

2022

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

FREEDOM OF INFORMATION AMENDMENT BILL 2022

**EXPLANATORY STATEMENT
and
HUMAN RIGHTS COMPATIBILITY STATEMENT
(*Human Rights Act 2004, s 37*)**

**Presented by Chris Steel
MLA**

FREEDOM OF INFORMATION AMENDMENT BILL 2022

The Bill **is not** a Significant Bill. Significant Bills are bills that have been assessed as likely to have significant engagement of human rights and require more detailed reasoning in relation to compatibility with the *Human Rights Act 2004*.

OVERVIEW 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 meet the objectives of the Act more efficiently, for applicants and the broader public.

The Bill makes a range of amendments to address processing issues, including pauses to processing time in certain circumstances to ensure that as much of the statutory timeframe is spent by agencies actively processing requests, rather than expiring whilst agencies wait to receive information that is necessary for their consideration of the request.

The Bill provides legislative clarity in several instances, in particular to clarifying open access publication obligations, to avoid the need to publish duplicate copies of policy documents with information contrary to the public interest deleted, and to provide greater certainty about when extensions in time given by the Ombudsman are appropriate and permissible.

The Bill aims to increase the efficiency with which respondents process information access requests, including by requiring third parties who object to the disclosure of information to provide their views to agencies earlier, by encouraging applicants to respond quicker and more proactively to requests to clarify the scope of applications, and by setting clearer timeframes according to which parties to an Ombudsman review should provide requested particulars.

The Bill provides greater scope for the ACT Ombudsman to review decisions to make open access information publicly available, and to give access to government information.

The Bill also increases the processing time initially granted to respondents from 20 to 30 working days. This amendment is not intended to delay access to government information. Rather, it is pursued to better reflect the reality of processing times under the Act and avoid the need to request relatively small extensions in time which are already being granted in most instances.

CONSULTATION ON THE PROPOSED APPROACH

Consultation was undertaken with all ACT Directorates, the Territory Records Office, the ACT Ombudsman, ACT Human Rights Commission, ACT Law Society and the ACT Bar Association.

CONSISTENCY WITH HUMAN RIGHTS

Rights engaged

The Bill may engage and promote procedural fairness rights and the right to a fair trial, protected by section 21 of the *Human Rights Act (2004)* (HR Act).

The Bill may engage and limit the right to freedom of expression, under section 16 of the HR Act, and the right to equality in section 8.

Rights Promoted

The Bill amends Schedule 3 to expand review rights. Persons whose interests are affected will be able to review a decision to make open access information. This will allow third parties who object to the release of government information on the open access portal an opportunity to have that decision challenged supporting their right to a fair trial under section 21 of the HR Act, particularly the procedural fairness element of this right.

Section 21 is similarly engaged and promoted by clause 27 which makes a decision to give access to government information reviewable by the applicant. This avoids a narrow reading of Schedule 3, and allows an FOI applicant who has been given information, but feels there is additional information that has not been identified, standing to seek review.

Rights Limited

Timeframes for making decisions

1. Nature of the right and the limitation (ss 28(2)(a) and (c))

Section 16 of the HR Act protects the right to freedom of expression, which includes the freedom to seek receive and impart information and ideas of all kinds.

The Bill includes several amendments that support respondent agencies to decide access applications according to extended timeframes:

- Clause 12 – increasing the ‘time to decide’ an application to 30 working days;
- Clause 13 - pausing processing time whilst an agency undertakes consultation with the applicant, necessitated by section 46, before refusing to deal with certain access applications;
- Clause 14 – pausing processing time during Christmas shutdown.

To the extent that these amendments result in a minor reduction in the timeliness with which applicants can expect to receive information, this may limit the right to freedom of expression.

2. *Legitimate purpose (s 28(2)(b))*

These amendments are intended to allow the objectives of the Act, particularly facilitating and promoting the disclosure of the maximum amount of government information promptly and at the lowest reasonable cost, to be met more efficiently, for applicants and the broader public. This will assist to ensure the sustainability of the ACT's FOI regime to meet increasing processing demands.

3. *Rational connection between the limitation and the purpose (s 28(2)(d))*

This legitimate objective will be achieved by improving and streamlining processing of freedom of information access applications and reviews, and providing greater flexibility in managing workflows.

