

APPEALS
POLICIES AND PROCEDURES
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1. PURPOSE

The Ombudsman has established policies and procedures as set out in this document in order to provide guidance to members of the public and public authorities on appeals filed with the Office of the Ombudsman (“OMB”) under Part VII of the FOI Law.

The policies and procedures in this document expand on Part VII of the FOI Law by applying a two-stage approach to appeals filed with the Ombudsman under section 42¹:

- (a) Stage 1 – Pre-Hearing Investigation: in the first stage of the appeal a pre-hearing investigation of the appeal is opened, certain basic facts are established and verified, responsive records are submitted to the OMB, and an informal resolution to the dispute is sought. If the dispute between the parties is not satisfactorily resolved at this stage, or should either of the parties request it at any stage of the investigation, the appeal may move to the second stage.
- (b) Stage 2 – Hearing: in the second stage of the appeal a formal written hearing is undertaken before the Ombudsman.

The policies and procedures of the Office of the Ombudsman are intended to ensure fairness, certainty, transparency and efficiency throughout the appeal process.

If an applicant has a limited ability to read or write, or has a disability that impairs his or her ability to file an appeal in writing, the OMB will assist the applicant as necessary.

2. PROCEDURES FOR SUBMITTING AN APPEAL

2.1 Grounds for appeal

An applicant may appeal to the Ombudsman on the broad basis that he or she believes that a provision of the FOI Law has not been applied properly, including non- or late response of a public authority or non disclosure of responsive records.

Section 42(1) grants an applicant the right to apply to the Ombudsman for a decision that a public authority has failed to comply with an obligation under the Law, specifically where a public authority has -

¹ All references to sections in this Policy are to sections of the *Freedom of Information Law (2018 Revision)*, and all references to regulations are to regulations of the *Freedom of Information (General) Regulations 2008*, unless otherwise specified.

- (a) failed to indicate whether or not it holds a record;
- (b) failed to communicate the information contained in a record within the time allowed by this Law or at all;
- (c) failed to respond to a request for a record within the time limits established in this Law;
- (d) failed to provide a notice in writing of its response to a request for a record;
- (e) charged a fee that is in contravention of this Law; or
- (f) otherwise failed to comply with an obligation imposed under this Law.

Where an appeal is solely based on an alleged procedural failure, the Ombudsman may pursue it as a procedural investigation under section 44 of the FOI Law.

2.2 Conditions for appeal

In writing:

An appeal to the Ombudsman must be made in writing (email is acceptable).

Other means of redress:

Before an appeal can be accepted by the OMB, the applicant must have exhausted all other means of redress provided for in the FOI Law. This means that in certain cases the applicant must first ask the public authority for an internal review.

In the following cases an internal review has to be concluded before the applicant may make an appeal to the Ombudsman:

- (a) where a public authority has refused to grant access to a record;
- (b) where a public authority has granted only partial access to a record;
- (c) where a public authority has deferred access to a record; or,
- (d) where a public authority has charged a fee for action taken – as to the amount of the fee.

If the information manager of a public authority has failed to give an initial decision within the time allowed by the Law, this is to be regarded as a refusal to do so, and the applicant may apply for an internal review.

The applicant may make an appeal directly to the Ombudsman if the Minister responsible, Chief Officer or Principal Officer was the person who made the initial decision.

The OMB may also accept an appeal where the normal time for initial decision and internal review has elapsed, with no response from the public authority.

Timelines:

An appeal must be made within 30 calendar days:

- (a) from the date on which the applicant was notified of the public authority's decision taken upon internal review;
- (b) from the initial decision made by the Minister responsible, the Chief Officer or Principal Officer; or,
- (c) from the date when either of the decisions above should have been taken, where no decision was taken.

The Ombudsman may agree to extend the period during which an appeal may be made, if she is satisfied that the applicant's delay in submitting the appeal is reasonable.

