

A report on the operation of the

Freedom of Information Act 2016

FOR 2023–24

OCTOBER 2024

Report by the ACT Ombudsman,
Iain Anderson under s 67 of the *Freedom of
Information Act 2016* (ACT)

REPORT NO. 9 | 2024

Acknowledgement of Country

We acknowledge the Ngunnawal people as the traditional custodians of the ACT and recognise any other people or families with connection to the lands of the ACT and region. We acknowledge and respect their continuing culture and the contribution they make to the life of this city and this region.

Contacting the ACT Ombudsman

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If you would like further information about the ACT Ombudsman, please go to:

Website ombudsman.act.gov.au

This 2023–24 report on the operation of the *Freedom of Information Act 2016* is available on the above website.

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Produced by the ACT Ombudsman, Canberra.

2023-24 HIGHLIGHTS



Open Access information decisions

10,132



Decisions to publish

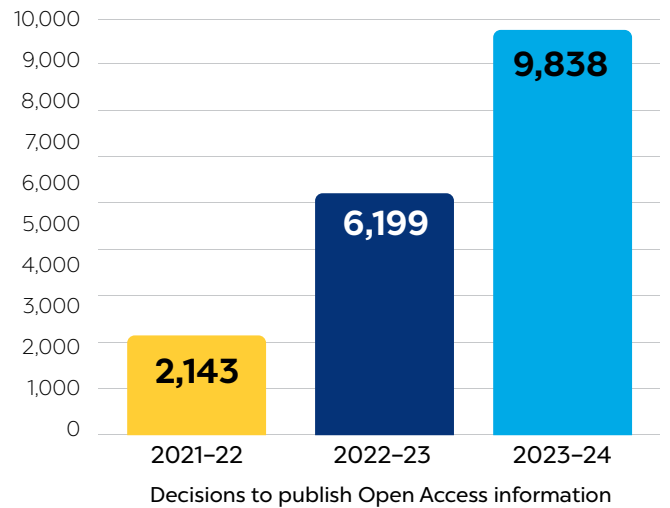
9,838



Decisions not to publish

294

Note: in 2023-24 we have combined 'decisions to publish in part' and 'decisions not to publish' to simply report 'decisions not to publish'.



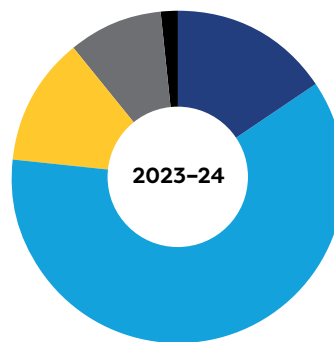
Access applications in the ACT

1,351
received

1,064
finalised

99%

Access decisions made within statutory timeframes



Note: these numbers will not add up to 1,064 as they exclude decisions decided in different ways or applications withdrawn by the applicant.



Ombudsman reviews

43
received

49
finalised



Complaints

4
received

4
finalised

Introduction from the ACT Ombudsman



I am pleased to introduce the 2023–24 annual report on the operation of the *Freedom of Information Act 2016* (ACT) (FOI Act), prepared under s 67 of the FOI Act.

For this reporting period, we received the mandatory data from all ACT Government directorates, with 8 of the 9 providing additional optional data. This allows the ACT Ombudsman to build our understanding of the operation of the FOI Act.

Overall, we have found the FOI Act is largely achieving its objectives – agencies are improving the quality of their decision-making and proactively making open access decisions. However, adequate resourcing for FOI functions remains an ongoing challenge for agencies, and there appears to be a growing backlog of unmade decisions within agencies. In these circumstances, there may be potential to streamline processes and improve the operation of the legislation.

Government information should be published proactively wherever possible, with formal access applications the last port of call. During 2023–24, we continued to promote the pro-disclosure objectives of the FOI Act, working closely with agencies to ensure consistent and timely decision-making. The significant increase in publishing open access information in 2023–24 provided increased transparency of Government-held information. This is important to maintain confidence and trust in government.

This year, we completed 49 Ombudsman reviews, 23 of which resulted in formal decisions published on our website. The other 26 Ombudsman reviews were resolved without the need for a formal decision. The 128 Ombudsman review decisions published as of 30 June 2024 contribute to a growing body of guidance on the operation of the FOI Act and assist practitioners with future decision-making.

Over the next 12 months, we will continue working closely with agencies to promote consistent and timely FOI Act decision-making in accordance with the legislation’s pro-disclosure objectives.

Additionally, we will focus on providing our insights and input to help inform the upcoming independent review of the FOI Scheme.

A handwritten signature in black ink, appearing to read 'Iain Anderson', written in a cursive style.

Iain Anderson
ACT Ombudsman

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Part 1: Introduction

This report outlines the ACT Ombudsman's insights about the operation of the FOI Act in 2023–24, as well as planned priority activities for 2024–25.

The public's right to access government information, underpinned by properly administered FOI legislation, contributes strongly to the effective working of representative democracy. The FOI Act in the ACT has a pro-disclosure bias and a focus on making government information accessible to the public.

Under the FOI Act, every person has a right to access government-held information where it is not contrary to the public interest for that information to be disclosed.¹

The FOI Act requires agencies and Ministers to publish government information proactively and be transparent about the information they do not publish. This includes information held by government directorates and agencies, Ministers, government-owned corporations (with some exceptions), public hospitals and health services, public authorities and public universities enacted under ACT laws.²

The FOI Act emphasises access to government information through informal requests, without the need for formal processes. Where a formal process is required, an access application can be made under the FOI Act to the relevant agency, and decisions are focused on public interest considerations.

The ACT Ombudsman oversees the FOI Act and promotes its objects by:

- monitoring the operation of the FOI Act, including the publication of open access information by agencies and Ministers, and agency compliance with the FOI Act
- publishing guidelines
- making open access information declarations
- considering requests for extensions of time to decide access applications
- conducting merits review (Ombudsman review) of FOI decisions, in response to review applications
- investigating complaints about an agency or Ministers' action in relation to their functions under the FOI Act.

Information on the ACT Ombudsman's own performance under the FOI Act, as an ACT Government entity required to report under s 96 of the FOI Act, is included in the *ACT Ombudsman's Annual Report 2023–24*, which is available on our website.³

¹ This is subject to some exceptions, such as information under the [Health Records \(Privacy and Access\) Act 1997](#) (see s 12 of the FOI Act).

² The [FOI Act](#) includes a comprehensive definition of agency (s 15).

³ See [ACT Ombudsman Publications](#).

Part 2: Open access information decisions

The intention of the FOI Act is to make government-held information accessible. Formal access applications for information should be a last resort, with information being published proactively wherever possible.⁴ ACT Government agencies must publish certain information routinely without the need for a formal application to be made by a member of the public. This includes policy documents, reports, budget papers and agency disclosure logs.⁵

The ACT Government maintains an open access portal⁶ to provide the public with a central, searchable interface to access government information. Agencies can publish information on their own website and add a link to this information on the portal.

We have published open access guidelines to help ACT agencies to understand and meet their open access obligations. These guidelines are notifiable instruments available on the ACT Legislation Register⁷ and on the ACT Ombudsman's website.⁸

The ACT Ombudsman's own open access strategy is available online⁹ and sets out:

- what information will be made publicly available
- how it will be made available
- how published information will be reviewed to ensure it remains accurate, up to date and complete
- that we will publish our reasons for decisions when information may not be made publicly available because it is contrary to public interest.

The strategy supports the ACT Ombudsman's staff to comply with open access requirements and may be used to assist directorates and agencies to develop their own strategies. In 2023–24, we published 38 documents under open access.

We note the steady rate of enquiries to the Office about the open access information scheme requirements, particularly the consideration of educational or other materials which are not technically policy documents but contain information about the work and functions of the entity. We intend to publish an open access information checklist to assist officers to understand their obligations and improve compliance with the scheme.

As part of the ACT Government's upcoming review of the FOI Act, we will provide input on

⁴ See page 3 of the [Explanatory Statement to the Freedom of Information Bill 2016](#).

⁵ See s 23 of the FOI Act for the list of categories of open access information.

⁶ See [ACT Government open access information](#).

⁷ See [open access information guidelines](#).

⁸ See [ACT Ombudsman publications](#).

⁹ See [ACT Ombudsman open access strategy](#).

open access to ensure the maximum amount of information is published and reporting on decisions to publish or not publish information is accurately captured in annual reporting.

Decisions to publish

During the reporting period, agencies and Ministers continued to publish open access information on their respective websites and on the open access portal.

As shown in Figure 1, at least **9,838 decisions** to publish open access information were made. This is a significant increase on the reported 6,199 decisions published in 2022–23, demonstrating agencies continue to take their open access obligations seriously and proactively publish open access information.

The above figures reflect agency decisions to publish information:

- on the agency disclosure log
- registered on the open access portal, or
- on the agency website.

We say ‘at least’ 9,838 decisions to publish information were made because we recognise this may not capture all the information published by agencies. Agencies are not expected to keep formal records or make public interest assessments on the multitude of documents they publish on a daily or weekly basis. To require this would impose an unnecessary administrative burden and could potentially undermine the objectives of the FOI Act by discouraging agencies from publishing government information.

