

1. Your rights

You have rights to access government information and to correct your personal information held by public sector organisations*. NT public sector organisations have a responsibility to handle your personal information in a way that protects your privacy. The *Information Act* says:

- If you want to **access** information, you can make a 'freedom of information' application to the public sector organisation that you believe holds the information.
- If you want to **correct** information, you can write to the public sector organisation that you believe holds the information and request they make a correction.
- If you feel your **privacy** has been breached, you can contact the public sector organisation that you believe has breached your privacy and request that they fix the breach and reach a resolution with you.

* **public sector organisations** are NT government bodies including NT government departments, agencies and other bodies created by NT legislation, and local government councils and shires.

For more detail about how to make these applications and how the applications should be handled by public sector organisations, see our further guidelines (www.infocomm.nt.gov.au).

2. Review of a decision by a public sector organisation

Access to information

If you are unhappy with a public sector organisation's response to your request to **access** or **correct** information, you should first write to the organisation and request it to review its decision. This is called an 'internal review'. The organisation is required to look at the decision it made and consider whether it was correct or whether it should be changed. The person who will review the decision will be a different person from the person who made the first decision. You need to go through the internal review process before you can make a complaint to the Information Commissioner.

Privacy

If you are unhappy with a public sector organisation's response to your **privacy** concerns, you can complain to the Information Commissioner. You do not have to ask the organisation to do an internal review, but you do have to have raised your privacy concerns with the organisation and given it a reasonable chance to respond.

3. Complaining to the Information Commissioner

Once you have been through the internal review process (except for a privacy matter, where internal review is not required), you may make a complaint to the Information Commissioner. You must make a complaint to us about access or correction within **90 days** from the date the organisation notified you of their decision to refuse access or correction. You have **12 months** to

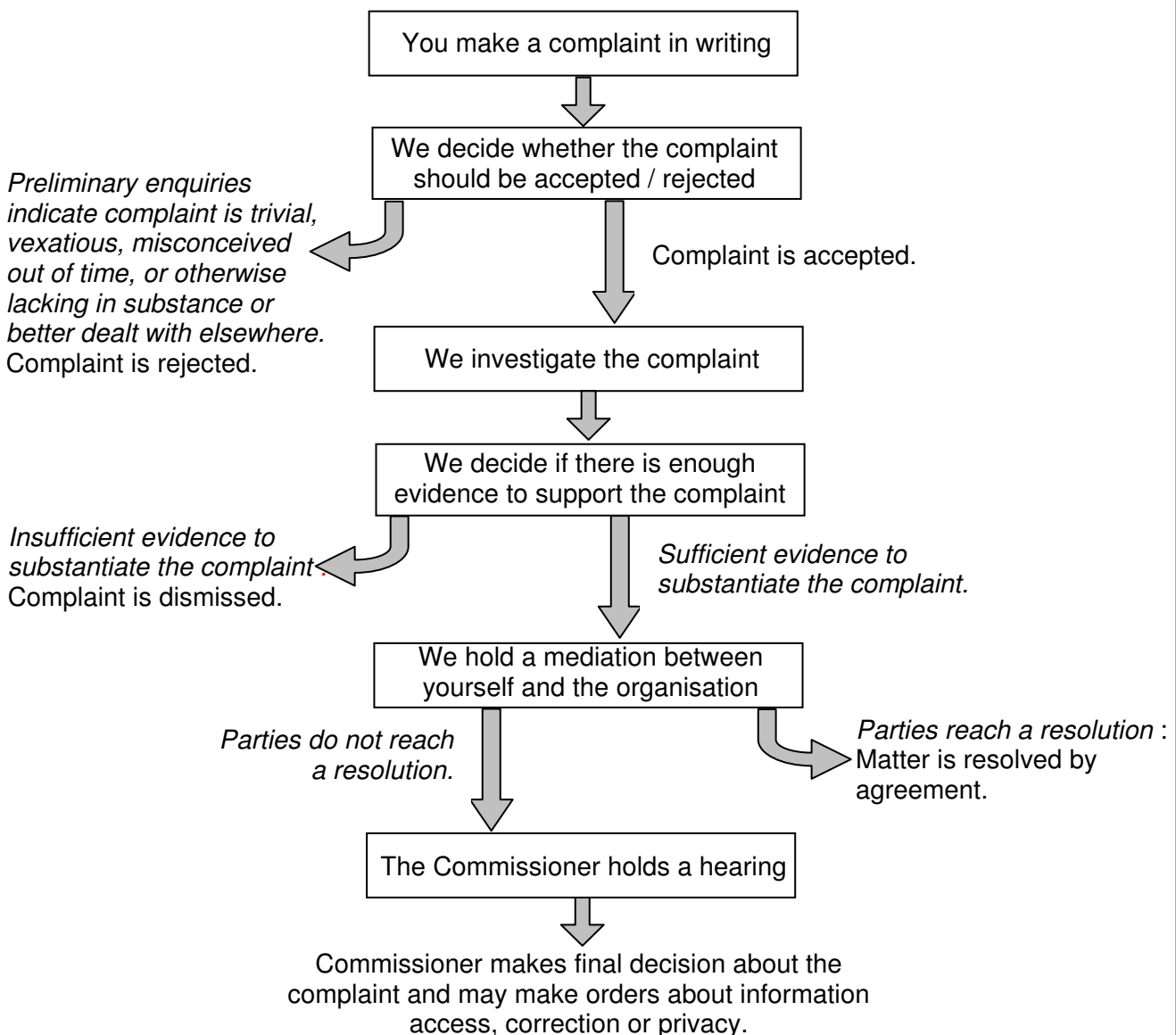
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complain to us about an interference with your privacy from the date you became aware of that interference.

