

From: [AGO,Rocelle](#)
To: [TYDD,Liz](#)
Subject: [For FOIC consideration] IC review Procedure Directions and proposed searches process [SEC=OFFICIAL]
Date: Monday, 8 April 2024 11:23:08 AM
Attachments: [RE searches SECOFFICIAL \(31.1 KB\).msg](#)

Dear Liz

Draft procedure direction for agencies

As requested, we are resubmitting the procedure direction for agencies your reconsideration.

The draft procedure direction has been revised to relocate content from Part 10 of the FOI Guidelines and to also include annexures to set out processes for different cohorts (deemed access refusals and searches) as we previously discussed.

The Executive Brief on Procedure Direction for agencies, including the draft procedure direction for agency and stakeholder comments is at: [D2024/007050](#).

Draft procedure direction for applicants

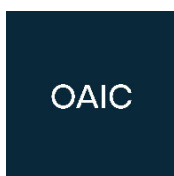
For your consideration, the draft Executive Brief on Procedure Direction for applicants, including the draft procedure direction for agency and stakeholder comments is at [D2024/008712](#).

Proposed searches process

Following our discussion on the proposed searches process, please find the proposed searches process set out at [D2024/009313](#):

- In summary, the process seeks to commence review and request the respondent to undertake further searches (s 55V) and provide a statement of reasons under s 55E following triage for validity, in the absence of an adequate statement of reasons.
- The process seeks to follow the process set out in your email attached (Wednesday 21 February) and have included suggested timeframes recognising the automated registration of smartforms and receipt of applications over weekends.
- The letters drafted also note the required classifications for signatories consistent with the delegations instrument: [Delegation of freedom of information powers and functions | OAIC](#).

Kind regards
Rocelle



Rocelle Ago (she/her)
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The OAIC acknowledges Traditional Custodians of Country across Australia and their continuing connection to land, waters and communities. We pay our respect to First Nations people, cultures and Elders past and present.

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Executive brief

Responsible Executive Member:	Rocelle Ago, Assistant Commissioner FOI
Prepared by:	Jessica Eslick and Sara Peel, Director, Monitoring, Guidance and Engagement
To:	Elizabeth Tydd, FOI Commissioner
Copies:	Karen Tulloch, Raewyn Harlock
File ref:	D2024/008712
Date:	4 April 2024
Subject:	Proposed updates to draft IC review procedure direction for applicants

Purpose and timing

To inform you of the proposed updates to the draft IC review procedure direction for applicants (titled ‘Direction as to certain procedures to be followed in by applicants in Information Commissioner reviews’) (the draft direction).

Recommendations

1. That you note our proposed updates to the draft direction via comments to the draft direction (**Attachment A**).
2. That you note our summary of the submissions in response to our consultation, whether we have proposed updates to the draft direction in light of those submissions, and our rationale /comments (**Attachment B**).

Background

The Australian Information Commissioner may give written directions under s 55(2)(e)(ii) of the FOI Act in relation to procedures to be followed in Information Commissioner (IC) reviews.

The Information Commissioner has issued 2 directions under s 55(2)(e)(ii), which are currently in effect:

- [Direction as to certain procedures to be followed in Information Commissioner reviews](#), which has had effect from 26 February 2018.
- [Direction as to certain procedures to be followed by applicants in Information Commissioner reviews](#), which had had effect from 1 September 2021.

On 9 May 2023, we sought comments from, or [consulted](#), interested stakeholders on draft revisions to each of the 2 directions.

In our consultation, we advised stakeholders:

We intend to make all submissions publicly available. Please indicate when making your submission if it contains confidential information that you do not want made public and why it should not be published. Requests for access to confidential comments will be determined in accordance with the FOI Act. If the OAIC accepts submissions in confidence you must also provide a copy that can be published.

Between 8 June 2023 and 6 July 2023, we received submissions on the draft direction from **6 agencies** as follows:

1. Administrative Appeals Tribunal on 8 June 2023
2. Attorney-General's Department on 30 June 2023
3. Australian Federal Police on 30 June 2023
4. Australian Tax Office on 30 June 2023
5. Commonwealth Ombudsman on 30 June 2023
6. Department of Defence on 30 June 2023

Related brief [D2023/015645](#) contains TRIM links to those submissions at its Attachment B.

Attachments

1. **Attachment A:** Proposed updated draft direction (with proposed updates in highlight and comments).
2. **Attachment B:** Summary of agencies' submissions in response to our consultation on the draft direction, whether we have proposed (at Attachment A) to update the draft direction in response to those submissions, and our rationale/comments.

Attachment A

Proposed direction



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

- 1.1 This direction is given by the Australian Information Commissioner under s 55(2)(e)(i) of the Freedom of Information Act 1982 (FOI Act) in relation to Information Commissioner reviews (IC reviews).
- 1.2 This written direction sets out the procedure to be followed by applicants for IC reviews undertaken by the Information Commissioner under the FOI Act.
- 1.3 The Information Commissioner 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 Information Commissioner (s 54W(c)).
- 1.4 The Information Commissioner may also give written directions as to the procedure to be followed in relation to a particular IC review (s 55(2)(e)(ii)).
- 1.5 This direction does not apply to the extent it is inconsistent with a provision of the FOI Act, another enactment or a specific direction made in a particular IC review under s 55(2)(e)(ii) of the FOI Act.
- 1.6 Further information relating to the IC review process is published on the Office of the Australian Information Commissioner's (OAIC) website. In particular, Part 10 (Reviews by the Australian Information Commissioner) of the Guidelines issued by the Information Commissioner under s 93A of the FOI Act (FOI Guidelines) describes the principles that inform the OAIC's approach to IC reviews.
- 1.7 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.
- 1.8 This direction applies to IC review applications received from 1 July 2024. For IC review applications received before 1 July 2024, specific directions may be made in the context of these IC reviews.

Part 2: The IC review process

- 1.9 IC review procedures are found in Part VII of the FOI Act. The IC review process is intended to be an informal, non-adversarial and timely means of external merits review of FOI decisions made by agencies and ministers. Part 10 of the FOI Guidelines, to which agencies and ministers must have regard when performing a function or exercising a power under the FOI Act, sets out in detail the process and underlying principles of IC review.

Making an application for IC review

- 1.10 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. The online form is located at: https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICR_10.
- 1.11 Where it is not possible for an application to be made online, applications may be sent to the OAIC by:

Postal address	GPO Box 5218 Sydney NSW 2001
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Email address	FOIDR@oaic.gov.au
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Fax	+61 2 9284 9666
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- 1.12 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
 - 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).
- 1.13 The OAIC 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 OAIC will consider any notices as received when sent to an applicant's preferred contact.
- 1.14 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
 - 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.
- 1.15 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 OAIC 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.
- 1.16 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.
- 1.17 The applicant must provide the OAIC 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.
 - 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.¹

- If an application for IC review is not made within the timeframes in the FOI Act, applicants may apply to the Information Commissioner 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 Information Commissioner 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.

1.18 An application for IC review should also:

- a. identify the parts of the decision you want 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.

1.19 The OAIC must provide 'appropriate assistance' to a person who wishes to apply for IC review and requires assistance to prepare the IC review application (s 54N(3)).

1.20 Section 54N of the FOI Act sets out the requirements for the contents and delivery of an application for IC review. These requirements include giving the OAIC contact details to which notices can be sent and providing a copy of the FOI decision the applicant wants the Information Commissioner to review. An application that does not comply with these requirements may be considered to be invalid.

During the IC review

Changes to contact details

1.21 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 Information Commissioner may decide not to undertake an IC review, or not continue to undertake an IC review, if the applicant or their nominated representative cannot be contacted after making reasonable attempts (s 54W(a)(iii)).

¹ 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).

Participation in the IC review

General principles

- 1.22 Applicants must respond to inquiries from the OAIC within the time provided unless there are 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 why additional time is needed and propose a new date for response. Approval of an extension request is at the discretion of the OAIC.
- 1.23 The OAIC expects that applicants and agencies will engage with the IC review process, with respect and courtesy.²

At the commencement of an IC review

- 1.24 The OAIC requires agencies and Ministers to engage with the IC review applicant at the commencement of an IC review. The purpose of this engagement is to attempt to resolve the issues identified in the IC review application in an informal and timely way. Agencies are required to contact applicants for IC review shortly after receiving the Information Commissioner's notice of IC review under s 54Z to arrange a suitable time for the engagement process. 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)).
- 1.24 The Information Commissioner may use any technique the Information Commissioner considers appropriate to facilitate an agreed resolution of the matters at issue in the IC review (such as alternative dispute resolution processes - s 55(2)(b)). Where appropriate, and following the compulsory engagement process described above, the OAIC may invite applicants to attend a teleconference to discuss the issues in dispute in the IC review with the agency's or Minister's office and to explore options for resolution, with a view to reaching agreement on some or all of the matters at issue in the IC review.

Receiving revised decisions under s 55G

- 1.25 An agency or minister may make a 'revised decision' under s 55G of the FOI Act during an IC review, giving access to further material. 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

- 1.26 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.

² [OAIC service charter](#).

- 1.27 Applicants will be invited to make written submissions after the initial triage and early resolution process is complete, and once the application has been assigned to a review adviser for substantive review/case management. First, the agency or Minister will be asked to make submissions in support of the IC reviewable decision. The agency or Minister will send the applicant a copy of their submissions at the same time as they are sent to the OAIC. The applicant will then have the opportunity to make submissions addressing any issues raised by the agency or the Minister. The applicant is required to send their submissions to the agency or Minister at the same time as they are sent to the OAIC.
- 1.28 The Information Commissioner will generally give the parties (both the applicant and the agency or Minister) 4 weeks to make their submissions.
- 1.29 The Information Commissioner will not accept any further submissions from either party to the IC review unless the Information Commissioner has requested them.
- 1.30 The Information Commissioner will contact the parties after receipt of submissions if procedural fairness requirements have been identified. For information on procedural fairness see [3.15] – [3.31] of Part 3 of the FOI Guidelines.
- 1.31 The OAIC may provide a preliminary view at any time during the IC review. This will outline the case officer's preliminary thinking on the issues in dispute in the IC review. The applicant may be invited in some cases to withdraw their IC review application, or make submissions in response to a preliminary view, depending on the views expressed in the preliminary view.
- 1.32 The IC review application and any attachments will be shared with the agency or Minister, as well as any other parties to the review, unless there is a reason not to do so. Any other information and submissions provided to the OAIC by the applicant will be made available to the other parties to the IC review.
- 1.33 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.
- 1.34 Generally, submissions should be made in writing and sent by email or pre-paid post. In limited circumstances, if an applicant is unable to provide written submissions, the OAIC may agree to accept verbal submissions by telephone.

Information Commissioner decisions

- 1.35 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.
- 1.36 When the Information Commissioner makes a decision on IC review under s 55K of the FOI Act, the Information Commissioner will quote or summarise the submissions in the published decision. If a confidential submission is relied on by the Information Commissioner in making a decision on the IC review, this will be noted in the decision without revealing the confidential material.
- 1.37 To protect against the unreasonable disclosure of personal information, the Information Commissioner will consider whether identifying information should be included in published decisions. Natural persons may opt not 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: Procedure for IC review of specific types of decisions

Deemed access refusal decisions

- 1.38 A 'deemed access refusal' occurs when the statutory time for making a decision on an FOI request for access to a document has expired and notice of the decision has not been given. In these circumstances the agency or Minister is 'deemed' to have refused the FOI request. Where the applicant applies for IC review of a deemed access refusal decision, the OAIC will make inquiries with the agency or Minister.
- 1.39 If, during the IC review, the agency or Minister sends the applicant a written decision on the applicant's FOI request, the OAIC will confirm with the applicant whether they are satisfied with the decision. Applicants who are satisfied with the decision and do not wish to proceed with the IC review must advise the OAIC in writing that they withdraw their application for IC review. Applicants who are not satisfied with the agency's or Minister's decision must explain why they disagree with the 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 undertake an IC review on the basis that the applicant has failed to cooperate in progressing the IC review application without reasonable excuse (s 54W(a)(ii)) or for non-compliance with the procedure direction (s 54W(c)).

Access refusal decisions

- 1.40 An 'access refusal decision' means (s 53A):
- 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 all the 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 (s 21) (see Part 3 of the Guidelines)
 - e. a decision relating to the imposition or amount of a charge (s 29)
 - f. a decision to give access to a document to a 'qualified person' (where disclosing the information to the applicant might be detrimental to the applicant's physical or mental health or well-being) (s 47F(5))
 - g. a decision refusing to amend a record of personal information in accordance with an application (s 48)
 - h. a decision refusing to annotate a record of personal information in accordance with an application (s 48).
- 1.41 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)).

- 1.42 Given that the agency or Minister bears this onus, it will generally be necessary to undertake inquiries or seek information from the agency or Minister before inviting comment from applicants.

Access grant decisions

- 1.43 An 'access grant decision' means a decision to grant access to a document where there is a requirement to consult a third party (s 53B). Such decisions involve granting the FOI applicant access to information or documents following consultation.
- 1.44 In an IC review of an access grant decision, it is the IC review applicant who bears the onus of establishing that a decision refusing the FOI request is justified, or that the Information Commissioner should give a decision adverse to the FOI applicant (s 55D(2)).
- 1.45 IC review applicants will generally be invited to provide information or submissions which explain why the agency's or Minister's decision is wrong before comment is invited from the agency or Minister.

Part 4: Non-compliance with this direction

- 1.46 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 review as outlined in s 54W(c). This means that, in these cases, the review will be finalised.
- 1.47 Applicants will be provided with the opportunity to explain why the Information Commissioner should not finalise the IC review under s 54W(c) of the FOI Act before a decision is made.

Attachment B

Summaries of updates and agencies' submissions

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
1.8 – Direction has effect from 1 July 2023	<ul style="list-style-type: none"> • N/A 	<p><u>Updated:</u></p> <ul style="list-style-type: none"> • This Direction has effect from 1 July 2024. The update is not in response to agencies' submissions. <p><u>Comments:</u></p> <ul style="list-style-type: none"> • As stated in the corresponding EB on the procedure direction for agencies (D2024/007050), we should potentially have a separate process for backlog matters. • We could state, for example: <p><i>For IC review applications received before 1 July 2024, agencies and ministers must have regard to Part 10 of the FOI Guidelines issued under s 93A of the FOI Act which sets out the general principles and expectations of the Information Commissioner regarding IC reviews. Specific directions may be made in the context of these IC reviews.</i></p>

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>1.13 – OAIC contacting applicants</p> <ul style="list-style-type: none"> Paragraph 1.13 explains that the OAIC will contact applicants using their preferred contact method. Paragraph 1.13 also states ‘Where an applicant has listed a preferred contact method as well as other contact information, the OAIC will consider any notices as received when sent to an applicant’s preferred contact’. 	<ul style="list-style-type: none"> The AAT submits that we may wish to consider referring to an exception where there is evidence of non-receipt, such as a returned letter or email non delivery message. 	<p><u>Not update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> Note that the existing IC review procedure for applicants contains the same wording at para 1.13. In practice, if we cannot contact an applicant, we may not be able to continue with the IC review and would consider finalising the IC review under s 54W(a)(iii) (cannot contact applicant after making reasonable attempts). We consider that it is not worthwhile discussing our power under s 54W(1)(a)(iii) here, at the beginning of the procedure direction.
<p>1.15 – Who can be an IC review applicant?</p> <ul style="list-style-type: none"> Paragraph 1.15 refers to s 54L(3), namely that an IC review application may be made by the person who made the request to which the decision relates, and the proceeding paragraphs 1.16 to 1.20 set out the requirements for the IC review application. 	<ul style="list-style-type: none"> The AAT queries whether the requirements for IC review applications of access grant decisions (s 54M) are the same as those discussed at paragraphs 1.16 to 1.20. 	<p><u>Update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> Update para 1.15 to refer to s 54M(3) (application for IC review of access grant decisions), given that the information requested in the following paragraphs can apply to applications for IC review of access grant decisions. Minor updates may be required to following paragraphs, such as to para 1.18(c) so that we refer to ‘wrongly granted’ rather than ‘wrongly refused’.

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>1.17(a) – Information that must be provided with IC review application:</p> <ul style="list-style-type: none"> Paragraph 1.17 states that ‘The applicant must provide the OAIC with about the FOI decision, in particular (a) ... (b) ... (c) ... (d) ...’. Paragraph 1.17(a) states that the applicant should say whether the decision under review is an original decision or internal review decision, and notes ‘it is usually better to seek internal review first ...’ (emphasis added) 	<ul style="list-style-type: none"> Defence proposes that we consider making internal review compulsory, in circumstances which allow it. This would allow for agencies and ministers to have further meaningful engagement with the applicant before they seek an IC review in an attempt to resolve the issues in an informal and timely way, thus reducing the workload for the OAIC. ATO submits that it is unclear whether there will be any requirement on the applicant to either seek internal review or provide details on why they did not consider it appropriate in the circumstances (ATO). 	<p><u>Not update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> Requiring applicants to seek internal review before seeking IC review is outside the scope of the procedural direction, and would require legislative change. We could consider making clearer by way of a separate dot point that, for example ‘applicants have a choice between applying for internal or IC review of a decision, unless the decision was made by the Minister or personally by the principal officer of an agency, or is a deemed access refusal decision. In those cases, applicants must directly apply for IC review.
<p>1.17(b) – Information to be provided with IC review application</p> <ul style="list-style-type: none"> Paragraph 1.17(b) notes that ‘In most cases, an application for IC review must be made within 60 days of the applicant being notified of the ... decision ...’ (emphasis added) 	<ul style="list-style-type: none"> The AAT submits that we may wish to consider whether the date of receipt of the decision is also relevant. 	<p><u>Not update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> Para 1.13 (above para 1.17) says ‘the OAIC will consider any notices as received when sent ...’. Given that agencies and the OAIC mostly send notices by email, we consider that no change is required to distinguish between the date a notice is given and the date received. The 60 day time limit for applying for IC review of an access refusal decision is also generous, which lessens the need to distinguish between when a notice is given, and received.
<p>1.17 (general)</p> <p>Agency reference number</p>	<ul style="list-style-type: none"> AFP submits that applicants should also be required to provide the agency reference number for the FOI decision. 	<p><u>Not update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> The applicant is already generally required to provide a copy of the decision (s 54N(1)(b)), which should state the agency reference number.

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>1.18 – Further information to be provided with IC review application:</p> <ul style="list-style-type: none"> Paragraph 1.18 advises that ‘An application for IC review should also: (a) ... (b) ... (c) ... (d) ...’, such as the aspects of the decision about which they seek the IC review. (emphasis added) 	<ul style="list-style-type: none"> ATO submits that given the mandatory consultation requirement proposed to be put on agencies it would appear appropriate for applicants to be required to provide the information set out in this paragraph prior to any consultation occurring. ATO also queries whether a failure to provide this information would be considered a ‘failure to engage’. 	<p><u>Not update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> Providing the information listed in para 1.18 is already framed as a requirement, stating ‘should’. The power to finalise an IC review for failure to cooperate (s 54W(a)(ii) is discussed in the second section of this part of the direction (under the subheading During the IC review), and does not need to be discussed in this section, the first section (under the subheading Making an application for IC review). We are required to provide appropriate assistance to a person who wishes to make an IC review application, and requires assistance (s 54N(3)), and therefore it is not appropriate to emphasise the power to finalise an IC review at the application stage).
<p>1.18(a) – Further requirements of IC review application</p> <ul style="list-style-type: none"> Paragraph 1.18(a) says that an application should ‘identify the aspect(s) of the ... decision about which the IC review is sought’. 	<ul style="list-style-type: none"> AGD submits that this wording may be confusing for some readers, and could alternatively say “identify the parts of the decision you want the Information Commissioner to review”. Defence submits that at para 1.18, the revisions suggest that an IC review application should identify why the agency's or minister's decision is wrong. Defence proposes making this compulsory, saying that would assist the agency or minister to better understand and resolve the issues in a meaningful, informal and timely way. 	<p><u>Update</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> Update in line with AGD’s proposal ‘identify the parts of the decision you want the Information Commissioner to review’. In relation to Defence’s submission, we note that providing the information listed in para 1.18 is already framed as a requirement, stating ‘should’.