Decisions not to publish

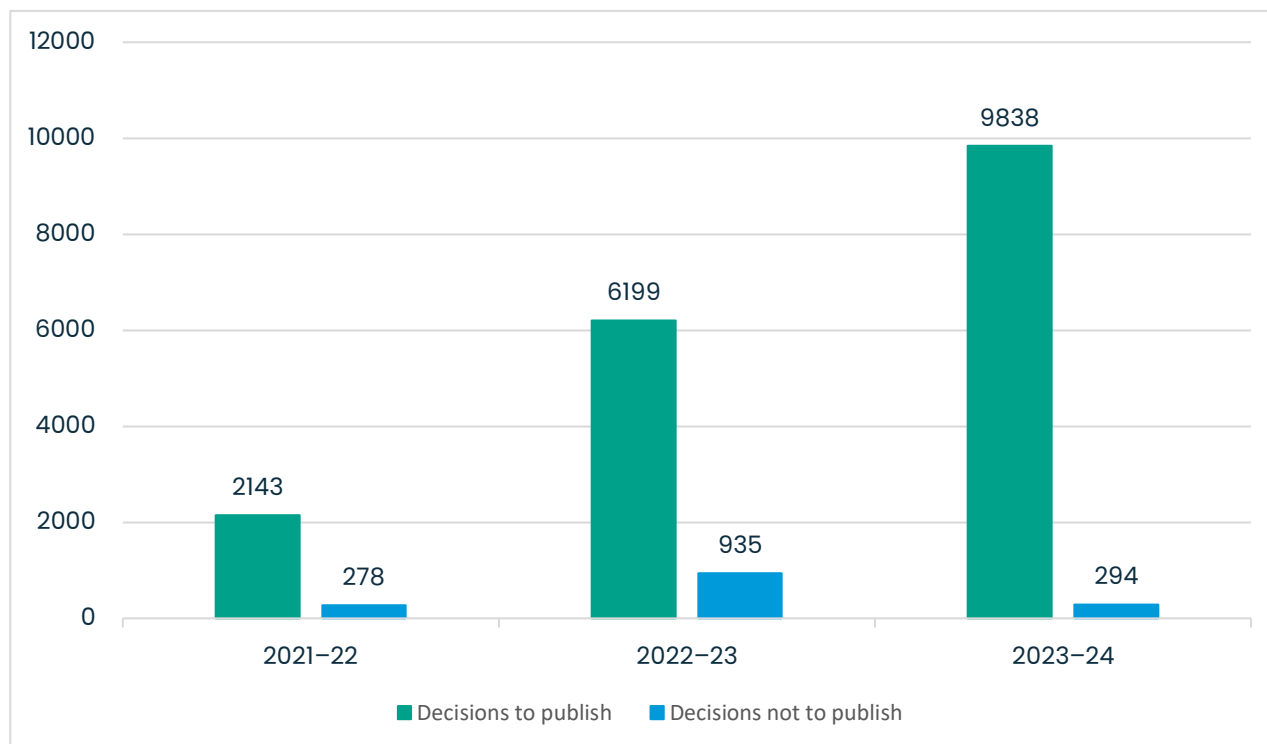
Generally, if open access information is not made available because it would be contrary to the public interest to do so, the FOI Act requires the agency instead to publish a description of the information and the reason for this non-disclosure, except in limited circumstances.

As shown in Figure 1, in 2023–24, ACT Government agencies made **294 decisions not** to publish open access information, compared to 935 decisions not to publish in 2022–23. This accounted for **3%** of total open access decisions in 2023–24 (down from **13%** in 2022–23).

This is a significant decrease in decisions not to publish open access information compared to 2022–23. While it is in line with the number of decisions not to publish open access information in 2021–22 (278), there were many less decisions to publish made in that year.

The data for 2023–24 suggests that agencies’ open access strategies are working well. The much lower number of decisions not to publish open access information and the much higher number of decisions to publish open access information demonstrate a continued maturing of the open access scheme.

Figure 1: Open access decisions



In 2023–24, the number of decisions **not to** publish a description of open access information remained steady, with **7** such decisions made in 2023–24, compared to **6** such decisions made in 2022–23.

Decisions by agencies and Ministers

The number of open access decisions made by each of the agencies and Ministers, as reported to the ACT Ombudsman, are outlined in Table 1.¹⁰ As we did in 2022–23, we split the decisions not to publish open access information into decisions not to publish at all and decisions not to publish in part. This provides a clearer picture of the number of decisions to publish open access information, as a decision not to publish in part is also a decision to publish some open access information.

The Office of the Legislative Assembly (OLA) again made the highest number of decisions to publish open access information, with **3,128 decisions**, followed by the Chief Minister, Treasury and Economic Development Directorate (CMTEDD), with **2,361 decisions**, and the ACT Health Directorate (Health), with **1,265 decisions**.

Most agencies did not make any formal decisions to withhold information.

¹⁰ This dataset includes information provided by each directorate, not including smaller agencies within their portfolio. Separate data for each agency will be available in their respective annual reports. Agencies that reported nil for all categories have not been included in this table.

In 2023–24, a total of **55 decisions** were made to publish Ministerial information,¹¹ including 27 Ministerial diaries, 23 Ministerial travel reports, 4 Ministerial hospitality reports and one access application. This is less than the 66 decisions to publish Ministerial information made in 2022–23.

¹¹ See [Ministers' open access information](#).

Table 1: Open access decisions by agencies that reported decisions

Directorates and agencies	Decisions to publish open access information	Decisions not to publish open access information in full	Decisions not to publish open access information in part	Decisions not to publish a description of open access information
OLA	3,128	-	-	-
CMTEDD	2,361	149	-	-
Health	1,265	-	-	-
CSD	1,070	14	-	-
Education	592	-	-	-
TCCS	485	-	3	-
CHS	360	49	-	-
JACS	236	62	-	-
EPSDD	108	-	-	-
ACT Ministers	55	-	-	-
ACTIC	45	-	-	-
ACTO	38	-	-	-
CIT	31	3	-	-
AAO	20	-	-	-
MPC	16	-	-	-
SLA	11	-	-	-
CRA	5	-	-	-
ICRC	4	-	-	-
HRC	2	-	-	-
ICS	2	-	-	-
LA	2	-	-	-
CFC	1	-	-	-
OCSE	1	-	-	-
UC	-	7	-	7
Total	9,838	284	3	7

Part 3: Informal requests for information

Information can be requested informally from an agency or Minister, and a decision may be made to release it directly without the need for a formal access application.

Agencies are not required to report on the number of informal requests received, or related outcomes, as to do so would impose an unnecessary administrative burden. Agencies may, however, choose to report optional data on the number of access applications that were withdrawn and resolved outside the FOI process.

The figures for 2023–24 show a small decrease in the number of access applications resolved informally, with **100 access applications reported as resolved outside the formal FOI process**, compared to the 111 access applications reported as resolved outside the formal FOI process in 2022–23.

While we cannot ascertain if all the matters resolved informally were finalised after information was provided informally, it is positive to continue to see applications are being resolved outside the formal FOI process, as intended by the FOI Act.

The ACT Ombudsman encourages agencies to release information informally where possible, rather than require applicants to seek information through the FOI process. We will continue to monitor what is being reported by agencies to identify trends or issues.

Part 4: Access applications

An access application is the formal way to request information under the FOI Act. Access applications can be made to an agency or Minister, and decisions on access applications may be reviewed by the Ombudsman. An agency or Minister will assess the application and may decide to give full or partial access to government information sought under the FOI Act or refuse access.

An agency or Minister can refuse access to information in circumstances where it is assessed as contrary to the public interest to release. They can also refuse to deal with an access application or refuse to confirm or deny that information is held in limited circumstances.¹²

Applications made

In 2023–24, **1,351 access applications** were made to ACT Government agencies and Ministers.

As shown in Figure 2, this is a **4% increase** from the **1,301 access applications** received in 2022–23. Figure 2 also shows the total access applications received in each financial year since 2018–19 (the first full year of the operation of the FOI Act), showing a steady increase in access applications over the past 4 years.

¹² These being that the information is contrary to the public interest information and doing so would reasonably be expected to: endanger the life or physical safety of a person, be an unreasonable limitation on a person's rights under the *Human Rights Act 2004* (ACT), or significantly prejudice an ongoing criminal investigation. See s 35 of the FOI Act.

Figure 2: Access applications received by agencies and Ministers

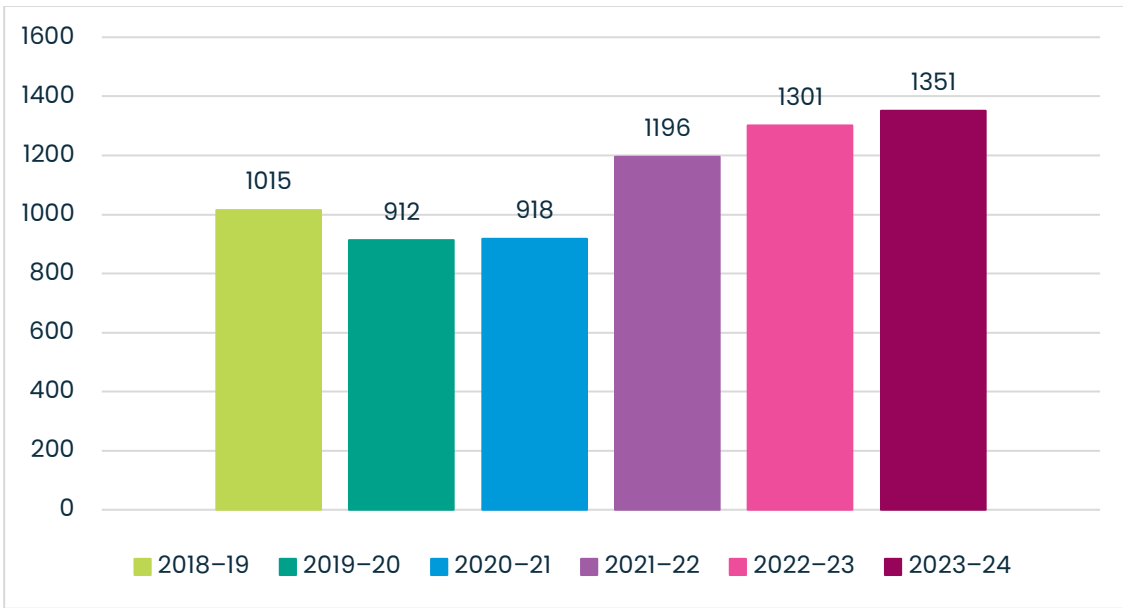
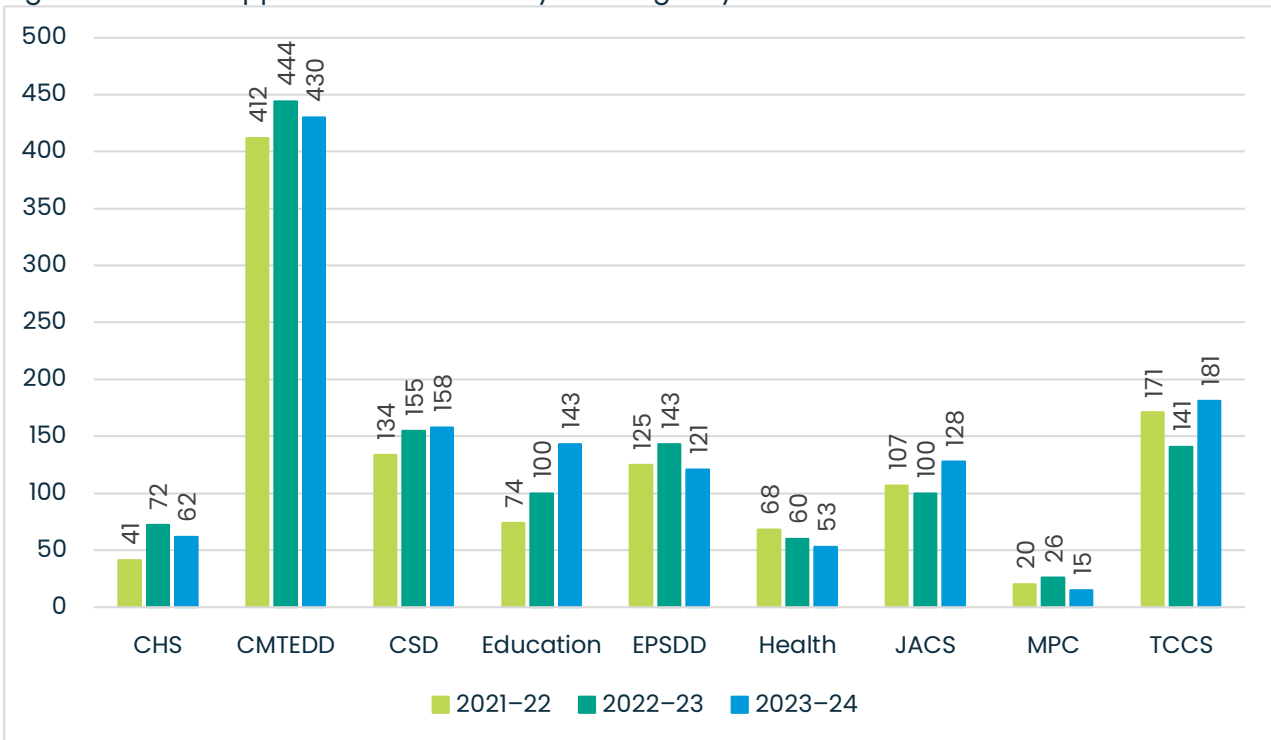


