



Applying the legislation

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

Substantial and unreasonable diversion of agency resources

If dealing with an application would result in a substantial and unreasonable diversion of resources then an agency¹ can refuse to deal with the whole application.²

The intention of this section is to find a balance between the pro-disclosure objectives of the legislation and the unreasonable disruption that could be caused to the performance of an agency's daily operations if it was required to process voluminous requests for information.³

This guideline examines the provisions and explains the steps that an agency must take before it can refuse to deal with an application on the grounds that to do so would cause a substantial and unreasonable diversion of its resources.

Note

An agency can decide to deal with an application even if there is a provision that allows it to be refused.⁴ This is consistent with the pro-disclosure bias of the legislation.

Does the ground of refusal apply?

Section 41(2) of the *Right to Information Act 2009* (Qld) (**RTI Act**)⁵ contains a list of mandatory considerations that a decision maker must take into account when making a decision about the impact that processing an application would have on its resources.

You must consider the resources involved in:

- identifying, locating and collating documents
- deciding whether to give, refuse or defer access to documents, or give access to edited copies
- consulting relevant third parties about documents
- making copies of documents; and
- notifying any final decision on the application.

¹ In this guideline, references to an agency include a Minister, unless otherwise specified. If the application is to a Minister, the threshold question would be whether dealing with the application would interfere substantially and unreasonably with the performance by the Minister of their functions (see section 41(1)(b) of the RTI Act).

² See section 41 of the RTI Act. If the applicant has more than one application, the agency can consider the impact of all current applications from the applicant.

³ As discussed in *Secretary, Department of Treasury and Finance v Kelly* (2001) 4 VR 595 in relation to the equivalent provision in the Victorian *Freedom of Information Act 1982* (Vic).

⁴ See section 39(3) of the RTI Act.

⁵ Section 60 and 61 of the IP Act are the equivalent provisions. For simplicity this Guideline will only refer to the RTI Act sections, however it should be read to include the equivalent provisions in the IP Act



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You can also consider additional relevant factors relating to the resources required to deal with an application as the above list is not exhaustive.

However, you **must not** take into account the reasons the applicant gives or any beliefs you hold about why the applicant is applying for access.⁶

Diversion of resources must be both substantial and unreasonable

It is important to remember that the diversion of agency resources must be both substantial **and** unreasonable. If both elements are not satisfied, then section 41 of the RTI Act does not apply and the agency cannot rely on this ground to refuse to deal with the application.

The mere fact that an agency will be required to expend significant resources to process an access application is not, in itself, sufficient to satisfy the ground of refusal. It must also be shown that the diversion of resources or interference with normal operational functions is unreasonable.

While each agency's and application's circumstances will vary, some general factors that may be relevant⁷ when deciding this include the:

- size of the agency
- ordinary allocation of RTI resources
- ability of the agency to perform their other functions
- statutory timeframe for making a decision; and
- the public interest in disclosure of the documents requested.

What does substantial and unreasonable mean?

The term '*substantially and unreasonably*' is not defined in the RTI Act. The Commissioner has noted that '*Substantial*' is relevantly defined as meaning a '*considerable amount, quantity, size, etc.: a substantial sum of money*' and '*of a considerable size or value: substantial funds*'; and '*Unreasonable*' is relevantly defined as meaning '*exceeding the bounds of reason; immoderate; exorbitant*' and '*immoderate; excessive: unreasonable demands*'.⁸

What steps must be taken before refusing to deal?

If you decide that processing the application would be both a substantial and unreasonable diversion of agency resources, you must follow the process in section 42 of the RTI Act before refusing to deal with the application.

⁶ Section 41(3) of the RTI Act.

⁷See *Smeaton v Victorian WorkCover Authority* [2012] VCAT 1550 which considered the equivalent provision in the Victorian *Freedom of Information Act 1982*.

⁸ In *60CDYY and Department of Education and Training* [2017] QICmr 52A (7 November 2017)



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Disregard all irrelevant considerations

Section 41(3) of the RTI Act specifically prohibits consideration of any:

- reasons the applicant gives for seeking access; or
- belief the decision maker has about the applicant's reasons for seeking access.

This means that you must:

- give a written notice of intention to refuse to deal (NIRD) to the applicant, advising them that the agency *intends* to refuse to deal with the application
- advise the applicant that, for a period of 10 business days from the date of the NIRD (or a longer period as agreed), the applicant may consult with you to make the application in a way that removes the grounds for refusal; and
- give the applicant information which will help them make an application which would remove the grounds for refusal, as far as is reasonably practicable.⁹

The NIRD must also advise the applicant that:

- they may confirm or narrow their application by giving the agency written notice
- if they narrow their application, then the agency will consider if the changed application would result in a substantial and unreasonable diversion of resources¹⁰ and make a final decision about whether it can be processed or will be refused;
- that they will not have another opportunity to consult and narrow their application; and
- if they don't respond in writing either confirming or narrowing their application by the end of the prescribed consultation period (explained below) they will be considered to have withdrawn their application

It is critical that your NIRD comply with section 42. Even if processing the application would substantially and unreasonably divert your agency's resources, if your NIRD does not meet the requirements of section 42, your decision may not be upheld on review.

