

# OVIC

Office of the Victorian Information Commissioner  
Freedom of Information

## CONSULTATION AND NOTIFICATION

### A guide to third party consultation and notification requirements for access requests

#### Overview

The *Freedom of Information Act 1982*, has been amended<sup>1</sup> to include new third party consultation and notification requirements for a number of exemptions in Part IV of the Act.

The amendments commenced on 1 September 2017. The new provisions, and changes to pre-existing consultation and notification requirements in ss 33 and 34, only apply to access requests made on or after that date.<sup>2</sup>

There are some important exceptions to the requirement to consult, including where consultation is not practicable.

While decision makers now have 30 days to determine an access request, they may allow themselves up to a further 15 days where consultation is required.

#### Pre-decision notification and consultation

Agencies and Ministers are required to consult relevant third parties when considering whether an exemption in ss 29, 29A, 31, 31A, 33, 34 or 35 applies.

Consultation is required even where the decision maker does not propose to grant access to a document.

Depending on the relevant exemption, the third party may be a government agency or authority, a financial, commercial or business undertaking, or an individual.

Consultation generally requires an agency or Minister to notify the third party of the access request, and seek their views on the whether the document should be disclosed to the applicant.

For exemptions in ss 33, 34 or 35, agencies and Ministers must also notify the third party that, if they consent to the disclosure of all or part of a document, they will not be entitled to seek VCAT review of a decision to release that material.

Where a decision maker is required to consult with a third party, the agency or Minister:

- > must have regard to the views of third parties before making a decision; and
- > may decide to extend the time for making a decision by up to 15 calendar days (see our guide to 'Timeframe for deciding access requests, including extensions of time' for more detail).

An objection from a third party does not mean that a document must not be released (that is, they do not have the ability to veto release). However, a third party's views must be considered along with all other relevant considerations.

<sup>1</sup> As amended by the *Freedom of Information Amendment (Office of the Victorian Information Commissioner) Act 2017*.

<sup>2</sup> See s 5 of Schedule 1 to the *Freedom of Information Act 1982*.

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## Post-decision notification

If, following consultation under ss 33, 34 or 35, a decision maker decides to release all or part of a document, they must notify any third party that objected to disclosure of their right to seek review of their decision by VCAT.

There is no requirement to notify a third party that has consented to disclosure, provided the decision reflects disclosure of the material to which the third party agreed.

A decision maker should also notify an applicant that a document will only be released when the third party's 60 day review period, which commences on the day after a decision is made, has expired.

## Consultation

Whenever possible, agencies and Ministers should notify and seek the views of third parties in writing. However, consultation may be done by less formal means, including via telephone, email or a meeting, in the interests of providing a timely decision.

Similarly, there is no requirement that a third party provide their views in writing. Decision makers must take a third party's views into account in whatever form they are provided. However, an agency or Minister should always make a written record of a third parties' views when provided verbally.

A third party should be asked to give reasons and, where relevant, supporting evidence where they do not consent to the release of a document.

It may be necessary for a decision maker to inform a third party of the identity of the applicant. Privacy considerations are dealt with later in this guide.

A decision maker should also consider whether it is necessary and practicable to give a third party a copy of the document to which access is sought. If so, any exempt or irrelevant information should be deleted in the copy provided.

An agency or Minister is entitled to make a decision rather than await the views of a third

party who does not respond within a reasonable specified timeframe.

What is a 'reasonable' timeframe will depend on the circumstances, including the number of documents, the nature (eg complexity or age) of the information and the complexity of the issues involved.

### Practical Tip

When consulting with a third party, advise them that if a response is not received within a specified timeframe, the agency or Minister may proceed to make a decision without their views.

### Practical Tip

Consider, ahead of time, whether there are ways to speed up the consultation process. For example, if particular third parties are routinely consulted, you might agree in advance on a protocol for consultation, governing such matters as the means by which they will be consulted.

## Privacy considerations

The new provisions do not stipulate what information about an access request may be given to a third party during consultation.