Figure 3 reflects the number of access applications received by the 9 directorates in 2023-24 compared to the number of access applications received in 2022-23 and 2021-22. Overall, they remain largely consistent from previous years, though Education has received nearly double the applications compared to 2 years ago (74 in 2021-22; 100 in 2022-23; 143 in 2023-24). The number of access applications received by the 9 directorates does not include access applications received by smaller agencies and access applications received by Ministers.

Figure 3: Access applications received by each agency



We continue to see an increase in the number of access applications with a wide scope, resulting in a large volume of information being considered for release. Agencies differ in how they manage these applications on a case-by-case basis and may attempt to narrow the scope under s 34(3) of the FOI Act or decide to refuse to deal with an application on the basis that it would require an unreasonable and substantial diversion of resources within the meaning of s 44 of the FOI Act.

Application outcomes

During the reporting period, agencies and Ministers made **1,064 decisions** on access applications. This is a **2% decrease** from the previous financial year, when 1,087 such decisions were made. Given the number of applications are increasing, this suggests that there may be a growing backlog of decisions to be made by agencies.

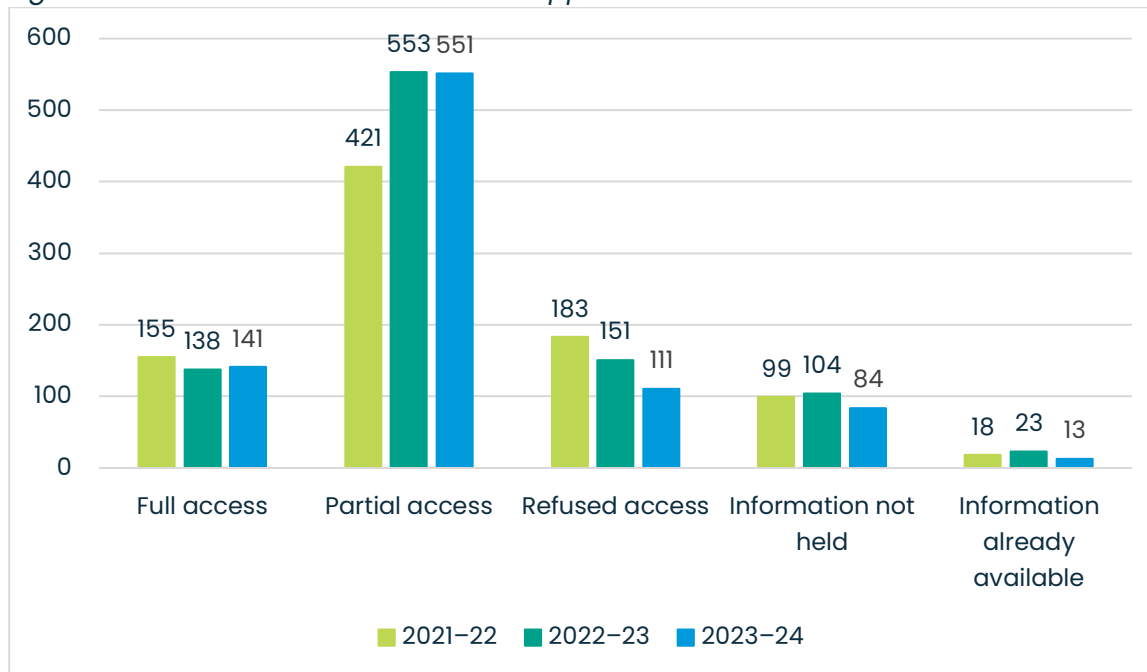
As outlined at Figure 4 **Error! Reference source not found.**, of the 1,064 decisions on access applications reported by agencies and Ministers:

- *Full access* was granted in **141 decisions (13%)** – with the agency disclosing all information identified within the scope of the access application.
- *Partial access* was granted in **551 decisions (52%)** – with some information redacted prior to the release because it was assessed as contrary to the public interest information.
- *Access was refused* in **111 decisions (10%)** – with the agency deciding the information was contrary to the public interest information.
- Information was assessed as *not being held* by the agency in **84 decisions (8%)** – with an agency required to take reasonable steps to identify all government information within the scope of the application prior to determining that it cannot be located or does not exist.
- Information was assessed as *already available* to the applicant in **13 decisions (1%)**.

Figure 4 does not include **164 decisions (15%)** that were decided in different ways, such as agencies *refusing to deal* with the application or *refusing to confirm or deny that information was held* (see further discussion of these decisions below). Providing detailed data to the ACT Ombudsman on this category of decisions is optional.

Figure 4 also excludes the **190 access applications** agencies reported as **withdrawn** by the applicant before a decision was made by the agency (an increase from the 186 reported in 2022–23), and the **134 access applications** reported as **transferred** from one agency to another.

Figure 4: Outcomes of decided access applications



These figures show the proportion of decisions to grant full access remained steady at **13%**. The proportion of decisions to partially release information also remained largely steady at **52%** (51% in 2022-23). The proportion of decisions to refuse access in full decreased to **10%** (14% in 2022-23).

When full access and partial access decisions are combined, access in some form was granted in **692 decisions (65%)**. This is consistent with 2022-23, where 64% of decisions resulted in access in some form. The data indicates a stable pro-disclosure culture.

One of the reasons given by agencies for the large proportion of partial release decisions is that many decisions require agencies to redact small amounts of personal information (such as personal telephone numbers or other direct contact information). This resulted in what would otherwise be full access decisions becoming partial access decisions.

Our analysis of FOI data from other jurisdictions for 2022-23, being the most recent data publicly available, indicates applicants in Australia are more likely to be granted partial access than full access.¹³ This is consistent with what we are seeing for the ACT.

We suggest the high proportion of partial access decisions in 2023-24 indicates an opportunity for agencies to improve their initial scoping

¹³ See, for example, discussion by the NSW Information and Privacy Commission in its *Report on the Operation of the Government Information (Public Access) Act 2009 (NSW)| 2022-2023* at [GIPA Compliance Reports](#).

activities with applicants, for example, to seek the applicant's agreement to exclude irrelevant information such as inconsequential personal information.

We will continue to monitor this issue in 2024–25 and offer further guidance to agencies.

Reasons for refusal

In this reporting period, 8 directorates provided optional data¹⁴ about the reasons for refusing access to information in full or in part.

Agencies may rely on Schedule 1 or Schedule 2 factors, or both, in deciding access applications – for example, an agency may rely on Schedule 1 for part of the information at issue and Schedule 2 for another part of the information at issue.

An agency can withhold information where disclosure would be contrary to public interest, as set out in Schedule 1 of the Act. In 2023–24, agencies reported **184** decisions to refuse access relying on Schedule 1.