Pauses in processing time effected by clauses 13 and 14 are included to ensure that as much of the statutory processing time as possible is spent by agencies actively processing requests, rather than this time expiring while agencies wait to receive information that is necessary for their consideration of the access request. This will allow respondent agencies to more flexibly manage their time and accommodate competing priorities. It will also reduce the likelihood of respondents being deemed to have refused requests when they are still actively considering them, and the additional administrative requirements that arise where the request is deemed to be refused.

The increase in processing time from 20 to 30 working days is pursued to better reflect the reality of processing times under the Act and avoid the need to request relatively small extensions in time which are already being granted in most instances. In 2020-21 processing time averages exceeded 20 working days, however only slightly in most instances: 6 out of 8 Directorates had an average processing time of 27 days or less¹. That the majority of applications are resolvable in 27 days or less indicates that the majority of extension requests are for small periods of time (7 days or less). Increasing the statutory processing time from 20 to 30 working days would avoid the need for these small extensions of time, and save respondents, applicants and the Ombudsman from the administrative burden associated with seeking, agreeing to, or granting them.

4. *Proportionality (s 28(2)(e))*

The approach chosen is the least restrictive means possible of achieving the legitimate objective. Clause 13 extends processing time only by the number of days already prescribed for a mandatory consultation period under section 46 of the Act.

¹ ACT Ombudsman report on the operation of the *Freedom of Information Act 2016* for 2020-21, page 11.

Similarly, clause 14 extends processing time over Christmas shutdown, a period where respondent agency staff are not at work. Clause 14 is similarly targeted to increase statutory processing time to a number of days that reflects average processing times, and not more. In this way, these provisions are the least restrictive means possible of delivering the intended efficiencies described above.

Relevance of an applicant's details when considering applications

1. Nature of the right and the limitation (ss 28(2)(a) and (c))

Section 16 may be further limited by clause 5, which allows a person's identity, circumstances and reasons for seeking access to information to be taken into account when applying the public interest test to a request for personal information that is not about the applicant. This may restrict an applicant's access to personal information that is not their own, and thus may operate as a limitation on the right to seek and receive information.

2. Legitimate purpose (s 28(2)(b))

In some circumstances it will not be appropriate to give an applicant access to personal information that is not their own, particularly if it would prejudice another person's right to privacy or other human right. This amendment structures the public interest test in a way that supports that outcome.

3. Rational connection between the limitation and the purpose (s 28(2)(d))

The identity of the applicant is relevant to the public interest, insofar as it establishes that the personal information sought does not pertain to them, and this amendment allows agencies to factor this into their application of the test, particularly the identification of factors favouring non-disclosure.

4. Proportionality (s 28(2)(e))

This limitation can be considered a proportionate limitation. Respondent agencies will still need to identify sufficiently compelling factors favouring non-disclosure, and weigh them against any factors favouring disclosure, before refusing access to the information sought. Applicants may also apply to the Ombudsman to seek review of a decision to refuse to give access to government information.

Other processing efficiencies

1. Nature of the right and the limitation (ss 28(2)(a) and (c))

The right to freedom of expression, and the right to equality (section 8 of the HR Act) may be limited by clauses 8 and 20. Clause 8 accelerates an agency's ability to discontinue dealing with an application where the scope of the application is unclear and requires clarification, but the applicant is not engaging in that process. Currently, the application needs to be suspended in this way for 3 months before it can be

closed, however the Bill provides that respondents need not deal further with applications that are suspended for 6 weeks. This provision potentially limits rights as it could limit the ability of people who are not contactable because of their personal circumstances, including homelessness, incarceration or illness, to access government information.

Clause 20 gives greater flexibility to respondent agencies regarding the form in which access to information must be given. This amendment could limit an applicant's ability to receive and access information. Similarly to clause 8, this could potentially impact disproportionately on vulnerable cohorts of people, particularly those with limited digital access, and consequently possibly limit their rights to freedom of expression and to equality.

2. *Legitimate purpose (s 28(2)(b))*

These amendments are intended to allow the objectives of the Act, particularly facilitating and promoting the disclosure of the maximum amount of government information promptly and at the lowest reasonable cost, to be met more efficiently, for applicants and the broader public.

3. *Rational connection between the limitation and the purpose (s 28(2)(d))*

This legitimate objective is achieved by improving and streamlining processing of freedom of information access applications and reviews, and to provide greater flexibility in managing workflows.

