

1. What we can investigate

1.1 Types of complaints

The Information Commissioner investigates:

- **FOI applicant complaints:** when you have formally sought information from an organisation under the Territory's freedom of information (FOI) scheme;
- **FOI third party complaints:** when someone has sought information about you under the Territory's FOI scheme, and the organisation intends to release it despite your objection; and
- **privacy complaints:** when you are unhappy with how your personal information has been handled by a Territory government body.
- **correction complaints:** when you have formally requested that an organisation correct your personal information in accordance with Part 3 Division 3 of the *Information Act*.

1.2 Complaints can only be about NT public sector organisations

The Information Commissioner investigates NT public sector organisations, which includes NT Government Departments, Councils, and any organisation created by NT legislation.

The Commissioner cannot investigate private businesses or associations, except to the extent they are handling personal information while providing services to public sector organisations.

1.3 This Guideline applies to complaints made on or after 1 May 2016

On 1 May 2016, amendments commenced to the *Information Act*. Complaints received by the Information Commissioner before 1 May 2016 will be handled under the pre-amended legislation. (See [Our Complaints Process October 2009](#)) Complaints received on or after 1 May 2016 will be handled in accordance with the process set out in this Guideline.

Need Help?

If you have any questions about the complaint process, including when or how to complain, or (if you work for an organisation) how to respond to a complaint, the Office of the Information Commissioner provides free advice.

www.infocomm.nt.gov.au

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2. How to complain

This section of the Guideline sets out **when** you can make each kind of complaint to the Commissioner, and **how** to write your complaint.

2.1 FOI Complaint (Applicant Complaint)

Before you can complain:

You can only make an FOI applicant complaint if the following three steps have occurred:

Step 1

You applied to a Northern Territory public sector organisation for information under section 18 of the *Information Act* (freedom of information application).

Step 2

You were unhappy with the organisation's decision (or lack of response within 30 days), and so you applied to that same organisation for 'internal review' under section 38 of the *Information Act* (an internal review application).

Step 3

The organisation either:

- gave you an internal review decision you were unhappy with;
- refused to conduct the internal review; or
- did not provide you with a decision within 30 days.

Time limit:

You must make your complaint within 90 days of Step 3 occurring. If you make a complaint after 90 days, it will be up to you to persuade the Commissioner that there is good reason to accept your late complaint.

How to make your complaint:

Your complaint must be in writing. You can write your complaint on paper, email, or use the complaint form on our website (www.infocomm.nt.gov.au/resources/forms).

Your complaint must:

- state your name and address for correspondence (an email address is preferable, but it is good to provide a postal address or an alternative email address as well);
- identify the public sector organisation you are complaining about;
- briefly state the information you were seeking from the organisation (preferably include the exact words you used when making your application for the information, although you should explain if your request was changed or clarified in discussions with the organisation);

- state when you made your application for internal review, and what response (if any) you received; and
- explain why you are unhappy with that response.

Useful attachments:

When you make a complaint, it will assist the Commissioner to process your application if you include:

- a copy of your original section 18 application to the organisation;
- a copy of their response;
- a copy of your request for internal review;
- a copy of their response;
- additional relevant correspondence which may include discussions between yourself and the organisation about the scope of your application, fees, estimates of time to process, and requests for extensions of time.

2.2 FOI Complaint (Third Party Complaint)

Before you can complain:

You can only make an FOI third party complaint if the following two steps have occurred:

Step 1

A public sector organisation has made a decision to release information about you to a person who applied for the information under freedom of information (that is, the applicant made an application under section 18 of the *Information Act*).

Step 2

You are a person who is 'aggrieved' by this decision. This means you must be or represent one of the following:

- an individual whose privacy would be interfered with if the information was released;
- a business where the information in question is confidential commercial information that your business provided to the public sector organisation;
- an Aboriginal custodian of a sacred site when the information in question is about that sacred site;
- an Aboriginal community or group when the information in question is confidential information about your community or group's traditional customs;
- a government which might be negatively affected by release of the information.