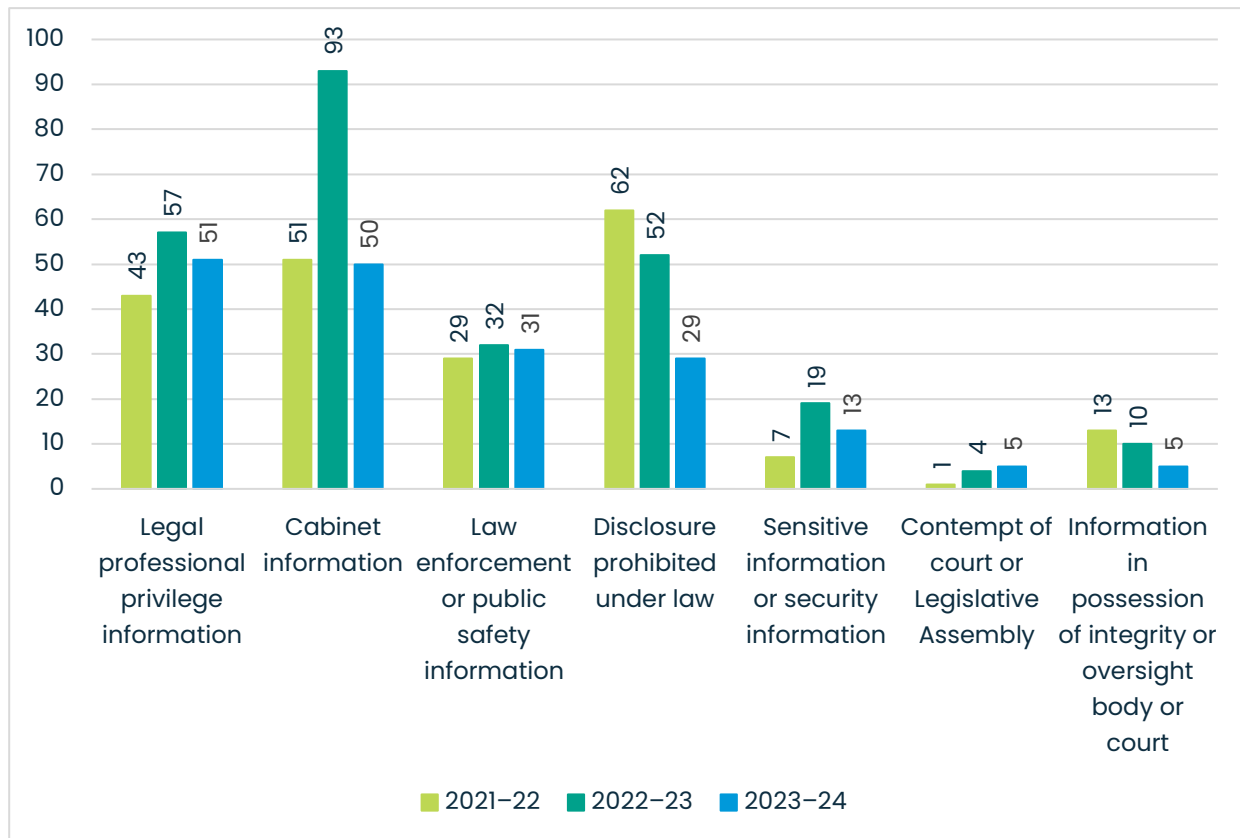
As outlined in Figure 5, the top 3 grounds relied on by agencies to withhold information under Schedule 1 of the FOI Act were:

- information subject to legal professional privilege (Schedule 1, section 1.2) (**51** decisions (**28%**))
- Cabinet information (Schedule 1, section 1.6) (**50** decisions (**27%**))
- law enforcement or public safety information (Schedule 1, section 1.14) (**31** decisions (**17%**)).

For comparison, Figure 5 also includes data obtained in 2022–23 and 2021–22. Grounds not relied upon at all during these reporting periods have not been included. Several grounds that separately were statistically negligible have been grouped together (for example, *information in possession of integrity or oversight body or court* includes information in possession of the Ombudsman, the ACT Human Rights Commission (HRC) and the ACT Integrity Commission (ACTIC)).

¹⁴ Optional data was not provided by the Community Services Directorate (CSD). CSD provided this data in 2021–22 and 2022–23, including significant data about the reasons for refusing access to information. The lack of this data from CSD in 2023–24 means that the overall data cannot be accurately compared. However, the data still provides insight into the decisions made by agencies.

Figure 5: Reasons for refusal under Schedule 1 of the FOI Act ¹⁵



If information is not to be withheld under Schedule 1, an agency needs to balance factors in deciding whether releasing the information is in the public interest. Schedule 2 sets out the factors favouring disclosure and non-disclosure. In 2023-24, agencies reported **778** decisions relied on Schedule 2 to refuse access. As Figure 6 shows, the top 3 factors favouring non-disclosure relied on by agencies to withhold information under Schedule 2 of the FOI Act were:

- prejudice the protection of an individual’s right to privacy or any other right under the Human Rights Act (Schedule 2, section 2.2(a)(ii)) (**392** decisions (**50%**))
- prejudice trade secrets, business affairs or research of an agency or person (Schedule 2, section 2.2(a)(xi)) (**110** decisions (**14%**))
- prejudice an agency’s ability to gain confidential information (Schedule 2, section 2.2(a)(xii)) (**56** decisions (**7%**)).

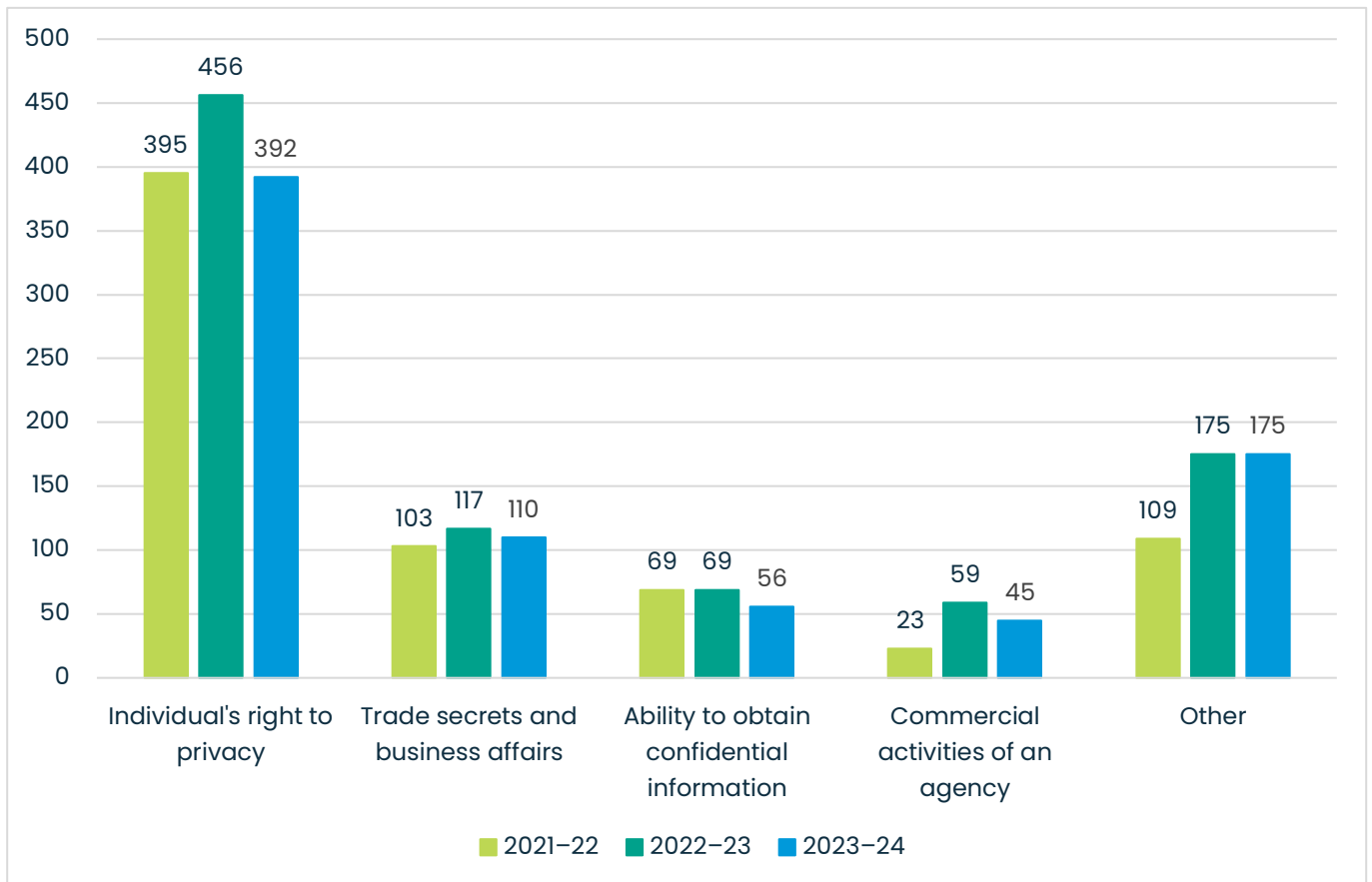
¹⁵ Optional data was not provided by CSD in 2023-24.

This is consistent with 2022–23, where the same top 3 Schedule 2 factors were reported.

Figure 6 also includes data obtained in 2022–23 and 2021–22. Grounds that separately were statistically negligible (5% or less) have been grouped together as *other*.

We will continue to monitor this data in future years to identify trends and compare grounds and factors arising in decisions subject to Ombudsman review.

Figure 6: Reasons for refusal under Schedule 2 of the FOI Act¹⁶



Processing times

Amendments to the FOI Act including provisions for additional time for agencies to process applications commenced on 24 May 2023.

For access applications received **prior to 24 May 2023**, an access application was required to be decided within **20 working days** – unless an applicant agreed to an extension of time, an extension was granted by the Ombudsman, or a third party was required to be consulted. Where a third party was consulted, agencies had an additional 15 working days to

¹⁶ Optional data was not provided by CSD in 2023–24.

decide the access application.

For these applications, agencies were able to seek an applicant's agreement to an extension of time for **up to 12 months** from the date of the application. If an applicant refused an extension request, the agency was also able to seek an extension from the Ombudsman. An extension beyond 12 months must be sought from the Ombudsman.

