Consultation and the FOI Act

Guideline

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STATE RECORDS
of South Australia

Government of South Australia
State Records

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Introduction

The *Freedom of Information Act 1991* (FOI Act) requires agencies to consult with third parties where specific documents are being considered for release.

In general, these documents (defined in Part 3, Division 2 of the FOI Act) concern information relating to an organisation or individual that is not the agency who holds the documents.

Purpose

This guideline explains your agency's consultation responsibilities and the benefits of seeking the views of others when processing FOI applications.

The guideline is broken up into three parts:

Part 1: Consultation with third parties

Part 2: Procedures for consultation

Part 3: Seeking the views of others

The use of the word 'consultation' in the guideline refers to the type of consultation required by Part 3, Division 2 of the FOI Act.

As consultation is a legal obligation under the FOI Act, the Act's other mechanisms, (for example, formal time extension options for your agency and review rights of those being consulted) apply as well.

The terms 'liaising' and 'seeking the views' have been used to refer to other types of information gathering. These communication types are not required or protected by the FOI Act.

Part 1: Consultation with third parties

The consultation process is an opportunity to gather information that may assist in making a determination.

Your agency cannot provide access to documents covered by Part 3, Division 2 of the FOI Act unless reasonable attempts are made to consult with all relevant third parties. This affords them their right to express views regarding the release of the document/s that relate to them.

Part 3, Division 2 describes the documents that require consultation before disclosure:

- section 25 – documents affecting inter-governmental or local government relations
- section 26 – documents affecting personal affairs
- section 27 – documents affecting business affairs
- section 28 – documents affecting the conduct of research.

Prior to commencing consultation with a third party you should consider whether:

- the document contains information covered by sections 25-28
- disclosure of the document is being considered – if disclosure is not being considered, there is no legal obligation to consult.

While a third party cannot veto an Accredited FOI Officer's decision, consideration of third party views obtained through consultation in relation to the kinds of documents covered by sections 25-28 places the agency in the best position to determine if the document should or should not be released.

Section 25 – Documents affecting inter-governmental or local government relations

Section 25 covers documents concerning the affairs of the Commonwealth Government or other State Governments (inter-governmental) or a council (local government), regardless of which State it resides in.

These documents may have:

- originated there
- contain extracts from a document which originated there, or
- been created by an agency and contain confidential information about or received from the inter-governmental agency or local government council.

Associated Exemption – Schedule 1 - clause 5

Documents covered by section 25 may be exempt under clause 5, Schedule 1. To satisfy clause 5, the document's disclosure:

- could reasonably be expected to cause damage to intergovernmental relations, or
- would divulge information from a confidential intergovernmental communication

… and would, on balance, be contrary to the public interest.

Considerations when deciding whether disclosure could reasonably be expected to cause damage to relations with other governments include whether disclosure would:

- create difficulty in relations between South Australia and the Commonwealth, another State or local government council
- disclose negotiating positions
- substantially impair good working relationships, or
- be detrimental to the development of future programs, laws etc.

Section 26 – Documents affecting personal affairs

Section 26 covers information containing the personal affairs of any person, living or deceased. The Act defines personal affairs to include a person's:

- personal qualities or attributes
- financial affairs
- criminal records
- marital or other personal relationships, or
- employment records.

The definition uses the word 'includes' indicating the list above is not exhaustive. Where information not listed above is held by your agency, the ordinary meaning of personal affairs must be considered.

This definition does not extend to the personal affairs of a body corporate.

Examples of personal affairs include:

- name, addresses and telephone numbers
- birth date and place of birth
- family details and details of personal relationships
- health related information (for example, diagnoses and treatment)
- financial information such as bank details, property and other assets, taxation information, social welfare benefits etc
- education records
- criminal records
- records about a person's behaviour, personality or reputation, or
- employment information.

Section 26 (and by default Schedule 1, clause 6) does not extend to third parties acting in their official capacity such as businesses and Members of Parliament (current or former).

Associated Exemption – Schedule 1 - clause 6

Documents covered by section 26 may be exempt by virtue of clause 6, Schedule 1.

To satisfy clause 6, disclosing a person's personal affairs must be considered unreasonable. Determining whether it is unreasonable to disclose requires the objective balancing of numerous elements. This test must be applied case-by-case.

