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**THE LEGISLATIVE ASSEMBLY FOR  
THE AUSTRALIAN CAPITAL TERRITORY**

**FREEDOM OF INFORMATION AMENDMENT BILL 2019**

**REVISED EXPLANATORY STATEMENT**

**Presented by  
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# FREEDOM OF INFORMATION AMENDMENT BILL 2019

## Introduction

This explanatory statement relates to the Freedom of Information Amendment Bill 2019 (the Bill) as presented to the Legislative Assembly. It has been prepared in order to assist the reader of the bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Assembly.

This explanatory statement must be read in conjunction with the Bill. It is not, and is not intended to be, a comprehensive description of the Bill. What is written about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts.

## Purpose of the Bill

The purpose of the Bill is to amend the *Freedom of Information Act 2016* (the Act) to improve and streamline processing of freedom of information access applications and reviews, and to provide greater flexibility in managing workflows, in order to more efficiently meet the objectives of the Act, for applicants and the broader public.

The Bill makes a range of amendments to address processing issues, including allowing respondent agencies to manage situations where they are not able to contact an applicant to clarify the scope of the information sought, or to confirm that an applicant wishes to proceed where an estimate of fees has been issued. It will allow the Ombudsman to grant longer extensions of time for processing for respondent agencies, where this additional time is reasonable and necessary for complex and exceptional cases, and subject to conditions where appropriate.

The Bill makes changes to provisions allowing the deferral of access to information to confirm that access may be deferred where the information was created with the intention that it be formally published within a stated time, and that it has not yet been published. It also clarifies other issues relating to budget papers where interpretation of terminology or issues of timing have been unclear.

The Bill provides greater scope for the ACT Ombudsman to seek to resolve applications for review informally between the parties, or through mediation, before proceeding to a formal review of a decision. This allows the Ombudsman to narrow issues in dispute and focus on achieving an effective and timely outcome for the applicant as far as possible. It also gives the Ombudsman additional grounds for refusing to deal with a review application, to align with grounds for refusal by respondents.

## Human rights

The Bill engages human rights protected under the *Human Rights Act 2004* (HR Act), namely, the right to freedom of expression in section 16 of the HR Act which includes the freedom to seek and receive information and the right to equality before the law protected in section 8 of the HR Act.

The right to freedom of expression is engaged by an amendment to section 49 of the FOI Act to clarify that a respondent may defer giving access to government information for a reasonable period (not longer than three months) if the information was prepared with the intent that it be formally published within a stated time and has not yet been published as intended.

This amendment is intended to address potential limitations of the current wording of the section which allows deferral of information 'prepared - for release to the media'. This wording does not necessarily cover documents such as significant review reports which are prepared for the purpose of informing government policy but with the intent that they will be formally published (including through publication on a government website with a media release).

Although the amendment engages the right to freedom of expression, in allowing the deferral of access to government information in a potentially slightly wider range of circumstances, this would not amount to a substantive limitation of the right, because the deferral is limited to a reasonable period, and in any event not more than three months. The limitation is reasonable to allow agencies to effectively manage communications around information designed to be publicly released.

The change to the definition of 'open access information of a Minister' in section 23(1) confirms that a summary of a budget Cabinet decision does not need to be released under the open access regime until after the budget has been presented to the Assembly. This amendment potentially engages the right to freedom of expression, as it could delay the publication of Government information, but any limitation is reasonable and justifiable, as it preserves confidentiality of budget decisions until budget night, but allows the information to be published (subject to any other public interest issues) once the budget is released.

The right to freedom of expression and the right to equality are engaged by amendments to allow respondent agencies to suspend and not deal further with an information request where they are unable to contact an applicant to clarify scope of the request or to confirm that the applicant is willing to pay estimated fees for processing the request. Similarly, these rights are engaged by the amendment to subsection 82(3) to allow the Ombudsman to decide not to review a decision where the Ombudsman has been unable to contact the applicant for review despite making reasonable efforts.

