

FOI Guidelines - Guide to consultation and transfer of requests

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FOI Guide to Consultation and Transfer of Requests Under Section 16 of the Freedom of Information Act 1982

Purpose

The purpose of this Guide is to set out consultation and transfer of requests under section 16 of the *Freedom of Information Act 1982* (the FOI Act). It covers both discretionary and compulsory transfer and consultation.

Unless the contrary is indicated, a reference to an agency includes a reference to a Minister.

Transfer of Requests (s16)

Overview

The FOI Act provides a mechanism to transfer requests to another agency where the agency receiving the request either does not have the documents or the subject matter of the document is more closely connected with the functions of another agency. This ensures that the final decision is made by the most appropriate agency.

Consultation with the agency to which the request is to be transferred is essential. This is because a formal transfer under the FOI Act affects legal obligations of agencies and the rights of applicants.

Transfers should be arranged through the FOI sections of the transferring and receiving agency and should generally be done formally, except where an agency is handling a request made to its responsible Minister.

Transfers under the FOI Act can be both discretionary and compulsory.

Where a request is transferred the receiving agency is responsible for processing the request and is deemed to have originally received the request. This means if there are other documents that fall within the scope of the request it must consider those documents as well the documents which were transferred.

When the documents are transferred, the agency making the transfer must tell the applicant of the transfer.

Discretionary Transfer of Requests

Where a request is made to an agency for access to a document and either:

- the document is not in the possession of the agency but the agency knows which agency has possession of the document; or
- the subject matter of the requested document is more closely connected with the functions of another agency to which no request has been made; *and*
- the other agency agrees,

the request for access may be transferred to that other agency.

Examples:

1. The Department of Immigration and Multicultural Affairs (DIMA) receives a request for a report about an epidemiological study amongst migrants. DIMA does not have the report but knows that the Department of Health has such a report. With the agreement of the Department of Health, the request is transferred and the applicant advised of the transfer.
2. The Department of Families, Community Services and Indigenous Affairs (FaCSIA) receives a request for a report about the demographics of ageing. It has a copy of the report, which was prepared by a consultant for the Department of Health for the purposes of planning health expenditure for the aged. As the report is more clearly linked to the Health Department it may, with Health's agreement, be transferred from FaCSIA to Health.

The meaning of 'more closely connected with'

To determine whether the documents are '*more closely connected*' with the activities of the agency, the functions of the agency must be determined. Just because a document was produced by an agency does not necessarily make that document more closely connected with that agency. For example, this rule clearly applies to legal advice provided to a client department by the Attorney-General's Department. Even though the Attorney-General's Department would have copies of all its advices the advice would be more closely connected with the client department's functions. The same rule would apply to any other document produced by one agency as a service to another.

In some instances, the document may be more clearly allied to a third department's functions. For example, say a test report on defoliant chemicals was prepared for the Department of Defence by the CSIRO and a copy was sent to the Department of Health. If Health received a request for the report it would be appropriate to transfer the request to Defence as the agency with a greater interest in the report.

Where a report is generated by the joint activities of a number of agencies (e.g. an interdepartmental committee) the general rule is that the report would be closely connected with the agency which chaired the committee or which initiated the production of the document.

Compulsory Transfer of Requests

Exempt agencies listed in Part I of Schedule 2

Agencies listed under Part 1 of Schedule 2 of the FOI Act are exempt from the operation of the FOI Act. Where an agency receives a request for access to a document which

1. originated from, or was received from, an agency under Part I of Schedule 2 (the Schedule agency); *and*
2. the subject matter of the requested document(s) is more closely related to the functions of the Schedule agency,

the agency which originally received the request *must* transfer it to the Department which administers the Act establishing the Schedule agency.

Agencies listed in Part I of Schedule 2 to which this section applies, and their corresponding Departments, are set out in the Table 1 below.

Table 1: Exempt Agencies

Agency	Department
Aboriginal Land Councils and Land Trusts	Department of Families, Community Services and Indigenous Affairs
Auditor-General	Department of the Prime Minister and Cabinet
Australian Government Solicitor	Attorney-General's Department
Australian Secret Intelligence Service	Department of Foreign Affairs and Trade
Australian Security Intelligence Organisation	Attorney-General's Department
Defence Imagery and Geospatial Organisation	Department of Defence
Defence Intelligence Organisation	Department of Defence
Defence Signals Directorate	Department of Defence
Inspector-General of Intelligence and Security	Department of the Prime Minister and Cabinet
National Workplace Relations Consultative Council	Department of Employment and Workplace Relations

Agency	Department
Office of National Assessments	Department of Prime Minister and Cabinet

Documents closely related to agencies & bodies corporate listed in Parts II & III of Schedule 2

Agencies and bodies listed under Part II of Schedule 2 are exempt from the FOI Act with respect to certain prescribed documents. Bodies corporate which fall under Part III of Schedule 2 are exempt from the FOI Act with respect to their commercial activities (Schedule agency in both cases). The words '*commercial activities*' mean 'activities carried on by an agency on a commercial basis in competition with persons other than governments or authorities of government' or activities of that type that may be carried out in the foreseeable future.