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>1.23</p> <p>Engagement to resolve issues (issue 1)</p>	<ul style="list-style-type: none"> AAT submits that engagement should only be required if there has been no internal review of the decision. 	<p><u>Update</u></p> <ul style="list-style-type: none"> Clarify in both applicants and agencies procedure directions that engagement would not be required if they have evidence of engagement with the applicant that is above their duty to take reasonable steps to assist the person to make the request in a manner that complies with s 15 (s 15(3)), such as during an internal review process.
<p>1.23</p> <p>Engagement to resolve issues (issue 2)</p> <ul style="list-style-type: none"> Paragraph 1.23 states 'Agencies are required to contact applicants for IC review shortly after the IC review application is lodged to arrange a suitable time for the engagement process.' (emphasis added) 	<ul style="list-style-type: none"> AAT, AFP, and the Commonwealth Ombudsman submit that paragraph 1.23 should say that agencies are required to contact applicants to arrange the engagement after receiving the s 54Z notice. AFP in particular notes that there can be a delay between an IC review application and s 54Z notice. 	<p><u>Update</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> Consider updating para 1.23 to say 'after receiving the OAIC's notice of IC review under s 54Z'.
<p>1.23</p> <p>Engagement to resolve issues (issue 3)</p>	<ul style="list-style-type: none"> ATO submits it would also be helpful to provide applicants with further details about what is expected of them in terms of participating in agency engagement and that simply attending a meeting with no intention to attempt to resolve the review application would be not considered appropriate 'engagement'. 	<p><u>Update</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> Consider updating para 1.23 to say that the engagement may be more likely to resolve the matter if both parties are well prepared for the engagement. Consider updating para above, para 1.22 to discuss respectful engagement.

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>1.31 – Preliminary view</p> <ul style="list-style-type: none"> Paragraph 1.31 states ‘The OAIC may provide a preliminary view at any time ... The applicant may be invited in some cases to withdraw the IC review application, depending on the views expressed in the preliminary view’. 	<ul style="list-style-type: none"> The AAT submits that if there is an opportunity for the parties to provide information in response to the preliminary view, it may be useful to state this. Such a view may raise a fact or issue that can be addressed. 	<p><u>Update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> Update to clarify that the OAIC will invite the applicant to withdraw or make submissions in response to a preliminary view, in line with paras [10.60] of the draft FOI Guidelines (D2022/009530) which says: <p><i>10.60 ... the OAIC’s IC review officer may review the material submitted by both parties and provide a preliminary view as to the merits 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.</i></p>
<p>Revised decisions are not referred to in the draft procedure direction</p>	<ul style="list-style-type: none"> N/A (observed by OAIC) 	<p><u>Update.</u></p> <p><u>Comment:</u></p> <ul style="list-style-type: none"> In part 2, under subheading During the IC review, insert a sub-subheading ‘Receiving revised decisions under s 55G’ and insert content in line with para 1079 of draft Part 10 of the FOI Guidelines which says: <p><i>A 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.</i></p> <ul style="list-style-type: none"> Then add references to the Information Commissioner’s powers under 54W(a) and 54W(c).

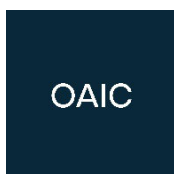
Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
General	<ul style="list-style-type: none"> AGD queries if it may be simpler and more effective for all users of the FOI system to have a single direction, addressed to both the agency and the applicant. This would ensure all parties have a consistent understanding of the IC review process. By comparison, we note the AAT General Practice Direction (General-Practice-Direction.pdf (aat.gov.au)), under s 18B of the Administrative Appeals Tribunal Act 1975 applies to all parties to a review and appears to provide greater consistency in the explanation of process and responsibilities. 	<p><u>Not update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> <u>We consider that having 2 procedure directions means that we have one particular procedure direction that is targeted to applicants and increases their accessibility to the information that they require to gain the benefit of an IC review.</u>
General	<ul style="list-style-type: none"> AGD submits that it is unclear what practice directions (if any) apply to third parties joined to an IC review or whether the process for an IC review in the directions for agencies and applicants may differ where there are other parties to the review. 	<p><u>Not update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> We consider that third parties do not require a procedure direction, and that their role is sufficiently discussed in the FOI Guidelines. Agencies also engage with third parties by way of consultation, which gives them the required information about the IC review process and their rights and obligations in relation to the IC review.
General	<ul style="list-style-type: none"> ATO submits that a delay in seeking a review by an applicant should be a ground for providing an agency with additional time to respond. 	<p><u>Not update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> To give agencies greater time to respond to our requests for information on the basis that the applicant has been granted an extension for applying for an IC review would not further the objects of the FOI Act, which include to facilitate and promote public access to information, promptly and at the lowest reasonable cost.

From: [AGO,Rocelle](#)
To: [TYDD,Liz](#)
Cc: [PEEL,Sara](#)
Subject: RE: Draft Procedure Direction [SEC=OFFICIAL]
Date: Monday, 11 March 2024 5:34:05 PM

Dear Liz

Thank you, we will review your comments/additions which I understand is highlighted in yellow in Attachment A in [D2023/015645](#).

Kind regards
Rocelle



Rocelle Ago (she/her)
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The OAIC acknowledges Traditional Custodians of Country across Australia and their continuing connection to land, waters and communities. We pay our respect to First Nations people, cultures and Elders past and present.

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From: TYDD,Liz <Elizabeth.Tydd@oaic.gov.au>
Sent: Monday, March 11, 2024 5:28 PM
To: AGO,Rocelle <Rocelle.Ago@oaic.gov.au>
Cc: PEEL,Sara <Sara.Peel@oaic.gov.au>
Subject: RE: Draft Procedure Direction [SEC=OFFICIAL]

Dear Rocelle

2 or 3 additions – please review but from my perspective finalised for submission to Angelene

Kind regards and thanks to all contributors

Liz

From: AGO,Rocelle <Rocelle.Ago@oaic.gov.au>
Sent: Tuesday, March 5, 2024 10:41 AM
To: TYDD,Liz <Elizabeth.Tydd@oaic.gov.au>
Cc: PEEL,Sara <Sara.Peel@oaic.gov.au>
Subject: Draft Procedure Direction [SEC=OFFICIAL]

Dear Liz

As you know, last year, we [published draft revisions to the two procedural directions \(PDs\)](#) for consultation: ‘*Direction as to certain procedures to be followed in Information Commissioner reviews*’ (for agencies) and the ‘*Direction as to certain procedures to be followed by applicants in*

Information Commissioner reviews'. By way of background, we drafted the revised directions in the context that we were working within existing resources and matters were being actioned in chronological order (subject to exception of priority cohorts).

The revised PD for agencies proposed a new requirement that agencies and ministers undertake engagement with an applicant at the commencement of an IC review – as well other revisions:

- clarifying the process for dealing with IC review applications involving deemed access refusal decisions
- clarifying the requirement for agencies and ministers to provide a marked up and unredacted copy of the documents at issue in an IC review, as well as a schedule of documents
- providing that submissions will only be requested after the completion of the initial triage and early resolution process, and following any case management activities that may occur as a result of the compulsory engagement process
- providing that no further submissions will be accepted from either party to an IC review (unless either requested by the OAIC or procedural fairness requirements are identified)
- articulating additional potential regulatory action for non-compliance with the direction.

In a public consultation process – via written submissions and a subsequent workshop held on 12 July 2023 – agencies expressed some concerns about the revised PDs. Notably, there was resistance to the mandatory nature of the requirement to engage with applicants. Agencies also raised issues around timeframes, the production of documents and other matters. We have previously documented agency concerns:

1. 'Talking Points for Workshop – IC review Procedure Direction': this brief groups and summarises agency concerns thematically and sets out the rationale underpinning key revisions: [D2023/015811](#).
2. Executive Brief: Revised IC review draft procedure directions: Submissions and Workshop – this includes a table summarising each submission: [D2023/015645](#).
3. Notes on the consultation workshop of 12 July 2023 (includes agency feedback): [D2023/016199](#).

In terms of finalising the PDs, once the revisions are settled – and in particular, if the proposed engagement requirement is implemented – we will need to consider commencement and/or transitional arrangements and whether, there are separate processes to follow for backlog matters and incoming matters.

For completeness, I also note that since respondents are now being given 8 weeks to respond to s 54Z notices – this is an extended period (from 3 weeks) consistent with the revised draft PDs. The extended period was intended to accommodate engagement between minister/agency and applicant. At present, the engagement requirement is not in play however agencies and ministers are generally expected to provide submissions within the 8 week period – this expectation around submissions would not be retained under the proposed arrangements in the new PDs.

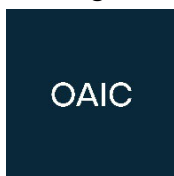
Finally, I confirm that we are progressing revisions to the Guidelines at [Part 10: Review by the Information Commissioner](#). A draft is currently before me

Once the PDs are settled and remade, we will be in a position to reflect updates in the Part 10 Guidelines.

As an aside, I have often considered whether the FOI Guidelines, as issued under s 93A, should be used for guidance around decision making on formal requests and obligations around the disclosure log/IPS, and rather than outlining the OAIC's IC review process, given the general

power to issue procedure directions under s 55(2). It may reduce duplication between the Guidelines and the procedure direction and also provide clarity around regulatory messaging.

Kind regards



Rocelle Ago (she/her)

Assistant Commissioner, Freedom of information

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The OAIC acknowledges Traditional Custodians of Country across Australia and their continuing connection to land, waters and communities. We pay our respect to First Nations people, cultures and Elders past and present.

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Executive brief

Responsible Executive Member:	Rocelle Ago, Assistant Commissioner FOI
Prepared by:	Sara Peel, Director, Monitoring, Guidance and Engagement
To:	Toni Pirani, FOI Commissioner
Copies:	Karen Tulloch, Raewyn Harlock
File ref:	D2023/015645
Date:	7 July 2023, updated 10 and 11 July 2023
Subject:	Revised IC review draft procedure directions: Submissions and Workshop

Purpose and timing

To provide a summary of the key themes/feedback from agencies' submissions to the draft revised IC review procedure directions ahead of the workshop on the IC review procedure directions in Canberra on 12 July 2023.

Recommendations

1. That you note the proposed revised *Direction as to certain procedures to be followed in IC reviews* set out in **Attachment A**.
2. That you note the comments and themes raised by agencies and the summaries of each agency's submission at **Attachment B** and the specific submissions as listed at **Attachment C**, noting the following agencies and attendees who will be attending the workshop on 12 July 2023:
 - a. Administrative Appeals Tribunal: s47F)
 - b. Attorney-General's Department: s47F
 - c. Australian Federal Police: s47F
 - d. Australian Tax Office: s47F
 - e. Commonwealth Ombudsman: s47F
 - f. Department of Climate Change, Energy, Environment and Water: s47F
 - g. Department of Defence: Steve Williams; s47F
 - h. Department of Employment and Workplace Relations: s47F
 - i. Department of Foreign Affairs and Trade: s47F
 - j. Department of Home Affairs: s47F
 - k. Department of Veteran Affairs: s47F

3. That you approve the proposed agenda for the workshop at **Attachment D**.

Background

Consultation

The Australian Information Commissioner may give written directions under s 55(2)(e)(ii) of the FOI Act in relation to procedures to be followed in Information Commissioner (IC) reviews.

The OAIC has revised the 2 existing procedure directions:

- Direction as to certain procedures to be followed in IC reviews for agencies and ministers (**Attachment A**)
- Direction as to certain procedures to be followed by applicants in Information Commissioner reviews.

We sought feedback with an extended consultation period closing on **Friday 30 June 2023**. In making submissions, agencies were advised:

We intend to make all submissions publicly available. Please indicate when making your submission if it contains confidential information that you do not want made public and why it should not be published. Requests for access to confidential comments will be determined in accordance with the FOI Act. If the OAIC accepts submissions in confidence you must also provide a copy that can be published.

Submissions

A summary of the submissions is set out at **Attachment B**. The list of submissions is set out at **Attachment C**.

Key themes and feedback

1. **Requirement to engage:** There is significant resistance to the mandatory nature of the requirement to engage with applicants. Agencies raise administrative burden, concerns about risks to staff, limited benefit or utility, as well as a range of other concerns. Agencies also consider that there should be flexibility in the method of engagement with applicants – so they are not limited to video and telephone conference – and raise applicants’ needs and preferences. Agencies have also submitted that the OAIC should be involved in the engagement as an independent third party.
2. **Timeframes:** Time frames are too short, extensions should be available other than in extenuating circumstances, or guidance should be provided as to what constitutes extenuating circumstances.
3. **Production of documents and requests to make submissions in confidence:** Agencies were also concerned regarding the requirement to provide marked-up and unredacted documents, as well as the requirement to request to make confidential submissions ahead of providing the submission.
4. **Other issues:**
 - The OAIC should identify issues in dispute at an early stage of the IC review process and communicate this to parties to establish scope, facilitate targeted submissions and an efficient process.
 - There should be more information about the steps and process undertaken by the OAIC, including the time-frames that apply to the OAIC.

Workshops

Timing and attendees

For agencies that have made submissions, we have provided the opportunity host a workshop to work through their concerns. Due to the number of attendees, two workshops have been scheduled for **Wednesday 12 July 2023** at 4 national Circuit (Flex ISPT Room M4):

- Session 1: 10:00 – 11:15 am
- Session 2: 11:30 – 11:45 am

A proposed agenda is set out at **Attachment D**. The agenda will be updated on Tuesday 11 July 2023 to confirm attendees for each workshop.

Attendees from the OAIC will include:

1. **Toni Pirani**, Acting FOI Commissioner
2. **Rocelle Ago**, Assistant Commissioner Freedom of Information
3. **Sara Peel**, Director, Monitoring Guidance and Engagement
4. **Romina Domenici**, Executive Officer

Attachments

1. **Attachment A**: Direction as to certain procedures to be followed in IC reviews
2. **Attachment B**: Summaries of agencies' submissions
3. **Attachment C**: List of agencies' submissions
4. **Attachment D**: Draft Agenda

Attachment A



Australian Government

Office of the Australian Information Commissioner

Direction as to certain procedures to be followed in IC reviews

This direction is given under s 55(2)(e)(i) of the *Freedom of Information Act 1982*.

Contents

Direction as to certain procedures to be followed in IC reviews

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1. About this Direction

- 1.1 This Direction is given by the Australian Information Commissioner under s 55(2)(e)(i) of the *Freedom of Information Act 1982* (the FOI Act) in relation to Information Commissioner (IC) reviews generally.
- 1.2 The purpose of this Direction is to set out the particular procedures that agencies and ministers are required to follow during IC reviews, including procedures relating to:
 - deemed access refusal decisions
 - a requirement to engage, or make reasonable attempts to engage, with IC review applicants during the IC review for the purpose of genuinely attempting to resolve or narrow the matters at issue in the IC review
 - the production of documents and submissions.
- 1.3 This Direction does not apply to the extent it is inconsistent with a provision of the FOI Act, another enactment or a specific direction made in a particular IC review.
- 1.4 This Direction is not a legislative instrument.¹
- 1.5 This Direction has effect from 1 July 2024.

2. General principles

- 2.1 IC review procedures are found in Part VII of the FOI Act. The IC review process is intended to be an informal, non-adversarial and timely means of external merits review of decisions by agencies and ministers in relation to FOI requests. Part 10 of the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act, to which ministers and agencies must have regard in performing a function or exercising a power under the FOI Act, sets out in detail the process and underlying principles of IC review.
- 2.2 Before commencing an IC review, the Information Commissioner will notify the relevant agency or minister that an applicant has applied for IC review of the agency or minister's decision (s 54Z notice of IC review).²
- 2.3 Section 55(2)(a) of the FOI Act authorises the Information Commissioner to conduct an IC review in whatever way the Information Commissioner considers appropriate. Section 55(2)(d) of the FOI Act allows the Information Commissioner to obtain any information from any person and to make any inquiries that the Information Commissioner considers appropriate.
- 2.4 In general, IC reviews will be conducted on the papers unless there are unusual circumstances to warrant a hearing.³ Therefore, complete and timely production of

¹ Section 55(3) of the FOI Act.

² Not every application for IC review will proceed to an IC review. The Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* (FOI Guidelines) set out the circumstances in which the Information Commissioner may not conduct a review at [10.81] and [10.85] – [10.86].

³ See *FOI Guidelines* at [10.20] and [10.63].

documents at issue, submissions and any other information that has been requested is important.

- 2.5 Under s 55DA of the FOI Act, agencies and ministers must use their best endeavours to assist the Information Commissioner in the conduct of IC reviews. Under s 55D(1) of the FOI Act, agencies and ministers have the onus of establishing that a decision refusing access is justified or that the Information Commissioner should give a decision that is adverse to the IC review applicant in an IC review of an access refusal decision. The Information Commissioner will make a decision in an IC review on the basis of the evidence before them. Failure to properly satisfy the onus in s 55D(1) by providing the Information Commissioner with complete and appropriate evidence for an access refusal decision will increase the likelihood of a decision being made that is adverse to an agency or minister.
- 2.6 Section 55Z of the FOI Act provides immunity to a person from civil proceedings and penalties if the person gives information, produces a document or answers a question in good faith for the purposes of an IC review.

3. General procedure in relation to IC review of deemed refusal decisions

Preliminary inquiries

- 3.1 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 Information Commissioner will undertake preliminary inquiries under s 54V of the FOI Act. In undertaking preliminary inquiries, the Information Commissioner will require the agency or minister to confirm that the relevant FOI request is deemed to have been refused.
- 3.2 Agencies and ministers will have one week to respond to the Information Commissioner's preliminary inquiries.

Commencement of review

- 3.3 If the agency or minister confirms that the relevant FOI request is deemed to have been refused, or fails to respond to the Information Commissioner's preliminary inquiries, a notice under s 54Z will be issued notifying of the commencement of an IC review. This notice will be accompanied by a direction under s 55(2)(e) of the FOI Act, requiring the agency or minister to either:
 - a. make a revised decision under s 55G if the decision the agency or minister intends to make will result in the giving of access to the requested documents in full and to provide the relevant decision to the applicant and to the Information Commissioner or
 - b. make a revised decision under s 55G if the decision the agency or minister intends to make will result in the giving of access to some of the requested documents, and to provide the relevant decision and non-exempt documents to the applicant, and to provide all relevant processing documents and the documents remaining at issue to the Information Commissioner or
 - c. make submissions in support of the access refusal if the agency or minister intends refusing access to the requested documents and to send those submissions to both the

Information Commissioner and the applicant. The agency or minister must also provide all relevant processing documents and exempt documents to the Information Commissioner under s 55T of the FOI Act.

3.4 Agencies and ministers will have 3 weeks to respond to the Information Commissioner's written direction.

4. General procedure in relation to review of other access refusal and access grant decisions

Commencement of review

4.1 The Information Commissioner will issue a notice under s 54Z of the FOI Act to advise the respondent agency or minister of the commencement of the IC review (s 54Z notice).

Requirement to engage with the applicant

4.2 The s 54Z notice will also require the agency or minister to engage, 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 in the IC review.

4.3 Engagement with IC review applicants will comprise a telephone or video conference between the applicant and the agency or minister. The agency or minister will be responsible for contacting the applicant and making the necessary arrangements for the engagement process. The OAIIC will not be involved in making such arrangements or in attending the telephone or video conference.

Response to s 54Z notice

4.4 The agency or minister will generally have 6 weeks to respond to the Information Commissioner's s 54Z notice. The 6 week timeframe takes into account the time needed to contact and make arrangements with the applicant for the engagement process, and to reach agreement, where relevant. It is not expected that agencies or ministers will require any additional time. The Information Commissioner will consider any request for an extension of time on a case-by-case basis. However it is expected that it will only be in extenuating circumstances that any further extension to time will be granted.

4.5 Respondent agencies and ministers must provide the Information Commissioner with evidence of the action they have taken to address the issues identified in the IC review application, or actions taken to contact the applicant.⁴

4.6 The evidence to be provided to the Information Commissioner will include:

- evidence 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

⁴ An agency may not be required to engage in the conciliation process if it is able to provide evidence of having engaged in a similar process at an earlier stage. However, participation in formal statutory processes (for example, the request consultation process outlined in s 24AB of the FOI Act in relation to practical refusals) will not be a basis for not consulting the applicant in relation to the IC review.

- evidence of 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
- evidence of the outcome of the engagement between the agency or minister and the IC review applicant, including any evidence 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.⁵

4.7 In the event that not all issues in dispute in the IC review are resolved through the engagement process with the IC review applicant, respondent agencies and ministers should consider whether to make a revised decision under s 55G of the FOI Act.

