

Australian Capital Territory

Freedom of Information (Volume 6 - Ombudsman reviews) Guidelines 2020

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made under the

Freedom of Information Act 2016, s66 (Guidelines for Act)

1 Name of instrument

This instrument is the *Freedom of Information (Volume 6 - Ombudsman reviews) Guidelines 2020*.

2 Commencement

This instrument commences on the day after notification.

3 Guidance material

I make the guidelines for the *Freedom of Information Act 2016* as set out in schedule 1 to this instrument.

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ACT Ombudsman
26 June 2020



OMBUDSMAN AN OFFICER OF
THE ACT LEGISLATIVE ASSEMBLY 

Freedom of Information Guidelines

OMBUDSMAN REVIEWS
MAY 2020

Guideline Number. **6 of 6**

Disclaimer

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

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

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

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1. Purpose

This guideline outlines policy and procedures applied by the ACT Ombudsman (the Ombudsman) when implementing its independent review function as set out under Division 8.2 of the *Freedom of Information Act 2016* (ACT) (**FOI Act**).

It is designed to provide:

- guidance for Ombudsman staff who manage the review caseload and/or make relevant decisions under the FOI Act
- information for agency staff and Ministers on what they can expect when their decisions are appealed to the Ombudsman
- transparency in terms of the FOI review process in the ACT for the general community, in addition to the summary information available on the ACT Ombudsman [website](#).

2. Introduction

The Ombudsman is an Independent Officer who reports directly to the Legislative Assembly.

In an FOI context, the Ombudsman provides independent oversight of the FOI Act to help ensure it:

- provides the right to access government information
- promotes a culture of openness and transparency, increasing government accountability
- improves public understanding of government decisions
- promotes public participation in government.

The Ombudsman also has a number of specific functions, which are set out in s 64, and include:

- reviewing FOI decisions made by agencies or Ministers
- granting extensions to agencies or Ministers processing access applications
- monitoring the operation of the FOI Act, including open access compliance
- making open access declarations
- making FOI guidelines
- reporting on the operation of the FOI Act
- investigating complaints.

This guideline provides advice on how the Ombudsman's Office carries out the first two functions listed above—this includes how we:

- review FOI decisions made by agencies and Ministers—see [section 4—Ombudsman FOI reviews](#)
- decide applications for extensions of time—see [section 5 Extensions of time](#)

Note:

- Information on open access compliance activities undertaken by the Ombudsman can be found in [Guideline 1 of 6 Open Access Information](#).
- ACT Ombudsman annual reports on the operation of the FOI Act can be found on our [website](#).
- Information about the FOI complaint process is also available on our [website](#). A more detailed FOI complaints policy is under development and will be published on our website once finalised.

All section numbers are references to sections of the FOI Act unless indicated otherwise. References to legislation are ACT legislation unless indicated otherwise.

The agency or Minister which decided the access application under review is referred to as the **decision-maker**. This document, consistent with s 70, will use this term to refer to an agency or Minister, where a decision has been made (although the review section of the FOI Act does use the terms **respondent** and **decision-maker** interchangeably)

Consistent with the FOI Act, where an application remains on hand, the agency or Minister is referred to as the **respondent**—for example, where a request for an extension of time is made.

The term **Ombudsman** may include staff of the Ombudsman's Office.

- An officer with carriage of a specific Ombudsman review application is referred to as the **Case Officer** in this document.
- Decisions will, however, be made by the Ombudsman or a delegate at the appropriate level as provided for under s 64(2).¹

An application made to the Ombudsman for review of a reviewable decision is referred to as an **ombudsman review**, consistent with s 73.

Note:

- Review by the Ombudsman is a merits review process.
- The Ombudsman does not only review the reasons for decision given by the decision-maker, but also determines the correct or preferable decision, in the circumstances. It should, however, be noted that:
 - the decision will be made on the basis of the facts and circumstances as they exist at the time the Ombudsman decision is made, not at the time of the original access application decision
 - the review will only focus on information that remains at issue (that is, information the applicant still seeks and the relevant agency or Minister still refuses to disclose) under s 72 of the FOI Act,
 - the onus of establishing that the information is contrary to the public interest information is on a person seeking to prevent disclosure of government information – that is, the original agency or Minister who made the decision to refuse access, or a third party who is objecting to the release of information that they have decided to disclose.

3. Guiding principles

The Ombudsman's role is to independently investigate, and review, decisions made by agencies and Ministers about access to and amendment of information under the FOI Act.

Ombudsman reviews are intended to be simple, practical and cost-efficient. This is consistent with the objects of the FOI Act.²

¹ The Ombudsman may delegate his or her functions to a person mentioned in s 32 of the *Ombudsman Act 1989*. Internal staff should consult the current delegation instrument available on the intranet.

² FOI Act s [6](#).

