

Informal Resolution

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1 Overview

This guideline examines the informal resolution methods that are used by the Information Commissioner in processing external review applications under the *Right to Information Act 2009* (Qld) (**RTI Act**) and *Information Privacy Act* (Qld) (**IP Act**).

This guideline also refers to the timeframes that are generally applicable to the informal resolution stage of the external review process. For more detailed information on timeframes involved in all stages of the external review process, please refer to the Timeframes Guideline.

2 Informal resolution

Informal resolution is a term used by the Office of the Information Commissioner (**OIC**) to collectively describe the methods that are used during the external review process to resolve external review applications, or particular issues raised in applications, on an informal basis.

If an external review is resolved informally, the Information Commissioner must give each participant notice that the review is complete.¹ The external review will be taken to be complete at the date of the notice.²

If all issues in a review are resolved informally, the Information Commissioner is not required to make a written decision.³ However, where certain issues raised in an application are not informally resolved, a written decision will be made on those remaining issues.⁴

2.1. Objectives

The objectives of informal resolution processes are to:

- resolve or reduce the issues in dispute in a review
- avoid lengthy legalistic processes
- use resources efficiently
- resolve disputes at an early stage in the review
- produce outcomes that are lawful, effective and acceptable to the participants and the Information Commissioner
- enhance participant satisfaction with the external review process.

2.2. Factors to consider

Whether informal resolution methods are used in a review will depend on the following:

- capacity of the participants to participate effectively
- subject matter of the application
- volume and type of documents in issue
- any identified need for urgency
- likelihood of an agreed outcome or reduction of issues in dispute
- whether informal resolution may offer a more flexible outcome than a written decision
- whether issues raised in the review relating to exempt or contrary to public interest information require determination by written decision.

It may not be appropriate to use informal resolution methods in every review. Ultimately, the approach taken to process an external review application is within the discretion of the Information Commissioner.⁵

3 Early assessment and resolution

The RTI Act and IP Act require the Information Commissioner to identify opportunities and processes for early resolution of an external review application, including mediation, and to promote settlement of an external review application.⁶

¹ Section 90(4)(a) of the RTI Act and section 103(4)(a) of the IP Act.

² Section 90(4)(b) of the RTI Act and section 103(4)(b) of the IP Act.

³ Section 110(2) of the RTI Act or section 123(2) of the IP Act.

⁴ Under section 110(1) of the RTI Act or section 123(1) of the IP Act.

⁵ Section 95(1)(a) of the RTI Act and section 108(1)(a) of the IP Act

⁶ Section 90(1) of the RTI Act and section 103(1) of the IP Act.

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This requirement reflects Recommendation 95 of the Right to Information Report.⁷

The early assessment and resolution process detailed below is one of the ways in which the Information Commissioner satisfies this requirement.

3.1. *Early assessment and resolution team*

On receipt of an external review application, the Information Commissioner will refer the application to a team of staff within the OIC known as the early assessment and resolution team (**EAAR Team**).

The EAAR team is comprised of an Assistant Commissioner and Review Officers and is supported by registry staff, particularly in the initial processing of applications.

The purpose of the EAAR Team is to improve timeliness in the processing of external review applications and to achieve consistency in the approach taken to manage reviews.

The key **goals** of the team are to:

- complete administrative processing of applications on the same day they are received by the OIC
- ensure applications that present opportunities for early settlement are identified and appropriate steps taken to informally resolve the review where possible
- improve the quality of jurisdictional decision making through quicker, consistent application of the provisions⁸
- resolve straight forward reviews in under 90 days.

The EAAR Team **achieves** these goals by:

- obtaining initiating documents from an agency or Minister as soon as possible following receipt of an application, either by facsimile or email
- determining whether applications fall within the jurisdiction of the Information Commissioner and accurately identifying the decision to be reviewed
- dedicating resources to preparation of same-day notification of review correspondence and, where appropriate, asking for initiating documents in that correspondence⁹
- making an early call for submissions from participants, where appropriate
- including in the notification correspondence sent to agencies/Ministers and acknowledgment correspondence sent to applicants, guidance about the information sought by the Information Commissioner and the relevant issues raised in the review, where appropriate

⁷ Report delivered by Dr David Solomon (and the Independent Review Panel) to the Queensland Government on 10 June 2008 following a review of Queensland's freedom of information laws (**RTI Report**). Recommendation 95 was supported by the Queensland Government in its response to the RTI Report released 20 August 2008.

