



Office of the Victorian
Information Commissioner

Information Access Series

*Working with OVIC –
consultation and notification
under the Freedom of
Information Act*

Seminar 5
28 March 2019

Presentation Overview

- Consultation under the FOI Act
- Practicability and reasonableness of consultation
- OVIC's notification requirements
- Hints and tips

Consultation under the FOI Act

- When processing an FOI request, Agencies and Ministers are **required** to consult relevant third parties when considering the application of certain exemptions.
- **Timeframes and extensions of time** – While decision makers must notify an applicant of a decision no later than 30 days after the date a valid request is received, they may allow themselves up to a further 15 days under s 21(2)(a) because:
 - (a) third party consultation is being undertaken; or
 - (b) will be undertaken.
- Section 21(4) requires the Applicant to be notified of the extension of time.

Which exemptions require consultation?

Section	Exemption
29	Documents containing matter communicated by any other State
29A	Documents affecting national security, defence or international relations
31	Law enforcement documents
31A	Documents relating to IBAC
33	Documents affecting personal privacy
34	Documents relating to trade secrets etc.
35	Documents containing matter communicated in confidence

What does consultation involve?

Section	Consultation provision
Section 33 – Personal affairs information	Section 33(2B)
Section 34 – Trade secrets etc.	Section 34(3)
Section 35 – Confidential information	Section 35(1A)

- Notify the third party of the request
- Seek their views on whether the information in the document should be disclosed
- Forfeiture of appeal rights when consenting to disclosure

Notifying a third party

- **Whenever possible:**
 - seek the views of third parties in writing
 - keep a written record of the third party's views
 - ask for reasons and where relevant supporting evidence
 - consider if practicable to give the third party a copy of the document (with exempt or irrelevant information deleted)
 - set reasonable timeframes for a third party to respond (What is reasonable?)



Privacy considerations

- Agencies should have regard to their obligations under the *Privacy and Data Protection Act 2014*
- Information Privacy Principle 2.1 – ***Use and disclosure*** provides:

Personal information can only be used and disclosed for the primary purpose it was collected, or for a secondary purpose that would be reasonably expected. It can also be used and disclosed in other limited circumstances, such as with the individuals consent, for law enforcement purposes, or to protect the safety of an individual or the public.

- The Information Privacy Principles are contained in [Schedule 1 of the *Privacy and Data Protection Act 2014*](#)

Privacy considerations

Consider whether an exception to the Information Privacy Principle 2.1 applies by:

- Obtaining the Applicant's consent to the disclosure of their personal information to the third party; or
- Establish that disclosure is for a related secondary purpose, for which the Applicant would reasonably expect the Agency or Minister to disclose their person information.

Hot Tip!

Consider including a privacy notice or “tick to consent” box in your FOI access request forms or acknowledgement letters.

With whom do you consult?

Section	Consultation
33	<p>With the person who is the subject of information in the documents</p> <ul style="list-style-type: none"> ○ If deceased, their next of kin; ○ If a child (s 5(1) - person under the age of 18), their parent or guardian.

EXCEPTIONS TO CONSULTATION

Section 33(2C) – an Agency or Minister is not required to notify a person if–

- (a) reasonably likely to endanger the life or physical safety, cause that person undue stress, or is otherwise unreasonable in the circumstances; or
- (ab) the person notified is a primary person and notification would risk that person's safety from family violence; or
- (b) it is not practicable to do so

With whom do you consult?

Section	Consultation
34	With the financial, commercial or business undertaking whose information is contained in the documents.
35	With the individual or Agency that communicated, or on whose behalf the information was communicated in confidence.

EXCEPTIONS TO CONSULTATION

- Section 35(1B) – an Agency or Minister is not required to notify a person if–
- (a) the notification would be reasonably likely to endanger the physical safety of that person, cause undue distress, or is otherwise unreasonable in the circumstances; or
 - (b) it is not practicable to do so.

Third party views



Consent to release information

- No right of appeal to VCAT
- Not required to notify the third party of your decision to release information



No consent to release information

- An objection from a third party is a factor to be considered in your final decision, not determinative
- If you decide to release the information you must:
 - notify the third party of your decision
 - inform them of their right to appeal

Applicant's Access to Documents

- The Applicant is to receive documents only after the third party's review period has expired – 60 days.
- Allow a few extra days for postal applications to VCAT.

When is it 'impracticable' or 'unreasonable' to consult?

Practicability	Reasonableness
<ul style="list-style-type: none"> • The person (or their next of kin) cannot be located • The person's capacity to consent • The age of the document • Your Agency's resources (subjective consideration) 	<ul style="list-style-type: none"> • Endangerment to life or physical safety • Exposure to family violence • Undue stress or anxiety
<p>Remember to clearly document the reasons why you chose not to consult</p>	



OVIC's notification requirements

Section 49P(5)

The Information Commissioner is required to provide notification of its decision where:

- a third party or undertaking did not consent to the release of their information following consultation with the agency or Minister;
- the Information Commissioner decides to release information claimed to be exempt under ss 33(1), 34 and 35; and
- it is practicable to do so

Following a review OVIC will...