This guideline refers to 'the Commissioner' as the person who handles your complaint, but it may be another person to whom the Commissioner has delegated powers to handle complaints and make decisions under the *Information Act*.

4. What happens when you complain to us?

This flowchart gives you an overview of the process we use when you make a complaint to the Information Commissioner. The rest of the guideline takes you through the process in more detail.



5. How to make a complaint to the Commissioner

You need to make your complaint in writing. You can use the forms available or write your own letter. Ring us (1800 005 610), email us (infocomm@nt.gov.au) or visit our website (www.infocomm.nt.gov.au/forms.htm) to obtain the right form:

- Use the 'Applicant Complaint to the Commissioner' form to complain about a response to your request for **access** or **correction**.
- Use the 'Privacy Complaint to the Commissioner' form to complain about a response to your **privacy** matter.

6. What happens after you make a complaint

You will receive a letter from us acknowledging receipt of your complaint within 14 days. Once you have made a complaint to us, you are referred to as 'the complainant' in the matter, and the organisation you are in dispute with is referred to as 'the respondent organisation'.

Complaints are handled by the Commissioner or by a complaints officer who must make a decision about whether it should be accepted. The office has 90 days to decide whether to accept or reject the complaint. In order to make this decision, the office may request that the complainant attend our office to provide information, or email or post us documents. We may also talk to the public sector organisation about the complaint and its response.

The complainant receives a letter telling about whether the complaint has been accepted or rejected. If it has been rejected, the letter will set out the reasons for the rejection. If you are a complainant who believes your complaint has been rejected improperly, you may wish to seek legal advice to decide whether you should appeal the decision to the Supreme Court.

7. If a complaint is accepted, we investigate

The Commissioner is required to investigate accepted complaints. The Commissioner expects the parties to assist this process by providing relevant information within the time requested.

Investigations into information access or correction matters

For complaints concerning information access or correction, the Commissioner will usually request the respondent organisation to provide copies of the following documents within a specified time:

- a. The complainant's original application.
- b. The organisation's response in accordance with section 19 or 32 of the Act.
- c. The complainant's request for review.
- d. The organisation's response to the complainant in accordance with section 39 of the Act.
- e. If the respondent organisation's reasons for refusing access could not be provided to the applicant in full (for example, because to do so would reveal exempt information), the internal document setting out these reasons in full.
- f. The schedule of documents located, showing which pages were released in part or in full, and the exemptions relied upon.