Please refer to Appendix A for a template letter agencies may wish to use or adapt for their Notice of Intention to refuse to deal with the application.

Hints for communicating with the applicant

Applicants often misunderstand the purpose of the NIRD and thinks it is the agency's decision to refuse to deal with the application.

It is important to ensure the NIRD is as simple and uncomplicated as possible. It must clearly explain that the agency is not refusing to deal with the application at

⁹ What is considered 'reasonably practicable' will depend on the facts and circumstance of each matter.

¹⁰ By again considering the mandatory factors listed in section 41 of the RTI Act.



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this stage and outline the consultation requirements as required by section 42 of the RTI Act.¹¹

Communicating clearly with the applicant will:

- help them understand that they have an opportunity to consult with you to change their application so that it can be dealt with
- help avoid the applicant not fully understanding the purpose of the NIRD, which can result in them running out of time and the application being considered withdrawn; and
- inform applicants that the NIRD does not give them any rights of review.

Note

In addition to the NIRD, you could also contact the applicant by telephone to explain the process. This can make the process less formal and help the applicant gain a better understanding of the situation by giving them a chance to ask questions and discuss ways they could narrow the scope of their application to remove the ground of refusal.

What happens when a NIRD is issued?

The timeframe that applies to the NIRD process is the *prescribed consultation period*.¹² When a NIRD is issued, the processing period pauses; the prescribed consultation period begins on the next business day.

The prescribed consultation period is ten business days or a longer period agreed between the agency and the applicant; there is no limit on how long the prescribed consultation period can be extended.

However, the prescribed consultation period can never be less than ten business days. This means that if the applicant responds quickly, for example if they successfully narrow their application three business days after the NIRD is issued, the processing period still does not resume until the full ten days of the prescribed consultation period have run.

For more information on timeframe under the Act, refer to *How to calculate timeframes*.

What are the outcomes after consulting with the applicant?

Applicant does not respond in writing

After the NIRD is issued, the agency must give the applicant a reasonable opportunity to consult with them, with a view to making their application in a form that would remove the ground for refusal.

If the applicant does not respond in writing either confirming or narrowing the application, then they are taken to have withdrawn the application at the end of

¹¹ Refer to Appendix A for sample text.

¹² Section 42(4) of the RTI Act.



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the prescribed consultation period. The applicant cannot apply for an internal or external review as it is not a reviewable decision.

As explained above, agencies can agree to extend the prescribed consultation period¹³ if the applicant needs further time to respond.

OIC encourages agencies to contact the applicant to inform them of the requirement for a written response. This is particularly relevant where the applicant has consulted verbally but not provided a response in writing.

Note

There is no requirement in the legislation to provide the applicant with a written notice informing them when an application is taken to be withdrawn. However, it is good administrative practice and customer service to do this.

Applicant responds in writing confirming the application

If the applicant confirms the unchanged scope of their application in writing, the agency can refuse to deal with it if they consider it would still result in an unreasonable and substantial diversion of agency resources.¹⁴ The applicant must be provided with a prescribed written notice of the decision.¹⁵

This is a reviewable decision.

Applicant responds in writing narrowing the application

If the applicant responds in writing and narrows the scope of the application, the agency must again consider if dealing with the changed application would substantially and unreasonably divert agency resources as per section 41 of the RTI Act.¹⁶

The agency is not required to consult with the applicant again. You may, however, give the applicant a further opportunity to narrow the scope of the application if you consider it appropriate, extending the prescribed consultation period as needed.

If the agency decides that dealing with the changed application would still result in a substantial and unreasonable diversion of agency resources then they can refuse to deal with it. Once a decision is made to refuse to deal with the application, the applicant must be provided with a prescribed written notice of the decision.¹⁷

This is a reviewable decision.

If the agency decides that the changed application has removed the ground for refusal, then the application must be processed. Although there is no requirement

¹³ Section 42(6) of the RTI Act.

¹⁴ Under section 41 of the RTI Act.

¹⁵ See section 191 of the RTI Act for the requirements of a prescribed written notice.

¹⁶ See the beginning of the Guideline for further guidance on section 41 of the RTI Act.

¹⁷ See section 191 of the RTI Act for the requirements of a prescribed written notice.



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to do so, agencies should confirm the narrowed scope and tell the applicant that their application will be processed.

For additional information and assistance please refer to *Information Sheet – Substantial and unreasonable diversion of agency resources: A guide for applicants* and the OIC's guidelines, or contact the Enquiries Service on 07 3234 7373 or email 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.

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



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Appendix A - Template Letter for Notice of Intention to Refuse to Deal

This is a best practice example that agencies may wish to consider adapting for use when sending a notice to applicants under section 42 of the RTI Act or section 61 of the IP Act.