Factors to consider when applying the 'unreasonableness test' include:

- the nature of the information (how private is it?)
- the nature of the applicant's interest in the information
- how the information was obtained by the agency
- the current relevance of the information

- whether the individual objects to disclosure
- whether disclosure would cause damage, unfairness or hardship
- the relationship between the applicant and the individual
- whether the information is already known by the applicant or is in the public arena

… and in the case of the personal affairs of your agency's staff, the effect on the ability to manage risks to personnel (for example, psychosocial or safety concerns).

Again, this list is not exhaustive.

Section 27 – Documents affecting business affairs

Section 27 covers information that contains trade secrets, has commercial value, or can be considered the business, professional, commercial or financial affairs of any person.

Each of these elements carry their own weight. To assist your assessment, we've broken them down below.

Trade Secrets

The term "trade secrets" has been defined by the Full Federal Court as information usable in the trade that is kept secret and possessed by one trader while being generally unknown, giving the trader an advantage over its competitor's. An example of a trade secret is KFC's famous 11 herbs and spices.

Commercially valuable

Information is considered "commercially valuable" if it is required for the continuation of commercial activity engaged in by that agency or another person.

Information that has generated interest whereby someone is willing to pay to obtain it is also considered commercially valuable.

Examples of commercially valuable information includes:

- a current client list
- an agreement containing profit and loss details, or
- a unique method for project management.

Information that is aged, out of date or publicly available may no longer be considered commercially valuable.

Business affairs

Business affairs relate to the conduct of a business and must be an organised operation for the purpose of obtaining profits or gains (even if profits or gains are not obtained).

Professional affairs

Professional affairs are those relating to a profession or vocation (such as a pilot, teacher, or public servant). Legally speaking, there is no strict definition. What is considered to constitute a 'profession' is not rigid or static. It is progressive with the general evolution of the community (*Young v Wick* (1986) 79 ALR 448).

However, there is authority that professional affairs do not include the performance of salaried professionals performing duties in the service of the public sector (*Harris v Australian Broadcasting Corporation* (1983) 78 FLR 236).

Commercial or financial affairs

Commercial or financial affairs extend the application of the exemption because it would cover agencies or organisations that do not operate a business of supplying goods and services on a commercial basis.

Associated Exemption – Schedule 1 - clause 7

Documents covered by section 27 may be exempt by virtue of clause 7, Schedule 1. As discussed above, clause 7 has 3 separate elements.

To satisfy clause 7(1)(a) – trade secrets, the information should be:

- usable in a trade and kept secret
- not widely known outside the business
- valuable

To satisfy clause 7(1)(b) – commercially valuable, the information must have commercial value and, if disclosed:

- could reasonably be expected to destroy or diminish the commercial value, and
- would be contrary to the public interest.

To satisfy clause 7(1)(c) - business, professional, commercial or financial affairs, disclosure could reasonably be expected to:

- have an adverse effect on those affairs, or
- prejudice the future supply of such information to government

… and would, on balance, be contrary to the public interest.

Section 28 – Documents affecting the conduct of research

Section 28 covers documents related to research, including research that has yet to commence or is still in progress.

The FOI Act does not define research, nor has there been any South Australian judication to provide guidance. The Macquarie Dictionary defines research as ‘diligent and systematic inquiry or investigation into a subject in order to discover facts or principles.’ Examples of research include surveys, focus groups, experiments, statistical analysis, observation and controlled trials.

While these are all forms of research, the remaining elements of Schedule 1, clause 8 must be satisfied before it can be considered exempt. If those elements cannot be satisfied and the documents are being considered for release, consultation under section 28 must occur.

Associated Exemption – Schedule 1 - clause 8

Documents covered by section 28 may be exempt by virtue of clause 8, Schedule 1.

To satisfy clause 8, the document's disclosure must:

- reasonably be expected to have an adverse effect on the agency or person carrying out the research, and
- on balance, be contrary to the public interest.

Part 2: Procedures for consultation

Initial contact

Consultation under sections 25-28 of the FOI Act requires the agency to seek the views of third parties. Where possible and without breaching personal privacy, copies of the documents concerned should be attached to the consultation letter.

