

Part 10 —

Review by the Information Commissioner

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Overview

- 10.1 Part 10 of the FOI Guidelines sets out general principles and procedures for Information Commissioner review (IC review), as contained in Part VII of the FOI Act. Part 10 also provides guidance to agencies and ministers (the respondent) in relation to the practice of the Information Commissioner (IC) with respect to the steps in an IC review, the IC's decision, and relevant appeal rights.¹
- 10.2 Part 10 of the FOI Guidelines should be read in conjunction with the *Direction as to certain procedures to be followed by agencies and ministers in IC reviews* and the *Direction as to certain procedures to be followed by applicants in IC reviews*.²

What decisions can the Information Commissioner review?

- 10.3 A person³ who disagrees with an agency's or minister's decision following an FOI request for access to a document, or an application for amendment or annotation of personal records, may apply to the IC for review under Part VII. It is not necessary to apply for internal review before applying for IC review, however the IC considers it is usually better for a person to seek internal review of an agency decision before applying for an IC review.⁴ Internal review by an agency gives the agency an opportunity to reconsider the initial decision, usually at a more senior level, and the result may well provide a more robust decision or facilitate the release of information. These outcomes will generally be more timely and use agency resources more efficiently than an IC review. Internal review is not available if the decision was made by a minister or personally by the principal officer of an agency.⁵
- 10.4 The IC can review the following decisions by an agency or minister:
- an 'access refusal decision' (s 54L(2)(a), discussed below at [10.8])
 - an 'access grant decision' (s 54M(2)(a), discussed below at [10.9])
 - a refusal to extend the period for applying for internal review under s 54B (s 54L(2)(c))
 - an agency internal review decision made under s 54C (ss 54L(2)(b) and 54M(2)(b)).

¹ The Office of the Information Commissioner has issued a Freedom of Information Regulatory Action Policy which provides guidance on the Australian Information Commissioner's approach to the exercise of FOI regulatory powers, including in undertaking IC reviews, investigating FOI complaints and initiating investigations. The Regulatory Action Policy is available on the OAIC website - [Freedom of information regulatory action policy | OAIC](#).

² Both documents are available on the OAIC website www.oaic.gov.au.

³ A reference to 'person' includes a body politic or corporate as well as an individual (see s 2C of the *Acts Interpretation Act 1901* (Cth)).

⁴ If the FOI decision has been made personally by the principal officer of an agency, or the responsible Minister, there is no right to internal review; the person must apply for IC review if they disagree with the decision (see s 54A).

⁵ For detailed information about internal review see Part 9 of these Guidelines. See also Part 2 of the Guidelines which explains that a person who is authorised by the minister to make FOI decisions does so on behalf of the minister, not in their own right as an authorised person.

Deemed decisions

- 10.5 The IC may also review decisions that are deemed to have been made by an agency or minister where the statutory timeframe has not been met. This may happen:
- at first instance (following a request for access to documents (s 15AC) or for amendment to a personal record (s 51DA)) or
 - following an application for internal review (where the original decision is taken to have been affirmed under s 54D).
- 10.6 An application for IC review may be made for a deemed access refusal decision. In these circumstances the IC may allow the respondent further time to make an actual decision. If the respondent makes a new decision that decision is substituted for the deemed access refusal decision for the purposes of the IC review (s 54Y(2)).
- 10.7 If a respondent varies their original decision that new decision becomes the subject of the IC review.

Access refusal decisions

- 10.8 An ‘access refusal decision’ encompasses more than a refusal to grant access to a document. ‘Access refusal decision’ is defined in s 53A to mean:
- a) a decision refusing to give access to a document in accordance with a request
 - b) a decision giving access to a document, but not giving access to all documents to which the request relates
 - c) a decision purporting to give access to all documents to which a request relates, but not actually giving that access
 - d) a decision to defer access to a document for a specified period under s 21 (see Part 3 of these Guidelines) (other than a document covered by s 21(1)(d), that is, where Parliament should be informed)
 - e) a decision under s 29 relating to the imposition of a charge or the amount of a charge (see Part 4 of these Guidelines)
 - f) a decision to give access to a document to a ‘qualified person’ under s 47F(5) (when disclosing the information to the FOI applicant might be detrimental to the FOI applicant’s physical or mental health or well-being — see Part 6 of these Guidelines)
 - g) a decision refusing to amend a record of personal information in accordance with an application under s 48 (see Part 7 of these Guidelines)
 - h) a decision refusing to annotate a record of personal information in accordance with an application under s 48 (see Part 7 of these Guidelines).

Access grant decisions

- 10.9 An ‘access grant decision’ is defined in s 53B to mean a decision to grant access to a document where there is a requirement to consult with a third party under ss 26A, 27 or 27A. The agency or minister will have decided that the document:
- is not exempt under s 47 (trade secrets or commercially valuable information)

- is not conditionally exempt under s 47B (Commonwealth-State relations), s 47G (business documents) or s 47F (personal privacy) or
- is conditionally exempt under ss 47B, 47G or 47F, but access would not be contrary to the public interest (see Part 6 of these Guidelines).

10.10 A decision that an applicant's FOI request falls outside the FOI Act. For example, a decision that a document is not an 'official document of a minister'⁶ or a decision that a document is open to public access as part of a public register where access is subject to a fee⁷ may be reviewed by the Information Commissioner.

Who can seek IC review?

10.11 Different applicants can apply for review of different decisions. In summary:

- where the respondent's decision is an access refusal decision (including a decision about charges and a refusal to amend or annotate a record of personal information) — the person who made the FOI request (that is, the FOI applicant) (s 54L(3))
- where the decision is to grant access — a third party consulted under s 26A(2) (s 54M(3)(a))
- where the decision is to grant access — a third party invited to make a submission in support of an exemption contention under ss 27 or 27A and who did so (s 54M(3)(a))
- where the decision is made after internal review of the original access refusal decision — the person who applied for internal review (that is, the original FOI applicant) (s 54L(3))
- where the agency's decision on internal review is an access refusal decision — the person who made the FOI request (that is, the FOI applicant) (s 54L(2)(b))
- where the agency's decision on internal review is an access grant decision — a third party invited to make a submission in support of an exemption contention and did so (s 54M(3)(b))
- where the decision is to refuse to allow a further period to apply for internal review of an access refusal decision (under s 54B) — the person who was seeking internal review (that is, the original FOI applicant).

10.12 Another person may apply on behalf of the person who made the FOI request or the affected third party (ss 54L(3) and 54M(3)). The IC must be satisfied that the other person has authority to act on behalf of the FOI applicant or third party.

10.13 For instance, in circumstances where the representative is not a legal practitioner the IC may ask for written authority, signed by the FOI applicant, that indicates that the representative will be acting for the FOI applicant for the purposes of the IC review.

10.14 In some circumstances other legislative requirements may apply in relation to whether the information can be disclosed to the representative (for instance, see subdivision 355-B of Schedule 1 to the *Taxation Administration Act 1953*).

⁶ For example, see *Philip Morris Ltd and Treasurer* [2013] AICmr 88.

⁷ For example, *Mentink and Australian Federal Police* [2014] AICmr 64.

Onus

- 10.15 The respondent has the onus of establishing that the decision is justified or that the IC should give a decision adverse to the IC review applicant in an IC review (s 15) or an application to amend personal records (s 48).⁸ The respondent must also bear in mind their obligation to use their best endeavours to assist the IC to make the correct or preferable decision (s 55DA).⁹
- 10.16 Section 55D(1) does not operate to automatically require or support a decision against a respondent and in favour of an IC review applicant if a respondent does not engage fully with the IC review or does not provide further evidence to support the IC reviewable decision. However as noted by the FOI Commissioner in *South East Forest Rescue and Department of Climate Change, Energy, the Environment and Water*, deficiencies in engagement with the IC review process can adversely impact respondents. For example, a failure to provide submissions may lead to a decision adverse to the agency.¹⁰ In such circumstances the IC will make a decision on the merits having regard to the evidence before them and applying all applicable administrative law principles. However, in the absence of sufficient evidence being provided by a respondent, and absent any other material provided by or relevant to a third party, maintaining the respondent's contentions in a decision on IC review may in some cases be significantly less likely than would otherwise be the case.¹¹
- 10.17 In an IC review of an access grant decision, the affected third party (the IC review applicant) has the onus of establishing that a decision refusing the FOI request is justified or that the IC should give a decision adverse to the person who made the FOI request (s 55D(2)).