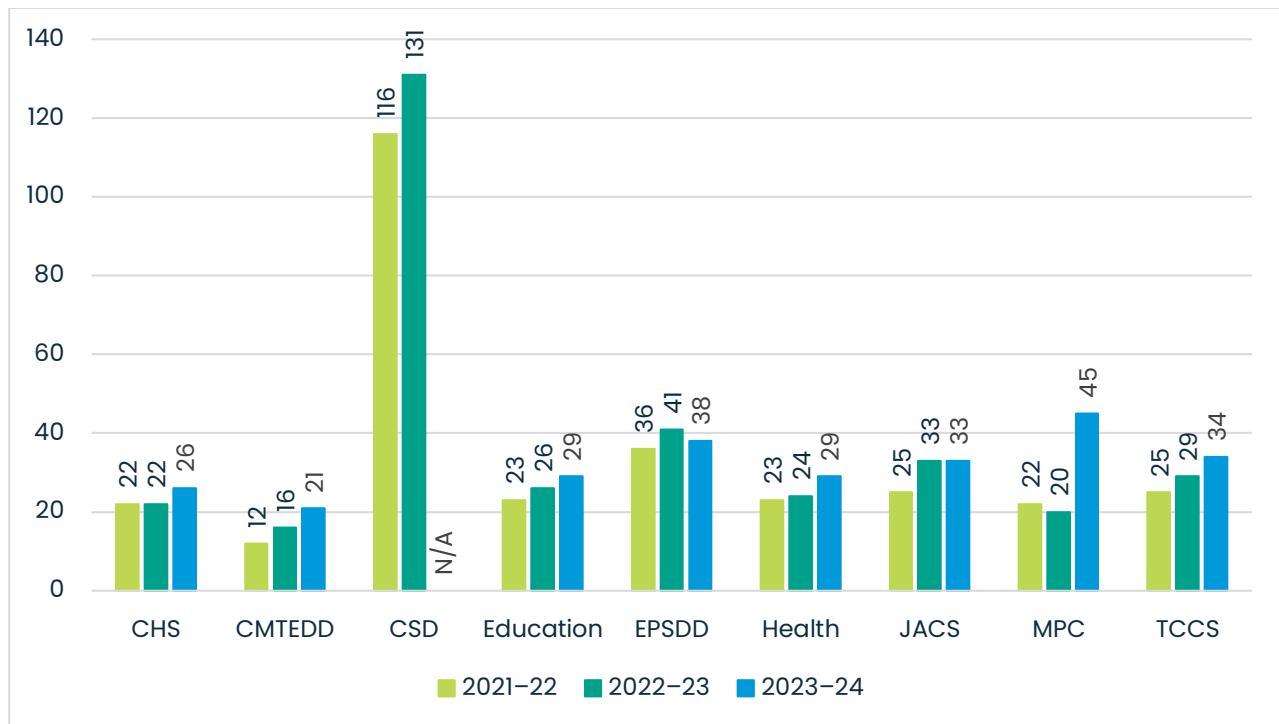
For access applications received **on or after 24 May 2023**, an access application is required to be decided within **30 working days** – unless an applicant agrees to an extension of time, an extension is granted by the Ombudsman, or a third party must be consulted. Where a third party must be consulted, agencies continue to have an additional 15 working days to decide the access application.

For these applications, agencies can seek an applicant's agreement to an extension of time for **up to 24 months** from the date of the application. If an applicant refuses an extension request, the agency can also seek an extension from the Ombudsman. An extension of time beyond 24 months must be sought from the Ombudsman.

Figure 7 below shows the average processing times, in working days, by each directorate, compared to the average processing times in 2022–23. Noting the legislative changes to processing times apply only to access applications received on or after 24 May 2023, the comparison to the 2022–23 data may indicate an increase in the average processing time in working days by directorates, but this is in part because of the increased processing time available to agencies following the amendments to the FOI Act.

The average processing time for CSD cannot be compared to 2022–23, as CSD did not provide optional data in 2023–24.

Figure 7: Average processing time in working days by each agency¹⁷



Access applications processed within time

During the reporting period, **99%** of decisions on access applications were decided within the statutory timeframes – that is, within the standard timeframe or within an extension granted by the applicant or the Ombudsman. It is mandatory for agencies to report on meeting the statutory timelines, however it is optional for agencies to report their average processing time.

Access applications decided without any extension of time accounted for **83%** of decisions. A further **15%** of applications were processed where the applicant approved an extension request. Applications processed with an Ombudsman extension of time accounted for **1%** of decisions. The remaining **1%** of access applications became deemed refusal decisions and are discussed below.

There were **218 access applications** ‘on hand’ at the end of the reporting period (up from **192** last year). The ACT Ombudsman does not have visibility over the length of time these applications have been open.

¹⁷ Optional data was not provided by CSD in 2023–24.

Extensions of time by the Ombudsman

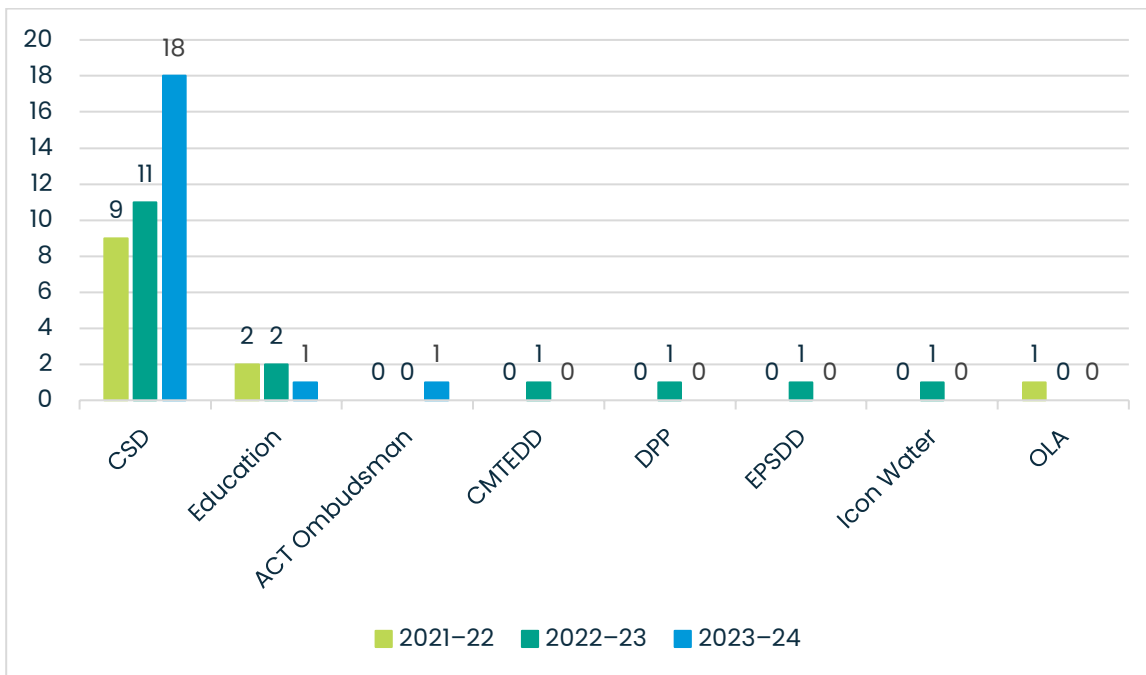
The Ombudsman has discretion to grant an extension of time to an agency to decide an access application. An extension can be granted if the Ombudsman believes it is not reasonably possible for the access application to be dealt with within the timeframe, because the application:

- involves dealing with a large volume of information
- is complex, or
- other exceptional circumstances apply.

There is no cap on the length of time the Ombudsman can grant an extension, and the FOI Act allows the Ombudsman to impose conditions on the extension granted. Once granted, the Ombudsman can cancel or amend the extension if the directorate does not comply with the conditions imposed.

During the reporting period, **20 applications** were made to the Ombudsman for an extension of time. The applications made by agencies are shown in Figure 8.

Figure 8: Extension of time applications to the Ombudsman



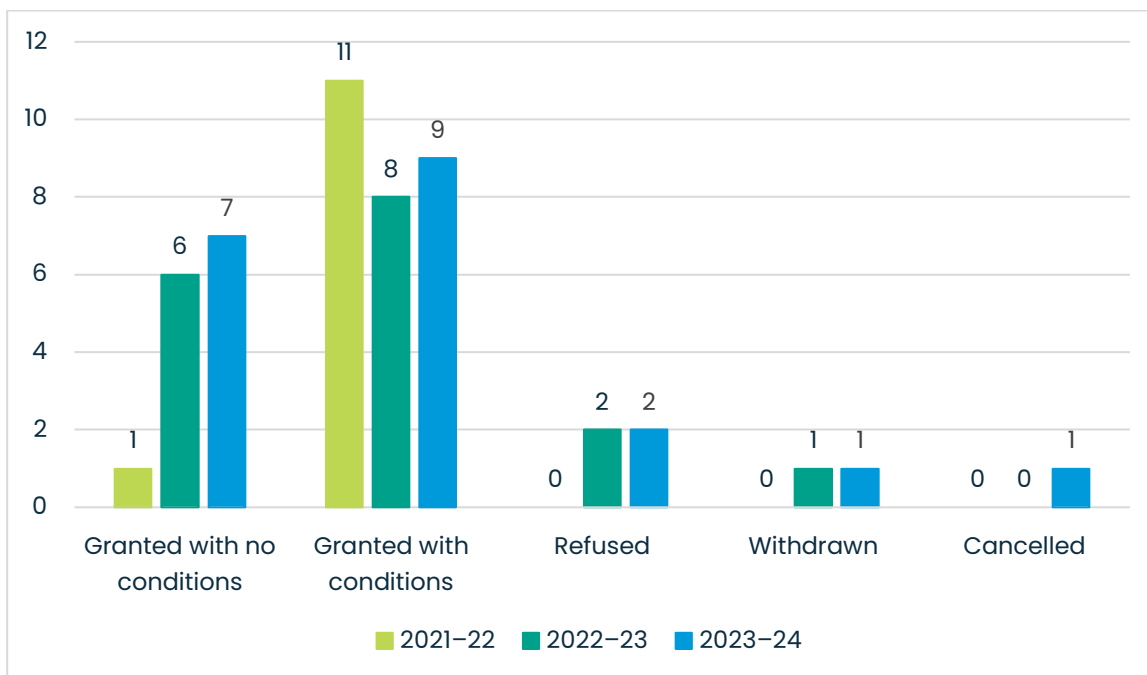
As shown in Figure 9, after assessing these requests, the Ombudsman granted **16 applications** for an extension of time. The Ombudsman imposed additional conditions on **9 of these 16 applications**. These conditions included requiring incremental releases of information throughout the processing period and providing progress updates to the Ombudsman.

The Ombudsman refused **2** extension of time applications from CSD because they were not considered to be reasonable requests. In addition, **one** extension of time application was withdrawn by the ACT Ombudsman and **one** application from CSD was initially granted and then later cancelled as the conditions were not met.