However, it may be necessary for a third party to know the identity of the applicant in order to decide whether to consent to release of a document, and how to frame any specific objections.

Agencies should have regard to their obligations under the *Privacy and Data Protection Act 2014* whenever disclosing an applicant's identity and other 'personal information'.<sup>3</sup>

In particular, agencies should consider whether an exception to Information Privacy Principle 2.1 (prohibition on disclosure of personal information other than for the

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<sup>3</sup> Defined in section 3 of that act to mean "information or an opinion (including information or an opinion forming part of a database), that is recorded in any form and whether true or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion, but does not include information of a kind to which the Health Records Act 2001 applies".

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primary purpose of collection) applies. For example, an agency or Minister might –

- > obtain an applicant's consent to the disclosure of their personal information to a third party (**IPP 2.1(b)**); or
- > establish that the disclosure is for a related secondary purpose, for which the applicant would reasonably expect the agency or Minister to disclose their personal information (**IPP 2.1(a)**).

For further information, see the Guidelines to the Information Privacy Principles [here](#).

#### Practical Tip

Agencies and Ministers should consider including privacy notices or 'tick to consent' boxes on their access request forms or acknowledgement letters, to assist them in establishing that either IPP 2.1(a) or (b) apply.

## When will consultation be 'practicable'?

Consultation is only required under the relevant exemptions where it is 'practicable' to do so.

A common sense approach should be applied in determining what is 'practicable'. The term is not defined in the FOI Act, nor is it a term of precise meaning.<sup>4</sup> What is 'practicable' must be determined on a case-by-case basis.

It requires consideration of matters such as the time and effort involved, an agency's available resources, the time available to decide the request, and the expected outcome of consultation.

It may not be practicable to consult a third party when –

- > they cannot be located as you cannot find a current address or contact telephone number (searching the White Pages directory or ASIC online is recommended);

- > a large number of third parties are involved (although what is 'large' will depend on available resources and applicable statutory timeframes<sup>5</sup>); or
- > the third party lacks the necessary mental capacity and, therefore, is unlikely to be able to provide their views.

## When will consultation be 'unreasonable'?

Consultation is not required under ss 33 or 35 where an agency or Minister is satisfied that consultation would be reasonably likely to –

- > endanger the life or physical safety of the relevant third party;
- > cause the relevant third party undue distress; or
- > otherwise be unreasonable in the circumstances.

What is unreasonable will depend on the particular circumstances of a matter.

Examples of when it may be unreasonable to consult include where –

- > there is a risk of harm, distress or anxiety to a person other than the third party (for example, the applicant); or
- > the third party is a 'child'<sup>6</sup>.

#### Practical Tip

Agencies and Ministers should keep complete and accurate records of their decisions and actions with respect to consultation. A failure to consult may result in a complaint to the Information Commissioner.

A final note of the information available to an agency or Minister, and their reasoning process in determining that consultation was not 'practicable', may assist in expeditiously dealing with a complaint.

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<sup>4</sup> See *Re Schubert and Department of Premier and Cabinet* (2001) 19 VAR 35; *Coulston v Office of Public Prosecutions Victoria* [2010] VCAT 1234.

<sup>5</sup> Noting the availability of further extensions by agreement with the applicant.

<sup>6</sup> Note that s 5 of the FOI Act defines a 'child' as a person under the age of 18 years.

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## Further Information

### Visit our website, call or email us:

- > [www.ovic.vic.gov.au](http://www.ovic.vic.gov.au)
- > 1300 842 364 (1300 VIC FOI)
- > [enquiries@foicommissioner.vic.gov.au](mailto:enquiries@foicommissioner.vic.gov.au)

### Other related resources include:

- > Online module and webinars on the amendments;
- > Consultation and Notification Flowchart;
- > Tracked changes version of the FOI Act.

*Disclaimer: This fact sheet does not constitute legal advice and should not be used as a substitute for applying the provisions of the Freedom of Information Act 1982, or any other legal requirement, to individual cases.*