⁸ Section 88 of the RTI Act and section 101 of the IP Act.

⁹ Sent under section 92 of the RTI Act or section 105 of the IP Act.

- accurately identifying the scope of the application, and the possibility for early resolution of issues at an early stage of the review

3.2. Early resolution process

The process followed by the EAAR Team is referred to as the early assessment and resolution process. It reflects a conciliation based approach to resolving reviews.

The actual approach taken by the EAAR Team during this process is very **flexible** and will be adapted to take account of:

- particular issues raised in the review
- special needs of applicants
- the need to achieve a balance between efficient informal resolution and the protection of the participants’ legal rights
- any power imbalances between the parties
- the need for security of exempt or contrary to public interest information
- current and historical relationship between the participants
- cultural factors, eg language background of participants
- risk factors, eg personal safety of participants
- whether participants are represented.

The box below sets out important ground rules that guide the early resolution process.

GROUND RULES FOR EARLY RESOLUTION

- All information provided and any actions taken by participants during the early resolution process may be taken into account by the Information Commissioner when making a written decision
- Participants engage in early resolution and agree to any settlement on a voluntary basis
- The Information Commissioner may assist participants by providing information on the application of the law to their case—but will not provide legal advice to participants
- An outcome achieved through early resolution may not necessarily be the outcome achieved by a written decision, eg an applicant may get access to more information in an informal settlement than under a written decision
- Settlement completes a review in that an applicant cannot, at a later date, re-open any issues in the review, even if the settlement did not resolve those issues.

Generally, the early resolution process will involve the following:

- initial assessment
- telephone consultations and/or meetings with participants
- referral of external review file to the Review Team.

These stages are examined in detail below.

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3.2.1. Initial assessment

On receipt of an application, the EAAR Team will initially assess whether the review or specific issues raised in the review are suitable for informal resolution by examining:

- the application
- the decision(s) made by the agency or Minister
- any other relevant documents, including legislation.

This stage is generally completed within **10 business days** of receipt of the application.

3.2.2. Telephone consultations

Following an initial assessment of the documents, if the EAAR Team identifies opportunities for early resolution of an external review, a member of the team will contact the participants by telephone to:

- discuss issues raised in the review and any relevant background matters
- attempt negotiation of discrete issues, or in some cases, the entire review
- where possible, provide an oral preliminary view on issues raised in the review.

The EAAR Team may need to conduct several telephone consultations with participants before a specific issue in the review, or the entire review, is resolved. This process reflects a conciliation-based approach as it involves an EAAR Team member:

- engaging in discussions with participants
- putting forward and negotiating options and possible solutions with participants
- seeking participants' agreement to resolution of the review on the basis of those discussions and negotiations.

Conducting telephone negotiations in the early stages of a review can assist in:

- reducing the issues in dispute
- negotiating discrete issues
- achieving settlement of the entire review.

Telephone consultations are usually held within **20-30 business days** of receipt of the external review application.

An example of a resolution achieved through a series of telephone consultations is set out below.

Case Study 1

Party Z applies to a local council for access to a document containing a list of properties identified for potential acquisition for a council project.

The council refuses to grant access to any information in the document on the basis that its disclosure would be contrary to the public interest as it contains personal, commercial and confidential information.

Party Z applies for external review and explains in their application that they do not seek access to personal or confidential information but are interested in the areas in which the properties are located.

In the early assessment and resolution process, the EAAR Team identifies that the properties are listed in the schedule according to suburb/area name.

An EAAR Team case officer phones the council to seek their agreement to releasing the names of the suburbs only. The council agrees to this approach. The case officer then phones Party Z to inform them of the agreement reached with the council.

Party Z is satisfied with this outcome and, following receipt of the document containing the suburb names, agrees to finalise the external review application on that basis.

