



Australian Government

Office of the Australian Information Commissioner

Direction as to certain procedures to be followed by
applicants in Information Commissioner reviews

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Part 1: About this direction

Application

- 1.1 This Direction applies to applications to the Information Commissioner (IC) for a review of a decision under the *Freedom of Information Act 1982* (Cth) (FOI Act).
- 1.2 This Direction has effect from 1 July 2024.
- 1.3 This Direction is arranged in Parts. The applications to which a Part applies, and the extent to which the Part applies to those applications, is stated at the commencement of the Part.
- 1.4 This Direction applies to the extent that it is not inconsistent with a provision of the FOI Act, another enactment or a specific direction made in a particular application to IC for a review of a decision under the FOI Act (IC review).¹
- 1.5 Further information relating to the IC review process is published on the Office of the Australian Information Commissioner's (OAIC) website. Specifically, [Part 10](#) (Review by the Australian Information Commissioner) of the Guidelines issued by the IC under s 93A of the FOI Act (FOI Guidelines) describes the principles that inform the IC's approach to reviews.
- 1.6 In addition to this direction, the OAIC service charter, available on our website, sets out the standard of service applicants can expect from the OAIC, explains how applicants can assist the OAIC and provides an opportunity for applicants to provide feedback.
- 1.7 This Direction is not a legislative instrument.²

Interpretation

- 1.8 In this Direction:

Application means an application to the Information Commissioner for a review of a decision under the FOI Act. An application can be made for review of an 'access refusal decision' or an 'access grant decision'.

IC review means Information Commissioner review.

Part 2: Matters applying to all applications

- 2.1 This Part applies to all IC review applications.

General principles

- 2.2 IC review procedures are found in Part VII of the FOI Act.
- 2.3 In relation to each IC review, the IC must:

- conduct the IC review with as little formality and technicality as is possible,

¹ Section 55(2)(e)(ii) of the FOI Act.

² Section 55(3) of the FOI Act.

- ensure that each party is given a reasonable opportunity to present their case, and
 - conduct the IC review in as timely a manner as possible.³
- 2.4 The IC review procedure is designed to be an informal, cost-effective, timely, responsive and proportionate procedure for conducting external merits review of decisions by agencies and ministers.⁴
- 2.5 The IC may conduct a review as they consider appropriate.⁵ In general, IC reviews will be conducted on the papers unless there are unusual circumstances to warrant a hearing.⁶ The IC may:
- make a direction in a particular IC review that may depart from the processes and timeframes set out in this Direction
 - expedite and finalise an application or cohorts of applications, ahead of existing applications on hand.⁷
- 2.6 In an IC review of an access refusal decision, the agency or Minister bears the onus of establishing that the decision is justified or that the Information Commissioner should give a decision adverse to the IC review applicant (s 55D(1)). In an IC review of an access grant decision, the IC review applicant bears the onus of establishing that a decision refusing the request is justified or that the IC should give a decision adverse to the person who made the request (s 55D(2)).

Making an application for IC review

- 2.7 An application for IC review must be made in writing and should be made online using the Information Commissioner Review Application form available on the OAIC website. A copy of the notice of the decision must be included in the application. The online form is located at: https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICR_10.⁸
- 2.8 There are requirements for the contents and delivery of an application for IC review. These requirements are explained below. The requirements include giving the IC contact details to which notices can be sent and providing a copy of the FOI decision the applicant wants the Information Commissioner to review.⁹ An application that does not comply with these requirements may be considered to be invalid.

Contact details and assistance

- 2.9 An IC review application must, at a minimum, include the following contact details:
- a. the applicant's name or, where the applicant is an organisation or company, the name of contact person for the IC review and the name of the organisation or company
 - b. a contact telephone number

³ Section 55(4) of the FOI Act.

⁴ See *FOI Guidelines* at [10.15] and [10.25].

⁵ Section 55 of the FOI Act.

⁶ See *FOI Guidelines* at [10.20] and [10.63].

⁷ See Part 4 of the Direction as to certain procedures to be followed by agencies and ministers in IC reviews.

⁸ Further information on how to make an IC review application is available at <https://www.oaic.gov.au/freedom-of-information/your-freedom-of-information-rights/freedom-of-information-reviews/information-commissioner-review>.

⁹ Section 54N of the FOI Act.

