



Hearings and Directions

Information Act Guideline

Procedures for hearing complaints are determined by the Information Commissioner who may give directions about those procedures, subject to the requirements of Part 7, Division 2 of the *Information Act*. The Commissioner is not bound by the rules of evidence.

As far as possible, the hearing process is conducted in writing. This may involve the following steps:

1. The Commissioner issues written **Directions for Hearing**. The Directions set out the procedures to be followed by the parties. The Directions are effective immediately but parties are given one week to raise any issues regarding them, or to seek further directions from the Commissioner. Sample Directions that reflect typical procedures are set out at the end of this guideline.
2. The parties then take it in turn to prepare and lodge written **submissions and evidence**. A party may choose to rely on submissions already lodged during the Investigation stage. In each case, the Commissioner provides to the other party copies of the materials lodged. The party that lodged material first then has a chance to lodge a **Reply**.
3. The Commissioner then prepares a decision and reasons for decision, unless the Commissioner decides that an oral hearing is necessary. An oral hearing will only be convened if the Commissioner considers that there are issues that cannot be clarified in writing or it is necessary or desirable to hear oral evidence. Parties have one week from the date for lodging the Reply in which to submit that there is a need for an oral hearing.

Presentation of submissions

The usual order for presentation of submissions during the hearing process is set out below. The order may be varied according to the circumstances of the case.

FOI complaint involving refusal of access by respondent	Respondent agency, any third parties, FOI access applicant
FOI complaint involving objection to disclosure by third party	Third party, FOI access applicant, respondent agency
Other FOI complaints	FOI access applicant, respondent agency, any third parties
Privacy complaints	Complainant, respondent agency

Material already obtained

Material obtained in the course of the Investigation stage will usually be available to the Commissioner for the purposes of the hearing. This may include submissions and materials provided by the parties and information obtained directly by the Office of the Information Commissioner (the OIC). It will include materials that have previously been exchanged between the parties, and materials referred to in the *Prima facie* decision under s.110. The letter circulating Directions for Hearing may list additional materials.

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There is no need to repeat submissions made or evidence lodged in the form of an affidavit or statutory declaration during the Investigation stage. The OIC may contact a party to clarify whether a particular submission or evidence continues to be relied on.

In FOI complaints, there may be cases in which disclosure of particular submissions or evidence would disclose information that is claimed to be exempt from disclosure. Information of that type will not be disclosed to an FOI applicant in the course of the complaint without the agreement of the other party or parties.

This may mean that an FOI applicant is not provided with a document, or is only provided with an edited document. However, as far as possible, the Commissioner will give a party the opportunity to respond to any matter arising from documents that may give rise to a finding of substance adverse to the party. For more information, see *Preparing and editing submissions and evidence* below.

Nothing said, recorded or done in the course of the Mediation stage under s.111 is made available to the Commissioner.

Preparing and editing submissions and evidence

All parties are encouraged to prepare submissions and evidence in a way that will convey their case while not disclosing information claimed to be exempt. If this is not possible, material that discloses information claimed to be exempt should be kept to a minimum and confined to discrete portions that can be easily excised from the submission or evidence without unduly disrupting the flow of the argument.

A party that contends that a part of its submissions or evidence should be withheld from another party should lodge the submission and evidence with the Commissioner by the due date, and at the same time apply to the Commissioner in writing to direct that the material be edited prior to provision to the other party.

The application should clearly show the segments sought to be deleted from the material, and explain the grounds for requesting deletion. The Commissioner will make further directions if necessary.

If the identity of a person is claimed to be exempt, and the person is a party to the complaint, different procedures may be adopted to avoid disclosure of their identity.

Hearing procedures

Each party to a hearing must bear its own costs of the hearing unless there are exceptional circumstances that justify the Commissioner ordering otherwise.

Every effort is made to keep hearings as informal as possible. Parties should not feel that it is necessary to retain legal representation for the purposes of a hearing. A party can appear in person. A public sector organisation can be represented by an officer or employee.

A party seeking to be represented by another person (including a legal practitioner) at an oral hearing should seek approval of the Commissioner as early as possible.

Hearings are closed to the public unless the Commissioner orders otherwise. The Commissioner may direct that evidence given, or a record or other thing produced, at a hearing not be published. The Commissioner may also direct that the identity of a party to, or a person giving evidence or producing a record or other thing at a hearing not be disclosed.

If a matter complained of at a hearing is a decision to refuse access to information, the respondent must prove on the balance of probabilities that the information is exempt under Part 4 or that the complainant is not entitled to access under the Act.

Oral hearing

The question of whether it is necessary to hold an oral hearing, and whether it is necessary to take oral evidence from any witness at an oral hearing is a matter for the Commissioner.

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A party that considers an oral hearing is necessary or that oral examination of a particular witness would be desirable must notify and explain the reason to the Commissioner and the other parties no later than one week after the due date for the Reply.

In any case, a party that lodges written evidence must take all reasonable steps to ensure that all witnesses are available to give evidence at an oral hearing, should that prove necessary.

The Commissioner will ordinarily require a person giving evidence at an oral hearing to take an oath or affirmation.

The Commissioner has the power to require a person to attend a hearing and give evidence or to attend before the Commissioner and produce a record or other thing in the person's possession or control. The Commissioner can require a person giving evidence at a hearing to answer a question.

Sample Directions

Information Commissioner Directions for Hearing

Complaint No: ***
Complainant: ***
Respondent: ***

Under Part 7, Division 2 of the *Information Act* (NT), the Information Commissioner has the power to give directions in relation to the hearing of a complaint.

The Information Commissioner gives the following directions in relation to the above complaint:

1. The respondent must by ***, [three weeks to prepare] lodge with the Information Commissioner any written submissions and evidence on which it relies in support of its case.
2. The complainant must by ***, [two weeks later] lodge with the Information Commissioner any written submissions and evidence on which it relies in support of its case.
3. The respondent must by ***, [one week later] lodge with the Information Commissioner any Reply.
4. Written evidence must be in the form of a sworn affidavit or statutory declaration.
5. A party that lodges written evidence must take all reasonable steps to ensure that all witnesses are available to give evidence at any oral hearing.
6. Any party that contends that an oral hearing is necessary or desirable must, by no later than one week after the date for Reply, notify the Information Commissioner, and explain the reasons for requesting an oral hearing.
7. Any party that seeks to examine a witness at an oral hearing must, by no later than one week after the date for Reply, notify the Information Commissioner, and explain the reasons for requesting the opportunity to examine the witness.

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This guideline is produced by the Information Commissioner to promote awareness and understanding about the *Information Act*. It is **not a substitute for the Act**. You should read the relevant provisions of the Act to see how it applies in any particular case. Any views expressed in this guideline about how the Act works are **preliminary only**. In every case, the Commissioner is open to argument by a member of the public or a public sector organisation that a different view should be taken.