In addition, the Ombudsman is guided by the following principles in the FOI Act when dealing with applications for review or extensions of time:

- Every person has an enforceable right to government information, unless access to the information is contrary to the public interest (s 7(1)).
- Access to government information should be facilitated promptly and at the lowest reasonable cost (s 6(f)).
- A person's reasons for seeking access to information or a respondent's belief about a person's reasons for seeking access are not relevant (s 17(2)(f)).
- The Ombudsman should have regard to the importance of encouraging timely resolution of access applications (s 42(4)(b)).
- In an Ombudsman review, a person seeking to prevent disclosure of government information has the onus of establishing that the information is contrary to the public interest information (s 72).

4. Ombudsman reviews

4.1. Who can apply for an Ombudsman review and of what decision?

Section 73 of the FOI Act outlines who can apply to the Ombudsman for review and of which decisions, with the details provided for in Schedule 3 of the FOI Act.

The table below outlines:

- the decisions made by agencies or Ministers under the FOI Act that are reviewable by the Ombudsman (**reviewable decisions**)—that is, decisions included in column 3 of Schedule 3 of the FOI Act
- the entities that can apply for an Ombudsman review—that is, entities specified in column 4 of Schedule 3 of the FOI Act

Section	Decision	Entity
24(1)	not make open access information publicly available	any person
35(1)(a)	give access to government information	relevant third party
35(1)(b)	government information not held	any person
35(1)(c)	refuse to give access to government information*	any person
35(1)(d)	refuse to deal with application	applicant, person whose interests are affected
35(1)(e)	refuse to confirm or deny government information held	any person
61(1)(b)	refuse to amend personal information	applicant

*A decision to refuse access to government information includes:

- a decision to refuse access to all information sought under s 35(1)(c)
- a decision to only grant partial access, refusing access to some of the information requested
- a deemed refusal decision—that is, where a decision was not made in the required timeframe by the agency of Minister and is taken to be refused under s 39(1)(a).

Note:

- Where the Ombudsman is reviewing a deemed refusal decision, the decision-maker may apply to the Ombudsman to set aside the deemed decision and request further time to deal with the access application.³
- For more information about deemed decisions see [section 5.3 Ombudsman extension—deemed refusal](#) and [Guideline 3 of 6: Dealing with access applications](#).

4.2. Time limits for lodging a review application

As outlined under s 74, an application for Ombudsman review must be made within **20 working days after**:

- the day the decision notice is published on the agency's disclosure log
- if the decision relates to an access application for personal information, then the day the decision-maker gives the applicant a decision notice on the access application
- if it is a deemed decision, then the day the application is taken to have been refused
- if it relates to a decision not to make open access information available because it is contrary to the public interest information—the day the matters under s 24(2) are published.

It is, however, open to the Ombudsman to allow for review applications to be made outside of the 20 working days.⁴

Late review applications will be accepted where considered reasonable, particularly when:

- the applicant was unaware the review period had commenced due to matters outside of their control (for example, where a decision notice was not received, and/or the disclosure log was not updated by the decision-maker as required), or
- the applicant previously commenced a review but it was closed by the Ombudsman due to circumstances out of the applicant's control—see [section 4.11.6 Not enough information to review](#) and [section 4.11.10 The Ombudsman has been unable to contact the applicant](#).

4.3. Making a valid review application

An application for Ombudsman review is considered valid if:

- the decision is a **reviewable decision**—see [s 4.1 Who can apply for an Ombudsman review and of what decision](#) above
- the applicant is an **entity** able to apply—see [s 4.1 Who can apply for an Ombudsman review and of what decision](#) above, and
- it was made within the appropriate timeframe—see [section 4.2 Time limits](#) above.

³ Ibid s 78.

⁴ FOI Act s [74\(1\)\(b\)](#) and s [151C](#) of the *Legislation Act 2001*.

There are no other validity requirements under the Act, however:

- A [review application form](#) is available on the Ombudsman website, which applicants are encouraged to use to help ensure they provide all of the required information.
 - The completed form should be emailed to actfoi@ombudsman.gov.au.
- The Ombudsman can decide not to proceed with a review where there is insufficient information to do so—see [section 4.11 Not enough information to review](#).

Note:

- The decisions that are reviewable and who can apply for a review of these decisions are also summarised above at [section 4.1 Who can apply for an Ombudsman FOI review and of what decision?](#)
- Use of the review application form is not mandatory, and the Ombudsman will consider any application received in writing, although use of the form does assist the Ombudsman to conduct a timely review.
- There is no fee for applying for an Ombudsman review.

4.4. Parties to the review

The parties to an Ombudsman review include:

- the *applicant*—i.e. the person applying for an Ombudsman review
- the *decision-maker*—i.e. the entity or respondent that made a decision on the original access application.⁵

It is, however, also open to any other person to apply to the Ombudsman to participate in the review.⁶ It is then at the discretion of the Ombudsman to allow them to participate.⁷

Third party participation is likely to be allowed where the party has a personal or business interest in the matter, rather than a general public interest. It is expected that any party wishing to participate in an Ombudsman review as a third party will outline how they can contribute to the review and/or how they may be impacted by the review outcome.