- c. an email address that will be used to receive correspondence in connection with the IC review (a postal address may be provided if no email address is available).
- 2.10 The IC will contact applicants using their preferred contact method nominated in the application for IC review. Where an applicant has listed a preferred contact method as well as other contact information, the IC will consider any notices as received when sent to an applicant's preferred contact.
- 2.11 An application for IC review must also include the following information (if relevant):
 - a. The name and contact details of any person the applicant would like to represent them, as well as evidence that the person has authority to act on the applicant's behalf, where appropriate.
 - b. If the applicant requires an interpreter, the language or dialect required.
 - c. If the applicant requires any other assistance, the type of assistance required. This is because the IC must provide 'appropriate assistance' to a person who wishes to apply for IC review and requires assistance to prepare the IC review application.¹⁰
 - d. If the applicant has contacted the OAIC previously about the current application or another matter, the reference number previously provided by the OAIC to the applicant.
- 2.12 An application for IC review may be made by, or on behalf of, the person who made the FOI request to which an access refusal decision relates (s 54L(3)). In relation to access grant decisions, third parties who were consulted under s 26(2), and third parties who were invited to make submissions in support of exemption contentions under ss 27 and 27A and did so, can also apply for an IC review of that access grant decision (s 54M(3)(a)). The IC may require information about the applicant's identity to establish that they are the person who made the original FOI request or evidence that a third party is authorised to seek review of the decision by that person.
- 2.13 An applicant or nominated representative must advise the OAIC if there are any changes to their contact details as soon as it is possible to do so. The IC may decide not to undertake a review, or not continue to undertake a review, if the applicant or their nominated representative cannot be contacted after making reasonable attempts (s 54W(a)(iii)).

The notice of decision and details about the review request

- 2.14 An application for IC review must be accompanied by a copy of the agency's or Minister's decision (called a s 26 notice) for which review is sought or, if no decision has been made (for example, when the agency or Minister is taken to have refused the FOI request because they have not made a decision within the statutory time period), a copy of the FOI request.
- 2.15 The applicant must provide the IC with information about the FOI decision, in particular:
 - a. Whether the decision about which IC review is sought is an original decision or an internal review decision.
 - If an applicant has the choice between applying for internal review or IC review, the Information Commissioner is of the view that it is usually better to seek internal review first as this is generally quicker and allows the agency to take a fresh look at its original decision. The circumstances in which applicants must apply directly for IC review are where the original decision was made by the Minister or personally by the principal officer of an agency, or where they are seeking review of a deemed access refusal.

¹⁰ Section 54N(3) of the FOI Act.

- If an applicant has applied for internal review, they should wait for the agency to make a decision before applying for IC review.
- b. The date of the FOI decision.
- In most cases, an application for IC review must be made within 60 days of the applicant being notified of the agency's or Minister's decision to refuse access to some or all of the documents requested, or within 30 days of a decision granting access to documents to another person.¹¹
 - If an application for IC review is not made within the timeframes in the FOI Act, applicants may apply to the IC under s 54T of the FOI Act for an extension of time to apply for IC review. Where an extension of time is sought, the applicant must provide reasons which explain why it would be reasonable in all the circumstances to extend the time to apply for IC review. In considering what is reasonable in all the circumstances, the IC may take the following factors into account:
 - i. the length of the delay in applying for IC review
 - ii. the reason for the delay
 - iii. any action taken by the applicant regarding the decision after the agency or minister made their decision
 - iv. any prejudice to the agency or the minister and the general public due to the delay and
 - v. the merits of the substantive IC review application.

2.16 An application for IC review should also:

- a. identify the parts of the decision the applicant wants the Information Commissioner to review
- b. state why the applicant disagrees with the agency's or minister's decision
- c. identify which documents the applicant considers have been wrongly refused or which exemptions have been incorrectly applied
- d. if the FOI request has been refused on the ground that it would substantially or unreasonably divert an agency's resources or interfere with the performance of a minister's functions (ss 24 and 24AA) – specify the reasons why the applicant believes the FOI request would not have this impact.

During the IC review

Engagement between parties at the commencement of an IC review

2.17 The IC requires agencies and ministers to engage with the IC review applicant to resolve or narrow the issues in dispute in the IC review.

Method of engagement

2.18 Engagement with agencies of Ministers may comprise a telephone or video conference. The agency or minister will be responsible for contacting the applicant and making the necessary arrangements for

¹¹ Section 14A of the *Electronic Transactions Act 1999* provides that an email or similar electronic communication is received at the time it is capable of being retrieved by the addressee. This is assumed to be the time it reaches the addressee's nominated electronic address (this day could be a weekend or public holiday). This rule may be varied by a voluntary and informed agreement between the sender (the applicant) and the addressee (the agency or minister).

the engagement process. The OAIC will not be involved in making such arrangements or in attending the telephone or video conference.

- 2.19 Applicants may express a preference to engage with the agency or minister by means other than telephone or video conference. In these cases, the engagement process may be undertaken by other means, to attempt to resolve the issue between the parties or narrow the issues in dispute.