2.3 Documentation required from the applicant

The applicant must provide the following documentation to the OMB within 10 calendar days of making an appeal:

- (a) the reason for the appeal;
- (b) a copy of the original request;
- (c) a copy of the acknowledgment received from the public authority;
- (d) a copy of the initial decision of the public authority;
- (e) a copy of any additional communications between the applicant and the public authority.

Where applicable, the applicant must also submit:

- (f) a copy of the applicant's request for an internal review;
- (g) a copy of the internal review decision;
- (h) a copy or list of any responsive records already received from the public authority in response to the request;
- (i) any other relevant information.

This documentation may be provided by email.

If all the applicable documentation has not been received from the applicant within 10 calendar days after the request for an appeal was made, the Ombudsman may not accept the appeal, unless the applicant can provide good reason for the delay in providing the documentation.

2.4 Acceptance of appeal

Upon receipt of a request for an appeal and all applicable documentation from the applicant, the OMB's Appeals and Compliance Officer establishes whether the appeal may proceed under the FOI Law.

If the OMB accepts the appeal, the Appeals and Compliance Officer:

- (a) enters the appeal in the OMB's appeal log;
- (b) assigns a unique reference code;
- (c) opens an appeal file; and,
- (d) notifies both parties (the applicant and the public authority) that an appeal has been raised in a Notice of Appeal.

The Notice of Appeal includes an explanation of the reasons for the appeal, although it is possible that these may evolve as the appeal progresses.

The Ombudsman may require the Chief Officer and the Information Manager of the public authority to attend a meeting, in order to set out her expectations with respect to the appeal and possible hearing.

2.5 Late appeals

Section 42(3) provides that, where an appeal is not made within the 30-day period allowed, the Ombudsman may extend that period if he is satisfied that the appellant's delay in doing so is not unreasonable.

If an appeal is made outside the normal 30-day period, it must include:

- (a) a written statement of the reasons why the appeal was not made within the 30-day period allowed; and,
- (b) any written evidence to support those reasons.

If either of the above two items are not communicated when the appeal is made, the OMB will request that they be submitted by the applicant within a reasonable time period.

When the Ombudsman receives a late appeal he will ask the affected public authority to provide its views on the matter in writing. If the public authority wishes to object to the acceptance of the late appeal it must submit written reasons for doing so, together with any supporting evidence it may possess.

In coming to a decision as to whether to accept a late appeal the Ombudsman considers:

- (a) the matters stated in the request for appeal;

- (b) any written statements and supporting evidence provided by the person making the appeal;
- (c) any written statements and supporting evidence provided by the public authority;
- (d) any other relevant matters within the knowledge of the Ombudsman.

When the Ombudsman decides whether to accept an appeal filed outside the statutory deadline of thirty days, she will as soon as practicable give written notice of that decision to the parties, including the reasons for accepting or not accepting the appeal.

3. PRE-HEARING INVESTIGATION POLICY AND PROCEDURES

Once the OMB has accepted an appeal, a pre-hearing investigation commences.

3.1 Purpose

The purpose of a pre-hearing investigation is:

- (a) to clarify the applicant's reasons for seeking the appeal;
- (b) to clarify the position of the public authority, particularly the reasons for withholding records;
- (c) to attempt the amicable resolution of the dispute between the two parties; and,
- (d) to ensure that all documentation is available for consideration by the Ombudsman in a formal hearing, if necessary.

Under section 6(3) the OMB is not allowed to require that an applicant reveal the reasons for requesting access to the records themselves. However, since any appeal under the FOI Law is based on the applicant's complaint that the public authority has failed to comply with an obligation imposed under the Law, the OMB encourages the applicant to explain the reasons and circumstances of their complaint as fully as possible.

In any appeal the burden of proof is on the public authority to show that it acted in accordance with its obligations under the Law. As most appeals follow from the non-disclosure or partial disclosure of records responsive to an application made under the FOI Law, the pre-hearing investigation seeks to clarify the detailed reasons for which the records were withheld, or partially withheld by the public authority.

