



## CYGNUS LAW GUIDE

# FINANCIAL ADVICE SERVICE DISCLOSURE

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## CYGNUS LAW GUIDE

# FINANCIAL ADVICE SERVICE DISCLOSURE

## 1. INTRODUCTION

In this guide we summarise the new disclosure obligations of financial advice providers (**FAPs**) & financial advisers set out in the Financial Markets Conduct Regulations 2014 (**Regulations**). The guide is set out in the following sections:

<i>Section</i>	<i>Page</i>
<b>1. Introduction</b> .....	<u>2</u>
<b>2. Overview Of Disclosure Obligations</b> .....	<u>3</u>
<b>3. Information To Be Disclosed- General Matters</b> .....	<u>7</u>
<b>4. Information To Be Disclosed- Specific Disclosure</b> .....	<u>10</u>

The new disclosure obligations apply from **15 March 2021** and replace disclosure obligations at law prior to that date. The new disclosure obligations are part of wider reforms of the regulation of financial advice services from that date. There are related obligations in the Financial Markets Conduct Act and the Code of Professional Conduct for Financial Advice Services (**Code**). We consider some of those related obligations in this guide.

The new disclosure obligations replace requirements to provide static & inflexible disclosure documents under the Financial Advisers Act. Under the new disclosure regime there are no mandated disclosure documents- there is significant flexibility with respect to how disclosure is made. This supports FAPs & their advisers to implement disclosure in a way that ensures clients are best able to engage with the information provided.

The guide focuses on disclosure obligations in relation to FAPs that deliver advice through financial advisers.

### About Cygnus Law

Cygnus Law provides legal advice & support to a wide range of businesses. Our key services include:

- Practical help to support new and established financial service providers to meet regulatory requirements and commercial objectives.
- Support for businesses to establish and succeed through effective commercial agreements, transactions and compliance.
- Help to understand the law's impact on your business and how the law can be used to achieve commercial solutions.

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## 2. OVERVIEW OF DISCLOSURE OBLIGATIONS

### Who must information be disclosed to?

FAPs and financial advisers must disclose information to retail clients including potential retail clients.

### What information must be disclosed?

Information must be disclosed in relation to the following matters (with some differences at each disclosure stage):

- The identity and address of the FAP and the identity of the financial adviser
- The regulated status of the FAP (either licensed, an authorised body or exempt)
- The nature & scope of advice provided (and limitations) including details of products advised on
- Commissions and other incentives (where material)
- Other conflicts of interest (where material)
- Fees charged to the client
- Disciplinary history (if relevant)
- The internal complaints process and details of the dispute resolution scheme
- Legal duties of the FAP and adviser

### When must information be disclosed (and what is the purpose of disclosure)?

Information disclosure is required at four different stages

Stage	When is disclosure required? (responsibility)	Purpose of disclosure
1	<b>At all times</b> (on a website* or on request) (FAP responsible)	To give retail clients access to information that will help them to find a FAP that meets their needs.
2	<b>When nature/scope of financial advice is known</b> (Adviser responsible)	To give retail clients information that will help them to make an informed decision about whether to seek, obtain, or act on advice.
3	<b>When financial advice is given</b> (Adviser responsible)	To give retail clients information that will help them to make an informed decision about whether to act on advice they have been given.
4	<b>When there is a complaint</b> (FAP or adviser receiving complaint responsible)	-

\* Where a website is maintained by or on behalf of a FAP.

### How must information be disclosed?

If an internet site is maintained by or on behalf of a FAP certain information has to be made available on the internet site (Stage 1). The same information must also be provided at any time on request from a member of the public, whether or not the FAP has an internet site.

**How must information be disclosed? (continued)**

There is significant discretion when making disclosure at Stages 2, 3 and 4:

- Disclosure can be verbal and/or in writing. But if disclosure is not given in writing the client must be told that the disclosure is available in writing, on request.
- Disclosure made “in writing” includes disclosure made electronically, for example via a website, email or text message.
- Disclosure can be made in different ways at each stage.
- Disclosure can be provided at the appropriate part of the advice process (within limits), so allowing disclosure to be made when clients are best placed to engage with and understand the information disclosed.

