



# USERS GUIDE

## *Right To Information Act*



All RTI publications can be made available in some accessible formats for people with disabilities and in the three (3) official languages of the Republic of Vanuatu. If you require assistance, please contact the RTI Unit.

This publication should be attributed as: Department of Strategic Policy, Planning and Aid Coordination, Guide to the Right to Information Act, 2016.

Enquiries regarding [the license and] any use of this report should be directed to:

**Right To Information Unit**

The Department of Strategic Policy, Planning & Aid Coordination  
Prime Minister's Office, Government of the Republic of Vanuatu  
PMB 9108, Port Vila, Vanuatu, SW Pacific

Tel: (678) 33380

Email: [rti@vanuatu.gov.vu](mailto:rti@vanuatu.gov.vu)

Website: [www.rti.gov.vu](http://www.rti.gov.vu)

Facebook: <https://www.facebook.com/raetblongsave>

# Contents

PART 1.....	5
1.1 Principals & Objectives of the Right To information.....	5
1.2 The Right To Information Law as part of Government Policy .....	5
1.3 Objectives of the Vanuatu Right To Information Law .....	5
1.4 Overview & Key Features.....	6
PART 2.....	11
2.1 Proactive Publication of Information .....	11
2.2 Breakdown of the RTI Request & Response Process .....	13
Step 1: Request Intake .....	16
Step 2: Acknowledge the Request .....	16
Step 3: Transfer Request.....	16
Step 4.A: Clarify Request .....	17
Step 4.B: Narrow the Request .....	17
Step 5: Find the Records .....	17
Step 6: Review the Records .....	18
Step 7: Make the Decision .....	19
Step 8: Respond to Applicant .....	21
2.3 Exemptions .....	26
2.4 Public Interest.....	36
PART 3.....	38
3.1 Best Practices.....	38
REFERENCES .....	41
APPENDIX.....	42

## About This Guide

This Guide is for officers who have the daily responsibility for administering the RTI Law. It explains how to apply the Act by giving practical examples and answering frequently asked questions. The Guide will be further supplemented by the Information Commissioner's RTI guidelines, notices and circulars (s. 70) and practice notices from the RTI Unit.

The Guide is divided into three (3) parts:

### PART 1

- 1.1 Principles and Objectives of the Right to Information
- 1.2 The Right to Information Law as Part of Government Policy
- 1.3 Objectives of the Vanuatu Right to Information Law
- 1.4 Overview and Key Features

### PART 2

- 2.1 Proactive Publication
- 2.2 Breakdown of the RTI Request & Response Process
- 2.3 Exemptions
- 2.4 Public Interest Test

### PART 3

- 3.1 Best Practices
  - [APPENDIX I](#)
  - [APPENDIX II](#)
  - [APPENDIX III](#)
  - [APPENDIX IV](#)

## PART 1

### 1.1 Principles and Objectives of the Right to Information

The Right to Information (RTI) is based on the principle that government is accountable to the general public by providing voluntary and requested information about its policies, programs and activities. RTI laws remove the discretion of governments to determine what information to provide to the public by imposing formal criteria for:

- the voluntary publication of information; and
- responding to public requests for information.

RTI laws also balance the public's general right to know with a government's legitimate need to withhold some types of information.

If a dispute arises, an adjudicating mechanism, such as an Independent Information Commissioner or a Tribunal, decides the outcome. If an applicant or appellant is still dissatisfied with that decision, an appeal may be made to the courts.

### 2.1 The Right to Information Law as Part of Government Policy

The Right to Information Law represents part of Vanuatu's broader national strategy of improved governance under the Comprehensive Reform Program (CRP), the National Priority Action Agenda and the Leadership Code.

Internationally, the Law signals the Government's compliance with treaties to which it is a signatory, notably the United Nations Convention Against Corruption (UNCAC) which Vanuatu ratified in 2011.

Regionally, the law is in line with Vanuatu's commitments to improved governance, transparency and accountability under the 2005 Regional Pacific Plan.

### 3.1 Objectives of the Vanuatu Right to Information Law

Public authorities spend money collected from taxpayers and make decisions that can significantly affect many people's lives. Access to information about these activities and decisions helps the public to hold public authorities accountable for their actions and allows public debate to be better informed.

Access to official information can also improve public confidence and trust if government and public sector bodies are seen as being open. The RTI Act was passed to:

**GIVE** effect to the right to freedom of expression under the Constitution;

**PROMOTE** transparency, accountability, and national development by empowering and educating the public to understand and act upon their rights to information;

**PROVIDE** access to information held by Government agencies, relevant private entities and private entities, subject to exceptions;

**ESTABLISH** voluntary and mandatory mechanisms to give the public the right to access to information;

**INCREASE** public participation in governance

The Act is an official recognition of the public's right of access to information and records held by public and related bodies, subject to a few exemptions which balance that right against the need to withhold certain types of information.

The Act guarantees the public's right in two ways:

- public entities are obliged to publish certain information about their activities; and
- the public is entitled to request and receive information from them in a timely fashion.

## 4.1 Overview & Key Features

### PRELIMINARIES

(Section 1 – 5)

The RTI Act gives effect to the right to freedom of expression under paragraph 5(1) (g) of the Vanuatu Constitution and sets out the mechanisms for guiding the public on how to exercise the right.

The Act applies to records or information created or held by a [Government agency or relevant private entity on or after 30 July 1980](#) and any information held by a [private entity that may assist in the exercise or protection of the rights of a person](#).

### a. Exclusions from the Act

The Act does not apply to any information held by the system of customs and traditions practiced throughout Vanuatu; any information of a relevant private entity relating to any function that is not public service related or funded in whole or in part by the Government; and any information held by a publicly owned media body.

### b. Disclosure or Non-Disclosure Under Other Laws

The Act overrides the provisions of any other law dealing with the disclosure of information if there is a conflict. However, a government agency or relevant private entity is not prevented from giving access to information other than under the Act if it is required to do so by any other law, policy, practice or order of a court.

### c. Who Can Apply

Anyone, including persons who are not Vanuatu citizens or resident in Vanuatu, can make an RTI request.

### d. Entities Involved

Persons can make requests for information from *Government agencies*; *relevant private entities*; and private entities that may assist in the exercise or protection of the rights of a person.

- [Government Agencies](#) comprise the state, the government, and a constitutional entity. In practical terms, this will include for example, all Vanuatu government ministries; public agencies, boards, commissions and advisory bodies; school boards, colleges and universities; public hospitals; the police and municipalities.



- **Relevant Private Entities** are entities that are owned, controlled or substantially financed directly or indirectly by Government funds. The information that can be sought from these entities is however limited to functions *related to that financing*.

Entities that carry out statutory or public services or functions, *whether financed directly or indirectly by Government funds or by some other source* are also covered by the Act, but *only to the extent of the statutory or public services or functions being provided*.

The Minister may also designate an entity to be a relevant private entity by order

- **Private Entities** are defined as persons who carry on or have carried on a trade, business or profession, but only in that capacity; or partnerships which carry on or have carried on any trade or business; or any former or existing persons or any successors in title, not including a Government agency or a relevant private entity

## e. Types of Records

Any member of the public can request any record of information in any form that is held by a government agency, relevant private entity or private entity. Such records include written records, and ordinary materials created on a daily basis such as emails, memos, opinions, advice, press releases, circulars, orders, logbooks, contracts, and reports.

The definition of records also extend to samples and models, manuscripts and files, films (including microfilm), negatives, microfiche and faxes, maps, plans, graphs, drawings, photographs, sound tracks or other device in which sounds or other data are electronically stored and can be reproduced.

### NOTE

- **Government Bodies:** The records that can be requested from these entities must have been created or held no earlier than July 30, 1980. This is in recognition of on-going improvements to the systems of records management in Vanuatu. However, the Minister responsible for information has the discretion to allow access to records created earlier than July 30, 1980
- **Relevant Private Entities:** Since these entities, by definition, have functions which are also non-governmental, access to information from them under the RTI Law is therefore limited to **information about any funding provided to them by the Government; and to information about the public service or functions carried out by them and funded in whole or in part by the Government or by another organization.**



## f. Disclosure & Access to Information

(Section 6 – 30)

- **The Right to Information** - The right of access to information is formally established and recognized. Private entities must also comply with the Act if information requested from them is to assist in the exercise or protection of any right recognized under the laws of Vanuatu.

Government agencies and relevant private entities must publish and disseminate, in each official language, information about its organization, functions and activities to aid the public in deciding where to direct requests for information.

- **Responsible Officers** - A Right to Information Officer (RTI Officer) must be appointed and is primarily responsible for receiving applications for information, assisting persons who seek information and receiving and addressing complaints. Persons wishing to obtain information must apply to the RTI Officer of the relevant entity and applications can be made orally or in writing and in any of the official languages.