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- g. The information located that was within the scope of the complainant's application for access or correction.
- h. If information was partially released, copies of the documents as edited for release.
- i. If information was corrected, documents showing the changes made.
- j. If the complaint suggests that the respondent organisation has not made all reasonable efforts to locate the information, the organisation's reasons for concluding that all reasonable efforts had been made to locate the information.

If the respondent organisation does not provide these documents to the Commissioner within the time period specified, the Commissioner will make a *prima facie* decision in the absence of this information.

Extensions of time to comply with the Commissioner's requests

The respondent organisation may seek an extension of time to provide the documents. In making a decision whether to grant an extension of time, the Commissioner will take into account the following matters:

- a. The urgency of the complainant's request.
- b. The capacity of the respondent organisation to respond to the request. This means the capacity of the organisation as a whole, not just the capacity of the individual within the organisation who is handling the matter.
- c. That the role of the respondent organisation is to be a 'model litigant' and to assist the Information Commissioner in good faith to reach a fair and timely outcome, rather than focusing on defeating the complaint.
- d. Whether the documents should already exist as a result of handling an application in accordance with the *Information Act*. The complainant ought not to be penalised for an organisation's poor record keeping and decision making processes.
- e. Any other matters which may be relevant.

Requests for other documents

In addition to the documents listed above, the Commissioner may also seek further documentation and information be provided by the complainant or the respondent organisation within a reasonable time. The Commissioner is entitled to full and free access at all reasonable times to the records of a public sector organisation under the *Information Act*, and may require a public sector organisation to produce a record or answer a question.

If further documentation or information is not provided within the specified time, and no extension of time has been obtained, the Commissioner may issue a *prima facie* decision in the absence of this information.

8. The *prima facie* test: is there enough evidence?

After investigation, the Commissioner or Commissioner's delegate must make a decision as to whether there is enough evidence for the complaint to proceed. This is known as the '*prima facie* decision', and its purpose is to check if a complaint has substance before proceeding to mediation or hearing. A complaint has substance if the available evidence is sufficient for the complainant to have an arguable case at hearing.

For example, the test is satisfied if it appears that the complainant has an arguable case that:

- a. the organisation's interpretation of the Act is wrong in law;
- b. the organisation has not articulated adequate reasons for applying an exemption;
- c. the organisation has applied an exemption without an adequate factual basis to do so;
- d. the organisation has breached an information privacy principle;
- e. the organisation has not corrected information that is inaccurate, incomplete or out of date;
or
- f. the organisation has disadvantaged the complainant by failing to comply with the Act.

9. The meaning of 'sufficient evidence' at the *prima facie* stage

Complaints about refusal of access to information

When deciding whether there is sufficient evidence to substantiate a complaint that the respondent organisation has refused access to information, the Commissioner will bear in mind that there is a right to access government information, and that at the hearing stage the onus will be on the organisation to prove that access should be refused.

If the respondent organisation does not provide clear and sound reasons for refusing access, and relevant supporting evidence, the Commissioner will be likely to consider that this constitutes sufficient *prima facie* evidence to substantiate the complaint.

Complaints about correction of information

When deciding whether there is sufficient evidence to substantiate a complaint that a respondent organisation has not corrected personal information as requested, the Commissioner will bear in mind that there is a right to correct personal information if the information is inaccurate, incomplete or out of date.

However at the hearing stage, the onus will be on the complainant to prove to the Commissioner's satisfaction that the information ought to be corrected.

Complaints about privacy

When deciding whether there is sufficient evidence to substantiate a complaint that an organisation has breached the information privacy principles, the Commissioner will bear in mind that at the hearing stage the onus will be on the complainant to prove to the Commissioner's satisfaction that the privacy breach occurred.

10. Contested questions of fact and law at the *prima facie* stage

Sometimes the parties will not agree on what happened, and will not agree about the correct interpretation of the law. It is not the *prima facie* decision maker's role to make a decision about questions of law or fact which are disputed, to make decisions as to the credibility of witnesses, or to make decisions about the weighting of factors when applying the 'public interest balancing' test. These matters will be determined by the Commissioner if the complaint goes to hearing.

