



LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY
Mr Peter Cain MLA (Chair), Dr Marisa Paterson (Deputy Chair),
Mr Andrew Braddock MLA

Submission Cover Sheet

Inquiry into the Freedom of Information Amendment Bills 2022

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Mr Peter Cain MLA
Chair, Standing Committee on Justice and Community Safety
ACT Legislative Assembly
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By email: LACommitteeJCS@parliament.act.gov.au

Dear Mr Cain

Inquiry into the Freedom of Information Amendment Bills 2022

Thank you for the opportunity to provide a submission to the Committee's review of the Freedom of Information Amendment Bill 2022 (the Bill) and Freedom of Information Amendment Bill 2022 [No 2] (Bill No. 2).

The Justice and Community Safety Directorate (JACS) regularly consulted with the Office of the ACT Ombudsman (the Office) throughout the development of the Bill. Further, the Office made comments on the Exposure Draft ACT Cabinet Submission on the Bill. Overall, we supported most of the proposed amendments. My Office's comments on specific amendments of interest to the Committee are below. I appreciate the constructive and collaborative manner in which JACS undertook consultation and considered our input.

The Office was not consulted on Bill No. 2, which would amend the *Freedom of Information Act 2016* (the FOI Act) to create a proactive disclosure provision for the ACT Government to publicly release Cabinet records within 30 business days after being considered by Cabinet. Our assessment is the amendments proposed by Bill No. 2 would not have a significant impact on the Ombudsman's functions under the FOI Act. The Office would not have a review function, though an aggrieved person could make a complaint to the Office under s 69 of the FOI Act. Further, Bill No 2 does not appear to impose any additional reporting requirements on the Ombudsman. Given this bill essentially raises a policy issue concerning access to Cabinet information, which is a matter for the ACT Government, and noting the limited impact on the Office, I do not propose to comment further on Bill No. 2.

Functions of the ACT Ombudsman under the *Freedom of Information Act 2016*

As you are aware, the ACT Ombudsman performs the functions and exercises the powers required of the Ombudsman under Part 7 of the *Freedom of Information Act 2016* (FOI Act), including to:

- conduct merits reviews (Ombudsman review) of FOI decisions

- consider requests to grant extensions of time to decide access applications
- monitor the operation of the FOI Act, including the publication of Open Access information by agencies and Ministers, and agency compliance with the FOI Act
- make open access information declarations
- publish guidelines which are to be periodically revised, and
- investigate complaints about an agency or Ministers' action in relation to their functions under the FOI Act.

Freedom of Information Amendment Bill 2022

Proposed amendment to Schedule 3—Include decision to make open access information available as a reviewable decision

The first bill will expand the jurisdiction of the ACT Ombudsman to review decisions to make open access information publicly available under section 24(1) of the FOI Act.

Agencies and Ministers must make open access information publicly available unless the information is contrary to the public interest (section 24(1) of the FOI Act).

The Open Access Information Scheme is designed to encourage pro-active disclosure of government information to facilitate access promptly and at the lowest reasonable cost. As the intention is to allow access to information without a formal request, agencies and Ministers are not required to produce a decision notice when making open access information publicly available.

Agencies are expected to continually consider whether government information falls within one of the categories of open access information that is required to be published. Where open access information is assessed as contrary to the public interest information, the agency or Minister must publish certain information about the decision not to make this information publicly available. A decision not to make open access information publicly available is a reviewable decision.

Currently, a third party consulted prior to the publication of Open Access information who objects to release can make a complaint to the ACT Ombudsman about the agency's compliance with the Open Access requirements but cannot seek review of the decision to publish. We would be able to suggest an agency take down information if we thought that was the appropriate outcome, but could not compel the agency to do so. We have not however identified any complaints to this Office about an agency's decision to publish Open Access information.

The proposed amendments to Schedule 3 of the FOI Act would allow a person whose interests are affected to apply for Ombudsman review of the decision to make open access information publicly available (clause 26). The proposed amendments to section 74 would require an application for Ombudsman review to be made within 20 working days after the day the information was published (clause 21).

We have previously expressed our concerns to JACS about the practicality of undertaking a retrospective review in these circumstances, noting that information will already be published and available when a review is sought. This may impact our ability to resolve these review matters to any level of satisfaction of the person seeking a review as the information at issue could remain publicly available until the review is finalised.