For example, this could include the original FOI applicant, where a third party who disagrees with an agency's decision to disclose information has lodged an Ombudsman review application.

It is, however, unlikely to include a media entity or other third party that is simply interested in the outcome of the review—with interested parties able to access review decisions on our [website](#) when finalised.

⁵ Ibid s [77\(1\)](#).

⁶ Ibid s [77\(2\)](#).

⁷ Ibid s [77\(3\)](#).

4.5. The review process—pre-assessment phase

4.5.1. Notification of agency

When a valid application for Ombudsman review has been made, the Ombudsman will first notify the decision-maker by email that an Ombudsman review application has been received,⁸ in the form of a **s 75 notice**.

This notice will also provide the contact details of the case officer managing the review application and ask the decision-maker to provide a contact to communicate with about the Ombudsman review.

Note:

- Agencies and Ministers are reminded that, as outlined in [Guideline 3 of 6 Dealing with access applications](#), if a decision-maker receives a notice of an Ombudsman review, they have an obligation under s 76 to tell each relevant third party consulted.

4.5.2. Requests for information

To streamline review processes, while referred to as a **s 75 notice**, initial correspondence from the Ombudsman about a review matter will also generally outline the information the decision-maker is required to provide to the Ombudsman within a specified timeframe as provided for under s 79.⁹

The information requested will vary from case to case, so the decision-maker is encouraged to read the notice carefully. Information commonly requested by the Ombudsman from the decision-maker includes:

- a complete copy of the FOI processing file including:
 - the original access application
 - any correspondence with the applicant modifying the scope
 - copies of correspondence relating to the processing of the access application, including with the applicant, internally and/or any other external parties such as third-party consultation notices and responses (i.e. not just with the review application)
 - file notes of relevant telephone conversations relating to the access application
 - files notes explaining which third parties were consulted and why
 - copies of any documents that record the searches conducted
 - notes kept by individuals conducting searches
 - correspondence between the information officer and individuals who conducted searches
 - records of searches or recorded consideration of where to search
 - the decision notice
 - documents disclosed to the applicant
 - a complete unredacted copy of the information sought
 - a marked up copy of any information that was provided to the FOI applicant (that is, copies of documents with redactions where made)
- additional submissions explaining the decision

⁸ Ibid s [75](#).

⁹ Ibid s [79](#).

Note:

- If the decision notice does not sufficiently describe the relevant reasons for the decision, our Office will usually require written submissions to support the decision by the agency or the Minister.
- If, on review, the decision-maker identifies further or different factors favouring nondisclosure applies to the information at issue, they should also provide additional submissions as part of this process.

Agencies are expected to provide the documents requested within the allocated time frame, usually **five working days**, unless otherwise agreed with the Ombudsman's office noting that:

- the review process is intended to be efficient and cost-effective
- the Ombudsman has limited time frames under the FOI Act to make an Ombudsman review decision, and there is no opportunity to 'stop the clock' while waiting for required documents from the decision-maker—see [section 4.8 Review timeframes](#).

Agencies and Ministers are also reminded that under s 68, the Ombudsman, in undertaking an Ombudsman review, is entitled to **full and free access at reasonable times to all relevant government information** they hold.

Note:

- The FOI Act affords protection to staff of agencies and Ministers for actions taken in accordance with the FOI Act.¹⁰ For example, producing a document in response to an Ombudsman review does not constitute waiving legal professional privilege.
- It is the responsibility of agencies and Ministers to decide on an efficient and appropriately secure method for providing required documents to the Ombudsman's Office. They are reminded that any **Protected** information will need to be provided to our Office by hand or via secure electronic means where agreed (e.g. Kojensi where available). **Cabinet** information should **not** be emailed and should be provided by hand, or via Objective Connect.

4.6. Other Ombudsman powers to obtain information

4.6.1. Powers to attend and answer questions

The Ombudsman has the power to give a person a written notice under s 79(3) to attend at a reasonable time and place stated in the notice to answer questions relevant to a review.

To date, this power has not been required to be used by the Ombudsman. Ombudsman staff do, however, meet with parties during an Ombudsman review, when there are complex matters they wish to discuss, or where they seek to better understand submissions made, particularly during the informal resolution stage.

¹⁰ Ibid s [103](#), as well as ss [170-171](#) of the *Legislation Act 2001*.

4.6.2. Powers to require additional searches

Under s 80(2), the Ombudsman may also direct the decision-maker or another agency or Minister to conduct a further search for information—that is, make inquiries to locate the information.¹¹

This can be done at the request of a participant in the review or on the Ombudsman's own initiative, when the Ombudsman is undertaking a review and it appears not all the government information within scope of the access application has been identified.

4.7. The review process – initial assessment

After receiving information from the applicant and the decision-maker, the case officer will review the material and may request further information from the parties.

This may include asking the parties for further submissions to support their arguments using the legislative provisions outlined above at [section 4.5.2 Request for information](#).

It may also include seeking assistance from other third parties—for example, if the information at issue involves complex or technical issues, the Ombudsman may seek expert assistance from agency staff or another party.