The *prima facie* decision maker asks only: if the evidence and the law were interpreted in a way which was most favourable to the complainant, would it be possible for the complainant to succeed at hearing? If the answer is yes, then there is sufficient *prima facie* evidence to substantiate the complaint.

11. Making the *prima facie* decision process fair

Both the complainant and the organisation will be given the opportunity to provide information to the Commissioner to support their position.

The Commissioner recognises that:

1. The Commissioner has a duty to assist persons to exercise their legal rights under the *Information Act*.
2. A complainant may not be in a position to raise many relevant arguments if the complainant cannot see relevant information held by the organisation.

To this end, the *prima facie* decision maker should consider arguments which could be relied upon by a complainant even if the complainant has not specifically identified those arguments, where it is necessary to consider those arguments to make the *prima facie* decision.

The respondent organisation will be provided with a copy of the complaint made to the Commissioner. Where possible the public sector organisation will be alerted to any arguments the *prima facie* decision maker considers need to be addressed before a *prima facie* decision is made.

When providing submissions, a respondent organisation should be aware that it is not enough to argue that its decisions have been reasonable or that they may be justified. To dismiss the complaint at the *prima facie* stage, the Commissioner has to be satisfied that even taking the complainant's arguments at their highest, the complainant has no realistic prospect of success at hearing. The organisation should be aware that this is a fairly low test for the complainant.

If the Commissioner intends to find that there is insufficient evidence to substantiate the complaint, the Commissioner will invite the complainant to make a written submission as to why the complaint should not be dismissed and will have **28 days** to do so. The Commissioner may grant an extension of time at the request of the complainant, but only if this is appropriate in all the circumstances. If the complainant fails to make a written submission within the specified time, the Commissioner will dismiss the complaint.

If the complainant makes a written submission within the specified time, the Commissioner will consider the submission before making a decision as to whether the *prima facie* test is made out. If, after considering the complainant's submission, the Commissioner decides that the *prima facie* test is made out, the Commissioner will provide a copy of the complainant's written submissions to the respondent organisation, so as to allow the organisation time to consider the arguments prior to mediation or hearing. In the meantime, the *prima facie* decision will be issued.

12. Informal resolution

A complainant may withdraw a complaint at any time by writing to the Commissioner. The respondent organisation should consider whether it would be beneficial to negotiate with the complainant to settle the matter. These negotiations can be initiated by the parties at any point.

The Commissioner will encourage parties to negotiate, but will not participate in the negotiations until the matter reaches the stage of mediation. If both parties agree that further negotiation would be useful, the Commissioner will be receptive to extending any relevant timeframes to allow those negotiations to take place.

When negotiating, parties should be aware that as a general rule, each party must pay their own costs of the proceeding. This may involve costs in seeking legal advice, legal representation, or copying documents. The Commissioner can order a party to pay the other party's costs associated with the hearing in exceptional circumstances. However, the Commissioner cannot order a party to pay any costs that were not associated with the hearing, such as the costs of mediation. Both parties should consider whether the benefits of pursuing the matter are likely to outweigh the resources required to pursue or defend a matter through the complaints process.

13. Written decision at the end of the investigation stage

The Commissioner will issue a written *prima facie* decision, setting out the reasons why there is sufficient or insufficient evidence for the matter to proceed. This decision may not consider every legal argument that may eventually be raised at hearing, but need only establish that the complainant's case had sufficient evidence to proceed to the next stage. However, the *prima facie* decision may serve the function of alerting the parties to potential legal arguments or difficulties, as well as other relevant matters.

Sometimes the *prima facie* decision will contain exempt information, or may reveal whether the existence of information that the organisation has claimed can neither be confirmed nor denied exists. In this situation, the Commissioner will keep a written record of the full *prima facie* decision, but provide the complainant with a version of the decision that does not prematurely reveal information that the respondent organisation has refused to release.