If an application does not comply with the requirements under the Act, the RTI Officer must assist the applicant free of charge to refine it. If an application for access to information is denied, the RTI Officer must notify the applicant of the reasons for the refusal and the right of appeal to the Information Commissioner.

- **Deadlines** - A request for information must be processed within 30 days of its receipt. Within that period, timelines are established for acknowledgement of receipt of an application (5 days), the transfer of applications to another entity if necessary (5 days), and if access is granted, providing the information within 7 days of payment of a reproduction fee.

If an application concerns information necessary to safeguard the life or liberty of a person, a response must be given within 48 hours of receiving the application. The period of 30 days for responding to an application may be extended under certain circumstances for not more than 14 days and for only 1 occasion.

- **Procedures** - Access to information is provided in the form requested and the language used by the applicant. An applicant prevented by disability from reading, viewing or listening to information in the manner in which it is held must be assisted by the RTI Officer to make the information available in a form that helps the applicant overcome these challenges.

If parts of the information requested are exempt, the RTI Officer must delete them before granting access. An RTI Officer may refuse an application on the basis that it is a repeated application and must consult with a supervisor or the principal administrative officer before deciding to defer, partially grant or deny access to a request for information.

- **Fees** - There is no application fee. However, a fee can be charged for copies of the records requested (ex. photocopies, transcripts etc.). There are, however, circumstances under which a fee may be waived or may not be payable.

## g. Third Party Notifications & Intervention

(Section 31 – 33)

If requested information contains personal or commercial and confidential material about someone who is not the applicant, an RTI Officer must take reasonable steps to notify that person to give them the opportunity to either consent to the disclosure or request that the application be denied. The RTI Officer must make a decision on the grant of access to information and notify the third party of the decision within 21 days of advising the third party of the application for access to information.

## h. Amendment of Personal Information

(Section 34 – 36)

Any person can apply in writing to amend his or her personal information if it is incomplete, incorrect, out of date or misleading. The RTI Officer must follow certain steps when deciding whether to amend records containing the personal information, including transferring it if the personal record is held by another agency or entity, and must notify the applicant and any other relevant agencies of any amendments to personal records.

## i. Exemptions

(Section 37 – 51)

The Act sets out 9 exemptions: personal information; legal privilege; commercial and confidential information; health and safety; law enforcement; defense and security; economic interests of the State; policy making and operations of agencies; information relating to protected sites and the environment.

An RTI Officer may refuse to grant access to information if any of the exemptions apply to a record. Information may not be considered exempt on the basis that a document is classified as confidential or that the information is already publicly available.

Exemptions do not apply to information that is more than 10 years old. The Information Commissioner may review decisions to exempt information within 2 years of such decisions being taken and is empowered to remove exemptions from information if the exemption no longer applies.

If the RTI Officer refuses to grant a request, then it must be proven that the information is exempt from disclosure under the Act and that the interest protected by the exemption outweighs the public interest in disclosing the information.

## j. Information Commissioner

(Section 52 – 63)

An Information Commissioner (IC) must be appointed for a period of 5 years and is deemed to be a leader under the Leadership Code. The IC is independent and is not subject to the direction of any person or body in relation to the exercise of powers or the performance of functions under the Act. The IC hears and makes decisions on appeals, investigates non-compliance with the Act, and monitors and reports on RTI implementation and compliance. The office of the IC also undertakes training and awareness raising activities for officials and the general public.

The IC reports annually to Parliament on the implementation of the Act and RTI Officers must submit quarterly (and other interim) reports to that office. The IC and staff are protected from civil or criminal liability for anything done or omitted to be done in good faith in the execution or purported execution of powers or functions under the Act.

## k. Enforcement by the Information Commissioner

(Section 64 – 68)

An applicant can appeal a decision made by an RTI Officer to the IC within 20 days of notification of the decision. The IC investigates appeals and can take certain actions when investigating them. The IC may also investigate any matter related to the Act independently of an appeal. Appeals are resolved through mediation, negotiation or conciliation.

An appeal must be decided within 30 days of its receipt by the office of the IC and if a person is not satisfied with the decision, an appeal may be made to the Supreme Court for review.

## l. Measures to Promote Access to Information

(Section 69 – 81)

- The RTI Unit is the central resource mandated to train RTI Officers, monitor the execution of the National Implementation Plan, develop educational materials and public educational activities, develop a National Code of Practice on information and records management, and establish and refine reporting and monitoring obligations of government agencies. Government agencies must collaborate with the RTI Unit to undertake RTI staff training.
- The RTI Steering Committee provides oversight and monitoring of the implementation of the RTI policy and supports, advises and receives reports from the RTI Unit. The Committee reports to the Council of Ministers and makes recommendations on implementation. The Unit acts as the secretariat to the RTI Committee.
- The IC issues public guidelines on how to access information, the contact details of RTI Officers, information about proactive publication, and the appeals process.

## m. Miscellaneous

(Section 82 – 87)

Information released under the Act, except personal information, is considered to be in the public domain but is not to be taken as the publication of the document under the laws relating to defamation or breach of confidence or copyright. A person releasing information which they believe shows evidence of wrongdoing or is a serious threat to health, safety or the environment does not commit a civil or criminal offence and will not attract any employment related punishment if they acted in good faith.

Government agencies, relevant private entities, private entities, Ministers and officers are protected from actions for defamation, breach of confidence or copyright for providing access to information in good faith.

Offences under the Act attract maximum fines of VT 500,000 or a term of imprisonment of not more than 1 year. The Minister makes regulations on proactive publication, training of officials, reporting obligations, fees, and any other matters necessary for the proper implementation of the Act.



## PART 2

### 2.1 Proactive Publication of Information

#### a. What is Proactive Publication?

Proactive disclosure is the routine publication or release of information in anticipation of the public's informational needs and interests. It is one of the most important aspects of open government and ensures the right of Vanuatu citizens have to know how the government is using public resources and how taxpayer money is spent.

Under the RTI Act, a Government agency or a relevant private entity must publish and make available to the public an initial statement of its organization in each official language. Public entities may publish the initial statement of agencies which fall under them with the authorization of the Minister.

The information required to be published must be widely disseminated, must be easily accessible to the public, use the most effective method of communication and take into consideration local languages.

#### b. What is the Initial Statement of Organisations?

The initial statement of organization must be published by government agencies to provide a roadmap for persons who wish to make requests. It must include:

- |   |  |
|---|--|
| <ul style="list-style-type: none"> <li>• a description of their structure and functions;</li> <li>• a list of the entities falling under them, location, opening hours, and subjects handled;</li> <li>• the title, business address and contact details of Principal Administrative Officers;</li> <li>• the particulars of their finances;</li> <li>• a directory of officers, employees and a brief description of functions and powers;</li> <li>• the procedure followed in the decision making process, such as channels of supervision and accountability;</li> <li>• a simple guide to their information-keeping systems;</li> <li>• a statement of the types and forms of information and categories of documents that are held by them and used in the discharge of its functions;</li> <li>• relevant details about any services they provide directly to the public;</li> </ul> | <ul style="list-style-type: none"> <li>• the content of all decisions or policies that affect the public, the reasons for them, authoritative interpretations, and important background material;</li> <li>• the particulars of any arrangement that exists for consultation with or representation by the members of the public in relation to the formulation and implementation of policies;</li> <li>• the procedure to be followed to make applications for information, particulars of facilities available to citizens for obtaining information (ex. working hours of a library or reading room, if maintained for public use);</li> <li>• complaints mechanisms for the public about acts or a failure to act by the agency or relevant private entity;</li> <li>• the names, designations, contact details and other particulars of RTI Officers;</li> <li>• any other information that is in the public interest or as may be prescribed under the Act</li> </ul> |
|---|--|



The Statement must be updated within 12 months of its first publication and every 6 months thereafter.

### c. What other types of information must be made public?

- Information about projects and public spending must be made public as well. Under subsection 6 (3), this additional information must include: any relevant background material;
- information related to tenders for contracts and the process of tendering;
- finalized contracts with appropriate deletions to protect confidentiality and copyright issues;
- the name of contractors;
- the scope, duration and completion dates of the contractual services;
- the value of the contract;
- payment schedules and criteria for payment;
- the penalties due from either party to the contract in the event of any breach or non-compliance.

### d. Who is responsible for proactive publication?

It is the usual practice for the RTI Officer to marshal, monitor and guide the proactive publication functions of a public entity.



## 2.2 Breakdown of the RTI Request & Response Process

### a. What is the role of Government Agencies and Related Entities?

Each government agency and related entities must:

- appoint and maintain an RTI officer who will be responsible for promoting best practices, receiving requests and assisting applicants in identifying records;
- ensure that officials are trained and given the resources and support needed to meet their obligations under the Act;
- ensure that records are properly created and maintained in a manner that facilitates access to information.