Note:

- Submissions, or at least their substance, are likely to be made available to all parties to an Ombudsman review.
- As a result, if parties wish to make confidential submissions, they should advise the Ombudsman before doing so and provide the reasons why this is required, so that it can be determined whether this is appropriate in the particular circumstances of the case and how natural justice obligations will be met

The case officer will then proceed to make an initial assessment of a review matter, this includes whether, on the basis of the information available, they recommend the Ombudsman (or delegate) should:

- proceed to resolve the matter via informal resolution—see [section 4.8 Information Resolution](#).
- proceed to resolve the matter via mediation—see [section 4.10 Mediation](#).
- proceed to a formal decision on the matter—see [section 4.1 Ombudsman decision](#).
- decide not to review the matter—see [section 4.11 Decision not to review](#).

The time taken to finalise an FOI Ombudsman review will depend on which of the above resolution pathways are adopted—see [section 4.7 Review timeframes](#) below.

Note:

- The Ombudsman's preference is to finalise Ombudsman reviews via informal resolution processes where possible.
- As a result, informal resolution activities will generally be commenced for all matters in the first instance. Such activities will then be ceased if it is clear that informal resolution will not be successful in the particular matter—see [section 4.8 Information Resolution](#).

¹¹ FOI Act s [80\(3\)](#).

- At any stage in an Ombudsman review, the applicant can also withdraw their application. If this occurs, the case officer will advise the parties.

4.8. Review timeframes

Review timeframes depend on a number of factors including:

- the number of documents
- whether the agency or Minister needs to undertake further searches
- any new issues raised by parties to the review
- the time it takes for parties to respond to requests for information
- whether informal resolution is undertaken by the Ombudsman
- whether mediation is undertaken by the Ombudsman

The timeframes for finalisation of an Ombudsman review that parties can expect (based on the timeframes outlined in the FOI Act) are summarised in the table below.

Working Day	Action
0	Day valid application is received ¹²
30	Day review decision is due if Ombudsman proceeds straight to formal decision ¹³
60	Day review decision is due if Ombudsman attempts informal resolution or mediation prior to moving to a formal decision ¹⁴

4.9. Informal resolution

As noted above, the Ombudsman's preference is to finalise Ombudsman reviews via informal resolution where possible.

This is because it is often the quickest and easiest way to resolve the matter, consistent with the objects of the FOI Act.

The sections below provide an overview of how informal resolution processes are undertaken and possible outcomes for the parties.

Where these processes are unsuccessful, the Ombudsman will proceed to make a review decision. In the majority of cases, this will be a formal published decision on the matter, unless the delegate decides not to proceed with a review—see [section 4.10 Ombudsman decision](#).

4.9.1. Process overview

Informal resolution activities will be commenced for all matters in the first instance.

Such activities will then be ceased if it is clear that informal resolution will not be successful. The FOI Act provides a period of up to 30 working days for an Ombudsman review application to be suspended in an attempt to resolve the matter informally.¹⁵

¹² See [section 4.3 Making a valid review application](#).

¹³ FOI Act s [82\(b\)](#).

¹⁴ Ibid ss [80A\(2\)](#), [81\(2\)](#) and [82\(3\)\(b\)](#).

¹⁵ Ibid s [80A\(2\)\(b\)](#).

Informal resolution activities will vary depending on the nature of the review application and the information at issue, the process can include the case officer:

- working with the applicant to understand what issues concern them the most and what they are seeking to achieve out of the review process
- narrowing or clarifying the scope of an Ombudsman review
- considering whether there are aspects of the review that can be negotiated between the parties
- considering whether there are any clear issues with the decision that the decision-maker may be prepared to reconsider and provide access to additional documentation—[section 4.9.2 Negotiations regarding the provisions of additional information](#) below
- forming a preliminary view on the case and potentially preparing a case officer assessment – see [section 4.9.3 Case officer assessment](#).

Note:

- This preliminary view will be formed on the basis of facts and circumstances, as they exist at the time of forming the view, **not** the time when the original decision was made on the access application.

4.9.2. Negotiations regarding provision of additional information

During the informal resolution process the case officer may, in discussions with the parties, identify:

- there has been some confusion between the parties regarding the scope of the original access application
- there is additional documentation that the decision-maker may in fact be minded to grant access to, and/or
- the applicant is prepared to further clarify the scope of the information being sought.

In these circumstances, the case officer may write to the decision-maker seeking their views on additional information being disclosed to the applicant.

Where this is agreed to, the case officer will then contact the applicant and see if the proposed additional information will meet their needs and whether the formal Ombudsman review needs to proceed.

Where the applicants agrees, the case officer will arrange for the decision-maker to provide this documentation to the applicant and request the applicant formally withdraw their Ombudsman review application in writing, thus finalising the matter.

Note:

- If the applicant does not proceed with the agreed withdrawal, it is also open to the Ombudsman not to proceed further to review the decision if the decision-maker otherwise resolves the matter.

