



OmbudsmanSA

FREEDOM OF INFORMATION - Agency release of documents under section 19(2a)

This information sheet has been created to help you understand an agency's ability to release documents under section 19(2a) of the *Freedom of Information Act 1991* (the **FOI Act**).

Section 19(2a) can be used by agencies to determine to provide an applicant with access to documents after the statutory time limit set out in section 19(2) of the FOI Act has elapsed. While section 19(2) requires agencies to make a determination within 30 days of receiving an access application, section 19(2a) provides that:

... nothing prevents an agency from making a determination to give access to a document on an application after the period within which it was required to deal with the application (and any such determination is to be taken to have been made under this Act).

The purpose of section 19(2a) is to allow agencies to give access to documents where they have failed to make a determination within the 30 day period and are therefore deemed to have refused access to those documents.

Section 19(2a) can also be used by agencies to give access to documents in 'double deemed refusal' situations i.e. where they have failed to make a determination within the 30 day period and also failed to make a determination on internal review within the 14 day period prescribed by section 20 of the FOI Act.

Determination to 'give' access only

It is important to note that under section 19(2a), agencies can only determine to give access to documents; it does not permit agencies to determine to refuse access. This is because, by failing to determine an application within time, an agency is already deemed to have refused access.

For this reason, if an agency erroneously purports to issue a belated determination refusing access to documents, the Ombudsman will not treat this as a valid determination. The purported refusal will be treated as a submission from the agency as to why the Ombudsman should conclude that the documents are exempt.

Section 19(2a) cannot be used to reverse an express determination

Section 19(2a) only applies where an agency is deemed to have refused access to documents because it fails to make a determination within the statutory time frame. If an agency has made an express determination that certain documents are exempt documents, it cannot use section 19(2a) to make a second determination to give access to documents. Such a determination would not be valid and the person making it would not be protected by sections 50 - 52 of the FOI Act.

Location of additional documents within scope

If an agency makes a determination but later discovers additional documents within the scope of an application, it can use section 19(2a) to provide access to those additional documents.

Benefits of making a section 19(2a) determination

While agencies are not obliged to make section 19(2a) determinations when they have failed to make determinations within time, doing so can be beneficial because:

- the applicant will gain access to some or all of the documents they seek. This may mean they decide against applying for external review by the Ombudsman or a review by SACAT
- if the applicant is satisfied and does not apply to the Ombudsman or SACAT, the agency will save the time and cost involved in making submissions and preparing documents for the Ombudsman or SACAT's consideration

- even when the applicant has already applied for an external review by the Ombudsman or review by SACAT, giving access to all the documents will often resolve the review. Even giving access to only some of the documents will serve to narrow the issues the Ombudsman or SACAT needs to consider
- when an agency's FOI officer determines to give access under section 19(2a), they are afforded the protections set out in sections 50 - 52 of the FOI Act, which would not be the case if documents were released outside the FOI process.

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