Where an agency receives a request, and:

1. the requested document(s) originated from, or were received from, a Schedule agency; *and*
2. the subject matter of the request is more closely related to the functions of a Schedule agency;

the agency which has received the request *must* transfer it to the Schedule agency. Once received, the Schedule agency *must process* the request. Agencies that fall within Parts II and III of Schedule 2, and the relevant categories of documents, are listed in Table 2 below.

Table 2: Agencies exempt in relation to particular documents

Agency/Body Corporate	Request in relation to
Albury-Wodonga Development Corporation	documents in respect of its commercial activities
Attorney-General's Department	documents in respect of commercial activities it undertakes and in relation to documents in respect of commercial activities undertaken by the Australian Government Solicitor
Australian Communications and Media Authority	exempt Internet-content documents concerning the performance of a function, or the exercise of a power, under Schedule 5 to the <i>Broadcasting Services Act 1992</i> .
Australian Broadcasting Corporation	its program material and its data casting content

Agency/Body Corporate	Request in relation to
Australian Postal Corporation	documents in respect of its commercial activities
Australian Trade Commission	documents concerning the carrying out, in whole or in part, of overseas development projects
Australian Transaction Reports and Analysis Centre	information communicated to it under section 16 of the <i>Financial Transaction Reports Act 1988</i>
Classification Board	exempt Internet-content documents concerning the performance of a function, or the exercise of a power, under Schedule 5 to the <i>Broadcasting Services Act 1992</i> .
<i>Classification Review Board Act 1992.</i>	exempt Internet-content documents concerning the performance of a function, or the exercise of a power, under Schedule 5 to the <i>Broadcasting Services</i>
Comcare	documents in respect of its commercial activities
Commonwealth Scientific and Industrial Research Organisation	documents in respect of its commercial activities
Department of the Treasury	documents in respect of activities of the Australian Loan Council and in respect of the commercial activities of the Royal Australian Mint
Export Finance and Insurance Corporation	documents concerning anything done by it under Part 4 or 5 of the <i>Export Finance and Insurance Corporation Act 1991</i>
Federal Airports Corporation	documents in respect of its commercial activities and in respect of determinations of aeronautical charges under the <i>Federal Airports Corporation Act 1986</i>
Indigenous Business Australia	documents in respect of its commercial activities
Medicare Australia	documents in respect of its commercial activities

Agency/Body Corporate	Request in relation to
National Health and Medical Research Council	documents in the possession of members of the National Health and Medical Research Council who are not persons appointed or engaged under the <i>Public Service Act 1999</i>
Office of Film and Literature Classification <i>Broadcasting Services Act 1992.</i>	exempt Internet-content documents concerning the performance of a function, or the exercise of a power, under Schedule 5 to the <i>Bro</i>
Reserve Bank of Australia	documents in respect of its banking operations (including individual open market operations and foreign exchange dealings) and in respect of exchange control matters
Special Broadcasting Service Corporation	its program material and its data casting content
Telstra Corporation Limited	documents in respect of its commercial activities
Australian Statistician	information collected under the <i>Census and Statistics Act 1905</i>

Table 3: Legislation relating to agencies exempt in respect of documents in relation to their commercial activities

<i>Australian Wine and Brandy Corporation Act 1980</i>
<i>Dairy Produce Act 1986</i>
<i>Primary Industries and Energy Research and Development Act 1989</i>
<i>Wheat Marketing Act 1989</i>

Intelligence Organisation Documents

Where an agency receives a request for access to a document that has been received from, or originated from, the Australian Secret Intelligence Service, the Australian Security Intelligence Organisation, the Inspector General of Intelligence and Security or the Office of National Assessments, or the [Defence Imagery and Geospatial Organisation](#), the [Defence Intelligence Organisation](#) or the [Defence Signals Directorate](#) of the [Department](#) of Defence, that agency is exempt from the operation of the Act and does not need to transfer the request.

When informing a person who has made a request that a document is exempt under the Act, it is essential not to disclose any of the information contained in the document.