In the course of the pre-hearing investigation the OMB seeks an amicable solution to the dispute by finding common ground between the parties. For this purpose, the Appeals and Compliance Officer:

- (a) seeks to define and narrow down exactly what the dispute is about;
- (b) identifies whether any informal remedies may resolve the dispute in a manner acceptable to both parties; and,
- (c) encourages both parties to agree to an informal settlement without reverting to a formal hearing before the Ombudsman, if appropriate.

In the event that an amicable settlement cannot be reached within a reasonable period of time, the relevant information or documentation provided to the OMB in the pre-hearing stage of the appeal may be passed on to the Appeals and Communications Officer of Hearings for consideration by the Ombudsman in a formal hearing.

3.2 Timelines

Although there is no formal time limit to a pre-hearing investigation, the OMB recognizes that time is of the essence and the FOI Law imposes strict timelines on all processes under the Law.

Therefore, the Ombudsman requires that both parties make a sincere effort to cooperate fully and timely with OMB staff in order to bring the appeal to a close, either through an informal resolution or a formal hearing.

As soon as no actual progress is being made in the pre-hearing investigation, or the prospects of an informal resolution are minimal or non-existent, the OMB will cease the pre-hearing investigation and escalate the appeal to the formal hearing stage.

Alternatively, either party may request at any stage of the pre-hearing investigation that the appeal move to a formal hearing before the Ombudsman.

3.3 Cooperation with OMB staff

It is imperative that both parties cooperate fully and timely with the Ombudsman and her staff during an appeal, whether in the course of a pre-hearing investigation or a formal hearing.

Since the Law provides that the burden of proof in any appeal rests on the public authority, OMB staff requires the full and timely cooperation of the Chief Officer, the Information

Manager and possibly other staff of the public authority concerned, in order to investigate the appeal without hindrance or delay, and bring it to an end, either informally, or formally by means of a hearing.

Section 45(1) grants the Ombudsman the power to:

- (a) require the production of evidence;
- (b) compel witnesses to testify; and,
- (c) call for and inspect an exempt record.

Therefore, the OMB may require the production of documentation such as internal or external correspondence, and policy and procedures, and may ask Chief Officers, Information Managers or other relevant staff to provide their views in writing, including in the form of a sworn statement (affidavit) about the existence of records or other relevant matters.

The Law specifically grants the Ombudsman the power to “examine any record to which this Law applies, and no such record may be withheld from the Ombudsman on any grounds”, except if the Governor certifies that the examination of such record would not be in the public interest. In order to conduct the pre-hearing investigation and adjudicate the formal hearing meaningfully, the OMB requires unrestricted access to all the records relevant to the appeal.

3.4 Documents required from the public authority

Upon receipt of the Notice of Appeal the public authority must submit the following documentation to the Appeals and Compliance Officer within 10 calendar days:

- (a) a copy of any redacted records provided to the applicant, showing the redactions and the exemptions applied in each instance;
- (b) a copy of the records in (a) above, in unredacted form; and,
- (c) Any additional reasoning for the exemptions applied, including any prejudice and public interest tests that were considered.

If the public authority claims that no records are held, it must provide the following documentation to the Appeals and Compliance Officer within 10 calendar days:

- (d) a record of the search efforts undertaken in order to locate responsive records, including physical locations, paper and electronic files searched, dates, staff involved and any other steps taken in conducting a reasonable search.

The Appeals and Compliance Officer may also require that the public authority provide (as applicable) :

- (e) a listing of all the responsive records, indicating:
 - i. which records were disclosed to the applicant in full;
 - ii. which records were disclosed to the applicant in part; and,
 - iii. which records were withheld from the applicant;
- (f) copies of communications sent to, or received from third party individuals in relation to the disclosure of their personal information;
- (g) copies of communications sent to, or received from other third parties, e.g. in relation to commercial interests; and,
- (h) any other relevant information.

In extraordinary circumstances, e.g. if the responsive records are vulnerable or exceptionally extensive, the public authority may propose alternative practical arrangements. However, any alternative arrangements must be agreed by the OMB.