The length of additional time requested and granted varied. The extension granted to Education was for 19 working days. The ACT Ombudsman originally requested 10 working days but later withdrew its application. CSD requested and was granted longer extensions, ranging from 25 to 399 working days.

The lengthier extensions requested by CSD reflect the complexity and sensitivity of the access applications received by CSD, as well as the large volume of personal information often sought. The long extensions requested by CSD are conditional upon the incremental release of information occurring throughout the processing period, so that applicants are not waiting the full extension period to receive all the information requested.

Figure 9: Extension of time outcomes



Deemed refusal decisions

Where statutory timeframes have not been met and an extension of time has not been obtained, an agency or Minister's decision is taken (deemed) to be a refusal to give access to the government information requested.

Section 39 of the FOI Act requires agencies to notify the Ombudsman of a deemed refusal and, after the access application (including any review or appeal) is finally decided, table a copy of that notice in the Legislative Assembly. Most agencies continue to process an access application and make a formal decision in deemed refusal cases, despite the statutory timeframe having expired, which is preferable to agencies stopping and waiting for the applicant to seek review of the deemed refusal.

As shown in Figure 10, during 2023–24, agencies reported **10 deemed refusal decisions**. This is a decrease from 2022–23, when agencies reported 18 deemed refusal decisions.

In 2023–24, the Ombudsman was formally notified of **10 deemed refusal decisions**. During collection of data for this report, the Ombudsman identified that 2 of these deemed refusal decisions were included in the statistics reported for 2022–23 but were not formally notified to the Ombudsman until 2023–24.

The Ombudsman identified 2 deemed refusal decisions¹⁸ included in the statistics reported for 2023–24 that were not formally notified to the Ombudsman.

While s 39 of the FOI Act does not specify when agencies must notify the Ombudsman of a deemed refusal, the ACT Ombudsman considers it is best practice for agencies to give notice as soon as possible after a deemed refusal occurs.¹⁹

We engaged with the agencies that did not formally notify the Ombudsman of deemed refusal decisions to remind them of their obligations under the FOI Act and offer assistance.

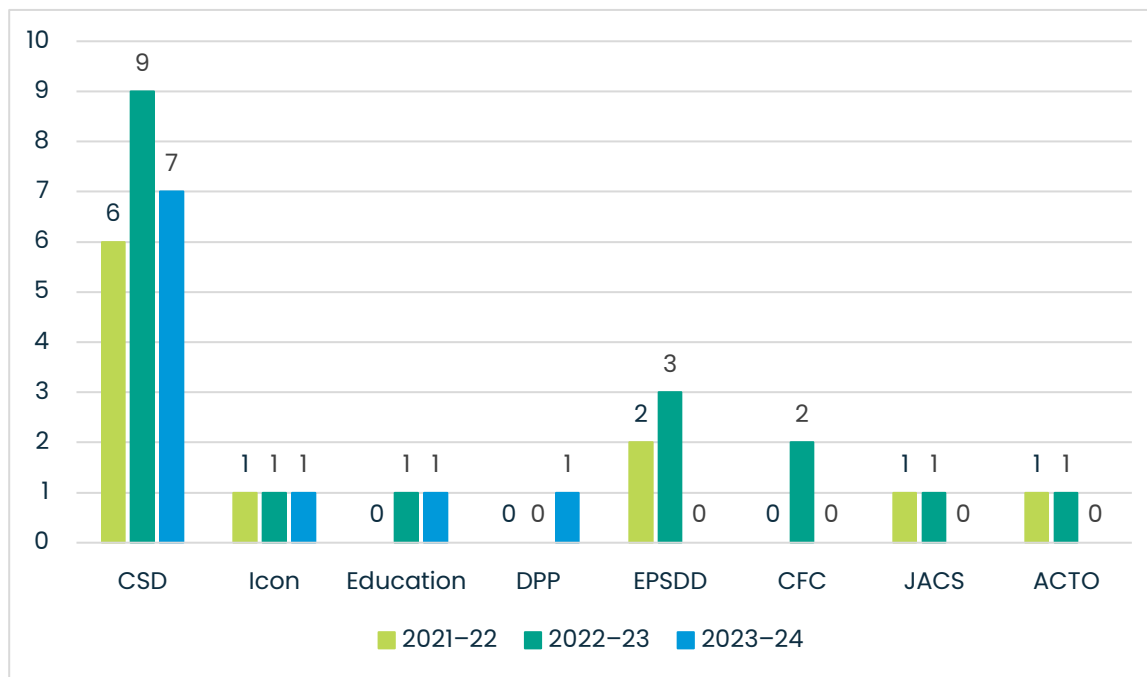
The ACT Ombudsman's published FOI Guidelines²⁰ provide details about these reporting requirements and draft templates to assist agencies.

¹⁸ One each from the Office of the Director of Public Prosecutions and Icon Water.

¹⁹ See s 151 B of the Legislation Act.

²⁰ See [ACT Ombudsman Publications](#).

Figure 10: Deemed refusal decisions



Refusing to deal with access applications

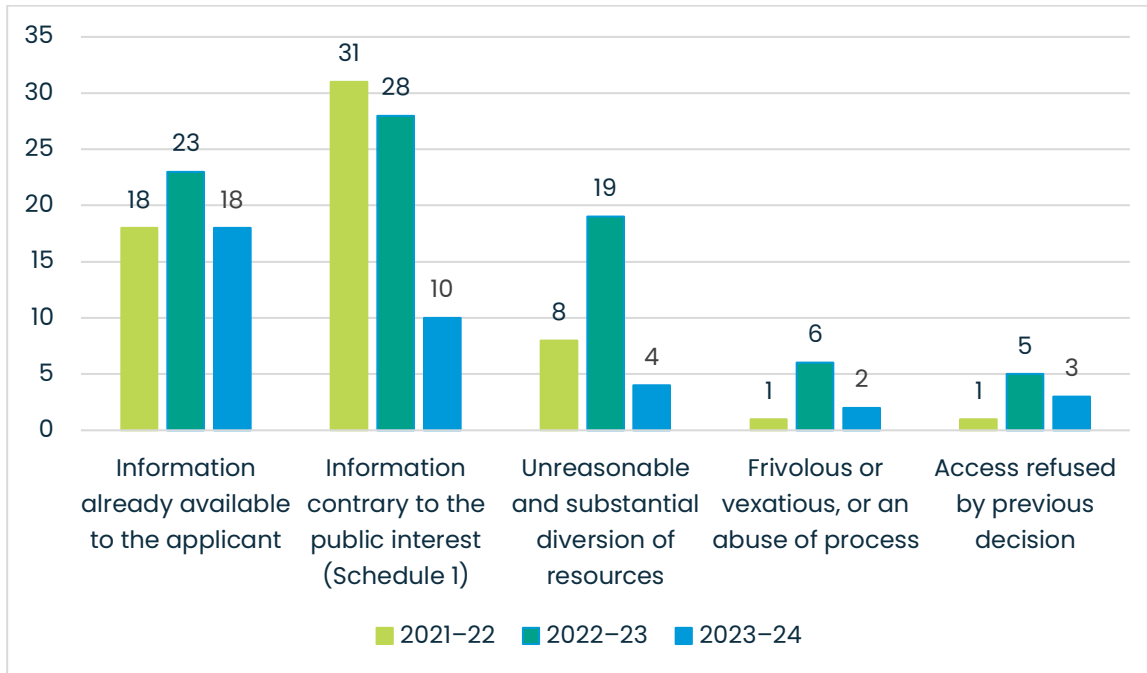
Under s 43 of the FOI Act, agencies can refuse to deal with an access application in limited circumstances.

In 2023–24, 6 agencies reported they relied on this provision to refuse to deal with a total of **37** access applications: Health, CMTEDD, Education, EPSDD, JACS and MPC. This is a decrease on the 10 agencies that reported they relied on s 43 to refuse **81** access applications in 2022–23. It is optional for agencies to report this data.

Figure 11 shows the reasons decision-makers decided not to deal with an access application, the most common being that the information sought was already available to the applicant (**49%**), followed by the information sought was taken to be contrary to the public interest to disclose under Schedule 1 of the FOI Act (**27%**).

Compared with 2022–23, there was an increase in the percentage of access applications refused because the information was already available to the applicant (**28%** in 2022–23) and a decrease in the percentage of access applications refused on the basis the information sought was taken to be “contrary to the public interest” information under Schedule 1 of the FOI Act (**35%** in 2022–23).

Figure 11: Reasons for refusing to deal with an access application



Fees

The objects of the FOI Act outline that access should be granted at the lowest reasonable cost to applicants. A fee may be charged when more than 50 pages of information are provided in response to an access application, except in certain circumstances – for example, where an access application for personal information about the applicant is made.

The fees that can be charged – where considered appropriate – are determined by the Attorney-General and are outlined in the *Freedom of Information (Fees) Determination 2018 (ACT)*.²¹

No agencies reported charging for processing an access application in 2023–24. This is consistent with 2022–23. The data is consistent with the pro-disclosure objects of the FOI Act, with cost not being an obstacle to access.

²¹ See [FOI Fees Determination 2018](#).

Part 5: Amendment of personal information

If an individual has access to an ACT Government record or file or other government-held information that contains their own personal information, and they believe their information is incomplete, incorrect, out of date or misleading, they can request this information be amended.

In this reporting period, one agency reported **one** formal application to amend or annotate personal information under the FOI Act. Last year, there were no such formal applications.

We understand ACT agencies generally manage such requests for amendment through other informal channels, rather than the FOI Act.

Part 6: Ombudsman reviews

The Ombudsman may conduct independent merits review of decisions on access applications made by agencies and Ministers under the FOI Act. In reviewing a decision, the Ombudsman can confirm or vary the original decision or set it aside and substitute a new decision. Ombudsman review decisions may be reviewed by the ACT Civil and Administrative Tribunal (ACAT).

Applications received

During the reporting period, the ACT Ombudsman received **43 applications** for Ombudsman review. This is a 22% decrease on the 55 Ombudsman review applications received in 2022–23. The complexity of Ombudsman reviews, however, continues to increase. The number of multiple access applications and Ombudsman review requests made by single applicants also continued to increase.