Requests received by a Minister

A request for access under the Act may be for access to an official document of the Minister. The request to the Minister may be transferred between a Minister or agency whose functions are more closely related to the subject matter of the request.

A formal transfer between a Minister and his department would not be appropriate in some cases as it would be hard to argue that the subject matter of the documents would be more closely aligned to the department as their functions are often the same. In these cases, the practical solution is for the department to make the decision on behalf of the Minister without a formal transfer. Alternatively, if it is more convenient or better suits the Minister, a member of the Minister's personal staff may make a decision on his or her behalf. In that case, the question of transfer does not arise. It would be open to the department to provide the Minister's office with any assistance it may need.

The FOI Act does not require a Minister to personally decide whether to grant access to a request for an official document of the Minister. If the decision-maker is someone other than the Minister, the applicant should be advised by the decision-maker that the decision is made for and on behalf of the Minister. In this case, no information about internal review rights should be given as decisions of Ministers are not reviewable under the internal review procedure. They are, however, reviewable in the AAT.

Partial transfer of a request

Agencies may transfer part only of a request where some of the documents, falling within the scope of a request, originated from another agency and are more closely connected with its functions or where a requested agency is aware of other agencies that hold documents relevant to the request.

Section 16 of the Act does not expressly provide for the splitting of requests, but partial transfers should be made and accepted by agencies in the interests of sensible and effective administration.

Where part of the request has been transferred the transferring agency is still responsible for dealing with the part of the request that *has not* been transferred.

Time Limits

Where a request is transferred then the request is deemed, by the FOI Act, to have been received by that agency **on the same day** as it had been received by the transferring agency. It is, therefore, *essential* that agencies transferring a request or requests, do so as quickly as possible so that the agency to which the requests was transferred is able to meet its statutory deadlines under the FOI Act.

Suggested processes for transferring documents

The process for transferring documents is as follows.

1. When an agency receives a request and it is clear that it does not hold the document but it knows which agency does, consult the FOI coordinator in the agency concerned regarding a transfer the document. Identify all agencies which may have an interest in the documents.
2. Where the agency holds documents that are more closely connected with the functions of another agency, consult the relevant agency, or its portfolio department, about transferring the request.
3. Once a transfer has been agreed to, prepare a letter to the applicant advising that the request has been transferred (either in full, if all the documents are held by the other agency, or in part, if only some of the documents are held in the other agency). The letter should advise when the request was transferred and why, and the name and contact details of the agency to which the request was transferred.
4. At the same time a letter should be prepared to the accepting agency outlining the nature of the request, including the date of request, which part is being transferred, whether any fees were paid or remitted and whether the transferring agency will be processing any part of the request. Attach, if necessary, the document(s) in question.
5. If the agency in question refuses to accept the transfer, then the agency which received the request can refuse access under section 24A of the FOI Act (documents cannot be found or do not exist) if they do not hold the documents. In this case, the agency should advise the applicant that the documents may be held by another agency and give the contact details of the other agency so the applicant can apply directly to that agency. Care should be taken in advising applicants as the existence of intelligence organisation documents, or, in confirming or denying the existence of certain documents that may be exempt.
6. Where the agency accepting a transfer does not have the document(s), the transferring agency must provide the document(s). A copy of the document in question (not necessarily the original) should be provided.

Sample Letters - Transferring Requests

Transfer to Another Agency

Dear <Agency contact person>

FOI Request Number: <Reference number - for our reference>

As discussed, enclosed is a copy of a request under the *Freedom of Information Act 1982* (the FOI Act) from <insert name of applicant> seeking documents on <insert subject of request>. I request that you accept the transfer of this request under:

- Section 16(1)(a) of the FOI Act, on the ground that these documents are in your possession; or

- Section 16(1)(b) of the FOI Act, on the ground that the subject matter of the document is more closely connected with the functions of your agency than the functions of this Department.

I enclose a copy of *<insert name of applicant>*'s request, together with a copy of the receipt for payment of the \$30 application fee. The request was received by this Department on *<date received>*, and therefore the 30 day time limit for processing this request commences from that date.

I have sent *<insert name of applicant>* a letter acknowledging receipt of the request and advised *<him/her>* that the request has been transferred to your agency. A copy of that letter is attached for your records.

Please contact me on *<insert phone number>* if I can be of any further assistance.

Yours sincerely

Letter of Advice to Applicant

Dear *<Applicant>*

I refer to your request of *<insert date>* in which you sought access under the *Freedom of Information Act 1982* (the FOI Act) to documents relating to *<subject of request>*.

The documents relevant to your request are held by *<name of contact person and agency where request is being transferred>*.

