

**2025**

**LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY**

**EXPLANATORY STATEMENT AND HUMAN RIGHTS COMPATABILITY STATEMENT  
TERRITORY RECORDS (EXECUTIVE RECORDS) AMENDMENT BILL 2025**

This explanatory statement relates to the Territory Records (Executive Records) Amendment Bill 2025 (the Bill). It has been prepared in order to assist the reader of the Amendments and to help inform debate on the bill. It does not form a part of the bill and has not been endorsed by the Assembly.

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## OVERVIEW OF THE BILL

This bill legislates a statutory timeframe for the processing of requests for accessible executive records, and sets a new mechanism for appealing decisions concerning access to executive records under the *Territory Records Act 2002*. Accessible executive records are those executive records (commonly referred to as cabinet documents) that are more than ten years old, and are identified as having become accessible on a list published each Canberra Day – the second Monday in March.

This Bill establishes a timeframe and mechanisms similar to what is currently in effect under the *Freedom of Information Act 2016*. A 30 working-day limit is placed on the time permitted for the principal officer to grant access to a document, which includes the time to consider whether a release restraint determination should be made. This period may be extended where agreed to by the requester, or by the ACT Ombudsman if the ACT Ombudsman agrees that the extension is reasonable in the circumstances, or where Christmas shutdown days occur. It allows for a reasonable delay to large requests which would constitute an unreasonable and substantial diversion of resources without consequently impacting the timeliness of requests by other requesters being met. These extension provisions allow for flexibility in resource management and therefore support compatibility with section 65 of the *ACT Self-Government Act 1988*.

If a decision is not made by the principal officer within the time limit, including any agreed extensions, the applicable records are deemed to have been fully restrained under a release restraint determination. This allows for the deemed decision to be appealed to the ACT Ombudsman by the requester without prejudicing any information that should genuinely require redaction under the Act. Any full or partial release restraint decision made by the principal officer that the requester is not satisfied with can be similarly appealed. The ACT Ombudsman is then empowered to review the decision, as made or deemed, instead of the current practice of allowing for an internal review by alternative officers within the Chief Minister, Treasury and Economic Development Directorate. Appeals on ACT Ombudsman reviews can be made to ACAT.

Consequential amendments are made to the *Ombudsman Act 1989* for consistency with their new functions under the *Territory Records Act 2002*.

## CONSULTATION ON THE APPROACH

An exposure draft of this bill was tabled in the Assembly and published on the Legislation Register on 9 April 2025, and was open for consultation until 25 May 2025.<sup>1</sup>

Advice was received from the Human Rights Commission, which was incorporated to improve the human rights compatibility statement from the version included with the exposure draft. This advice has been published by the Commission on its website.<sup>2</sup>

Specific feedback was also received from the ACT Ombudsman, which was incorporated to provide for more flexible and workable timelines for ombudsman reviews, and the addition of a new section to ensure that the participants of any review at ACAT are the applicant and the principal officer, and not the ACT Ombudsman.

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<sup>1</sup> [https://www.legislation.act.gov.au/ed/db\\_72347/](https://www.legislation.act.gov.au/ed/db_72347/)

<sup>2</sup> [https://www.hrc.act.gov.au/\\_data/assets/pdf\\_file/0010/2844442/Advice-to-Andrew-Braddock-MLA-Territory-Records-Executive-Records-Amendment-Bill-2025.pdf](https://www.hrc.act.gov.au/_data/assets/pdf_file/0010/2844442/Advice-to-Andrew-Braddock-MLA-Territory-Records-Executive-Records-Amendment-Bill-2025.pdf)

## HUMAN RIGHTS COMPATABILITY

This 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*.

That said, it is worth acknowledging that the underlying provisions concerning the release of executive documents were first introduced in the *Executive Documents Release Act 2001*, and their provisions were incorporated into the *Territory Records Act 2002* as part of the *Territory Records Amendment Bill 2010*. Neither bill offered a detailed Human Rights compatibility analysis of the executive records scheme as a whole.

