



## Applying the legislation

GUIDELINE *Right to Information Act 2009* and *Information Privacy Act 2009*

### Consulting with a relevant third party

- 1.0 Overview
- 2.0 Consultation and the processing period
- 3.0 Consultation, not permission
- 4.0 Reasonable expectations?
- 5.0 Reasonably practicable steps
- 6.0 Who to consult with
- 7.0 Preparing the documents
- 8.0 Disclosing the identity of the applicant to the consulted third party
- 9.0 The consultation process
- 10.0 Timeframe for the third party to respond
- 11.0 The third party's response and the applicant's access
- 12.0 What if the decision to give access is

#### 1.0 Overview

Under the *Right to Information Act 2009*<sup>1</sup> (Qld) (**RTI Act**) anyone can apply for documents held by Queensland government agencies, which includes departments, Ministers, local government, public hospitals, universities, and government owned corporations. Access must be given to the documents unless it would be contrary to the public interest to do so.

Some documents may contain information that would reasonably be of concern to a third party if it was released. If the decision maker has decided to give access to those documents, they must take reasonable steps to consult with that third party.

#### **Only consult if considering release**

If you have already formed the view that information will not be released, do not consult on it. It is not required by the Act and can create unnecessary concern for third parties.

<sup>1</sup> And the *Information Privacy Act 2009* (Qld).



## 2.0 Consultation and the processing period

When a decision maker forms the view that they have to consult with a third party, they get ten<sup>2</sup> additional business days to make a decision.

Technically, the processing period stops for the consultation period and restarts when it is done, but, unlike other time periods, the consultation period has no defined start and stop 'trigger' events. OIC's view is that it is simpler to add ten business days to the twenty five day processing period and assume the consultation period fell somewhere in the middle of the twenty five business days.<sup>3</sup>

As long as the decision maker makes the decision that they need to consult before the end of day twenty five of the processing period, they are entitled to the ten extra business days, even if they have not actually started the consultation.

### Informing the applicant

Decision makers should consider advising applicants that the due date of the decision has changed. This will help manage their expectations and prevent them from thinking their decision has become deemed.

## 2.1 Consultation and the further specified period

If a decision maker has asked an applicant for extra time—the further specified period—they can still consult with a third party, but they will not be entitled to the consultation period's ten extra business days. The consultation period only applies where a decision maker made the decision to consult during the processing period.

## 2.2 Internal agency consultation

Decision makers will often need to consult with business units inside their agency. This is not third party consultation under the Act and does not trigger the additional ten business days or any other requirements.

### Officers in their private capacity

If a decision maker needs to consult with an officer of the agency in their *private* capacity, ie not as an officer but instead representing their own, personal views that is third party consultation under the Act. This may occur, for example, in applications for witness statements or in employment matters.

---

<sup>2</sup> See section 18(2)(d) of the RTI Act and 22(2)(c) of the IP Act - these 10 business days do not count as part of the processing period.

<sup>3</sup> Refer to: [How to calculate timeframes](#) for more information.



Office of the Information Commissioner  
Queensland

---

### 3.0 Consultation, not permission

Under section 37 of the RTI Act<sup>4</sup>, an agency<sup>5</sup> is consulting with a third party to seek their views about whether:

- the document is not subject to the RTI Act; and/or
- the information is exempt or contrary to the public interest to release.

When consulting, the decision maker is not asking for a third party's permission to release the information. Any relevant views provided by the third party must be taken into account but it is up to the decision maker if those views change their proposed decision about giving access to the document.

#### 3.1 Limitations of the consultation

Third parties may provide views on more than just whether information is contrary to the public interest or exempt, or whether the document is excluded from the RTI Act. For example, they may say that documents are out of scope, that information is irrelevant, or raise arguments relating to their relationship with the agency.

A third party providing their views on any issue beyond the ones specifically provided for in section 37(3) is not supported by the RTI Act. Section 37 limits the subject of consultation to the dot points set out above in 3.0.

### 4.0 Reasonable expectations

The views of a third party only need to be sought if it is *reasonable* to expect that they would be concerned about information being disclosed. This is an objective test that must be approached from the viewpoint of the reasonable decision-maker<sup>6</sup> who must make a judgement about whether it is reasonable to expect the disclosure to be of concern, rather than that being an irrational, absurd or ridiculous<sup>7</sup> outcome.

The expectation of concern must arise from the disclosure itself, not from other circumstances,<sup>8</sup> and there must be more than a mere risk of the third party being concerned about the disclosure.<sup>9</sup> An expectation

---

<sup>4</sup> And section 56 of the IP Act.