Your request was transferred to *<name of agency>* on *<date of transfer>* so that agency can make a decision on your request for access to their documents. The reason the documents were transferred is *(insert reason)*

(Where payment accompanied the request insert the following) I have attached a receipt for your \$30 processing fee.

The FOI officer in the *<name of agency>* will be writing to you directly concerning your request. If you want to make any enquiries relating to your request, please contact: *<provide name and contact details>*

Yours sincerely

Consultation

Overview

There are a number of circumstances in which consultation should occur before the release of documents occurs. These are where:

- no transfer to another agency has taken place but the documents are more closely aligned to the other agency; and
- formal consultations are required by the FOI Act.

In some circumstances it is necessary to consult applicants to clarify the scope of a request or where an agency intends to refuse a request under subsection 24(1) as being too voluminous to process.

In other circumstances, FOI decision-makers may wish to consult internally within their agencies as to the sensitivities of a particular document being considered for release.

Consultation about the disclosure of documents

Even where no formal consultation is required by the FOI Act, agencies may wish to consider negotiating an agreement with other agencies in advance in relation to what documents may or may not be released without the need for consultation. For example, such an arrangement may cover documents which:

- contain records of consultation with another agency;
- were jointly prepared by two or more agencies; or
- contain information received from another agency.

Where an agency is in doubt about whether to release a document which clearly affects the interests of another agency, it is good practice to consult the other agency.

The FOI Act does not preclude consultation between agencies and it is simply a matter of sensible administration. However, consultation *should* be undertaken before certain documents are released, even if the FOI Act does not require it. These are set out in Table 3 below.

Table 4: Documents requiring consultation before release

Documents	Consultation
<i>Ministerial documents</i>	A document that involves or has involved a Minister would not normally be released without consulting the Minister. Consultation will ensure that the decision-maker is aware as far as possible of all relevant facts bearing on the access decision. For example, the document may relate to a matter in which a Minister, formerly holding a particular portfolio, was personally involved and the matter deals with sensitive issues; or the document may relate to a former Minister personally involved in a sensitive issue. Where a Minister was not personally involved (e.g. the Minister simply signed a letter prepared by the Department) then no consultation is necessary although as a matter of courtesy the

Documents	Consultation
	<p>Minister may need to be advised that release will occur.</p> <p>If in doubt discuss this with the Ministerial Unit in the agency or the FOI Coordinator to the Department of the Prime Minister and Cabinet (PM&C).</p>
<i>Cabinet and Executive Council documents</i>	Unless the FOI Coordinator of PM&C has been consulted and has agreed to release, Cabinet and Executive Council documents are not to be released.
<i>Documents involving State Premiers</i>	Consult the FOI Coordinator of PM&C.
<i>Documents involving legal matters</i>	The FOI Coordinator in the Attorney-General's Department can provide advice about documents originating from the Attorney-General's Department or the Australian Government Solicitor.
<i>Classified documents</i>	<p>Do not release unless documents have been declassified.</p> <p>Where internal network communications cables received from the Department of Foreign Affairs are declassified and disclosed, the Communications Centre of that department should be advised. It is advisable to consult the FOI Coordinator of the Department of Foreign Affairs.</p>
<i>Documents of intelligence organisations</i>	Consult the FOI coordinator in relevant agency overseeing the intelligence organisation.

Where possible, consultation should take place between the FOI contact officers of the agencies involved. If for some reason it is necessary to consult an operational area of an agency, it would be courteous to keep the FOI contact officer of that agency informed of the consultation.

Consultation with agencies before refusal of access

It is good practice to consult with other interested agencies even where it is not intended to release a document. This is because that agency may have already released the document in question under a separate FOI request or may have made the

document available publicly. Consultation is particularly important where several agencies receive similar requests from the same applicant.

Resolution of differences over the release of documents

If an agency is unable to obtain agreement from another agency about the disclosure of a document, consideration should be given as to whether the subject matter of the document more closely relates to the functions of the other agency. Where this is the case, the document should be transferred to that agency.

Except where a request has been transferred under section 16 of the FOI Act, it is the responsibility of the agency that received the request to make a decision about the request. The fact that another agency has been consulted and no consensus has been reached on the disclosure of the document does not absolve an agency from meeting its statutory obligation to make a decision.

Consultation Under Sections 26A, 27, 27A

Overview

Section 26A - Consultation with States

Section 26A requires that States be consulted before a decision is made to release any document that originated from a State where that State may reasonably wish to contend that the document is an exempt document.

Section 27 - Consultation in relation to commercial affairs

Where a request is received in respect of a person's business or professional affairs or the business, commercial or financial affairs of an organisation, section 27 requires that the person or organisation be given a reasonable opportunity to make a submission contending that the document is an exempt document.