3.2.3. Meetings with participants

The EAAR Team also holds face to face meetings with participants as part of the informal resolution process. Such meetings are used in addition, or as an alternative to, telephone consultations. Meetings are generally used to achieve the same objectives as telephone consultations in terms of negotiating issues in the review and reaching an agreement between participants to resolve the review or particular issues.

Meetings involving all participants in a review are generally held at the OIC's premises. However, OIC staff may attend an agency's offices to conduct a meeting with agency staff in certain circumstances, such as those outlined below.

Attendance on an agency

The EAAR Team may identify that further information about an agency's document management system is required in order to understand why the agency undertook particular searches for documents sought in the access application. In such cases, the EAAR Team may consider that a physical examination of the agency's record keeping processes and document management system would assist in gaining a better understanding of the agency's requirements and processes and therefore, may attend the agency's offices for this purpose and to negotiate associated issues in the review.

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Meetings which involve all participants are not suitable in some reviews, eg where there is an acrimonious relationship between participants or a participant feels that their safety is at risk. The Information Commissioner will decide what is appropriate in the circumstances of the review and conduct the review accordingly.

3.2.4. Referral to the Review Team

If, following telephone consultations and/or face to face meetings, the EAAR Team decides that:

- issues in the review are not able to be resolved through the early assessment and resolution process and/or
- further investigation and/or research is required in relation to certain matters,

the EAAR Team will generally forward the external review application file to an officer in the Review Team who will process the application and generally, proceed to issuing a written preliminary view to the participants. The preliminary view process is set out in section 4 of this guideline.

INFORMAL RESOLUTION BY REVIEW TEAM

The Review Team is not prevented from attempting to informally resolve a review or particular issues over the phone, if an opportunity for such resolution is later identified.

Generally, if an informal resolution has not been achieved within **30 business days** of receipt of the external review application, the application will be transferred to the Review Team for further processing and completion.

However, if there are particular circumstances which warrant the EAAR Team continuing to process an external application beyond 30 business days, the EAAR Team may retain the file until it has had the opportunity to conduct/finalise negotiations with participants. Examples of such extenuating circumstances may include:

- an informal resolution is close to being reached following initial discussions with participants but negotiations have been delayed pending the outcome of a related court/tribunal proceeding
- the applicant has indicated a willingness to engage in negotiations but is non-contactable for a period of time due to them being overseas/in hospital.

In a small number of cases, the EAAR Team may transfer a review file to the Review Team without attempting early resolution of the review. This may occur where:

- one or more participants has indicated, at the start of the review, that they are not willing to engage in any sort of informal resolution

- the history of applications between the participants indicates that early resolution will not succeed
- the review raises complex or novel legal issues which require significant research.

If a file is transferred to the Review Team without early resolution having been attempted, the Review Team will commence the preliminary view process as set out in section 4 of this guideline.

4 Preliminary view

The Information Commissioner also facilitates informal resolution of an external review by providing participants with a **preliminary view**.

A preliminary view may be given to participants in writing or orally in a telephone consultation or face to face meeting.

4.1. Purpose of a preliminary view

A preliminary view is not a decision—it is a view formed after the Information Commissioner (or delegated decision maker) has conducted an independent assessment of relevant documents and issues on the basis of all the information before them.

A preliminary view also serves as a tool to afford **procedural fairness**¹⁰ by giving any participant whose interests would be adversely affected by a decision of the Information Commissioner an opportunity to present their views¹¹ prior to a written decision being made.

Generally, a preliminary view is only provided to those participants to which the view is adverse. The Information Commissioner will, at the same time as conveying the preliminary view to the adversely affected participants, inform the other participants of the preliminary view that has been formed but will not generally ask them for submissions or any further information.

If a participant provides additional information or evidence in response to a preliminary view that supports their right of access to the documents (applicant) or exemption/contrary to public interest claim (agency or third party objecting to disclosure), the decision maker will reconsider the view in light of that further information—this may result in the view changing.

4.2. Examples

The boxes below set out examples of how preliminary views (both written and oral) are used by the Information Commissioner to informally resolve external reviews.

¹⁰ See section 5 of this guideline for an explanation of this concept and how it applies to the external review process.

¹¹ See section 97(2)(b) of the RTI Act and section 110(2)(b) of the IP Act.