**What commissions & incentives must be disclosed?**

The actual commission, benefit or other incentive (whether monetary or non-monetary, direct or indirect) must be disclosed (including the actual value of monetary payments) to the client if all of the following criteria are met:

- The commission or incentive is provided to a FAP, adviser or a connected person.
- The commission or incentive is provided as a result of the adviser giving the advice or the client acting on the advice e.g. acquiring a financial product.
- A reasonable client would expect the commission or incentive to (or to be likely to) materially influence the advice given.

“Incentive” is a broad term, for example it is likely to include “soft commissions” such as trips available for meeting targets.

The “reasonable client” standard can be difficult to apply, as it requires consideration not only of the mind-set of a reasonable client, but of how that reasonable client would expect another person (a financial adviser) to respond to incentives. In the absence of guidance from the FMA and relevant Courts decisions, we recommend taking a cautious approach. However, one of the examples of disclosure in the Regulations is instructive - “We will receive a commission of 10% of the first year’s premium from XYZ Limited if you take out this policy”. This indicates a presumption that material commissions must be disclosed.

**What conflicts of interest (other than commissions & incentives) must be disclosed?**

Conflicts of interest (other than commissions & incentives) must be disclosed if a reasonable client would expect the interest to (or to be likely to) materially influence the advice given. An example of a conflict is advising on a bond, share or other product issued by a company of which the adviser is a director.

**When does information need to be updated?**

Previous disclosure does not need to be updated except where there has been a “material change”. A change is material if a reasonable client would expect the change to (or to be likely to) materially influence a decision about whether to seek or obtain advice, or to act on advice given. Where an update is required the client may be given either:

- an updated version of the information; or
- an explanation of what has changed only, for example an email to the client that states that the adviser is no longer advising on the products of a particular provider, or that a certain fee payable to the FAP has increased.

**What other considerations apply when disclosing information?****Form & Manner of Disclosure**

When disclosing information FAPs and their advisers must ensure that the information:

- Is presented in a clear, concise, and effective manner (this supports keeping disclosure brief and to the point). This is reinforced by Code Standard 1 (treat clients fairly), which includes an obligation to communicate with clients in a timely, clear and effective manner. Jargon should be avoided and technical terms should be explained in plain English.
- Is given prominence if it is presented with other information. So disclosure can be made in other documents, for example a statement of advice, provided it is given prominence.
- If it is presented in writing, must be in a format, font, and type size that are easily readable.
- Is given in writing, if requested by the recipient (if the disclosure is not otherwise provided in writing).
- Is provided free of charge.

**Consider Purpose**

The purpose of disclosure at each stage (except Stage 4) is relevant and needs to be considered when deciding how, when, where and what to disclose. In particular, the Regulations don’t always provide all relevant details so, if you’re uncertain about what to do, adopt an approach that is consistent with the relevant purpose.

**Avoid providing false or misleading information**

FAPs and advisers must also ensure that required disclosures are not false or misleading, are not likely to mislead and do not omit any information required by the Regulations, where that would be materially adverse from the client’s perspective. Relevant additional considerations are:

- A statement about a future matter (including the doing, or not doing, of an act) is misleading if the person making the statement does not have reasonable grounds for making it.
- Even if the effect is not “materially adverse” (so there is no breach), false, misleading or omitted information may still constitute a breach under another part of the Regulations or under other law.

*What other considerations apply when disclosing information? (continued)*

**Consider Code Standard 2 (Act with Integrity)**

Code Standard 2 requires FAPs and financial advisers who give advice to act with integrity at all times. That applies not only to giving advice but also to “surrounding & supporting” practices, including when:

- describing themselves & their business
- publishing & sharing information with clients, prospective clients & the public.

Compliance with the Regulations will support compliance with Code Standard 2 but the integrity Code standard will apply to a wider range of interactions with clients and others.

**Record Keeping**

The Regulations do not require that particular records of disclosure be kept. Record keeping obligations are set out in other law including the standard conditions for FAP licences. It would be advisable to keep records of disclosure, being relevant documents or other evidence that the required information was provided (including logs that verify that documents/information were sent electronically to clients), in order to clearly demonstrate compliance with disclosure obligations.

### 3. INFORMATION TO BE DISCLOSED- GENERAL MATTERS

We set out below general matters relevant to disclosure at each of Stages 1, 2 and 3. In the next section we set out specific disclosure required at Stages 1 to 4.