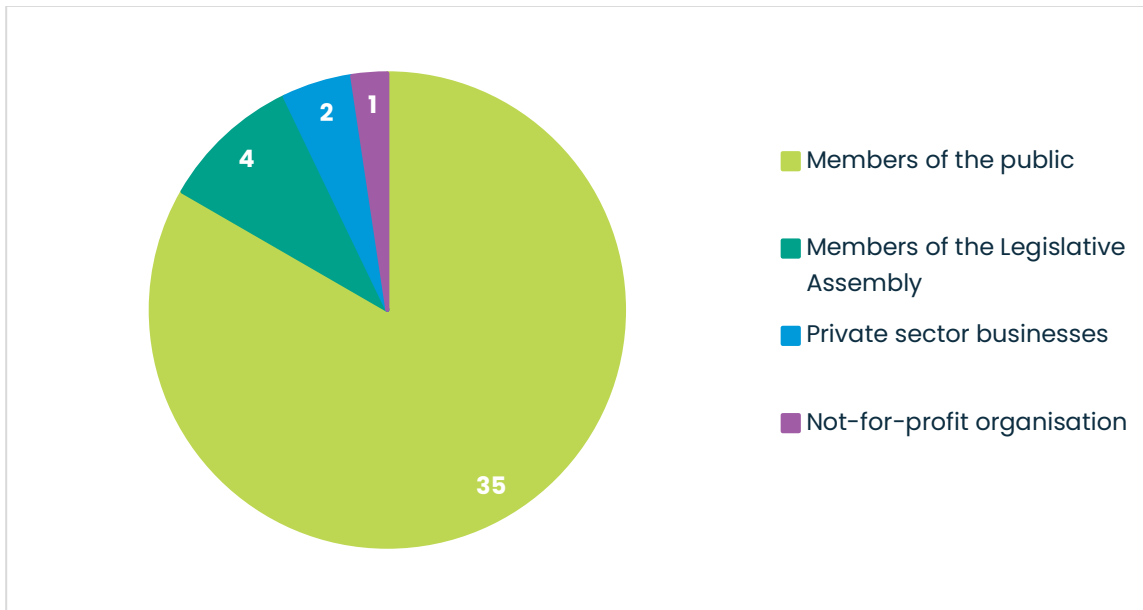
Agencies should carefully consider how they initially scope access applications, as well as engaging early with applicants. When notifying applicants of an access decision, agencies should be conscious of clearly articulating why they have made the decision they have, with clear reference to the FOI Act. Clear scoping and decisions may assist applicants to better understand the decision that has been made.

Types of review applicants

Figure 12 shows most Ombudsman review applications received in 2023–24 were made by members of the public (**35 applications or 81%**), followed by members of the Legislative Assembly (**4 or 9%**) and private sector businesses (**2 or 5%**). **One** application was received from a not-for-profit organisation.

The figures show some differences compared to 2022–23, when most Ombudsman review applications were made by members of the public (**69%**), followed by members of the Legislative Assembly (**16%**) and private sector businesses (**9%**).

Figure 12: Who applied for review

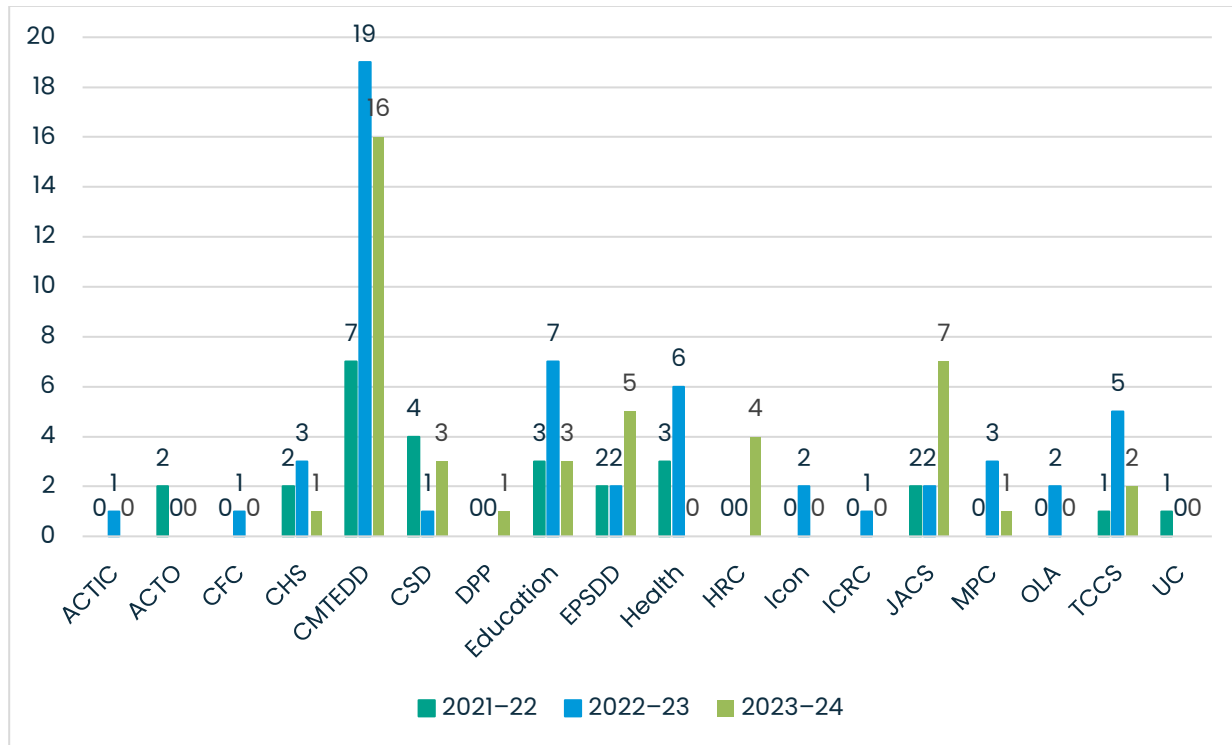


Agency participation in reviews

Figure 13 shows the Ombudsman review applications received in 2023–24 (and 2022–23 for comparison), broken down by agency.

The data reflects that Ombudsman review applications received decreased for most agencies. We observed an increase in applications for review of decisions made by JACS from **2** in 2022–23 to **7** in 2023–24 and an increase in applications for review of decisions made by the HRC from **zero** in 2022–23 to **4** in 2023–24. We did not identify any specific reason for these increases – for example, any decline in the quality of access decisions made.

Figure 13: Review applications by ACT agency



Applications finalised

As shown in Figure 14, during the reporting period, **49 Ombudsman reviews** were finalised. This is a 20% increase on the 41 Ombudsman reviews finalised in 2022–23. Of the 49 Ombudsman reviews finalised in 2023–24:

- **23** were resolved with a formal decision
- **12** were withdrawn following informal resolution processes
- **one** was closed after the ACT Ombudsman granted the agency an extension of time to decide the application (s 78)
- **13** were closed with no review, of which:
 - **10** were closed on the ground there was no reasonable prospect that the original decision would be varied or set aside (s 82(5)(b))
 - **2** were closed because the ACT Ombudsman was unable to contact the applicants despite making reasonable efforts (s 82(5)(e))
 - **one** was closed because it was an invalid application.

These outcomes are explained below.

Compared to 2022–23, the number of review matters withdrawn following informal resolution processes in 2023–24 remained consistent, with **13 matters (27%)** withdrawn in 2023–24 compared to **11 (27%)** in 2022–23.

The number of formal decisions also remained consistent, with **23 formal decisions** made in 2023–24 (**47%**) compared to **20** made in 2022–23 (**49%**).

Closed with no review

Thirteen Ombudsman reviews were closed by the Ombudsman with no review taking place. Under s 82(5) of the FOI Act, the Ombudsman may decide not to review a decision if:

- the applicant has not given the ACT Ombudsman enough information to review the decision
- there is no reasonable prospect that the original decision would be varied or set aside
- the agency or Minister makes a subsequent decision on the access application or otherwise resolves the application
- the Ombudsman is satisfied the review application is frivolous or vexatious or involves an abuse of process, or
- the Ombudsman is unable to contact the review applicant despite making reasonable efforts.

Under s 78 of the FOI Act, the Ombudsman may extend the time to decide an access application if an application for review of a deemed decision has been made. The Ombudsman finalised one review by extending the time to decide the access application.

Informal resolution

Where possible, before proceeding to a formal decision, we seek to resolve reviews through informal resolution.

This involves clarifying and, in some cases, refining the scope of an application for review, and working with both parties to resolve the dispute. For example, if the applicant is focused on one particular document, the ACT Ombudsman may ask the agency for its view on the release of that document, rather than review the whole matter. Informal resolution assists the ACT Ombudsman to provide a satisfactory outcome for review applicants in a timely manner.

Where a matter is assessed as unlikely to result in a change of outcome, the ACT Ombudsman uses case officer assessments to attempt to resolve the matter before progressing to a final decision. Parties are given information on the likely outcomes of the review and options for resolution. This approach reduces the overall timeframe for our reviews and saves the applicant additional legal fees where they have a legal representative.