Broadly, a consultation letter should contain:

- a file reference
- copies of the documents being sought, without divulging any confidential or sensitive matters or the personal affairs of any other person
- an explanation why the third party is being consulted
- relevant sections of the FOI Act and corresponding exemption clauses
- what the agency requires in the response, that is, the third party's view on disclosure of the document to the applicant, including the impact of disclosure, if known (if there is more than one section or exemption clause that may apply to the document, a response to each identified section or exemption may be necessary. It is important the agency allows the third party to form their own view in relation to disclosure.)
- the fact the third party cannot veto an Accredited FOI Officer's decision, but that their views will help inform the decision made
- a contact name and phone number
- a due date for the third party to respond.

The response from the third party should be in writing. If this is not possible, accurate records must be kept documenting their views.

State Records has published several documents and letter templates on our website, with two specifically addressing the initial contact of consultation.

Consultation timeframes and extensions

Your agency should establish as early as possible whether consultation with third parties will be required and allow at least one week for the third party to respond.

Extending under section 14A(1)(b)

The FOI Act does not automatically afford FOI officers extra time for consultation. The 30 calendar day time limit can only be formally extended for the purposes of consultation under section 14A(1)(b). This extension must be approved by the Principal Officer within the first 20 calendar days after receipt of a valid application.

Formal extensions of time under section 14A(1) are a determination under the FOI Act.

Importantly, if this occurs the applicant is not afforded internal review rights because extensions are determined by the Principal Officer. As such, determinations made under section 14A(1) must be reviewed externally.

Internal reviews

In the event of an internal review, consultation may be required if your agency considers releasing information previously refused. Unfortunately, the FOI Act does not afford formal extension rights to your agency under these circumstances.

It is recommended you seek an informal, negotiated extension with the applicant to allow for any consultation to occur.

Another consequence of consulting during an internal review is that consulted parties do not have internal review rights to the internal review determination. This is because internal reviews should be officially decided (signed off) by the Principal Officer and, as such, are not internally reviewable under the FOI Act.

Availability of third parties

There is no legal obligation to consult if a third party cannot be contacted. However, your agency must demonstrate that reasonable steps were taken to contact the third party. A file note should be made if attempts to consult with the third party are not responded to documenting what occured.

Deceased persons

When your agency is proposing to release a document that contains a deceased person's personal affairs, the obligation to consult still exists. In these cases, section 26(5) of the FOI Act requires the agency to consult with the personal representative of the deceased or, if there is no personal representative, the closest relative (provided they are 18 years of age or older).

Personal representatives are the executor or administrator of the deceased person's estate.

An **executor** is appointed by a person in their will whereas an **administrator** is appointed by the Supreme Court where there is no executor appointed, or the person appointed is unable or unwilling to act.

The primary obligation under section 26(5) of the FOI Act is to consult with the personal representative. However, where there is no executor or administrator it will be necessary to consult with the closest relative above the age of 18 years.

The most convenient method of determining the closest relative is to follow the order of relationship set out in the *Succession Act 2023* as follows:

1. spouse or domestic partner
2. child(ren) or step-child(ren)
3. grandchild(ren)
4. parent(s)
5. sibling(s)
6. grandparent(s)
7. aunt(s) or uncle(s)

If there are several close relatives with relationships of equal value to the deceased (e.g. the deceased has three children) they should all be consulted provided they can be reasonably located.

You should consider all relevant views expressed by third parties before making a determination. It is the role of an Accredited FOI Officer to weigh up the views expressed by the different relatives and make their own determination, even if their views are in conflict with one another.

Disclosing the name of the applicant during consultation

The FOI Act is silent on whether the name of the applicant can be released to a third party during consultation.

In the 2002-03 Ombudsman Annual Report (and again in their 2014 FOI audit report), the Ombudsman was of the opinion that there is no obvious legal impediment to an agency releasing the applicant's name during the consultation process. However, it may be prudent for agencies to alert applicants to the possibility of their identities being disclosed during consultation.

Your agency must also take into consideration the Information Privacy Principles Instruction (IPPI) or agency specific privacy policies. Disclosure of the applicant's name during consultation may be a breach of the IPPI or relevant privacy policy unless an exception applies.

Exceptions may include where the applicant:

- has consented to disclosure of their name
- is not a natural person – e.g. the applicant is a business, company or a media organisation and therefore has no 'personal' privacy
- is a holder of a public office, such as a Member of Parliament, and they are applying for non-personal information in their position as a public office holder. It would be different however if the public office holder were applying for their own personal information or the personal information of another. In this case, the IPPI or relevant privacy policy would still need to be considered.