Disclosure Stage		
Stage 1	Stage 2	Stage 3
At all times (internet site & on request) (FAP responsible)	When nature/scope of advice is known (Adviser responsible)	When advice is given (Adviser responsible)
<p>Required information must be disclosed at all times by the FAP if it maintains an Internet site or a site is maintained on its behalf.</p> <hr/> <p>The internet site must be easily accessible to the public at all reasonable times. The information (or a link to it) must either be:</p> <ul style="list-style-type: none"> <li>prominently displayed on the <u>home page</u>; or</li> <li>on an <u>appropriate section</u> of the site- the homepage must include a prominent link to that section.</li> </ul> <hr/> <p>The FAP must make the required information available in writing on request from a member of the public, whether or not the FAP has an internet site.</p>	<p>Disclosure is required when both (1) &amp; (2) apply:</p> <p>(1) The adviser knows (or should know) the nature &amp; scope of advice:</p> <ul style="list-style-type: none"> <li>the client is seeking; or</li> <li>the adviser is giving or intending to give.</li> </ul> <p>(2) There are reasonable grounds for concluding that the FAP or the adviser may give the advice.</p> <p>So disclosure obligations can apply even if a person is not actively seeking advice including if financial advice is included in an advertisement.</p> <p><b>Examples:</b> Disclosure required: Advertisement: “XYZ Loans is the best personal finance option if you need to buy a car”. But disclosure is not required if the advertisement says: “Call us today about obtaining a personal loan from XYZ Loans.” Client meeting: After an initial meeting with a potential client, during which the potential client indicated the type of advice they are seeking.</p> <hr/> <p>Disclosure is likely to be provided at the same time as complying with the adviser duty in section 431J to take reasonable steps to ensure the client</p>	<p>Stage 3 disclosure may be provided at the same time as complying with Code Standard 4 (ensure that the client understands the financial advice). So processes &amp; documents can be designed to achieve efficient compliance with both obligations.</p> <hr/> <p>Stage 3 disclosure is to be made at the time the advice is given but it can be earlier (if known). This permits Stage 3 disclosure to be made at the same time &amp; together with Stage 2 disclosure.</p> <hr/> <p>Disclosure can be provided immediately after providing advice, if not practicable at the time advice is given.</p> <hr/> <p>Where a formal statement of advice (or similar document) is provided at Stage 3 the disclosure could be made in that statement of advice, provided the disclosure is appropriately emphasised.</p> <hr/> <p>Stage 3 information does not have to be repeated if the Stage 3 information was previously disclosed to the client and has not materially changed</p>



Disclosure Stage		
Stage 1	Stage 2	Stage 3
At all times (internet site & on request) <i>(FAP responsible)</i>	When nature/scope of advice is known <i>(Adviser responsible)</i>	When advice is given <i>(Adviser responsible)</i>
	<p>understands the nature/scope of the advice (&amp; limitations).</p> <hr/> <p>Stage 2 &amp; Stage 3 disclosure can be made at the same time, if the relevant information is available. This may be possible in simpler advice scenarios. <b>Example:</b> When advice is provided over the phone by an employed adviser of a product provider in relation to a single product of that provider such as a car insurance policy.</p> <hr/> <p>It may be advisable for some FAPs providing advice services on more complex matters (for example advice in relation to personal risk insurance generally or investment planning) to have an agreement (including a scope of service) with a potential client at Stage 2 (since the FAP has obligations to the potential client, even though the potential client may not act on the advice). An option then is to provide relevant disclosure in the agreement. For example, disclosure of the nature &amp; scope of the advice could be included in the service description, with the disclosure required by the Regulations appropriately emphasised (to distinguish non-advice services, for example assisting clients with the product application process and with claims (for insurance)).</p> <hr/> <p>Stage 2 information does not have to be repeated if the Stage 2 information was previously disclosed</p>	<p>(taking into account all other information provided at Stage 2 &amp; Stage 3) but the client may request that the same information be given again.</p> <hr/> <p>The FAP can provide the information on the adviser's behalf.</p> <hr/>



<b>Disclosure Stage</b>		
<b>Stage 1</b>	<b>Stage 2</b>	<b>Stage 3</b>
<b>At all times (internet site &amp; on request) <i>(FAP responsible)</i></b>	<b>When nature/scope of advice is known <i>(Adviser responsible)</i></b>	<b>When advice is given <i>(Adviser responsible)</i></b>
	<p>to the client and has not materially changed (taking into account all other information provided at Stage 2), but the client may request that the same information be given again.</p> <hr/> <p>The FAP can provide the information on the adviser's behalf.</p>	

## 4. INFORMATION TO BE DISCLOSED- SPECIFIC DISCLOSURE

We set out below specific information that is required to be disclosed at each stage by reference to the type of information to be disclosed.