4.9.3. Case officer assessment

A case officer assessment will generally be sent to the applicant, where the initial assessment of the application indicates that it is very unlikely the delegate would vary or set aside the decision on the original access application—that is, there is no reasonable prospect of success for the **applicant** if the review proceeds.

Where this occurs, the case officer will set out:

- relevant background information
- identified opportunities for informal resolution and success at such negotiations to date, and
- the likely outcomes of the review.

The case officer will then seek the applicant's views on whether they wish:

- the Ombudsman to proceed with the review, or
- to withdraw their review application—finalising the matter.

If they choose not to withdraw, the case officer will then recommend that informal resolution activities cease and that either:

- the review not proceed and be finalised by the delegate (Executive Level 2 (EL2) or above) on the basis there is no reasonable prospect that the original decision would be varied or set aside — see [section 4.11.5 Decision not to review, or](#)
- the Ombudsman proceed to make a formal decision on the application—see [section 4.11 Ombudsman decision](#).

Note:

- Unless the delegate (EL2 or above) considers there is no reasonable prospect that the original decision would be varied or set aside, the Ombudsman or delegate (Senior Assistant Ombudsman (SAO) or above) will proceed to make a formal decision on the application.
- Even where there is no reasonable prospects of success, the Ombudsman may still also proceed to make a formal decision, where it is considered that a decision would provide useful guidance regarding the application of the FOI Act.

4.10. Mediation

Under the FOI Act, the Ombudsman may decide to resolve an Ombudsman review via mediation.¹⁶

Where the Ombudsman decides mediation is appropriate, s 81(2) provides for the Ombudsman to:

- refer the matter to an accredited mediator, and
- require the parties to attend the mediation.

Such activities will be ceased if it is clear that mediation will not be successful in the particular matter, with the FOI Act providing a period of up to 30 working days for an Ombudsman review application to be suspended in an attempt to resolve the matter via mediation.¹⁷

¹⁶ Ibid s [81](#).

¹⁷ Ibid

If the parties do resolve the matter by mediation, they are required to tell the Ombudsman.¹⁸ If this involves the decision-maker making a further decision on the access application, a copy of this must also be provided to the applicant.¹⁹

If a case is referred to a mediator, unless the Ombudsman directs otherwise, the decision-maker (respondent) is required to pay for the costs of the mediation (e.g. the costs of hiring the venue and the fees for the accredited mediator). They are not, however, required to pay any costs incurred by the other parties to attend the mediation (e.g. legal or travel costs).²⁰

Note:

- An accredited mediator is defined under s 81(5) as a person who is entered as a mediator in the register of nationally accredited mediators maintained by the Mediator Standards Board (that is, the incorporated body registered under the Corporations Act as the Mediator Standards Board Limited (ACN 145 829 812)).
- At this point in time, the Ombudsman has not resolved any Ombudsman reviews via mediation. This section will be updated if, and when, an Ombudsman review is resolved via mediation, with additional procedural information.

4.11. Ombudsman decision

4.11.1. Overview

If informal resolution or mediation processes are not successful, the Ombudsman must proceed to review the decision **unless** the delegate decides not to review the relevant access application decision on the basis of one of the circumstances specified under s 82(5)—see [section 4.11.5 Decision not to review](#).

If the review does proceed, the Ombudsman must decide to:

- *confirm* the respondent's decision²¹—that is, uphold the decision of the original decision-maker
- *vary* the respondent's decision²²—that is, uphold the decision of the original decision-maker with some amendments made (for example, with some additional information to be disclosed), or
- *set aside* the respondent's decision and make a substitute decision²³—that is, change the respondent's decision and for example, find that the information sought is not contrary to the public interest information.

Note:

- In instances where the fees have been paid by the original FOI applicant, and the Ombudsman's decision is to vary or set aside the respondent's decision, the Ombudsman may also direct the respondent agency or Minister to refund the fees paid.²⁴

¹⁸ Ibid s [81\(3\)](#).

¹⁹ Ibid.

²⁰ Ibid s [81\(4\)](#).

²¹ Ibid s [82\(2\)\(a\)](#).

²² Ibid s [82\(2\)\(b\)](#).

²³ Ibid s [82\(2\)\(c\)](#).

²⁴ Ibid s [82\(6\)](#).

The FOI Act provides for a further 30 working days to make such a decision²⁵—with our Office aiming to finalise Ombudsman reviews within 60 working days where possible (that is, 30 days for informal resolution and 30 days to then make a final decision if required).²⁶

Prior to making a decision, the Ombudsman will generally prepare a ‘draft consideration’ setting out the expected decision to give all parties a chance to comment and provide additional submissions, before a final decision is made—see [section 4.1.2 Draft considerations](#) below.

Once any final submissions have been reviewed, a final decision will then be made by the Ombudsman or delegate with a decision notice sent to the parties—see [section 4.1.3 Final decision](#) and [section 4.1.4 Notification and publication requirements](#) below.

4.11.2. Draft considerations

A draft consideration is a mechanism our Office uses to ensure that parties are provided with natural justice and a chance to comment prior to the Ombudsman making a final decision on an Ombudsman review.