Time limit:

You must make your complaint within 30 days of Step 1 occurring. If you have not made a complaint within 30 days, the organisation will release the information.

How to make your complaint:

Your complaint must be in writing. You can write your complaint on paper, email, or use the complaint form on our website (www.infocomm.nt.gov.au/resources/forms).

Your complaint must:

- state your name and address for correspondence (an email address is preferable, but it is good to provide a postal address or an alternative email address as well);
- identify the public sector organisation you are complaining about;
- describe or include a copy of the decision by the organisation to release your information (including the date you received the decision); and
- explain why you are unhappy with that decision.
- NOTE: If you do not want the disputed information to be released prior to a final determination, you must make a specific request to the Information Commissioner for an order in those terms.

Useful attachments:

When you make a complaint, it will assist the Commissioner to process your application if you include:

- a copy of any correspondence you received from or sent to the organisation concerning your objections;
- any additional information which will assist the Commissioner to understand why you will be unreasonably harmed or disadvantaged if the information is released;
- relevant evidence to support your concerns (for example, statutory declarations by you or another witness to prove certain information is confidential, or to establish releasing the information could cause difficulties for you), although please note that if your complaint is valid you will likely be given opportunity to provide relevant evidence at a later stage.

2.3 Privacy Complaint

Before you can complain:

You can only make a privacy complaint if the following three steps have occurred:

Step 1

You have discovered that your personal information has been inappropriately collected, used, disclosed, or otherwise mishandled by a public sector organisation, in a way that breaches the Information Privacy Principles (IPPs) found in Schedule 2 of the *Information Act*.

Step 2

You have approached the organisation and explained to them why you believe they have breached your privacy. The Commissioner recommends stating to the organisation that you are making a privacy complaint, and ideally identifying the IPPs you believe have been breached.

Step 3

You have given the organisation a reasonable amount of time to respond to the privacy issues. What is a reasonable amount of time will vary. In an urgent situation, the time could be very short. If the situation is complex and the organisation requires time to conduct investigations, the reasonable time for a response could be longer. We would advise giving the organisation a month to respond to relatively simple, non-urgent complaints.

Time limit:

You must make your complaint to the Commissioner within 12 months of Step 1 occurring. If you have not made a complaint within 12 months, it will be up to you to persuade the Commissioner that there are good reasons to accept your late complaint.

How to write your complaint:

Your complaint must be in writing. You can write your complaint on paper, email, or use the complaint form on our website (www.infocomm.nt.gov.au/resources/forms).

Your complaint must:

- state your name and address for correspondence (an email address is preferable, but it is good to provide a postal address or an alternative email address as well);
- identify the public sector organisation you are complaining about;
- describe how you believe the organisation has breached your privacy;
- describe when you discovered that the organisation had breached your privacy;
- describe what you have done to attempt to get the organisation to resolve or fix your privacy concerns (include when you first raised the issue with them);

- describe what the organisation has done in response;
- explain why you are unhappy with that response.
- NOTE: Making a complaint to the Information Commissioner does not prevent the respondent from repeating or continuing the act complained of, or similar acts. It is important that you make a specific request to the Information Commissioner for an order to prevent such acts or similar acts from being repeated or continuing.

Useful attachments:

When you make a complaint, it will assist the Commissioner to process your application if you include:

- a copy of any correspondence you received from or sent to the organisation concerning your privacy concerns;
- a summary of any conversations you had with the organisation concerning your privacy concerns;
- relevant evidence to support your concerns (for example, documents or statutory declarations by you or another witness to prove that the organisation did breach your privacy), although please note that if your complaint is valid you will likely be given opportunity to provide relevant evidence at a later stage.

2.4 Correction Complaint

Before you can complain:

You can only make a correction complaint if the following three steps have occurred:

Step 1

You applied to a Northern Territory public sector organisation to correct information about you under section 31 of the *Information Act* (correction application).

Step 2

When you were unhappy with its decision (or lack of response within 30 days), you applied to that same organisation for 'internal review' under section 38 of the *Information Act* (an internal review application).