### b. What are the RTI Officer's Obligation under the RTI Law?

The RTI Officer plays a key and substantial role in the RTI process. The RTI Law specifies that the RTI Officer must:

- promote best practices in relation to the right to information, its importance and the role of officials in facilitating that right;
- promote best practices on records management, archiving and disposal of records;
- serve as the central contact for receiving applications for information;
- assist persons seeking information;
- receive complaints under this Act;
- carry out any other functions as set out in the Act

### c. What are the RTI Officer's daily functions?

- interview applicants to clarify their requests;
- inform applicants if a record is already published and where the information can be accessed;
- ensure that applicants are fully informed of the status of their applications;
- transfer applications to other public entities as needed;
- examine requested records to determine if they are exempt in whole or in part; if access should be granted; or if the grant of access should be deferred;
- assist persons with limited ability to read or write or with any mental or physical disability;
- monitor the inspection of records;
- record all applications for access and maintain a disclosure log of all grants of access;
- keep up to date on the Law itself, the Code of Practice on Records Management, and the laws and practices on records and information management;
- coordinate and update the information required for the publication scheme

### d. Can anyone else help with these functions?

Yes. Under the law, the RTI Officer can request the assistance of any person employed at the agency and that person is obliged under the Act to provide all reasonable assistance.

### e. Who can apply?

RTI requests may be made by any person whether a Vanuatu citizen, resident or not. Requests can also be made by bodies such as companies, media houses, and non-government organizations. Employees of a public entity can also make requests, although good internal communications and staff relations should lessen the need for this. Persons may also apply for the amendment or annotation of records under s. 34.

### f. What must applicants do when applying?

An applicant must address the request to the public entity that is most likely to hold the relevant record(s) and provide sufficient details about what is requested to enable the RTI officer to identify the record. An RTI application must include:

- a postal address, fax number or email address to which the information may be sent;
- a telephone number at which the applicant may be reached;
- the form of access required;
- the language in which the information granted is to be supplied;
- an indication of whether the application is being made on behalf of a person and submission of proof of authorized capacity to the reasonable satisfaction of the RTI Officer

#### NOTE

An applicant does not have to use their real name and may use a pseudonym to make a request. A real name must be provided however, if:

- the request is for an amendment or annotation of personal records under s. 34; or
- the applicant seeks access to the personal information of a third party and is the guardian or next of kin of the third party or is the executor of the will of a deceased third party (s. 42). In such cases, the Act requires the applicant to provide proof of capacities which will include among other things, photo identification with the applicant's real name.

### g. What forms must applicants take?

A request for access to information may be made in writing (ex. by letter, email), or through any electronic means (ex. by telephone/fax/email) and in any of the 3 official languages. Applicants may also make requests for an amendment or annotation of their personal information.



## h. Must a reason for an application be given?

An applicant need not provide, and the public entity **must not require**, the reasons why the application is being made. Access to information may not be denied based on the lack of a reason for the application or the opinion of an official as to what the applicant's reason may be for applying.

## i. Can Civil Servants make an RTI Request?

Yes, civil servants can make RTI requests. This law applies to all persons.

## j. What is application is not addressed to the RTI Officer?

Applicants do not have to direct their request to the designated RTI Officer or even mention the RTI Act. The RTI officer cannot, therefore, ignore or refuse a request simply because it is addressed to a different member of staff. It would be good practice to train customer-facing staff and persons handling incoming mail to immediately pass letters or emails that appear to be seeking information under the RTI Act to the RTI Officer.

## k. Is every enquiry an RTI Request?

Not every request or enquiry needs to be treated as a formal RTI request. Some may be handled under the usual customer service procedures (for example, if a member of the public wants to know whether their child has secured a place at a school or what are the plans for road repairs in a community).

An enquiry or a request only becomes an RTI request if the requested information cannot be provided immediately; or the applicant clearly states that the enquiry is being made pursuant to the RTI Act.

## l. Is there a deadline for responding?

The RTI Officer must respond to a request for access within 30 days. The response to the applicant must be in writing (*See APPENDIX IV - Sample RTI Response Letter*). This time frame must be adhered to but can be extended under certain circumstances. (*See below*)

## m. What are the steps for processing requests?

(Section 14 – 30)

### STEP 1: REQUEST INTAKE

The first step to take when a request is received is to stamp the date on the request. This is important because of the statutory time requirements. All customer facing staff and persons responsible for incoming mail should be sensitized to ensure:

- that time is not wasted in the internal mail process; and
- to immediately send to the RTI Officer any mail marked “RTI” or any other marking suggestive of an RTI request or any mail addressed to the designated RTI Officer or the responsible RTI division.

Once the RTI Officer receives the request, a file should be opened which will serve as a record of the decisions taken. The file should also have a tracking and recording form on cover which will help route the file if it is sent to other divisions in the agency. Input return dates on the folder as this will help keep everyone involved aware of the timelines.

### NOTE

If an oral request is received, the RTI Officer must reproduce it in written form for filing purposes, and provide a copy to the applicant. If the RTI Officer is able to provide an immediate response to an oral application and the response is to the satisfaction of the applicant, that oral application must also be recorded in writing for documentation purposes.

An applicant does not have to use their real name to make a request (unless it is personal information being requested) and the applicant's reason, motivation or purpose is not relevant to their request or the public entity's response.

Note that sometimes a request might be in the form of a question. For example, an applicant might write, "**Does this agency have any information on tenders?**" This is broad and vague but likely motivated by a legitimate need for targeted information. For this reason, requests in the form of questions should be clarified with the applicant (*see below*) before proceeding to process the request.

## STEP 2: ACKNOWLEDGE THE REQUEST

The RTI Officer must acknowledge the receipt of the request within 5 days of receiving the application by writing or emailing the applicant (if the applicant provides an email address) to state the date on which the application was received and the officer responsible for the application.

## STEP 3: TRANSFER REQUEST (*If necessary*)

Determine if the records requested are held or under the control of your agency. If another entity holds the record, the applicant must be informed, and if s/he agrees, the application must be transferred as quickly as possible (within 5 days) to that other entity. The applicant must be notified in writing once the transfer has been made. The notice must include:

- the date of the transfer;
- the government agency or related entity to which it has been transferred;
- the contact information for that agency and its opening hours; and
- the name and contact details of the RTI officer of that other agency.

The RTI officer of the agency to which the request is transferred must then follow the usual procedure of acknowledging the request and proceed to process the request within the 30 day period which begins from the date of the transfer.

## STEP 4.A: CLARIFY REQUEST

If the application is for information that is held by your entity, then you must now go ahead and process the request.

Note however, that many times, people who request access to information may not always know what types of records a government agency has. In these cases, the RTI Officer may have to clarify the request.

To clarify a request is to have a clear understanding and agreement between the entity and the applicant about what the applicant wants. For example, an applicant wants "a job competition file", but has provided no further

information. Clarification would be needed in this instance. Clarification is a practical step that will make the entire process easier for all concerned in the long run.

## STEP 4.B: NARROW THE REQUEST

To narrow a request for information is to reduce the breadth or scope of the request by decreasing the number of records requested. Clarifying or narrowing a request must be done as soon as possible after receiving the request to determine how much search and review will be required to process the request and to offset unnecessary disputes at the end of the process when a decision is finally made.

### NOTE

It is best if the employee who is most knowledgeable about the requested record(s) communicates directly with the applicant. A letter is appropriate in some instances, but speaking with an applicant is usually the better way for both parties to quickly explain and answer questions about the scope and content of the request.

## STEP 5: FIND THE RECORDS

The Act only covers recorded information held by a public entity or related public entity. While the information sought by an applicant might involve multiple records and sources, the RTI Officer is not required to make up an answer or find out information from elsewhere if the relevant information in recorded form does not already exist.

A request for access to hardcopy records must be for records that exist at the time a request is received. There is no requirement to compile information from a number of records to create a new hardcopy record in response to a request (ex. an applicant might ask to see a copy of an audit report of a planning board. It might be that an audit report was never prepared by the planning board. If this is the case the planning board would not be obliged to prepare one to satisfy the request).

If the requested information is found to be contained among a group of records, it is still considered a request despite the fact that the request appeared to be asking for a single record. In this case, the agency must identify and advise the applicant of the existence of the related group of records.

### a. Records That Cannot Be Found/Do Not Exist

Before an RTI Officer decides that an agency does not hold the records requested, care should be taken to carry out adequate and targeted searches. If after a thorough search has been conducted, the RTI Officer concludes that the agency does not have the information requested, the applicant must be notified in writing. If it is known that the information is held by another government agency, transfer the request to them and advise the applicant accordingly.

If all reasonable steps have been taken to find information requested by an applicant and there are reasonable grounds for believing that the information is in the possession of your agency but cannot be found or does not exist, you must, within 30 days of receiving the application, notify the applicant in writing.

