

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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Consultation and the FOI Act

Purpose

This guideline has been prepared to assist agencies to understand consultation and the benefits of seeking the views of others when processing FOI applications.

The guideline is broken up into four parts:

Part 1: Consultation with third parties

Part 2: Procedures for consultation

Part 3: Liaising with the applicant

Part 4: Seeking the views of others.

The use of the word 'consultation' in the guideline refers to the type of consultation required by the FOI Act. To avoid confusion, the terms 'liaising' and 'seeking the views' have been used to refer to other types of consultation not required by the Act.

Part 1: Consultation with third parties

Consultation should be considered by agencies as an opportunity to gather valuable information and knowledge that may assist in making a determination. A determination made with sufficient evidence is generally more consistent, robust and likely to stand up to examination during a review or appeal.

Agencies cannot provide access to certain documents under the FOI Act unless reasonable steps have been taken to consult with all relevant third parties as to whether, in their view, the document could be exempt. The kinds of documents that require consultation before disclosure are described in sections 25-28 of the FOI Act and are listed below:

- » 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 the Accredited FOI Officer should consider whether:

- » the document contains information of the kind covered by sections 25 – 28
- » disclosure of the document is being contemplated – if disclosure is not being contemplated, 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.

Availability of third parties

There is no legal obligation to consult if a third party cannot be contacted, however, an agency should be able to demonstrate that they have taken reasonable steps to contact the third party. If a third party does not respond to attempts made to consult with them under the FOI Act, a file note to this effect should be made.

Deceased persons – section 26(5)

In cases where the agency is proposing to release a document that concerns the personal affairs of a deceased person the obligation to consult still exists. In these cases the agency must take reasonable steps to consult with the personal representative of the deceased or, if there is no personal representative, the closest relative, providing they are 18 years of age or older.

A personal representative means either the executor or the administrator of the estate of the deceased person. An executor is appointed by a person in their will, and 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, ie executor or administrator. However, where there is no executor or administrator it will be necessary to consult with the closest relative.

The most convenient method of determining the closest relative is to follow the order of relationship set out in the *Administration and Probate Act 1919* as follows:

- » spouse
- » children
- » grandchildren
- » parents
- » siblings
- » grandparents
- » aunts or uncles.

If the closest relative comprises of several persons of equal degree of relationship (eg children or siblings) they should all be consulted provided they can be reasonably located. The Accredited FOI Officer should consider all relevant views expressed by third parties before making a determination. It is immaterial if two or more relatives of an equal degree of relationship express a different view on the disclosure of a particular document. It is the role of the Accredited FOI Officer to weigh up the views expressed by the different relatives and make their own determination.

Disclosing the name of the applicant during consultation

The FOI Act does not address the question of whether the name of the applicant can be released to a third party during consultation.

In his 2002-03 Annual Report, and again in his 2014 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.

State Government agencies must also take into consideration the Information Privacy Principles (IPPs) or the Code of Fair Information Practice (whichever is applicable). Disclosure of the applicant's name during consultation may be a breach of their personal privacy and a contravention of the IPPs or the Code unless an exception applies. Exceptions may include:

- » Where the applicant has consented to disclosure of their name.
- » Where the applicant is not a natural person eg the applicant is a business, company or a media organisation and therefore has no 'personal' privacy.
- » Where the applicant 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 was applying for their own personal information or personal information of another. In this case, the IPPs or the Code would still need to be considered.

In cases where an agency receives an application from a public office holder or from a business or the media, the agency may wish to include in its acknowledgement letter to the applicant a statement about releasing the applicant's 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, the Accredited FOI Officer should contact the applicant or a legal advisor and discuss.

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 in writing. Without breaching personal privacy, and where possible, 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
- » why the third party is being consulted
- » relevant sections of the FOI Act and corresponding exemption clauses
- » what the agency requires in the response, ie 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 that the agency allows the third party to form their own view in relation to disclosure
- » the fact the third party cannot veto the 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 third party to respond.

The FOI Act does not provide extra time for consultation and the time allowable for processing an application can only be formally extended under section 14A within the first 20 calendar days after receipt of a valid application. Agencies 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. The response from the third party should be in writing. If this is not possible, accurate records must be kept to document their views.

Advising of outcome

The third party must be advised in writing if a determination is made to release the documents, where release is contrary to their views. They must also be advised of their rights of review and appeal under the Act. Agencies should consider whether or not the third party is to be charged a fee 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, eg documents relating to a submission by a charity group.

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

- » 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 should also be advised that access to the document will be deferred until such time as all reviews and appeals are concluded or the time for lodging a review or appeal has lapsed.

Records of consultation

Agencies should keep records of all communication they have with a third party, the applicant or with any other agency or person they have consulted or liaised with during the processing of the application. Evidence that reasonable steps have been taken to consult may be particularly important should the determination be subject to a review or appeal.

Part 3: Liaising with the applicant

There are certain instances where an agency will benefit from liaising with the applicant. This can occur at anytime throughout the process, but is particularly important at the beginning to ensure the application is valid, or to clarify or reduce the scope of the application.

If the application is invalid, ie it does not meet the requirements of section 13 of the FOI Act, section 15 requires agencies to take adequate steps to assist the applicant to amend their application in order to make it valid. At this stage the applicant needs to be advised that the time to process the application does not commence until the application becomes valid.

In some cases applicants make valid applications that are large and require significant resources to deal with. Section 18(1) allows any agency to refuse an application if it would 'substantially and unreasonably divert the agency's resources'. However, the agency cannot refuse the application until it has endeavoured to assist the applicant to reduce the scope of the application so that it can be managed within the agency's resources. It is recommended that agencies document any agreement to narrow the scope of an FOI application.

Part 4: Seeking the views of others

Seeking expert opinion

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

- » the Principal Officer
- » other public servants including contract administrators within agencies
- » the Minister's Office
- » State Records

a legal officer.

Sometimes when legal opinion is sought, the Accredited FOI officer may need to share it with others in their agency or in another agency to ensure that the legal advice is properly understood. Before sharing legal advice outside of their agency, Accredited FOI Officers should seek advice from the legal officer concerned to ensure that legal professional privilege is not unintentionally waived.

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

Seeking the views of other agencies

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

identities. However, liaison between agencies provides an opportunity to seek the views of agencies that may have created, originally received, or contributed to the development of the document.

Documents originating in other agencies

If the applicant is seeking a document that was created by another agency, the views of that agency are important to ensuring a complete understanding of the context that surrounds the document including the reasons why it was created. Examples where liaison is considered vital includes where secrecy provisions may exist in other legislation or where the document could be subject to national security protections.

While the views of the other agency will help establish if there are any sensitivities that should be considered, it will also help to establish if these sensitivities 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 that 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 the Accredited FOI Officer should contact the other agency to ensure that the application is being transferred to the correct agency.

Transferring an application should occur as soon as possible. Any delay will reduce the time the other agency has to process the application. The applicant also needs to be advised in writing that their application has been transferred to another agency.

Across-government applications

In some cases a number of agencies can receive an application of a similar kind at around 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 Accredited FOI Officers to liaise with their 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
- » increase 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.

Please refer to the Across-Government FOI Applications Procedure on the State Records website for further information in relation to dealing with these kinds of applications.

Need further assistance?

Contact

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Email staterecords@sa.gov.au

Web www.archives.sa.gov.au

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