Step 3

The organisation either:

- gave you an internal review decision you were unhappy with;
- refused to conduct the internal review; or
- did not provide you with a decision within 30 days.

Time limit:

You must make your complaint within 90 days of Step 3 occurring. If you make a complaint after 90 days, it will be up to you to persuade the Commissioner to accept your complaint.

How to write your complaint:

Your complaint must be in writing. You can write your complaint on paper, email, or use the complaint form on our website (www.infocomm.nt.gov.au/resources/forms).

Your complaint must:

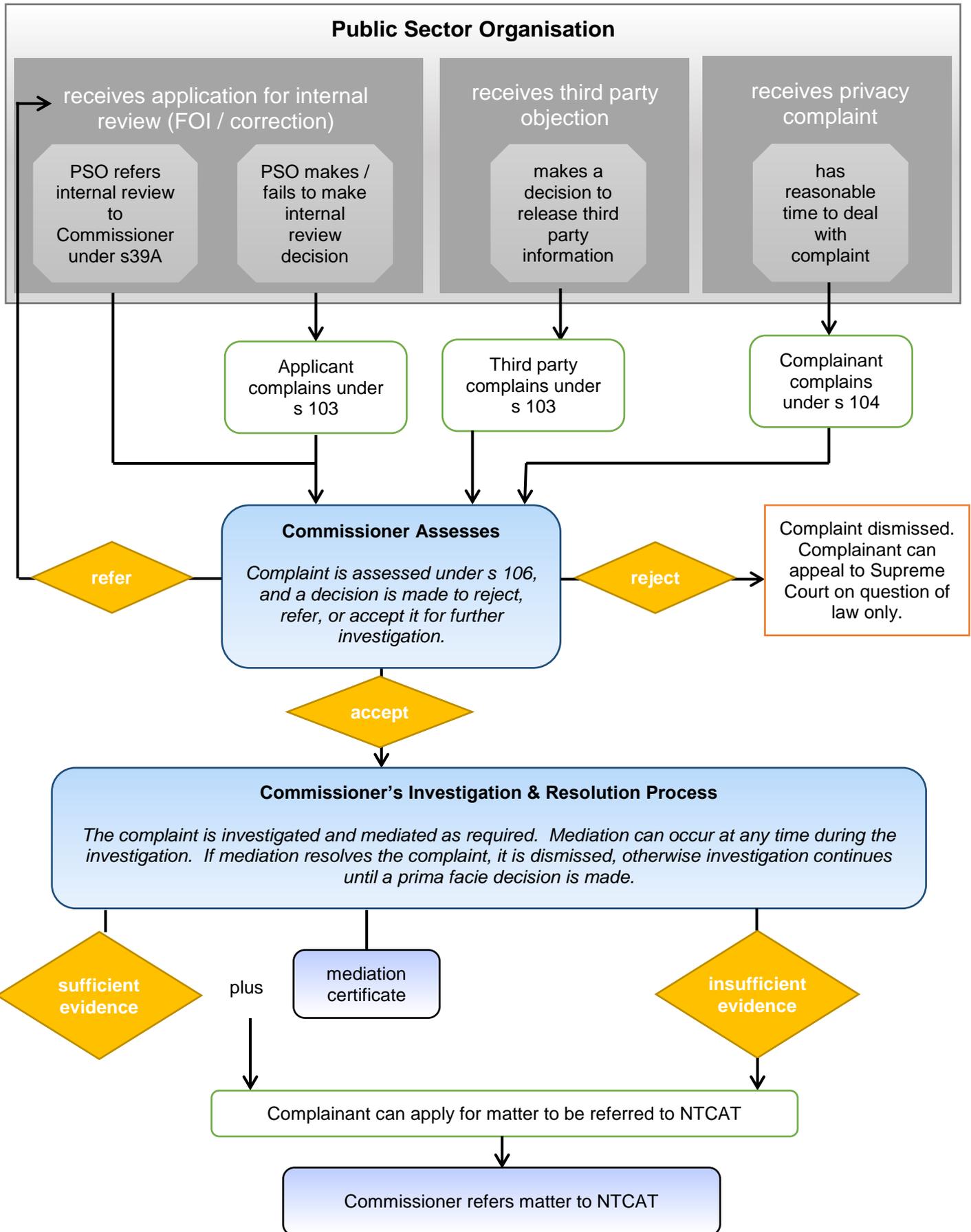
- state your name and address for correspondence (an email address is preferable, but it is good to provide a postal address or an alternative email address as well);
- identify the public sector organisation you are complaining about;
- briefly state the correction you were seeking from the organisation;
- state when you made your application for internal review, and what response (if any) you received; and
- explain why you are unhappy with that response.
- NOTE: Making a complaint to the Information Commissioner does not affect the operation of the respondent's decision. If you believe there is good reason for the correction to be made quickly, it is important that you:
 - bring this to the attention of the Commissioner;
 - explain your reasons in writing to the Commissioner.

