



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

Submission Number: 005.1

Date Authorised for Publication: 2 December 2022



Andrew Barr MLA
Chief Minister
Treasurer
Minister for Climate Action
Minister for Economic Development
Minister for Tourism

Member for Kurrajong

Mr Peter Cain MLA
Chair, Standing Committee on Justice and Community Safety
ACT Legislative Assembly
GPO Box 1020
Canberra ACT 2601

Dear Mr Cain,

Inquiry into the Freedom of Information Amendment Bills 2022

I am writing in response to your letter of 16 November 2022, and to provide a response to the ACT Ombudsman's submission to the Standing Committee on Justice and Community Safety's Inquiry into the Freedom of Information Amendment Bills (2022).

The ACT Ombudsman was consulted closely during the policy development and drafting of the Government's Freedom of Information Amendment Bill (No 1). The ACT Ombudsman performs several valuable roles under the *Freedom of Information Act* and as such, the Government welcomes their views on the Bill. The Ombudsman's specific comments are addressed in detail in an attachment to this letter.

There are no other submissions the Government wishes to comment on at this time.

We trust this will assist your inquiry, and look forward to the Committee's final report in due course.

Yours sincerely,


Andrew Barr MLA
Chief Minister

25 November 2022

ACT Legislative Assembly London Circuit, GPO Box 1020, Canberra ACT 2601

 @ABarrMLA

 +61 2 6205 0011

 barr@act.gov.au

 AndrewBarrMLA

 andrewbarrmla



Andrew Barr MLA
Chief Minister
Treasurer
Minister for Climate Action
Minister for Economic Development
Minister for Tourism

Member for Kurrajong

Attachment – Detailed Response to ACT Ombudsman’s Submission to the Inquiry into the Freedom of Information Amendment Bills 2022

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

As the submission notes, this proposed amendment would expand the Ombudsman’s jurisdiction to review open access information publicly available under section 24(1) of the FOI Act.

I note the Ombudsman’s views that retrospective review of a decision to publish information on Open Access may be difficult to resolve to the satisfaction of the person seeking review. However, I note that the purpose of the amendment is to increase the review opportunities for people whose interests are affected by a decision to publish information on Open Access. I appreciate that reviews initiated under the proposed amendment may not necessarily be resolved to the satisfaction of the third party in every instance, for example if the Ombudsman was to affirm the original decision to publish, or vary the decision, but the information had nonetheless been publicly available as the review was being considered.

Notwithstanding this, an expansion of review rights is still a beneficial new pathway for people who may disagree with an agency’s decision to publish information. Prompt submission of a review request, and conduct of the review by the Ombudsman, may ameliorate some of the practical shortcomings of these reviews that the Ombudsman foresees.

The Ombudsman further submitted 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. The Justice and Community Safety Directorate will continue to monitor the resourcing impact with the Ombudsman following passage of the Bill.

Proposed amendments to section 40 – Extend timeframe to decide

The Bill includes an amendment to increase the initial time to decide access applications from 20 to 30 working days. An amendment to increase the processing time initially granted to respondents from 20 to 30 working days is not intended to delay access to government information. Rather, it is pursued to better reflect the reality of processing times under the Act and avoid the need to request relatively small extensions in time which are already being granted in most instances.

As the submission notes, in the 2021-22 financial year, the average processing time for access applications in all but one directorate exceeded 20 working days. All other Directorate processing time averages exceeded 20 working days, however only slightly: six out of eight Directorates had an average processing time of 25 days or less.

That fact that the majority of applications are resolvable in 25 days or less indicates that the majority of extension requests are for small periods of time. Increasing the statutory processing time from 20 to 30 working days would avoid the need for these small extensions in time, and save respondents, applicants and the Ombudsman from the administrative burden associated with seeking, agreeing to, or granting them. 264 applications made in the 2021-22 financial year required an extension in time from the applicant or the Ombudsman¹. This proposed increase to the initial time to decide access applications therefore has the potential to achieve efficiencies for respondents, applicants and the Ombudsman on a large number of FOI requests.

Proposed amendment to section 17 – Public interest test

The Bill proposes to amend the public interest test so that identity, circumstances, or reason for seeking access to information is not to be taken into account, except in circumstances where an applicant is seeking access to personal information that is not their own. The current framing of the public interest test precludes decision-makers from taking into account the fact that a person is seeking access to personal information that does not relate to them, and there may be circumstances in which this is relevant to the decision to release information, particularly when certain factors favouring non-disclosure are engaged, such as prejudice to an individual's right to privacy or other human right.

The original policy intent of precluding a person's identity from factoring in the weighing of public interest was to prevent bias affecting decision-making under the Act. Although it is crucial that this tenet be preserved, there may be circumstances where it is not appropriate to grant an applicant access to personal information that is not their own, and their identity is relevant to the public interest, insofar as it establishes that the personal information sought does not pertain to them.

The Government shares the Ombudsman's view that 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. Irrelevant factors should not be taken into account when a decision-maker is applying the public interest test to access applications. If passed, the Justice and Community Safety Directorate will work with the Ombudsman to ensure that

¹ 27% of 978 access applications decisions made [A report on the operation of the Freedom of Information Act 2016 for 2021-22](#)

decision-makers have access to appropriate guidance material to understand and apply this amendment.

Proposed amendment to section 39 – Decision not made in time

I note that the Ombudsman is not supportive of this amendment, submitting that section 39 is an important accountability mechanism. I note that the proposed amendment is only to remove the need for the Minister to report on deemed refusals of access to *personal* information.

The Legislative Assembly oversight of decisions not made in time is an important feature of the FOI Act, however this information is also compiled in Ombudsman Annual Reports. These reports are tabled each year, meaning the Assembly will not lose visibility of these deemed refusals of access to personal information. These annual reports present a clearer overall picture of performance and timeliness of agencies than documents relating to individual matters. Given the privacy context surrounding personal information, it is often not possible to draft written notice to the Legislative Assembly of a deemed refusal of access to personal information in a way that provides useful context or assists the Assembly to give valuable scrutiny to the application and processing.

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

The Bill includes an amendment to give agencies greater flexibility in the form that access to information must be provided in, particularly to account for the difficulty in posting hard copies with the shift to remote work and paperless offices.

I note the Ombudsman's concerns that applicants may be disadvantaged if access to government information is given in an alternative form without their agreement or consent. However, an individual's right to seek and receive information, protected by section 16 of the ACT *Human Rights Act*, is protected insofar as a respondent must be reasonably satisfied that a person can receive the information in the alternative form.