4.8 If the respondent agency or minister decides not to make a revised decision under s 55G giving full access in accordance with the applicant's FOI request, agencies and ministers are required to provide the Information Commissioner with the FOI request processing documents and marked up copies of the exempt documents at issue in the IC review (if applicable) (see [5.2] below).

5. General procedure for production and inspection of documents

Production of documents

5.1 The Information Commissioner has various powers to require the production of information and documents under the FOI Act. These powers are outlined in Annexure 1 to this Direction. In addition to the Information Commissioner's information gathering powers under Division 8 of the FOI Act, the Information Commissioner is able to obtain any information from any person, and to make any inquiries, that are considered to be appropriate under s 55(2)(d) of the FOI Act. Therefore, when the Information Commissioner commences an IC review by issuing a notice of IC review, the Information Commissioner will also request relevant information and documents to progress the IC review.

5.2 Document production requirements may vary from case to case depending on the issues being considered (application of exemptions, searches, charges or practical refusal).⁶ In relation to IC reviews involving the application of exemptions under the FOI Act, the Information Commissioner will require the agency or minister to provide a marked up and unredacted copy of the documents at issue in electronic format and the documents setting out any relevant consultations (for example, under ss 26A, 27 or 27A of the FOI Act).⁷

5.3 In providing the Information Commissioner with a marked up copy of relevant documents, agencies and ministers must ensure that all redactions pursuant to an exemption, or deletions on the basis of relevance pursuant to s 22(1)(a)(ii) of the FOI Act, are clearly marked

⁵ At Annexure 2 to this Direction is an evidence checklist designed to assist agencies and ministers provide relevant evidence relating to the agency or minister's engagement with the applicant during the IC review.

⁶ See *FOI Guidelines* at [10.98].

⁷ See *FOI Guidelines* at [10.100].

with reference to the relevant provision of the FOI Act that the redactions or deletions are made under. A schedule of marked up documents must also be included.

- 5.4 In IC reviews where an agency or minister claims that documents cannot be found or do not exist, the Information Commissioner will require the agency or minister to provide evidence of the searches that have been undertaken to find relevant documents.⁸
- 5.5 In IC reviews involving a charge or a practical refusal reason, the Information Commissioner may require the agency or minister to provide a sufficiently representative sample of documents considered to be within the scope of the request.⁹ The OAIC has developed templates to assist decision makers in providing cogent reasons for this decision. Those reasons must be adequate s55E.
- 5.6 Agencies and ministers must provide their response within the timeframe set out in the notice, unless an extension of time has been sought and granted. However as noted at [4.4], the Information Commissioner considers that it will only be in extenuating circumstances that any further extension to time will be granted. If an agency or minister requires an extension of time to respond to a notice of IC review, the agency or minister must make a request in writing to the Information Commissioner with supporting evidence of the need for the extension prior to the due date.
- 5.7 Where an agency or minister fails to provide information and documents within the initial or extended timeframe, or requests another extension, the Information Commissioner may proceed to require the provision of information and the production of documents pursuant to s 55R of the FOI Act (discussed at Annexure 1 to this Direction).

Inspection of documents

- 5.8 Inspection of the documents at issue by the Information Commissioner in response to a request for production will only be considered in very limited situations where the agency or minister can demonstrate that the circumstances warrant inspection rather than the direct production of copies of the marked up documents.
- 5.9 What constitutes these very limited circumstances is not prescriptive and will be determined on a case-by-case basis. The onus is on the requesting agency or minister to justify that circumstances exist that warrant inspection.
- 5.10 If an agency or minister is of the view that there are circumstances that justify inspection, the Information Commissioner will require the agency or minister to provide a written request for inspection together with supporting reasons prior to the due date in the s 54Z notice of IC review.
- 5.11 The Information Commissioner considers that inspection will not be warranted where the documents at issue are subject to conditional exemptions. The Information Commissioner considers that inspection may be appropriate in some circumstances where the documents at issue are subject to a national security, Cabinet or Parliamentary Budget Office exemption

⁸ See *FOI Guidelines* at [10.98].

⁹ See *FOI Guidelines* at [3.121] and the IC review decisions in *Adrian Wright and Department of Human Services (Freedom of information)* [2017] AICmr 127 and *Cash World Gold Buyers Pty Ltd and Australian Taxation Office (Freedom of information)* [2017] AICmr 20.

claim (ss 33, 34 and 45A of the FOI Act). However, the requesting agency or minister must satisfy the Information Commissioner that the circumstances warrant inspection.¹⁰

- 5.12 If the Information Commissioner agrees to an agency's or minister's request for inspection, the agency or minister will be required to undertake all necessary arrangements to facilitate the inspection. Unless otherwise agreed, this will occur at the Information Commissioner's office.

6. General procedure in relation to submissions made during an IC review

General principles

- 6.1 All parties to an IC review will be given a reasonable opportunity to present their case through written submissions.
- 6.2 Written submissions will be sought from parties following the completion of the initial triage and early resolution process and once the matter has been assigned to a review adviser for substantive review/case management.
- 6.3 In seeking submissions from agencies and ministers in support of the IC reviewable decision, the OAIC will require the agency or minister to send their submissions to the applicant at the same time as they are sent to the Information Commissioner. 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 Information Commissioner.
- 6.4 Agencies should approach the preparation of submission on the basis of comprehensively addressing all issues. Agencies should not expect the opportunity for further submissions. Subject to [6.6], the Information Commissioner will not accept any further submissions from either party to the IC review.
- 6.5 The Information Commissioner will generally provide each of the parties with 4 weeks to make their submissions.
- 6.6 The Information Commissioner will contact the parties after receipt of submissions if procedural fairness requirements are identified or where a preliminary view can be provided to an agency that may result in an agency or minister making a revised decision under s 55G of the FOI Act.

Request to make submissions in confidence

- 6.7 If an agency or minister wishes to make a submission in confidence, a request for the submission to be treated in confidence must be made before providing the submission. Any request for confidentiality must be accompanied by reasons to support such a claim, including whether the submission would reveal the contents of the documents at issue.

¹⁰ The OAIC is able to receive secure electronic transmission of documents. For more information contact the OAIC.

- 6.8 Where the Information Commissioner accepts a submission in confidence, agencies and ministers must provide a version of the submission that can be shared with the applicant.¹¹
- 6.9 If the Information Commissioner forms the view that the submission does not disclose exempt matter, or is otherwise not inherently confidential, the Information Commissioner will advise the agency or minister of this view and invite the agency or minister to withdraw the claim for confidentiality with respect to the submission. If the agency or minister does not wish to withdraw the claim for confidentiality they may elect to withdraw the submission because it will not be considered by the Information Commissioner to make a decision under s 55K of the FOI Act on the issues in the IC review.

Consideration of submissions

- 6.10 The Information Commissioner will generally proceed with the IC review on the basis of the evidence provided in response to the s 54Z notice, and submissions.
- 6.11 Where the Information Commissioner makes a decision on IC review pursuant to s 55K of the FOI Act, the Information Commissioner will quote or summarise an agency's or minister's non-confidential submissions in the published decision. If a confidential submission is relied on by the Information Commissioner in making a decision on the IC review, this will be noted in the decision without revealing the confidential material.
- 6.12 In providing submissions, agencies and ministers should be mindful of their obligation to assist the Information Commissioner pursuant to s 55DA of the FOI Act and their onus under s 55D of the FOI Act. As it may be appropriate for an IC review to proceed to a decision under s 55K of the FOI Act on the basis of a response to a notice of IC review, it is in agency's and ministers' interests to put forward all relevant contentions and supporting reasons in response to the notice of review.¹²
- 6.13 Agencies and ministers 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 decision under s 55K of the FOI Act without any further opportunity to make submissions.

7. Non-compliance with this Direction

- 7.1 Because the model litigant obligation under the *Legal Services Directions 2017* extends to Commonwealth entities involved in merits review proceedings, failure to adhere to the requirements of this Direction may amount to non-compliance with the model litigant obligation.¹³
- 7.2 The Information Commissioner may report non-compliance with this Direction in the Office of the Australian Information Commissioner's Annual Report.
- 7.3 The Information Commissioner may also report non-compliance with this Direction to the Office of Legal Services Coordination in the Attorney-General's Department.

¹¹ See *FOI Guidelines* at [10.103].

¹² See *FOI Guidelines* at [10.74].

¹³ See paragraph 3 of Appendix B to the *Legal Services Directions 2017*.

7.4 The Information Commissioner may also consider investigating the non-compliance under Part VIIB of the FOI Act.

Angelene Falk
Australian Information Commissioner

DATE

Annexure 1: Information gathering and document production powers

1. Notice to Produce

- 1.1 Pursuant to s 55R(3) of the FOI Act, the Information Commissioner may issue a written Notice to Produce to require an agency or minister to give information or produce documents of a kind specified in the Notice. A Notice to Produce may also be issued in conjunction with either ss 55T or 55U of the FOI Act (discussed below).
- 1.2 The Information Commissioner will allow at least 2 weeks for agencies and ministers to respond to a Notice to Produce. It is an offence to fail to comply with a Notice to Produce issued by the Information Commissioner.

2. Production of exempt documents generally

- 2.1 Section 55T of the FOI Act concerns the production of exempt documents generally. This section applies when an agency or a minister claims that a document is an exempt document and the document is not covered by s 55U of the FOI Act (discussed below).
- 2.2 Section 55T(2) of the FOI Act provides that, for the purposes of deciding that a document is an exempt document, the Information Commissioner may require the document to be produced. In addition, s 55T(4) of the FOI Act provides that the Information Commissioner may require the production of an exempt document for the purpose of determining whether it is practicable for an agency or a minister to give access to an edited copy of the document.

3. Production of particular exempt documents

- 3.1 Section 55U of the FOI Act concerns the production of documents subject to a national security, Cabinet or Parliamentary Budget Office exemption claim (ss 33, 34 or 45A the FOI Act).
- 3.2 Section 55U(3) of the FOI Act provides that, if the Information Commissioner is not satisfied by evidence on affidavit or otherwise that a document is an exempt document under ss 33, 34 or 45A of the FOI Act, the Information Commissioner may require the document to be produced for examination.
- 3.3 If, after examining the documents, the Information Commissioner is still not satisfied that the documents are exempt under s 33 of the FOI Act, pursuant to s 55ZB of the FOI Act, the Information Commissioner will request the Inspector-General of Intelligence and Security to appear and give evidence on the damage that would or could reasonably be expected to result from the release of the documents.¹⁴

¹⁴ The Information Commissioner has a Memorandum of Understanding with the Inspector-General of Intelligence and Security to facilitate the Information Commissioner's information gathering powers.

Annexure 2: Evidence checklist – IC review compulsory conference

The 'Direction as to certain procedures to be followed in IC review' issued under s 55(2)(e)(i) of the Freedom of Information Act 1982 by the Australian Information Commissioner requires agencies and ministers to engage, or make reasonable attempts to engage, with IC review applicants during the IC review.

Agencies and ministers must provide the Information Commissioner with evidence of the action they have taken to address the issues identified in the IC review application, or actions taken to contact the applicant. This checklist has been developed to assist agencies provide relevant evidence and can be used as a cover when providing relevant evidence to the OAIC.

1. Contact with IC review applicant

Evidence of earlier engagement in similar process*	<input type="checkbox"/> Attached <input type="checkbox"/> Not applicable
Copy of letter sent to IC review applicant to arrange contact	<input type="checkbox"/> Attached <input type="checkbox"/> Not applicable
Date of Letter	[insert date]
File note of telephone call to IC review applicant	<input type="checkbox"/> Attached <input type="checkbox"/> Not applicable
Copies of written correspondence from IC review applicant	<input type="checkbox"/> Attached <input type="checkbox"/> Not applicable

2. Attempts to resolve issues in dispute

File note of engagement with applicant	<input type="checkbox"/> Attached <input type="checkbox"/> Not applicable
Suggestions made by agency/minister to resolve IC review	<input type="checkbox"/> Attached <input type="checkbox"/> Not applicable
Response provided by applicant, and any suggestions made by applicant to resolve IC review	<input type="checkbox"/> Attached <input type="checkbox"/> Not applicable

3. Outcome of engagement

Outcome of engagement	<input type="checkbox"/> Attached <input type="checkbox"/> Not applicable
Written notification that IC review applicant wishes to withdraw their application for IC review	<input type="checkbox"/> Attached <input type="checkbox"/> Not applicable

* An agency may not be required to engage in the engagement process if it is able to provide evidence of having engaged in a similar process at an earlier stage. However, participation in formal statutory processes (for example, the request consultation process outlined in s 24AB of the FOI Act in relation to practical refusals) will not be a basis for not consulting the applicant in relation to the IC review.

Attachment B

Summaries of agencies' submissions

Agency	Comments
Administrative Appeals Tribunal (AAT) <u>D2023/014318</u>	<p>Comments on process and overview</p> <ul style="list-style-type: none"> • Suggests increasing clarity on components and timeframes, including flow chart. For example, the stage of the process in which submissions are requested is not clear. [para 3.2; 3.4; 4.4; 6.5] • Not clear how and when identification of the issues in the IC review application occurs. Efficiency will be enhanced if issues are determined by the OAIC as early as possible (at point of notifying the agencies) and conveyed to the parties, enabling them to focus on real issues in dispute, and manage the scope/expectations of further engagement. [4.1; 4.2] • This submission makes a range of detailed/technical comments concerning the directions and suggests various aspects where clarity could be increased. <p>Response to s 54Z notice and s 55(2)(e) direction</p> <ul style="list-style-type: none"> • Requirement at 3.3b to provide the processing documents and remaining documents at this stage based on a deemed refusal seems premature. Should check with applicant whether they want a review of material exempted under the decision before the material is unnecessarily collected and submitted to the OAIC. • Requirement at 3.3c to make submissions in support of the access refusal – suggest it would be preferable to provide a statement of reasons for the decision; also reiterate comment above about requirement to provide processing and exempt documents. • 3 weeks may be too short in some cases, could refer to the possibility of seeking an extension of the time frame by way of consultation. <p>Time frames</p> <ul style="list-style-type: none"> • Time frames are generally too short, given the increased complexity of digital information collection/storage and increasing breadth and volume of requests. [Para 4.4;] • Given the significant variation in complexity, the setting of time periods for the provision of material should be done in consultation with the agency rather than relying on standard time frames. It is usual for a court or tribunal to ask parties how long they need in setting a timetable. This also avoids the need to commit resources to administering extension of time requests. • The 2-week time period (set out in Annexure 1) to respond to a Notice to Produce should instead be set following consultation with the agency (given preparation may be resource intensive and failure to comply is an offence). <p>Engagement requirement</p> <ul style="list-style-type: none"> • The engagement process should only occur where there has been no internal review and the manner in which it should be conducted should be left to the agency, which will have a better understanding of the best way to communicate with the applicant. Engagement requirement may cause delay or annoy the applicant where engagement has already occurred.

Agency	Comments
	<ul style="list-style-type: none"> • Unreasonable to undermine arrangements/protocols for applicants who have engaged in abusive/unreasonable behaviour, refers to managing psychological hazards • Evidence of the engagement could be more proportionately satisfied by the provision of a statement similar to that required by federal courts by section 6 of the <i>Civil Dispute Resolution Act 2011</i>. <p>Production of documents</p> <ul style="list-style-type: none"> • Marking up and schedule requirements can be resource intensive. Suggests referring to the Information Commissioner’s ability to specify alternative requirements, which can be determined in consultation with the agency/minister where appropriate. • Unclear how time-frame in the notice is determined. 8-week time-frame, this is insufficient for the outcome of any engagement to be considered by the OAIC and taken into account in narrowing scope to issues in dispute. Suggest the time-frame is determined in consultation with the agency.
<p>Australian Federal Police (AFP)</p> <p>D2023/015096</p> <p><i>This summarises their public submission.</i></p> <p><i>AFP have also submitted a ‘confidential submission’ with further information. We have requested they provide reasons for us not to publish.</i></p>	<p>Engagement requirement</p> <ul style="list-style-type: none"> • Disagrees with compulsory requirement. Raises workplace health and safety implications on the FOI practitioners. • FOI practitioners are not trained mediators. Notes time and expense to upskill FOI practitioners in negotiation or to engage external (legal) providers. • Attempts at engagement are frequently made at the primary decision or internal review stages. Unlikely to have more success in reaching resolution at the IC stage, particularly without the involvement of an independent third party. <p>Response to s 54Z notice</p> <ul style="list-style-type: none"> • Evidence requirements in response to a 54Z notice will place additional reporting and administrative obligations on agencies. Expresses concern that this will add further pressures to the staff workloads, detrimentally affect FOI processing timeframes. <p>Making an application for IC review</p> <ul style="list-style-type: none"> • Recommends adding the requirement for an agency reference number to the information that an applicant must provide. Applicants may have multiple FOI matters at various stages – without the reference, it can be difficult to establish which is the relevant matter.
<p>Australian Taxation Office (ATO)</p> <p>D2023/015090</p>	<p>Commencement of review: s 54Z notice and direction under s 55(2)(e)</p> <ul style="list-style-type: none"> • Suggests that we soften language to indicate that the three options in response to a s 55(2)(e) notice (release in full, release in part, refuse access) will generally be applicable, and that extensions might be appropriate in some cases.

Agency	Comments
	<ul style="list-style-type: none"> • There are circumstances not covered by the above options – for example, in complex matters it may be still unclear what or how many documents might be caught by a request, and an agency may consider an unreasonable diversion of resources argument. • Agencies may not be able to comply with the 3-week time-frame e.g. because of the number or sensitivity of documents or the time lapsed since the decision was made. <p>Engagement requirement</p> <ul style="list-style-type: none"> • Considers that either an aspirational or matter specific approach would be preferable. • Requirement may lead to a ‘tick box’ exercise without meaningful results in a majority of cases. • Where disagreements over ‘discretionary’ matters – such as size/scope of request – are not resolved at initial decision or internal review stages, it is unlikely further engagement will progress the matter. In the case of ‘non-discretionary’ issues – such as the application of the tax law confidentiality – it is not useful to set out the same reasoning which has not previously been accepted by the applicant. • Avenues to resolve issues can occur outside the engagement process, such as by investigating issues, exploring options for resolution with other agency officers or with third parties. The ATO assumes that such attempts will not be taken into consideration. • Notes circumstances where it is appropriate not to engage with applicants beyond what is necessary for their statutory functions, including for WHS reasons. Engagement is also unlikely to be effective where an applicant repetitively seeks access, in cases where an agency has explained why they cannot provide access. <p>Production of documents</p> <ul style="list-style-type: none"> • Submits that they should not be obligated to provide a marked up and unredacted copy of the document at issue in some cases – in particular, evidence to justify an exemption can exist with having regard to those documents. They make some exemption decisions without searching for and collating the documents (e.g. Person A requesting Person B’s tax return, in some instances there are also applicable offence provisions). This means they would be searching for and collating documents solely for the purposes of the IC review. <p>Production of schedule</p> <ul style="list-style-type: none"> • Submits that the requirement for a schedule of marked up documents to be provided should not be necessary in every case but only ‘where appropriate’. Notes instances where both the nature of the document and redactions are self-evident and that they provide documents in electronic bundles so particular exemptions can be located in seconds. <p>Timeframes for providing responses</p> <ul style="list-style-type: none"> • Express concerns about the position where further time is only provided in ‘extenuating’ circumstances (in this case, referring to the Direction concerning provision of sample documents). Suggest extensions should be provided where appropriate. Notes issues such as the number/sensitivity of documents and the time which has lapsed since the original decision contribute to the work involved in responding to an IC review. • Raises concern about the requirement to make an extension request in writing and with supporting evidence: states that this overlooks ‘utmost’ efforts towards compliance, competing priorities and factors beyond control.