Useful attachments:

When you make a complaint, it will assist the Commissioner to process your application if you include:

- a copy of your original section 31 application to the organisation;
- a copy of their response;
- a copy of your request for internal review;
- a copy of their response;
- additional relevant correspondence which may include discussions between yourself and the organisation about whether your information can or should be corrected.

3. Overview of complaints process



4. Roles

4.1 Information Commissioner

The Information Commissioner independently investigates and mediates complaints. The Commissioner's role may be conducted by the Commissioner herself, or by a delegate of the Commissioner.

The Information Commissioner's role is to make sure that decisions concerning freedom of information and privacy follow the rules in the *Information Act*, and to decide matters by reference to principles of natural justice and due process. The Commissioner has a duty to assist persons to exercise their rights under the Act by providing them with appropriate assistance. This involves providing general advice. The Commissioner cannot provide legal advice or act as an advocate for a person.

If a matter is ultimately referred to the NTCAT, the Commissioner provides a report to the NTCAT about what was discovered during the investigation.

The Information Commissioner's role is more inquisitorial than adversarial. It is a role that involves actively steering an investigation to uncover relevant facts and legal issues, provided they are within the scope of the complaint. The Commissioner particularly recognises that:

- in many complaints, at least one party cannot see all the information in question, and this limits the appropriateness of an adversarial process in most cases;
- parties are often non-lawyers and some parts of the legal framework raise technical legal issues that a layperson could not be expected to independently identify or respond to; and
- when the *Information Act* is read as a whole, part of the Commissioner's role in the overall process is to assist in identifying the relevant legal issues and relevant evidence to put before the NTCAT at a hearing.

4.2 Parties and the Onus of Proof

The Commissioner calls the persons or organisations formally involved in the dispute the 'parties'.

The parties to a complaint are:

- the **Complainant** – the person who made the complaint;
- the **Respondent** – the organisation who the Complainant is complaining about.

In an FOI third party complaint, the person who applied for the information becomes another respondent, and is usually given a name like 'the Second Respondent'.

When a complaint is being dealt with, one party will have the job of persuading the Commissioner that their case has merit. This is called having the 'onus of proof'. If the party with the onus of proof persuades the Commissioner that their case has merit, they will be successful.

The onus of proof is:

- on the *Respondent* in an FOI applicant complaint to show that their decision not to disclose the information was justified;
- on the *Complainant* in an FOI third party complaint to show that information about them should not be released;
- on the *Complainant* in a correction complaint to show that the information should be corrected;
- on the *Complainant* in a privacy complaint to show that the organisation has breached the Information Privacy Principles.

4.3 Interpreters

Interpreters will be used where this is necessary to facilitate access to justice. The need for interpreters will be considered on a case by case basis.

4.4 Legal Representatives and Support Persons

Parties are not required to use legal representatives when engaging with the Office of the Information Commissioner. The choice to use a legal representative is up to the party and at their own cost. Costs cannot be sought from the other party for legal fees incurred prior to the hearing. Costs for legal fees related to the hearing are a matter for the NTCAT.

