Information Act 2002 Guideline
Third party consultations

August 2020

In brief

Section 30 requires a public sector organisation to seek the views of third parties prior to deciding to grant access to particular information. It operates in relation to:

- interference with privacy
- information obtained from businesses
- prejudice to inter-governmental relations
- information about Aboriginal sacred sites and traditions.

It does not give the third party the power to refuse disclosure. The decision must be made by the organisation.

It does not limit other necessary consultations but other consultations do not give rise to a right to complain to the Information Commissioner under s30.

Requirement to seek views prior to deciding to provide access

Section 30 sets out the circumstances in which a public sector organisation must seek the views of a person or persons before deciding to provide access. Each category of person and information is discussed separately below.

The organisation does not have to consult unless it is contemplating giving access. If the organisation is satisfied that the information is exempt, and does not propose to provide access, consultation is not required.

In any event, consultation may be an important preliminary step in order to establish whether the relevant person has any objection to disclosure. Past experience suggests that third parties will frequently, although by no means always, be willing to consent to disclosure of some or all of the information sought.

Consultation may also be necessary in order to obtain evidence that will assist in deciding whether or not information qualifies for exemption, eg, evidence from a source may be important in deciding whether information was communicated in confidence.

Other consultations

Section 30 does not limit the consultations that can or should be made by an administrator or decision-maker faced with an FOI access application. There will often be a number of people within the organisation who must be consulted in order to locate documents and whose views may be relevant to disclosure or other issues.

There may be people who have left the organisation or external contractors who have relevant information. Others within or outside government may also have information that will assist in dealing with the application or making relevant decisions on access or other issues. In each case, the relevant FOI administrator must decide what input is necessary to properly address the application and make an appropriately informed decision about whether or to what extent access should be granted.

People or organisations who have been consulted for these purposes do not have a right to veto disclosure. They do not take part in the decision making process. But the information they provide may well be valuable in assisting the decision-maker.

However, a person or organisation who has been consulted for these purposes, and who does not fall within the scope of a s 30 consultation requirement, is not entitled to make a complaint to the Information Commissioner under s 30 challenging an initial decision to provide access to information.

When does the s.30 requirement arise?

Section 30 sets out the requirement for consultation in relation to "information about a third party". Section 30 also defines who is to be consulted as a third party.

Section 30(2) uses the word "would", as in "would prejudice" and "would be an interference" when identifying the third party to be consulted, while s 30(1) uses the word "might" when defining "information about a third party". This difference potentially gives rise to ambiguity as to the precise scope of the obligation on organisations.

In the circumstances, the objects of the Act and of s 30 are probably better served if organisations consult when a qualifying circumstance "might" arise.

The qualifying circumstances are:

- interference with a person's privacy;
- disclose a trade secret or other information obtained from a business likely to expose the business unreasonably to disadvantage;
- prejudice inter-governmental relations;
- disclose information about an Aboriginal sacred site or Aboriginal tradition.

They correspond with the exemption provisions in ss 56(1)(a), 57(1), 51 and 56(1)(b), respectively.

What views may a third party express in a consultation?

In *Re Various Applications under the Information Act 2002 [No. 2]* [2020] NTCAT 2, the Northern Territory Civil and Administrative Tribunal (NTCAT) made it clear that s 30 is intended to allow for a third party to object and ultimately pursue avenues of review, in support of a claim to exemption in respect of whichever of the above provisions it is entitled to be consulted.

The third party has no general right to raise broad objections to disclosure based on other potentially applicable exemptions or principles under the Act.

A third party might make submissions on other points or provide evidence that accords with or supports a view of the decision-maker in relation to another provision but the application of other provisions is entirely a matter for the decision-maker to consider. Any complaint or further review sought by a third party must be based on the particular exemption in respect of which the third party was entitled to be consulted.

Requirement to seek views – Interference with privacy

If disclosure of information about an individual might be an interference with their privacy, the individual must be consulted prior to a decision to disclose the information.

If the person is a child, has a disability or is deceased, consultation may be made with a person who could make a complaint on their behalf under s 155.