Agency	Comments
	<p>Limit on submissions after initial exchange:</p> <ul style="list-style-type: none"> • Suggests less prescriptive wording, as the circumstances set out in the Direction are not the only circumstances where it might be appropriate to allow a party to make further submissions. <p>Request to make submissions in confidence</p> <ul style="list-style-type: none"> • Expresses lack of understanding as to why this request must be made before providing the submission. Submits that request for confidentiality and a submission could be made at the same time without affecting the OAIC process for dealing with these submissions. <p>Timeliness of IC Applications</p> <ul style="list-style-type: none"> • Referring to the strict timeframe which are proposed for agencies, suggests consideration as to whether an applicant’s delay in seeking a review will be a ground for providing an agency with additional time to respond, noting that it is more difficult to respond to aged matters. <p>Participation in IC review – ‘failure to engage’</p> <ul style="list-style-type: none"> • Clear enforceable requirements on applicants will assist in making consultations meaningful and productive. • Provide further information to applicants on what is a failure to engage. • A failure to provide the information required of an IC applicant in the Direction should be a ‘failure to engage’. • Provide applicants with details about expectations around engagement with the agency and that attending a meeting with no intention to attempt towards resolution is not considered appropriate ‘engagement’.
<p>Attorney-General’s Department (AGD) D2023/015009</p>	<p>Timeframes, steps in the process, transparency</p> <ul style="list-style-type: none"> • Suggests greater clarity concerning the time-frames that apply to the OAIC. • The order in which certain steps are to occur in the IC process is unclear (in particular, where the s 54Z notice fits in with other steps). • Detail about certain steps are not explained in the draft direction. For example, there is no explanation about when the OAIC will endeavour to make its decision, nor the timeframe for providing documents to the applicant (if the IC decides to vary the decision) and the timeframe for destruction or return of evidence documents to agencies for discontinued reviews. • The OAIC should commit to status updates to agencies in more circumstances than outlined in the guidelines, and at regular intervals. • Recommends a checklist, or some other method of transparency, about the IC review process. Additional guidance such as a flow chart similar to the AAT flow chart would be useful. <p>Response to s 54Z notice</p> <ul style="list-style-type: none"> • Extensions might be needed more routinely than in ‘extenuating circumstances’. Sometimes agencies have not been notified of IC review applications for more than 12 months after it was lodged – this additional time means agencies need to re-consult stakeholders on exemption claims, and there is also the engagement requirement to factor in.

Agency	Comments
	<p>Engagement requirement</p> <ul style="list-style-type: none"> • Where agencies have not been notified of an IC review application, they cannot – as required in the draft direction – contact applicants shortly after it is lodged (as required in the draft direction). • Suggests that agencies be provided a copy of the review application close to the time of receipt by the OAIC, so they can be proactive from an earlier stage. Alternatively, agencies should be made aware the OAIC has received the notice of review and advised when they can expect to receive a copy. • The guidance could be read to suggest that the engagement requirement only applies to access refusal or access grant decisions (not deemed refusals). This would not appear to take into account third-party consultations. • Without the OAIC’s involvement, or a clear framework to support the engagement process, there is the potential for disputes about what has occurred and agreed on during the process. • This process may expose agency staff dealing with abusive applicants to WHS risks. • Expresses a strong view that there should be discretion as to the engagement method. Verbal engagement may not be practicable, nor the preference, for applicants who are incarcerated, who are disabled, who are located overseas or who have English as a second language. • Additional OAIC guidance about the engagement process would be helpful and promote consistency, such as templates and information for applicants about appropriate conduct (which could potentially mitigate risks to staff). • Different matters may require different levels of engagement (e.g. deemed refusal compared to a matter where significant negotiation has occurred under a s 24AB process) – it would be helpful to provide some detail about the kind of engagement required in different circumstances. <p>Non-compliance with direction – reports to Office of Legal Services Co-ordination</p> <ul style="list-style-type: none"> • Non-compliance with the procedural direction may not always amount to non-compliance by the agency with its model litigant obligations. Suggests some minor language changes. <p>Format of directions, third parties</p> <ul style="list-style-type: none"> • May be simpler and more effective to have a single direction, addressed to both the agency and the applicant. • Unclear what practice directions (if any) apply to third parties joined to an IC review or whether the process for an IC review in the directions for agencies and applicants may differ where there are other parties to the review.
<p>Department of Climate Change, Energy, the Environment and Water (DCCEEW)</p> <p>D2023/015095</p>	<p>Engagement requirement:</p> <ul style="list-style-type: none"> • Undue administrative burden – creates additional work and increase need for extensions of time, additionally strain its ability to meet its statutory obligations. • Increased complexity is exacerbated by notification of IC reviews after significant time has passed since the original decision (staff movements and Machinery of Government changes increase the challenge of a consultation process). • Objects to mandatory nature – noting they regularly provide submissions to IC reviews where there is no realistic chance that the review will be successful, no benefit in an engagement requirement in these circumstances.

Agency	Comments
	<p>Section 54Z</p> <ul style="list-style-type: none"> If the engagement requirement is implemented, submits that the proposed 8 week time period is inadequate (presumably referring to s54Z).
<p>Department of Defence (Defence)</p> <p>D2023/015719</p>	<p>Engagement requirement:</p> <ul style="list-style-type: none"> May cause delay when there has already been engagement through the internal review process It may not be possible to provide further meaningful information to the applicant Suggests optional conferences that can be conducted by any method considered reasonable to the parties, such as email (noting this may also assist anonymous applicants) Parties choosing the method enables agencies to put in place WHS and security protections for staff Considers OAIC involvement in conferences vital, also considers that the OAIC should provide parties with an early high-level merits review assessment and promote informal resolution strategies If issues are not resolved through engagement, consider requiring the applicant to advise OAIC of the minister/agency response and why they were not satisfied <p>Section 54Z notice:</p> <ul style="list-style-type: none"> An additional 10 business days, in addition to the 8 weeks, should be provided to respond, if engagement with the applicant is required at the start of the IC review Suggests suspension of the notice if an agreement is reached, in conference, that the agency will review the FOI request with a view to providing a s 55G decision <p>Production of documents:</p> <ul style="list-style-type: none"> Considers requirement for a ‘sufficient representative sample of documents’ to be ambiguous – suggests clarification, for example, by providing a percentage Requests more flexible arrangements for inspection, allowing for inspection at an agency’s premises, for security reasons. <p>IC application / applicant’s submissions:</p> <ul style="list-style-type: none"> Vital for applicant to articulate their reasons for disagreeing with a particular aspect of the decision at the time they lodge their application – this would lead to more targeted submissions by agencies/ministers and meet procedural fairness requirements. Should be compulsory in the IC application for applicants to identify why an agency’s/minister’s decision is wrong. <p>Commencement date:</p> <ul style="list-style-type: none"> Requests commencement date after 1 October 2023, given resources/training/processes impacts.

Agency	Comments
Department of Employment and Workplace Relations (DEWR) D2023/015092	<p>Section 54Z notice:</p> <ul style="list-style-type: none"> Suggests a 30-day timeframe to make either a revised section 55G decision or provide submissions in support of access refusal of documents, stating this is consistent with other FOI-Act timeframes. <p>Engagement requirement</p> <ul style="list-style-type: none"> Concerned about the compulsory nature, suggests it be discretionary. Applicants may find a forced process of dealing with the agency daunting or frustrating, rather than dealing with the OAIC to which it has applied. Where relationship between parties has broken down, this could be unproductive and entrench an applicant in their position, at a point where third-party intervention by OAIC has been requested and could provide a circuit breaker. If this is compulsory, suggests consideration of specified exemptions to deal with the above circumstances.
Department of Foreign Affairs and Trade (DFAT) D2023/015676	<p>Engagement requirement</p> <ul style="list-style-type: none"> Compulsory engagement will not provide benefits for parties, will not reduce OAIC or DFAT workload, and may increase burden on agencies' resources while putting staff at risk. Supports IC encouragement of engagement but not an engagement requirement, including as to engagement method. By the time of an IC review, DFAT has generally exhausted avenues for productive engagement with the applicant. A significant portion of their decisions reviewed by OAIC involve section 33 of the Act and relate to national security or international relations sensitivities that do not lend themselves to open discussion and negotiation with members of the public. Benefit of IC review comes from an external review by a third party- unmediated resolution unlikely to provide more resolution opportunities, particularly when exemptions are at issue. Also unlikely to be of benefit given the robust decision-making process DFAT uses to ensure that exemptions are only sought when necessary and defensible. Many other IC review matters involve application of s 24 on unreasonable diversion of resources. DFAT always engages on these matters and questions benefit of further engagement at IC review stage. Due to the level of decision-making authority around s55G decisions, FOI decision-makers (SES Band 1 and above at DFAT) would need to be engaged in negotiations or give detailed advice. This is impracticable and would slow the process - in some cases, making the 8-week deadline impossible. WHS issue to expose staff to abusive/intimidating applicants, contrary to recent changes to regulations concerning psychological safety in the workplace. Engagement requirement also removes DFAT's use of anonymity to protect FOI staff, who currently do not typically use their names in correspondence to avoid this risk. Any new procedure should give agencies the discretion to no longer engage with an individual. In some cases, there may be a significant power imbalance. Concerned about requirement to provide evidence of engagement. Unclear how engagement requirement sits with the proposed process for deemed refusals. DFAT would be better able to address applicant's concerns if all material were provided to the Department as part of the s 54Z process (not only the notice and the application). <p>Deemed refusal decisions and time frames</p> <ul style="list-style-type: none"> <u>Deemed refusals usually involve high complexity or unresolved issues and a three week time frame to respond to IC direction is impractical.</u>

Agency	Comments
	<ul style="list-style-type: none"> • Where an agency decides not to make a s 55G revised decision, it will be extremely time-consuming to provide the IC with the FOI request processing documents –a significant volume of documents may have been generated in processing the request. <p>Production of documents – general procedure</p> <ul style="list-style-type: none"> • Providing a representative sample of documents in IC reviews involving a charge or practical refusal decision is inconsistent with the purpose of practical refusal (relating to unreasonable diversion of resources). Processing a representative sample is also an unreasonable diversion, it is also not clear what will constitute a representative sample. Practical refusal refers not only to difficulty locating documents but also of processing documents, and may require significant internal and external consultations, as well as consideration by senior officials. This will be wasted work if the IC ultimately decides the practical refusal decision at issue is correct. • It is not clear what will happen to these sample documents once they are provided to the IC. • The samples may attract exemptions, which would not be applied at the time they are provided to the OAIC. Representative samples may also include documents that would be subject to exemptions under s 33 of the FOI Act and would not routinely be provided in unredacted form to the OAIC. <p>Confidential submission</p> <ul style="list-style-type: none"> • A separate process for obtaining approval for confidential submissions adds to agency and OAIC burdens. • Presumably the request to provide confidential submissions will need to be made in the 4-week submission-making period but agencies may not be able to meet this timeframe and may not be able to obtain extensions of time which will only be provided in extenuating circumstances. • Unclear what happens if IC refuses a request for confidential submissions. <p>Exchange of submissions</p> <ul style="list-style-type: none"> • Question fairness of applicants having two opportunities to make submissions (including at initial application) while agencies have one.
<p>Department of Home Affairs (Home Affairs)</p> <p>D2023/015089</p>	<p>Overview and preference for legislative change</p> <ul style="list-style-type: none"> • Detailed submission which accepts numerous aspects of the draft Directions. • Recommends elements of the draft direction be removed or rethought particularly where the benefits ‘are unclear and the costs, safety and feasibility of implementation are of concern’. • Suggests proposed changes to the directions would be better effected by legislative changes to sections 54L(2) and 54E to enable FOI applicants’ easier access to internal review on deemed refused and substantive decisions. <p>Commencement</p> <ul style="list-style-type: none"> • Recommends commencement is negotiated with agencies so there is time for implementation, requiring: <ul style="list-style-type: none"> ○ additional staffing resources. ○ staff consultation processes including health and safety assessments ○ system changes including ICT. ○ staff training including updates to Departmental procedural instructions.

Agency	Comments
	<p>Engagement requirement</p> <ul style="list-style-type: none"> • Recommends allowing agencies to assess where there is value in engaging with an applicant, when there is no risk to staff. • Proposed value of requirement is unclear and does not offset administrative burden; also impacts timeliness. Benefit is unclear especially where: <ul style="list-style-type: none"> ○ no substantive decision has been made. ○ there are exemption claims that the applicant disputes and which cannot be resolved. ○ there is risk the exempt information could be inadvertently disclosed in conversation such as s33 exemptions. ○ the applicant is unwilling/unable to revise the scope to resolve practical refusal issues. ○ the Department consider all searches have been conducted. • The Department already engages with review applicants at the initial stages of the process where this would assist towards resolution. Applicants may not wish to engage with the Department, hence their application for independent review. • Unacceptable psychosocial and physical risks to staff when discussing outcomes with disgruntled clients. • Recommends requirement for telephone/video conference be removed or adjusted. Additional funding needed to implement this including system supports and staffing resources. • Recommends removing requirements on agencies to provide evidence of engagement – will impact timeliness and benefit is unclear. <p>Section 54Z notice</p> <ul style="list-style-type: none"> • Recommends that when the OAIC issues its s 54Z notice, it provides information about the elements of the decision the applicant disputes and any elements the IC may want specifically covered. This would aid decision makers to understand concerns and better target the drafting of timely submissions. • Accepts the proposed 8 weeks for response to a 54Z notice, stating this would often remove administration of the extension of time (EOT) process that occurs under the current 3-week time period. Requests that further guidance be provided regarding what constitutes 'extenuating circumstances' for EOT requests. <p>55(2)(e) direction</p> <ul style="list-style-type: none"> • Requests clarity as to what constitutes 'relevant processing documents' (3.3b). It will add significant strain on officers and increase administration if this includes all consultation documents and un-redacted exempt documents. • Sending submissions in support of access refusal to the applicant (3.3c) would lead to further interactions with applicants who disagree with their submissions. This is burdensome and an unreasonable diversion of resources. <p>Production of documents</p> <ul style="list-style-type: none"> • Seeks clarity around the 'extenuating circumstances' in which an extension of time would be granted. <p>Procedure for submissions</p> <p>Disagrees with requirement for agencies to send submission to applicant. Considers OAIC should do this as the party responsible for conducting the review. This avoids client confusion resulting in the OAIC missing out on client responses impacting procedural fairness and decision making.</p>

Agency	Comments
	<ul style="list-style-type: none"> Supports considerations of approaches that will reduce the need for multiple submissions for reviews to improve timeliness for all parties. To be feasible, the initial request for submissions would need to detail the issues at dispute from the client and the IC. There needs to be ability to go beyond the proposed 4-week period for submissions where circumstances prevent agencies meeting this deadline.
<p>Department of Veteran Affairs</p> <p>D2023/016010</p> <p><i>This summarises their public submission.</i></p> <p><i>DVA have also submitted a 'confidential submission' with further information. We have requested they provide reasons for us not to publish.</i></p>	<p>Engagement requirement</p> <ul style="list-style-type: none"> Inconsistent with a trauma-informed approach when interacting with veterans. Expresses particular concerns about: <ul style="list-style-type: none"> vulnerable applicants who may not be able to engage in the early resolution process without significant support, or at all; DVA has established special communication arrangements for such clients to better assist them; applicants who wish to remain anonymous and do not wish to provide contact details. May expose vulnerable applicants and staff to risk of harm. Refers to the AAT Alternative Dispute Resolution (ADR) Guidelines' general principles which include the following considerations: the capacity of the parties to participate effectively; cultural factors; safety of the parties; the context of an application including the history of past applications by the applicant; relative cost to the parties of an ADR process and a determination. Significant additional resources would be required to facilitate conferences, with an estimated 12 hours to prepare and facilitate a conference. Sets out a comprehensive breakdown of this timing at Annexure A. This may impact its significant FOI workload and increase resource pressures. To find the balance between ensuring the health and safety of vulnerable applicants with FOI Act objects and timely/cost-effective information access, suggests consideration of exceptions to the engagement requirement, including for: <ul style="list-style-type: none"> vulnerable applicants; circumstances where an agency/minister has engaged in a similar process with an applicant at an earlier stage (clarifying the current exception to this effect); other circumstances where there are compelling reasons – suggests a flexible approach similar to the AAT; and that the agency/minister could provide submissions or evidence outlining why a conference is not appropriate and the matter could proceed to the next stage of the process, including, e.g. a teleconference between the parties facilitated by the OAIC. <p>Section 54Z notice – time-frames</p> <ul style="list-style-type: none"> Recommends that the 8-week time-frame be extended to 12 weeks. 8 weeks to engage with applicants and provide a response to the OAIC is not sufficient to consider whether it is appropriate to directly engage with applicants. Given the department's client base, this will require a comprehensive assessment involving not only the FOI team but also potentially case managers, clinicians and specialist care providers. <p>Implementation of the revised Direction from 1 July 2023</p> <ul style="list-style-type: none"> Concerns about ability to comply with Direction by 1 July 2023, recommends implementation date be extended to at least 1 October . 2023 DVA will require time to establish processes/resources to enable compliance, particularly given the vulnerability of many clients who may be on specialised communication arrangements. The department will need to set up new workflows, likely including policies, frameworks, scripts, case management and triage processes. The OAIC may wish to consider delaying implementation until after the Legal and Constitutional Affairs References Committee releases its report on the operation of Commonwealth FOI laws, noting that comprehensive inquiry will consider issues closely aligned with the proposed revisions to the Direction and may recommend further changes to the Information Commissioner.

Agency	Comments
Services Australia D2023/015091	<p>Engagement requirement</p> <ul style="list-style-type: none"> • Considers it should be facilitated by an independent third party including due to procedural fairness reasons. Significant administrative burden. Fraught approach whereby an agency is both the ADR facilitator and participant – it means agencies will be unable to robustly represent their own interests. • Shifts an independent third-party burden onto agencies and does not allow for departure from the process. This is restrictive and unnecessarily rigid in circumstances where the obligation as a model litigant to engage on a proper basis in ADR already applies. • There is already engagement with applicants in the initial request and review processes - this takes into account an applicant’s preferred mode of communication, or access to communication channels. This engagement also takes into account restricted servicing arrangements in place to counter inappropriate, threatening or aggressive behaviours. Conferencing without third-party facilitation is potentially harmful to staff. • Where engagement by conference is not appropriate, suggests a suitable alternative is a requirement to notify OAIC of the reasons for <i>not</i> engaging in its preferred ADR channels. • Recognises role for proactive engagement with some applicants, with regard to the individual circumstances of the case (such as deemed refusal matters).

Submissions

The following agencies made submissions:

1. Administrative Appeals Tribunal: [D2023/014318](#)
2. Australian Federal Police: [D2023/015096](#)
3. Australian Tax Office: [D2023/015090](#)
4. Attorney-General's Department: [D2023/015009](#)
5. Commonwealth Ombudsman: [D2023/015094](#)
6. Department of Climate Change, Energy, Environment and Water: [D2023/015095](#)
7. Department of Defence: [D2023/015719](#)
8. Department of Employment and Workplace Relations: [D2023/015092](#)
9. Department of Foreign Affairs and Trade [D2023/015676](#)
10. Department of Home Affairs: [D2023/015089](#)
11. Services Australia: [D2023/015091](#)

We have received comments from the Department of Education ([D2023/015010](#)). Given the department has advised the comments are not a submission, we have not extended an invitation to the forum. The comments are therefore not included in the summary.

Attachment D

Proposed Agenda

10:00 – 11:30 am

Attendees (TBC)

Time	Item	Durations
10:00	Acknowledgement of country, welcome and overview Toni Pirani, Acting Freedom of Information Commissioner	(10 minutes)
10.10	Topic 1: Response to s 54Z notice – Engagement process and evidence requirements	(30 minutes)
10:40	Topic 2: Response to s 54Z notice – Timeframes	(15 minutes)
10:55	Topic 3: Production of documents – Providing marked up and unredacted copies of documents; sample documents	(10 minutes)
11:05	Topic 4: Requests to make submissions in confidence	(10 minutes)
11:15	Close	



Talking points for workshop: IC review procedure direction

Date:	12 July 2023
Time:	10am to 11.30am
Location:	Flex ISPT at 4 National Circuit in Barton

Agenda

Key items for discussion

Time	Item	Durations
10:00	Acknowledgement of country, welcome and overview Toni Pirani, Acting Freedom of Information Commissioner	(10 minutes)
10.10	Topic 1: Response to s 54Z notice – Engagement process and evidence requirements	(30 minutes)
10:40	Topic 2: Response to s 54Z notice – Timeframes	(15 minutes)
10:55	Topic 3: Production of documents – Providing marked up and unredacted copies of documents; sample documents	(10 minutes)
11:05	Topic 4: Requests to make submissions in confidence	(10 minutes)
11:15	Close	

Acknowledgement of country, welcome and overview (10 minutes) Toni Pirani, Acting Freedom of Information Commissioner

Overview

- Thank you for coming and for making a submission in response to our draft revisions to the [2 draft IC Review Procedure Directions](#).
- This is a workshop for agencies who have made a submission during the consultation period to assist us to understand and address issues that have been raised.
- The *'Direction as to certain procedures to be followed in Information Commissioner reviews'* sets out the procedures that agencies and ministers are required to follow during IC reviews in respect of the production of documents, engagement with IC review applicants, administration of deemed access refusal decisions and the provision of submissions.