### Rights Engaged

The Bill engages the following rights under the *Human Rights Act 2004*:

- Right to privacy and reputation (section 12) (promoted and limited)
- Freedom of expression (section 16) (promoted and limited)
- Taking part in public life (section 17) (promoted)

### The nature of the rights affected (s28(2)(a))

Executive records, notably cabinet documents, are traditionally kept confidential to facilitate frank and fearless deliberation within cabinet without the elevated risk of political consequences for a member of the executive who might change their mind or compromise on a priority. This pertains not just to members of the executive, but also parts of government and non-government organisations who put proposals before cabinet that may or may not be agreed to by cabinet. This is commonly known as ‘cabinet confidentiality’.

In this context, the protection of privacy (s12) is frequently taken as a means to protect reputations (s12), because of the broadly-accepted conclusion that public judgements should be based primarily on considered decisions. In the hotly-contested arena of public opinion, a Minister who changes their mind in the course of submissions may find their reputation tarnished if they can be portrayed as ‘indecisive’ or ‘compromising’ as examples of possibly ‘weak’ political traits. By corollary, a Minister who loses an argument inside Cabinet may struggle to express their internal opposition to a proposal readily and suffer reputational damages within their party.

Cabinet confidentiality therefore constrains the freedom of expression (s16) of individual members of the executive. The release of executive documents necessarily unburdens that confidentiality and freedom of expression, but can have correlating consequences for reputations. In doing so, it enhances the broader public’s ability to take part in public life (s17), but the ten year delay in the release of records does this in a way that is intended to support sensible retrospection rather than revelatory outrage.

Separate to this is the well-understood need to protect private and personal information (s12), including email addresses and contact phone numbers, for which their owners have a right to see this information not shared with the general public unnecessarily.

These are all elements of the existing executive record release scheme. The remaining compatibility analysis here will focus specifically on how they are varied by the bill.

## **How the rights are promoted**

The bill provides for releases of information to be made in a significantly timelier manner, so that someone wishing to evidence their reputation with respect to historical events can do so within the space of a few months, which is within the bounds of public debate on an issue, rather than needing to wait for up to a year. The ability to take part in public life (s17) and have the freedom of expression (s16) is thereby enhanced and promoted.

The bill also provides for avenues of appeal on release restraint decisions through the ACT Ombudsman, which will improve confidence that any release restraint decisions are made for a legitimate purpose and without political interference. If a decision is not made within the new statutory timeframe, a full release restraint decision is presumed, thereby protecting privacy (s12) by default pending any further review by the ACT Ombudsman.

## **The importance of the purpose of the limitation (s28(2)(b))**

An ombudsman review process ensures public confidence in the decisions being made by government, by ensuring that there is an appeal mechanism outside of the ACT Government. This provides the Canberra community greater assurance that reviews are being undertaken by an independent and neutral adjudicator not subject to the same cultural operating environment and political pressures as the principal officer who made the original decision.

The limitation on freedom of expression (s16) is a necessary choice in balancing it against the promotion of the right to privacy (s12). Promoting one of these rights necessarily produces a risk that the other becomes limited.

## **The nature and extent of the limitation (s28(2)(c))**

The introduction of an ombudsman review process exposes the information with possible implications for privacy (s12) to a new additional actor: The ACT Ombudsman.

A release restraint decision may also inherently limit freedom of expression (s16), and specifically the freedom to receive information, particularly where an overwhelmed processing system precipitates deemed release restraint decisions despite the best intentions and efforts of public servants. This arises as a consequence of the bill's decision to prioritise promotion of the right to privacy (s12). However, the limitation only truly manifests where processing systems in the public service become overloaded to produce a pattern of *de facto* deemed refusals. The bill has incorporated a range of criteria to allow for extensions to processing times, specifically including in circumstances involving a high volume of information or other exceptional circumstances. It is envisaged that deemed refusals should be exceedingly rare.

## **The relationship between the limitation and its purpose (s28(2)(d))**

Allowing the ACT Ombudsman to access the accessible executive records which potentially contain private and confidential information (s12) is necessary for them to execute their review functions.

A risk of limitations on the right to freedom of expression (s16) is a necessary and unavoidable consequence of the decision to prioritise the protection of the private and confidential information (s12) in the release process.