The Commissioner may make directions in relation to the conduct of a mediation, and parties who wish legal representatives, other representatives, or support persons to attend the mediation should discuss this with the Commissioner. In most cases, representatives or support persons are allowed to attend, however this should not be assumed.

4.5 NTCAT

The Northern Territory Civil and Administrative Tribunal (NTCAT) is a tribunal which hears disputes about a range of matters in the NT, including hearings relating to FOI and Privacy complaints made on or after 1 May 2016. Tribunals are similar to courts, but slightly less formal. You can find out more about the NTCAT at www.ntcat.nt.gov.au.

5. Assessment and Investigation

5.1 Assessment

The Commissioner assesses whether a complaint should be accepted, rejected, or referred in accordance with section 106 of the *Information Act*. Complaints are required to be accepted, rejected, or referred within 90 days.

5.1.1 *When will a complaint be accepted?*

A complaint is usually accepted when, based on the information available to the Commissioner, it appears to be a matter that can be complained about in accordance with section 103 or section 104.

If the complaint is the kind of complaint that can be made in accordance with sections 103 or 104, it can only be rejected if:

- the Complainant has not complied with relevant time frames;
- the complaint is trivial, frivolous, or vexatious;
- the complaint is misconceived or lacking in substance;
- the complaint is more appropriately dealt with by another body or process;
- the matter is being dealt with in another court or tribunal;
- the matter has already been dealt with by the Commissioner.

The Commissioner does not have to reject a complaint for these reasons, but can do so if it seems appropriate to do so in all the circumstances.

An applicant who makes a complaint out of time is seeking special treatment in respect of having the complaint accepted, and will have to show the Commissioner that it is appropriate to accept the complaint out of time. There is a public interest in protecting the statutory time frames. The Commissioner will look at a range of factors, including the extent to which not accepting the complaint may lead to injustice, the reasons why the complaint was not made in time, and the public interest issues involved in the complaint. (Cases: *Lucic v Nolan and Others* (1982) 45 ALR 411; *Young and Worker's Compensation Board of Queensland* (1994) 1 QAR 543; *Hickey v Australian Telecommunications Commission* [1984] FCA 176; (1983) 47 ALR 517).

5.1.2 *When will a complaint be referred?*

An FOI applicant complaint can be referred back to the public sector organisation to conduct a further internal review if the Commissioner considers it is appropriate to do so. In deciding whether it will be appropriate to do so, the Commissioner will consider:

- the extent to which the organisation is willing or able to conduct a further review;

- the extent to which the organisation appropriately discharged its obligations to respond to the applicant in the matter now complained about;
- the extent to which referral of the matter back to the organisation is likely to:
 - lead to a resolution of the issues in dispute between the parties;
 - result in the location of information which would assist in narrowing or clarifying the issues in dispute between the parties; or
 - allow for necessary consultation with third parties;
- any other matter which the Commissioner considers relevant in relation to a particular complaint.

The Commissioner also has the power to refer a complaint to the NT Ombudsman, the Health Complaints Commissioner, or another privacy regulator, if appropriate.

5.1.3 What happens if a complaint is accepted?

The Complainant and Respondent(s) will be notified in writing of the Commissioner's decision to accept the complaint.

A complaint that is accepted will be investigated by the Commissioner. If there is sufficient evidence to support the complaint it can progress to hearing if mediation is unsuccessful.

5.1.4 What happens if a complaint is rejected?

The Complainant will be notified in writing.

If the Complainant wishes to contest the decision, he or she has 28 days to appeal to the Supreme Court to argue that the decision was wrong at law.

5.1.5 What happens if a complaint is referred?

The organisation must conduct an internal review in accordance with Part 4 of the *Information Act*. This gives the organisation 30 days to conduct an internal review (or further internal review).

If a Complainant is unhappy with the results of the internal review, they are entitled to make a complaint to the Commissioner under section 103 of the *Information Act*.