These provisions could limit the ability of people who are not contactable because of their personal circumstances, including homelessness, incarceration or illness, to access government information.

The provisions address a legitimate purpose, as they avoid requiring an agency to undertake resource-intensive administrative activity which may be futile, such as processing an information request where the scope of information sought is not clear, or where it is unlikely that the documents will be able to be provided to the applicant once processed, because the applicant is no longer resident at their contact address and is not able to be contacted.

However, to ensure that the human rights are not unreasonably limited, the Bill clarifies that if an application is closed by a respondent agency under these provisions, an applicant may lodge a new access application for the same information. Thus the applicant does not lose their entitlement to seek information and may submit a new application when they are in a position to do so.

A provision has also been included to ensure that where the Ombudsman has decided not to review a decision because they have been unable to contact the applicant, the applicant may reapply for review at a later date, and the Ombudsman has discretion to accept this application. The applicant could also seek review of the Ombudsman's decision through the ACT Civil and Administrative Tribunal.

The right to freedom of expression and the right to equality are engaged by amendments to section 41(3)(b) of the FOI Act which provide that where a respondent agency has requested further time to process the application, and the applicant has not refused the request within 7 working days after receiving the request, that the request is deemed to have been agreed. This amendment is intended to allow the respondent time to prepare an application to the Ombudsman for an extension of time if the applicant does not agree to the request.

Although the period of 7 working days to respond to the request may be more difficult for some applicants to meet (for example because of illness or other personal circumstances), this period is considered reasonable, as the total time allowed for processing is 20 working days, and a longer period would not allow the respondent adequate time to prepare a formal application to the Ombudsman for an extension (noting that some time will already have elapsed in the initial consideration and scoping of the request and in contacting the applicant).

A safeguard has been included in the Bill to provide that an extension (or further extension) may not be sought by a respondent if this would extend the total processing time from the date of the application to more than twelve months. An applicant may also make a complaint to the Ombudsman under section 69 of the Act if an extension that is deemed granted under this provision is unreasonable.

The Bill will also engage the right to freedom of expression in providing for the time for processing applications to be suspended during periods when an applicant has been asked to clarify the scope of the request, or to confirm whether they agree to proceed after an estimate of fees has been provided. It also provides for suspension while an application for fee waiver is determined. To the extent that the suspension of time limits the right to receive information, this is reasonable and justifiable as it will avoid agencies wasting resources continuing to process an information request in situations where this may ultimately be futile (for example if the applicant decides not to proceed with the request or the waiver is not granted). Efficient use of processing resources is important to ensure that the freedom of information scheme is sustainable into the future.

Accordingly, although the Bill engages human rights protected under the HR Act, the safeguards included ensure that it does not impose any limitations on human rights that are not reasonable and demonstrably justifiable in a free and democratic society in accordance with section 28 of the HR Act.

## OUTLINE OF PROVISIONS OF THE BILL

### Clause 1 Name of Act

This clause provides for the name of the Act, being the *Freedom of Information Amendment Act 2019*.

### Clause 2 Commencement

This clause provides for the commencement of the Act. The Act commences on a day fixed by the Minister by written notice, or otherwise automatically commences within 6 months of notification.

### Clause 3 Legislation amended

This clause provides that the Act amends the *Freedom of Information Act 2016*.

### Clause 4 What is *open access information*? Section 23 (1), definition of *open access information*, of an agency, paragraph (d)

This clause amends the definition of open access information of an agency to remove the existing reference to ‘details of appropriations by appropriation units for classes of outputs’ which is terminology no longer used by Treasury in the context of budget appropriations. The amendment aligns the terminology in the Act with the *Financial Management Act 1996*. The amendment is intended to clarify but not change the scope of budget papers required to be released as open access information.

### Clause 5 Section 23 (1), definition of *open access information*, of a Minister, paragraph (b)

This clause provides that open access information of the Chief Minister does not include information about a decision of Cabinet or Cabinet Committee in relation to a proposed budget where the Budget has not yet been presented to the Legislative Assembly. This amendment ensures that there is no requirement to release a summary of confidential budget Cabinet decisions until after the presentation of the Budget to the Assembly.

