TRANSCRIPT – *Third party consultation (online training)*

Slide 1 – 0:00

Welcome to the short refresher video on third party consultation. I'm Sharron Harrington from the Office of the Information Commissioner's Enquiries Service and I hope that you'll find this information valuable.

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Section 37 of the *Right to Information Act* and section 56 of the *Information Privacy Act* both require third party consultation in certain circumstances. I'm only going to be referring to the RTI Act throughout the rest of this video but please remember that all of this information applies to section 56 of the IP Act as well.

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Third party consultation is required on access applications under the RTI Act when an agency is going to give access to information which may reasonably be expected to be of concern to a third party. In those situations, an agency may only give access to the information if the agency has taken the steps which are reasonably practicable to consult. I'm just going to mention this here, in circumstances where there are no steps you can take to consult or you have simply exhausted all of the steps that are available to you – that's it, you're done. You can give access without undertaking a consultation. The Act does actually recognise that it's not always going to be possible to consult with the third party. When we are talking about third party consultation one of the most important things to remember is that consultation is not automatic.

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You must assess and decide. You must consider the threshold for consultation. You are obtaining a third parties' views. You are not seeking their permission to release the document. You must notify all relevant parties. You must defer access to the entire document. These are the 5 things I'm going to go through in this very brief video.

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Consultation is not automatic. Don't go through your documents, spy personal information and go "aha! Personal information! I must consult with that person immediately. Quick! To the consultation-mobile!"

You only consult on information if you are going to release it. Don't consult simply because you see a type of information that you know is problematic and that you want to get the third party's views on. The first thing you should be doing, in relation to that information, is looking at it and saying "am I going to release this or not?" If the answer is no – if it's the sort of information that you would never release – then there is absolutely no need to consult in relation to it. So the first thing you're going to want to do is assess the information and make a preliminary decision on it. Is this information that is going to be released? Unless the answer to that question is yes, don't consult. In some circumstances you might come down right on the fence. Those circumstances should be very rare. Do keep in mind

though, the Act does say where you come down on the fence you should release it. But it's understandable if you come right down on the fence where it's 50/50 for and against disclosure in those circumstances you might also want to consult. But as I said those circumstances should be few and far between.

Perform your assessment, decide if you're going to release it or not and *then* look at consulting. Do not simply consult based on the type of information you are looking at.

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Once you've looked at the information and you've gotten rid of all of the information you're not intending to release and all you have in front of you is information that you are going to send out the door to the applicant (or are highly likely to send out the door to the applicant) you still do not automatically consult on it. There is a threshold in the RTI Act. It says that you only consult on information the disclosure of which may reasonably be expected to be of concern. This is a low threshold, it's a very low bar to meet, but it is still a threshold that must be met. Just because you are going to release doesn't mean you automatically consult. You have to assess the information against the threshold in section 37 of the RTI Act.

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So the first thing to look at is: is this just standard information that no one could possibly be concerned about? Is it completely innocuous information? Is it information that is already in the public domain? Is it routine personal work information, is it information that is absolutely 100% going to be released; there's absolutely no grounds to hold it back? In a lot of cases, most cases in fact, routine personal work information is going to fall into that category – you're not going to consult on that.

Look at anything that the third party might have been told when that information was provided. Particularly where it was provided in response to a call for tenders or submissions. In some circumstances the call for tenders or submissions may specifically have addressed the release of this information under an RTI application and might have included words like "please include with your submission whether or not you want to be consulted should this information become subject to an RTI application". If the call for tenders or submissions did include words to that effect and the third party did not include anything indicating they wanted to be consulted in those circumstances – that's not a black and white answer as to whether you should consult them, but it's something you could bear in mind when considering whether or not it could reasonably be expected to be of concern to the third party.

Look at the information you have in front of you and consider the threshold in section 37 and whether or not the information could reasonably be expected to be of concern to the third party. If it couldn't be, you don't have to consult on it. Hopefully at this point in time you've actually winnowed your pile of information you have to consult on down to something that's relatively reasonable to manage.

The other thing I'm going to mention here is when you do consult it's very important that you don't send out unaltered documents. When you consult with a third party you should consult them on the document exactly as you're intending to release it. If you've got a 20 page document and it's got information about multiple people in it and you're only consulting and sending this copy out to one of them. Then you will want to redact that document down so that it appears in the form you are

intending to release it or so the information that you are showing to the third party is only the information that is relevant to them. That's very important. Don't just send them out unaltered documents that would have information about other people or that includes information that you are not intending to release. They should see the document in the form you're intending to release it but also with information about any other third parties removed from the document.