The notice must give a full account of all steps taken to find the information and must include:

- details of all locations searched and the person(s) who conducted the search;
- details of any communications with any person that you contacted in searching for the information or attempting to establish the existence of the information;
- any evidence relating to the non-existence of the information including any evidence that the information was destroyed or the location in which the information was last known to be held.

If the information in question is found after notice is given to the applicant, you should immediately notify the applicant in writing of that fact, quickly begin processing the application and, within 14 days, determine whether to grant the application and notify the applicant of the decision in writing.

## b. Records That Have Been Destroyed

An agency might get a request involving a record that was destroyed according to its records retention schedule. In these cases, the RTI Officer should advise the applicant that the record does not exist.

### Note

The notice to the applicant regarding information that cannot be found will be taken as a decision to deny access and can be appealed to the IC.

## STEP 6: REVIEW THE RECORDS

Whether the information requested involves one or several records, each record must be carefully reviewed to determine:

- if access will be granted or denied to the whole record(s);
- if an extension of time may be needed;
- if the record contains third party personal information or is otherwise exempt in whole or in part; and
- if access will be granted to the record with a part(s) deleted/severed/redacted.

### Extending Time

An RTI Officer may extend the 30 day period by a period of not more than 14 days only if:

- ***the application involves a large amount of records; or***
- ***such a large amount of records is to be searched that it would unreasonably interfere with the activities of the entity; or***
- ***the required consultations would take a longer time than the 30 day period for responding.***

In such cases, the RTI Officer must, within the 30 days after the application is received, notify the applicant of the need to extend the period for responding the reasons for the extension, the duration of the proposed extended period (maximum 14 days), the right of appeal to the IC and if the applicant agrees, make every effort to help the applicant to narrow the application (see above).

### Third Party Information

If a request involves personal or commercial and confidential material about someone who is not the applicant, the RTI Officer must notify that person within 14 days of receipt of the request. The notice must state:

- ***the name of the applicant;***
- ***describe the content of the request;***
- ***the personal information that is exempt under the Act;***
- ***whether the public interest override may be applied and why; and***
- ***that the applicant must respond to the notice within 14 days to provide written or oral representations as to why the request must be refused***

The RTI Officer must make a decision to grant or refuse access whether the third party responds or not and notify the third party of the decision within 21 days of the first notice and the right of appeal to the IC within 14 days.

## STEP 7: MAKE THE DECISION

It is important that decisions are made in a transparent way and in conformity with the RTI Act. Failure to give a decision, or to amend or annotate a personal record within the time required under the Act will be regarded as a refusal to do so and subject to an appeal to the IC. The RTI Officer is required under the Act to consult with supervisors or the principal administrative officer prior to making a decision on whether to defer, partially grant, or refuse to grant access to an applicant.

### a. Full Grant

If an application for access to information is granted, the notice to the applicant must include the reproduction fee payable, the form in which access will be given, and the applicant's right of appeal to the Information Commissioner in relation to the fee payable and the form in which access has been granted. Access to the records must be granted within 7 days of payment of a fee where payable.

If the information requested contains information relating to a third party, the RTI Officer must notify the third party, consider the third party's arguments for refusing access and refuse to grant access to the records until the time for the third party to appeal the release of the information has expired without any appeal being made; or an appeal made by the third party has been finally determined in favor of the release of the information.

### b. Partial Grant

If part of a record contains exempt information, the RTI Officer must delete the exempt portions before granting access (***See Part 2.3 Exemptions for how to delete exempt information***).

The RTI Officer must state in the response letter the information to which access has been granted or denied, the exempting provision relied upon and the applicant's right of appeal.

It should be made clear what parts of the record have been edited. This can be done by inserting the exempting section of the Act relied upon in the space remaining after the information has been deleted from the record or in the margin.

## c. Denial of Access

If an application for access to information is denied, the notice to the applicant must state the reasons for the refusal and the applicant's right of appeal to the Information Commissioner, the procedure for applying and the applicable time limits.

## d. Deferral of Access

The RTI Officer may decide to defer or delay access to records if:

- the information is a report that is to be tabled in Parliament. Access is granted 5 days after it has been presented and approved by Parliament;
- the information is a report that has been prepared for an official or an official body. Access is granted after the report has been presented or made available to that person or body or upon the expiration of 45 days from the date of the application, whichever is earlier;
- the publication of the information within a particular time is required under the provisions of any law access is granted after the expiration of that period;
- the premature release of the record would be contrary to the public interest. Access is granted after the occurrence of any event, or the expiration of any period after which the release of the document would not be contrary to the public interest.

The applicant must be notified of the decision to defer access, the reasons for the deferral, the period of the deferment, and the applicant's right of appeal to the IC within 14 days of the RTI Officer's notice.

### Notes on Grant of Access

- When the decision is to grant full or partial access, the record/s should only be released to the applicant if:
  - *the fees are paid*
  - *there is no ongoing review of the decision by the IC at the behest of a third party; or*
  - *third party review rights have run out*
- It is good practice therefore for RTI Officers to check first with the IC as to whether any review proceeding related to the records that are slated for release is in progress.
- For large requests, RTI Officers should consult with the applicant to agree on a staggered approach to release of the records.
- Where partial access is granted and information deleted from a record, the applicant must not be allowed the option of viewing the original.

In responding to a request for access to information, the response must indicate whether access to all, part or none of the information will be granted. When access is denied, the decision letter should clearly set out why some or all of the information has been denied.

The RTI Officer must very clearly explain why an exemption has been applied since this is not only fair to the applicant but can greatly reduce the chances of an appeal. If the applicant decides to appeal a denial decision, a properly drafted decision letter will be essential to the efficient processing of the appeal.

## The Response Letter

The response should contain:



- |   |  |
|---|--|
| <ul style="list-style-type: none"> <li>• An index of records since a request may involve several records</li> <li>• A general description of each record being provided if access is granted fully or in part</li> <li>• The exemption(s) applied to each record or part of a record and the reason it was applied</li> </ul> | <ul style="list-style-type: none"> <li>• Fees payable if any</li> <li>• Name and position of the RTI Officer</li> <li>• Appeal to the IC notice setting out the applicant's right of appeal within 20 days of decision letter</li> </ul> |
|---|--|

The response letter should also recommend that in an appeal to the IC, the applicant should:

- include the decision letter file number;
- a copy of the decision letter itself; and
- a copy of the original request made by him/her

## n. In what forms must access be given?

### a) In The Form Requested

If an applicant has requested that access to information be provided in a particular form, then access must be given in the form or manner requested.

Access may be given as:

- |  |  |
|--|--|
| <ul style="list-style-type: none"> <li>• a copy of the information;</li> <li>• inspection of the information using equipment normally available to the agency;</li> <li>• a copy taken by the applicant using own equipment;</li> <li>• hearing or viewing sounds or visual images;</li> </ul> | <ul style="list-style-type: none"> <li>• copies of information held on a computer, or in electronic form;</li> <li>• a transcript whether in print, sound or visual form;</li> <li>• an inspection of works; or the taking of samples of materials.</li> </ul> |
|--|--|

### b) In An Alternative Form

Access may be granted in an alternative form if:

- the form of access requested would unreasonably interfere with the operation of the public entity;
- the form of access requested would be detrimental to the preservation of the information or involve an infringement of copyright of a person;
- the applicant requests an alternative form other than originally requested;

The security of the records should also be considered. The public entity should take reasonable steps to ensure that a record is not defaced, changed, destroyed or stolen as a result of granting access (ex. an employee is present when access to the record is provided to the applicant).

### c) In A Form Which Accommodates Persons With Disabilities



If an applicant is prevented by a disability from reading, viewing or listening to the information concerned in the form or manner in which it is held, the RTI Officer must, if the applicant so requests, take reasonable steps to make the information available in a form in which it is capable of being read, viewed or heard by the applicant.

### o. What about copyright?

Section 85 (3) of the Act provides that a grant of access to information is not to be construed as authorization or approval for the breach of the Copyright and Related Rights Act by the applicant. Any person granted access to records is bound by copyright.

As a best practice, when providing access to records, an agency should:

- stamp the records with the phrase such as "*Copyright Act Applies to Use and Reproduction*"; and
- state the author's name or other indication of authorship on the copies of documents released.

### p. Is there a charge for applying?

No. The RTI Act does not require applicants to pay an application fee to submit their requests.

### q. When are fees payable?

Whenever access is granted in whole or in part, the applicant must pay a fee for the reproduced copies of the records (A prescribed schedule of fees will be contained in RTI Regulations).

### r. When are fees no payable?

In addition to no reproduction fee to make the RTI application, no fee is payable:

- for time spent to search for and examine records to determine if they contain exempt information or to delete any exempt information;
- to make copies of **personal information** where the applicant is a guardian of a natural third party and the application is made in that capacity or if the applicant is the next of kin or the personal representative of a deceased third party;
- for the reproduction of information which is in the public interest;
- if the RTI Officer has failed to respond to the application within 30 days or an extension of time.