### Clause 6 Requirement for disclosure log Section 28 (6)

Subsection 28 (6) of the FOI Act provides that information published on a disclosure log must not include an access application for personal information.

Clause 6 of the Bill adds an additional ground for non-publication of information on the disclosure log. The amendment provides that information about an applicant’s business, commercial, financial or professional affairs must not be included on the disclosure log if the publication of that information would be unreasonable in the circumstances.

This amendment provides additional protection where an applicant has sought and been provided information relating to their own business, commercial, financial or professional affairs which would not be reasonable to make public, for example information about unsubstantiated food safety allegations made against the

applicant's business, the publication of which could unduly damage the reputation of the applicant's business.

**Clause 7 Section 31 heading**

This clause substitutes a new heading for section 31 'Application not in accordance with requirements'.

**Clause 8 New section 31 (4)**

This clause inserts a new subsection 31(4) to provide that an agency or Minister need not deal further with an application if, despite the agency or Minister taking reasonable steps to assist the person and giving the person reasonable time (but not less than 3 months) to make the application comply, the application does not comply with the formal requirements for an application under section 30.

This provision allows a respondent to close the matter for administrative purposes where the person has not submitted a compliant application despite reasonable time and assistance, but does not prevent the person from reapplying at a later date.

**Clause 9 Deciding access – identifying information within scope of application  
Section 34 (3)**

This clause amends subsection 34(3) to provide that where a respondent contacts the applicant to clarify the scope of the application this is a *clarification request*.

**Clause 10 New section 34 (4) to (7)**

This clause amends section 34 to insert additional subsections (4) to (7) to give respondents the ability to suspend, and ultimately decide not to deal further with, applications where the respondent has sought clarification of the scope of the application and the applicant is not contactable or does not respond to the clarification request. These provisions do not prevent an applicant making another application for the same information at a later time.

Subsection (4) provides that the respondent may suspend an access application if the respondent has taken all reasonable steps to contact the applicant about a clarification request; and either the respondent is unable to contact the applicant; or the applicant does not respond to the clarification request.

Subsection (5) provides that if the application is suspended, the respondent must tell the applicant, in writing, that the application has been suspended, and about the effect of subsection (6) which relates to a three month time frame for the applicant to respond.

Subsection (6) provides that the respondent must decide the matter if the applicant responds to the clarification request within three months, but need not deal with application if it is suspended under (4) for three months or longer.

Subsection (7) clarifies that subsection 6(b) does not prevent the applicant from making another access application for the same information.

**Clause 11 Deciding access—decision not made in time taken to be refusal to give access  
New section 39 (1A)**

This clause inserts a new subsection 39 (1A) to provide that a respondent must give a written notice to the Ombudsman that a decision was not made in time, where a decision was not made within additional time to decide provided by the Ombudsman under section 78.

**Clause 12 Section 39 (3)**

This clause substitutes a new section 39 (3) to provide that a copy of the notice required to be provided to the Ombudsman under subsection 39 (1) (c) is to be presented to the Legislative Assembly within 3 sitting days of the matter being finally decided (including any review or appeal) rather than within 3 sitting days of the notice being given to the Ombudsman. This is intended to allow an explanation of the delay and the resolution of the matter to be provided to the Assembly.

**Clause 13 Deciding access—time to decide  
Section 40 (2)**

This clause substitutes a new subsection 40 (2) to include additional situations which extend the time to decide an access application as set out in subsection 40 (1).

These amendments recognise that the respondent is not able to continue to process the application while awaiting clarification from the applicant of the scope of the information requested, or confirmation that the applicant wishes to go ahead with an application or to vary the application after being provided a fee estimate, or the applicant has requested a fee waiver and this is being decided.

The amended provision has the effect of extending the time period where the respondent makes a clarification request under section 34 (3) by the number of working days the applicant takes to respond to the clarification request.

