

How we deal with complaints

A guide for agencies



Information Act Guideline

Office of the Information Commissioner

The Office of the Information Commissioner can accept complaints about Freedom of Information decisions and Privacy issues concerning NT Government organisations, including local government authorities.

Independent

We are independent. We do not take sides in a complaint. We do not represent complainants, government organisations or anyone else involved in a complaint. We do not give legal advice.

Informal

We do our best to resolve complaints informally. Our main aim is to assist the parties to find a solution that meets their needs and obligations. We inform the parties about the rights and limitations in the *Information Act*, so that they can make a realistic assessment of what they can hope to achieve from the formal processes under the Act. We explore with the parties alternatives for resolution both within and outside the processes in the Act. Our preferred outcome is for the parties to agree on a solution.

The complaints process

The way we approach each complaint will vary depending on what we see as the best way to explore options for resolution.

However, for each complaint, there are four possible stages recognised in the *Information Act* – **acceptance, investigation, mediation and hearing**. Each stage is discussed below.

The Commissioner does not usually become personally involved in dealing with a complaint prior to the hearing stage. Earlier stages are dealt with by other staff of the Office. Our Complaints Officer will give the parties information about the progress of the complaint from time to time. If you have questions about the progress of the complaint you can contact our office.

Who is involved in the process?

Both the complainant and the organisation are entitled to be involved in the complaint process. If the complainant is a third party objecting to disclosure of information under the FOI provisions, the person who made the application will also be a party.

The Office may also need to consult, or obtain information from, staff of the organisation or other people who may be affected in some way by the complaint or who can provide information relevant to the complaint.

In some cases, other people who have an interest in the information may be joined as parties to a hearing.

The role of the organisation – Informal approach

Given its emphasis on informal resolution, the Office asks organisations to co-operate in the exploration of alternative resolutions, both within and outside the terms of the *Information Act*. A level of flexibility in the approach of an organisation to issues that come to light in the course of a complaint can often lead to a resolution which meets the needs of the parties whilst not adversely affecting the operations of the organisation.

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This can lead to a fairer result and to significant savings in terms of time and resources that would otherwise be involved in formal resolution of a complaint. Even so, it is acknowledged that options for informal resolution in a particular case may be limited due to the need to protect essential government or private interests.

The role of the organisation – Model litigant

There are numerous court decisions that explain the proper role for a public sector organisation to play in legal proceedings. It is often described as a requirement for the government to be a 'model litigant'.

The role of the organisation is to assist the court or tribunal to come to the correct or preferable decision. The organisation should adhere to the standard of fair dealing expected of government, rather than placing emphasis on defeating the complaint. This approach includes ensuring that all relevant facts and documents are before the tribunal, compliance with procedures designed to minimise cost and delay, and refraining from taking purely technical points.

An organisation is entitled to raise points that it honestly and reasonably believes apply in the circumstances of the case. If it does so, it should support those points with a clear explanation of how they apply in the particular case. It should not raise unsubstantiated arguments merely for the sake of complicating or hindering the progress of the complaint.

The role of the organisation – Review of administrative decisions

This obligation on the organisation is put into even clearer focus when the court or tribunal is conducting a review of an administrative decision, such as a review by the Information Commissioner of a decision made under the *Information Act*. The obligation in such circumstances has been described by the President of the Commonwealth Administrative Appeals Tribunal in the following terms:

“Just as the staff of departments or agencies will have assisted decision-makers in making the original decision, so too it is natural that they should adopt the same role so far as the Tribunal is concerned. The role of the support teams in the department or agency when the original decision was made was not a partisan role and it should not become a partisan role when the Tribunal is seeking to undertake precisely the same task as was undertaken by the original decision-maker.

What is the content of the duty to assist the Tribunal in reaching its decision? In my view, it has at least three aspects.

1. Reconsidering the original decision at the time of the Tribunal review for the purpose of determining whether it continues to represent the correct or preferable decision. This practice may involve informally referring the decision back to the decision-maker although that should not be allowed to delay review in the Tribunal.
2. Furnishing evidence and submissions to the Tribunal to ensure that the Tribunal is in the best position to make the correct or preferable decision. This may involve special assistance being given when an applicant is self-represented but will continue to apply even though the applicant is represented.
3. Responding to requests for assistance on particular issues from the Tribunal. In undertaking this task the respondent will simply be acting in the way that it would have acted if a similar request had been made by the original decision-maker.