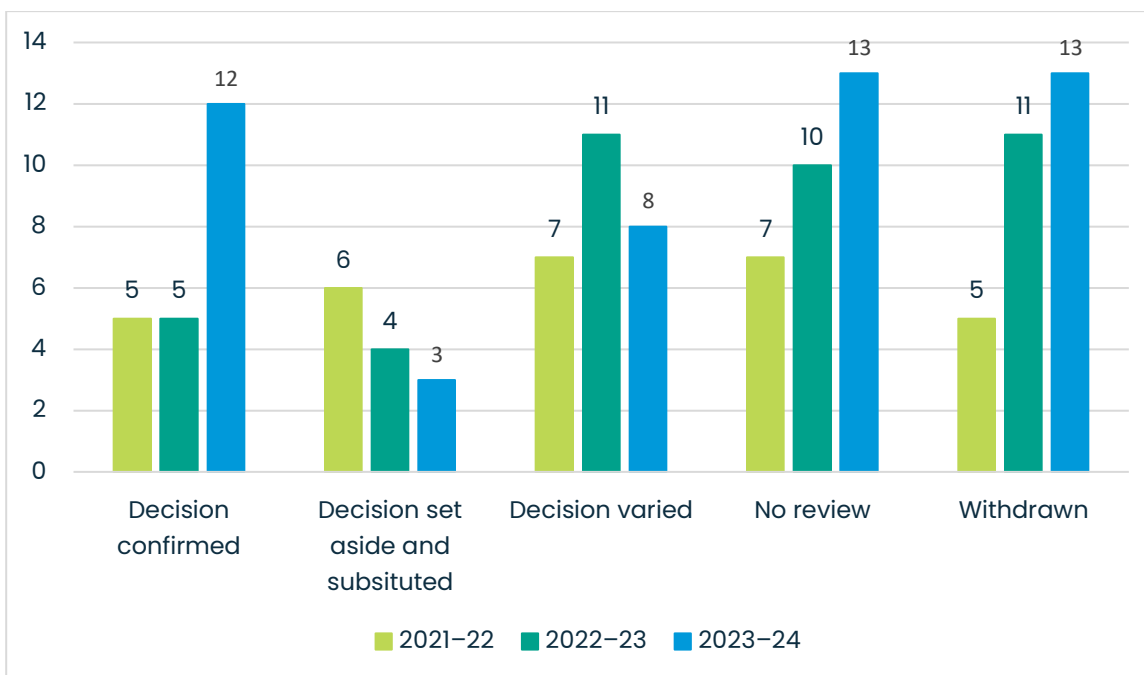
Formal decision outcomes

From the commencement of the FOI Act on 1 January 2018 to 30 June 2024, a total of **128 Ombudsman review decisions** have been published.²² In 2023–24, **24** Ombudsman review decisions were published.²³ These decisions provide agencies and applicants with guidance on the FOI Act, including the application of the public interest test.

Figure 14 shows of the 23 Ombudsman reviews finalised with a formal decision in 2023–24, the Ombudsman:

- confirmed the agency’s decision in **12 Ombudsman reviews**
- varied²⁴ the original decision in **8 Ombudsman reviews**
- set the original decision aside and substituted²⁵ a new decision in **3 Ombudsman reviews**.

Figure 14: Review applications finalised by outcome



²² See [FOI Review decisions](#).

²³ 23 Ombudsman reviews were finalised with a decision – an additional decision finalised in 2022–23 was published in 2023–24.

²⁴ That is, upheld the decision of the original decision-maker with some amendments made (for example, with some additional information to be disclosed).

²⁵ That is, changed the original decision and, for example, found that the information sought was not contrary to the public interest information.

Review timeframes

The FOI Act requires Ombudsman reviews be completed within 30 working days. Up to 30 additional working days are allowed to undertake informal resolution or if a matter is referred by the Ombudsman for mediation.

The ACT Ombudsman also has internal service standards for Ombudsman review applications.²⁶ In 2023–24, we did not meet these internal service standards. Of the 49 Ombudsman reviews finalised:

- **18%** were finalised within 6 weeks (target 30%)
- **35%** were finalised within 12 weeks (target 60%)
- **69%** were finalised within 6 months (target 95%).

While we aim to progress Ombudsman reviews as quickly as possible, timeframes can vary, particularly when a matter is complex or involves a large volume of documents for assessment. Timeframes can also extend if any of the parties seek additional time to make their submissions.

Ombudsman review requests received during the reporting period required the Ombudsman to consider a range of issues, including Cabinet information, the right to privacy under the Human Rights Act, trade secrets and business affairs, and information subject to legal professional privilege. Further, the ACT Ombudsman managed several Ombudsman reviews involving a large volume of documents, with novel and complex issues concerning multiple parties. This resulted in 31% of Ombudsman reviews taking longer than 6 months to finalise.

In 2024–25, we will continue to review our performance against internal service standards, with a view to reducing the time taken to complete Ombudsman reviews.

Case study

ACT Ombudsman FOI review – Elizabeth Lee, Derise Cubin and Chief Minister, Treasury and Economic Development Directorate [2024] ACTOFOI 5

This Ombudsman review considered the public interest in confidentiality of conflict of interest disclosures balanced against the public interest in disclosure of the reasons behind the conflict of interest disclosures.

²⁶ See [FOI Complaints and Reviews](#).

Elizabeth Lee MLA applied for Ombudsman review of CMTEDD's decision to refuse access to information concerning a conflict of interest disclosure made by the ACT Commissioner for Fair Trading, Ms Derise Cubin. In making their decision to refuse access to this information, CMTEDD considered that disclosure could prejudice an individual's right to privacy or any other right under the Human Rights Act (Schedule 2, s 2.2(a)(ii) of the FOI Act).

Ms Cubin was invited, and accepted, to participate as a third party to the Ombudsman review under s 77 of the FOI Act.

The Ombudsman observed that where an individual holds a significant position within the ACT public service, this brings with it an understanding they will have a reduced expectation of privacy where this intersects with the performance of their role.

The Ombudsman also noted that there is a public interest generally in allowing for confidentiality in disclosing conflicts of interest, to enable people to proactively disclose actual or potential conflicts so that appropriate management strategies can be considered without needing to be concerned about the reasons being disclosed widely without appropriate reason.

The critical issue with actual or potential conflicts of interest is that all are actively disclosed and managed appropriately. In some contexts, it may then be necessary to go further and publicly disclose the nature of the conflict.

Ms Cubin's disclosure had already been partially released under an earlier FOI decision, with the specifics of the reasons for the conflict of interest disclosure not being released to the applicant. The topic of the conflict of interest disclosure had been the subject of extensive questioning in the ACT Legislative Assembly prior to the FOI application being lodged.

When preparing the final decision, the Ombudsman identified that additional specific details concerning the conflict of interest had already been disclosed by CMTEDD in responding to another FOI request.

The Ombudsman decided to release additional information regarding the specific nature of the conflict, noting that in this particular case the public interest in disclosing the nature of the conflict and the steps taken to manage it, as well as the fact the information had already been released, weighed in favour of release.

This Ombudsman review demonstrates that each review is considered and conducted on its own particular merits. This was an exceptional case, not to be construed as a broad-based precedent that the specifics of conflict of interest disclosures are in the public interest to release under the FOI Act.

Appeals to ACAT

Under s 84 of the FOI Act, participants in an Ombudsman review may apply to ACAT for a review of the decision. Since the FOI Act commenced operation on 1 January 2018, no applications to ACAT for a review of an Ombudsman decision have been made.

Part 7: Complaints

The Ombudsman can investigate complaints about an agency's or Minister's functions under the FOI Act.

During this reporting period, the ACT Ombudsman received **4 complaints** about an agency's functions under the FOI Act, a significant decrease from the 13 complaints received in 2022–23.

In 2022–23, a large number of complaints were linked to issues identified during an ACT FOI review. These issues were remedied through the complaints process. Further, in 2023–24, the Office managed to resolve issues through an enquiry process without moving to a complaint.

Complaints received during the reporting period were about agencies' actions performed under the FOI Act, including the time taken to process access applications, forms of access and identifying information within the scope of the application.

Four complaints were finalised in 2023–24, including one complaint received in 2022–23. **Two** were finalised without further investigation. **One** was resolved after our Office made preliminary inquiries and the agency agreed to engage further with the applicant. **One** complaint was investigated and finalised after additional information was provided to the complainant and an extension of time agreed to.

At the end of 2023–24, one complaint remained open.

Case study

ACT Ombudsman FOI complaint – accessibility of information

The Office received a complaint about the accessibility of information given to an applicant in response to their access application made to CSD.

The applicant applied for access to information about the property they were residing in and received over 1,000 pages of printed documents within the scope of the request. The applicant made a complaint to our Office that the text on some of the documents was too small or unclear to read.

Our Office made preliminary inquiries to CSD to understand in what form the applicant requested access and how the information was given to the applicant. Under s 47 of the FOI Act, access to information may be given through an electronic or printed copy

of the record (a respondent may also give a transcript or written document created using equipment available to the agency for retrieving or collating stored information).

If an applicant requested access in a particular form, access must be given in that form (s 47(4) of the FOI Act) (subject to exceptions). However, access may be given in an alternative form if it is not reasonably practicable for the respondent to give access in the form requested, and the respondent is reasonably satisfied that the applicant can receive the information given in the alternative form (s 47(5) of the FOI Act).

Initially, the applicant asked for access to the information by way of inspection. As the application was made during the COVID-19 pandemic, it was not reasonably practicable at that time for CSD to meet with the applicant in person. Ultimately, the applicant agreed to receive a printed copy of the information by post.

CSD provided information to our Office about the nature of some of the information requested (for example, a large table of data) and explained it was not possible to print on paper larger than A4. Following our enquiries, CSD engaged further with the applicant about alternative forms of access, including access to electronic copies of the documents where the text could be enlarged, resolving the complaint to the complainant's satisfaction.

It is important respondents engage with applicants to ensure they can access information requested, particularly where applicants may not be able to access the information in a particular form (for example, no internet, computer or phone access).

Part 8: Glossary

Acronym	Agencies
AAO	ACT Audit Office
ACAT	ACT Civil and Administrative Tribunal
ACTIC	ACT Integrity Commission
ACTO	ACT Ombudsman
BCITF	Building and Construction Industry Training Fund
CFC	Cultural Facilities Corporation
CHS	Canberra Health Services
CIT	Canberra Institute of Technology
CMTEDD	Chief Minister, Treasury and Economic Development Directorate
CRA	City Renewal Authority
CSD	Community Services Directorate
CSE	Commissioner for Sustainability and the Environment
DPP	ACT Director of Public Prosecutions
EC	ACT Electoral Commission
Education	ACT Education Directorate
EPSDD	Environment, Planning and Sustainable Development Directorate
Health	ACT Health Directorate
HRC	ACT Human Rights Commission
ICRC	Independent Competition and Regulatory Commission
JACS	Justice and Community Safety Directorate
LA	Legal Aid Commission
LSA	Long Service Leave Authority
MPC	Major Projects Canberra
OLA	Office of the Legislative Assembly
SLA	Suburban Land Agency
TCCS	Transport Canberra and City Services Directorate
TQI	Teacher Quality Institute
UC	University of Canberra