<sup>5</sup> In this Guideline references to an 'agency' include Ministers.

<sup>6</sup> *Leech v Sydney Water Corporation* [2010] NSWADT 298 citing *Neary v State Rail Authority* [1999] NSWADT 107.

<sup>7</sup> *Attorney-General's Department v Cockcroft (Cockcroft)* (1986) 64 ALR 97 at 106., regarding the phrase '*could reasonably be expected to*' in section 43(1)(c)(ii) of the Commonwealth FOI Act

<sup>8</sup> *Murphy and Treasury Department* (1995) 2 QAR 744 at paragraph 54.

<sup>9</sup> *Neary and State Rail Authority* [1999] NSWADT 107 at paragraph 35.



Office of the Information Commissioner  
Queensland

---

of an occurrence that is merely a possibility (ie speculative, conjectural or hypothetical) is unreasonable.<sup>10</sup>

Generally, disclosure of information may reasonably be expected to be of concern to a third party for the purposes of section 37(1) if the information is important to, or has an important bearing upon, the relevant third party.

## 5.0 Reasonably practicable steps

Decision makers cannot release information that would reasonably be of concern to a third party without first following the procedure in section 37. However, the requirement to consult is not absolute. Section 37 only requires decision makers to take *reasonably practicable steps* to consult.

If there are no reasonably practicable steps that can be taken, or an agency takes all reasonably practicable steps and is not able to consult (for example, if the third party cannot be found) the information can be released without consulting.

### Note

If you are unsure if an address is correct, consider sending the consultation correspondence by registered post so it can only be accepted by the third party. This will prevent any accidental disclosure of the information to another party.

## 6.0 Who to consult with

### 6.1 Agencies and government

When consulting with other agencies, or with governments from other jurisdictions, contact should be made with the Right to Information unit or equivalent. Consultation will generally be undertaken through that unit.

### 6.2 Former Ministers

If you need to consult with a former Minister who is still a Member of Parliament, you can contact them through their electorate office. Alternatively, and for former Ministers who are not currently Members of Parliament, Queensland Parliamentary Services may be able to facilitate consultation with the former Minister.<sup>11</sup>

---

<sup>10</sup> *Murphy and Treasury Department* (1995) 2 QAR 744 at paragraph 44, citing *Re B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at paragraph 160.

<sup>11</sup> [www.parliament.qld.gov.au/members/former/contacting-former-members](http://www.parliament.qld.gov.au/members/former/contacting-former-members)



### 6.3 *Deceased people*

Section 37 provides that if disclosure of information could reasonably be expected to be of concern to a person but for the fact that they are deceased, the requirement to consult applies.

In the case of deceased people, the decision maker should consult with the person's representative. Depending on how long the person has been deceased, and the nature of the agency's documents, it may be difficult to find their representative.

#### **Probate filings**

If they are recently deceased and probate has been filed, searching the [Supreme Court civil files](#) may help you locate their representative. You can try searching by the name of the deceased in 'Party details' and, if you find a result, click on file details.

### 7.0 **Preparing the documents**

Third parties should only be provided with the information they are being consulted on. This may require redacting the document to remove other information.

#### 7.1 *If you can't send the actual document*

Wherever possible, the document containing the information subject to consultation should be given to the third party. However, if it is not possible, then the third party can be provided with a detailed description of the information.

This may be necessary in circumstances where, practically, the document cannot be redacted (see below re video footage), where the third party may not know the document exists and there are sound reasons for them not to know, or it is not appropriate, considering the content, for them to be given a copy.

#### 7.2 *Video footage*

Consulting on video footage can be challenging. Depending on the location of the camera, the footage may capture many individuals who may not be identifiable.

If the identity of an individual cannot be determined, or the details of individuals in the footage cannot be obtained, there may be no reasonably practicable steps a decision maker can take to consult.<sup>12</sup>

If the third party or parties can be identified and located, it may not be possible to give them a copy of the footage, due to privacy or practical

---

<sup>12</sup> See section 2.1 above.



issues. In that case, the decision maker can provide the third party with a description of the footage, including date, time and location it was taken. In some circumstances, inviting them to view the video may be a suitable alternative.

## 8.0 **Disclosing the identity of the applicant to the consulted third party**

If the applicant is an individual, the privacy principles<sup>13</sup> will apply to the consultation. Under these principles, disclosure of the applicant's identity to the third party will generally not be permitted, unless one of the exceptions to the non-disclosure rule applies. These would usually be where:

- the agency has sought the individual's consent and they have agreed to the disclosure of their identity; or
- disclosure is authorised or required by law<sup>14</sup>.