The time frame is also extended where the respondent contacts the applicant under subsection 106 (2) to provide an estimate of fees and asks the applicant to confirm or vary the application. In this instance, the time frame is extended by the number of working days the applicant takes to confirm or vary the application.

Where the applicant makes an application to the agency or Minister to waive a fee under section 107, the time frame is also extended by the number of working days the agency or Minister takes to decide the waiver application.

**Clause 14 Deciding access—respondent may ask for additional time to decide  
Section 41 (3) (b)**

This clause amends subsection 41 (3) (b) to provide a time frame of 7 working days for the applicant to refuse the respondent's request for additional time. If the applicant has not refused the request within this 7 working day period, and has not applied for review under Part 8, the respondent may decide the application within the additional time requested.

## **Clause 15 New section 41 (4)**

This clause inserts a new subsection 41 (4) which imposes a cumulative time limit on the requests for additional time that may be sought from the applicant. The respondent must not ask the applicant for additional time under this section if the effect of the applicant agreeing to the additional time would be to give the respondent more than 12 months from the day of receiving the access application to decide the application. In these circumstances a respondent must seek any further extension of time from the Ombudsman under section 42.

## **Clause 16 Section 42**

This clause substitutes a new section 42 which deals with extensions of time given by the Ombudsman. This new section provides greater flexibility for the Ombudsman to grant extensions for a period the Ombudsman considers reasonable in the circumstances, and allows the Ombudsman to consider a broader range of exceptional circumstances that might justify an extension.

The new section 42 provides that a respondent may apply to the Ombudsman for an extension of time to decide the application if the applicant has refused a request for additional time, or if the amount of additional time required by the respondent would extend the time frame for decision beyond 12 months from the date of receiving the access application and a further request to the applicant is thus prevented under section 41(4).

The new section provides that the Ombudsman may grant an extension where

- (a) the application involves dealing with a large volume of information; or
- (b) the application is complex; or
- (c) there are other exceptional circumstances.

The clause provides an example of exceptional circumstances where multiple, conflicting public interest factors apply to the information covered by the application and extensive third party consultation is required.

The Ombudsman may extend the time to decide the access application for the period the Ombudsman considers reasonable in the circumstances, having regard to the objects of the FOI Act and the importance of encouraging timely resolution of access applications.

The Ombudsman may grant the extension subject to conditions, for example that the respondent provides the Ombudsman with regular updates on progress with the application; the respondent agrees to a timetable to progress the application and the respondent provides information progressively to the applicant as the application is processed.

The Ombudsman may cancel or amend an extension if the Ombudsman considers this appropriate, having regard to the factors in s 42(4) (the objects of the Act and the importance of encouraging timely resolution of access applications) or the respondent has not complied with a condition of the extension. The Ombudsman must tell the respondent and the applicant about any extension, or cancellation or amendment of an extension.



**Clause 17 Refusing to deal with application—information already available to applicant**  
**New section 45 (ea)**

This clause inserts an additional subsection 45 (ea) which provides that a respondent may refuse to deal with an access application where the information has otherwise previously been given to the applicant.

This is intended to cover situations where an access application has been made for information, but the applicant is provided that information informally, or by another means.

**Clause 18 Section 49**

This clause substitutes a new section 49 which deals with deferral of access to information. The substituted section provides that the respondent may defer giving access to government information for a reasonable period, but no longer than 3 months, if the information was prepared with the intention that it be formally published within a stated time; and the information has not yet been published as intended.

Examples of formal publication include presentation to the Legislative Assembly, the formal release of a report at an event or publication online with a media release.

The section also clarifies that a respondent may defer giving access to information where a fee is payable and the applicant has not paid the fee.

**Clause 19 Access applications if two or more agencies or Ministers hold relevant information**  
**Section 58 (1)**

This amendment corrects a drafting error by removing an unnecessary word ('and') in subsection 58 (1).