- The *'Direction as to certain procedures to be followed by applicants in Information Commissioner reviews'* assists IC review applicants to understand how the IC review process operates and their obligations with respect to their IC review application.
- Submissions closed on 30 June 2023 and we have started the process of reviewing the feedback set out in submissions.

Topic 1: Response to s 54Z notice – Engagement process and evidence requirements (30 minutes)

Revision to direction

- This is a new requirement. At the commencement of each IC review, the OAIC will issue a s 54Z notice requiring the agency or minister to engage, or make reasonable attempts to engage, with IC review applicants during the IC review for the purpose of genuinely attempting to resolve or narrow the matters at issue in the IC review. Engagement is to take the form of a teleconference or videoconference. Proof of attempts to engage in this process will be required, as will the outcome of the process. The requirement will not apply in relation to deemed access refusal decisions or where the ministers or agencies provide evidence of appropriate consultation during the processing of the FOI request (not including s 24AB consultation).

Rationale

- Anecdotally, we hear from applicants that they do not always have the opportunity to engage with agencies about their FOI application.
- Where engagement leads to early resolution, this reduces agencies' workload and provides an efficient outcome for the applicant.
- As well as potentially narrowing the scope of an application, the direction gives agencies an opportunity to explain their decision – in our experience, many applicants do not read or do not understand the s 26 statement of reasons. This may improve applicants' understanding of agency decisions and lead to resolution (for example, in cases concerning the application of s 38: secrecy exemption).
- The requirement to provide evidence supports the mandatory aspect of this direction, ensuring genuine attempts are made to contact IC review applicants and engage with the issues in dispute.

Agency submissions

- Agencies expressed a range of concerns about
 - undue administrative burden, with additional work slowing the process, as well as additional unfunded expense;
 - work health and safety risks to staff in engaging with applicants who exhibit unreasonable and abusive behaviours;
 - FOI staff not being trained mediators;
 - delays in the issuing of s 54Z notices as a challenge to successful engagement (due to staff movements or Machinery of Government changes since the original decision was made);
 - the unclear value of the engagement:
 - by the time a matter gets to IC review, the agency will generally have exhausted avenues for productive engagement with the applicant;

- often there is no ability to provide applicant with further meaningful information;
 - certain exemptions (such as s 33 on national security, defence and international relations) do not lend themselves to open discussion;
- lack of authority for decision-making in the engagement process – at the Department of Foreign Affairs and Trade (DFAT), for example, FOI staff will not have authority to make s 55G decisions and will need to consult SES staff, and this is not practical within the 8-week period.
- Agencies considered there should be flexibility regarding the format of the engagement. Telephone or video conferencing does not suit all applicants (for example, anonymous applicants, applicants with disabilities or those who have English as a second language) and may additionally pose risks to staff where the applicant exhibits challenging behaviours.
- Agencies considered that the OAIC should be involved as external and independent third-party, and that this is the very benefit of IC review. Services Australia stated that agencies are unable to robustly represent their own interests if they are both ADR facilitator and participant.
- The Department of Defence (Defence) considers that an early high-level merits review by the OAIC will assist the engagement process—similarly, the Administrative Appeals Tribunal (AAT) and Department of Home Affairs (Home Affairs) state that the OAIC should identify issues and convey them to parties early in the process.

Topic 2: Response to s 54Z notice – Timeframes (15 minutes)

Revision to direction

- The revised direction extends the timeframe to respond to s 54Z notices from 3 weeks to 8 weeks. Agencies are not required to make submissions in this timeframe. This period includes time for respondent agencies and ministers to:
 - contact the applicant;
 - engage with applicant;
 - provide evidence of engagement and outcome of engagement;
 - if no 55G decision is made to provide full access to the requested documents, to provide the OAIC with the FOI request processing documents and marked up copies of the exempt documents at issue in the IC review (if applicable).

Rationale

- The 8-week period combines the current 3-week period to respond to a s 54Z notice with an additional month to contact and engage with the applicant.
- 8 weeks should be adequate time to engage with the applicant and produce documents.
- Capacity to extend this period is provided in the direction – it states that extension of time requests will be considered on a case-by-cases basis but only in extenuating circumstances will any further extension to time be granted.
- Other timeframe changes include:
 - 1 week for agencies to respond to a preliminary inquiry regarding a deemed access refusal decision (OAIC only seeks confirmation whether the request has been refused) – this is a codification of existing arrangements;
 - 3 weeks for the agency to respond to a s 54Z notice (following confirmation that the decision is deemed);

- 'At least 2 weeks' to respond to a s 55R notice to produce. This provision replicates the existing provision in the current direction.

There is a capacity in all of these to extend the time for agencies to respond based on the individual circumstances of the review.

Agency submissions

- Agencies expressed concerns:
 - that an 8-week time frame to respond to s 54Z notice – and other time-frames in the direction – are insufficient;
 - about circumstances in which there has been delay in the OAIC sending the s 54Z notice – the passage of time makes timely collation of documents and consultation more difficult;
 - about evidence requirements concerning engagement, for example, that it will place additional reporting and administrative obligations on agencies;
 - about the 'extenuating circumstances' threshold for extensions to time, suggesting more flexibility or more clarity as to what would constitute extenuating circumstances.
- The AAT considers that time-frames should be set in consultation with the respondent agency, rather than applying standard time-frames. Along with the Attorney-General's Department, it also suggests increasing clarity regarding the time-frames that apply to the OAIC.

Topic 3: Production of documents – Providing marked up and unredacted copies of documents; sample documents (10 minutes)

No change to current process

- The revised direction makes no change to the current position with respect to the production of the documents in dispute in the IC review (see 10.1000, 10.102 and 10.14 of the [FOI Guidelines - Part 10: Review by IC](#)) and 3.2 and 3.3 of the current [direction](#)). That is, to conduct the IC review the IC needs a copy of the document/s with the exempt matter clearly marked.
- There may be confusion in relation to this point – some agencies think we need two sets of exempt documents: one 'clean' and one with redactions applied. It may be better to describe this as one copy of the documents at issue in the IC review with exemptions applied clearly marked so a reader can see the underlying text.
- Additionally, there have been no changes to the IC's discretion to require the provision of a sufficiently representative sample of documents in IC reviews relating to a charge or practical refusal reason (see 3.6 of the current [direction](#)). The FOI Guidelines at [Part 3: Processing and deciding on requests for access](#) provide further guidance, stating that a representative sample of 10-15% (or more than 20% where numbers of documents are not high) is an appropriate sample size for calculating processing time when deciding whether a practical refusal reason exists.

Rationale for requirement

- The IC must view the documents to decide whether they are exempt or not.
- Marked up documents assist in the IC review process, noting the onus on agencies to establish their case (s 55D). This is also helpful where there are multiple decisions made.

Agency submissions

- The AAT considered that the requirement to provide marked-up/redacted documents is resource intensive. The Australian Tax Office (ATO) noted that it makes some exemption decisions without searching for and collating the documents. Compliance with the requirement to provide marked up/redacted therefore involves searching for and collating documents solely for the purposes of the IC review.
- In relation to the representative sample requirement, DFAT and Defence request further clarification as to what is needed (such as a percentage). DFAT expresses a range of other concerns, including that it is an unreasonable diversion of resources, particularly in cases where it is ultimately found that the practical refusal decision is correct.

Topic 4: Requests to make submissions in confidence (10 minutes)

No change to current overall process – new element introduced

- Agencies must request to make a submission in confidence before providing their submissions, including reasons to support the claim. If the IC agrees to accepting a submission in confidence, a version that can be shared must also be provided. This is consistent with existing provisions (5.3 – 5.4 of the current [direction](#))
- **New element:** If the Information Commissioner decides the submission is not inherently confidential, or does not disclose exempt matter, the agency will be invited to withdraw the claim for confidentiality or withdraw the submission and it will not be considered as part of the IC review.

Rationale

- The OAIC's starting position is that all submissions will be shared with the parties to the IC review (reflected in 5.3 of the current [direction](#) and consistent with 10.103 of [FOI Guidelines - Part 10: Review by IC](#)).
- Where agencies seek to depart from this position, they need to provide clear reasons – accepting submissions in confidence has procedural fairness implications.
- Deciding whether IC will accept confidential submissions ahead of their preparation reduces duplication – an agency will know in advance whether they need to provide 2 versions of the submissions (one confidential and one that can be shared).

Agency submissions

- The ATO and DFAT have expressed concern about a separate process for confidential submissions, considering that this issue can be dealt with at the same time the submission is provided. DFAT suggests this adds to agencies' burden.

Close

Stakeholder comments at IC Reviews Procedure Direction: Workshop 12 July 2023

Agency	Attendees
DEWR	s47F ██████████ Principal Government Lawyer
Defence	s47F ██████████, Director, FOI s47F ██████████ - Special Advisor FOI, Review
DCCEEW	s47F ██████████ – Principal Legal Officer s47F ██████████
Commonwealth Ombudsman	s47F ██████████ Senior Assistant Ombudsman, Defence, Investigations
Services Australia	s47F ██████████ General Counsel, FOI ad Ombudsman Branch
ATO	s47F ██████████ – Deputy General Counsel
Home Affairs	s47F ██████████ – A/g Director, FOI s47F ██████████
AGD	s47F ██████████, Director, FOI and Privacy, Strategy and Governance Branch
AAT	s47F ██████████ Legal officer (observer)
AFP	s47F ██████████, Principal Lawyer and Chief Counsel (FOI and Privacy)
DFAT	s47F ██████████ Seconded lawyer, FOI Section, Public Interest Law Branch s47F ██████████ Assistant Director, FOI
DVA	s47F ██████████, Director Information Law

Topic 1: Response to s 54Z notice – Engagement process and evidence requirements

- FOI Commissioner discussed the reasons for introducing this requirement, including that some cases are not significantly developed when they come to us as an independent arbiter.
- FOI Commissioner confirmed that requirement will not apply in relation to deemed access refusal decisions or where the ministers or agencies provide evidence of appropriate consultation during the processing of the FOI request (not including s 24AB consultation).
- FOI Commissioner confirmed verbal interaction is preferred, as well as the process: following notification of commencement of IC review, engage with applicant, then advise of engagement and provide evidence (8 weeks to do so)
- Participants raised concerns about repeated engagement, some raised that they are already engaging with applicants, or engaging with applicants but not with all of them (Home Affairs).
- . FOI Commissioner confirmed that repeated engagement is not required: if you have engaged, and can show this by providing evidence to the OAIC, the engagement process does not need to be repeated. Participants requested this be clarified in the direction.

- There had been some misinterpretation by participants on 4.2 and 4.3: Make wording clearer as confused about how to engage and when this requirement applies.
- Some participants challenged the benefit of engagement requirement (Home Affairs). DHA expressed fundamental disagreement that this type of engagement needs to happen.
- Others supported in general but expressed concerns about the mandatory nature of the engagement without exceptions/carve-outs.
 - Participants referenced AAT mediation guidelines which have an element of flexibility
 - Concerns about risks:
 - engagement sometimes is restricted around matters involving s33 exemptions given issues around national security. Requested flexibility to the rule as doesn't specifically note any particular exemptions (DFAT, Defence, SA and Home Affairs)
 - engagement with journalists with vulnerability to subsequent media reporting on items discussed– agencies have protocols for dealing with media
 - staff disclose, or come under pressure to disclose, something they should not disclose (this is easier to manage in writing) e.g. in cases involving personal information (separated parents/domestic violence) leading to privacy risks, as well as s 33 matters
 - DHA commented that sometimes FOI requests are made in a legal context, as an alternative to subpoena where the applicant thinks they may not get documents they need via that process. They would need to put processes in place to manage this risk.
 - Concerns about behaviours of some applicants, and staff welfare (noting agency profiles differ in relation to their client cohort)
 - Some applicants will deliberately not engage with agencies (Assistant Commissioner advised that 'reasonable steps' to engage need to be made in those matters).
 - Concerns about logistics including resource implications of managing large volume of phone calls, seeks guidance on this.
 - No direction about specific applicants, anon/SPOC/right to know
- Assistant Commissioner acknowledged challenges (such as applicant behaviours) but stated that in the majority of matters engagement is helpful
- It would be helpful if the s 54Z notice was very clear about what the applicant is disputing or what the OAIC is interested in.
- Guidance on the engagement process would be useful.
- Suggested smart form update: proposed checklist to the applicant at commencement of the IC review – ie what don't you understand about the SOR, are you open to being contacted from the agency, what are your contact details.
-

- Prefer that engagement with applicant would include OAIC as a 3rd party: this could prevent applicants getting agitated or parties coming away with a different view of what was agreed.
- Participants expressed some confusion about timing of the various steps, for example, whether the mandatory engagement with the agency is pre or post submissions, and at what point agencies provide evidence of engagement.
-
- Issue: no direction about specific applicants, anon/SPOC/right to know
- Update guidance for revised Direction

Topic 2: Response to s 54Z notice – Timeframes

- Incentivise agencies to engage by allowing extra time (if they have not engaged already). DVA suggested optional requirement, where an agency has either a 2 week period to respond to the s 54Z notice without engagement, but has an 8-week period to respond if incorporating the engagement process.
- Agencies expressed concern about the use of the term ‘extenuating circumstances’ for extensions to time (including at 4.4). Discussed challenges of responding efficiently after the passage of time (e.g. due to MOG). Assistant Commissioner discussed that we may consider that extenuating circumstances; we look towards what is reasonable, and also clarified what documents are expected within that 8-week period, and that a s55G decision is not expected in that time.
- Include in guidance that days are working days, only M-F not including public holidays or shutdown

Topic 3: Production of documents – Providing marked up and unredacted copies of documents; sample documents

- Flexibility to engage without documentation: there are some matters where the agency does not have the documents because the requested documents are exempt on the face of it (e.g. secrecy provisions apply)
- Inspection at premises to be built into revised direction
- Discussion of redacted documents led to discussion of audio and video files and marking these up (suggestion to provide both an edited and unedited file)
- **Congensi has gone – bigger files how to transfer across?** – Romina to follow up with Brenton

Topic 4: Requests to make submissions in confidence

- Agencies to hold back sending confidential submissions until they have made the request to do so and it has been approved
- DHA: what happens if the IC does not accept the reasons for the confidential submission?
- Discussion by FOI Commissioner and Assistant Commissioner: onus is on agency to provide it in a form that is unreasonable; if there’s a disagreement, we like to think

we can resolve it; usually if it is a request that relates to national security or similar then we are likely to approve the request.

Questions posed:

1. Process going forward
2. Timeline for implementation
3. Potential transitional process
4. Potential for trial period

NB - All keen on a session on the implementation of the revised Direction

From: [TYDD,Liz](#)
To: [AGO,Rocelle](#); [PIRANI,Toni](#)
Subject: Content Manager Document : D2024/007050 : Short EB - IC review procedure direction for agencies 2024-03-13 [SEC=OFFICIAL]
Date: Tuesday, 16 April 2024 5:38:00 PM
Attachments: [t000KTNK.txt](#)

Dear Rocelle and Toni

I have now updated to acquit my tasks of:

Messaging the template eg brief, decision sound and address issues in application

Specifying our right to implement differential case management (treat cohorts differently) and identifying impact on time frames

Removed references to differentiation with aged cases

I have also highlighted in blue new additions to be carried over in part or in whole to the applicant PD

Most importantly I have not alerted you to issues of internal consistency, repetition, application of conventions, disjointed information, heading malalignment, legal correctness including overreach . The PD seems to have developed over time without focus on correctness, accessibility and audience. I've spent a great deal of time on these aspects but I cannot claim to have addressed all of the issues. It will need a further edit – how can this be achieved expeditiously?

Assistance greatly appreciated.

Kind regards

Liz

Record : D2024/007050 : Short EB - IC review procedure direction for agencies 2024-03-13

From: [LODGE,Justin](#)
To: [TYDD,Liz](#); [AGO,Rocelle](#)
Subject: Direction template [SEC=OFFICIAL]
Date: Wednesday, 17 April 2024 10:41:05 AM
Attachments: [image004.emz](#)
[image003.png](#)
[Short Direction to R template.docx](#)

Dear Liz,

Apologies for the delay. This took longer than anticipated because I have been unable to access content manager (where templates are kept).

I have made those changes now and have circulated that to the directors. The template is at [D2024/010296](#) and is attached.

Thanks

Justin

From: LODGE,Justin
Sent: Wednesday, April 10, 2024 5:10 PM
To: TYDD,Liz <Elizabeth.Tydd@oaic.gov.au>; AGO,Rocelle <Rocelle.Ago@oaic.gov.au>
Subject: RE: Significant decisions team receipt of cases [SEC=OFFICIAL]

Dear Liz,

Yes, of course. We will make the changes to the template and then confirm that with you.

Regards

Justin

From: TYDD,Liz <Elizabeth.Tydd@oaic.gov.au>
Sent: Wednesday, April 10, 2024 4:36 PM
To: LODGE,Justin <Justin.Lodge@oaic.gov.au>; AGO,Rocelle <Rocelle.Ago@oaic.gov.au>
Subject: RE: Significant decisions team receipt of cases [SEC=OFFICIAL]

Dear Justin and Rocelle

Firstly, thank you this is very helpful and it definitely includes some of the force required.

I've augmented – see below and could this be implemented as amended please?

Attachment A

Direction to the Department of Home Affairs under s 55(2)(e) (ii) of the Freedom of Information Act 1982

In relation to [OAIC ref number], I, [name], delegate of the Australian Information Commissioner, issue the following direction to the [agency name] under s 55(2)(e)(ii) of the FOI Act:

1. [include direction – for example, To provide a copy of its submission to the applicant, and the OAIC electronically to [case officer's email address] and FOIDR@oaic.gov.au, by [date]].

Your obligations

I draw your attention to the following matters:

Freedom of Information Act 1982

Section 55(2)(e)(ii) of the FOI Act provides that the Information Commissioner may give written directions as to the procedure to be followed in relation to a particular IC review.

Compliance with this direction can be met by taking the steps set out above.

Section 55

FOI Guidelines and procedure direction

The Information Commissioner has issued guidelines under s 93A of the FOI Act that Australian Government agencies and Ministers must have regard to when performing a function or exercising a power under the FOI Act. For information about the IC review process, see [Part 10 of the FOI Guidelines](#).

The '[Direction as to certain procedures to be followed in IC reviews](#)' applies to agencies and Ministers during IC reviews and during preliminary inquiries prior to the commencement of an IC review, if such inquiries are undertaken. The Procedure Direction sets out the procedures that agencies and ministers must follow in respect of the production of documents, the provision of a statement of reasons where access has been deemed to be refused and the provision of submissions.

The IC Review Procedure Direction also explains that:

- in the event of non-compliance with the IC review Procedure Direction, the Information Commissioner may proceed to make a decision under s 55K of the FOI Act on the basis that the agency or minister has failed to discharge their onus under s 55D of the FOI Act
- as the model litigant obligation under the Legal Services

Directions 2017 extends to Commonwealth entities involved in merits review proceedings, failure to adhere to the requirements of the IC Review Procedure Direction may amount to non-compliance with the model litigant obligation.

Direction issued by [name], Director

Signed:

Date: 10 April 2024

From: LODGE,Justin <Justin.Lodge@oaic.gov.au>
Sent: Wednesday, April 10, 2024 3:28 PM
To: TYDD,Liz <Elizabeth.Tydd@oaic.gov.au>; AGO,Rocelle <Rocelle.Ago@oaic.gov.au>
Subject: RE: Significant decisions team receipt of cases [SEC=OFFICIAL]

Dear Liz,

Sorry about that. I've included the direction template below.

Regards

Justin

Attachment A

Direction to the Department of Home Affairs under s 55(2)(e)
(ii) of the Freedom of Information Act 1982

In relation to [OAIC ref number], I, [name], delegate of the Australian Information Commissioner, issue the following direction to the [agency name] under s 55(2)(e)(ii) of the FOI Act:

[include direction – for example, To provide a copy of its submission to the applicant, and the OAIC electronically to [case officer's email address] and FOIDR@oaic.gov.au, by [date]].

Compliance with this direction.

Compliance with this direction can be met by taking the steps set out above. I draw your attention to your positive obligation under the FOI Act. Section 55DA requires your agency to use your best endeavours

to assist the Information Commissioner to make a decision.

Non-compliance may result in:

- a decision adverse to your interests may be made in the absence of the information requested; and
- further regulatory action including examination of your agency's performance of functions under the FOI Act.