14. Mediation

The Commissioner is required to conduct mediation before a matter goes to hearing. Mediation may be conducted by means of telephone conversation, correspondence, face to face meetings, or some combination of these methods. The Commissioner may choose to conduct the mediation personally, or for a delegate to conduct the mediation. Alternatively, the Commissioner may allow the parties to agree upon a mediator.

Who participates in the mediation stage?

In most cases, the complainant will be expected to participate in person. If the complainant is a child, has a disability, or is deceased, another appropriate person can appear on the complainant's behalf. The respondent organisation must be represented by a person with the legal authority to represent the organisation. This might be the Chief Executive Officer, an appropriate delegate, or a legal practitioner acting on behalf of the organisation. In the case of a face-to-face mediation, a delegate is not appropriate unless he or she brings a written authority stating he or she has the power to make offers on behalf of the organisation.

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A friend or legal practitioner may accompany either party, but there should be no more than two people on either side.

Preparing for the mediation stage

Before participating in mediation, both parties should think about the issues and what each wants to say. Focus less on the law, and think about what you want from the other party and what you can offer them in return. You are not limited to discussing matters arising under the *Information Act*. Think about concerns the other party might raise and be prepared to discuss these concerns.

Be realistic. Think about your alternatives if mediation does not work. Is a hearing likely to get you the result you are after? This can help you work out how much you are prepared to compromise at the mediation.

If you are participating in a face-to-face mediation, you should set aside at least four hours, and ensure this time will be uninterrupted so it can be given your full attention. You will be required to switch off your mobile phone. If you drive your car, park in a place where you do not have to worry about getting a parking fine.

What happens in the mediation stage?

The mediator facilitates a structured discussion where both parties can air their concerns and generate creative options for resolving the matter by agreement. At the start of the mediation stage, the mediator will explain how the mediation process will proceed.

Both parties will be given the opportunity to put forward their view. Usually the complainant will be given the opportunity to speak first. Parties must be prepared to both speak and listen.

Mediation is confidential

The mediation process is confidential. Anything said, recorded or done during the mediation is not admissible in any proceedings whatsoever, including the hearing of this matter before the Commissioner.

Mediation outcomes

If the matter is not resolved within the time allotted for mediation, the mediator will make an assessment about whether it will be productive to extend the mediation process. The mediator will seek the views of the parties in making this decision. The mediator will then either arrange further mediation activities, or conclude the mediation process.

At the end of mediation, the mediator issues a certificate setting out the outcome of the mediation. If the mediation resolves the matter, orders can be issued that reflect the mediated outcome. If the complaint is not resolved by mediation, the Commissioner will conduct a hearing.

15. Hearing

The Commissioner may issue directions on how a hearing is to be conducted on a case-by-case basis.

The Commissioner will be able to draw on all evidence, submissions, and information provided in the course of the complaint (other than anything said, recorded, or done during the course of mediation).

Each party will be given the chance to make further submissions and present further evidence in support of their case. This will usually be done by allowing each party to lodge further submissions or provide written evidence in the form of affidavits or statutory declarations. If the Commissioner considers that there is a need for further exploration of the issues, or oral examination of witnesses, a hearing in-person may be arranged. All information and materials lodged by one party will be provided to the other parties, except where this would disclose information claimed to be exempt.

The Commissioner can order a party to pay the other party's costs associated with the hearing in exceptional circumstances, however the Commissioner cannot order a party to pay any costs that were not associated with the hearing, such as the costs of mediation.

After the hearing, the Commissioner will provide a written decision and reasons for the decision to the parties, and publish those reasons.

16. Cases

In forming the views expressed in this guideline, the Information Commissioner has considered the following cases:

North Ganalanja Aboriginal Corporation and Anor v Queensland and Ors (1996) 185 CLR 595.

Pat Mubwandarikwa v Anti Discrimination Commissioner and Ors [2007] NTMC 071.



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This guideline is not a substitute for reading the *Information Act*. The views expressed are preliminary, and the Information Commissioner is open to alternative arguments by a member of the public or a public sector organisation. This guideline does not provide legal advice.