### KEY

 Areas where information disclosure is (or may be) required.

### STAGES 1, 2 & 3

Type of information to be disclosed	Disclosure Stage		
	Stage 1	Stage 2	Stage 3
	<b>At all times (internet site &amp; on request)</b> <i>(FAP responsible)</i>	<b>When nature/scope of advice is known</b> <i>(Adviser responsible)</i>	<b>When advice is given</b> <i>(Adviser responsible)</i>
<b>Licensing information</b>	<ul style="list-style-type: none"> <li>Statement to the effect (as applicable):               <ul style="list-style-type: none"> <li><i>Licensed FAP</i>: The FAP holds a licence issued by the FMA to provide financial advice services.</li> <li><i>Authorised Body FAP</i>: The FAP is authorised by a licence issued by the FMA to provide financial advice services &amp; the name of the licensee.</li> <li><i>Exempted FAP</i>: The FAP is exempt from the requirement to hold a licence.</li> </ul> </li> <li>A <i>brief</i> summary explaining each condition of the licence that limits or restricts the advice that may be given.</li> </ul>		
<b>Identity information</b>	The information must be clearly identified as having been provided by the FAP and must disclose: <ul style="list-style-type: none"> <li>The name of the FAP</li> <li>The address of the FAP.</li> </ul>	Financial adviser must disclose: <ul style="list-style-type: none"> <li>Adviser's name</li> <li>That he/she is a financial adviser</li> <li>The name of the FAP the adviser is giving advice on behalf of.</li> </ul>	

Type of information to be disclosed	Disclosure Stage		
	Stage 1 At all times (internet site & on request) (FAP responsible)	Stage 2 When nature/scope of advice is known (Adviser responsible)	Stage 3 When advice is given (Adviser responsible)
<b>Nature &amp; scope of advice (and limitations)</b>	<ul style="list-style-type: none"> <li>Types of financial advice products advised on.</li> <li>If advice is limited to products of particular product providers, a statement to that effect and:                             <ul style="list-style-type: none"> <li>the names of the providers; <u>or</u></li> <li>a description that allows the providers to be identified</li> </ul> <b>Example:</b> “Companies on the NZX50.”                         </li> <li><i>Brief</i> explanation of any material limitations or restrictions on the scope of <i>financial advice services</i> that can be given. “material” means information that would materially influence a client in deciding whether to seek or obtain advice from a FAP.</li> </ul>	The <b>same information as specified for Stage 1</b> except that any limitations and restrictions on the nature and scope to be disclosed at Stage 2 relate to the <i>financial advice</i> that can be given (not the <i>financial advice services</i> ).	If the information disclosed at Stage 2 has materially changed (taking into account all other information disclosed at Stage 2), provide an updated version of the information or an explanation of what has changed. <b>Example:</b> A change of a product provider(s) since disclosure at Stage 2.
<b>Commissions &amp; other incentives</b>	<p>If a commission, benefit or other incentive will or may be given in relation to the advice, a <i>brief</i> explanation of:</p> <ul style="list-style-type: none"> <li>When (or in what circumstances) it will/may be given.</li> <li>The steps that have been/will be taken to manage conflicts of interest.</li> </ul> <p><u>Note:</u> The explanation may describe commissions or other incentives that are of a similar kind as a class, and need not itemise each separate commission or incentive.</p>	<p>If a commission, benefit or other incentive will or may be given in relation to the advice, for <i>each</i> commission, benefit or incentive a <i>brief</i> explanation of:</p> <ul style="list-style-type: none"> <li>When (or in what circumstances) it will/may be given.</li> <li>Who will give it and to whom it will be given.</li> <li>The amount/value (or how that will be determined).</li> </ul> <p><b>Example:</b> “We receive commissions from the relevant insurance company if you take out insurance following our advice.</p>	<p>To the extent not already disclosed at Stage 2, disclose the information on commissions, benefits and other incentives required under Stage 2. The disclosure at Stage 3 is not subject to the obligation to be “brief”. That means the description may be more extensive. However, the overall obligation to be clear, concise &amp; effective applies so this will inform the extent of disclosure required.</p> <p>If the <u>actual</u> commission/incentive was not disclosed at Stage 2 (either an amount or by way of a formula), the actual</p>