Clause 8 facilitates more efficient management of a respondent agency's access application caseload. Having these access requests 'off their books' after 6 weeks without engagement from the applicant, rather than 3 months of inactivity, is intended to reduce the number of 'open' files, and therefore offer improvements to processing efficiency. A six-week deadline is also more likely to lead to the applicant responding more promptly if they are interested in continuing the application.

Clause 20 is intended to give agencies greater flexibility in the form that access to information must be provided in, particularly to account for the difficulty in posting hard copies with the shift to remote work and paperless offices, and other instances where providing information in the requested form is not reasonably practicable, but does not meet the current threshold of unreasonable interference with the exercise of the respondent's functions.

4. *Proportionality (s 28(2)(e))*

The potential limitation on rights effected by clause 8 is considered proportionate, given that section 34(7) specifically preserves an applicant's ability to make a further request for the same information. Thus, the applicant does not lose their entitlement to seek information and may submit a new application whenever they are in a position to do so. Respondent agencies will also continue to be required to take reasonable steps to contact the applicant about the clarification request.

Safeguards have been included in clause 20 to guard against unreasonable limitations on human rights. The respondent will need to be reasonably satisfied that the applicant can receive the information given in the alternative form, before the ability to give access in the alternative form is enlivened. Accordingly, documents could not be provided in electronic format if the applicant does not have access to digital technology. Furthermore, the respondent may only give access in the alternative form if it is 'not reasonably practicable' to provide access in the form requested. Respondents will not be able to meet this threshold if the reason providing access in the alternative form is purely administrative convenience.

Expansion of Schedule 1

1. Nature of the right and the limitation (ss 28(2)(a) and (c))

The right to freedom of expression may be further limited by amendments to Schedule 1 of the Act. Information in the possession of the Inspector of Correctional Services, and information to which legal professional privilege applies, even where that information identifies corruption, the commission of an offence by a public official or that the scope of a law enforcement investigation has exceeded the limits imposed by law, will be deemed contrary to the public interest to disclose. This may limit the scope of information that may be disclosed to an applicant.

2. Legitimate purpose (s 28(2)(b))

Amendments to expand Schedule 1 ensure that acutely sensitive information, particularly material that may limit another person's right to privacy or right to a fair trial, is conclusively protected by the Act.

3. Rational connection between the limitation and the purpose (s 28(2)(d))

Expanding Schedule 1 avoids the need to apply the public interest test to information in the possession of the Inspector of Correctional Services, or to which legal professional privilege applies. Including information in Schedule 1 'deems' it to be contrary to the public interest to disclose' thus creating a more efficient, automatic and appropriate means for deciding access to sensitive information.

4. Proportionality (s 28(2)(e))

The application of the public interest test, and the weighing of factors for and against disclosure would be a less restrictive means of managing access to this kind of information. Due to the sensitive nature of Inspector of Correctional Services (ICS) investigations and their interaction with vulnerable people and collection of sensitive personal information, it is likely that much of this information would already be prevented from release as sensitive personal information under the public interest test. However, it would assist both the ICS and the people who engage in their investigations, to know that this information is not required to be disclosed under FOI. The proper flow of information between the ICS and people engaged in the

investigation is essential for the conduct of an investigation. Providing certainty that this information is not required to be disclosed under FOI encourages people to participate in the process as fully as possible. It would also support and protect the right to privacy of people who share their sensitive personal information with the ICS. As an independent statutory officer, the ICS exercises careful judgment regarding the publication of information in its reports of investigations and reviews. This independent oversight role could potentially be affected by investigation information being sought through the FOI process. Similar protections are already in place for the Human Rights Commission's complaint handling functions.

Similarly, there are strong arguments for giving confidence to people who seek legal advice on potential issues of corruption or the commission of other offences by a public official that this legal advice would not be released under FOI. Although it is a strong policy intent of the Act that information that identifies corruption or other offences is not subject to automatic exemptions under Schedule 1, the maintenance of legal professional privilege is an important feature of a fair justice system, and supports the right to a fair trial. Consequently, the conclusive presumption that it is not in the public interest to release information subject to the privilege ought not be disturbed simply because advice is sought in relation to corrupt conduct or other offences. Weighting factors favouring non-disclosure, particularly that a person's right to privacy may be engaged or that the release of information could reasonably be expected to prejudice the management function of an agency, is not an efficient or appropriate means for deciding access to this government information.