The draft consideration will set out the Ombudsman or delegate’s preliminary decision to either confirm, vary or set aside and substitute the decision under review. They are generally sent to all parties, with further submissions requested within *five working days*.

This stage provides each party with the opportunity to reconsider their position and/or provide additional submissions to support their arguments—with a person seeking to prevent disclosure of government information bearing the onus of establishing that the information is contrary to the public interest information.²⁷

4.11.3. Final decision

The Ombudsman or delegate will proceed to make a final decision, once the deadline for any submissions has passed. The final decision will take into account:

- the information in dispute
- the parties’ submissions—including any further submissions received in response to the draft consideration
- the applicable law
- any other information considered relevant.

Note:

- New information can come to light at this late stage in the process or a party may put forward new arguments which may lead to the Ombudsman changing or varying their decision.
- In rare circumstances, the Ombudsman’s delegate may be different for the final decision. In which case, they will consider the case on its merits and may come to a different conclusion.
- The Ombudsman can take into account additional information, or material, that has arisen since the reviewable decision was originally made. The Ombudsman may consider the passage of time and whether disclosure of the information at issue is **now** contrary to the public interest.

²⁵ Ibid s [82\(3\)](#).

²⁶ Ibid s [82\(3\)](#) and [section 4.8 Review timeframes](#).

²⁷ Ibid s [72](#).

4.11.4. Notification and publication requirements

4.11.4.1. Notification by the Ombudsman

Once a decision is made, consistent with s 71(5), the Ombudsman must give a reviewable decision notice to the parties.

Note:

- This notice must be consistent with the *ACT Civil and Administrative Tribunal Act 2008 (ACT)*—that is, it should set out any principles of law relied on, and the way in which the Ombudsman has applied the principles of law to the facts.²⁸

4.11.4.2. Post-decision obligations on the decision-maker

It is then the decision-maker's responsibility to give effect to the decision—for example, to provide access to information as decided by the Ombudsman, subject to any further review activities—see [section 4.11.11 Review rights and the ACT Administrative and Civil Tribunal \(ACAT\)](#).

There is also an onus on the decision-maker under s 71(5) to take all reasonable steps to give the notice to any other person whose interests are affected.²⁹

In addition, agencies and Ministers are reminded that, as outlined in [Guideline 3 of 6 Dealing with access applications](#), they also have an obligation under s 76(2) to tell 'any other person or entity' about the Ombudsman review if a decision by the Ombudsman to disclose information may reasonably be expected to be of concern to them.

Note:

- The above obligation under s 76(2) includes informing relevant third parties with whom the decision-maker did not consult because it had decided that disclosure of the third party information was contrary to the public interest, where the Ombudsman's decision is that the information is *not* contrary to the public interest to disclose.
- As part of the draft consideration process, the Ombudsman may also suggest that additional third parties be consulted. The Ombudsman will not, however, consult with third parties on behalf of the decision-maker who are not parties to the review.

4.11.4.3. Publication of the decision

The Ombudsman must publish their decision on an Ombudsman review and the reasons for the decision, as soon as practicable after making the decision.

Decisions are published on the Ombudsman website (available [here](#)). We aim to publish decisions **three working days** after the decision is provided to the parties

²⁸ See *ACT Civil and Administrative Tribunal Act 2008*, s [67A](#).

²⁹ See also *ibid* at s [67A](#).

Note:

- If the applicant is an individual, identifying information about the individual or matter will be removed from decisions before publication **unless** the applicant indicates they are comfortable with their details being included.
- If, however, the review applicant is an organisation, business, journalist or Member of the Legislative Assembly, they will be identified as the applicant in our decisions.

4.11.5 Decision not to review

Under s 82(5), the Ombudsman may decide not to review a decision if:

- the applicant has not given our Office enough information to review the decision³⁰
- there is no reasonable prospect that the original decision would be varied or set aside³¹
- the agency or Minister makes a subsequent decision on the access application or otherwise resolves the application³²
- the Ombudsman is satisfied the review application is frivolous or vexatious or involves an abuse of process³³, or
- the Ombudsman has been unable to contact the review applicant despite making reasonable efforts.³⁴

Each of these reasons are discussed in more detailed below. Where this occurs, the Ombudsman will notify all parties in writing.

4.11.6 Not enough information to review

To progress with a review, the Ombudsman requires at least some minimum information from the applicant, including details about the access application that they lodged and a copy of the relevant decision notice.

Where this information is not provided, our Office will contact the applicant and request the additional information be provided within **seven working days**. If this does not occur, a further reminder will be sent.

If no response is received and/or the Ombudsman (or delegate) is still satisfied there is not enough information available to review the decision and that reasonable steps have been taken to contact the applicant, the Ombudsman will decide not to review the decision under s 82(5)(a) and the matter will be closed.

Note:

- Where a matter is closed under s 82(5)(a), and our Office is subsequently contacted by the applicant, the Ombudsman can consider giving them extra time to enable them to lodge a new, more comprehensive application—see [section 4.2 Time Limits](#).