### 8.1 ***If the applicant objects***

If the applicant objects to their name being given to the third party then the decision maker will have to carefully consider whether it is *necessary* to disclose the applicant's identity in order to properly consult with the third party.

#### **Example**

If an agency has to consult with another agency in relation to Crime and Corruption Commission investigation documents, the identity of the applicant will generally be a necessary part of the consultation, as the application of the relevant exempt information provision turns on whether or not the applicant was the investigated party.

Refer to the [Crime and Corruption Commission](#) guideline for more information.

#### 8.1.1 **Providing context to the third party**

Providing context to the third party about who the applicant is can often reassure a third party. For example, telling the third party that the applicant is, or is not, part of a class of people, eg a local resident or member of the media. This would generally not reveal the applicant's identity but could provide enough context to assist the third party.

---

<sup>13</sup> See chapter 2 of the IP Act.

<sup>14</sup> Section 37 of the RTI Act does not authorise or require disclosure of the applicant's identity, but if it is necessary to proactively disclose it in order to consult, or consultation will reveal their identity, it will be impliedly authorised or required by law, and therefore permissible under the privacy principles.



**Office of the Information Commissioner**  
Queensland

---

**8.2 If the applicant is not an individual**

Where the applicant is not an individual (for example, a company) the privacy principles do not apply, because only an individual can have personal information<sup>15</sup>. It will be up to the decision maker whether they tell the third party who the applicant is. It is good practice, however, to have a consistent policy that applies across all non-individual applications.

**9.0 The consultation process**

Before sending consultation correspondence, it is a good idea to contact the third party to explain the process and answer any questions.

When writing to the third party to seek their views, the consultation letter should include:

- details of the consultation provisions of the RTI Act
- a brief explanation of the consultation process
- a copy of the information which they are being consulted about
- details about what they are being consulted on<sup>16</sup>
- a copy or details of the exempt information provisions and the public interest factors or the relevant provision relating to documents to which the Act does not apply<sup>17</sup>
- an explanation of the provisions of the RTI Act dealing with disclosure logs<sup>18</sup>
- the decision maker's contact details, in case the third party has any queries
- a date by which the third party must provide a response to the consultation; and
- what happens if they do not respond.

Agencies may also wish to include a copy of the OIC's Information Sheet: [What Does it Mean if you are Consulted as a Third Party](#).

**9.1 Consulting where documents concern a child**

When preparing for and conducting consultations involving children consider the following:

- the age of the child and their capacity to understand the consultation
- the ability of the child to make a 'mature judgement' in relation to the consultation
- guardianship and custody issues

---

<sup>15</sup> See section 12 of the IP Act and the Guideline: *What is personal information?*

<sup>16</sup> ie whether the information is exempt or contrary to the public interest or whether the document is not subject to the RTI Act.

<sup>17</sup> These can be omitted when consulting with another Queensland government agency.

<sup>18</sup> See section 37(1)(b) of the RTI Act. It is not a requirement of section 56 of the IP Act



- whether it is appropriate for the consultation to be undertaken through an independent third party (such as a health care professional); and
- the presence of a parent or guardian during the consultation process.<sup>19</sup>

## 9.2 *Consulting with adults with impaired capacity*

Consulting with adults that have impaired capacity can raise similar issues to consulting with children. The decision maker should consider whether it is appropriate to consult directly with the individual or whether the consultation should be with someone who has authority to act on that person's behalf.

## 10.0 **Timeframe for third party to respond**

The decision maker must give the third party a reasonable opportunity to respond to the consultation. This will not necessarily be ten business days. To work out how long a *reasonable opportunity* will be, decision makers should consider:

- how long it will take for correspondence to be exchanged (eg is the consultation being conducted by post or email)
- the number of documents and complexity of the information; and
- any accessibility concerns of the third party.

If the end of the processing period is approaching, decision makers may need to seek an extension from the applicant in order to complete the consultation.

## 10.1 *Consultation during internal review*

In some circumstances, an internal review decision maker may need to consult with a third party during an internal review. Internal reviews must be decided within 20 business days<sup>20</sup> and the RTI Act does not allow additional time to decide an internal review application under any circumstances.

Internal review decision makers will need to work consultation into the time allowed and may need to adjust what constitutes a *reasonable opportunity* to respond based on their fixed timeframe.