In the exceptional event that the OMB agrees to inspect records onsite, the public authority must provide photocopies of selected records upon demand. During the inspection the OMB may employ recording and copying devices as it sees fit. The OMB may take any copies, whether provided by the public authorities or made by the OMB, away from the onsite location and keep them in confidence and safety within the offices of the OMB.

3.5 Confidentiality

The OMB never discloses responsive records either during or after an appeal.

Any other documentation or information provided to the OMB in the course of an appeal unless otherwise stated in this policy is kept in confidence and will not be divulged to the other party or parties to the appeal to the extent that, in the opinion of the OMB, doing so would, or would likely, prejudice the discussions between the parties or the negotiating position of either party.

Where reasonable and necessary, either party may indicate the confidential nature of specific documentation or information provided to the OMB, and may submit such documentation or information explicitly *in camera*.

3.6 Pre-hearing investigation report

Where an informal resolution of the dispute within reasonable timelines cannot be found, the responsible Analyst writes a report to conclude the pre-hearing investigation.

In the pre-hearing investigation report, the Analyst:

- (a) lists the material facts of the case to date;
- (b) identifies and addresses the outstanding issues in the dispute;
- (c) may provide a non-binding opinion on the reasons given by the public authority for refusing or deferring access to the responsive records; and,
- (d) identifies and addresses any procedural matters that may have arisen.

The Investigation Report is communicated to both parties and to the Appeals and Communications Officer for inclusion in the Ombudsman's Hearing binder.

In the interest of protecting confidential information, the Analyst may add confidential appendices to the report to be disclosed to one party only.

3.7 Appeals involving personal information

When an appeal involves a public authority's use of section 23(1), the exemption relating to personal information of one or more third party individuals, the OMB may require that a public authority notify the third party individual(s) whose information is at issue.

Without revealing the name of the applicant, this notification should:

- state that an application has been made under the FOI Law for access to a record containing personal information of the third party individual;
- describe the contents of the request and the record concerned;
- state that the matter is currently in appeal with the Ombudsman;
- offer the third party individual the chance to express their views on the disclosure of the personal information as soon as practicable, but within 28 days;
- state that the record(s) will be withheld until the third party's time for responding has expired; and,
- explain that their views will be taken into account, but will not compel the final decision on disclosure.

The third party individual's representations should be sent to the public authority and passed on to the OMB without delay.

3.8 Legal counsel

If a public authority wishes to seek advice from legal counsel, it is encouraged to do so without delay, and not wait until the pre-hearing investigation or hearing stage of an appeal.

The Law requires that the reasons for refusing or deferring access must be stated in the initial decision, as well as in the internal review, and it is not acceptable for a public authority to wait until the matter is appealed, or indeed until a hearing has commenced, before it determines its legal position and provides its full reasons for refusing or deferring access to a record.

Particularly during the hearing stage of the appeal, both parties are expected to meet strict deadlines and delays must be minimized.

4. HEARING OF APPEALS

The Law requires that the Ombudsman decide an appeal after giving both the complainant (applicant) and the public authority an opportunity to provide their views in writing. When an appeal cannot be resolved in the pre-hearing investigation, this is accomplished by way of a formal, written hearing.

A hearing involves a number of steps, including the provision of written submissions by both parties, and their subsequent exchange. Reply submissions are also accepted and exchanged. Written submissions provide the Ombudsman with the full reasons for the decision of the public authority and the views of the applicant as to why records and information should be withheld or disclosed.

While an applicant is encouraged to submit their views in writing to the Ombudsman, the Law places the burden of proof on the public authority to show that it acted in accordance with its obligations under the FOI Law.

Once an appeal moves to the hearing stage, all parties are informed, and the pre-hearing investigation report is passed to the Appeals and Communications Officer of Hearings. The Appeals and Communications Officer is responsible for the administrative aspects of a hearing.

These Policies and Procedures address written hearings before the Ombudsman, which are the norm, but the Ombudsman may decide to hold an oral hearing, in which case separate instructions would be issued.