Principles of IC review

- 10.18 IC review of decisions about access to government documents (and amendment of personal records) is designed around several key principles. The IC review is:
- a merit review process where the IC makes the correct or preferable decision at the time of the decision
 - intended to be as informal and cost effective as possible
 - intended to be timely and responsive and
 - intended to be proportionate.

Merit review

- 10.19 In the IC review the IC determines the correct or preferable decision in all the circumstances. The IC can access all relevant material, including material the respondent claims is exempt. The IC can also consider additional material or submissions not

⁸ Section 55D(1) of the FOI Act

⁹ This requirement is consistent with the general obligation of agencies to act as a model litigant. The nature of this obligation is explained in Appendix B to the *Legal Services Directions 2017*.

¹⁰ *South East Forest Rescue and Department of Climate Change, Energy, the Environment and Water (Freedom of information)* [2024] AICmr 90 [37].

¹¹ *Christis Tombazos and Australian Research Council (Freedom of information)* [2023] AICmr 14 [5]. See also *Paul Farrell and Department of Home Affairs (No. 5) (Freedom of information)* [2023] AICmr 99 [13].

considered by the original decision maker, including relevant new material that has come to light since the original FOI decision was made. For example, for the purpose of deciding whether a document is conditionally exempt, the IC can take account of contemporary developments that shed light on whether disclosure would be contrary to the public interest. However, the IC cannot determine the exempt status of documents that have become documents of an agency or minister after the date of the applicant's FOI request.¹²

- 10.20 If the IC decides that the original decision was not correct at law or not the preferable decision, the decision can be varied or set aside and a new decision substituted. For example, the IC may decide that a document is not an exempt document under the FOI Act or that a charge was not correctly applied.

Informal

- 10.21 IC reviews are intended to be a simple, cost-effective method of external merit review. This is consistent with the objects of the FOI Act, which provide that functions and powers under the FOI Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost (s 3(4)).
- 10.22 Consistent with the object of promoting public access to information, the IC will provide appropriate assistance to IC review applicants to make their applications (s 54N(3)), which includes, for example, explaining what information they must provide with their IC review application and confirming the aspects of the decision they disagree with.
- 10.23 Consistent with the object of providing prompt and cost-effective access to information, most reviews will be conducted on the papers rather than through formal hearings and the IC expects that general information will be shared between the parties. Although the IC has formal information gathering powers (see Division 8 of Part VII), documents may be requested informally from agencies. The IC's formal powers may be used to compel respondents who do not respond to informal requests by the OAIC.¹³ This practice reflects the escalation of regulatory powers by resorting to the use of coercive powers when informal interventions are unsuccessful in eliciting a response from the respondent.

Cost-effective

- 10.24 To reduce formality and costs all parties are encouraged to minimise their use of legal representation in IC reviews. The IC expects to receive responses from the respondent rather than a legal representative, even where the respondent chooses to seek legal advice on particular issues.
- 10.25 The IC also encourages parties to reach agreement as to the terms of a decision on an IC review. The IC may then make a decision in accordance with those terms without completing the IC review (s 55F) (further information about agreements made under s 55F can be found at [10.117] – [10.121]).

Timely and responsive

- 10.26 IC review is intended to be efficient and lead to resolution as quickly as possible. Respondents must use their best endeavours to assist the IC to make the correct or preferable IC review decision (s 55DA). This duty is consistent with the obligation on the

¹² *Lobo and Department of Immigration and Citizenship* [2010] AATA 583.

¹³ See Australian Information Commissioner, *Direction as to certain procedures to be followed by agencies and ministers in IC reviews* [3.16] (available on the OAIC website www.oaic.gov.au).

Commonwealth and its agencies to act as model litigants — that is, with complete propriety, fairly, and in accordance with the highest professional standards as a party to proceedings, including tribunal proceedings.

10.27 To maintain efficiency, the OAIC relies on:

- respondents making genuine attempts to resolve the IC review application with applicants: The respondent may make a revised decision under s 55G (see [10.75] – [10.83] below), or the parties may agree as to the terms of a decision on an IC review. The IC may then make a decision in accordance with those terms without completing the IC review (s 55F).
- the use of directions and information gathering powers to take timely and necessary action
- timely responses to requests for the documents at issue and submissions from the parties, and
- preliminary views, which may be provided by an IC review officer, to the parties after review of the documents at issue and submissions, where appropriate.

Proportionate

10.28 In conducting an IC review, the IC will use their powers proportionately, consistent with the expectations to provide a timely and responsive IC review process.

10.29 The IC may decide to expedite an IC review application in response to a request from the IC review applicant, or for other reasons. When considering whether to expedite an IC review application, the IC may have regard to any of the following factors:

- whether expedition will best facilitate and promote prompt public access to information. For example, this factor may be relevant where the IC review application may delay the FOI applicant from accessing documents found not to be exempt. This may be relevant where an affected third party applies for IC review of an access grant decision (under s 54M) and the FOI applicant's access to the documents in dispute is delayed because of the IC review application.
- whether expedition will best facilitate public access to information at the lowest reasonable cost. For example, it is relevant to consider whether:
 - an IC review decision will address a novel issue
 - an IC review decision will resolve issues raised in a number of other related IC review applications which may result in the resolution of the other IC review applications at the lowest reasonable cost and
 - whether it is administratively more efficient and timely to consider related IC review applications or IC review applications that raise similar issues together
 - whether the decision will provide broader guidance to an agency or agencies
- the objects of the FOI Act
- any other factors the Information Commissioner considers relevant in the circumstances.

10.30 If the IC review is expedited, this may be reflected by changes to the IC review process. For example, it may be appropriate for the IC to provide the parties with shorter timeframes for responses and require the provision of submissions that can be shared with the other party

to eliminate delays incurred when parties initially seek to only provide submissions on a confidential basis.

Procedures in an IC review

Parties to an IC review

10.31 The parties to an IC review (as specified in s 55A) are:

- a) the IC review applicant (see [10.11] above)
- b) the principal officer of the agency, or the minister, to whom the FOI access request was made
- c) an affected third party required to be notified of an IC review application under s 54P (discussed below at [10.51] – [10.52])
- d) a person who is joined by the IC to the IC review proceedings as a person whose interests are affected (discussed below at [10.54] – [10.57]).

10.32 Where a minister is the respondent to an IC review and there is a change of minister during the IC review, the new minister is the respondent. The obligation to respond to the IC review does not automatically cease when the individual who holds a ministerial office changes. The IC review will continue, with the relevant minister remaining the respondent, despite a different individual holding that office. The new minister, in responding to the IC review application, needs to make factual enquiries as to whether the document at issue is in their possession. The status of the document as an ‘official document of a minister’ is to be decided by the facts and circumstances that existed at the time the FOI request was received.¹⁴ However, further judicial examination of this issue is anticipated.

Application for IC review

Making an application

10.33 An application for IC review must be in writing (s 54N), which includes email. The application must:

- give details of how notices may be sent to the IC review applicant (for example, by providing an email address)
- include a copy of the notice of the decision given by the respondent under s 26.

10.34 Including a copy of the s 26 notice enables the IC to readily identify the respondent and the matters in dispute.

10.35 The IC review application may also contain particulars of the basis on which the IC review applicant disputes the reviewable decision (s 54N(2)). It will assist prompt handling of the IC review if the IC review applicant sets out the following matters in the application:

- any grounds on which the IC review applicant disputes the reasons given for a decision that a document is exempt or conditionally exempt

¹⁴ *Patrick v Attorney-General (Cth)* [2024] FCA 268 [99].

- any grounds on which the IC review applicant considers that the public interest in giving access outweighs the reasons given for not granting access
- if an FOI request has been refused on the ground that processing the request will substantially and unreasonably divert the respondent's resources from their operations or the performance of a minister's functions (ss 24 and 24AA) — reasons why the IC review applicant believes the FOI request will not have that impact.

10.36 The OAI must provide 'appropriate assistance' when an IC review applicant needs help to make or prepare their IC review application (s 54N(3)). This may arise, for example, where the IC review applicant has language or literacy difficulties or other factors that affect their capacity to prepare an application.

Access grant decision

10.37 An IC review applicant who is a third-party seeking IC review of an access grant decision should provide a copy of the access grant decision with their IC review application (s 54N(1)(b)).