### s. When are fees refundable?

If an applicant pays a reproduction fee and access to the information is not provided within 7 days, the whole amount of the fee previously paid must be refunded. If the delay is caused by factors beyond the RTI Officer's control, the fee is not refundable.

### t. When are fees collected and by whom?

Fees must be paid by the applicant once the RTI Officer informs of the grant of access, the cost associated with the reproduction of the related documents and how and where to pay. Records must not be reproduced until payment is received.

**Note that once the fee is paid by the applicant, the records must be provided within 7 days of the payment.** In the case of Government agencies, reproduction fees are to be paid at the Government cashier in the Department of Finance.

#### u. Is there a limit to the fees chargeable?

Yes. Under the Act, reproduction fees must not exceed VT 50,000.

#### v. What is the applicant is not satisfied with a decision?

The applicant can appeal to the Information Commissioner within 20 days of the RTI Officer's decision letter on the following grounds:

- refusal of access or refusal to indicate whether or not the entity holds the information requested;
- refusal to detail the categories of information in its statement of organization;
- refusal to grant access to information within 48 hours for the protection of life or liberty;
- failure to respond to an application for information within the time limits under the Act;
- extending the time period for responding to an application;
- failing to provide a notice in writing of its response to an application;
- failing to communicate information regarding third party consent; failing to transfer an application or transferring an application to an incorrect public entity;
- providing insufficient, incomplete, inaccurate, misleading or false information;
- failing to communicate information in the form requested;
- failing to appoint an RTI Officer;
- refusal of an RTI Officer to accept an application for information;
- the partial grant of access;
- charging a fee, or an excessive fee;

The IC must decide an appeal within 30 days. If dissatisfied with the IC's decision, the applicant may appeal to the Supreme Court for a judicial review.

# Summary of Steps in Processing a Request

## RECEIVE A REQUEST

- Is the request in writing/does it mention RTI?
- Does it provide sufficient detail to enable identification of the requested record(s)?
- If not, assist the applicant to rewrite the request.
- Clarify/Narrow the request as needed
- Date-stamp the request, open a file and prepare a tracking and recording form.

## DO THE RECORDS EXIST?

- Do the records exist? If not, notify the applicant and include right of appeal to the IC
- Can the records be found? If not, notify the applicant and include right of appeal to the IC
- If records are found subsequent to the notice, proceed to process the request immediately

## DOES THE AGENCY HAVE CUSTODY OR CONTROL OF THE RECORDS?

- If not, make reasonable inquiries to determine where to transfer the request, and make the transfer within 5 days of receipt of the request. Notify the applicant and include the name of the agency and the RTI Officer
- If unclear where to transfer the request, notify the applicant that the records do not exist at that particular agency and that the applicant can appeal to the IC

## LOCATE & REVIEW THE RECORDS

- Gather the records and review them.
- Do they contain third party personal information? If so, notify the person
- Is a time extension required? If so, notify the applicant
- Check if any exemptions apply

## PROCESS THE RECORDS

- Retrieve the records.
- Determine what exemptions apply.
- Determine if the public interest override applies.
- Delete exempt content where necessary
- Determine if fees are chargeable.

## GRANT ACCESS

- If access to the whole or part of a record is granted, determine the method of access (copy or original).
- If access is granted, denied or partial, give the applicant notice of decision
- If an affected third party is involved, give notice to third party of the grant of access
- Collect fee chargeable, and provide record.
- Do not grant access until it is confirmed that no appeal is filed

## CORRECT PERSONAL INFORMATION

- Verify the information to be corrected, correct the information or file a statement of disagreement.
- Notify recent users of the personal information of the correction or statement of disagreement.

## COMPLETE THE FILE

- Document the request and all actions taken.
- Close the file, unless an appeal is commenced.

### Practical Reminders

- The law assumes that every record is open unless there is a lawful reason to withhold it
- Communicate with the applicant early in the process if there might be a need to clarify or simplify the request or to extend time. This can avoid complications and misunderstandings later in the process
- Document your actions to show what has been disclosed to the applicant and that your search was reasonable. This will be particularly helpful if there is an appeal and you have to provide documents to the Information Commissioner

### About Disclosure Logs

A Disclosure Log is a running account of access to information requests received and the results of those requests. It is good practice for RTI Officers to develop, update and publish such a log regularly (ideally on a website or webpage) to:

- provide current information to the public on results of RTI requests
- publish requests and decisions that are in the public interest
- avoid repeat applications from the public for the same records/information

### About Instant Messaging & Personal Email Accounts

- Personal email accounts and instant messages are subject to RTI requests
- Challenges include searching for and producing them when requested, retaining and preserving them, privacy and security
- Government agencies are advised to prohibit use or preserve as business records

### About Websites

- Agency websites should include:
  - *An introduction to RTI and the objectives of the RTI Law*
  - *Information on how and to whom to make a request for a record*
  - *Any disclosure log showing previous responses to requests for records*
  - *The Publication Scheme of the public entity*
- Information on websites about RTI must be current and accurate. The whole point of proactive publication will be lost if the information contained on webpages or websites is outdated or inaccurate. It should be remembered at all times that the publishing of records will reduce the number of access requests a public entity receives.

## 2.3 Exemptions

### a. About Exemptions

(Section 37 – 50)

#### *Denial of Access*

Under the RTI Act, an RTI Officer may refuse to grant access to information that is exempt from disclosure under any of the 9 exemptions (*See below*).

#### *Burden of Proof*

The onus is on the RTI Officer to prove **firstly**, that the information that has been denied is exempt from disclosure under the Act; and **secondly**, that the harm being prevented and the interest being protected by the exemption outweigh the public interest in the disclosure of the information.

#### *Refusal to Indicate if Information is Held or Not*

Of the 9 exemptions, 7 provide that, in addition to refusing a grant of access based on any exemption, the RTI Officer may also *refuse to indicate whether or not the agency holds the information requested*. This is because the act of confirming or denying whether a document exists can, in some instances, cause harm (ex. knowing that an agency possesses a copy of a particular document, coupled with the knowledge that the document could originate from only one source, might disclose a confidential source).

The RTI Officer in these circumstances may give the applicant notice in writing that the agency neither confirms nor denies that it holds the information. *Refusal to confirm or deny the custody or control of information amounts to a refusal of access without providing a reason and should be resorted to only in limited cases.*

#### *Exemption Limit*

Exempt information ceases to be exempt if more than 10 years has elapsed from the date of it being designated exempt (s.51). This automatic time limit is not applicable to the exemption of personal information of natural persons.

#### *Classified Information Not Automatically Exempt*

Information is not exempt from access merely on the basis of it being classified as confidential or given any other status to that effect.

#### *Information Already Publicly Available*

An RTI Officer must not refuse to communicate information requested if the information is already publicly available. The RTI Officer can assist the applicant in this regard by providing the information or if more practical, clearly indicate to the applicant where the information is published (ex. providing a functioning link to where the information is published online)

#### *Deletion of Exempt Material*

To delete the exempt information, the best practice, if there is no available software, is to:

- photocopy the record or portion of it containing the exempt information;

- use a black marker to blank out the exempt information from the photocopy;
- make another copy of the photocopy for release to the applicant. This second photocopy step is necessary because print can be seen through a black marker;

Alternatively, place removable white tape (if available) over the exempt portions of the record and make 2 photocopies, one for release to the applicant and the other for the agency's file.

## b. Personal Information

(Section 42)

An RTI Officer may refuse to indicate whether or not it holds the information requested by an applicant or refuse to grant access to such information, if to do so would involve disclosure of the personal information of a third party.

Note also that s. 31 sets out clear processes for the notification and intervention of third parties where an application for access concerns the personal or the commercial and confidential information of a third party.

(See 2.4. *The Public Interest Test below*)

### *What is Personal Information?*

Under the RTI Act, personal information means *information about a person, whether living or deceased*. Personal information can take many forms and may be:

- related to the race, gender, sex, marital status, national, ethnic or social origin, color, sexual orientation, age, physical or mental health, well-being, disability, religion, conscience, belief, culture, language and birth of the person
- related to the education or the medical, criminal or employment history of the individual or information relating to financial transactions in which the person has been involved;
- any identifying number, symbol or other particular assigned to the person;
- the address, fingerprints or blood type of the person;
- the personal opinions, views or preferences of the person;
- correspondence sent by the person that is implicitly or explicitly of a private or confidential nature or further correspondence that would reveal the contents of the original correspondence the views or opinions of another individual about the person;
- the name of the person where it appears with other personal information relating to the person or where the disclosure of the name itself would reveal information about the person.