Accordingly, although these provisions limit human rights protected under the HR Act, these limits are reasonable and demonstrably justifiable in a free and democratic society in accordance with section 28 of the HR Act.

Freedom of Information Amendment Bill 2022

Human Rights Act 2004 - Compatibility Statement

In accordance with section 37 of the *Human Rights Act 2004* I have examined the **Freedom of Information Amendment Bill 2022**. In my opinion, having regard to the Bill and the outline of the policy considerations and justification of any limitations on rights outlined in this explanatory statement, the Bill as presented to the Legislative Assembly is consistent with the *Human Rights Act 2004*.

.....

Shane Rattenbury MLA
Attorney-General

CLAUSE NOTES

Clause 1 Name of Act

This clause provides for the name of the Act, being the *Freedom of Information Amendment Act 2022*.

Clause 2 Commencement

This clause provides for the commencement of the Act. The Act commences on the 7th day after the Act is notified.

Clause 3 Legislation amended

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

Clause 4 – Section 16

This clause substitutes a new definition of ‘contrary to the public interest information’. It retains the previous definition that information is contrary to the public interest to disclose if it is deemed under Schedule 1, or if the balancing test in section 17 determines that it would be contrary to the public interest to disclose. It adds that information captured by Schedule 1.2, that is information subject to legal professional privilege, is contrary to the public interest to disclose even if it identifies corruption, or the commission of an offence by a public official, or that the scope of a law enforcement investigation has exceeded the limits imposed by law.

Clause 5 – Public interest test new section 17(3)

This clause inserts new subsection (3) to allow an applicant’s identity, circumstances and reason for seeking access to the information to be taken into account in the determination of whether information is contrary to the public interest to disclose, in circumstances where the applicant is seeking personal information that is not their own.

Clause 6 – Open access information – deletion of contrary to the public interest information new section 26(3)

This clause removes the obligation to make a copy of a policy document publicly available if the information, other than the contrary to the public interest information contained in the record has been otherwise made publicly available. This avoids the need to publish policy documents with redacted information, if the information that need not be redacted is available in complete form elsewhere.

This clause also removes the obligation to publish a statement that the original record contained contrary to the public interest information that has been deleted from the copy, in the circumstances described above.

Clause 7 – Requirement for disclosure log section 28(1)

This clause substitutes subsection (1) to impose the obligation to keep a record of access applications on the agency or Minister who deals with an access application, rather than the agency or Minister to which an access application is made.

Clause 8 – Deciding access – identifying information within the scope of the application section 34(6)

This clause provides that agencies need not deal further with an access application if it is suspended under subsection (4) for six weeks.

Clause 9 – Deciding access – relevant third parties section 38(5)(b)

This clause requires that third parties who object to the disclosure of information must provide their views on whether the information is contrary to the public interest information, within 10 days.

Clause 10 – Deciding access – decision not made in time taken to be refusal to give access section 39(4)

This clause requires that, in circumstances where the Ombudsman is given notice that a decision relating to an application was not made within the time allowed under section, or extended under section 41 or 42, the relevant Minister must ensure that a copy of the notice is presented to the Legislative Assembly within 6 sitting days after the access application (including any review or appeal) is finally decided.

Clause 11 -Section 39(5)

This clause removes the obligation in section 39(4) to give notice to the Legislative Assembly of decisions not made in time if the Ombudsman extended the time for the respondent to decide the access application under section 78, or because the access application is only for personal information.

Clause 12 – Deciding access – time to decide section 40(1)

This clause provides that a respondent has 30 working days from the day of receiving an access application to make a decision on the application.

Clause 13 – New section 40(2)(ba)

This clause extends the processing time available to respondents by the consultation period prescribed by section 46(4) in circumstances where consultation is required prior to a respondent refusing to deal with certain applications.

Clause 14 – New section 40(2), example

This clause extends the processing time available to respondents by the number of 'Christmas shutdown days'.

This clause substitutes a new example to reflect clause 14's increase to the number of working days available to the respondent to decide the access application.

This clause defines Christmas shutdown day as a working day that falls on the 27, 28, 29, 30 or 31 December.