4.1 Setting the Hearing Calendar

The Appeals and Communications Officer contacts the parties to a hearing to set an appropriate timetable for the various requirements and actions in the hearing. Whilst every effort is made to work within the confines of the schedules of the parties involved, the final decision on hearing dates is made by the Appeals and Communications Officer in consultation with the Ombudsman. It is imperative that all parties adhere to the timelines set out in the Hearing Calendar.

4.2 Notice of Hearing

The Appeals and Communications Officer provides all parties with a Notice of Hearing which explains what the hearing is about and how it is expected to proceed. The Notice of Hearing contains the following information (as appropriate):

- (a) a synopsis of the request;
- (b) a list of the records in dispute;
- (c) the sections of FOI Law under consideration;
- (d) the issues under review;
- (e) the key dates in the hearing (e.g. due dates of submissions and hearing decision);
- (f) the deadlines for the delivery of initial and reply submissions.

The Appeals and Communications Officer will allow all parties to the hearing an opportunity to review and provide their views on the Notice of Hearing and these must be received by the OMB in writing by the deadline set out in the Notice of Hearing.

The Ombudsman or Appeals and Communications Officer may at the written request of a participant and with the consent of the parties, or where appropriate and reasonable in the circumstances, make changes to the content and timelines set out in the Notice of Hearing. If changes are made, all parties are provided with amended copies of Notice of Hearing.

4.3 Initial Submissions

Hearing participants must deliver a copy of their Initial Submission to the Appeals and Communications Officer on or before the dates set out in the Notice of Hearing. Documentation may be provided by email.

Initial Submissions are meant to address only those issues set out in the Notice of Hearing and should include evidence and written arguments. Only exceptionally will new issues or exemptions be accepted by the Ombudsman.

As set out in the Notice of Hearing, the Appeals and Communications Officer will exchange the submissions received, so each party receives a copy of the other party's submissions.

During the hearing, all submissions and correspondence relating to the hearing is shared with all parties, unless it has been submitted *in camera*. This ensures that the principles of natural justice are adhered to and that all parties are treated fairly.

If not already provided during the pre-hearing investigation, a copy of all responsive records must be supplied by the public authority on or before the date set for Initial Submissions. The responsive record will not be disclosed to any party by the OMB either during or after an appeal.

Practical guidelines for submissions for written hearings are available from the OMB.

4.4 Reply Submissions

Participants are given the opportunity to reply to each others' Initial Submissions in the form of a Reply Submission. The Reply Submission must not raise any new issues or contain any new facts (except in response to facts in other participants' Initial Submissions). The due date for Reply Submissions is in the Notice of Hearing.

Providing a Reply Submission is discretionary and may not be necessary if the party feels that their position was clearly laid out in their Initial Submission and they do not need to respond to issues discussed in the Initial Submission of another party.

If a party intends to decline to provide a Reply Submission, they must advise the Appeals and Communications Officer of this in writing as soon as possible, but in any event no later than the deadline set for reply submissions.

As set out in the Notice of Hearing, the Appeals and Communications Officer will exchange the Reply Submissions received, between the parties.

Under special circumstances participants may also see the need to provide a further submission after the reply submission. An opportunity to submit this *sur-reply* and may be granted if it is necessary to raise new and significant issues. This should be sent to the Appeals and Communications Officer.

4.5 Close of Hearing

Once all the submissions and evidence have been received and reviewed by the Appeals and Communications Officer, the Ombudsman's Binder is assembled. The Binder contains all the documents related to the hearing needed for the Ombudsman to render a decision and includes:

- (a) The original Freedom of Information application;
- (b) The public authority's initial decision;
- (c) The applicant's application for internal review (if applicable);
- (d) The public authority's internal review decision (if applicable);
- (e) The applicant's appeal to the OMB;
- (f) The pre-hearing Investigation Report;
- (g) The Notice of Hearing;
- (h) The Initial Submissions and Reply Submissions of all parties;
- (i) Additional evidence provided during submissions including any relevant case law;
- (j) Any official correspondence that relates to procedural objections or adjournments;
- (k) Redacted and un-redacted copies of all records in dispute; and,
- (l) Any other material relevant to the hearing.