## 11.0 **The third party's response and the applicant's access**

After a consultation, the third party may:

- have no objections to the release of information
- not respond to the consultation; or
- object to the release of all or part of the information.

---

<sup>19</sup> For more information, please refer to the OIC Guideline: [Applications by and for children](#).

<sup>20</sup> See section 83 of the RTI Act and section 97 of the IP Act.



### **11.1 *If the third party has no objections***

If the third party does not object to release of the information, the decision maker can release the documents without having to further consider the third party. Once the applicant receives their decision, they can access the documents upon payment of any applicable processing and/or access charges.

### **11.2 *If the third party does not respond***

If the third party does not respond to the consultation, a decision must be made on access without the benefit of their views. This does not automatically mean the decision maker should decide to release, but they will not have any new information to consider.

If they decide to release, they can do so without having to further consider the third party, because they did not make a decision contrary to views expressed by a consulted third party.<sup>21</sup> Once the applicant receives their decision, they can access the documents upon payment of any applicable processing and/or access charges.

### **11.3 *If third party objects to release***

If the third party objects to the release of all or part of the information they were consulted on, the decision maker must:

- consider if the objections fall within section 37; and
- if they do, consider them and make a decision whether to give access to the document.

#### **11.3.1 *If access is given over third party objection***

If the decision maker decides to give access over the third party's objections, they must:

- give a prescribed written notice of their decision to release over their objections to the third party; and
- defer giving the applicant access to the entire document consulted on until the third party has exhausted their review rights or they have expired<sup>22</sup>.

#### **Defer access to the whole document**

It does not matter how much or how little of the document the third party was consulted on, the whole document must be held back from release until the third party has exhausted their review rights or they have lapsed.

---

<sup>21</sup> As long as the decision maker was satisfied that all reasonably practicable steps were taken by the decision maker to contact and seek the views of the relevant third party.

<sup>22</sup> Section 37(3) of the RTI Act; section 56(5) of the IP Act.



Office of the Information Commissioner  
Queensland

---

The third party decision notice must include reasons for the decision and the third party's review rights, which include internal and external review.

**Give prescribed written notice to the applicant**

The decision notice to the third party does not replace the requirement to give a prescribed written notice to the applicant. The decision maker must still deliver a notice of decision<sup>23</sup> to the applicant by the end of the processing period or the decision will be deemed. These notices should be sent at the same time or, if not possible, the applicant's decision should be sent first.

**11.3.1.1 When access is no longer deferred**

When access to the documents is no longer deferred, the decision maker must give the applicant written notice, informing the applicant that the documents can now be accessed.<sup>24</sup> If there are no outstanding charges, the documents could be included with the notice.

**Check for an external review**

Before releasing deferred documents because the third party's review rights have expired, decision makers should contact the Office of the Information Commissioner's Registry Team on [administration@oic.qld.gov.au](mailto:administration@oic.qld.gov.au), to make sure the third party has not lodged an external review.

**11.3.2 If access is *refused* because of third party objection**

If the third party objects to release, and the decision maker decides to refuse access to the information they were consulted on, the reasons for refusal must be included in the applicant's notice of decision. There is no need to specifically refer to the third party in these reasons.

In these circumstances, the decision maker does not give a decision notice to the third party, because they are essentially upholding the third party's objections, but it is good practice to tell them the information is not going to be released.

**12.0 What if the decision to give access is overturned by a third party's internal review?**

If the third party applies for an internal review, the internal review decision maker must make a new decision on the consultation

---

<sup>23</sup> Including information about the deferral of access to documents because of the third party consultation.

<sup>24</sup> Section 37(4) of the RTI Act and section 56(4) of the IP Act.



**Office of the Information Commissioner**  
Queensland

---

document as if the original decision on the document had not been made.<sup>25</sup>

If the internal review decision maker changes the original decision to give access to the consultation document, replacing it with a decision to refuse access to it, they must give prescribed written notice of their decision to:

- the third party who sought the review; and
- the original access applicant, setting out their right to seek an external review, because their right of access has been changed by the internal review decision.

For additional information and assistance, please contact the Enquiries Service on 07 3234 7373 or email [enquiries@oic.qld.gov.au](mailto:enquiries@oic.qld.gov.au).

**This guide is introductory only, and deals with issues in a general way. It is not legal advice. Additional factors may be relevant in specific circumstances. For detailed guidance, legal advice should be sought.**

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

**Published 28 February 2014 and Last Updated 26 November 2021**

*Changes to legislation after the update date are not included in this document*

---

<sup>25</sup> Section 80(2) of the RTI Act and section 94(2) of the IP Act.