Clause 15 – Deciding access – respondent may ask for additional time to decide - section 41(3) and (4)

This clause substitutes a new section 41(3) and (4). It provides that the respondent may decide the application before additional time requested if the total period for deciding the application would be not more than 12 months, and that the applicant agrees to, or is taken to agree to, the request.

This clause provides that 'taken to agree' means the applicant has not, within 7 working days after the request is made, refused the request and the respondent has not received notice that the applicant has applied for review under part 8 of the Act.

This clause further provides that the respondent may decide the application before the end of additional time requested if the period for deciding the application would, if the request is agreed to, be more than 12 months but not more than 24 months. Applications can only be decided according to this lengthier extension of time if the applicant has agreed to the request (that is, not been taken to agree to the request by virtue of section 41(3)(b)) and the respondent has agreed to deal with the application progressively, which includes providing information to the applicant progressively.

This clause prevents respondents from asking for extensions in time from the applicant if the total period for deciding the application would be more than 24 months.

This clause provides that the 'total period' to decide an access application begins on the day the respondent receives the application and ends on the day the respondent decides the application.

Clause 16 – Deciding access – extension of time given by the ombudsman section 42(1)(a) and (b)

This is a consequential amendment necessitated by clause 19. This clause substitutes subsection (a) and (b) to correctly refer to the provisions in new section 41.

Clause 17 – Deciding access – extension of time given by ombudsman section 42(3)

This clause inserts an example of an exceptional circumstance that may constitute a ground upon which the ombudsman may grant an extension of time. It describes the exceptional circumstance as 'at a point in time, the volume or complexity of

applications significantly exceeds the resources available to the respondent to deal with the application.’ This is intended to be reserved for acute and rare pressure on staffing, rather than business-as-usual resourcing shortfalls.

Clause 18 – Refusing to deal with application – general section 43(1)(b), new example

This clause inserts an example of a vexatious application, as a reason for which a respondent may refuse to deal with an access application wholly or in part. It describes a vexatious application as one made ‘an application made only to annoy or unreasonably interfere with the respondent’s operations, or for an improper purpose’.

Clause 19 – Refusing to deal with application – information already available to applicant section 45(a)

This clause substitutes subsection (a). It provides that a ground for refusing to deal with an application is that the information requested is publicly available, thus removing the requirement that the agency or Minister needed to have made the information publicly available.

Clause 20 – Form of access section 47(5)

This clause substitutes subsection (5) and provides that information may be given to the applicant in a form other than the form requested by the applicant, but only if it is not reasonably practicable for the respondent to give access in the form requested and the respondent is reasonably satisfied that the applicant can receive the information in the alternative form.

Clause 21 – Applications for ombudsman review new section 74(1)(a)(iiia)

This is a consequential amendment necessitated by clause 30. It provides that for a decision to make open access information available, an application for ombudsman review must be made 20 working days after the day the information was published.

Clause 22 – Ombudsman review new section 82(3)(aa)

This clause extends the time available to the Ombudsman to review a decision by the time, or the end of the period, stated in the notice issued under section 79(1), requiring a person to give to the ombudsman, information relevant to the review.

Clause 23 – New section 82(8)

This clause provides that the ombudsman may, in reasons given for a decision made under section 82, correct a mistake, error or omission in a decision.

Clause 24 – Information disclosure of which is taken to be contrary to the public interest schedule 1

This is a consequential amendment necessitated by clause 4. It omits this description of information not taken to be contrary to the public interest to disclose, because this definition has been included in new section 16.

Clause 25 - Schedule 1, new section 1.15

This clause provides that information in the possession of the Inspector of Correctional Services that has been obtained or generated in relation to an examination or review conducted under section 18 of the *Inspector of Correctional Services Act 2017* is included in Schedule 1.

Clause 26 – Reviewable decisions schedule 3, new item 1A

This clause amends schedule 3 to make a decision made under section 24(1) to make open access information publicly available, reviewable by persons whose interests are affected.

Clause 27 – Schedule 3, item 2

This clause amends schedule 3 to add ‘an applicant’ to the list of ‘entities’ that can review a decision to give access to government information made under section 35(1)(a).

Clause 28 – Dictionary, new definition of *policy document*

This clause inserts a new cross reference to the definition of policy document in section 23.