Not every disclosure of a reference to a person has the potential to be an interference with privacy. If the Parliament had intended that there be consultation on every occasion on which a reference is made to an identifiable person, it could simply have used the term "personal information" in s 30. However, it used the distinct term, "interference with … privacy." It is a matter for the third party to explain why the proposed release of information would be an interference with their privacy.

Further, the term "personal information" is broadly defined to include any identifying information but it does not include information that discloses the person's identity (but no other personal information about them) in the context of them having acted in an official capacity. For example, the name of a public officer who signed an official letter on behalf of their organisation would not be considered "personal information"[1].

[1] Section 4A of the *Information Act 2002.*

Requirement to seek views – Information from businesses

If disclosure of information obtained by a public sector organisation from a business, commercial or financial undertaking might disclose information of a business, commercial or financial nature, and the disclosure is likely to expose that undertaking unreasonably to disadvantage, that undertaking must be consulted prior to a decision to disclose the information.

If disclosure of information obtained by a public sector organisation from a business, commercial or financial undertaking might disclose a trade secret, that undertaking must be consulted prior to a decision to disclose the information.

Requirement to seek views – Inter-governmental relations

If disclosure of information might prejudice inter-governmental relations between two or more bodies politic, each of those bodies politic must be consulted prior to a decision to disclose the information.

The respective governments of Australia, each Australian state and territory and foreign nations are bodies politic. Even if the information is not actually "about" one of the bodies politic, consultation will be necessary if disclosure might prejudice relations.

Requirement to seek views – Sacred sites and traditions

If information about an Aboriginal sacred site might be disclosed, the Aboriginal custodians of the site must be consulted.

If information about an Aboriginal tradition might be disclosed, the community or group to whom the tradition belongs must be consulted.

There is no need to consider whether there is potential for prejudice or interference. All that is required is that disclosure might disclose information about the sacred site or tradition.

Consultation with employees

As mentioned above, disclosure of personal information about an individual public sector employee can give rise to an interference with that employee's privacy. However, not every reference to a public sector employee will give rise to a requirement to consult under s 30.

The definition of personal information under the Act excludes information that only discloses a person's identity in the context of having acted in an official capacity for a public sector organisation.

This means that employees only need to be consulted where the information contains personal information beyond routine references in the course of normal duties or where an employee is identified merely in the context of performing their duties.

What if the third party can't be consulted or doesn't respond?

The organisation may decide to provide access without obtaining a person's views if:

- the third party's views were unable to be obtained after all reasonable attempts were made to do so; or
- the third party does not respond to a request for his or her views within 30 days after having received the request.

Notification

The organisation must notify the third party in writing of its decision. This would appear to be the case whether the decision is to provide access or refuse access to the information, and whether or not the third party objected to disclosure. Clearly, if the third party could not be located for the purpose of consultation, they cannot be notified of the decision.

A notice under s 30(4) need not be in the same format as a notice to the applicant and should generally be limited to notifying the decision with respect to the information subject to consultation.

If the decision is to disclose information subject to consultation, both the notice to the third party and the notice to the applicant must advise that access will be provided 30 days after the third party receives notice of the decision, or if the third party makes a complaint to the Commissioner, after determination of complaint.

Complaint to Commissioner

An aggrieved third party required to be consulted under s 30 can make a complaint to the Information Commissioner within 30 days of receiving notice of the decision. The organisation and the access applicant are respondents to the complaint (s 30(6)).

If the organisation refuses to provide access and the applicant subsequently makes a complaint to the Commissioner about refusal of access, the organisation and third party are respondents to the complaint.

The grounds a third party may rely on in a complaint to the Commissioner are limited to those in respect of which they were entitled to be consulted under ss 30(1) and 30(2) of the Act. (*Re Various Applications under the Information Act 2002 [No. 2]* [2020] NTCAT 2).

Referral to NTCAT

A third party whose complaint to the Commissioner is dismissed may apply to the Commissioner to refer the decision to the NTCAT (s 112A).

Part 7A of the Act sets out provisions relating to Tribunal proceedings.

Again, when considering such an objection, the third party is limited to pursuing objections on the grounds in respect of which they were entitled to be consulted under ss 30(1) and 30(2) of the Act.