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Case study 2 - Refusal of access

Party A seeks access to documents held by Agency X.

Agency X releases 10 documents to Party A but refuses access to two documents on the basis that they comprise information if disclosed could reasonably be expected to identify a confidential source of information (exempt information under Schedule 3, section 10(1)(b) of the RTI Act).

Party A applies to the Information Commissioner for external review of the decision of Agency X to refuse access to the two documents. The Information Commissioner obtains and examines the two documents to which Party A was refused access and forms the preliminary view that only certain parts of the documents contain exempt information.

The Information Commissioner sends a written preliminary view to Party A and Agency X and both parties accept the preliminary view in finalisation of the external review. The Information Commissioner asks Agency X to release the relevant parts of the documents to Party A in accordance with the preliminary view.

The external review is settled on an informal basis.

Case study 3 - Documents which do not exist

Party B applies for access to documents held by Agency Y.

Agency Y refuses Party B access to the documents sought on the basis that the documents do not exist because they were never created.

Party B applies to the Information Commissioner for external review on the basis that relevant documents do exist and should have been located by Agency Y. The Information Commissioner asks Agency Y to provide submissions setting out the searches it has undertaken for the documents and reasons why the documents sought by Party B do not exist.

Agency Y provides submissions in response to the Information Commissioner's request. The Information Commissioner examines the submissions and forms the preliminary view that the documents sought by Party B do not exist because they were never created.

The Information Commissioner holds a telephone consultation with Party B to discuss the submissions from Agency Y and to convey the preliminary view. In light of the further reasons provided by Agency Y, Party B accepts the preliminary view that documents do not exist in resolution of the review.

The external review is settled on an informal basis.

4.3. Submissions in response

If a participant does not accept a preliminary view, the decision maker will invite them to provide submissions in support of their case.

Submissions do not need to be extensive or be framed in legal terms—the purpose of obtaining submissions is to allow participants to express their views in their **own words**.

If participants prefer, or it is more convenient for them to do so, they may provide submissions over the phone or in a face to face meeting with a staff member of the OIC.

The box below sets out examples of the types of submissions that may be requested from participants to support their arguments in a review.

Submissions in response to a preliminary view

If an **applicant** does not accept a preliminary view that information is exempt or contrary to public interest information and wishes to pursue access to the information, the applicant should provide submissions and/or evidence which explains the reasons why they think the information should be provided to them and where possible, rebuts the exemption or contrary to public interest claims made by the agency or third party.

If an **agency or Minister** does not accept a preliminary view that information should be released to an access applicant and maintains exemption or contrary to public interest claims, the agency or Minister should provide submissions and/or evidence to support their claim that the information is exempt or contrary to public interest information.

If a **third party** does not accept a preliminary view that documents should be disclosed to an access applicant and maintains an objection to disclosure, the third party should provide submissions and/or evidence which explains their objections to release of the information and sets out why they consider the information is exempt or contrary to the public interest information.

In some reviews, the preliminary view may set out **specific issues** which a participant should address in their submissions.

The box below sets out specific matters which an applicant, who contends that searches for documents conducted by an agency or Minister have been inadequate, may be asked to address in their submissions.

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Submissions on a specific issue

If an applicant maintains that further documents falling within the scope of an access application should be held by an agency or Minister, they may be asked to provide a submission to the Information Commissioner which:

- sets out the grounds which they consider establish that the agency or Minister holds additional documents which within the terms the access application
- attaches copies of any relevant documentary evidence which supports their contention that further documents exist, and explains the relevance of any such documents
- specifies what additional searches they say the agency or Minister should reasonably be required to undertake in an effort to locate additional documents.

Once submissions are received from participants in response to a preliminary view, the decision maker will carefully examine those submissions. If the submissions do not persuade the decision maker to revise the preliminary view, the decision maker will then proceed to making a written decision which reflects the preliminary view.

The requirements relating to a written decision are set out in section 4.4 of the External Review Process and Requirements Guideline.

4.3.1. New evidence or issues raised in submissions

If submissions received from participants raise new evidence or identify further searches that need to be undertaken, the decision maker will then need further time to examine the new evidence and where necessary, conduct further research and request the agency to undertake additional searches.