5.1.6 Seeking information prior to accepting, rejecting, or referring a complaint

In deciding whether to accept a complaint the Commissioner may:

- seek information from a public sector organisation;
- request further information from the Complainant.

At this stage of the process, the Commissioner can require a public sector organisation to provide records or other things, or to answer questions in accordance with section 87. The

Commissioner can require a complainant to attend, and to provide records or other information in accordance with section 106(2).

If there is sufficient information for the Commissioner to reach a decision, the Commissioner may accept or reject the complaint without consulting with the Respondent.

5.1.7 Determining the scope of the complaint

When accepting a complaint, the Commissioner will define the scope of the complaint that has been accepted.

The letters or forms that are lodged with the Commissioner when a person makes a complaint are not treated as a technical 'statements of claim'. The Commissioner does not expect that a Complainant will precisely identify and frame the legal issues in dispute. Rather, these documents are treated as an expression of a desire by a person to seek the Commissioner's assistance to exercise his or her rights under the Act.

The Commissioner may seek further information to clarify what has occurred, whether a valid complaint may be made, and what the scope of that complaint is intended to be.

With **FOI applicant complaints**, the scope of the complaint will be construed broadly as a general complaint about the organisation's refusal to provide access to information unless it is very clear that the Complainant intends to limit the complaint to specific issues. This is because the onus of proof is on the Respondent at hearing and a Complainant is not in a position to view the material and frame a fully-informed critique of the Respondent's decision. However, the scope of an FOI applicant complaint is limited by what was requested by the Complainant in his or her application to the organisation (as stated in the original application or subsequently modified by agreement).

If a complaint is accepted, the Commissioner will set out the scope of the complaint that has been accepted in its notice to the parties in accordance with section 107.

5.2 Investigation

If a complaint is accepted and not referred, the Commissioner investigates the complaint.

5.2.1 Commissioner's powers to gather evidence

Under section 110A, the Commissioner has the power to require any person to produce records or other things in their possession or control, to give evidence on oath, and to answer questions.

Under section 87, the Commissioner is also entitled to full and free access at all reasonable times to the records and other things of a public sector organisation, and can require a public sector organisation to answer a question or to produce a record or a thing.

5.2.2 *What happens if I don't comply with the Commissioner's request to provide records or other things, to give evidence, or to attend and answer questions?*

If there are reasons that you won't be able to comply within the specified time frame, it is important to contact the Commissioner as soon as possible to explain the reasons and seek an adjustment of the requirement.

It is important to make reasonable efforts to comply with a request for information from the Commissioner or her delegate. It is an offence under section 101 of the *Information Act* to intentionally engage in conduct which results in non-compliance (without reasonable excuse). Intentionally obstructing the Commissioner, and attempting to improperly influence the Commissioner is also an offence. The offences can result in imprisonment of up to 12 months or a fine of up to 200 penalty units.

6. Mediation

Mediation is a required part of the Commissioner's complaint process.

6.1 When does mediation occur?

Mediation can occur at any point after a complaint has been accepted by the Information Commissioner, but before it is either dismissed or referred to the NTCAT.

Mediation *must* occur before a matter with sufficient evidence can be referred to the NTCAT for hearing.

If the Information Commissioner finds there is insufficient evidence to substantiate a complaint (by making a *prima facie* decision in which the complainant is unsuccessful), the complainant can appeal to the NTCAT. The NTCAT reviews the *prima facie* decision. If the NTCAT finds that there was sufficient *prima facie* evidence, it may refer the matter back to the Information Commissioner to conduct a mediation before any hearing occurs.

6.2 Do I have to participate in mediation?

There must be an attempt made to resolve the matter by mediation before a hearing can occur. If the complainant fails to attend a mediation, the Commissioner may take it as a sign the Complainant is not interested in pursuing the complaint, and may discontinue the complaint.

The Commissioner may issue formal directions to the parties in relation to the conduct of the mediation.