Demonstration of engagement or attempts to engage and the consequences of a failure to engage

- 2.20 Agencies and ministers are required to provide the IC with information to demonstrate the action(s) they have taken to engage with the applicant to resolve or narrow the issues in dispute in the IC review, which may include:

- that the agency or minister has taken genuine and reasonable steps to contact the IC review applicant, including any written correspondence issued to the applicant and any file notes of telephone calls made to the applicant
- that the applicant has expressed a preference for the engagement to be undertaken other than by video or telephone conference (where applicable)
- communications and any correspondence with the IC review applicant that demonstrates the attempts made by the parties to resolve the issues in dispute, including any proposals made by the agency or minister to resolve the IC review informally, and any response from the applicant
- the outcome of the engagement between the agency or minister and the IC review applicant, including if the applicant has notified the agency or minister in writing that their IC review application is withdrawn as a result of the agency or minister's contact with the applicant.

- 2.21 Failure by an applicant to participate in the engagement process without reasonable excuse may in some cases result in the Information Commissioner not continuing to undertake the IC review on the ground that the IC review applicant has failed to cooperate in progressing the IC review application or IC review without reasonable excuse (see s 54W(a)(ii)).

Responding to requests for information from the OAIC

- 2.22 Applicants must respond to requests for information from the OAIC within the time provided unless there are exceptional circumstances warranting a longer period to respond. If more time is needed, a request for an extension of time must be made to the OAIC at the earliest opportunity within the period provided for response, and no later than 2 days before that period is due to expire. Requests for more time must explain the exceptional circumstances that necessitate additional time and propose a new date for response. Approval of an extension request is at the discretion of the OAIC.

- 2.23 The OAIC expects that applicants and agencies will engage with the IC review process, with respect and courtesy.¹²

Receiving revised decisions under s 55G

- 2.24 An agency or minister may make a 'revised decision' under s 55G of the FOI Act during an IC review, including when:

- the agency or minister did not make a decision within the processing timeframe

¹² [OAIC service charter](#).

- the agency or minister did make a decision within the timeframe but no longer maintains that request should be refused under particular exemptions under the FOI Act.
- 2.25 A revised decision does not automatically conclude the IC review, and the revised decision becomes the decision under review (s 55G(2)(b)). The OAIC will generally consult the IC review applicant as to whether they want to continue the IC review on the basis of the revised decision. Applicants who are not satisfied with the revised decision must explain why they disagree with the revised decision and the basis on which they wish to proceed with the IC review. If the applicant does not respond to the OAIC's correspondence, the Information Commissioner may decide not to continue to undertake the IC review (s 54W of the FOI Act).

Submissions

- 2.26 During an IC review, applicants will be given a reasonable opportunity to present their case. This generally includes having the opportunity to comment on relevant, adverse information provided to the OAIC by other parties.

Providing submissions to the agency/minister

- 2.27 In seeking submissions from agencies and ministers in support of the IC reviewable decision, the IC will require the agency or minister to send their submissions to the applicant at the same time as they are sent to the IC. The applicant will then have the opportunity to make submissions in response. The applicant will be required to send their submissions to the agency or minister at the same time as they are sent to the IC, within 10 business days of receiving the agency or minister's submissions.
- 2.28 IC review applicants should be aware that if they do not make submissions when an opportunity to do so has been provided, the review may proceed to a final decision without any further opportunity to make submissions.
- 2.29 The IC review application and any attachments will be shared with parties to the review where appropriate. Any other information and submissions provided to the OAIC by the applicant will be made available to the other parties to the IC review.

Request to make submissions in confidence

- 2.30 Applicants can apply to the OAIC to make a submission in confidence. The applicant must give reasons why they want to make a confidential submission and the OAIC will consider those reasons and decide whether to accept the submission on a confidential basis. If the OAIC agrees to treat a submission confidentially, the applicant may be required to provide a second version of the submission which can be shared.

Decisions made under s 55K of the FOI Act

- 2.31 The Information Commissioner must give written reasons for the decision to all the parties to the IC review (ss 55K(1) and (6)) and must publish the decision in a manner that makes it publicly available (s 55K(8)). This means that when the Information Commissioner makes a decision under s 55K of the FOI Act, the outcome of the IC review will be published online.
- 2.32 Where the IC makes a decision on IC review pursuant to s 55K of the FOI Act, the IC will quote or summarise an agency's or minister's non-confidential submissions in the published decision.
- 2.33 To protect against the unreasonable disclosure of personal information, the IC will consider whether identifying information should be included in published decisions. Natural persons will not be named in the decision, unless they specifically request to be named by providing notice in writing during the

IC review. Other applicants, such as organisations or companies, must provide reasons for wishing not to be named, which will be considered on a case-by-case basis.

Part 3: Non-compliance with this direction

- 3.1 This Part applies to all IC review applications.
- 3.2 If an applicant fails to comply with this direction, the Information Commissioner may in some cases decide not to undertake an IC review or make a decision at their discretion, not to continue with the review.¹³ This means that, in these cases, the review will be finalised.
- 3.3 Applicants will be provided with the opportunity to explain why the Information Commissioner should not finalise the IC review.

Elizabeth Tydd
Freedom of Information Commissioner

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¹³ Section 54W(c) of the FOI Act.