[FOI Guidelines and procedure direction](#)

The Information Commissioner has issued guidelines under s 93A of the FOI Act that Australian Government agencies and Ministers must have regard to when performing a function or exercising a power under the FOI Act. For information about the IC review process, see [Part 10 of the FOI Guidelines](#).

The '[Direction as to certain procedures to be followed in IC reviews](#)' applies to agencies and Ministers during IC reviews and during preliminary inquiries prior to the commencement of an IC review, if such inquiries are undertaken. The Procedure Direction sets out the procedures that agencies and ministers must follow in respect of the production of documents, the provision of a statement of reasons where access has been deemed to be refused and the provision of submissions.

The IC Review Procedure Direction also explains that:

- in the event of non-compliance with the IC review Procedure Direction, the Information Commissioner may proceed to make a decision under s 55K of the FOI Act on the basis that the agency or minister has failed to discharge their onus under s 55D of the FOI Act
- as the model litigant obligation under the Legal Services Directions 2017 extends to Commonwealth entities involved in merits review proceedings, failure to adhere to the requirements of the IC Review Procedure Direction may amount to non-compliance with the model litigant obligation.

Direction issued by [name], Director

Signed:

Date: 10 April 2024

From: TYDD,Liz <Elizabeth.Tydd@oaic.gov.au>

Sent: Wednesday, April 10, 2024 3:08 PM

To: LODGE,Justin <Justin.Lodge@oaic.gov.au>; AGO,Rocelle <Rocelle.Ago@oaic.gov.au>

Subject: RE: Significant decisions team receipt of cases [SEC=OFFICIAL]

Dear Justin

We might be at crossed purposes here. The template I was seeking is the one just to convey procedural directions and what we say about failure to implement that procedural direction. See item 4 (not item 3).

Could you cut and paste again please for the procedural direction template which sets out time for provision of info etc.

Many thanks

Liz

From: LODGE,Justin <Justin.Lodge@oaic.gov.au>
Sent: Wednesday, April 10, 2024 2:27 PM
To: TYDD,Liz <Elizabeth.Tydd@oaic.gov.au>; AGO,Rocelle <Rocelle.Ago@oaic.gov.au>
Subject: RE: Significant decisions team receipt of cases [SEC=OFFICIAL]

Dear Liz,

Thanks for your email.

Unfortunately, I am having some trouble accessing content manager, so I haven't been able to attach the template letter.

I have provided an excerpt of the template letter below.

Thanks

Justin

Our reference: [insert OAIC ref]

Your ref: [insert agency ref]

FOI contact officer

[insert agency name]

By email: [insert agency's email address]

Compliance with decision under s 55K of the Freedom of Information Act 1982

Dear FOI contact officer

Please find enclosed a decision under s 55K of the *Freedom of Information Act 1982* (the FOI Act) in relation to the above Information Commissioner review application:

- [\[decision name\]](#)

I am writing to seek information regarding [\[agency's name\]](#)'s (...) compliance with the decision.

Please provide the following information by **[28 days from the date of the letter]**:

1. Whether the [\[agency's name\]](#) has fully implemented the decision *or* whether it will be seeking review of the decision by the AAT.
 1. If the [\[agency's name\]](#) has implemented the decision and where relevant, whether it has published the relevant documents on its disclosure log. Please note the obligation under s 11C of the FOI Act to publish this information on a website. Please also see [Part 14](#) of the Guidelines issued under s 93A of the FOI Act, which agencies and Ministers must have regard to when performing a function or exercising a power under the FOI Act (FOI Guidelines)). Please note that the requirement to publish information released to an FOI applicant on a disclosure log does not apply to personal information or information about a business if publication would be 'unreasonable'.
 2. If the [\[agency's name\]](#) has implemented the decision and where relevant, whether it has published relevant documents on its website for the purposes of the Information Publication Scheme (IPS) under Part II of the FOI Act. Please see [Part 13](#) of the Guidelines. Please note that the exceptions at s 8(g) indicate that agencies are generally not expected to publish information given to an individual or business applicant in response to an FOI request that is personal to that applicant.

This information is required by exercise of my powers to perform FOI functions under the AIC Act. Failure to provide this information within the required period may be reported in the annual report given to the Minister under s 46 of the *Public Governance, Performance and Accountability Act 2013*^[1] which is required to include a description of any efforts made by the Information Commissioner to assist agencies to comply with obligations under the FOI Act.^[2] The collection of information about compliance with decisions will inform the Information Commissioner's approach to the exercise of FOI regulatory powers under the *Australian Information Commissioner Act 2010* as described in the [Freedom of information regulatory action policy](#).

The information collected may also identify ways in which the OAIC can provide advice, assistance and training to agencies and Ministers about compliance with the FOI Act following Commissioner decisions.

If you have any questions or require further information about this letter, please feel free to contact me by return email.

Yours sincerely

[Director's name]

Director

10 April 2024

From: TYDD, Liz <Elizabeth.Tydd@oaic.gov.au>

Sent: Wednesday, April 10, 2024 12:12 PM

To: LODGE, Justin <Justin.Lodge@oaic.gov.au>; AGO, Rocelle <Rocelle.Ago@oaic.gov.au>

Subject: Significant decisions team receipt of cases [SEC=OFFICIAL]

Dear Justin and Rocelle

I have reviewed the review input agenda and observe the following re item 4.

Item 4 procedural – failure to respond to a direction

On the basis of the brief info supplied Ive spent some time trying to understand the request.

If we are discussing s 55(2)(e) ie a general power used in the context of review functions (as distinct from division 8 info gathering powers) I would like to know what info we publish generally eg procedural direction s93 or fact sheets/guidance and specifically ie in the corro that contains the directions. For example if its about time frames back to previous discussions regarding clear statement to provide docs etc and failure to adhere to timeframes means decision made on the basis of available info and it may be adverse to the respondent agency/applicant. Also how do we convey the positive duty to co-operate s55DA and also ss3 and 4.

Im really not sure why this question is here except that Im reading into this a handover of incomplete files from 1 team to another.

Outcome:

1. I fully support recrafting of corro to parties on directions to address above if its not already included in our procedural directions. In my view one opportunity is sufficient unless there are exceptional circumstances. However we must include this approach in individual corro. If it takes time to amend the procedural direction that's fine the individual communication will prevail. **Please provide template corro.**
2. If there is an ongoing failure – decisions under s 55K and otherwise should reflect non co-operation and that should be highlighted in the decision on page 1.

Please do not hesitate to advise me of any other issues. I can see the current structure will give rise to these types of tensions and perhaps that's a matter for further consideration as I am respectful of the views of others and extant team structures.

Kind regards

Liz



Elizabeth Tydd (she/her)
Freedom of Information Commissioner
Office of the Australian Information Commissioner
Sydney | GPO Box 5288 Sydney NSW 2001
P +61 2 9246 0436 E elizabeth.tydd@oaic.gov.au

Executive assistants: jsla.gibson@oaic.gov.au; lucy.roberts@oaic.gov.au

The OAIC acknowledges Traditional Custodians of Country across Australia and their continuing connection to land, waters and communities. We pay our respect to First Nations people, cultures and Elders past and present.

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^[1] AIC Act, s 30(a).

^[2] AIC Act, s 31(1)(i).



**Direction to the [Department/Agency name]
under s 55(2)(e)(ii) of the *Freedom of Information Act 1982***

In relation to [insert reference number] I, [name], Director, Freedom of Information, Delegate of the Australian Information Commissioner for the purposes of the [Freedom of Information Act 1982](#), issue the following direction to the [insert name of agency] [the agency initials] under s 55(2)(e)(ii) of the FOI Act:

1. To provide submissions and information in response to the request for further information provided to [agency initials] on [insert date] by [insert due date] to the applicant, and the OAIC via FOIDR@oaic.gov.au cc [insert email address of review adviser].

I draw your attention to the following matters:

Compliance with this direction

Section 55(2)(e)(ii) of the FOI Act provides that the Information Commissioner may give written directions as to the procedure to be followed in relation to a particular IC review.

Compliance with this direction can be met by taking the steps set out above. I draw your attention to your positive obligation under the FOI Act. Section 55DA requires your agency to use your best endeavours to assist the Information Commissioner to make a decision.

Non-compliance may result in:

- a decision adverse to your interests may be made in the absence of the information requested; and
- further regulatory action including examination of your agency's performance of functions under the FOI Act.

FOI Guidelines and procedure direction

The Information Commissioner has issued guidelines under s 93A of the FOI Act that Australian Government agencies and Ministers must have regard to when performing a function or exercising a power under the FOI Act. For information about the IC review process, see [Part 10 of the FOI Guidelines](#).

The '[Direction as to certain procedures to be followed in IC reviews](#)' applies to agencies and Ministers during IC reviews and during preliminary inquiries prior to the commencement of an IC review, if such inquiries are undertaken. The Procedure Direction sets out the procedures that agencies and ministers must follow in respect of the production of documents, the provision of a statement of reasons where access has been deemed to be refused and the provision of submissions.

The IC Review Procedure Direction also explains that:

- in the event of non-compliance with the IC review Procedure Direction, the Information Commissioner may proceed to make a decision under s 55K of the FOI Act on the basis that the agency or minister has failed to discharge their onus under s 55D of the FOI Act
- as the model litigant obligation under the Legal Services Directions 2017 extends to Commonwealth entities involved in merits review proceedings, failure to adhere to the requirements of the IC Review Procedure Direction may amount to non-compliance with the model litigant obligation.

Direction issued by [name], Director, Freedom of Information

Signed:

Date: 20 November 2024

From: [AGO,Rocelle](#)
To: [TYDD,Liz](#); [PIRANI,Toni](#)
Subject: RE: Procedure Directions: Action items arising [SEC=OFFICIAL]
Date: Wednesday, 17 April 2024 7:55:19 AM

Dear Liz

Thank you for your email for the discussion this morning – as discussed, I'll propose to make the amendments and also proceed with 1 July 2024.

Kind regards
Rocelle

From: TYDD,Liz <Elizabeth.Tydd@oaic.gov.au>
Sent: Wednesday, April 17, 2024 7:00 AM
To: AGO,Rocelle <Rocelle.Ago@oaic.gov.au>; PIRANI,Toni <Toni.Pirani@oaic.gov.au>
Subject: Re: Procedure Directions: Action items arising [SEC=OFFICIAL]

Dear Rocelle

Good to see us actioning so swiftly see responses below
To assist with actioning the above as efficiently as possible, Liz could I please clarify the following:

- The Insertion of principles into the procedure direction (see paragraphs 2.4-2.4.6; informality, cost effectiveness, timeliness, responsiveness, proportionality) – whether this should be inserted in the procedure direction or in Part 10 of the Guidelines, on the basis that the FOI Guidelines currently set out principles which inform the IC review process (see paragraphs 10.15-10.25, merit review, an informal process, non-adversarial, timely). Once clarified, we can also progress Part 10 of the FOI Guidelines with the procedure directions back to you so they could be issued at the same time.

We agreed 6 weeks for respondent and 2 weeks for applicant. That means a total period of 8 weeks

I want to avoid the back and forth that is so prevalent. Please include in guideline is required but let's just get them both operationalised asap

- The proposed direction originally had separate sections for responding to the s 54Z notice (8 weeks) and then providing submissions (4 weeks) as they were provided separately. We agreed today we would have a truncated process and timeframe (8 weeks) for the engagement and parties submissions to occur – on this basis, for clarity I would suggest

merging the contents between sections 3 (General procedure in relation to review of access refusal and access grant decisions) and 5 (General procedure in relation to submissions made during an IC review).

I'm trying to follow a procedural staged approach for clarity and accessibility if the approach you recommend doesn't disturb that principle then please go ahead

- Whether the commencement date of 1 July 2024 would provide a more acceptable timeframes for agencies to develop processes and to use various forums to promote external messaging (strategies could include: Information Matters newsletter, ICON alerts, correspondence to and attendance of SES Forum quarterly meeting in June 2024, targeted correspondence to frequent applicants, writing to agency heads, setting up a dedicated OAIC page for FAQs on new procedure directions for agencies and applicants)

Ok but we have all of May can't we just do an email alert and mail out?

- The inclusion of annexures to include distinct processes (deemed, searches) – noting your comment Liz around the nexus between Annexure A.2 with the rest of the direction, are we still comfortable with including distinct processes in annexures for particular matters that would depart from the general procedure direction (and requirement to engage/general 8 week timeframe)? If so, we will make it clearer in the 'About the Direction part' and throughout and also include placeholders for other processes (for example, Annexure A.3 Practical refusal, Annexure A.4 Charges, Annexure A.4 Access Grants etc)

Please don't rewrite the issues of quality were significant and should be avoided.

Yes keep the PD receptive and flexible for case management changes so place hold approach might work.

This doesn't have to be perfect it just has to work so there is a fine line in our engineering.

I hope I've answered enough to action and yes to edits but no to collective rewriting it just introduces so many new issues.

Many thanks

Liz

From: AGO,Rocelle <Rocelle.Ago@oaic.gov.au>

Sent: Tuesday, April 16, 2024 11:08:28 PM

To: TYDD,Liz <Elizabeth.Tydd@oaic.gov.au>; PIRANI,Toni <Toni.Pirani@oaic.gov.au>

Subject: Procedure Directions: Action items arising [SEC=OFFICIAL]

Dear Liz and Toni

Thank you both for your time this afternoon, it was really helpful to work through the issues. It's very exciting to see us closer to finalising the direction.

Based on the attached documents and our discussion this afternoon, I understand the residual action items are for me to:

1. Edit the procedure directions for agencies and applications, including
 - a. ensuring consistency and general edit as noted in Liz's email (attached) and
 - b. considering guidance for agencies and applicants to accompany the 8 week timeframe where we will be expecting the engagement and submission exchange between the parties to occur, including guidance on when engagement is expected to occur, a template to assist with making submissions
2. Propose internal/external communication strategy
3. Draft script/FAQs for applicants and agencies and process/templates for managing complaints

To assist with actioning the above as efficiently as possible, Liz could I please clarify the following:

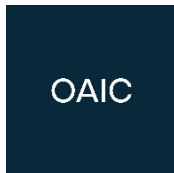
- The Insertion of principles into the procedure direction (see paragraphs 2.4-2.4.6; informality, cost effectiveness, timeliness, responsiveness, proportionality) – whether this should be inserted in the procedure direction or in Part 10 of the Guidelines, on the basis that the FOI Guidelines currently set out principles which inform the IC review process (see paragraphs 10.15-10.25, merit review, an informal process, non-adversarial, timely). Once clarified, we can also progress Part 10 of the FOI Guidelines with the procedure directions back to you so they could be issued at the same time.
- The proposed direction originally had separate sections for responding to the s 54Z notice (8 weeks) and then providing submissions (4 weeks) as they were provided separately. We agreed today we would have a truncated process and timeframe (8 weeks) for the engagement and parties submissions to occur – on this basis, for clarity I would suggest merging the contents between sections 3 (General procedure in relation to review of access refusal and access grant decisions) and 5 (General procedure in relation to submissions made during an IC review).
- Whether the commencement date of 1 July 2024 would provide a more acceptable timeframes for agencies to develop processes and to use various forums to promote external messaging (strategies could include: Information Matters newsletter, ICON alerts, correspondence to and attendance of SES Forum quarterly meeting in June 2024, targeted correspondence to frequent applicants, writing to agency heads, setting up a dedicated OAIC page for FAQs on new procedure directions for agencies and applicants)
- The inclusion of annexures to include distinct processes (deemed, searches) – noting your comment Liz around the nexus between Annexure A.2 with the rest of the direction, are

we still comfortable with including distinct processes in annexures for particular matters that would depart from the general procedure direction (and requirement to engage/general 8 week timeframe)? If so, we will make it clearer in the 'About the Direction part' and throughout and also include placeholders for other processes (for example, Annexure A.3 Practical refusal, Annexure A.4 Charges, Annexure A.4 Access Grants etc)

In terms of a comprehensive edit, Sara/Jessica from the MGE team would be able to assist, they had previously worked on updating the consultation draft and the draft that you have recently reviewed/edited. The procedure direction for applicants (in its first issue) was also reviewed by Comms for accessibility and a quick guide was also drafted as a companion piece.

Additionally, we can also pull together an implementation plan to address the internal implementation (updating process documents, workflow/Resolve amendments, reporting) which may require some assistance from BARD and internal/external communication, which may require some assistance from the Comms team.

Kind regards



Rocelle Ago (she/her)

Assistant Commissioner, Freedom of information

Office of the Australian Information Commissioner

P +612 9942 4205 **M** s47F **E** rocelle.ago@oaic.gov.au

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From: [AGO,Rocelle](#)
To: [TYDD,Liz](#); [PIRANI,Toni](#)
Subject: Revised Procedure Direction [SEC=OFFICIAL]
Date: Friday, 19 April 2024 10:01:09 PM
Attachments: [IC review procedure direction for agencies 19 April 2024.docx](#)

Dear Liz and Toni

IC review procedure direction to be followed by agencies and ministers

Further to our discussions this week, I have updated the procedure direction to be followed by agencies and ministers to reflect:

- the date of effect from 1 July 2024
- updated IC review principles, with the substance of the principles to be set out in the FOI Guidelines
- clarity around the general principles and procedures that apply to all matters and which matters would be subject to specific processes
- integration of sections providing for engagement and submission under the request for information section
- 8-week timeframe for engagement and submission exchange between the parties
- the approach of encouraging revised decisions only if it would resolve issues (i.e. full access)
- to remove repetition and for language to be as concise, consistent with the language of the FOI Act and plain as possible, which has included integrating the previous annexures on information gathering powers into a few paragraphs within the body of the instrument
- to remove practical guidance such as template submissions, engagement checklist into sample IC review forms/checklists onto the website (pending) to minimise the need to re-issue the direction each time a form/template is edited or created. I propose that checklists/forms are settled at the Director/Assistant Commissioner level
- a structure that is more consistent with the Procedure Direction to be followed by applicants.

A clean version is provided for review given the substantial rewrite and for ease of review.

IC review procedure direction to be followed by applicants and Part 10 FOI Guidelines – Work in progress

I was fortunate to have been working on a version of the agencies' procedure direction on my desktop as unfortunately I couldn't (and still cannot) access content manager to edit the procedure direction for applicants and Part 10 of the FOI Guidelines.

I will be away travelling between Saturday-Wednesday, but will be able to log back on Wednesday afternoon to progress the procedure direction for applicants and the FOI Guidelines. I don't anticipate there will be as much editing for the procedure direction (largely around the requirement to condense the s 54Z notification, engagement and submissions) and the FOI Guidelines (largely around ensuring content has been removed where it's discussed in the procedure direction for agencies and revision of the IC review principles).

The work in progress versions of the documents are at:

- **IC review procedure directions for applicants:** [D2024/008712](#).
- **Part 10 FOI Guidelines:** Executive Brief - [D2023/021023](#), Draft v 1.11 of Part 6 - [D2022/009530](#)

Roll out

With the proposed 1 July 2024 implementation date, I have included a basic timeframe for the roll-out (noting no consultation with Comms re timeframe as yet):

Task	Time period
Procedure Directions and FOI Guidelines to proceed to IC	29 April 2024
Develop FAQs / high level summary of changes Develop IC review external guidance (forms/checklists)	3 May 2024
Approval of procedure directions and FOI Guidelines Part 10 by Information Commissioner	8 May 2024
Advise FOI Branch of approval of procedure directions and Part 10 FOI Guidelines, including high level summary of changes	8 May 2024
Meet with FOI Branch to discuss changes / Q&A	10 May 2024
Publish procedure directions, FOI Guidelines and summary statements into dedicated page, noting effect from 1 July 2024. Include FAQs	10 May 2024
ICON alert: Special edition	10 May 2024
Development, implementation and testing of <ul style="list-style-type: none">• Resolve workflows• Process documents	31 May 2024
Staff training and engagement	Early June 2024
ICON alert	June 2024 (to confirm with MGE)
Archive previous direction and replace with new direction	1 July 2024
ICON alert: Special edition	1 July 2024

Have a great week ahead!

Kind regards

Rocelle Ago (she/her)



OAIC

Assistant Commissioner, Freedom of information
Office of the Australian Information Commissioner
P +612 9942 4205 M **S47F** E rocelle.ago@oaic.gov.au

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Executive brief

Responsible Executive Member:	Rocelle Ago, Assistant Commissioner FOI
Prepared by:	Jessica Eslick and Sara Peel, Director, Monitoring, Guidance and Engagement
To:	Elizabeth Tydd, FOI Commissioner
Copies:	Karen Tulloch, Raewyn Harlock
File ref:	D2024/008712
Date:	4 April 2024
Subject:	Proposed updates to draft IC review procedure direction for applicants

Purpose and timing

To inform you of the proposed updates to the draft IC review procedure direction for applicants (titled ‘Direction as to certain procedures to be followed in by applicants in Information Commissioner reviews’) (the draft direction).