Section 27A - Consultation for release of personal information

Where a request is made to access a document containing personal information, section 27A requires that the person be given a reasonable opportunity to contend that the document is an exempt document.

Consultation with the States: Section 26A

States must be consulted about an FOI application where there is a document that:

1. has originated from a State; and
2. the State may reasonably wish to contend that the document is an exempt document under section 33A (documents affecting relations with States).

Consultation is not necessary in all cases. For example, documents containing routine information which have been obtained from the State in the past and publicly released, or where documents have, in the past, been released without objection from the State.

Initially, all correspondence and communications should go through the FOI Contact Officers in the agencies and not directly to the action officer whose name appears on the document in question. This will ensure that requests are properly monitored and should minimise inconsistency across jurisdictions where applicants make requests across several Commonwealth and State agencies.

Normally, an FOI request must be processed - including consultation - within 30 days of receipt of the request. However, where formal consultation is required under section 26A, the agency or Minister may extend the processing period by a maximum of a further 30 days, giving a processing period of up to 60 days in total (see below).

Levels of consultation

Agencies should have an established process that sets out how consultation is to be undertaken. Consultation should be at the appropriate level, depending on the type of documents concerned. For example:

Document	Level
Communications involving or between Ministers	Ministerial or Secretary or Deputy Secretary level. The Minister should be informed if consultation not done at Ministerial level
Documents held on behalf of Ministerial Council or Inter-governmental Committee	Channels agreed to be the Council or Committee
Documents exchanged by Commonwealth and State departments and authorities	Channels agreed between the departments and authorities
Documents not part of an Commonwealth/State	Channel agreed between counterpart Commonwealth and

Document	Level
communications	State departments or authorities

Standing arrangements

Where Commonwealth agencies and states exchange large volumes of materials on a regular basis, standing agreements on the handling of such material under the FOI Act should be established.

Where such standing agreements exist, they must be included in the section 8 and section 9 statements setting out the functions and arrangement of the agencies.

Communications between the Prime Minister and State Premiers

Communications between the Prime Minister and State Premiers concern the most important matters of State and are central to Commonwealth/State relations. Where an agency receives a request for documents relating to such communications the agency should inform the Department of the Prime Minister and Cabinet and, where appropriate, consult on the release of documents. Consultation should be through the FOI Contact Officer to that department.

Documents Containing Personal Information - s27A

Documents containing personal information relating to an individual, including a deceased person, should not be released unless the person, or their legal representative, has had a reasonable opportunity to contend that the document is exempt from disclosure under section 41 of the FOI Act. Under section 41 of the FOI Act, a document is exempt from disclosure where it would constitute an unreasonable disclosure of personal information.

The requirement to notify an individual or their representative, does not apply if it is not reasonably practicable to contact them. The most obvious circumstance where consultation would *'not be reasonably practicable'* is:

- where an agency or Minister, despite making reasonable efforts, is unable to locate the present whereabouts of the relevant person;
- where it proves impossible to locate and contact the person within the time limits; this should not be lightly assumed, and the speediest form of communication should be used in appropriate cases; and
- where there would be a major workload arising out of the consultations.
Agencies should be careful in applying this reasons for not consulting as it is not appropriate to assume that any one or more of those persons to whom the

information relates, would not reasonably wish to contend that the document is an exempt document under section 41 of the FOI Act.

Unless there are compelling factors to indicate the contrary (for example, all the personal information concerned is already publicly known), an agency should proceed on the basis that a person to whom personal information relates 'might reasonably wish to contend' that the document. In general terms, determination of whether a person might reasonably wish to make such a contention depends on whether the information relates to possible personal privacy interests which the person might, objectively speaking, wish to claim should be withheld from public disclosure.

Most personal information in government records will require consultation before a decision is made to release it. The mere occurrence of a person's name, or name and address, in a government file will usually be a matter on which consultation should occur. The occurrence of a person's name, or name and address, in a government file or database may indicate other information about that person which raises privacy issues; for example, by revealing that a person is a client of a department or is under investigation by an agency.

Consultation is only required where an agency has reached an interim decision on the material available that disclosure of the personal information would not be unreasonable.

Where the agency has decided, on the basis of the existing evidence, that disclosure would be unreasonable, consultation with the person concerned is not required.

Nonetheless, in many cases an agency may wish to ensure that its conclusion is accurate and voluntarily consult with the person concerned. This may save embarrassment at a later stage if the person consulted has no objections to the disclosure.