10.38 The IC review application may also contain particulars of the basis on which the applicant disputes the reviewable decision (s 54N(2)). It will assist prompt handling of the IC review if the affected third party applicant sets out the following matters:

- any grounds on which they dispute the reasons given for a decision that a document is not exempt under s 47 or conditionally exempt under ss 47B, 47F or 47G and
- any grounds on which they consider that it would be contrary to the public interest to give access to the document.

Deemed decisions

10.39 An agency or minister is deemed to have refused access to documents requested under s 15 of the FOI Act and given notice of that refusal if a decision is not made within the statutory timeframe (s 15AC(3)). An agency or minister is deemed to have refused to amend or annotate a record of personal information and given notice of that refusal if a decision is not made within the statutory timeframe (s 51DA(2)). An agency or minister is deemed to have affirmed an original decision and given notice of that decision if a decision is not made on internal review within the statutory timeframe (s 54D).

10.40 A person will not receive a copy of the decision when notice is deemed to have been given. As a result, the IC review application should include details of the agency or minister to which the FOI request was made and state whether the deemed decision relates to the initial FOI request, an amendment application, or to internal review. If the decision under IC review is a deemed decision on internal review, the IC review applicant should provide the OAI with the s 26 statement of reasons for the initial decision.

10.41 If, after a person applies for IC review of a deemed decision, the IC allows the respondent further time to make an actual decision and the respondent does so within the extra time allowed, the actual decision made is substituted for the deemed decision for the purpose of the IC review (s 54Y(2)). At any time during an IC review a respondent may substitute a deemed or an actual access refusal decision with a decision that is in the applicant's favour (see s 55G and [10.75] – [10.83]).

Withdrawing an application

- 10.42 An IC review applicant may withdraw, in writing, their application for IC review at any time before the IC makes a decision (s 54R(1)). A withdrawn application is taken never to have been made (s 54R(2)). If an IC review application is withdrawn, the IC will notify the respondent.

Time for applying

- 10.43 An application for IC review must be made within 60 days of notice being given of an access refusal decision (s 54S(1)) or 30 days of notice being given of an access grant decision (s 54S(2)).
- 10.44 An FOI applicant must apply for IC review of an access refusal decision within 60 days after the day notice of the decision was given under s 26 (s 54S(1)). This time limit also applies to deemed refusals, as notice is deemed to have been given under s 26 of the FOI Act on the last day of the initial decision period (s 15AC(3) and Part 3 of these Guidelines). Where the FOI applicant sought internal review and the agency did not make a decision within 30 days and no extension was granted, the original decision to refuse access is taken to have been affirmed on the last day of the decision period, which is 30 days after the date that the FOI request was made (s 54D and Part 9 of these Guidelines).
- 10.45 An affected third party must apply for IC review of an access grant decision within 30 days after the day they were given notice under ss 26A(3), 27(6) or 27A(5). As an alternative to IC review, an affected third party may apply for internal review. As noted at [10.3] the IC is of the view that it is usually better for a person to seek internal review of an agency decision before applying for IC review. If the affected third party does not apply for IC review within 30 days of being given notice of the access grant decision, the agency or minister may provide access to the document, unless the IC grants an extension of time to the affected third party (ss 26A(4), 27(7) and 27A(6)). The IC will notify a respondent if an affected third party has applied for an extension of time. The IC will provide a further notice after making a decision on the application to extend the time to apply for IC review under s 54T. To minimise the possibility of dispute about the propriety or timing of a decision to release documents when a third party objects, agencies and ministers should contact the OAIC after the appeal period has expired to confirm whether an IC review application has been received and separately confirm with the third party whether they have applied for IC review.

Extension of time for applying

- 10.46 An FOI applicant or an affected third party may ask the IC for an extension of time to apply for IC review (s 54T(1)). The IC may extend the time if satisfied that it is reasonable in all the circumstances to do so, even if the time to apply for IC review has ended (ss 54T(2) and (3)). The IC review applicant should set out the reasons for the delay as part of their application. As a practical matter, an affected third party will not be able to apply for an extension of time if the respondent has already given the FOI applicant access to the documents after the time for applying for internal review or IC review has expired (see [10.45] above).
- 10.47 There may be a delay between an FOI applicant receiving notice of a decision to grant access to documents and when they receive those documents. The FOI applicant has the option of applying for internal review within 15 days of receiving access to the documents they requested (s 54B(1)(b)(ii)) — for more information see Part 9 of these Guidelines.

- 10.48 When an IC review application is made outside of the 60-day timeframe in s 54S (for an access refusal decision) due to a deemed access refusal, the IC may consider the lodgement of the IC review application to be an application under s 54T for an extension of time to make an IC review application.
- 10.49 Before granting an extension of time, the IC may require the IC review applicant to give notice of the application to any person the IC considers is affected (s 54T(4)). For example, the IC may require the IC review applicant to notify the respondent or an affected third party. The respondent or the affected third party may notify the IC in writing that they oppose the application, and must do so within the time the IC specifies (s 54T(5)). Unless there are special reasons to do otherwise, the IC will allow 14 days for a response.
- 10.50 The IC must give the IC review applicant and any person opposing the extension a reasonable opportunity to present their case before determining the application for an extension (s 54T(6)).

Respondent must notify third parties

- 10.51 The respondent must notify an affected third party when an FOI applicant has applied for IC review of a decision to refuse access to a document to which a consultation requirement applies (s 54P). This obligation applies whether the affected third party made a submission, or was invited to make a submission but did not do so, under s 26A (documents affecting Commonwealth-State relations), s 27 (business documents) or s 27A (personal privacy) (s 54P(1) — see Part 6 of these Guidelines). The affected third party has a right to be a party in the IC review. In this context, the affected third party will seek to support the respondent's decision that access should be refused to a document that affects them.
- 10.52 The respondent must, as soon as practicable, take all reasonable steps to notify the affected third party (s 54P(2)). The respondent must also give a copy of the notice to the IC as soon as practicable (s 54P(3)). The s 54P notice is generally requested by the IC review officer.¹⁵
- 10.53 Section 54Q provides that the IC may, on the respondent's application, order that this notice requirement does not apply to a document to which a consultation requirement applies under s 27 (business documents) or s 27A (documents affecting personal privacy). This may be done if the IC is satisfied that notification of the IC review would not be appropriate because it would, or could reasonably be expected to:
- a) prejudice the conduct of an investigation of a breach, or possible breach, of the law or a failure, or possible failure, to comply with a law relating to taxation (for example, if the person who would otherwise be notified is under investigation)
 - b) prejudice the enforcement or proper administration of the law in a particular instance
 - c) disclose, or enable a person to ascertain the existence or non-existence of a confidential source of information, in relation to the enforcement or administration of the law
 - d) endanger anyone's life or physical safety
 - e) damage the security, defence or international relations of the Commonwealth (s 54Q(3)).

¹⁵ See Australian Information Commissioner, *Direction as to certain procedures to be followed by agencies and ministers in IC reviews* [3.14] and [3.31]–[3.32] (available on the OAIC website www.oaic.gov.au).

Joining other parties to the IC review

- 10.54 The IC may join a person whose interests are affected as a party to an IC review (s 55A(3)) if that person applies in writing (s 55A(2)).
- 10.55 This could arise, for example, when the IC review applicant is an affected third party who disagrees with an agency's or minister's decision to grant access to a document. In that case, the IC may join the original FOI applicant to the IC review.
- 10.56 Another example is where an affected third party is not given notice of an IC review application because one of the reasons in s 54Q applies (see [10.53]). If the IC, on considering the IC review application, is not satisfied that the document concerning that person is exempt, the IC may decide to join the person to the IC review under s 55A(1)(d).
- 10.57 In some cases, the FOI decision may include documents that involve more than one agency or minister. An agency or minister has the option of transferring an FOI request to another agency or minister under s 16 where appropriate if the other agency or minister agrees. If the agency or minister decides not to transfer the FOI request, the agency or minister is responsible for consulting relevant agencies and ministers, both before making an FOI decision and throughout the IC review. In exceptional circumstances, where an agency or minister other than the decision maker applies to be joined as a party to an IC review, the Information Commissioner may decide to grant the application.

General procedure

- 10.58 IC reviews are intended to provide a simple, practical and cost-effective means of external merit review. To achieve this aim, the IC may conduct an IC review in whatever way the IC considers appropriate (s 55(2)(a)) and must use as little formality and technicality as possible (s 55(4)(a)). It is intended that most IC reviews will be determined on the basis of the documents and submissions (see [10.70]).