Type of information to be disclosed	Disclosure Stage		
	Stage 1 At all times (internet site & on request) (FAP responsible)	Stage 2 When nature/scope of advice is known (Adviser responsible)	Stage 3 When advice is given (Adviser responsible)
		<p>The commissions are between 7% and 12% of the first year’s premiums of your policy- the amount depends on which insurance company and which insurance policy you choose.”</p> <ul style="list-style-type: none"> <li>The steps that have been or will be taken to manage conflicts of interest.</li> </ul> <p><b>Example:</b> “We follow an advice process that ensures our recommendations are made on the basis of your goals and circumstances.”</p>	<p>commission/incentive must be disclosed at Stage 3. That’s the case even if the actual amount is within a range disclosed at Stage 2.</p> <p><b>Example:</b> “We will receive a commission of 10% of the first year’s premium from XYZ Limited if you take out this policy.”</p>
<b>Conflicts of interest (other than commissions &amp; other incentives)</b>	<p>If conflicts of interest (other than a commission or incentive) exist or are likely to arise, a <i>brief</i> description of:</p> <ul style="list-style-type: none"> <li>the conflicts of interest</li> <li>steps that are/will be taken to manage each conflict.</li> </ul>	<p>If conflicts of interest (other than a commission or incentive) exist or are likely to arise, a <i>brief</i> description of:</p> <ul style="list-style-type: none"> <li>the conflicts of interest</li> <li>steps that are/will be taken to manage each conflict.</li> </ul>	<p>To the extent not already disclosed at Stage 2, disclose the information on conflicts of interest required under Stage 2. The disclosure at Stage 3 is not subject to the obligation to be “brief”. That means the description may be more extensive. However, the overall obligation to be clear, concise &amp; effective applies so this will inform the extent of disclosure required.</p>
<b>Fees charged by FAP to client</b>	<p>If clients will or may have to pay any fees, expenses or other amounts to the FAP (or another person connected with the giving of the advice), a <i>brief</i> explanation of when or in what circumstances those amounts will or may be payable.</p>	<p>If clients will or may have to pay any fees, expenses or other amounts to the adviser (or the FAP or another person connected with the giving of the advice):</p> <ul style="list-style-type: none"> <li><i>Brief</i> explanation of when (or in what circumstances) the amount is payable</li> <li>The amounts (if known) or a <i>brief</i> description of how the amount will be</li> </ul>	<p>To the extent not already disclosed at Stage 2, disclose the information on fees, expenses or other amounts payable required under Stage 2 (where available). The disclosure at Stage 3 is not subject to the obligation to be “brief”. That means the description may be more extensive, for example the payment terms. However, the overall obligation to be clear,</p>

Type of information to be disclosed	Disclosure Stage		
	Stage 1	Stage 2	Stage 3
	At all times (internet site & on request) (FAP responsible)	When nature/scope of advice is known (Adviser responsible)  determined and (if practicable) an estimate <ul style="list-style-type: none"> <li>A <i>brief</i> explanation of payment terms (if known).</li> </ul> <u>Note:</u> It is not necessary to disclose fees related to <i>acting on the advice</i> .	When advice is given (Adviser responsible)  concise & effective applies so this will inform the extent of disclosure required.  If the client will or may have to pay fees, expenses, or other amounts in relation to <i>acting on the advice</i> , a statement to that effect. <b>Examples:</b> “Further fees may be applicable if you follow this advice.” “[name of product provider] will also charge you fees if you follow this advice.”
Disciplinary history (“reliability events”)		Details of any relevant “reliability events” in relation to the FAP and the adviser. Reliability events are instances of some court, disciplinary committee and regulator actions (and prior bankruptcy of an adviser). Disclosure is not required in relation to some events where: <ul style="list-style-type: none"> <li>A reasonable client would not expect the information to (or to be likely to) materially influence the client in deciding whether to seek or obtain advice from a FAP or its advisers.</li> <li>Information on the action was not publicly available.</li> </ul>	