6.3 What is the difference between mediation and other negotiations?

Mediation is a formal step that the Information Commissioner must arrange in the complaint process. It involves a neutral third party (usually the Commissioner or the Commissioner's delegate) facilitating a discussion between the parties in an attempt to reach a resolution. All discussions which are part of this mediation process are highly confidential and cannot be used in any proceedings, including in the hearing for the complaint. Mediation arranged by the Commissioner results in a mediation certificate confirming that a mediation took place, which is a prerequisite to hearing.

In addition, the parties may take their own steps to try and resolve a matter at any time. This might include writing letters of offer, or arranging their own mediations or settlement conferences. Many matters are resolved by informal negotiations conducted between the parties. However, parties should be aware that these informal discussions and mediations are not automatically excluded from being used as evidence in the hearing or other proceedings, and they will not result in an official mediation certificate.

6.4 Who can attend the mediation?

If a party is an individual, they will usually attend the mediation in person. It is common, but not required, for an individual to be accompanied by a support person.

Any person who attends as a representative of a party must attend with a document showing they are legally authorised to represent the party and make offers on their behalf.

Parties should provide the Commissioner with the names of all persons they wish to attend the mediation in advance. The Commissioner will need the opportunity to make enquiries in order to determine whether there are any issues with a certain person attending, or may wish to limit the number of persons attending a mediation. Ultimately, who can attend the mediation is a matter for the Commissioner to decide.

6.5 Where does the mediation take place?

It is usual for mediations to take place at the Office of the Information Commissioner in Darwin. However, if necessary, mediation can be arranged in other venues. When one or more parties have been unable to attend a mediation in Darwin, mediations have sometimes been conducted in part by telephone or videoconference.

6.6 How long does mediation take?

The Commissioner determines how long the mediation will take. However, as a general guide, you should allow a minimum of two hours for the mediation.

A mediation may involve a single mediation session, multiple mediation sessions, or a combination of mediation sessions and negotiations via email or other means.

6.7 How do I prepare for mediation?

The mediator will provide advice and directions on preparing for the mediation. If you have any questions or are unsure, you should contact the mediator or the Commissioner's office to obtain advice.

6.8 What happens at the mediation?

The precise process used will be decided by the mediator on a case by case basis. Parties are typically given the opportunity to speak with the mediator separately as well as in joint sessions.

The mediator's role is to be a neutral party who facilitates a resolution of the complaint. To this extent, the mediator will steer the conversation to certain topics, and set rules around whose turn it is to speak. The mediator may sometimes take a conciliator role by suggesting options that may assist the parties in reaching a resolution.

It is not uncommon to conclude a single mediation session without concluding the mediation process. This might occur because one or both parties undertakes to do some things to try and facilitate a resolution (for example, estimate time frames, produce particular documents for discussion, or seek third party views). When this occurs, the mediation is treated as still being in progress. The mediation may continue in negotiations via email and telephone. All such communications are considered to be part of the mediation process and are not admissible in any proceedings whatsoever. Further mediation sessions may be arranged, or the mediation may be concluded via written negotiations.

The mediation will conclude when the parties reach a resolution, or if it becomes apparent to the mediator that further discussion is unlikely to result in a resolution.

6.9 Mediation certificate

When the mediation is concluded (see 6.8 for an explanation of what constitutes the mediation process and when it is concluded) the mediator will issue a mediation certificate in accordance with section 111.

6.10 Outcome of mediation

6.10.1 Mediation is successful

The mediation certificate will state that the mediation was successful and the parties were able to resolve the matter. The complaint will then be discontinued and the Commissioner will close her file.

6.10.1 Mediation is unsuccessful

The mediation certificate will state that the mediation was unsuccessful.

If the Commissioner has already made a *prima facie* decision that there is sufficient evidence to substantiate the complaint, the Complainant has **28 days** from the day he or she receives the mediation certificate to apply to the Commissioner to refer the matter to the NTCAT for hearing.

If the Commissioner has not yet made a *prima facie* decision, the Commissioner will continue her investigation and make a *prima facie* decision.

7. Prima Facie Decision

7.1 Nature of *prima facie* decision

The *prima facie* decision is the name of the formal decision made by the Commissioner once a matter has been investigated, as required by section 110 of the *Information Act*.