Dear [applicant's name]

Notice of intention to refuse to deal with your application under [section 41 of the *Right to Information Act 2009*/section 61 of the *Information Privacy Act 2009*]

I refer to your application received by [name of agency] on [date] in which you sought access under the [*Right to Information Act 2009* (RTI Act)/*Information Privacy Act 2009* IP Act] to:

[state what the applicant applied for]

I have not yet made a decision on the documents relevant to your application. However, I have formed the view that the work involved in dealing with your application would substantially and unreasonably divert the agency's resources. I am writing to consult with you about this and to give you an opportunity to alter or clarify your application.

If your application is not changed then I intend to refuse to deal with it. Please note, I am not yet refusing to deal with your application and, as such, you cannot seek a review of this letter.

Why is it a substantial and unreasonable diversion of resources?

Processing an RTI application involves a number of steps, including identifying, collating, copying and preparing the documents, deciding whether to give, refuse or defer access to the documents as well as preparing several pieces of correspondence, including decision notices to any parties to the application. The [RTI Act/IP Act] requires this process to be undertaken within the statutory timeframe of 25 business days, or a longer period, if requested.

In excess of [number of documents and {if relevant} hours of audio/visual recordings] have been identified as responsive to the current scope of your RTI application. In relation to the processing of your request, the estimated time to process your RTI application is over [number of hours]. [Please refer to **Attachment A** of this notice which outlines the preliminary processing time.{Delete if not using}]

On this basis, I have concluded that processing your application would substantially and unreasonably divert the resources of this agency.

What can you do?



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Before refusing to deal with your application on this ground, the Act gives you the opportunity to consult with this agency to amend your request into a form which would mean this agency could deal with it.

[To assist you in narrowing the scope of your application, I have provided an outline at **Attachment A** which provides a list of categories of documents that have been identified through our search processes. {Delete if not using}]

I am happy to discuss this matter with you if you need any more information or assistance in changing your application. Please note that the RTI Act provides a timeframe of **10 business days from the date of this notice** for you to consult with me to make your application in a way which would allow the agency to process it. [I am happy to allow you more time if you need it {*depending on the circumstances, you may want to consider allowing them additional time at this stage*}].

When is a response required?

I require a **written response** from you by [date] either:

- confirming your original application; or
- outlining the changes you would like to make to narrow the scope of your application.

Please provide your written response by letter or email to [include email and postal addresses].

If you narrow your application then consideration will be given to your revised scope to decide if dealing with your changed application would still result in a substantial and unreasonable diversion of this agency's resources. You will not be given another opportunity to consult as the requirement to give you a notice and allow you to consult with this agency does not apply to your narrowed application.

If you fail to respond in writing by the above date then your application will be considered to be withdrawn. If you need additional time to respond in writing, please contact me.

Should you wish to discuss your application in any way please do not hesitate to contact me on [contact details].

Kind regards



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Note - In some circumstances, preparing a detailed estimate of the time it will take and a breakdown of the documents to this level will place an unreasonable strain on agency resources. In those circumstances, agencies may wish to not use this table and instead rely on a more generic overview of the time and pages involved. If providing the information in the below table would not place too great a strain on the agency, it can serve as a valuable tool for an applicant to narrow their scope.

ATTACHMENT A

ESTIMATED PROCESSING TIME

[Note that these are just examples and depending on the application and your agency more or fewer actions may be involved in processing the application, for example some applications may require retrieval of documents from long term storage.] The estimated time required to fulfill the requirements of the RTI process is outlined below:

RTI Processing Item	Approx. number of hours
Initial Processing <ul style="list-style-type: none"> - preparing correspondence to applicant associated with processing application 	
Search and Retrieve Documents <ul style="list-style-type: none"> - searches undertaken by business units - locating and retrieving relevant files - identifying responsive documents 	
Copy Documents <ul style="list-style-type: none"> - printing documents - copying/scanning documents from files and reports 	
Examining Documents <ul style="list-style-type: none"> - examining approx. [number of] documents 	
Examining Audio and Video Recordings <ul style="list-style-type: none"> - approx. [number of] hours 	
Consultation (approx. [number of] third parties)	
Decision	
TOTAL	hours

The calculations of the processing times are listed below in further detail with regard to the [number of] documents identified as responsive to your application:



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- Examining Documents - due to the nature of the content of the documents, an average of [number of documents per hour] was estimated to examine the responsive information, therefore approximately [number of hours] is estimated to examine the relevant documents.
- Examining Audio Recordings/Video Footage - there are [number of] hours of audio/video material which will need to be examined
- Consultation - approximately [number of] third parties are expected to be consulted in accordance with [section 37 of the RTI Act/section 56 of the RTI Act]. Due to the large number of documents required for consultation, an estimated total of [number of] hours has been included as the total consultation time.
- Decision - a total of [number of] hours is estimated to prepare the Notice of Decision.