### *Is the exemption applicable to all types of information?*

Under the Act, access to the personal information of a third party may be granted to an applicant *where the third party consents* and also under the following circumstances:

- **Information Requested by Guardians, Next of Kin, Executors** - If the applicant is the guardian of the third party, or the next of kin or the executor of the will of a deceased third party AND provides proof of the capacity in which the application is being made to the satisfaction of the RTI Officer
- **Information About Persons Who Have been Deceased For More Than 20 Years** - Personal information is information about an individual, which means a natural and not a deceased person.
- **Information About Government Employees** - Information about past and current directors and staff of Government agencies such as their names, terms of employment, their office or position, and anything written or recorded in any form by them during their employment.

- **Information About Government Contract Service Providers** - Information about past and present contract service providers to the Government and related entities such as their names, types of service or the terms of the contract; anything recorded in any form by them during and for the purposes of the provision of the service; the views or opinions of the person in relation to a Government agency, relevant or private entity the staff of any of them, the business, the performance of the services or functions of any of them

### Note

**About Guardians etc.** - In the case of applicants who are guardians, next of kin or executors, satisfactory proof of their respective capacities includes a power of attorney; a court order; probate letters of administration; or written authority by a next of kin to whom the information relates to apply for and gain access to the information.

**About Deceased Persons** - If information about a deceased person includes information or an opinion about a living person, it will be 'personal information' about that 'living individual' (ex. Jane's death certificate contains information about her next of kin, including her husband, Fred and daughter, Mary. While the information in the death certificate about Jane would not be personal information, if Fred and Mary are reasonably identifiable, the information about them on the death certificate would be personal information.

In any other case, if the RTI Officer decides to grant access to personal information, the third party to whom the information relates must be notified and will have 14 days from the date of the notification to make a case as to why the grant of access must be refused or to agree to its release.

### *Can personal information be more about than one person?*

Personal information of one individual can also be the personal information of another person or persons. For example, information provided for a joint loan application contains personal information about both parties to the loan application.

### *Can personal information be in format other than written?*

Personal information is not limited to information that is contained in written records. Personal information can be captured digitally (ex. photos), recorded (video, voice or tape recordings) or captured on signs. For example, tagged photographs of a person posted on a social media site will usually constitute personal information.



### Tips for Identifying Personal Information

In most cases, identifying personal information will be a reasonably straightforward exercise. However, in some cases it may not be as clear, and the answer will depend on the context and circumstances. Consider if:

- *the information requested is about an individual, that is, there is a connection between the information and the person. This is a question of fact, and depends on the context and circumstances. Some information is clearly about an individual – ex.name, date of birth and medical records;*
- *the information requested reveals a fact or opinion about the person, in a way that can be linked back to the individual third party-- the information reveals or conveys something about that person.*

**Remember** — If in doubt, it is recommended to err on the side of caution and treat the information as personal information.

### Common Types of Personal Information

**Information about a person's private or family life** such as a person's name, signature, home address, email address, telephone number, date of birth, medical records, bank account details and employment details will generally constitute personal information.

**Certain business information** such as information about a loan taken out by a sole trader to purchase tools for their business, or information about utility usage — may be personal information about the sole trader.

**Commentary or opinion about a person, for example**, a job reference's comments about a job applicant's career, performance, attitudes and aptitude is 'personal information' as it is information about that person. The reference's comments may also be personal information about the reference given that they provide information about the reference's views on a particular subject.

## c. Legal Privilege

(Section 43)

An RTI Officer may refuse to indicate whether or not information is held by the government agency or refuse to communicate information, if the information is privileged from production in legal proceedings unless the person entitled to the privilege waives it.

The underlying justification for this exemption is to facilitate full and frank disclosure between a lawyer and client in the interest of the effective administration of justice.

### *What is Legal Privilege?*

For legal privilege to exist, there is usually a legal adviser-client relationship where *a client retains the services of a lawyer for the purposes of obtaining professional advice*. Legal privilege may take 2 forms:

**Legal advice privilege** which protects the confidential communications between lawyers and their clients for the purposes of giving or obtaining legal advice; and

**Litigation privilege** which protects the confidential communications between lawyers, clients and third parties made for the purposes of actual or contemplated litigation.

### *What determines if legal privilege attaches to a record?*

In both cases, in determining if the legal privilege exemption attaches to a record, it should be considered:

- if there is a legal adviser/client relationship; if yes
- if the communication was for the purpose of giving or receiving legal advice, or for use in connection with actual or anticipated litigation; and if so,
- if the advice given is confidential.
- It should be noted that it is the purpose of the communication (the giving or receiving of legal advice or for use in actual or anticipated litigation) in the record, and not the information itself, that determines if the record or part of it is exempt.

The information in a record is only relevant if it throws some light on the purpose of the communication (that is, giving/receiving legal advice/for litigation/confidential).

(See **2.4. The Public Interest Test** below)

## d. Commercial & Confidential Information

(Section 44)

An RTI Officer may refuse to disclose information:

- if the information was obtained from a third party and to communicate it would constitute an actionable breach of confidence;
- the information was obtained in confidence from a third party and contains *a trade secret or its communication would likely seriously prejudice the commercial or financial interests* of that third party;
- if the information was obtained in confidence from another State or an international organization, and to communicate it would seriously prejudice relations with that State or the international organization.

This exemption is meant to protect secret or commercially sensitive information as the law generally seeks to prevent people from using such information to gain an unfair benefit or advantage. It protects not only the commercial interests of third parties but also the commercial interests of the public entity that holds the information. This exemption should not be used, however, to block the release of contracts with private bodies which are providing public services.

### *When is information obtained in confidence?*

To decide whether the release of a record would constitute an actionable breach of confidence, it must first be determined if the information was obtained in confidence. Information is communicated in confidence by a third party if it was communicated and received *under an express or implied understanding that the communication would be kept confidential*.

Note that the relevant time for the test of confidentiality is the time of communication of the information, *not the time of the request for access*.

For a record to be confidential, the RTI Officer must be satisfied that:

- the information has the necessary quality of confidence. Examples of information that has a quality of confidence can be whether it is labelled as such on the outside of a folder or if it contains a confidential watermark running through it; or whether it is information which is the subject of a pending patent or design registration;
- it was shared in a manner which imposed an obligation of confidence whether express or implied. In other words, there was an expectation of confidentiality by the owner of the information from the party with whom the information was shared.

### *What is an actionable breach of confidence?*

An actionable breach of confidence under this exemption would occur if the information, having been obtained in confidence by the entity, could be used by an applicant in an unauthorized way that could cause the owner of the information to suffer detriment from its unauthorized use.

### *What are trade secrets, commercial or financial interests?*

*Trade secrets* are any confidential business information which provides a competitive edge to an enterprise. Trade secrets generally encompass manufacturing or industrial secrets and commercial secrets. Disclosure of a trade secret to an owner's competitor could cause real or significant harm to the owner. The dissemination of information containing a trade secret must therefore be limited.

*Commercial interests* relate to a person's ability to successfully participate in a commercial activity. A *financial interest* relates to the financial position of an individual or organization. Care should be taken to minimize the harm caused to a company's competitive commercial interests when disclosing information, for example, by not publishing tender submissions during a tender process.

Public entities may obtain commercially sensitive information from third parties in a number of ways:

- as a result of legal, regulatory, or licensing requirements;
- in the course of policy development ex. information obtained, usually voluntarily, to inform and influence the development of policy, or changes to law or regulation;
- through providing support for business ex. information provided by a company to a public entity to obtain advice, help with a specific project, or for financial assistance which will often entail providing sensitive information about a project and the financial position of a company;
- through contracts ex. for products, services or research. A company may seek advice from a government department about its plans for a particular overseas market, and for this purpose provide information about its future products and plans.

### *How is serious prejudice determined?*

For the purposes of the Act, '*serious prejudice*' means causing harm in some way that is significant. To decide whether a grant of access would cause prejudice:

- there must be a *significant* negative consequence of the disclosure; and
- there must be a link between the disclosure and the negative consequence, that is, showing how one would cause the other and there is a real possibility of the negative consequences happening.

(See **2.4. The Public Interest Test** below)

## e. Health & Safety

(Section 45)

An RTI Officer may refuse to indicate whether or not a government agency holds certain information or refuse to grant access to information if to do so would likely endanger the life, health or safety of an individual.

To invoke this exemption, a public entity must demonstrate that there is a causal link between the disclosure of the information and endangerment to life, health or safety of an individual and show that the disclosure *would likely* have such a detrimental effect. The effect must be more than trivial or insignificant. The term ‘any individual’ has been viewed as including any specific individual, any member of the public, or groups within society.

### *How is “would like cause serious prejudice” measured?*

This is generally viewed as meaning that if the serious prejudice is below a 50% chance for instance, there must be a real and significant likelihood of prejudice occurring. The RTI Officer must decide the likelihood of prejudice arising on the facts of each case. The more “likely” the endangerment to the life, health or safety of an individual, the stronger the public interest in **not disclosing** the information requested.