Of course, testing the case of an applicant and subjecting it to critical examination is one important way in which respondents can assist the Tribunal. In the Tribunal's experience, this is not an area in which respondents have generally been falling short.”

(Downes J, *Future Directions*, A paper delivered to the 2005 Administrative Law Forum, Australian Institute of Administrative Law)

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How much does it cost?

Generally, each party must pay their own costs of the proceeding, for example for legal advice, legal representation or copying documents. The Commissioner can order a party to pay the hearing costs of another party or parties in exceptional circumstances.

Acceptance Stage

Once a complaint is received, the Office must decide whether the Commissioner has the power to deal with it, and whether it should be accepted. This involves checking things like:

- whether it meets the formal requirements for a complaint, for example, whether the complainant has supplied a name and address for correspondence;
- whether the complainant has pursued all required steps with the organisation eg, been through the internal review process (for an FOI application) or sought resolution or rectification (for a privacy complaint) , and
- whether the complaint is within time limits set by law (see the table below):

Complaint type	Time for making complaint
Against decision to refuse access or correction (FOI)	Within 90 days from receipt of internal review decision
Against decision to grant access (FOI)	Within 30 days from receipt of decision
Interference with privacy	Within 12 months from becoming aware of interference

We may contact the complainant or the organisation to obtain information to help us to decide whether to accept the application. The Office has 90 days to notify the complainant about whether the complaint will be accepted.

When we accept an application that does not mean that we accept that the organisation has made the wrong decision or interfered with the complainant's privacy. It just means that we accept that the complainant is entitled to make a complaint. We then proceed to the next stage – investigation.

Investigation Stage

The investigation stage usually involves contacting the organisation complained about and obtaining relevant information (including, for FOI access applications, copies of information that is the subject of the complaint and correspondence that the organisation has had with the complainant and any third parties). The complainant may also be contacted to discuss the complaint and ways it might be resolved.

We may also have to contact staff of the organisation and other people or organisations to obtain information about the complaint. We may have to disclose the fact that a complaint has been made and information about the complaint so that they can provide information or respond to the complaint.

We will try to give the parties as much information as we can about parts of the Act that may be relevant, and any guidelines or past decisions that may be useful. We may also express a **preliminary view** about the application of the Act. A preliminary view is not a decision.

It is a tentative view about the issues that may need to be addressed and the possible strengths and weaknesses in a party's case. It is intended to put parties in a better position to realistically assess their prospects for success, and to identify issues that may need to be addressed if the complaint were to proceed to a hearing.

Any information, submissions and evidence given to us at this stage may be exchanged with the other parties, unless we accept that there are good reasons why parts should be withheld. One good reason for not disclosing information would be if it would disclose information that is claimed to be exempt.

There may also be other reasons why disclosure of information would not be appropriate. However, even in such cases, we will consider options for disclosure in some other way, eg, in summary form, if disclosure is required to explain the substance of the arguments of a party or is otherwise likely to advance the prospects of resolution.

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If, after investigation, we find there is enough *prima facie* evidence to support the complaint, it will proceed to the mediation stage. Again, this does not mean that a final decision has been made in the complainant's favour. It means that there is enough evidence for the complaint to go to a hearing, if mediation is not successful. If there is not enough evidence, we will dismiss the complaint.

The organisation will be notified in writing of the decision made as a result of investigation.

Mediation Stage

The aim of the mediation stage is to try to resolve the complaint in a way that is acceptable to the parties. It may involve telephone negotiations with each party involved, correspondence, or face to face meetings with some or all of the parties. The mediation process is confidential.

At the end of the mediation, the mediator issues a certificate setting out the outcome of the mediation. If the mediation resolves the matter, and the parties wish, orders can be issued that reflect the mediated outcome. If the complaint is not resolved by mediation, the Commissioner will conduct a hearing.

Hearing Stage

If it is necessary for the complaint to go to a hearing, information, submissions and evidence that have been provided in the course of the complaint may be considered (other than anything said, recorded or done in the course of mediation).

Each party will be given the chance to make further submissions and present further evidence in support of their case. This will usually be done by allowing each party to lodge further written submissions, which can be supported by written evidence in the form of affidavits or statutory declarations. If the Commissioner considers that there is a need for further exploration of the issues, or oral examination of witnesses, a hearing in-person may be arranged.

Again, the usual course will be for all information and materials lodged by one party to be provided to the other parties (unless it would disclose information claimed to be exempt).

After the hearing, the Commissioner will provide a written decision and reasons for decision.



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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.