and Australian Wool Corporation* (1987) AATA 370.

under s 15AB for an extension of time, providing evidence of the agreement between the parties in its application.

3.204 A staged approach can assist agencies in managing its resources and avoid a practical refusal reason from arising by allowing the agency more time to consider and process the request. For example, the agency 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 and the applicant.

Form of access

3.205 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)).

3.206 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
- 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.

3.207 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.

3.208 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, an agency should consult with an applicant as to the most effective manner of providing access

to the information an applicant seeks, including by administrative release of information that has been compiled from documents or a database (see [3.2]).

3.209 An 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)).

Information stored in electronic form

3.210 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.[90] 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.

3.211 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.

3.212 In *Collection Point Pty Ltd v Commissioner of Taxation* the Full Federal Court held that the two conditions specified in [3.210] are distinct and to be applied sequentially.[91] 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.

3.213 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.'[92] 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'.[93] 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

[90] 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].

[91] [2013] FCAFC 67 [39]-[40].

[92] [2013] FCAFC 67 [43]-[44].

[93] [2013] FCAFC 67 [48].

adaption or creation is required in order to produce a document that is intelligible, such work may go beyond what s 17 obliges.[94]

3.214 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 two 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.[95]

3.215 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 with applicants about administrative release on a flexible and agreed basis of information extracted from databases.

3.216 The provisions set out at s 17 of the Act apply only to agencies. Ministers and their officers must, however, have regard to s 20 (discussed above at [3.205]) when considering the form of access to be given.

Charges for alternative forms of access

3.217 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

3.218 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

3.219 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.

3.220 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))

[94] *Stephen Cox and Australian Federal Police* [2015] AICmr 45.

[95] [2013] FCAFC 67 [53].

- 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 s 26A, 27 or 27A (s 91(1C)).

3.221 If a document is disclosed in any of the ways mentioned in [3.220], 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)).

3.222 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.

3.223 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.

3.224 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

3.225 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.[96] This immunity extends to disclosures for the purposes of undertaking consultation under s 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.

[96] 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.