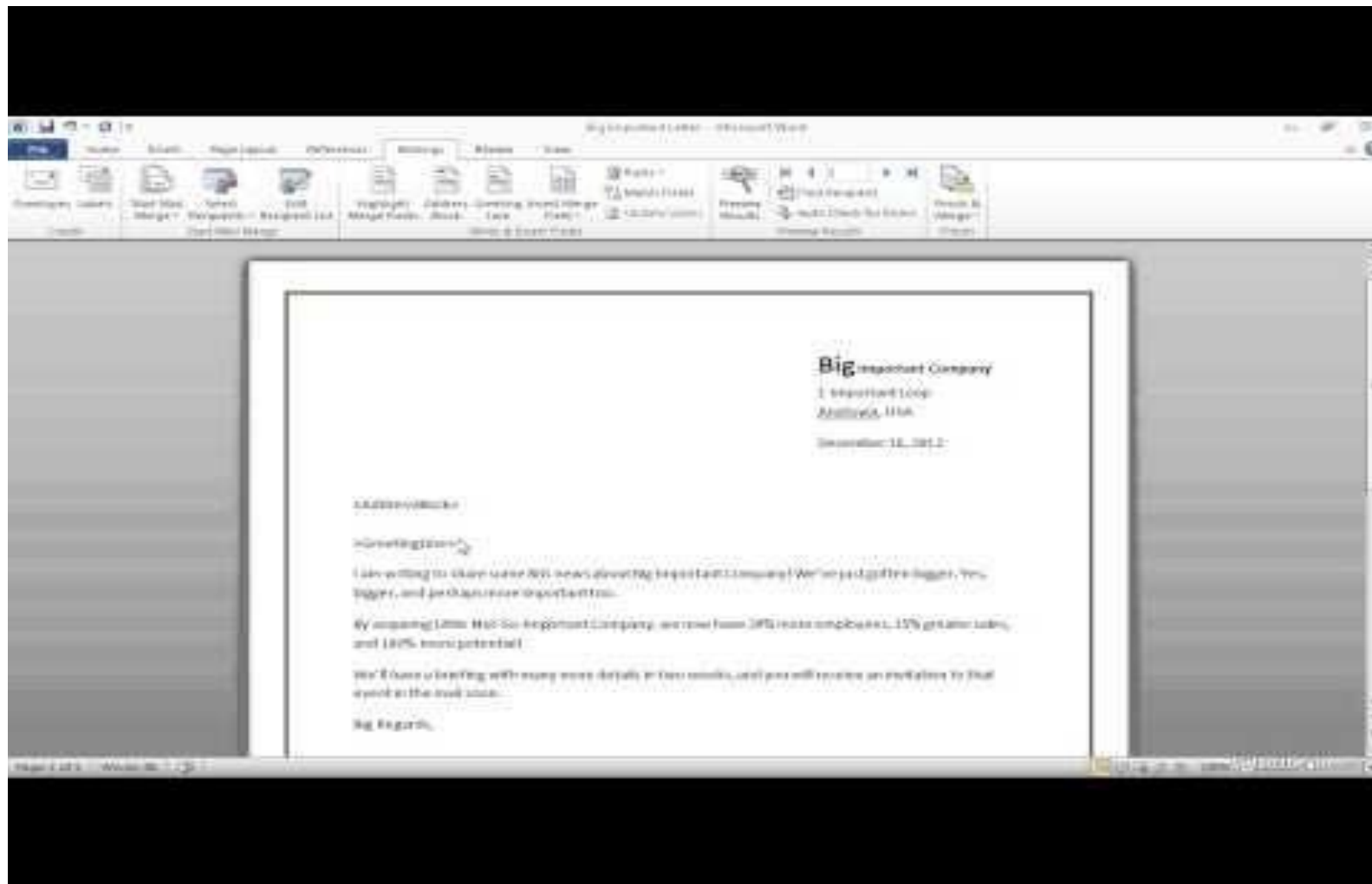
- Provide a brief description of the information being released
- Notify the third party of their review rights
- Include a factsheet for third parties

OVIC does not consult – we notify

Hints and Tips

1. Plan the amount of time needed to consult with various third parties
2. Informal methods of consultation (telephone, email and file notes)
3. Encourage third parties to provide relevant reasons
4. Identify the Applicant
5. Does the Applicant require third party information? Re-scope?
6. Help - the third party has not responded to my consultation request!
7. Record the consultation process

Mail Merge



Questions?

Next Seminar in April: Section 17 of the FOI Act

Resources

Consultation and notification factsheet

- <https://ovic.vic.gov.au/wp-content/uploads/2018/08/Consultation-and-notification-guide.pdf>
- Professional Standards available to view on OVIC website (draft format) <https://ovic.vic.gov.au/freedom-of-information/professional-standards/>
- Third party consultation flow chart <https://ovic.vic.gov.au/wp-content/uploads/2018/08/Third-Party-Consultation-Flowchart.pdf>