When your agency receives an application from a public office holder, business or from the media, your acknowledgement letter to them can include a statement about releasing their name during consultation.

Two examples of such a statement are provided below:

Applications from public office holders:

In the course of dealing with your application for non-personal information, this agency may be required under the FOI Act to consult third parties before giving access to some documents. If consultation occurs, your name may be disclosed to the relevant third parties. Disclosure of your name is not considered a disclosure of your personal information because you have made this application in your capacity as a public office holder.

Applications from a business or the media:

In the course of dealing with your application, this agency may be required under the FOI Act to consult third parties before giving access to some documents. If consultation occurs, the name of your business / media organisation (delete whichever does not apply) may be disclosed to the relevant third parties. Providing the name of your organisation is not considered a disclosure of personal information.

Generally speaking, Accredited FOI Officers should exercise common sense in making a decision whether or not to disclose the name of the applicant during consultation. If in doubt, it is recommended the applicant or a legal advisor be contacted.

Advising of outcome

The third party must be advised in writing if a determination is made to release the documents contrary to their views. This advice must also explain their rights of review and appeal under the FOI Act.

Your agency should consider whether to charge the third party in the event they wish to seek an internal review of the determination. There may be situations where an agency could consider it appropriate to waive this fee – e.g. documents relating to a submission by a charity group.

In general, the letter advising of the agency's decision will need to contain:

- details of the determination
- reasons supporting the determination to release the document
- an explanation of the third party's rights of review and appeal.

The third party (and the applicant) should also be advised that access to the document will be deferred until all reviews and appeals are concluded or the time for lodging a review or appeal has passed.

Records of consultation

You should always keep a record of any communication with a third party, the applicant or with any other agency or person consulted or liaised with during the processing of the application.

Evidence that reasonable steps have been taken to consult may be important should the determination be subject to review or appeal. Receiving advice in writing provides substantiated evidence, and is highly recommended however file notes and emails confirming discussions had can be just as valuable.

Part 3: Seeking the views of others

Seeking expert opinion

When processing an FOI application, an agency may need to seek the views of:

- the Principal Officer
- other public servants within agencies, including contract administrators
- the Minister's Office
- State Records
- a legal officer.

Discussion with one or more of the people listed above can be an important part of the decision making process. However, Accredited FOI Officers must exercise their own discretion and independence when making a determination with respect to each document.

Extending time limits under section 14A(1)(b) cannot be approved for time spent seeking the views of others.

Liaising with other agencies (South Australian state government only)

The FOI Act does not require South Australian state government agencies to consult with each other regarding FOI applications. This is because the Crown is one entity and South Australian state government agencies forming part of the Crown do not have independent legal identities.

However, your agency can obtain important context by seeking the views of other state government agencies that may have created, originally received, or contributed to the development of the document. We refer to this as liaising.

This only applies to South Australian state government agency communication with one another.

Consultation between state government agencies and Commonwealth agencies, other jurisdiction agencies or local councils is covered by section 25. Importantly, section 25 also applies to councils consulting with other councils.

Documents originating in other agencies

If an applicant is seeking a document created by another agency, that agency's views will provide important context to the document including the reasons why it was created. For example, secrecy provisions may exist in other legislation or a document could be subject to national security protections.

While the views of the other agency can identify any sensitivities that should be considered, it can also identify if they have now passed or diminished, allowing the document to be released.

Transferring applications

When an agency receives an application for a document held by another agency or a document more closely relates to the functions of another agency, the agency may transfer the application to another agency in accordance with section 16 of the FOI Act.

Prior to transferring an application, you should contact the other agency as soon as possible to ensure the application is being transferred to the correct agency.

See our Transferring FOI Applications webpage for more information.

Across-government applications

In some cases, a number of agencies can receive an application of a similar kind at the same time. These applications are often referred to as across-government FOI applications or broadcast applications.

When these types of applications are received it is often beneficial for you to liaise with your counterparts in other agencies that have received the application. The benefits of seeking these opinions include:

- gaining a broader perspective to help understand any relevant complex issues involving multi agency and even multi-jurisdictional issues
- increased efficiency, effectiveness and transparency by ensuring all agencies are considering all factors particularly where the public interest needs to be weighed
- a greater consistency in the application of the FOI Act.

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Need further assistance?

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