The Commissioner looks at all the evidence presented by the parties and located by the Commissioner. The Commissioner decides whether that evidence, on its face, could prove the Complainant's case. It is a threshold test to make sure that only complaints with substance proceed to hearing.

A *prima facie* decision does not:

- evaluate the credibility of witnesses or resolve conflicting evidence;
- decide how to weigh competing discretionary factors; or
- resolve unsettled questions of law.

A Complainant will succeed at *prima facie* stage if they have an arguable case. This does not mean that the Commissioner believes the Complainant will necessarily succeed at hearing, but just that the evidence and legal arguments have enough substance that the case is suitable to go to hearing.

A *prima facie* decision is written to set out clearly the reasons why the decision was made.

7.2 Copies of the *prima facie* decision may be redacted

The *prima facie* decision will often discuss or describe the information in dispute. Such information cannot be disclosed to the parties by the Commissioner unless it is done by agreement, or by order of the NTCAT. Consequently, parties will sometimes receive a 'redacted' decision (parts revealing the information in dispute are blanked out).

7.3 What are the consequences of the *prima facie* decision

7.3.1 If there is sufficient evidence to substantiate the complaint

This is a decision in favour of the Complainant. It means that the Complainant is eligible to have his or her matter heard by the NTCAT, provided that formal mediation has also taken place.

To have the decision heard by the NTCAT, the Complainant must:

- write to the Commissioner and request the matter be referred to the NTCAT for review of the *prima facie* decision;
- within **28 days** from the date that the Complainant has BOTH:
 - a mediation certificate under section 111, and

- has received notification of the outcome of the *prima facie* decision.

The Complainant will not have a mediation certificate if the matter has not already previously been referred to formal mediation under section 111. In that case, the Commissioner will refer the matter to mediation. Once mediation has occurred, the parties will be provided with a mediation certificate, and the Complainant will have 28 days from the certificate is provided to apply to the Commissioner to have the matter referred to the NTCAT.

7.3.2 If there is insufficient evidence to substantiate the complaint

This is a decision in favour of the Respondent. It means the Commissioner does not believe there is sufficient evidence to warrant a hearing before the NTCAT. The Commissioner will dismiss the complaint under section 110(5).

The Complainant can seek to have this decision reviewed by the NTCAT.

To have the decision reviewed, the Complainant must:

- write to the Commissioner and request the matter be referred to the NTCAT for review of the *prima facie* decision;
- within **28 days** from the date the Complainant is notified of the outcome of the *prima facie* decision.

The Commissioner will then refer the complaint to the NTCAT. The NTCAT will then review the evidence and decide whether there was sufficient *prima facie* evidence to substantiate the matter complained of. If the NTCAT decides the Commissioner's decision was incorrect, the NTCAT can either refer the matter back to the Information Commissioner for further investigation, or continue to handle the matter and decide the substantive issues raised by the complaint.

8. Fees and Costs

8.1 Cost of making a complaint

There is no fee for making a complaint or participating in the process.

8.2 Legal Costs

No party is required to have a lawyer. If a party chooses to use a lawyer to prepare submissions or attend before the Commissioner, the party bears their own legal costs.

If the matter goes to hearing before the NTCAT, parties generally bear their own costs, but a party can make an application for the NTCAT to direct the other party to pay some of their legal costs. Parties should note that when deciding whether to award costs, the NTCAT will consider:

- (a) whether the party genuinely attempted to enable and assist the decision maker to make the original decision on its merits; and
- (b) whether the decision maker genuinely attempted to make the original decision on its merits.

This means that delays, and inappropriate or biased decision making at the stage of the 'original decision' (which in this case usually means the internal review decision) can potentially have an impact on costs if the matter goes to hearing.

8.3 Costs of referral to NTCAT

Whether the NTCAT charges any fees in relation to lodging or hearing a matter is ultimately a matter for the NTCAT. However, at the time of writing, there were no fees charged for matters referred to the NTCAT by the Commissioner.