Recommendations

1. That you note our proposed updates to the draft direction via comments to the draft direction (**Attachment A**).
2. That you note our summary of the submissions in response to our consultation, whether we have proposed updates to the draft direction in light of those submissions, and our rationale /comments (**Attachment B**).

Background

The Australian Information Commissioner may give written directions under s 55(2)(e)(ii) of the FOI Act in relation to procedures to be followed in Information Commissioner (IC) reviews.

The Information Commissioner has issued 2 directions under s 55(2)(e)(ii), which are currently in effect:

- [Direction as to certain procedures to be followed in Information Commissioner reviews](#), which has had effect from 26 February 2018.
- [Direction as to certain procedures to be followed by applicants in Information Commissioner reviews](#), which had had effect from 1 September 2021.

On 9 May 2023, we sought comments from, or [consulted](#), interested stakeholders on draft revisions to each of the 2 directions.

In our consultation, we advised stakeholders:

We intend to make all submissions publicly available. Please indicate when making your submission if it contains confidential information that you do not want made public and why it should not be published. Requests for access to confidential comments will be determined in accordance with the FOI Act. If the OAIC accepts submissions in confidence you must also provide a copy that can be published.

Between 8 June 2023 and 6 July 2023, we received submissions on the draft direction from **6 agencies** as follows:

1. Administrative Appeals Tribunal on 8 June 2023
2. Attorney-General's Department on 30 June 2023
3. Australian Federal Police on 30 June 2023
4. Australian Tax Office on 30 June 2023
5. Commonwealth Ombudsman on 30 June 2023
6. Department of Defence on 30 June 2023

Related brief [D2023/015645](#) contains TRIM links to those submissions at its Attachment B.

Attachments

1. **Attachment A:** Proposed updated draft direction (with proposed updates in highlight and comments).
2. **Attachment B:** Summary of agencies' submissions in response to our consultation on the draft direction, whether we have proposed (at Attachment A) to update the draft direction in response to those submissions, and our rationale/comments.

Attachment A

Proposed direction



Australian Government

Office of the Australian Information Commissioner

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

Contents

Part 1: About this direction Error! Bookmark not defined.

Part 2: The IC review process Error! Bookmark not defined.

Making an application for IC review . Error! Bookmark not defined.

During the IC review Error! Bookmark not defined.

Changes to contact details.....**Error! Bookmark not defined.**

Participation in the IC review**Error! Bookmark not defined.**

Submissions.....**Error! Bookmark not defined.**

Information Commissioner decisionsError! Bookmark not defined.

Part 3: Procedure for IC review of specific types of decisionsError!
Bookmark not defined.

Deemed access refusal decisions Error! Bookmark not defined.

Access refusal decisions..... Error! Bookmark not defined.

Access grant decisions..... Error! Bookmark not defined.

Part 4: Non-compliance with this directionError! Bookmark not defined.

Part 1: About this direction

- 1.1 This direction is given by the Australian Information Commissioner under s 55(2)(e)(i) of the Freedom of Information Act 1982 (FOI Act) in relation to Information Commissioner reviews (IC reviews).
- 1.2 This written direction sets out the procedure to be followed by applicants for IC reviews undertaken by the Information Commissioner under the FOI Act.
- 1.3 The Information Commissioner 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 Information Commissioner (s 54W(c)).
- 1.4 The Information Commissioner may also give written directions as to the procedure to be followed in relation to a particular IC review (s 55(2)(e)(ii)).
- 1.5 This direction does not apply to the extent it is inconsistent with a provision of the FOI Act, another enactment or a specific direction made in a particular IC review under s 55(2)(e)(ii) of the FOI Act.
- 1.6 Further information relating to the IC review process is published on the Office of the Australian Information Commissioner's (OAIC) website. In particular, Part 10 (Reviews by the Australian Information Commissioner) of the Guidelines issued by the Information Commissioner under s 93A of the FOI Act (FOI Guidelines) describes the principles that inform the OAIC's approach to IC reviews.
- 1.7 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.
- 1.8 This direction applies to IC review applications received from 1 July 2024. For IC review applications received before 1 July 2024, specific directions may be made in the context of these IC reviews.

Part 2: The IC review process

- 1.9 IC review procedures are found in Part VII of the FOI Act. The IC review process is intended to be an informal, non-adversarial and timely means of external merits review of FOI decisions made by agencies and ministers. Part 10 of the FOI Guidelines, to which agencies and ministers must have regard when performing a function or exercising a power under the FOI Act, sets out in detail the process and underlying principles of IC review.

Making an application for IC review


- 1.10 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. The online form is located at: https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICR_10.
- 1.11 Where it is not possible for an application to be made online, applications may be sent to the OAIC by:

Postal address	GPO Box 5218 Sydney NSW 2001
----------------	---------------------------------

Email address	FOIDR@oaic.gov.au
---------------	-------------------

Fax	+61 2 9284 9666
-----	-----------------

- 1.12 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
 - 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).
- 1.13 The OAIC 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 OAIC will consider any notices as received when sent to an applicant's preferred contact.
- 1.14 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
 - 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.
- 1.15 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 OAIC 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.
- 1.16 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.
- 1.17 The applicant must provide the OAIC 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.
 - 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.¹

- If an application for IC review is not made within the timeframes in the FOI Act, applicants may apply to the Information Commissioner 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 Information Commissioner 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.

1.18 An application for IC review should also:

- a. identify the parts of the decision you want 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.

1.19 The OAIC must provide 'appropriate assistance' to a person who wishes to apply for IC review and requires assistance to prepare the IC review application (s 54N(3)).

1.20 Section 54N of the FOI Act sets out the requirements for the contents and delivery of an application for IC review. These requirements include giving the OAIC contact details to which notices can be sent and providing a copy of the FOI decision the applicant wants the Information Commissioner to review. An application that does not comply with these requirements may be considered to be invalid.

During the IC review

Changes to contact details

1.21 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 Information Commissioner may decide not to undertake an IC review, or not continue to undertake an IC review, if the applicant or their nominated representative cannot be contacted after making reasonable attempts (s 54W(a)(iii)).

¹ 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).

Participation in the IC review

General principles

- 1.22 Applicants must respond to inquiries from the OAIC within the time provided unless there are 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 why additional time is needed and propose a new date for response. Approval of an extension request is at the discretion of the OAIC.
- 1.23 The OAIC expects that applicants and agencies will engage with the IC review process, with respect and courtesy.²

At the commencement of an IC review

- 1.24 The OAIC requires agencies and Ministers to engage with the IC review applicant at the commencement of an IC review. The purpose of this engagement is to attempt to resolve the issues identified in the IC review application in an informal and timely way. Agencies are required to contact applicants for IC review shortly after receiving the Information Commissioner's notice of IC review under s 54Z to arrange a suitable time for the engagement process. 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)).
- 1.24 The Information Commissioner may use any technique the Information Commissioner considers appropriate to facilitate an agreed resolution of the matters at issue in the IC review (such as alternative dispute resolution processes - s 55(2)(b)). Where appropriate, and following the compulsory engagement process described above, the OAIC may invite applicants to attend a teleconference to discuss the issues in dispute in the IC review with the agency's or Minister's office and to explore options for resolution, with a view to reaching agreement on some or all of the matters at issue in the IC review.

Receiving revised decisions under s 55G

- 1.25 An agency or minister may make a 'revised decision' under s 55G of the FOI Act during an IC review, giving access to further material. 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

- 1.26 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.

² [OAIC service charter](#).

- 1.27 Applicants will be invited to make written submissions after the initial triage and early resolution process is complete, and once the application has been assigned to a review adviser for substantive review/case management. First, the agency or Minister will be asked to make submissions in support of the IC reviewable decision. The agency or Minister will send the applicant a copy of their submissions at the same time as they are sent to the OAIC. The applicant will then have the opportunity to make submissions addressing any issues raised by the agency or the Minister. The applicant is required to send their submissions to the agency or Minister at the same time as they are sent to the OAIC.
- 1.28 The Information Commissioner will generally give the parties (both the applicant and the agency or Minister) 4 weeks to make their submissions.
- 1.29 The Information Commissioner will not accept any further submissions from either party to the IC review unless the Information Commissioner has requested them.
- 1.30 The Information Commissioner will contact the parties after receipt of submissions if procedural fairness requirements have been identified. For information on procedural fairness see [3.15] – [3.31] of Part 3 of the FOI Guidelines.
- 1.31 The OAIC may provide a preliminary view at any time during the IC review. This will outline the case officer's preliminary thinking on the issues in dispute in the IC review. The applicant may be invited in some cases to withdraw their IC review application, or make submissions in response to a preliminary view, depending on the views expressed in the preliminary view.
- 1.32 The IC review application and any attachments will be shared with the agency or Minister, as well as any other parties to the review, unless there is a reason not to do so. Any other information and submissions provided to the OAIC by the applicant will be made available to the other parties to the IC review.
- 1.33 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.
- 1.34 Generally, submissions should be made in writing and sent by email or pre-paid post. In limited circumstances, if an applicant is unable to provide written submissions, the OAIC may agree to accept verbal submissions by telephone.

Information Commissioner decisions

- 1.35 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.
- 1.36 When the Information Commissioner makes a decision on IC review under s 55K of the FOI Act, the Information Commissioner will quote or summarise the submissions in the published decision. If a confidential submission is relied on by the Information Commissioner in making a decision on the IC review, this will be noted in the decision without revealing the confidential material.
- 1.37 To protect against the unreasonable disclosure of personal information, the Information Commissioner will consider whether identifying information should be included in published decisions. Natural persons may opt not 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: Procedure for IC review of specific types of decisions

Deemed access refusal decisions

- 1.38 A 'deemed access refusal' occurs when the statutory time for making a decision on an FOI request for access to a document has expired and notice of the decision has not been given. In these circumstances the agency or Minister is 'deemed' to have refused the FOI request. Where the applicant applies for IC review of a deemed access refusal decision, the OAIC will make inquiries with the agency or Minister.
- 1.39 If, during the IC review, the agency or Minister sends the applicant a written decision on the applicant's FOI request, the OAIC will confirm with the applicant whether they are satisfied with the decision. Applicants who are satisfied with the decision and do not wish to proceed with the IC review must advise the OAIC in writing that they withdraw their application for IC review. Applicants who are not satisfied with the agency's or Minister's decision must explain why they disagree with the 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 undertake an IC review on the basis that the applicant has failed to cooperate in progressing the IC review application without reasonable excuse (s 54W(a)(ii)) or for non-compliance with the procedure direction (s 54W(c)).

Access refusal decisions

- 1.40 An 'access refusal decision' means (s 53A):
- 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 all the 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 (s 21) (see Part 3 of the Guidelines)
 - e. a decision relating to the imposition or amount of a charge (s 29)
 - f. a decision to give access to a document to a 'qualified person' (where disclosing the information to the applicant might be detrimental to the applicant's physical or mental health or well-being) (s 47F(5))
 - g. a decision refusing to amend a record of personal information in accordance with an application (s 48)
 - h. a decision refusing to annotate a record of personal information in accordance with an application (s 48).
- 1.41 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)).

- 1.42 Given that the agency or Minister bears this onus, it will generally be necessary to undertake inquiries or seek information from the agency or Minister before inviting comment from applicants.

Access grant decisions

- 1.43 An 'access grant decision' means a decision to grant access to a document where there is a requirement to consult a third party (s 53B). Such decisions involve granting the FOI applicant access to information or documents following consultation.
- 1.44 In an IC review of an access grant decision, it is the IC review applicant who bears the onus of establishing that a decision refusing the FOI request is justified, or that the Information Commissioner should give a decision adverse to the FOI applicant (s 55D(2)).
- 1.45 IC review applicants will generally be invited to provide information or submissions which explain why the agency's or Minister's decision is wrong before comment is invited from the agency or Minister.

Part 4: Non-compliance with this direction

- 1.46 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 review as outlined in s 54W(c). This means that, in these cases, the review will be finalised.
- 1.47 Applicants will be provided with the opportunity to explain why the Information Commissioner should not finalise the IC review under s 54W(c) of the FOI Act before a decision is made.

Attachment B

Summaries of updates and agencies' submissions

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
1.8 – Direction has effect from 1 July 2023	<ul style="list-style-type: none"> • N/A 	<p><u>Updated:</u></p> <ul style="list-style-type: none"> • This Direction has effect from 1 July 2024. The update is not in response to agencies' submissions. <p><u>Comments:</u></p> <ul style="list-style-type: none"> • As stated in the corresponding EB on the procedure direction for agencies (D2024/007050), we should potentially have a separate process for backlog matters. • We could state, for example: <p><i>For IC review applications received before 1 July 2024, agencies and ministers must have regard to Part 10 of the FOI Guidelines issued under s 93A of the FOI Act which sets out the general principles and expectations of the Information Commissioner regarding IC reviews. Specific directions may be made in the context of these IC reviews.</i></p>

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>1.13 – OAIC contacting applicants</p> <ul style="list-style-type: none"> Paragraph 1.13 explains that the OAIC will contact applicants using their preferred contact method. Paragraph 1.13 also states ‘Where an applicant has listed a preferred contact method as well as other contact information, the OAIC will consider any notices as received when sent to an applicant’s preferred contact’. 	<ul style="list-style-type: none"> The AAT submits that we may wish to consider referring to an exception where there is evidence of non-receipt, such as a returned letter or email non delivery message. 	<p><u>Not update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> Note that the existing IC review procedure for applicants contains the same wording at para 1.13. In practice, if we cannot contact an applicant, we may not be able to continue with the IC review and would consider finalising the IC review under s 54W(a)(iii) (cannot contact applicant after making reasonable attempts). We consider that it is not worthwhile discussing our power under s 54W(1)(a)(iii) here, at the beginning of the procedure direction.
<p>1.15 – Who can be an IC review applicant?</p> <ul style="list-style-type: none"> Paragraph 1.15 refers to s 54L(3), namely that an IC review application may be made by the person who made the request to which the decision relates, and the proceeding paragraphs 1.16 to 1.20 set out the requirements for the IC review application. 	<ul style="list-style-type: none"> The AAT queries whether the requirements for IC review applications of access grant decisions (s 54M) are the same as those discussed at paragraphs 1.16 to 1.20. 	<p><u>Update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> Update para 1.15 to refer to s 54M(3) (application for IC review of access grant decisions), given that the information requested in the following paragraphs can apply to applications for IC review of access grant decisions. Minor updates may be required to following paragraphs, such as to para 1.18(c) so that we refer to ‘wrongly granted’ rather than ‘wrongly refused’.

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>1.17(a) – Information that must be provided with IC review application:</p> <ul style="list-style-type: none"> Paragraph 1.17 states that ‘The applicant must provide the OAIC with about the FOI decision, in particular (a) ... (b) ... (c) ... (d) ...’. Paragraph 1.17(a) states that the applicant should say whether the decision under review is an original decision or internal review decision, and notes ‘it is usually better to seek internal review first ...’ (emphasis added) 	<ul style="list-style-type: none"> Defence proposes that we consider making internal review compulsory, in circumstances which allow it. This would allow for agencies and ministers to have further meaningful engagement with the applicant before they seek an IC review in an attempt to resolve the issues in an informal and timely way, thus reducing the workload for the OAIC. ATO submits that it is unclear whether there will be any requirement on the applicant to either seek internal review or provide details on why they did not consider it appropriate in the circumstances (ATO). 	<p><u>Not update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> Requiring applicants to seek internal review before seeking IC review is outside the scope of the procedural direction, and would require legislative change. We could consider making clearer by way of a separate dot point that, for example ‘applicants have a choice between applying for internal or IC review of a decision, unless the decision was made by the Minister or personally by the principal officer of an agency, or is a deemed access refusal decision. In those cases, applicants must directly apply for IC review.
<p>1.17(b) – Information to be provided with IC review application</p> <ul style="list-style-type: none"> Paragraph 1.17(b) notes that ‘In most cases, an application for IC review must be made within 60 days of the applicant being notified of the ... decision ...’ (emphasis added) 	<ul style="list-style-type: none"> The AAT submits that we may wish to consider whether the date of receipt of the decision is also relevant. 	<p><u>Not update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> Para 1.13 (above para 1.17) says ‘the OAIC will consider any notices as received when sent ...’. Given that agencies and the OAIC mostly send notices by email, we consider that no change is required to distinguish between the date a notice is given and the date received. The 60 day time limit for applying for IC review of an access refusal decision is also generous, which lessens the need to distinguish between when a notice is given, and received.
<p>1.17 (general)</p> <p>Agency reference number</p>	<ul style="list-style-type: none"> AFP submits that applicants should also be required to provide the agency reference number for the FOI decision. 	<p><u>Not update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> The applicant is already generally required to provide a copy of the decision (s 54N(1)(b)), which should state the agency reference number.

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>1.18 – Further information to be provided with IC review application:</p> <ul style="list-style-type: none"> Paragraph 1.18 advises that ‘An application for IC review should also: (a) ... (b) ... (c) ... (d) ...’, such as the aspects of the decision about which they seek the IC review. (emphasis added) 	<ul style="list-style-type: none"> ATO submits that given the mandatory consultation requirement proposed to be put on agencies it would appear appropriate for applicants to be required to provide the information set out in this paragraph prior to any consultation occurring. ATO also queries whether a failure to provide this information would be considered a ‘failure to engage’. 	<p><u>Not update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> Providing the information listed in para 1.18 is already framed as a requirement, stating ‘should’. The power to finalise an IC review for failure to cooperate (s 54W(a)(ii) is discussed in the second section of this part of the direction (under the subheading During the IC review), and does not need to be discussed in this section, the first section (under the subheading Making an application for IC review). We are required to provide appropriate assistance to a person who wishes to make an IC review application, and requires assistance (s 54N(3)), and therefore it is not appropriate to emphasise the power to finalise an IC review at the application stage).
<p>1.18(a) – Further requirements of IC review application</p> <ul style="list-style-type: none"> Paragraph 1.18(a) says that an application should ‘identify the aspect(s) of the ... decision about which the IC review is sought’. 	<ul style="list-style-type: none"> AGD submits that this wording may be confusing for some readers, and could alternatively say “identify the parts of the decision you want the Information Commissioner to review”. Defence submits that at para 1.18, the revisions suggest that an IC review application should identify why the agency's or minister's decision is wrong. Defence proposes making this compulsory, saying that would assist the agency or minister to better understand and resolve the issues in a meaningful, informal and timely way. 	<p><u>Update</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> Update in line with AGD’s proposal ‘identify the parts of the decision you want the Information Commissioner to review’. In relation to Defence’s submission, we note that providing the information listed in para 1.18 is already framed as a requirement, stating ‘should’.

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>1.23</p> <p>Engagement to resolve issues (issue 1)</p>	<ul style="list-style-type: none"> AAT submits that engagement should only be required if there has been no internal review of the decision. 	<p><u>Update</u></p> <ul style="list-style-type: none"> Clarify in both applicants and agencies procedure directions that engagement would not be required if they have evidence of engagement with the applicant that is above their duty to take reasonable steps to assist the person to make the request in a manner that complies with s 15 (s 15(3)), such as during an internal review process.
<p>1.23</p> <p>Engagement to resolve issues (issue 2)</p> <ul style="list-style-type: none"> Paragraph 1.23 states 'Agencies are required to contact applicants for IC review shortly after the IC review application is lodged to arrange a suitable time for the engagement process.' (emphasis added) 	<ul style="list-style-type: none"> AAT, AFP, and the Commonwealth Ombudsman submit that paragraph 1.23 should say that agencies are required to contact applicants to arrange the engagement after receiving the s 54Z notice. AFP in particular notes that there can be a delay between an IC review application and s 54Z notice. 	<p><u>Update</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> Consider updating para 1.23 to say 'after receiving the OAIC's notice of IC review under s 54Z'.
<p>1.23</p> <p>Engagement to resolve issues (issue 3)</p>	<ul style="list-style-type: none"> ATO submits it would also be helpful to provide applicants with further details about what is expected of them in terms of participating in agency engagement and that simply attending a meeting with no intention to attempt to resolve the review application would be not considered appropriate 'engagement'. 	<p><u>Update</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> Consider updating para 1.23 to say that the engagement may be more likely to resolve the matter if both parties are well prepared for the engagement. Consider updating para above, para 1.22 to discuss respectful engagement.