³⁰ FOI Act s [82\(5\)\(a\)](#).

³¹ Ibid s [82\(5\)\(b\)](#).

³² Ibid s [82\(5\)\(c\)](#).

³³ Ibid s [82\(5\)\(d\)](#).

³⁴ Ibid s [82\(5\)\(e\)](#).

4.11.7 No reasonable prospects of success

The Ombudsman will only decide not to review the decision under s 82(5)(b) where, based on the available information, there is no reasonable prospect that the original decision would be varied or set aside. This is because there are no ACAT review rights available where a decision is made not to review a decision under s 82(5).

For example, this provision has been utilised where:

- the information requested clearly falls within the categories of information outlined in the Schedule 1 that are deemed to be contrary to the public interest information
- the applicant is questioning whether the decision-maker took reasonable steps to identify all relevant information and the agency provides evidence that extensive internal enquiries to try and locate any relevant to the access application.

The Ombudsman may also use this provision to finalise a matter following informal resolution activities, including providing the applicant with:

- a case officer assessment outlining why there are no reasonable prospects of success, and
- an opportunity to withdraw their application.

For more information, see [section 4.9 Informal resolution](#).

4.11.8 Respondent makes a decision

The Ombudsman will decide not to review the decision under s 82(5)(c) and the matter will be closed, if, since the original decision was made, the decision-maker has taken further action that in effect resolves the application, and renders the Ombudsman review unnecessary.

This could include where:

- the applicant has subsequently been provided with the information sought informally, or
- the relevant agency has published the information on their website.

4.11.9 Application is frivolous or vexatious or involves an abuse of process

The Ombudsman has not yet made a decision to not review a decision under s 82(5)(d), on the basis that the review application is frivolous or vexatious or involves an abuse of process.

It is intended that this provision only be used when absolutely required, and when the applicant is engaging in unreasonable behaviour, that could undermine the Ombudsman's management of its FOI review function.

Frivolous or vexatious

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

- *frivolous*—of little or no weight, worth or importance or characterised by lack of seriousness or sense.³⁵

³⁵ The Macquarie Online Dictionary, Macquarie Dictionary Publishers, 2019.

- *vexatious*—instituted without sufficient grounds, and serving only to cause annoyance.³⁶

Abuse of process

The Ombudsman, consistent with the definition provided for in s 43(4), would consider an *abuse of process* to include:

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

Harassment or intimidation of a person

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

To ‘harass’ a person is to disturb them persistently or torment them and to ‘intimidate’ a person is to use fear to force or deter the actions of the person, or to overawe them.³⁷

Examples of harassment and intimidation could include:

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

Unreasonable request for personal information about a person

To determine whether a request is unreasonable, the Ombudsman will consider whether a reasonable person would describe the access application as an unreasonable request for personal information about a person. Considerations may include:

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

4.11.10 The Ombudsman has been unable to contact the review applicant

Where the case officer has been unable to contact the applicant for review despite making reasonable efforts, the Ombudsman will decide not to review the decision under s 82(5)(e) and the matter will be closed.

Prior to closing a matter on these grounds, the Ombudsman will send a written request for any outstanding information.

If a response is not received within the specific period (at least seven working days), or advice is received that the address details provided were not correct, the Ombudsman will attempt to call the applicant to follow up.

³⁶ Ibid.

³⁷ The Macquarie Online Dictionary, Macquarie Dictionary Publishers, 2013.

The matter will be closed if they still do not provide a response or the Ombudsman is advised that the telephone details provided were not correct.

Note:

- Where a matter is closed under s 82(5)(e), if subsequently contacted by the applicant, the Ombudsman can, however, consider giving them extra time to enable them to lodge a new more comprehensive application—see [section 4.2 Time Limits](#).

4.11.11 Review rights and the ACT Civil and Administrative Tribunal (ACAT)

4.11.11.1 ACAT review

Under s 84, a person can apply to ACAT to seek a review of a decision made by the Ombudsman under s 82(2)—that is, a decision to confirm, vary or set aside a decision on an access application by a Minister or agency.

Where this occurs, the parties to the ACAT review will be the applicant and the original decision-maker—that is, not the Ombudsman.³⁸

The application for an ACAT review must be made within **20 working days after** the decision is published on the Ombudsman website unless ACAT approves a longer period.³⁹

4.11.11.2 Questions of law

At the request of a party to an Ombudsman review or if the Ombudsman deems it appropriate in the matter, the Ombudsman may, at any time during the review, refer a question of law to ACAT for a decision.⁴⁰

To date, the Ombudsman has not referred matters to ACAT to decide questions of law.

Factors the Ombudsman may, however, take into account in deciding whether to refer a question of law to ACAT include:

- whether a referral to ACAT would facilitate and promote, promptly and at the lowest reasonable cost, public access to information
- whether referring a question of law to ACAT would promote the objects of the FOI Act
- any other factors which the Ombudsman considers relevant in the circumstances.