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In the relationship with the third party when it comes to making the decision about what goes to the applicant and what does not – you are the one with the power. You are consulting with the third party; you are seeking their views; you are *not* asking for their permission to release the document. The RTI Act has given you all of the authority you need to release the document. The third party's permission is not required.

What you are consulting with them on is you are seeking their views as to whether the information you have provided to them is exempt information or whether it is contrary to the public interest information. You are also technically seeking their view on whether the document is one to which the RTI Act does not apply but I have never heard of that coming up so we will just leave that to one side.

You are not seeking their views on whether the information is irrelevant, you are not seeking their views on whether or not the document is in scope of the application, all of that is nothing to do with them. You are basically asking them "please give me your views on whether you think this should not be released because it is exempt or contrary to the public interest".

Third parties will rarely be able to articulate their reasons back to you specifically in that way. Whether people say, "yes it's exempt because the 5 tests for breach of confidence" or "yes it's contrary to the public interest because I've balanced the public interest factors for and against disclosure and here's my nicely reasoned argument why it shouldn't be released". That occasionally might happen, for example, if any of you were to be consulted as a third party. But an ordinary member of the public is unlikely to respond in that way. But they'll put something together and you should parse that as exempt or contrary the public interest as best you can.

You are not seeking their permission; you are simply seeking their views. Their permission is totally irrelevant. It's really important when you are consulting with them/speaking with them/communicating with them not to give them the impression that is what you're asking for…you're not. You are the decision maker. You have the authority to make the call, not them.

If they happen to disagree with a decision you make that's why they have review rights and why they received a prescribed written notice. You are the one with the power and it's just really important to keep that in mind.

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The other thing that is really important to remember is the notification requirements. The notification requirements that are going to apply are going to depend on the *outcome* of the third party consultation. It's really important to remember that no matter what happens you have to give the applicant a decision letter. That is perhaps the most important thing. The whole access application process hangs off that decision letter to the applicant. No matter how good a job you do with the third party consultation and you might do an absolutely fantastic job, if you don't send the decision

letter to the applicant the whole thing will be deemed and that would be terrible because all your work would be wasted. No matter what the outcome of the third party consultation is you must remember to send your decision letter to the applicant. Ideally you should send any communication to the applicant and any third parties at the same time – not necessarily simultaneously but on the same day is sufficient. If you can't send them on the same day, you should send it to the applicant first and then send to the third party. Because as I said the application process all hangs off that decision letter being delivered on time.

If you consult with a third party to get their views, you make your decision and they've objected and you decide to release the information over their objections then both the applicant and the third party must be given the prescribed written notice, the decision letter and their review rights because they will both have rights of review. Send these at the same time or if not possible send to the applicant first.

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The other option is: you consult, get the third party views and make your decision. If the third party objected and you thought the information that third party provided has actually raised public interest factors favouring nondisclosure and I think it would be contrary to the public interest to release that information. So you decide, based on the third party's objections you are not going to release the information. You are going to refuse the applicant access to that information then only the applicant has to be given prescribed written notice, decision letter and review rights. It's courteous to let the third party know the outcome of the consultation and that the applicant has rights of review. Not only is it courteous but you're potentially saving yourself trouble in the long run. If the third party has been consulted, they write back to you and they say don't release my information – here's all the reasons why and they never hear anything back I think there's a general tendency to assume the worst has happened, rather than the best.

So if, when you give the applicant their prescribed written notice, decision notice and review rights, you also let the third party know that you upheld their objections and the information isn't going to be released (but the applicant does have 20 business days to review the decision and they would be notified in due course if there are any changes). A quick letter, email or phone call is not only courteous but can keep those lines of communication open and ensure nothing goes wrong in the long run.

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When you consult with a third party you're consulting on information, but when you defer access – which you must do if you release information over a third party's objections – you're deferring access to the **document**. Section 37 of the RTI Act makes a very clear distinction between information and document as you're working through it. Even if you consulted with the third party on *some* information in the document, for example, you might have consulted with them on a few pages or paragraphs in a 20 page report. If they objected to release and you decided it should go out over their objections then you have to defer giving access to the *whole* document/report until review rights have been exercised or exhausted. You can't redact out the information consulted on and give the applicant the rest of the report. Section 37 doesn't allow you to do that. You have to hold back the entire report from the applicant until review rights have expired or been exercised and exhausted. It's really

important to keep that in mind when you're processing the application and writing your decision letter to the applicant and notifying them of deferral.

Slide 12 -16:13

There are resources available on the OIC website: www.oic.qld.gov.au. Refer to the slides for more detailed information.