Once the new evidence has been examined, research conducted and any necessary further searches undertaken, the decision maker may then issue a further preliminary view to participant(s) and invite their submissions in response. In some cases, this stage of the process may be conducted over the telephone to contribute to more efficient processing of the review.

The Information Commissioner aims to complete the preliminary view stage as efficiently as possible and by addressing all issues raised in the review in a single preliminary view, where possible. However, in some reviews, it can be necessary for the Information Commissioner to provide participants with two or more preliminary views, and request submissions in response to each, to ensure that all the evidence in the review has been addressed and sufficient searches have been undertaken for documents by the agency or Minister. Participants should be aware that where more than one preliminary view is needed in a review, this can result in the review process extending beyond the estimated timeframes that are generally allocated to the preliminary view process.

5 Procedural fairness

Procedural fairness (sometimes referred to as **natural justice**) is a term used to describe a set of obligations imposed on decision makers to ensure that:

- parties have a fair opportunity to prepare and present their case
- parties are given the opportunity to deal with adverse information that is credible, relevant and significant to the decision to be made¹²
- the decision is free from bias on the part of the decision maker
- parties are aware of the factors which the decision maker will take into account in making a decision.

Procedural fairness does not represent a set of rigid rules but rather, procedural standards. What is appropriate in terms of procedural fairness depends on the circumstances of a particular case.¹³

5.1. Application to the external review process

To the extent permitted by the RTI Act and IP Act, the Information Commissioner adopts the common law principles of procedural fairness in conducting external reviews.

Procedural fairness requirements relating to the conduct of an external review are also reflected in section 97 of the RTI Act and section 110 of the IP Act in relation to:

- allowing participants to make oral submissions
- adopting procedures that are fair, having regard to the obligations of the Information Commissioner under the RTI Act and IP Act
- ensuring that each participant has an opportunity to present their views to the Information Commissioner.

5.2. Non-disclosure of particular information

Certain provisions in the RTI Act and IP Act prohibit the Information Commissioner from disclosing:

- information that is claimed to be exempt or contrary to public interest information; or
- information the Commissioner considers may be protected by legal professional privilege.¹⁴

In light of the obligation to ensure non-disclosure of certain information, the Information Commissioner is given a corresponding power under the RTI Act and IP Act to receive evidence, or hear argument, in the absence of an access participant if it is necessary to do so to prevent disclosure to that person of information that is claimed to be exempt information or contrary to public interest information.¹⁵ This applies to evidence received both orally and in writing.

¹² *Kioa v West* (1985) 159 CLR 550 at 628-629 per Brennan J.

¹³ *Kioa v West*

¹⁴ Section 108(1) of the RTI Act and section 121(1) of the IP Act.

¹⁵ Section 108(2) of the RTI Act and section 121(2) of the IP Act.

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This requirement differentiates the Information Commissioner's processes from those of other administrative tribunals in which all the evidence filed by one party is provided to the other party either before or during the hearing.

In practice, the obligation means that the Information Commissioner may receive submissions from one participant in a review which cannot be provided to another participant, or which may have to be significantly edited, by the removal of information, before they are exchanged.

Information must be removed from submissions where its disclosure would risk bringing about the harm that a particular exemption or public interest factor favouring non-disclosure is intended to avoid.¹⁶

The example below illustrates how this obligation operates in the external review context.

Example

Party A applies for access to their medical records for the period of time they were resident in a mental health facility.

The Department of Health grants Party A access to certain information but refuses access to other information on the basis that is exempt information because its disclosure could reasonably be expected to endanger a person's life or physical safety (under schedule 3, section 10(1)(c) of the RTI Act).

In its submissions to the Information Commissioner, the Department specifically identifies the persons whose life or physical safety may be in danger if the information was disclosed and sets out the reasons raised by those persons for their expectations and/or fears for their safety.

The Information Commissioner is unable to provide Party A with a complete copy of the submissions from the Department because to do so would risk bringing about the consequences that the exemption in schedule 3, section 10(1)(c) is intended to avoid.

Accordingly, the Information Commissioner provides Party A with a copy of the Department's submissions with the exempt information deleted.