Not all disclosures of personal information are unreasonable. The determination of whether disclosure is unreasonable or not in any particular case will depend on the balancing of privacy interests of the third party (which themselves have a public interest dimension) against the public interest factors which may favour disclosure, including the general public interest in accessing government-held information. The agency must make a decision for itself on whether disclosure would be unreasonable.

In some cases it may not be necessary to consult. See section 27A(1A) of the FOI Act. Matters that could be taken into consideration are:

- the extent to which the person's personal information is well known;
- whether the person is known to be associated with the matters dealt with in the document;
- whether the information in the document is available from publicly available sources; and
- any other matters which the decision-maker considers relevant.

The considerations referred to in section 27A(1A) should not be interpreted in a rigid or technical manner, as it is impossible to foresee all the different circumstances that may arise. It is for this reason that the criteria in section 27A(1A) permit other relevant matters to be taken into account.

Meaning of 'well known'

Below are some points to consider in determining whether a person's personal information is 'well known'.

- Information is not well known merely because it is available from a publicly available source, such as a government register to which the public has access.
- Information must not be assumed to be well known only because it has been widely published in the past or extensively published in a particular locality.
- It is not sufficient that the information is known to a restricted group of persons, however considerable their knowledge of the information may be.
- It is necessary to take into account whether the person is '*known to be associated*' with the matters referred to in the documents.
- The fact that information is available from a source such as the electoral roll or a telephone directory does not mean that an agency should consider that it may, on that basis, release the information.

Where there is any doubt whether information is well known, whether a person is known to be associated with a particular matter, or about the availability of information from publicly accessible sources, the officer processing the application for documents must consult the person to whom the information relates.

Documents containing names of government employees or officials

Where the name of an official appears in a document in the normal course of the official's duties, there is no personal privacy interest in that information, and there is no need to consult the officials in such circumstances. The situation would be different, however, where the information related to something in which there may be some real privacy concern, such as work performance information about an individual official, or information relating to alleged disciplinary offences. Other information relating to an official may be entirely private in nature, such as his or her home telephone number or address. There may, therefore, be many situations where it is not possible to make a clear distinction between information relating to an official in the normal course of his or her duties and other matters. In such situations the official concerned should be consulted before personal information relating to that official is released.

Generally it would not be necessary to consult a serving or retired officer of the public service where the information in the document only revealed that the officer had performed an act in the course of his or her duty as an officer. However, if the document revealed an impropriety, then it is essential that the officer be contacted.

It was not Parliament's intention to provide anonymity for public officials each time one of them is mentioned in a file. That would be contrary to the stated aims of the FOI Act and would not assist in promoting openness or accountability. Consultation gives the person concerned an opportunity to bring to the decision-maker's attention reasons why the information is sensitive which may not otherwise be apparent to the decision-maker. It not only gives a third party an opportunity to affect the outcome of

the primary decision whether to release personal information, but it also gives her or him a right to be notified of a decision to release the information before release occurs. The third party then has an opportunity to take action, through internal review or AAT review, to prevent the release of information which the third party considers sensitive on privacy grounds.

Where an agency is obliged to consult a third party under section 27A of the FOI Act, the agency may extend the processing period by up to a further 30 days (see below).

Documents Relating to Business Affairs

- s27

When dealing with requests for access to documents containing information relating to business affairs or confidential commercial information, there is an obligation to consult where it is likely that the person may object to the disclosure of their commercial information. Such consultation provides an opportunity for that person or business to contend that the documents are exempt under section 43 (documents relating to business affairs). It will also assist the agency to determine the sensitivity of a document.

Consultation need be undertaken only where it is reasonably practicable to do so.

However, it is only where it is absolutely clear that the information is not commercially sensitive (for example, promotional material about a company product which is available from its web site or on the product itself) that there is no need to consult.

Factors to take into consideration when determining whether consultation is reasonably practicable include:

- whether the organisation or person to whom the information relates can be identified;
- whether the contact details of the organisation or person to whom the information relates is known or easily accessible; and
- if person or business is not based in Australia, whether there is an Australian representative who can be contacted.

Where the agency intends to refuse a request for access there is, of course, no need to consult.

Agencies dealing regularly with private organisations supplying commercial information or with Government Business Enterprises (GBEs) should establish lines of communication for consultation so that it can be done early and effectively and the agency can meet its statutory time deadlines under the FOI Act.

Administrative Requirements - Formal Consultation

Time limits where consultation required

The 30 day time limit extending to requests under the FOI Act may be extended by another 30 days where formal consultations are required under sections 26A, 27 and 27A.

Where it is necessary to consult a State or a third party, the FOI applicant must be advised, in writing, as soon as possible that the time period for processing has been extended.