Using alternative dispute resolution

- 10.59 The s 54Z notice sent agencies to notify of the commencement of an IC review will include a request that the respondent engage with, or make reasonable attempts to engage with, the IC review applicant during the IC review for the purpose of genuinely attempting to resolve or narrow the issues in dispute. The respondent will be required to provide the OAIC with information that demonstrates the engagement or reasonable attempts at engagement.¹⁶
- 10.60 Alternative dispute resolution methods and early appraisal can clarify, at an early stage, the issues to be resolved or the information to be provided by either review party in support of their claims. For instance, the OAIC's IC review officer may review the material submitted by both review parties and provide a preliminary view as to the merits of the application to the relevant party. That party then has the opportunity to make further submissions or take other action as may be appropriate (for example, by withdrawing the IC review application or issuing a revised decision under s 55G). The IC review officer can also facilitate a teleconference between the parties if this would assist in resolving the IC review.

¹⁶ See Australian Information Commissioner, *Direction as to certain procedures to be followed by agencies and ministers in IC reviews* [3.5], [3.8] and [3.11] (available on the OAIC website www.oaic.gov.au).

Participation by various means

10.61 The IC may allow a person to participate by any means of communication (s 55(2)(c)). For example, a person may be allowed to participate by telephone or video conference, or to provide a written submission. Appropriate arrangements may also be made to assist a person with a disability.

Obtaining information

10.62 The IC may obtain any information from any person and make any inquiries that the IC considers appropriate (s 55(2)(d)). For example, the IC may request information about the respondent's decision early in the IC review. Those inquiries may help the IC form a preliminary view about the issues to be addressed or the merit of the reviewable decision. The IC also has a specific power to make preliminary inquiries to determine whether to undertake an IC review (discussed below at [10.97]) and the power to compel agencies to participate in a number of information gathering processes (discussed at [10.107] – [10.115]). The IC can also seek expert assistance from agency staff or another party where documents involve complex or technical issues.

Written directions

10.63 The IC may give written directions about the procedure to be followed in IC reviews generally, and in a particular IC review (s 55(2)(e)).

10.64 The IC has issued the following general procedure directions:

- a direction setting out the general procedure to be followed by agencies and ministers for the production of documents and submissions in IC reviews¹⁷
- a direction as to certain procedures to be followed by applicants in IC reviews.¹⁸

10.65 In relation to directions in a particular IC review, the IC can, for example, direct that publication of certain evidence in a particular IC review be prohibited or restricted if satisfied the evidence should be kept confidential.

10.66 If a respondent fails to comply with a direction of the IC, the IC may proceed to make a decision under s 55K on the basis that the respondent has failed to discharge their onus (s 55D(1)).¹⁹

10.67 The IC may decide not to undertake an IC review or not to continue to undertake an IC review if the IC review applicant fails to comply with a direction of the IC (s 54W(c)).

When the reasons for a decision are inadequate

10.68 The IC may require a respondent to give reasons for their decision if the IC believes the reasons given are inadequate or if no reasons have been provided (s 55E).

¹⁷ See Australian Information Commissioner, *Direction as to certain procedures to be followed by agencies and ministers in IC reviews* (available on the OAIC website www.oaic.gov.au).

¹⁸ See Australian Information Commissioner, *Direction as to certain procedures to be followed by applicants in Information Commissioner reviews* (available on the OAIC website www.oaic.gov.au).

¹⁹ See Australian Information Commissioner, *Direction as to certain procedures to be followed by agencies and ministers in IC reviews* [3.24] (available on the OAIC website www.oaic.gov.au).

10.69 The IC may specify when a respondent must provide reasons. If no period is specified, the respondent must provide reasons within 28 days (s 55E(3)). For guidance on preparing good statements of reasons for decisions see Part 3 of these Guidelines.

Hearings

10.70 Hearings are not intended to be a common part of IC reviews because they can increase contestability, introduce more formality, and prolong the IC review. In general, IC reviews will be conducted on the papers (s 55(1)).²⁰

10.71 However, a review party may apply to the IC for a hearing at any time before a decision is made (s 55B(1)). An application for a hearing must identify the reasons why a hearing should be held in relation to the IC review and why a review conducted on the papers would not be appropriate in the circumstances.

10.72 The IC will only decide to hold a hearing if satisfied that a special reason exists that warrants a hearing being held. The IC will notify the other review parties of the application and give all review parties a reasonable opportunity to make submissions on the application.²¹

10.73 The IC must conduct hearings in public unless satisfied there are reasons to hold a hearing (in whole or part) in private (s 55(5)(a)). This means that part of a hearing may be held in the absence of one or more of the review parties and their representatives if the IC considers it necessary to prevent the disclosure of confidential matters.

10.74 A review party may be represented by another person at a hearing (s 55C), including a legal representative. For example, a review party may wish to be represented by an advocate, friend or family member.

Revising the decision during an IC review

10.75 After an application is made to the IC for IC review, an agency or minister may (at any time following the commencement of the IC review) revoke or vary an access refusal decision²² to favour the IC review applicant by:

- giving access to a document in accordance with the request (s 55G(1)(a))
- relieving the IC review applicant from liability to pay a charge (s 55G(1)(b)) or
- requiring a record of personal information to be amended or annotated in accordance with the application (s 55G(1)(c)).

10.76 During an IC review, where a respondent no longer contends that material is exempt under Part IV of the FOI Act, or has identified further material within the scope of the FOI request, the respondent is encouraged to make a s 55G decision. A revised decision under s 55G facilitates the prompt release of further material to the IC review applicant.

²⁰ Section 55(1) provides that review can be carried out on the documents or other available material if: the Information Commissioner considers the matter can be adequately determined in the absence of the review parties, the Information Commissioner is satisfied that there are no unusual circumstances that warrant a hearing, or none of the parties has applied for a hearing.

²¹ See *McKinnon and Department of Immigration and Citizenship* [2012] AICmr 34.

²² A minister or agency cannot vary an access grant decision once the matter is under IC review (that is, there is no equivalent to s 55G, which applies only to access refusal decisions).

- 10.77 Where a deemed access refusal decision is the subject of the IC review, revising the decision under s 55G facilitates release under the FOI Act where the statutory processing period has passed.
- 10.78 The respondent must notify the IC in writing of the revised decision (s 55G(2)(a)).
- 10.79 A revised decision does not automatically conclude the IC review. 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.
- 10.80 If the original decision under IC review is a decision refusing to give access to a document in accordance with a request under s 53A(a), the revised decision must have the effect of releasing more material to the IC review applicant.²³ That will include releasing part of a document because a ‘document’ under s 4(1) of the FOI Act is defined to also include any part of a document.²⁴ A revised decision may still be an access refusal decision in relation to other material within the scope of an FOI request, as long as the variation is made ‘in a manner that favours the applicant’.²⁵
- 10.81 The power under s 55G to make a revised decision during the IC review should be understood bearing in mind the purpose and context of the section. The provision only applies to decisions ‘that essentially benefit the applicant’,²⁶ does not require agreement between the parties,²⁷ and is a prescribed procedure within the IC review process (see Division 6 of Part VII of the FOI Act).
- 10.82 Accordingly, it is not in the spirit of a revised decision under s 55G to include further exemption claims in relation to the remaining material to which access is refused which would have the effect of disadvantaging an IC review applicant.
- 10.83 Any new contentions that further or different exemptions apply to the documents at issue should be put forward as part of the IC review in the form of submissions and not as a revised decision under s 55G. Any new contentions must be supported by detailed reasons that justify the respondent’s changed position, including how any new circumstances or information has given rise to new exemption contentions.²⁸ Respondents should bear in mind the lowest reasonable cost objective of the FOI Act under s 3(4) in ensuring that any such contentions are justified at a later stage of an IC review

Protections when information is supplied

- 10.84 A claim for legal professional privilege can still apply to a document or information produced for the purpose of an IC review. The act of producing the document does not of itself constitute waiver of the privilege (s 55Y).
- 10.85 A person is immune from civil proceedings and any criminal or civil penalty if the person gives information, produces a document or answers a question in good faith for an IC review (s 55Z). The immunity applies whether the information was supplied voluntarily or

²³ *Thomson and Australian Federal Police* [2013] AICmr 83 [12].

²⁴ See [2.26] – [2.28] of the FOI Guidelines.

²⁵ *Australian Associated Press Pty Ltd and Department of Immigration and Border Protection* [2016] AICmr 25 [18] [22] and [24].

²⁶ See Explanatory Memorandum to the Freedom of Information Amendment (Reform) Bill 2009 33.