This requirement also means that in some reviews, the Information Commissioner will make decisions that information is exempt or contrary to public interest information without giving the party who is adversely affected by the decision an opportunity to make submissions. An example of such a situation is set out below.

¹⁶ *CDY and Queensland Police Service* (unreported, 31 March 2003) at paragraph 13.

Example

On the basis of submissions received from an agency in a review, the Information Commissioner decides that information to which the applicant seeks access is exempt under the RTI Act.

The Information Commissioner decides not to provide the applicant with a copy of any part of the agency's submissions because to do so would reveal exempt information.

Therefore, the applicant does not get an opportunity to respond to the specific evidence upon which the Information Commissioner is going to rely in making the decision.

The Information Commissioner is also prevented by the RTI Act from including any exempt information in the reasons for decision or decision.

However, due to the statutory obligation on the Information Commissioner not to disclose exempt information, these circumstances do not give rise to a breach of procedural fairness.

Some participants in the external review process experience the Information Commissioner's compliance with the statutory obligation to ensure non-disclosure of particular information as unfairness because they believe that they should have access to all information provided by another participant in order to have a fair opportunity to prepare and present their case.

However, as set out above, the Information Commissioner is prohibited by statute from disclosing particular information during an external review.

The following points summarise the general approach of the Information Commissioner to accepting and exchanging submissions in a review.

GENERAL APPROACH TO SUBMISSIONS

- The OIC requests that participants only include information in their submissions which can be provided to other participants
- Submissions from participants are exchanged wherever possible and in accordance with the RTI Act and IP Act
- If participants need to include exempt or contrary to public interest information in submissions, it is to be included in a form that can be easily removed before submissions are provided to other participants.

5.3. Providing a preliminary view

The obligation to afford procedural fairness does not necessarily require a preliminary view be provided to participants.

However, a preliminary view serves as a tool to set out the information that is presently before the decision maker (and upon which the decision is likely to

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be based) and provide participants with an opportunity to present their views and respond to the information in the form of written submissions.

In some reviews, procedural fairness requirements may be discharged simply by the applicant:

- being aware of any evidence that is adverse to their case
- being informed of the factors upon which the decision maker will base their decision
- having an opportunity to respond before a written decision is made.

In such cases, the Information Commissioner may not provide participants with a preliminary view.

As set out above, what is required in terms of procedural fairness will vary according to the circumstances of the case. The box below sets out circumstances in which the Information Commissioner may make a written decision without preceding it with the issue of a preliminary view to participants.

Example

Where a review concerns a discrete issue which has been the subject of numerous previous decisions of the Information Commissioner in the past, the Information Commissioner may:

- advise participants of the factors to be taken into account in making the decision in the review, and
- give participants an opportunity to provide submissions which address those issues at an early stage in the review.

Following receipt of the participants' submissions, the Information Commissioner may proceed to make a written decision without issuing a preliminary view to the participants.

6 Summary

In an external review, the Information Commissioner may use a variety of methods to achieve early resolution and to promote settlement of an external review.

Informal resolution methods are not necessarily suited to all types of external reviews and ultimately, how and if these processes are used is a matter for the Information Commissioner to decide based upon the circumstances of the particular review.

If an external review cannot be settled using informal resolution methods, the Information Commissioner will proceed to making a written decision in accordance with the RTI Act and IP Act.¹⁷

If you wish to read more about the processes and requirements relating to external review decisions, please refer to the External Review Process and Requirements Guideline.

7 Disclaimer

This guideline is intended to provide information on the informal resolution processes that may be used by the Information Commissioner during an external review. The information in this guideline is not intended to represent the way in which all external reviews are dealt with by the Information Commissioner as this will always depend upon the particular circumstances of each review.

To gain a comprehensive understanding of the external review process, stages and timeframes, this guideline should be read in conjunction with the External Review Process and Requirements Guideline and Timeframes Guideline. Those guidelines set out how the external review process operates, discusses the general requirements of the process and give an indication of the timeframes which may apply during the external review process.

If you have any comments or suggestions on the content of this document, please submit them to feedback@oic.qld.gov.au

Last updated 25 June 2009

Changes to legislation after the above date are not included in this document.

¹⁷ Section 110 of the RTI Act and section 123 of the IP Act.