Consultations must be commenced within the initial 30 day period for the primary decision in order to attract the additional 30 days. If consultations are not done at the primary decision stage, and the matter goes for internal review, no further extension of time is possible. In that instance, the internal review - including any necessary consultation - will need to be completed within 30 days of receiving the review request.

In order to meet statutory deadlines, any consultation with the States/individuals or businesses should be undertaken early. Persons consulted should be advised as to the time constraints for their response when being consulted. Any letter should indicate that, if a response is not received within the specified time period, the Commonwealth may assume there is no objection to the release of the document and that consultations have been concluded.

Transfer of Requests where consultation required

A Minister or agency receiving a request for a document in which a State/individual or business may have an interest should consider whether any other Minister or agency has an interest in the subject matter which would require the other Minister or agency to be consulted. Generally where the subject matter of the request is more closely aligned to the other agency, consideration should be given to the transfer of the request to that agency or Minister.

Decisions after consultation under sections 26A, 27 and 27A

After consultation has taken place, proper consideration should be given to the contentions of consulted parties. However, a decision-maker is *not* obliged to act on the contentions of a third party.

Each document in question must be carefully considered individually and not as a class. Any public interest considerations should also be taken into account, as these may require release of the document despite the objections of a State or third party..

If a decision is taken to release the document, despite objection, the decision-maker must notify the party consulted of its decision that the documents are not exempt and the reasons for the decision. However, the consulted party has no right to veto a decision to release a document under the Act.

Review rights for consulted parties

Any decision to release a document, despite State or third party objections, may be reviewed by:

1. an internal review conducted by the deciding agency (unless it was made by the Minister or principal officer of the agency, in which case the right of review is directly to the AAT), and/or
2. AAT review under sections 58F, 59 or 59A of the FOI Act.

These reviews are often known as reverse FOI reviews.

Where a decision is being reviewed with regard to objections from a State, the only question for argument is whether the document is exempt under section 33A of the FOI Act - documents affecting relations with States. The State cannot raise any questions that may arise from the application of another exemption.

If the third party applies for a review, access to documents is not to be given until the appeal period has expired or until the Tribunal has confirmed the decision to release the document, whichever occurs later. If the third party does not seek a review, then access may be given to the document and no further contact with the applicant is necessary.

If a decision is made *not* to release the document, after considering the third party submissions or arguments, then no further contact with the third party is required, unless the applicant then lodges an appeal against the decision to the AAT. If that happens the third party should immediately be notified and may be made a party to any such appeal. As a matter of courtesy, the third party should also be advised where a decision is made not to release the documents following sections 26A, 27 or 27A consultations.

A decision not to consult with a person under section 27(1) is not subject to review by the AAT though a person who was not consulted has a right to review of the substantive decision under section 59. In some circumstances, a decision not to consult may be subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977*.

Disclosure of FOI applicant details in consultation

In no circumstances should the identity of the applicant be released unless permission has been sought from, and granted by, the applicant. Failure to seek consent could amount to a breach of the agency's obligations under the *Privacy Act 1988*.

Nevertheless, in some situations, a person being consulted may be more likely to agree (or disagree) to the disclosure of their information if they know the identity of the FOI applicant. It may help them frame specific and valid objection to the

disclosure. Also, it may assist the decision-maker to know the attitude of the consulted party to disclosure to a particular applicant. However, the decision-maker must take care not to allow his or her decision to be influenced by any stated or assumed purposes of the applicant in making the request for access. The FOI Act expressly provides that that consideration is irrelevant to the access decision.

Further information on review may be found in FOI Guide - Review of Decisions

Sample Letters for Consultation

Consulting with a State/Territory organisation

Dear <state/territory agency>

Re: FOI Request number <Reference number>

This Department has received a request under the *Freedom of Information Act 1982* (the FOI Act) seeking documents relating to <subject of request>. I have attached documents relevant to the request that originated from, or may be of interest to your organisation.

Under the FOI Act, where a requested document contains matter originating from a State/Territory and that State/Territory may reasonably have objections to the release of the document, this Department is required to consult with the relevant State/Territory agency before making a decision to release that document.

The purpose of this letter is to seek your views on whether <name of agency> has any objections to the release of the attached documents. Any objection must be based on the grounds for exemption contained in s 33A of the FOI Act.

These grounds are:

1. That disclosure would or could reasonably be expected to cause damage to relations between the Commonwealth and any State/Territory; or
2. That disclosure would divulge information or matter communicated in confidence by or on behalf of a State/Territory Government or authority to the Commonwealth Government.