²⁷ As distinct from s 55F of the FOI Act.

²⁸ See *Paul Farrell and Australian Criminal Intelligence Commission (Freedom of information)* [2024] AICmr 20 [8].

supplied because the Information Commissioner compelled production of the information (for example, under s 55(2)(d) — see [10.107] – [10.115]).

Evidence by the Inspector-General of Intelligence and Security

- 10.86 Before deciding that a document an agency or minister claims is exempt under the national security exemption (s 33) is not exempt, the IC must ask the Inspector-General of Intelligence and Security (Inspector-General) to give evidence on the likely damage if access was granted (ss 55ZA–55ZD — for guidance about s 33, see Part 5 of these Guidelines).²⁹ There are similar provisions in relation to Administrative Appeals Tribunal (AAT) proceedings (s 60A). The Inspector-General must comply with the IC’s request unless the Inspector-General believes they are not appropriately qualified to give evidence on those matters (s 55ZC).
- 10.87 The purpose of this requirement is to assist the IC make a decision through the provision of expert advice. In IC reviews involving s 33, the IC will require the Australian Criminal Intelligence Commission and the Australian Federal Police to provide information about whether the document(s) subject to IC review relate directly or indirectly to their intelligence functions and to provide information as to which intelligence function or functions the document relates (as identified in s 3(1) of the *Inspector-General of Intelligence and Security Act 1986*).
- 10.88 Because the Inspector-General is an independent statutory office holder, the evidence given is not evidence by the agency or minister who made the FOI decision. The IC and the Inspector-General have entered into a memorandum of understanding establishing agreed procedures for the exercise of this discretion.³⁰
- 10.89 For IC reviews that commenced before 12 August 2023,³¹ this requirement applies to all documents said to be exempt under s 33 (national security, defence, international relations, or divulge information communicated in confidence).³²
- 10.90 For IC reviews that commenced on or after 12 August 2023, the requirement for the Inspector-General to give evidence only arises if the documents are said to be exempt under s 33, the documents are not documents of the Inspector-General, and only if the documents relate directly or indirectly to:
1. the performance of the functions or duties, or the exercise of the powers, of a body mentioned in paragraph (a) of the definition of **intelligence agency** in ss 3(1) of the *Inspector-General of Intelligence and Security Act 1986*³³ or

²⁹ See *Penny Wong and Department of the Prime Minister and Cabinet* [2016] AICmr 6 [16] and *Wake and Australian Broadcasting Corporation* [2013] AICmr 45 [9].

³⁰ Available on the OAIC website at [Current memorandums of understanding | OAIC](#).

³¹ An IC review commences when a notice under s 54Z of the FOI Act is sent to the respondent (or the person who made the request in the case of an access grant decision).

³² See s 7 of the *Acts Interpretation Act 1901 (Cth)*.

³³ **Intelligence agency** is defined in s 3(1) of the *Inspector-General of Intelligence and Security Act 1986* to mean the Australian Security Intelligence Organisation, the Australian Secret Intelligence Service, the Defence Signals Directorate, the Defence Imagery and Geospatial Organisation, the Defence Intelligence Organisation, the Office of National Assessments and the 2 agencies that have an intelligence function – the Australian Criminal Intelligence Commission and the Australian Federal Police. Section s 3(1) of the *Inspector-General of Intelligence and Security Act 1986* specifies the intelligence functions for both these agencies.

2. the performance of an **intelligence function** (within the meaning of the *Inspector-General of Intelligence and Security Act 1986*) of a body mentioned in paragraph (b) of that definition.³⁴
- 10.91 The effect of this provision is that the Inspector-General is required to give evidence only in relation to agencies within their jurisdiction.
- 10.92 The Inspector-General must comply with the IC’s request unless the Inspector-General believes they are not appropriately qualified to give evidence on those matters (s 55ZC).
- 10.93 In IC reviews involving s 33, the IC will require the Australian Criminal Intelligence Commission and the Australian Federal Police to provide information about whether the document(s) subject to IC review relate directly or indirectly to their intelligence functions and to provide information as to which intelligence function or functions the document relates (as identified in s 3(1) of the *Inspector-General of Intelligence and Security Act 1986*).
- 10.94 Before receiving evidence from the Inspector-General personally, the IC must receive any evidence or submissions made by the agency or minister to whom the request was made for access to the document (s 55ZB(3)). The IC is not bound by the Inspector-General’s opinion (s 55ZB(4)).
- 10.95 This requirement does not apply if the IC considers there is sufficient material to affirm the agency’s or minister’s decision to exempt the document.

The Information Commissioner’s options

- 10.96 After receiving an IC application, the IC has 2 options:
- to review the decision if satisfied it is a decision that is reviewable, or
 - not to review the decision if satisfied on certain grounds (discussed at [10.100] below).

Preliminary inquiries

- 10.97 The IC may make preliminary inquiries of the parties to help determine whether to undertake an IC review (s 54V). Such inquiries might be made to clarify whether the FOI decision falls within the IC’s jurisdiction, or to clarify whether an internal review is currently on foot. Where an application for IC review is made in relation to an FOI request that is deemed to have been refused under ss 15AC(3), 51DA(2) or 54D(2) of the FOI Act, the IC will undertake preliminary inquiries.³⁵

³⁴ **Intelligence functions** for the Australian Criminal Intelligence Commission means:

- (i) the collection, correlation, analysis, production and dissemination of intelligence obtained by ACIC from the execution of a network activity warrant; or
- (ii) the performance of a function, or the exercise of a power, conferred on a law enforcement officer of ACIC by the network activity warrant provisions of the *Surveillance Devices Act 2004*; or

Intelligence functions for the Australian Federal Police means:

- (i) the collection, correlation, analysis, production and dissemination of intelligence obtained by the Australian Federal Police from the execution of a network activity warrant; or
- (ii) the performance of a function, or the exercise of a power, conferred on a law enforcement officer of the Australian Federal Police by the network activity warrant provisions of the *Surveillance Devices Act 2004*.

³⁵ See [2.1]–[2.3] of Appendix A.1 to the Australian Information Commissioner’s *Direction as to certain procedures to be followed in IC reviews*.

Who conducts the review?

10.98 Staff from the OAIC will manage the application for IC review. However, only the IC, FOI Commissioner, Privacy Commissioner or delegate can make the final decision on an IC review (AIC Act ss 10, 11, 12 and 25(e)).

Timeframe for a review

10.99 The FOI Act does not specify a time for completion of an IC review.³⁶ The time taken will depend on a number of factors, including:

- the type and range of issues involved in the IC review
- the number and type of documents involved
- whether there is a need to refine the scope of the issues the applicant has raised
- whether the respondent needs to undertake further searches for documents
- whether parties other than the respondent and the applicant need to be consulted or joined to the IC review
- any new issues the parties have introduced during the IC review
- the time parties take to respond to requests for information or other issues raised by the IC review officer and
- the extent to which the parties are willing to engage in informal resolution processes (where appropriate).

When the Information Commissioner will not undertake an IC review

10.100 The IC has the discretion not to undertake an IC review, or not to continue a IC review, if:

- a) the IC review applicant fails to comply with a direction by the IC (s 54W(c))³⁷ or
- b) if the IC is satisfied:
 - i) the IC review application is frivolous, vexatious, misconceived, lacking in substance or not made in good faith
 - ii) the IC review applicant has failed to cooperate in progressing the IC review application or the IC review without reasonable excuse
 - iii) the IC cannot contact the IC review applicant after making reasonable attempts (s 54W(a))
- c) if the IC is satisfied the IC reviewable decision should be considered by the AAT (s 54W(b) — see [10.104] – [10.105] below).

³⁶ The OAIC aims to finalise 80% of all IC reviews within 12 months of receipt. See OAIC *Corporate Plan 2023-24* at www.oaic.gov.au.

³⁷ See Australian Information Commissioner, *Direction as to certain procedures to be followed by applicants in Information Commissioner reviews* [2.21] and [3.2] (available on the OAIC website www.oaic.gov.au).

- 10.101 An IC review application seeking review of a decision to impose a charge will be considered to lack substance if the respondent waives the charge.³⁸ The circumstances in which an IC review application can be described as ‘frivolous or vexatious’ have been examined in various cases³⁹ These circumstances include where it is open to conclude that a series of FOI requests were made to annoy or harass agency staff and none of the requests is capable of conferring a practical benefit on the FOI applicant.⁴⁰ See Part 12 of these Guidelines for information about vexatious applicant declarations.
- 10.102 Where an IC review applicant expresses their wish for a decision not to be published because they are concerned about their privacy, this does not constitute failure to cooperate (but if the IC review proceeds the decision is nevertheless required to be published (s 55K(8)).⁴¹

Reviewing part of a matter

- 10.103 The IC may decide to review only part of an IC reviewable decision (see s 54U).