We also note that increasing the scope of decisions that may be reviewed could result in an increased workload for the Office, which if not resourced would cause either delay for these matters or delay elsewhere in the ACT Ombudsman's responsibilities if resources were moved internally to an increasing workload here. We will monitor this following the passing of the Bill.

Proposed amendment to section 40 – Extend timeframe to decide

The proposed amendment to section 40 of the FOI Act would increase the time allowed for agencies to process access applications, from 20 working days to 30 working days.

The Office prepares an annual report on the operation of the FOI Act and collects and reports on data from agencies about processing times for access applications. The table below provides a summary from these reports over the past 3 financial years. It is evident that many access applications are processed within 20 working days, or within a timeframe agreed by the access applicant.

Access applications	2021-2022 FY	2020-2021 FY	2019-2020 FY
Decided without any extension of time (20 working days)	69%	77%	65%
Applicant provided their agreement to an extension request	26%	22%	30%
Ombudsman extension of time	<1%	<1%	<1%
Deemed refusal – decision not made in time taken to be refusal to give access	<1% (12 total)	3% (19 total)	4% (20 total)

In the 2021-2022 financial year, the average processing time for access applications in 8 of the 9 directorates was greater than 20 working days. Of those 8 directorates, however, only 2 reported an average processing time of greater than 30 working days.

Proposed amendment to section 17 – Public interest test

The proposed amendment to section 17, which would apply where the information requested is personal information and the personal information is not about the applicant, would allow a respondent to take into account an applicant's identity, circumstances, and reason for seeking access when deciding whether disclosure of the information would, on balance, be contrary to the public interest.

The Office tentatively supports this amendment, as we agree there may be circumstances where it is appropriate and necessary to consider the identity, circumstances and reasons for an applicant seeking access to another individual's personal information, in forming a view about whether it is in the public interest to release the personal information to the applicant.

At the same time, the FOI Act already includes a range of existing protections which appropriately restrict the release or publication of personal information, including third party consultation requirements; exclusion of access applications for personal information from disclosure logs; the clear identification of personal information taken to be contrary to the public interest under Schedule 1; and the requirement to consider factors favouring non-disclosure listed in Schedule 2 (Schedule 2, s 2.2(a)(ii) of the FOI Act).

Further, we have some reservations that there may be cases where allowing a respondent to consider an applicant's identity, circumstances and reasons for seeking access to personal information that is not their own may allow otherwise irrelevant factors to be considered when

carrying out the public interest test. This has the potential to undermine the public interest test.

Given these concerns and risks, if this amendment is made, we consider it will be important to provide decision-makers with clear guidance on how an applicant's identity, circumstances, or reasons for seeking access should be considered in undertaking the public interest test. While this is primarily something for the Government to address, it is also something the Ombudsman could address in the guidelines made under s 66 of the FOI Act.

A further safeguard exists in that a decision to make personal information available is also reviewable by the Ombudsman. An Ombudsman review creates a safeguard as the person seeking to prevent disclosure of government information has the onus of establishing that the information is contrary to the public interest to disclose.

Proposed amendment to section 39 – Decision not made in time

The proposed amendment to sections 39(4) and (5) would remove the requirement for the relevant Minister to ensure a copy of the notice to the Ombudsman (decision relating to the application was not made within time) is presented to the Legislative Assembly within 6 sitting days after the access application is finally decided; where the relevant access application is for personal information only.

The Office does not support this amendment as we consider this mechanism to be an accountability measure, to ensure greater visibility of the number of deemed refusals and to confirm when these access applications are finally decided.

Proposed amendment to section 47 – Giving access—form of access

The proposed amendment to section 47 would allow a respondent agency to provide access to information in an alternative form, if it is not reasonably practicable to provide access in the form requested and the respondent agency is reasonably satisfied that the applicant can receive the information given in the alternative form.

The Office does not support this amendment as we consider the existing provisions already achieve an appropriate balance between the interests of respondent agencies and applicants by allowing for exceptions due to unreasonableness.

Applicants may request access in a particular form due to disability or vulnerability. We remain concerned that applicants may be disadvantaged if access is given in an alternative form without their agreement or consent.

Contact

I would be happy to provide further information about the role of the Office in relation to the FOI Act if this would assist the Committee's considerations.

Please contact Erin O'Connell, Director, ACT Reportable Conduct and FOI, on (02) 6276 0731 or at [REDACTED], if we can be of any further assistance to the Committee.

Yours sincerely

[REDACTED]
Iain Anderson
ACT Ombudsman