**Examples:** Information requested about the frequency of police patrols or speed checks at particular locations could result in criminal activity or more drivers speeding respectively because it has been discovered that enforcement is less likely at those locations.

Similarly, the identity of people who are whistle blowers on corruption inside their organization should be protected, because otherwise they may be targeted for discrimination or even violence.

(See 2.4. The Public Interest Test below)

## f. Law Enforcement

(Section 46)

An RTI Officer may refuse to indicate whether or not an entity holds information, or refuse to grant access to information, if to do so *would likely* (see note at E.) cause *serious prejudice* (See note at D.) to the prevention or detection of crime; the apprehension or prosecution of offenders; the administration of justice; the assessment or collection of any tax or duty; the operation of immigration, biosecurity and Customs controls; an assessment of whether a civil or criminal proceeding, or regulatory action pursuant to any Act, is justified.

### Some General Terms

- **“prevention or detection of crime”** - This applies to information about general policies and methods adopted by law enforcement agencies
- **“apprehension or prosecution of offenders”** – This criteria could potentially cover information on the general procedures related to the apprehension of offenders or the process for prosecuting offenders
- **“administration of justice”** – This is a broad term which has been interpreted as applying to the justice system as whole

**Example:** While an investigation is underway, there may be information about the identities of witnesses or the case that is being put together against a suspect which would need to be protected. If released, the witnesses could be put in danger or the case could be jeopardized. In addition, while a case is underway, information may need to be kept secret.

(See 2.4. The Public Interest Test below)

## g. Defense & Security

(Section 47)

An RTI Officer may refuse to indicate whether or not an entity holds information or refuse to grant access to information, if to do so *would likely* (**See note at E.**) *cause serious prejudice* (**See note at D.**) to the defense or national security of the Republic of Vanuatu.

The aim of this exemption is to protect Vanuatu's national security and defense, which could genuinely be harmed if certain types of information were to be released to the public.

Examples of the types of records which may be covered by this exemption include:

- policy and strategy, planning and intelligence records
- operational orders, tactics and rules of engagement information
- records related to the defense or reinforcement of other countries including any formal or informal arrangements and agreements
- information published during a conflict, detailing the number of soldiers defending a boundary, where they were positioned or their strategic plans

Certain commercial information which would reduce the likelihood of corruption or irregularities in the public procurement process should however be considered for release and the public interest test applied.

(See **2.4. The Public Interest Test** below)

## h. Economic Interests of the State

(Section 48)

An RTI Officer may refuse to indicate whether or not the public entity holds information or refuse to grant access to information if to do so *would likely* (**See note at E.**) *cause serious prejudice* (**See note at D.**) to the ability of the Government to manage the economy of Vanuatu or the legitimate commercial or financial interests of the public entity. The exemption does not apply to the results of any product or environmental testing, and the information concerned reveals a serious public safety or environmental risk.

This exemption recognizes the instability and economic damage that could be caused to the Vanuatu economy if certain information is disclosed. Note that many times, disclosures that could be prejudicial will be time sensitive and may be made after a particular event has occurred.

**Examples:** Information relating to the national budget, which must be withheld until it is presented in Parliament; information relating to changes in interest, currency or exchange rates, taxes; the regulation or supervision of banking, insurance and other financial institutions; proposals for borrowing and foreign investment. The release of these types of information could potentially cause serious prejudice to the effective management of the economy, particularly if released prematurely.

(See **2.4. The Public Interest Test** below)

## i. Policy Making & Operations of Agencies

(Section 49)

An RTI Officer may refuse to indicate whether or not an entity holds information, or refuse to grant access to information, if to do so *would likely* (**See note at E.**) *cause serious prejudice* (**See note at D.**) to the effective formulation or development of Government policy; or adversely affect the implementation of a policy by the premature disclosure of that policy.

The purpose of this exemption is to maintain some degree of confidentiality during the policy/decision-making process, to protect the integrity of the policymaking process, and to prevent disclosures which would undermine this process. The RTI Act states however that the exemption does not apply to facts, analyses of facts, technical data or statistical information used in the policy making process.

### *What is meant by formulation of government policy?*

The *formulation* of policy tends to refer to the early stages of the policy process where policy options and strategies are generated and assessed, risks are identified, consultation occurs, and recommendations or submissions are put to a minister of government who subsequently decides which options should be translated into political action. An official public announcement of such a decision can be viewed as the end of the policy formulation process.

### *What is meant by development of government policy?*

This tends to be viewed as including the process of reviewing, improving or adjusting existing policy. Note however, that not every decision made by a minister of government must be automatically taken to be policy development or implementation worthy of the exemption protection. Ministers may be involved in decisions that may be purely political, administrative, or operational in nature in relation to an existing policy.

Examples of the types of records that could be exempt include Cabinet papers, and the records of the deliberations of the Council of Ministers, Secretaries and other offices.

(See **2.4. The Public Interest Test** below)

## j. Protected Sites & the Environment

(Section 50)

An RTI Officer must not grant access to information if its disclosure would *reasonably be expected* to result in the destruction, damage, or interference with the conservation of any historical, archaeological or anthropological resources; anything declared to be a national monument, designated as protected national heritage or otherwise protected under any relevant laws of Vanuatu; or species of plant or animal life so designated or which is endangered, threatened or otherwise vulnerable; or any other rare or endangered living resource.

(See **2.4. The Public Interest Test** below)

## k. Other Grounds for Denial of Access

### *Repeat Applications*

An RTI Officer may refuse to grant an application for access to information if satisfied that the application is made by, or on behalf of, a person who, previously made an application for access to the same information; or the application was refused and the Information Commissioner or the Court, upon review, confirmed the decision; or there are no reasonable grounds for making the application again. The RTI Officer must notify the applicant of the decision to refuse access and inform the applicant of the reason for the refusal and the applicant's right of appeal to the Information Commissioner.

Aside from innocent repetitious applications, this provision empowers the RTI Officer to identify and handle requests that might amount to an attempt to abuse the right of access or are made in bad faith for a purpose other than to obtain access.

Note:

- the request must be identical or substantially similar to one that was previously submitted by the same applicant



- A request from the same applicant should not be rejected simply because it is for information on a *related* topic and only if there is a complete or substantial overlap between the two sets of information
- Seemingly repeat requests after a reasonable period of time should not be rejected out of hand since some information held by an agency might change in substance over a period of time.

### *Desired Form of Access Would Be Detrimental*

Section 28 (4) (5) provides that if the RTI Officer is of the view that granting access to information in the form requested by the applicant would:

- unreasonably interfere with the operation of the organization;
- be detrimental to the preservation of the information; or
- involve an infringement of the copyright of a person other than the Government agency, relevant private entity or private entity.

The RTI Officer can recommend to the applicant an alternative form of access which would avoid these outcomes, and if the applicant rejects the recommendation, deny the grant of access.





## 2.4 Public Interest

### a. What is the Public Interest Test?

In the interest of accountability and transparency, the RTI Act requires that even if any of the 9 exemptions apply to a record, disclosure may still be required if the public interest in the disclosure of the records clearly outweighs the purpose of the exemption (s. 37 – 38). This is the public interest test.

The “*public interest*” does not mean “*something the public is interested in*” but that there is **compelling reason** for the exempt information to be disclosed.

The interest in disclosure must be strong or overwhelming enough to clearly outweigh the purpose of the exemption. The override has been applied to promote, for example, transparency in public spending and accountability for actions by government agencies and public officials.

### b. What are the factors to be considered with applying the test?

These include:

- the objects of the RTI Act;
- the prevention of the commission of offences or other unlawful acts;
- the prevention of a miscarriage of justice, abuse of authority or neglect in the performance of an official duty;
- the promotion of effective use and oversight of public funds and expenditure;
- whether the information is to be used for public debate or discussions;
- the promotion of public participation in the political process and decision-making;
- the avoidance of any danger to the health or safety of an individual or the public;
- the avoidance of un-authorized use, or misuse of public funds;
- the protection of the environment;
- any other factors as the officer may consider relevant from time to time.

### c. What are the factors that should not be considered with applying the test?

The RTI Officer should not consider:

- that access to the information could result in embarrassment to, or cause a loss of confidence in the Government of Vanuatu;
- that access to the information could result in any person misinterpreting or misunderstanding the information;
- that the author of the document was, or is of high seniority in the Government agency or relevant private entity to which the application for access to the information was made;
- that access to the information could result in confusion or unnecessary debate.

### d. How is the public interest test applied?

The RTI Officer must carry out a balancing exercise by weighing the public interest against the purpose of the exemption. The results of that balancing test must be clear and definitive. Three questions should be asked when applying the public interest test:

- is the information covered by a legitimate exemption? If Yes, then;

- will disclosure cause substantial harm? If Yes, then;
- is the likely harm greater than the public interest in disclosure?