AAT review as an alternative to IC review

- 10.104 The IC may decline to undertake an IC review if satisfied ‘that the interests of the administration of the [FOI] Act make it desirable’ that the AAT consider the IC reviewable decision (s 54W(b)). It is intended that the IC will resolve most IC review applications. Circumstances in which the IC may decide that it is desirable for the AAT to consider the IC reviewable decision instead of the IC continuing with the IC review include:⁴²
- where the IC review is linked to ongoing proceedings before the AAT or a court
 - where there is an apparent inconsistency between earlier IC review decisions and AAT decisions
 - where, should the IC review application progress to an IC review decision, the IC review decision is likely to be taken on appeal to the AAT on a disputed issue of fact
 - where the FOI decision under review is of a level of complexity that it will be more appropriately handled through the procedures of the AAT
 - where there may be a perceived or actual conflict of interest in the IC undertaking the IC review, including where:
 - the FOI request under review was made to, or decided by, the IC or their delegate
 - the FOI request or documents at issue relate to specific functions exercised by the IC under the Privacy Act
 - the IC review applicant has active matters in other forums, including the AAT or Federal Court, and the IC is the respondent
 - where consideration by the AAT will further the objects of the FOI Act, particularly in relation to the performance and exercise of functions and powers given by the FOI Act

³⁸ *Knowles v Australian Information Commissioner* [2018] FCA 1212.

³⁹ For an example of abuse of process generally see *Bringolf and Secretary, Department of Human Services (Freedom of information)* [2018] AATA 2004.

⁴⁰ *Ford v Child Support Registrar* [2009] FCA 328, applying *Attorney-General (Vic) v Wentworth* (1998) 14 NSWLR 481.

⁴¹ *Giddings v Australian Information Commissioner* [2017] FCA 677.

⁴² See also *McKinnon and Department of Immigration and Citizenship* [2012] AICmr 34.

to facilitate and promote public access to information, promptly and at the lowest reasonable cost (s 3(4)).

10.105 The OAI may take into account the views of the parties to an IC review before concluding an IC review pursuant to s 54W(b). While the IC will consider the views of the review parties before finalising an IC review under s 54W(b), the decision whether it is more appropriate for the AAT to consider the IC reviewable decision ultimately rests with the IC. Through the functions conferred on the IC under the FOI Act, the IC will be in the most informed position to determine whether the interests of the administration of the FOI Act make it desirable for the AAT consider the IC reviewable decision.

Parties to be notified of decision not to undertake a review

10.106 If the IC decides not to undertake an IC review, the IC must give the parties written notice of the decision (s 54X(2)). Where the IC has decided it would be desirable for the AAT to undertake the review, the notice must state that the applicant may apply to the AAT for review (s 54X(3)(b)).

The Information Commissioner’s powers to gather information

10.107 The IC has a range of powers to compel respondents to participate in procedures to gather information needed to properly review the merits of a decision. In addition to the power to require an agency or minister to give adequate reasons for a decision (discussed at [10.68] – [10.69]), the IC has the power to:

- require a person to produce information and documents
- require a respondent to produce a document claimed to be exempt (with some qualification where the claimed exemption relates to national security, Cabinet or Parliamentary Budget Office documents)
- order a respondent to undertake further searches for documents
- require a person to attend to answer questions and to take an oath or affirmation that the answers given will be true.

10.108 Each of these is discussed below. The IC’s information gathering powers are similar to those of the AAT.

Producing information and documents

10.109 The IC can issue a notice requiring a person to produce information and documents if the IC reasonably believes they are relevant to an IC review (s 55R(3)). Failure to comply with a notice to produce is an offence punishable by 6 months imprisonment (s 55R(5)). The IC may take possession, copy and take extracts and hold those documents for as long as necessary for the purposes of the IC review (s 55S(1)).

Producing documents claimed to be exempt: general

10.110 The IC may require the respondent to produce a document claimed to be exempt, other than a document claimed to be exempt under the national security, Cabinet or

Parliamentary Budget Office documents exemptions (s 55T(1)). As a general rule, the IC will require the respondent to provide a copy of all documents that are claimed to be exempt to enable the IC to undertake merit review of the decision to refuse access. If satisfied the document is exempt, the IC must return the document to the respondent (s 55T(3)).

- 10.111 No person other than the IC, the FOI Commissioner, the Privacy Commissioner or a member of the IC's staff may have access to a document that is claimed to be exempt (s 55T(5)). (The IC must take all reasonable steps to ensure relevant OAIC staff are given appropriate security clearances (s 89P)).

Producing documents claimed to be exempt: national security, Cabinet and Parliamentary Budget Office documents

- 10.112 The IC may only require the respondent to produce a document they claim is exempt under the national security exemption (s 33), Cabinet documents exemption (s 34) or Parliamentary Budget Office documents exemption (s 45A) if the IC is not satisfied by evidence on affidavit or other evidence that the document is exempt (s 55U(3)).

Further searches for documents

- 10.113 The IC may require a respondent to undertake further searches for documents, including where access to a document has been granted but not actually given (s 55V(2)).⁴³

Attending to answer questions

- 10.114 The IC may require a person to attend to answer questions for the purposes of an IC review (s 55W(1)). The IC must give the person a written notice that specifies the time and place when the person must attend, with the time to be not less than 14 days after the person is given the notice (s 55W(2)). Failure to comply with the notice is an offence punishable by 6 months imprisonment (s 55W(3)).
- 10.115 The IC may also require a person who appears before the IC pursuant to a notice under s 55W(1) to take an oath or affirmation that the answers the person will give will be true (s 55X). Breaching that requirement (for example, if the person refuses to take an oath or affirmation, or knowingly gives false answers) is an offence punishable by 6 months imprisonment (s 55X(3)).

Steps in an Information Commissioner review

- 10.116 The FOI Act establishes a process for the conduct of IC reviews. These requirements inform specific guidance developed by the OAIC. For further information about the stages and timeframes applied in an IC review, respondents should have regard to *Direction as to certain procedures to be followed by agencies and ministers in IC reviews*.⁴⁴

⁴³ See for example 'ADN' and the Australian Taxation Office (*Freedom of information*) [2023] AICmr 44 [20].

⁴⁴ Available on the OAIC's website www.oaic.gov.au.

The Information Commissioner’s decision

Where the review parties reach agreement

- 10.117 At any stage during an IC review, the review parties may reach agreement under s 55F of the FOI Act as to the terms of a decision in the IC review. The agreement may relate to all or some of the issues to be decided in the IC review or it may be in relation to a matter arising out of the IC review application (see s 55F(1)(a)).
- 10.118 Respondents should be specific and clear about the terms being agreed to, for example, by specifying in the agreement the documents to be released in whole or in part (if applicable), or the revised scope, including relevant processing timeframes (in the case of a practical refusal decision). It should also be clear from its terms that the effect of the agreement is to resolve the IC review, either in its entirety, or in part. Respondents are encouraged to discuss any proposed s 55F agreements with the OAIC prior to submitting a signed agreement, to help ensure that the terms of the agreement reached with an IC review applicant are within the IC’s powers to give effect to.
- 10.119 The agreement must be in writing, be signed by the review parties and submitted to the IC. The IC may then make a decision in accordance with the agreement without completing the IC review. If the parties come to an agreement about part of the IC review application, the IC review will continue but only address the issues not dealt with in the agreement.
- 10.120 Before making the decision under s 55F(2), the IC must be satisfied that the terms of the written agreement would be within the powers of the IC⁴⁵ and that all parties have agreed to the terms.⁴⁶ This means that the agreement must be about something the IC could have decided had the IC review continued to a decision under s 55K. For example, a decision that documents are exempt (or not exempt), or that charges should be waived, or that a practical refusal reason does or does not exist. Examples of terms that are not be within the IC’s powers include an agreement that an agency apologise or take some other remedial action, or provide a timeline for agreed action not taken from the FOI Act.
- 10.121 All the review parties must agree to the terms of the agreement. If there are affected third parties involved in the IC review, they must also agree to the proposed terms and cannot be excluded from an agreement between the IC review applicant and the respondent. Particular care should be taken in the context of an IC review of an access grant decision. The proposed terms must be agreed to by the parties to the IC review which will include the IC review applicant, the original FOI applicant and the respondent.