The above grounds do not apply where disclosure would, on balance, be in the public interest.

Your comments are sought on whether any of the attached documents should not be disclosed because they meet the grounds for exemption outlined above.

It is not enough to simply assert that the documents should be exempt from disclosure; you will need to provide reasons and evidence to support your views. I will take these reasons into account when deciding whether to release the information.

The FOI Act also allows the deletion of certain details from documents where these are exempt, and for the rest of the document to be disclosed. If your agency does object to the release of some of the attached documents, would you please consider whether the deletion of any specific details from the documents would eliminate or substantially reduce those objections.

While I will give your comments careful consideration, this Department is not bound to act in accordance with the comments and recommendations you make. If a decision is made to release a document against the wishes of your agency, I will inform you of this decision and your review rights before any such documents are released.

I would appreciate it if you could send your comments to me at the address below by <date>. If you want to discuss this matter with me directly, please call me on <phone number>.

Consulting with a business organisation

Dear <name of business/commercial organisation>

Re: FOI Request number <Reference number>

This Department has received a request under the *Freedom of Information Act 1982* (the FOI Act) seeking documents relating to <subject of request>.

The Department has identified the enclosed documents as relating to the request in respect of your company's activities.

You may be aware that the FOI Act contains specific provisions under s 43 of the Act to exempt from disclosure documents containing information relating to business affairs. In order to use these provisions, the Department needs to establish that disclosure would:

1. Reveal trade secrets; or
2. Reveal information having a commercial value which could be, or could reasonably be expected to be, destroyed or diminished if disclosed

The Department is also interested in identifying information which, if disclosed, would:

1. Have any unreasonable adverse effect on a person in respect of their lawful business or professional affairs, or on an organisation in respect of its lawful business, commercial or financial affairs; or
2. Reasonably be expected to prejudice the future supply of information to the Commonwealth

To enable the Department to give full consideration to this request, I seek your comments on whether disclosure of any of the enclosed documents would adversely affect your business activities in any of the ways outlined above. If you consider that your business activities could be affected, you need to write to me explaining your

reasons. I will take these reasons into account when deciding whether to release the documents.

When providing your reasons, you may like to comment on:

- How it would be possible for your competitors to use the particular information to harm your business
- Why you would no longer provide information to the Department (You should note that where information is supplied under compulsion or in support of a claim for a benefit from Government, it is unlikely that the Department would accept that the information would not be provided in future.)
- Any public interest factors against the release of the information.

The FOI Act allows certain details to be deleted from documents where these are exempt, and for the rest of the document to be disclosed. If you do object to the release of some of the enclosed documents, would you please consider whether the deletion of any specific details from the documents would eliminate or substantially reduce your objections.

While I will give your comments careful consideration, I am not bound by the comments and recommendations you make. If a decision is made to release a document against your wishes, I will inform you of this decision and your review rights before any such documents are released.

I would appreciate it if you could send your comments to me at the address below by <date>. If you want to discuss this matter with me directly, please call me on <phone number>.

Yours sincerely

Consulting with a private individual

Dear <name of private individual>

Re: FOI Request number <Reference number>

This Department has received a request under the *Freedom of Information Act 1982* (the FOI Act). Some documents relating to this request contain information about you.

In order to protect individual privacy, the Department is not required to give access to documents where disclosure of documents would involve an unreasonable disclosure of an individual's personal information (including information about a deceased person).

Under the FOI Act, the Department is required to consult with any person who may be affected by the release of certain documents. The purpose of this letter is to seek your views on whether it would be unreasonable to disclose any of the enclosed documents given that they contain your personal information.

If you believe disclosure would be unreasonable, you need to write to me explaining your reasons. I will take these reasons into account when deciding whether to release the information.

When providing your reasons, you may like to comment on:

- The nature of the information (eg whether it is sensitive or not)
- The circumstances in which the Department obtained the information
- The current relevance of the information
- The extent to which the information is already publicly known

The FOI Act also allows me to delete certain details from documents (for example, names, addresses and dates of birth) so that an individual cannot be identified if the documents are released, or so that only information that needs protection is exempted from release and non-sensitive information can be released.

If you do object to the release of some of the attached documents, would you please consider whether the deletion of any specific details from the documents would eliminate or substantially reduce your objections.

While I will give your comments careful consideration, I can only exempt documents if the release would be unreasonable. If a decision is made to release a document against your wishes, I will inform you of this decision and your review rights before any such documents are released.

I would appreciate it if you could send your comments to me at the address below by *<date>*. If you want to discuss this matter with me directly, please call me on *<phone number>*.

Yours sincerely