The Ombudsman normally takes 14 calendar days to review the contents of the Binder and identify, if necessary, any further documentation and/or evidence she may need to ensure that all parties have had an opportunity to provide their views in writing as required under section 43.

Once the Ombudsman is satisfied, the Appeals and Communications Officer informs participants that the hearing has been closed. The Ombudsman then has 30 calendar days

to render a decision, and may take up to a further 30 days if necessary. Parties to the hearing will be informed in writing of any time extension before the expiry of the original 30 calendar days.

After the hearing has been closed, the Appeals and Communications Officer does not accept any further submissions from any party. However, the Ombudsman may request further submissions at any time if she considers more information is necessary or desirable.

4.6 Expedited Hearings

The purpose of the expedited hearing process is to provide a fast-track option for issues which are less complex than the application of exemptions.

Before an expedited hearing process is started, the OMB ensures that the applicant has requested an appeal relating to:

- (a) an exception under section 9(b), (c) or (d);
- (b) an alleged failure to comply with an obligation under the FOI Law other than the exemption or partial exemption of requested records; or,
- (c) an alleged failure to comply with an obligation under the FOI law, which can reasonably be separated from other outstanding issues, including the exemption or partial exemption of requested records.

For example, this process may apply to an appeal in which (1) the public authority intends to charge a fee in relation to the disclosure of requested records, which the applicant objects to, and, (2) the public authority is also withholding access to the requested records in whole or in part on the basis of one or more exemptions. Under these circumstances the Ombudsman may consider whether to conduct an expedited hearing on the fee issue, taking into consideration whether it is reasonable to do so without unduly delaying a decision on the exemption.

If the Ombudsman considers it reasonable to conduct an expedited hearing the Appeals and Communications Officer will set dates for the hearing, taking into consideration the overall schedule of hearings and the calendars of all the parties, while recognizing that it may not be possible to accommodate all parties to their satisfaction.

A Notice of Hearing is prepared in relation to the expedited issue(s) and sent to the parties (the public authority and the applicant) and any other appropriate persons, in exactly the same way as in the standard hearing process.

The public authority and any appropriate persons have 7 calendar days from the date the finalized Notice of Hearing is issued to make a submission to the OMB. Upon receipt of the submission from the public authority or other appropriate persons the Appeals and Communications Officer will provide a copy of the submission (if any) to the applicant.

The applicant then has 2 calendar days* to send a reply submission to the Appeals and Communications Officer. Upon receipt of the reply submission the Appeals and Communications Officer provides a copy of that reply (if any) to the public authority.

The public authority has 2 calendar days* to respond to the applicant's reply submission.

After receiving all submissions the Appeals and Communications Officer informs the parties that the hearing is closed. Once the hearing is closed, the Appeals and Communications Officer will not accept any further submissions.

The Ombudsman makes a decision as soon as practicable but not later than 30 calendar days after the hearing closes. Parties to the hearing are informed in writing of any time extension taken by the Ombudsman before the expiry of the original 30 calendar days.

5. OMBUDSMAN'S DECISION

After considering all relevant information, the Ombudsman issues a written Decision. Section 43 authorizes the Ombudsman to order the public authority to take such steps as may be necessary to bring it into compliance with its obligations under the Law, including the disclosure of some or all of the responsive records. Alternatively, the Ombudsman may uphold the public authority's decision to exempt all or some of the records.

The public authority has 45 calendar days to comply with the Ombudsman's Decision unless an appeal to the Grand Court by way of judicial review has been made. As per section 47(1), the other parties to a hearing may also apply for judicial review.

The OMB first provides each party with a copy of the Decision, prior to publishing it on the OMB website and issuing a press release. The applicant is not named or otherwise identified in the Decision or press release.