Type of information to be disclosed	Disclosure Stage		
	Stage 1 At all times (internet site & on request) (FAP responsible)	Stage 2 When nature/scope of advice is known (Adviser responsible)	Stage 3 When advice is given (Adviser responsible)
<b>Complaints process &amp; dispute resolution scheme</b>	<ul style="list-style-type: none"> <li>An explanation of how to make a complaint.</li> <li>An overview of the internal complaints process.</li> <li>Details of the FAP's dispute resolution scheme (<b>DRS</b>), including: <ul style="list-style-type: none"> <li>a statement to the effect that the DRS service is free and independent, and may help investigate or resolve matters if not resolved by internal complaints process</li> <li>name of the DRS</li> <li>DRS's contact details.</li> </ul> </li> </ul>		<ul style="list-style-type: none"> <li>An explanation of how to make a complaint.</li> <li>An overview of the internal complaints process.</li> <li>Details of the FAP's dispute resolution scheme (<b>DRS</b>), including: <ul style="list-style-type: none"> <li>a statement saying that the DRS service is free and independent, and may help investigate or resolve matters if not resolved by internal complaints process</li> <li>name of the DRS</li> <li>DRS's contact details.</li> </ul> </li> </ul> <p><b>OR</b></p> <ul style="list-style-type: none"> <li>If the information above is publicly available (e.g. disclosed at Stage 1 on the internet site of the FAP), a statement to the effect that the information is available on that internet site. But, if there have been material changes to the previous disclosure, provide an explanation of what has changed.</li> </ul>
<b>Duties information</b>	<p>A statement to the effect that the FAP (and any person giving advice on the FAP's behalf e.g. an adviser) is bound by duties to:</p> <ul style="list-style-type: none"> <li>meet the standards of competence, knowledge and skill set out in the Code</li> <li>give priority to the client's interests</li> <li>exercise care, diligence, and skill</li> </ul>		<p>A statement to the effect that the FAP (and any person giving advice on the FAP's behalf e.g. an adviser) is bound by the duties to:</p> <ul style="list-style-type: none"> <li>meet the standards of competence, knowledge and skill set out in the Code</li> <li>give priority to the client's interests</li> <li>exercise care, diligence, and skill</li> </ul>

Type of information to be disclosed	Disclosure Stage		
	Stage 1	Stage 2	Stage 3
	<p><b>At all times (internet site &amp; on request)</b> <i>(FAP responsible)</i></p> <ul style="list-style-type: none"> <li>meet the standards of ethical behaviour, conduct, and client care set out in the Code.</li> </ul> <p><u>Note:</u> References to the law do not need to be provided and the precise words of the law do not need to be used – disclosure should state the general effect of those duties.</p>	<p><b>When nature/scope of advice is known</b> <i>(Adviser responsible)</i></p>	<p><b>When advice is given</b> <i>(Adviser responsible)</i></p> <ul style="list-style-type: none"> <li>meet the standards of ethical behaviour, conduct, and client care set out in the Code.</li> </ul> <p><u>Note:</u> Proposed regulation updates will permit disclosure by reference to the Internet site disclosure required under Stage 1.</p>

#### STAGE 4 (COMPLAINTS)

*(FAP or adviser receiving the complaint responsible)*

The following information must be provided to the complainant, when a FAP or an adviser (or other person) receives a complaint:

- An overview of the FAP’s internal complaints process.
- Details of the FAP’s dispute resolution scheme (**DRS**), including:
  - A statement to the effect that the DRS service is free and independent, and may help investigate or resolve matters if not resolved by the internal complaints process.
  - Name of the DRS & the DRS’s contact details.

Note:

- A complainant can include a client as well as a person who may receive advice.
- A complaint is an expression of dissatisfaction relating to the FAP’s financial advice service (including with respect to advice given by an adviser) to which a response or a resolution is explicitly or implicitly expected (a complaint does not need to be made in writing to be valid).
- The information must be given within 2 working days after a complaint is received (or if that is not reasonably possible, as soon as possible after that time). However, if the complaint is resolved to the complainant’s satisfaction within those 2 working days then the information does not need to be given.





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