Where the review parties do not reach agreement

- 10.122 If the review parties do not reach an agreement, and unless the IC review applicant withdraws their application under s 54R, or the IC decides not to undertake an IC review, or continue to undertake an IC review under s 54W, the IC must make a decision after a merit review of the IC review application. The IC has 3 options:
- to affirm the respondent’s decision (s 55K(1)(a))

⁴⁵ See s 55F(1)(d) of the FOI Act.

⁴⁶ Section 55F(1)(c) of the FOI Act.

- to vary the respondent's decision (s 55K(1)(b))
- to set aside the respondent's decision and make a fresh decision (s 55K(1)(c)).

Written reasons to be given

10.123 The IC 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 way that makes it publicly available (s 55K(8)). The statements of reasons for IC review decisions are published on the Australasian Legal Information Institute website (AustLII) in the Australian Information Commissioner database.⁴⁷ The IC's published decision will not include any exempt matter or information about the existence or non-existence of a document that would be exempt under ss 33, 37 or 45A (see ss 55K(5)(a) and 25(1)), or any other matter that would cause the statement of reasons to be an exempt document (s 55K(5)(b)). In addition, where appropriate to protect against the unreasonable disclosure of personal information about an IC review applicant or third party, including details of their identity, the IC will not include such personal information in the decision published on the website. The identities of third parties may also be removed from the decision given to the IC review applicant, if including this information would involve an unreasonable disclosure of personal information about another person.

10.124 However the IC will generally publish the names of businesses or organisations where those entities are the IC review applicant or an affected third party to an IC review. This is because in most cases doing so will not result in the unreasonable disclosure of personal information. If a business is concerned about publication or disclosure of their name they can ask for a pseudonym to be allocated. An application for de-identification of a business's or organisation's identity must be supported by clear reasons. Each application will be treated on a case-by-case basis, taking into account the pro disclosure objects of the FOI Act.

Exempt documents

10.125 If the IC decides that a document is exempt, the IC has no power to decide that access to the document is to be given (s 55L). This includes a document that:

- has been found to be exempt because a specific exemption under Part IV Division 2 of the FOI Act applies
- is conditionally exempt (under Part IV Division 3) and access to the document would be contrary to the public interest, or
- is a document of a person, body or agency exempt from the operation of the FOI Act (s 7 — see Part 2 of these Guidelines).

Requiring records to be amended

10.126 Part V of the FOI Act enables a person to apply for amendment or annotation of personal information that an agency or minister uses for administrative purposes (see Part 7 of these Guidelines).

⁴⁷ See www.austlii.edu.au/au/cases/cth/AICmr/.

10.127 The IC's decision can require an amendment to be made to a record of personal information (subject to 2 limitations):

- a) *Opinions* — The IC may only require amendment of a record that relates to an opinion if satisfied:
 - i) the opinion was based on a mistake of fact or
 - ii) the author of the opinion was biased, unqualified to form the opinion or acted improperly in conducting the factual inquiries that led to the formation of the opinion (s 55M(1)).
- b) *Court or tribunal decision* — The IC cannot require that a record of a decision under an enactment by a court, tribunal, authority or person be amended (s 55M(2)(a)). Nor can the IC require that a record be amended if that would involve determining an issue that a person either is, or could be, entitled to have decided in another process — by an agency (on internal review), the IC, a court or tribunal (s 55M(2)(b)). This means that the IC does not have the power to require amendments that rely on the IC making another decision first that could be made by an agency (such as where an agency must first determine a person's eligibility for a benefit), the IC (such as deciding an FOI request for access to the relevant documents) or a court (such as deciding whether a person is bankrupt) or tribunal (such as deciding whether a person is eligible for a visa).

Practical refusal, searches and charges

10.128 Other decisions that the IC can affirm, vary or set aside include:

- access refusal decisions based on the existence of a practical refusal reason with respect to an FOI request following a request consultation process (s 24)
- access refusal decisions based on the contention that all reasonable steps have been taken to find a document and the document cannot be found or does not exist (s 24A). The FOI Act provides individuals with a right of access to documents that exist. There is no right of access to documents that do not exist or cannot be found. The Information Commissioner cannot consider whether documents should not have been destroyed or removed⁴⁸ or matters where the IC review applicant disputes the nature of the documents produced⁴⁹ and
- decisions with respect to charges (s 29).

Compliance with the Information Commissioner's decision

10.129 Parties to an IC review are notified of the IC's written reasons for decision at the conclusion of the IC review and are provided with a copy of those reasons.

10.130 At the time of notifying the review parties of the written reasons for decision, the IC will seek confirmation that the respondent will fully implemented the IC's decision, or alternatively, advice that the respondent is applying for review of the decision by the AAT. This information is to be provided to the IC within 28 days of notification of the decision.

⁴⁸ *Josh Taylor and Prime Minister of Australia (Freedom of information)* [2018] AICmr 42.

⁴⁹ See for example *'WW' and Department of Veterans' Affairs (Freedom of information)* [2021] AICmr 10.

10.131 The IC will also seek confirmation that the respondent has published relevant documents on its disclosure log (as required under s 11C of the FOI Act) and that documents have been published on the respondent’s website for the purposes of the Information Publication Scheme (IPS) under Part II of the FOI Act (where relevant).

Enforcement of the Information Commissioner’s decision

10.132 A respondent must comply with an IC review decision (s 55N). If a respondent fails to comply, the IC or the IC review applicant may apply to the Federal Court for an order directing them to comply (s 55P(1)). The application under s 55P can only be made after the period a respondent has to apply to the AAT for review of the IC’s decision has expired - 28 days (*Administrative Appeals Tribunal Act 1975* (AAT Act) s 29(2)). There is a similar scheme for enforcing determinations by the Privacy Commissioner (Privacy Act ss 55A and 62).

10.133 In exercising the power to enforce an IC review decision, the IC may consider the following factors:

- whether exercising the power to enforce an IC review decision will best facilitate and promote public access to information (for example, it is relevant to consider whether enforcement of an IC review decision will result in the respondent releasing documents to the IC review applicant and, more generally, increase compliance by the respondent with IC review decisions)
- whether exercising the power to enforce an IC review decision will best increase the promptness of public access to information (for example, it is relevant to consider whether this will impact the speed with which the respondent in question complies with IC review decisions)
- whether exercising the power to enforce an IC review decision will best facilitate public access to information at the lowest reasonable cost (for example, it is relevant to consider whether enforcement by the Federal Court of Australia is a cost effective way to increase compliance with the FOI Act)
- whether exercising the power to enforce an IC review decision will promote the objects of the FOI Act to give the Australian community access to information held by the Australian Government by requiring agencies to publish information and enforcing a right of access to documents and
- any other factors the IC considers relevant in the circumstances.

Correcting errors in the Information Commissioner’s decision

10.134 The IC has a discretionary power to correct obvious errors in their decision, either on their own initiative or on application by a review party (s 55Q).

Federal Court proceedings

10.135 The Federal Court may determine matters in 2 situations:

- deciding questions of law referred by the IC (s 55H)
- on appeal by an IC review party on a question of law, from the IC’s decision (s 56).

10.136 The Federal Court may also direct a respondent to comply with the IC’s decision (see [10.132]–[10.133] above).

Referring questions of law

10.137 The IC may refer a question of law to the Federal Court at any time during the review (s 55H), and must act consistently with the Federal Court’s decision (s 55H(5)). This power is intended to ensure that the IC makes decisions that are correct in law and that their decisions can finally resolve a matter.

10.138 If a reference is made to the Federal Court, the IC must send all relevant documents and information in their possession to the Court (s 55J).

10.139 In exercising the power to refer a question of law to the Federal Court, the IC may consider the following factors:

- whether referring a question of law to the Federal Court will best facilitate and promote public access to information (for example if there is uncertainty with respect to the interpretation of the FOI Act)
- whether referring a question of law to the Federal Court will best increase the promptness of public access to information (for example if resolving a particular question of law will result in a positive impact on the processing of FOI requests and the conduct of IC reviews)
- whether referring a question of law to the Federal Court will best facilitate public access to information at the lowest reasonable cost (for example if the Federal Court’s response to the question of law binds future decision makers and results in more efficient and therefore more cost effective processing of FOI requests)
- whether referring a question of law to the Federal Court will promote the objects of the FOI Act to give the Australian community access to information held by the Australian Government by requiring agencies to publish information and enforcing a right of access to documents, and
- any other factors which the IC considers relevant in the circumstances.