**Any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve (s28(2)(e))**

The ACT Ombudsman is a trusted Officer of the Assembly, who has statutory obligations to review decisions made in the public interest and protect private and personal information (s12) while doing so, consistent with the Human Rights Act. This is the least restrictive means of ensuring reviews can occur with probity and integrity. Engaging the ACT Ombudsman also limits the need for additional ACT Government officers to review private and confidential information through internal reviews.

The limitation on the right to freedom of expression (s16) is expected to be extremely rare. In order to manifest, it would likely require deliberate under-resourcing of the record release scheme by the ACT Government. To abolish the risk of this right being limited would require introducing risks that private and confidential information (s12) be exposed in automatic and unmanaged releases, which is considered to be a much more substantial risk.

## **CLIMATE IMPACT**

This bill has no direct implications for climate change. However, improved accessibility of accessible executive records may enhance the quality of decisions being made by the legislature relating to climate change over time.

## **CLAUSE NOTES**

### **Clause 1 – Name of the Act**

This identifies the bill, once it is prospectively passed, as being the *Territory Records (Executive Records) Amendment Act 2025*.

### **Clause 2 – Commencement**

The commencement date is set to coincide with Canberra Day, on the 9<sup>th</sup> of March 2026, on which the next lists of accessible executive records are to be made available to the public.

### **Clause 3 – Legislation Amended**

The bill will primarily amend the *Territory Records Act 2002*, with consequential amendments to the *Ombudsman Act 1989*.

### **Clause 4 – Definitions**

This omits the definitions of *internally reviewable determination* and *internal reviewer*, because they are no longer relevant. The process for internal review is being substituted with a process for review by the Ombudsman.

### **Clauses 5 & 6 – Imposing a 30 working day statutory deadline**

This omits, in 31E(2) and 31F, all instances of “after receiving the request” and substitutes “, but not later than 30 working days, after the day the officer receives the request”. This preserves the requirement that the principal officer must act on the request for access as soon as practical, while adding a requirement to do so within 30 working days.

## **Clause 7 – Extensions of Time and deemed restraint**

This adds new sections 31FA and 31FB.

31FA allows the principal officer to seek approval from the ACT Ombudsman for an extension of time where the Ombudsman agrees such an extension is reasonable in the circumstances. Examples are provided, specifically to cover concerns about voluminous requests that would become an unreasonable and substantial diversion of resources.

31FB ensures that a failure to give access to an accessible record within the 30 working-day time frame, or as otherwise extended by the ACT Ombudsman, becomes a decision to fully restrain the document. This decision can still be appealed to the ACT Ombudsman by the requester.

## **Clause 8 – New functions of Ombudsman**

This inserts a new section 31HA, which outlines the functions of the ACT Ombudsman for this Act, covering the granting of extensions of time and the review of restraint determinations.

## **Clauses 9 & 10 – Ombudsman review notices**

This establishes the requirement, in the event of a release restraint determination being made, to give notice of the requestor's ability to seek an ombudsman review, in place of an internal review.

## **Clause 11 – Ombudsman and ACAT review scheme**

This replaces the current internal review scheme with an ombudsman review scheme. An application for ombudsman review of a release restraint determination must be made within 28 days, setting out the grounds of the review. By default, the ACT Ombudsman then has 15 days to conduct the review. However, this may be extended by any period agreed to by the applicant, or otherwise up to an additional 15 days where the ACT Ombudsman identifies circumstances involving a large volume of information, a complex review, or other exceptional circumstances.

As with the assumptions for a deemed restraint under clause 7, an expiry of time results in the release restraint decision being confirmed by default, rather than overturned.

Any decision made by the ACT Ombudsman, including one deemed to have been made due to an expiry of time, can be appealed to ACAT. 31MA provides clarity that the participants in any review at ACAT are the applicant and the principal officer responsible for the original release restraint determination, and not the ACT Ombudsman.

## **Clause 12 – Dictionary**

The dictionary's note 2 is updated to include terms new terms drawn from the *Legislation Act* dictionary.

## **Schedule 1 – Consequential Amendments**

New sections 4C(da) and 5(3)(a)(iii) are added to reflect the new role given to the ACT Ombudsman under the *Territory Records Act 2002*.