Since the public interest test balances the pros and cons of release versus withholding, the RTI Officer should also consider the following exercise:

- List all the factors in favor of disclosure
- List all the factors in favor of maintaining the exemption
- Balance the two and determine which side carries more weight

Where the factors in favor of disclosure and those favoring non-disclosure are equal, the doubt should ideally be resolved in favor of disclosure and the exempt record should be released.



## Part 3

### 3.1 Best Practices

#### a. RTI Officers

##### *RTI Requests*

RTI Officers/RTI Committees should consult with the Office of the Attorney General for guidance on the interpretation and application of exemptions when in doubt

A method of tracking individual requests, whether paper based or using tracking software, should be devised or acquired. Accurate records of the numbers and types of requests received should also be maintained as this will help to:

- refer back to previous requests for records;
- facilitate reporting obligations to the IC and the RTI Unit;
- determine whether certain records are being requested frequently enough so that they might be routinely disclosed and removed from the formal request process.

When a full or a partial grant of access is to be given, the record(s) should only be released to the applicant if:

- the fees are paid;
- there is no third-party appeal being considered by the IC; or
- third party review rights have run out.

It is good practice therefore for RTI Officers to check first with the IC to determine if any review proceedings of the records in question are underway.

For large requests, RTI Officers should consult with the applicant to agree on a staggered release of the records.

##### *Initial Statements of Organization and Publication Schemes*

All entities should select persons within their organizations to lead, manage and provide guidance on the development of the Statement and Scheme

##### *RTI Association of Administrators (RTIAA)*

RTI administrators should establish an RTIAA from among themselves to facilitate advocacy, the sharing of best practices and self-monitoring

##### *Internal RTI Policies and RTI Committees*

RTI Officers should advocate for and lead the development of internal RTI policies and the establishment of internal RTI Committees. It should be noted that s. 27 of the RTI Law requires internal consultation with a supervisor or the principal administrative officer prior to any deferral, partial grant or denial of access. A functioning RTI Committee has proven helpful in expediting such decisions and their consultations provide proof, in the event of an on appeal, of bona fides in denying access

## *Collaborating with External Stakeholders*

Working with the public and interested agency stakeholders will help RTI administrators to gain perspective on particular types of proactive disclosures which are more frequently desired and publication formats that are more useful.

## *Records and Information Management Codes of Practice*

A government agency and related entities must ensure that the RTI Officer and other personnel responsible for information management are fully aware of the types of records held by the entity, how they are organized, and where they can be located.

To facilitate this, internal records management codes of practice should be developed to guide staff on the creation, storage, security and destruction of records.

## **b. Senior Management**

### *Support*

While a personal commitment to the principles of the Acts is important, RTI Officers by themselves cannot ensure compliance with the RTI Act. RTI Officers must therefore have the support and commitment of the government agency, starting with the principal administrative officer, through to the senior management and customer facing staff.

### *Resources*

The RTI Officer is, in most cases, the primary point of contact for members of the public seeking access to information. To ensure the effective administration of the access to information program, including quality customer service, prompt response times, and efficient processing of requests and appeals, it is vital that RTI Officers are provided with adequate resources and staff support.

### *RTI Committees/Decision Making Support*

The Act requires that before an RTI Officer makes a decision denying or granting partial access to a record, consultations must be held with the principal administrative officer of the public entity. Senior management should support the establishment and function of RTI Committees to facilitate the work of RTI Officers within their agencies.

### *Training & Education*

Providing staff with ongoing RTI training is an important responsibility for public entities. Reinforcing the importance of the underlying value of open government, as well as statutory interpretations and technical requirements of the access to information scheme, are essential to an effective RTI program.

### *Websites*

Government agencies should attempt to make any online information about RTI not just correct and up to date, but usable by posting materials in open format or offering more advanced search features.



## References

1. *Guidance Manual on the Freedom of Information Law, 2007 - Cayman Islands,*
2. *Access to Information Users' Guide, 2004 - Office of the Prime Minister, Jamaica*
3. *Guide to Freedom of Information, 2017 - Information Commissioner's Office, UK*
4. *Official Information Act 1982/OIA for Ministers and Agencies, 2016 - New Zealand*
5. *Guide to the Freedom of Information Act 1982 - Office of the Australian Information Commissioner,*
6. *Right to Information Act No. 13 of 2016*

## APPENDIX I

### STATEMENT OF ORGANIZATIONAL FUNCTIONS

- Description of structure and functions
- List of entities falling under agency including their location, opening hours, and subjects handled
- Title, business address and contact details of the Principal Administrative Officer
- Particulars of its finances
- Directory of officers and employees and brief description of functions and powers
- Procedures followed in the decision making process, such as channels of supervision and accountability
- Simple guide to its information-keeping systems
- Statement of the types and forms of information and categories of documents that are held or used by officers and employees to discharge agency functions
- Details of any services provided directly to the public
- Decisions or policies adopted which affect the public, reasons and any important background material
- Particulars of consultation arrangements available for the public to participate in policy formulation or implementation
- Procedure for making an application for information, particulars of facilities available for obtaining information such as library or reading room hours
- Any direct application or complaints mechanisms available to the public about acts or a failure to act by that Government agency or relevant private entity, along with a summary of any applications, complaints or other direct actions by members of the public and the response
- Names, designations, contact details and other particulars of RTI Officers

### NOTE

The RTI Regulations will prescribe the forms required to be used under the RTI Act. This template is for illustrative purposes only.



## APPENDIX II

### SAMPLE DISCLOSURE LOG

RTI Reference Number	Date of Access	RTI Request (Provide summary description)	Records Provided	Other Information

#### NOTE

The RTI Regulations will prescribe the forms required to be used under the RTI Act. This template is for illustrative purposes only.

## APPENDIX III

### RTI RESPONSE LETTER CHECKLIST

<ul style="list-style-type: none"><li>- Index of records</li><li>- Document number for each record</li><li>- Description of each record</li><li>- Indication for each record whether access granted or refused or whether part or parts of the record severed</li><li>- For each record or part of a record refused, the provision of the Act under which access is refused</li></ul>	<ul style="list-style-type: none"><li>- Fee information</li><li>- Name and position of the decision-maker</li><li>- Notice that the applicant may appeal the decision to the IC within 20 days</li><li>- Notice that applicant's appeal should include: the file number assigned by the government agency, a copy of the decision letter, and a copy of the original request.</li></ul>
---	---

#### NOTE

The RTI Regulations will prescribe the forms required to be used under the RTI Act. This template is for illustrative purposes only.

## APPENDIX IV

### SAMPLE INDEX FORM

*(Use if the request involves more than one record)*

Doc No.	Description of Record	Page No.	Decision	Section Applied	Comments

**NOTE:** *The RTI Regulations will prescribe the forms required to be used under the RTI Act. This template is for illustrative purposes only.*

## APPENDIX V

### SAMPLE RTI RESPONSE LETTER

[Date]  
[Name and address of applicant]

Dear [name]

**Re: File No. - RTI Act Request**

I refer to your right to information request dated [date] for [set out detail of request].

**[Use if granting request in full]** - The information you have requested will be granted.

**[Use if granting the request in part]** - Part of the information you have requested will be granted. However, we have decided to refuse your request for information which relates to [describe information withheld] under [Insert relevant exemption section(s) of the RTI Act]. **[Describe relevant harm and consideration of the public interest in release, if applicable].**

**[Use if granting request in full but releasing information at a later date]** - We have decided to grant your request. However, release will be deferred until [state reason for deferral] OR release will be delayed as it will take us some time to prepare the information for release. We will send you the information by [date].

**[Use if refusing request in full]** - We have decided to refuse your request under section [state exemption section(s) of the RTI Act]. **[Describe relevant harm and consideration of the public interest in release, if applicable].**

**[Use if granting access in a different form]** - You asked for the information to be released to you [specify form of release asked for by applicant]. However, we cannot release the information in that form as [state reason under s. 28] We have therefore decided to release the information to you as ..... [specify the form in which information will be released].

**[Use in all cases]** - Attached is an Index of Records relating to your request which includes a general description of each of the records you requested and indicates whether access is being granted fully, in part, or denied, relevant sections of the RTI Act and our reasons.

Section 30 of the Act authorizes charging fees for the records. [In this case, ----- must be paid prior to the release of the record] **OR** [the amount of \_\_\_\_\_ is not being charged because \_\_\_\_\_ [Insert reason]

I am responsible for this decision. If you wish to discuss this decision further with us, please feel free to contact [details of contact person].

Please note that if not satisfied, you may ask for a review within 20 days of receiving this letter by writing to the Information Commissioner at **(Insert address and contact details)** and providing that office with the file number listed at the beginning of this letter; a copy of this decision letter; and a copy of the original request for information you sent to our agency.

**(Insert Name, Title & Signature)**

**NOTE: The RTI Regulations will prescribe the forms required to be used under the RTI Act. This template is for illustrative purposes only.**