Appeal to the Federal Court

10.140 A review party has the right to appeal to the Federal Court on a question of law from a decision of the IC (s 56).

10.141 A review party may choose to apply to the Federal Court rather than seek merit review by the AAT if, for example, the review party believes the IC wrongly interpreted and applied the FOI Act. If the Federal Court remits a decision to the IC for reconsideration, a review party can later apply to the AAT for review of the IC’s subsequent decision.

10.142 Section 56A(1)(b) provides that in determining the matter, the Federal Court may make findings of fact if its findings of fact are not inconsistent with findings of fact made by the IC (other than findings resulting from an error of law), and it appears to the Court to be convenient. In determining whether it is convenient, the Court must have regard to all the following factors:

- i) the extent to which it is necessary for facts to be found

- ii) the means of establishing those facts
- iii) the expeditious and efficient resolution of the whole of the matter to which the IC review relates
- iv) the relative expense to the parties if the Court, rather than the IC, makes the findings of fact
- v) the relative delay to the parties if the Court, rather than the IC, makes the findings of fact
- vi) whether any of the parties considers that it is appropriate for the Court, rather than the IC, to make the findings of fact
- vii) such other matters (if any) as the Court considers relevant.

Review by the AAT

When can a person apply to the AAT?

10.143 A person can apply to the AAT for review of:

- the IC’s decision to affirm, vary or set aside a decision after the IC has undertaken an IC review (ss 55K and 57A(1)(a))
- the agency’s or minister’s decision where the IC has decided not to undertake an IC review on the basis that it is desirable that the AAT undertakes the review (ss 54W(b) and 57A(1)(b))
- the IC’s declaration of a person as a vexatious applicant (ss 89K and 89N).

10.144 A person cannot apply to the AAT directly for review of an agency or a minister’s decision – the person must apply for IC review first.⁵⁰ However, when applying for IC review an IC review applicant may make submissions as to why the IC should decline the review under s 54W(b), thus enabling the person to apply to the AAT.

10.145 A person cannot apply to the AAT for review of the IC’s decision not to undertake or not to continue an IC review under ss 54W(a)(i)-(iii) or 54W(c). A person can however seek judicial review by the Federal Court of Australia or the Federal Circuit Court of Australia of the decision not to undertake or continue an IC review under the *Administrative Decisions (Judicial Review) Act 1977*.

Time limit

10.146 A person must apply to the AAT within 28 days after the day they receive the IC’s decision (AAT Act s 29(2)). The same time limit applies where the IC declines to consider the IC review on the ground that it would be better dealt with by the AAT (s 57A(2)).

Parties to AAT proceedings

10.147 The parties to an AAT review are:

⁵⁰ *Scholes and Decision Maker (Freedom of information)* [2018] AATA 4091 [12]–[15].

- the person who applies to the AAT for review (s 60(3)(a))
- the original FOI applicant, that is, the person who made the request for access to documents or for amendment or annotation of a personal record (s 60(3)(b))
- the principal officer of the agency or the minister to whom the request was made (s 60(3)(c))
- any other person who is made a party to the proceeding by the AAT (s 60(3)(d)).

10.148 The AAT has a discretionary power under s 30(1A) of the AAT Act to join a person whose interests are affected by the decision.

10.149 The IC is not a party to proceedings in the AAT, except in relation to review under s 89N of a declaration that a person is a vexatious applicant. Consequently, the IC does not play any role in the proceedings in defending their decision. In deciding the correct or preferable decision, the AAT will be guided by the submissions of the parties, who will ordinarily be the FOI applicant and the agency or minister who made the IC reviewable decision. As noted below in [10.157], s 61A of the FOI Act modifies relevant provisions of the AAT Act to spell out the role in the proceedings of the agency or minister who made the IC reviewable decision. Further, s 58(1) of the FOI Act provides that the AAT may decide any matter in relation to the FOI request that could be decided by the agency or minister.

10.150 In relation to review of a declaration that a person is a vexatious applicant (see Part 12 of these Guidelines), note 3 to s 89N expressly refers to s 30 of the AAT Act, which sets out the parties to AAT proceedings. Section 30 states that the decision maker (in this case, the IC) will be a party to the proceedings. The IC's role is to assist the AAT and not to be a protagonist in the proceedings.⁵¹ An agency or minister may also apply to the AAT to be made a party to those proceedings (AAT Act s 30(1A)).

Notifying third parties

10.151 An agency or minister must notify affected third parties if an FOI applicant seeks review by the AAT of a decision to refuse access to third party information (s 60AA). This is the same as the notice requirement where an application is made for an IC review. An affected third party may apply to become a party to the AAT proceedings under s 30(1A) of the AAT Act (s 30(3)(d)).

10.152 The AAT may order that an agency or minister does not need to give notice to an affected third party of an AAT review application if it would not be appropriate to do so in the circumstances (s 60AB). An agency or minister must apply to the AAT for an order to be excused from the requirement to give notice (s 60AB(2)).

10.153 Section 60AB(3) provides the circumstances to which the AAT must have regard when determining if the requirement to give notice is not appropriate. Those circumstances are whether notifying the affected third party would or could reasonably be expected to:

⁵¹ In line with the view expressed in *R v Australian Broadcasting Tribunal; ex parte Hardiman* [1980] HCA 13; (1980) 144 CLR 13 [54]. See also AAT Act s 33(1AA).

- a) prejudice the conduct of an investigation of a breach of the law, or a failure to comply with a law relating to taxation (for example, if a document includes information about a person under criminal investigation)
- b) prejudice the enforcement or proper administration of the law in a particular instance
- c) disclose, or enable a person to ascertain, the existence or identity of a confidential source of information, or the non-existence of a confidential source of information, in relation to the enforcement or administration of the law
- d) endanger the life or physical safety of any person
- e) cause damage to the security, defence or international relations of the Commonwealth.

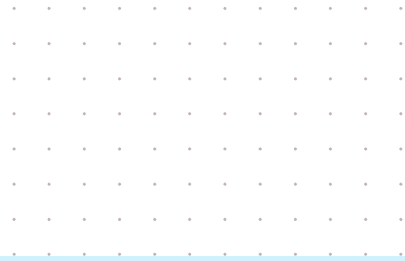
Onus

10.154 In AAT proceedings to review an FOI decision, the agency or minister who made a decision on the FOI request or the application for amendment of personal records has the onus of establishing that a decision adverse to the FOI applicant should be given. The agency or minister has that onus when:

- the agency or minister seeks review of the IC's decision (for example, that access should be given to a document because an exemption does not apply) — in this case the AAT will review a decision of the IC (s 61(1)(a))
- the FOI applicant seeks review of a decision made by the IC (for example, affirming that an exemption applies to a document and that access may be refused) — in this case the AAT will review the IC's decision (s 61(1)(b))
- the FOI applicant applies for IC review of a decision and the IC declines to undertake a review on the ground that it is desirable that the AAT undertake the review — in this case the AAT will review the decision of the agency or minister (s 61(1)(b)).

10.155 The FOI applicant does not bear an onus in either IC review or AAT review.

10.156 If an affected third party is a party to the proceeding, the third party has the onus of establishing that a decision refusing to give access to the document is justified, or the AAT should give a decision adverse to the person who made the request (s 61(2)).



Who bears the onus?	Nature of request for AAT review	Section of the FOI Act
Agency or minister that received the FOI request or the application for amendment of personal records	Review of the IC's decision sought by the agency or minister	s 61(1)(a)
	Review of the IC's decision sought by the applicant requesting documents or amendment of personal records	s 61(1)(b)
	Review of an agency's or minister's decision that the IC has declined to review under s 54W on the ground that it is desirable that the AAT undertake review	s 61(1)(b)
Affected third party that is a party to the AAT proceeding	Review of an access grant decision to which a consultation requirement applies under ss 26A, 27 or 27A	s 61(2)



Modifications to references in the AAT Act

10.157 Because agency and minister’s FOI decisions are reviewed by the IC, and generally the AAT’s role is to review decisions made by the IC, various provisions in the AAT Act that previously referred to ‘the person who made the decision’ are now taken to mean either the agency, minister or the person who made the IC reviewable decision, or each of the review parties, as the context requires. These modifications are listed in s 61A.