**Clause 20 Section 58 (2) (c) (ii) and (4)**

This clause amends section 58 to allow for the partial transfer of an access application from the respondent to another agency, so that the other agency may decide part of an application rather than the whole application. This may be appropriate where only part of the application relates to matters dealt with by that other agency, or where deciding the whole application would result in unnecessary duplication of information that will be provided by the respondent.

**Clause 21 Applications for Ombudsman review**  
**New section 74 (1) (a) (ia)**

This clause corrects a technical issue regarding the commencement of time for Ombudsman review. While the time normally commences from the date of publication of the decision on the disclosure log, decisions regarding requests for personal information are not published on the disclosure log. This amendment provides that in such cases time runs from the date that the decision is provided to the applicant.

**Clause 22 Ombudsman review—extension of time when decision not made in time**  
**Section 78 (4)**

This clause amends subsection 78 (4) which deals with extensions granted by the Ombudsman where a deemed decision has been made and the Ombudsman is reviewing that decision. These amendments mirror the changes made to the powers of the Ombudsman to grant extensions under section 41.

An extension of time given by the Ombudsman may be for the period the Ombudsman considers reasonable in the circumstances, having regard to the objects of the FOI Act and the importance of encouraging timely resolution of access applications.

**Clause 23 New section 80A**

This clause inserts a new provision section 80A to allow the Ombudsman to attempt to assist to the respondent and applicant to resolve matters informally before proceeding to a formal review. It provides that the time frame for review may be suspended for up to 30 working days for this purpose.

**Clause 24 Mediation for applications**  
**New section 81 (2) (c)**

This clause inserts a new paragraph 81(2)(c) which provides that where the Ombudsman decides to refer a matter to mediation, that the Ombudsman may suspend the time frame for review for up to 30 working days for this purpose.

**Clause 25 Ombudsman review**  
**Section 82 (1)**

This clause amends subsection 82(1) to set out the time frame for review by the Ombudsman, reflecting the potential for the time frame to be suspended for informal resolution, mediation or both. An example is provided of the operation of the time frame being suspended for informal resolution under section 80A.

**Clause 26 New section 82 (3) (c) to (e)**

This clause amends subsection 82(3) to insert three new grounds on which the Ombudsman may decide not to review a decision.

The Ombudsman may decide not to review the decision where:

- (c) the respondent makes a decision on the access application or otherwise resolves the application; or
- (d) the Ombudsman is satisfied that the review application is frivolous or vexatious or involves an abuse of process; or
- (e) the Ombudsman has been unable to contact the applicant for review despite making reasonable efforts.

The clause amends the Act to provide a note clarifying that if the Ombudsman has decided not to review the decision under paragraph (a) (where an applicant does not give the Ombudsman enough information to review the decision) or (e), and the applicant wishes to make a new application for ombudsman review, the longer period necessary for making the new application may be allowed by the Ombudsman under subsection 74 (1).

This note confirms that where the Ombudsman decides not to review a decision because the applicant was not contactable or did not provide information, a further review application may be made in relation to the same decision, and considered by the Ombudsman. This provides an important safeguard in situations where the applicant was not contactable because of personal circumstances such as illness, homelessness or incarceration.

**Clause 27 Review of decisions by ACAT  
Section 84 (1)**

This clause makes an amendment to the section reference for Ombudsman decisions reviewable by ACAT to reflect the amendment to section 82 made in clause 25.

**Clause 28 Section 106**

This clause substitutes a new section 106 to provide for access applications to be suspended where a fee estimate has been provided to the applicant, and the respondent has asked the applicant to confirm or vary the application but the applicant has not confirmed or varied the access application.

Section 106 also provides that a respondent need not deal further with an application if the application has been suspended for more than three months. This does not prevent an applicant from making another access application for the same information.

**Clause 29 Dictionary, note 2**

This clause adds a further example in Note 2 to the Dictionary of terms defined in the Legislation Act being:

- working day.

**Clause 30 Dictionary, new definition of clarification request**

This clause inserts a new definition of clarification request which refers to the amended subsection 34 (3).