If the Ombudsman does refer a question of law to ACAT, the review is suspended until such time ACAT makes a decision.⁴¹

³⁸ FOI Act s [85](#).

³⁹ Ibid s [84\(2\)](#).

⁴⁰ Ibid s [83](#).

⁴¹ Ibid s [83\(3\)](#).

5. Extensions of time

5.1. Available Ombudsman extensions

As outlined in [Guideline 3 of 6 Dealing with access applications](#), there are two situations in which the Ombudsman can grant an agency or Minister (**the respondent**) an extension of time to process an access application:

- where an application has yet to be finalised under s 42—see [section 5.2 Ombudsman extension – unfinalised application](#) below.
- where a deemed refusal has occurred under s 78—see [section 5.3 Ombudsman extension – deemed refusal](#) below.

5.2. Ombudsman extension—unfinalised application

When processing an application for an extension of time under s 42, case officers will first confirm that it meets basic validity requirements, that is:

- the processing period (including any extensions already granted) has not run out⁴²
- the respondent has requested an extension of time from the applicant and they have refused the request, or
- the applicant has already agreed to an extension of time totalling 12 months and a further request to the applicant cannot be made because it would result in a processing time of greater than 12 months.⁴³

The case officer will then make a recommendation to the delegate as to whether an extension is:

- not available as validity requirements are not met
- recommended on the basis that:
 - the application involves dealing with a large volume of information
 - the access application is complex, or
 - there are other exceptional circumstances,⁴⁴ or
- not recommended and why.

As outlined in [Guideline 3 of 6 Dealing with access applications](#):

- *Complex* is not defined, but the FOI Act does provide an example of a ‘complex’ application⁴⁵ as one where multiple, conflicting public interest factors apply to the information covered by the application and extensive third party consultation is required. It will be a matter for the respondent to satisfy the Ombudsman that the access application is complex when applying for more time under s 42(1).
- The FOI Act is also silent on what constitutes ‘exceptional circumstances’, although the Macquarie Online Dictionary defines ‘exceptional’ as unusual or extraordinary.⁴⁶

⁴² Ibid s [42\(2\)](#).

⁴³ Ibid s [42\(1\)](#).

⁴⁴ Ibid s [42\(3\)](#).

⁴⁵ Ibid.

⁴⁶ The Macquarie Online Dictionary, Macquarie Dictionary Publishers, 2019.

The case officer will also provide a recommendation as to whether it is appropriate to impose any conditions if an extension is granted, such as a requirement to:

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

When reviewing the case officer's recommendation and deciding whether to grant the extension of time request, the delegate will take into account:

- the objects of the FOI Act
- the importance of encouraging timely resolution of access applications as required under s 42(4).

The delegate will also consider:

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

If an extension of time is granted, the Ombudsman will notify the respondent and the applicant.⁴⁷ This will include an explanation of any conditions upon which the extension is granted.

Note:

- It should be noted that agencies and Ministers should not seek extensions of time from the Ombudsman as a matter of course.
- The onus is on agencies and Ministers to demonstrate to the Ombudsman why an extension of time is appropriate in the circumstances. Agencies and Ministers should consider what factors contribute to the exceptional circumstances of the case.
- There is no obligation for the Ombudsman to consult with the applicant about a request for an extension of time under s 42. The Ombudsman may, however, consider such consultation to be relevant in the circumstances.
- Further advice for respondents on what to include in their request and how to apply for an extension is available in [Guideline 3 of 6 Dealing with access applications](#).
- It is open to the Ombudsman to amend or cancel an extension of time under 42(6) if the Ombudsman considers it appropriate having regard to the objects of the FOI Act or the importance of encouraging timely resolution of access actions, or where a condition imposed has not been complied with.
- The Ombudsman will advise all parties if this occurs.⁴⁸

⁴⁷ Ibid s [42\(7\)](#).

⁴⁸ Ibid.

5.3. Ombudsman extension—deemed refusal

5.3.1. Overview

Where the Ombudsman is reviewing a deemed refusal decision, the respondent may apply to the Ombudsman to set aside the deemed decision and request for further time to deal with the access application.⁴⁹

If this does not occur, but the respondent proceeds to make an out-of-time decision on the application prior to the Ombudsman making a decision on the review application, for the purposes of the review, this actual decision may be substituted for the deemed decision.

This will not, however, automatically finalise the Ombudsman review. We will generally consult with the applicant as to whether or not they wish to continue with the Ombudsman review.

5.3.2. Considering the application

When processing an application for an extension of time under s 78, case officers will first confirm that it meets basic validity requirements, that the respondent has not previously sought an extension from the Ombudsman under s 42—see [section 5.2 Ombudsman extension – unfinalised application](#) above.

The case officer will also provide a recommendation as to whether it is appropriate to impose any conditions if an extension is granted, such as a requirement to:

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

When reviewing the case officer’s recommendation and deciding whether to grant the extension of time request and set aside the deemed refusal decision, the delegate will take into account:

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

Note:

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

⁴⁹ Ibid s [78\(2\)](#).