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>1.31 – Preliminary view</p> <ul style="list-style-type: none"> Paragraph 1.31 states ‘The OAIC may provide a preliminary view at any time ... The applicant may be invited in some cases to withdraw the IC review application, depending on the views expressed in the preliminary view’. 	<ul style="list-style-type: none"> The AAT submits that if there is an opportunity for the parties to provide information in response to the preliminary view, it may be useful to state this. Such a view may raise a fact or issue that can be addressed. 	<p><u>Update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> Update to clarify that the OAIC will invite the applicant to withdraw or make submissions in response to a preliminary view, in line with paras [10.60] of the draft FOI Guidelines (D2022/009530) which says: <p><i>10.60 ... the OAIC’s IC review officer may review the material submitted by both parties and provide a preliminary view as to the merits 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.</i></p>
<p>Revised decisions are not referred to in the draft procedure direction</p>	<ul style="list-style-type: none"> N/A (observed by OAIC) 	<p><u>Update.</u></p> <p><u>Comment:</u></p> <ul style="list-style-type: none"> In part 2, under subheading During the IC review, insert a sub-subheading ‘Receiving revised decisions under s 55G’ and insert content in line with para 1079 of draft Part 10 of the FOI Guidelines which says: <p><i>A 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.</i></p> <ul style="list-style-type: none"> Then add references to the Information Commissioner’s powers under 54W(a) and 54W(c).

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
General	<ul style="list-style-type: none"> AGD queries if it may be simpler and more effective for all users of the FOI system to have a single direction, addressed to both the agency and the applicant. This would ensure all parties have a consistent understanding of the IC review process. By comparison, we note the AAT General Practice Direction (General-Practice-Direction.pdf (aat.gov.au)), under s 18B of the Administrative Appeals Tribunal Act 1975 applies to all parties to a review and appears to provide greater consistency in the explanation of process and responsibilities. 	<p><u>Not update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> <u>We consider that having 2 procedure directions means that we have one particular procedure direction that is targeted to applicants and increases their accessibility to the information that they require to gain the benefit of an IC review.</u>
General	<ul style="list-style-type: none"> AGD submits that it is unclear what practice directions (if any) apply to third parties joined to an IC review or whether the process for an IC review in the directions for agencies and applicants may differ where there are other parties to the review. 	<p><u>Not update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> We consider that third parties do not require a procedure direction, and that their role is sufficiently discussed in the FOI Guidelines. Agencies also engage with third parties by way of consultation, which gives them the required information about the IC review process and their rights and obligations in relation to the IC review.
General	<ul style="list-style-type: none"> ATO submits that a delay in seeking a review by an applicant should be a ground for providing an agency with additional time to respond. 	<p><u>Not update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> To give agencies greater time to respond to our requests for information on the basis that the applicant has been granted an extension for applying for an IC review would not further the objects of the FOI Act, which include to facilitate and promote public access to information, promptly and at the lowest reasonable cost.



Direction as to certain procedures to be followed by agencies and ministers in IC reviews

This direction is given under s 55(2)(e)(i) of the *Freedom of Information Act 1982*.

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Part 1: About this Direction

Application

- 1.1 This Direction applies to applications to the Information Commissioner 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 IC review.¹
- 1.5 Further information relating to the IC review process is published on the OAIC's website. In particular, Part 10 (Reviews by the Information Commissioner) of the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act (FOI Guidelines) describes the principles that inform the Information Commissioner's approach to IC reviews. Agencies and ministers must have regard to the FOI Guidelines when performing a function or exercising a power under the FOI Act.
- 1.6 This Direction is not a legislative instrument.²

Interpretation

- 1.7 In this Direction:

Application means an application to the Information Commissioner for a review of a decision under the FOI Act.

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 Part VII of the FOI Act sets out the system for Information Commissioner review (IC review).
- 2.3 In relation to each IC review, the Information Commissioner must:
 - conduct the IC review with as little formality and technicality as is possible ,
 - 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

¹ Section 55(2)(e)(ii) of the FOI Act

² Section 55(3) of the FOI Act.

³ Section 55(4) of the FOI Act

- 2.4 The IC review procedure is designed to be an informal, cost-effective, timely, responsive and proportionate procedure of conducting external merits review of decisions by agencies and ministers.⁴
- 2.5 The Information Commissioner 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 Information Commissioner 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.

Onus on agencies and ministers: review of access refusal decisions

- 2.6 In an IC review involving the review of an access refusal decision, the agency or minister has 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)). The agency or minister must also use their best endeavours to assist the Information Commissioner to make his or her decision in relation to the IC review.
- 2.7 The agency or minister must provide the Information Commissioner and the IC review applicant documents and information within the timeframes specified in this Direction. Failure to provide relevant documents and information may result in a decision being made that is adverse to an agency or minister.

Timely provision of information to Information Commissioner and IC review applicant

- 2.8 Documents and information relevant to the IC review must be:
- identified as early as possible in the IC review process
 - provided to the Information Commissioner and to the IC review applicant in accordance with this Direction or with the direction made in a particular IC review.
- 2.9 The documents and information provided in response to the Information Commissioner's request through preliminary inquiries (s 54V), notice of an IC review (s 54Z) or through formal information gathering powers (Division 8 of the FOI Act), will assist the Information Commissioner to determine whether to conduct a review, continue to conduct a review or proceed to an IC review decision under s 55K of the FOI Act based on the evidence before them.
- 2.10 Agencies and ministers must provide their response within the timeframe set out in the notice, unless an extension of time has been sought and granted. The Information Commissioner considers that it will only be in extenuating circumstances that any further

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].

extension to time will be granted. If an agency or minister requires an extension of time to respond to a notice of IC review, the agency or minister must make a request in writing to the Information Commissioner with supporting evidence of the need for the extension prior to the due date.

2.11 Where an agency or minister no longer contends that material is exempt, the Information Commissioner requests that an agency or minister:

- make a revised decision under s 55G which facilitates the prompt release of further material to the applicant where all material will be released in full within 14 business days or
- advise the OAIC that it no longer contends that the material exempt in part within 10 business days and the IC review will proceed to a decision under s 55K of the FOI Act.

Part 3: General procedure for IC review of review of access refusal and access grant decisions

3.1 This Part applies to all IC review applications, other than applications for IC review of the decisions set out in Part 4.

Preliminary inquiries

3.2 Before commencing an IC review, the Information Commissioner may make inquiries for the purpose of determining whether or not to undertake a review (s 54V).

3.3 An agency or minister may generally have 5 business days to respond to a preliminary inquiries.

Notification of IC review

3.4 The Information Commissioner will notify the agency or minister of the commencement of an IC review under s 54Z of the FOI Act (s 54Z notice).

Request for information

3.5 In general, the s 54Z notification will include the following:

- a copy of the IC review application
- a request to engage, 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 in the IC review and to provide information that demonstrates the engagement or reasonable attempts at engagement (see paragraphs X – X)
- an informal request to provide documents and information (s 55(2)(d)) as set out in paragraph [x], to the Information Commissioner and the FOI applicant, which includes:
 - a copy of the FOI request
 - communication between the applicant and the agency or minister that modifies the original request

- the documents at issue, or sufficient details of the document to identify the nature of those documents (see paragraphs X – X) where relevant.
 - submissions in response to the issues raised in the IC review application (see paragraphs X – X).
- 3.6 An agency or minister may generally have 30 business days to respond to a request for information issued under s 54Z .

Engagement between parties

- 3.7 The s 54Z notice will also require the agency or minister to provide information regarding engagement, and/or reasonable attempts to engage with, the IC review applicant to resolve or narrow the issues in dispute in the IC review.

Method of engagement

- 3.8 Engagement with IC review applicants may comprise a telephone or video conference between the applicant and the agency or minister. The agency or minister will be responsible for contacting the applicant and making the necessary arrangements for the engagement process. The OAIC will not be involved in making such arrangements or in attending the telephone or video conference.
- 3.9 IC review 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, such as in writing to the applicant, to attempt to resolve the issue between the parties or narrow the issues in dispute.

Demonstration of engagement or attempts to engage

- 3.10 Agencies and ministers must provide the Information Commissioner information to demonstrate the action(s) they have taken to engage with the IC review 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.

- 3.11 The Information Commissioner has published a checklist to assist agencies and ministers provide relevant information relating to the agency or minister’s engagement with the applicant during the IC review: see [IC Review Practice Documents \[x-ref to website\]](#).
- 3.12 The Information Commissioner will advise the agency or minister if they consider that the agency or minister should undertake further engagement with the applicant during the IC review.

Documents and information to be provided by agency or minister

- 3.13 The Information Commissioner will generally request particular documents and information to address issues specific to the scope of an IC review as set out in the **Table A**.

Table A: Information to be provided the agency or minister in relation to the scope of the IC review

Scope of IC review	Information to be provided by agency or minister
Access refusal - Exemptions (Part IV Divisions 2 and 3, except ss 33, 34, 45A)	<ul style="list-style-type: none"> • The original FOI request and any correspondence with the FOI applicant that modifies the scope of the FOI request • Copies of correspondence including file notes of relevant telephone conversations between the respondent and anyone consulted • A marked up, unredacted copy of the documents at issue where material claimed to be exempt is highlighted with reference to the exemptions applied • Submissions in support of the exemptions claimed, including the application of s 11B of the FOI Act in relation to conditional exemptions, in the form prescribed by the Information Commissioner: see IC Review Practice Documents [x-ref to website]. • If any third parties are notified of the IC review, a copy of the written notifications under s 54P
Access refusal – Exemptions (Part IV Division 2, ss 33, 34, 45A)	<ul style="list-style-type: none"> • The original FOI request and any correspondence with the FOI applicant that modifies the scope of the FOI request • Copies of correspondence including file notes of relevant telephone conversations between the respondent and anyone consulted • Evidence, on affidavit or otherwise, including by way of submissions, that documents are exempt under ss 33, 34, or 45A • If any third parties are notified of the IC review, a copy of the written notifications under s 54P • A statement identifying whether the document(s) subject to IC review and which are claimed to be exempt under s 33 relate directly or indirectly to the intelligence functions of the ACIC and the AFP. The statement should provide information as to which intelligence function or functions the document relates (as identified in s 3(1) of the <i>Inspector-General of Intelligence and Security Act 1986</i>)
Access refusal –FOI request does not fall within FOI Act: Part I and ss 4, 5,6, 6A, 7, 12, 20 and Schedules to the FOI Act	<ul style="list-style-type: none"> • The original FOI request and any correspondence with the FOI applicant that modifies the scope of the FOI request • Information about the nature of the document in question • The respondent’s response to the FOI applicant • Any submissions in support of the respondent’s decision that the FOI request does not fall within the FOI Act: see IC Review Practice Documents [x-ref to website].

Scope of IC review**Information to be provided by agency or minister**

Access grant (Part IV Divisions 2 and 3 ss 47, 47F and 47G)

- The original FOI request and any correspondence with the FOI applicant that modifies the scope of the FOI request
- Copies of correspondence with the third party
- The documents in dispute
- The reasons for the decision to release the documents despite the third party's objections

Access refusal – Charges (Part III, s 29)

- The original FOI request and any correspondence with the FOI applicant that modifies the scope of the FOI request
- A copy of the preliminary estimate of charge notice sent to the FOI applicant and the FOI applicant's response
- A copy of the charges notice sent to the FOI applicant
- Explanation as to why the charge was imposed or how it was calculated, including any documentary evidence which supports the respondent's calculation of the charge
- Submissions in support of the respondent's decision to impose a charge or in the alternative, a revised decision under s 55G of the FOI Act waiving the charge in full: [IC Review Practice Documents \[x-ref to website\]](#).

Access refusal – Refusal to amend or annotate a record of personal information (Part IV)

- A copy of the documents that were given to the FOI applicant
- The reasons why the respondent considers that no amendment should be made under s 50, or the reasons why the requested annotation of records was not made under s 51
- Submissions in support of the respondent's decision to refuse to amend or annotate a record of personal information: see [IC Review Practice Documents \[x-ref to website\]](#).

Access refusal – Practical refusal (Part III, s 24)

- The original FOI request and any correspondence with the FOI applicant that modifies the scope of the FOI request
- Copies of any correspondence including file notes of telephone conversations relating to the respondent's request consultation process, including a copy of the letter sent to the FOI applicant and the FOI applicant's response (if any)
- Records that demonstrate the number of documents and/or pages encompassed by the FOI request, including but not limited to notes of any searches conducted and consultations with relevant staff members
- An estimate of the number of hours of processing time involved and a breakdown of this time to demonstrate how the time was estimated
- Evidence of document sampling if undertaken
- The names and contact details of anyone who was consulted by the respondent, formally under ss 15(7), 26A or 27A, or informally (including consultation with other Australian Government agencies).
- Submissions in support of the respondent's decision in the form prescribed by the Oaic: see [IC Review Practice Documents \[x-ref to website\]](#).

Access refusal – information as to existence of certain documents (Part III s 25)

- Submissions in support of the respondent's decision to refuse access under s 25 (relevant documents will not be requested in the first instance): see [IC Review Practice Documents \[x-ref to website\]](#).

Format of documents at issue

3.14 In providing the Information Commissioner with a marked up, un-redacted version of all documents identified within the scope of the FOI request that are subject to the IC review in an electronic format (that is, an electronic document that identifies the parts of the document claimed to be exempt, but allows the OAIC to view the exempt matter). Agencies and ministers must ensure that all redactions pursuant to an exemption, or deletions on the basis of relevance pursuant to s 22(1)(a)(ii) of the FOI Act, are clearly marked with reference to the relevant provision of the FOI Act that the redactions or deletions are made under. A schedule of marked up documents must also be included.

Production of documents at issue

3.15 The Information Commissioner's request for documents and information may initially be informal (s 55(2)(d)).

Requesting documents under specific provisions

3.16 The Information Commissioner may also require the production of documents and information under specific provisions of the FOI Act:

- Section 55U(3) of the FOI Act provides that, if the Information Commissioner is not satisfied by evidence on affidavit or otherwise that a document is an exempt document under sections 33, 34 or 45A of the FOI Act, the Information Commissioner may require the document to be produced for examination.
- Section 55T(2) of the FOI Act provides that, for the purposes of deciding that a document is an exempt document, the Information Commissioner may require the document to be produced.
- Section 55R(3) of the FOI Act provides that the Information Commissioner can issue a notice requiring a person to produce information and documents if the Commissioner reasonably believes it is relevant to an IC review.

3.17 Where an agency or minister fails to provide information and documents, including the documents at issue, within the initial or extended timeframe, or requests another extension, the Information Commissioner may proceed to require the provision of information and the production of documents pursuant to s 55R of the FOI Act. The Information Commissioner will generally provide 10 business days for agencies and ministers to respond to these notices. Failure to comply with a notice to produce is an offence punishable by six months imprisonment (s 55R(5)).

Requests for inspection

3.18 Inspection of the documents at issue by the Information Commissioner in response to a request for production will only be considered in very limited situations where the agency or minister can demonstrate that the circumstances warrant inspection rather than the direct production of copies of the marked up documents. What constitutes these very limited circumstances is not prescriptive and will be determined on a case-by-case basis. The onus is on the requesting agency or minister to justify that circumstances exist that warrant inspection.

- 3.19 The Information Commissioner considers that inspection will not be warranted where the documents at issue are subject to conditional exemptions. The Information Commissioner considers that inspection may be appropriate in some circumstances where the documents at issue are subject to a national security, Cabinet or Parliamentary Budget Office exemption claim (ss 33, 34 and 45A of the FOI Act). However, the requesting agency or minister must satisfy the Information Commissioner that the circumstances warrant inspection.⁷
- 3.20 If the Information Commissioner agrees to an agency's or minister's request for inspection, the agency or minister will be required to undertake all necessary arrangements to facilitate the inspection. Unless otherwise agreed, this will occur at the Information Commissioner's office.
- 3.21 If an agency or minister is of the view that there are circumstances that justify inspection, the Information Commissioner will require the agency or minister to provide a written request for inspection together with supporting reasons prior to the due date in the s 54Z notice of IC review.

Statement of reasons

- 3.22 Where the Information Commissioner believes that the statement of reasons is inadequate, or has not been provided, the Information Commissioner may require the decision maker to provide an adequate statement of reasons under s 26(1) (s 55E).

Submissions

Provision of submissions to the applicant

- 3.23 In seeking submissions from agencies and ministers in support of the IC reviewable decision, the OAIC 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.
- 3.24 Agencies and ministers 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 decision under s 55K of the FOI Act without any further opportunity to make submissions.
- 3.25 Agencies and ministers should not expect the opportunity for further submissions. Any request for extensions of time should only be made where exceptional circumstances can be demonstrated this is because extensions of time will only be granted in exceptional circumstances.

Requests to make submissions in confidence

- 3.26 The Information Commissioner will not accept submissions in confidence without a prior request. Any request for confidentiality must be accompanied by reasons to support such a claim, including whether the submission would reveal the contents of the documents at issue.

⁷ The OAIC is able to receive secure electronic transmission of documents. For more information contact the OAIC.

- 3.27 Where the Information Commissioner accepts a submission in confidence, agencies and ministers must provide a version of the submission that the agency or minister provides to the IC review applicant.⁸

Immunity

- 3.28 Section 55Z of the FOI Act provides immunity to a person from civil proceedings and penalties if the person gives information, produces a document or answers a question in good faith for the purposes of an IC review.

Review of information provided in response to s 54Z

- 3.30 The Information Commissioner will generally proceed with the IC review on the basis of the evidence provided in response to the s 54Z notice, and submissions. Agencies and ministers should therefore provide all of the information they consider relevant in response to the notice and procedural directions issued in each specific case.
- 3.31 The Information Commissioner will contact the parties after receipt of submissions if procedural fairness requirements are identified or where a preliminary view can be provided to an agency that may result in an agency or minister making a revised decision under s 55G of the FOI Act.

Third party consultation

- 3.32 In some IC reviews, there will be third parties, such as an affected third party who is required to be notified of an IC review application under s 54P (refer to items 1 and 2 of the above table at paragraph 3.13), and a person who is joined by the IC to the IC review as a person whose interests are affected by the IC reviewable decision.
- 3.33 The agency or minister may undertake consultation with third parties during the IC review in order to support their submissions. In some cases, the IC may request or require that the agency or minister undertake such consultation with third parties during the IC review. In those cases, the Information Commissioner may provide the agency or minister with 4 weeks to make their submissions.

Decisions made under s 55K of the FOI Act

Content of decisions

- 3.34 Where the Information Commissioner makes a decision on IC review pursuant to s 55K of the FOI Act, the Information Commissioner will quote or summarise an agency's or minister's non-confidential submissions in the published decision.
- 3.35 Where a confidential submission is relied on by the Information Commissioner in making a decision on the IC review, reference to the submission will be made without revealing the confidential material.

⁸ See *FOI Guidelines* at [10.103].

Notification of implementation

3.36 Where a decision under s 55K sets aside the decision under review, the Information Commissioner may request the agency or minister to advise, within 28 days, to advise the Office of the Australian Information Commissioner (OAIC) whether it has fully implemented my decision or whether it will be seeking review of the decision by the Administrative Appeals Tribunal (AAT).

Part 4: Procedures for IC review of specific types of decisions

4.1 This Part applies to IC review applications of specific types of decisions as set out in Annexure A.

4.1 The Information Commissioner may choose to expedite a particular application or cohort of applications. Annexure A sets out the procedure for the following applications:

Annexure	Procedure	Application
A.1	Procedures in relation to IC review of deemed access refusal decisions	Preliminary inquiries, notification of review (s 54Z notice) and request for information
A.2	Procedures in relation to IC reviews of decisions to refuse access to documents on the basis that they cannot be found or do not exist (s 24A)	IC review process

Part 5: Non-compliance with this Direction

5.1 This Part applies to all IC review applications.

5.2 Because the model litigant obligation under the *Legal Services Directions 2017* extends to Commonwealth entities involved in merits review proceedings, failure to adhere to the requirements of this Direction may amount to non-compliance with the model litigant obligation.⁹

5.3 The Information Commissioner may report non-compliance with this Direction in the Office of the Australian Information Commissioner's Annual Report.

5.4 The Information Commissioner may also report non-compliance with this Direction to the Office of Legal Services Coordination in the Attorney-General's Department.

5.5 The Information Commissioner may also consider non-compliance within this Direction as part of investigations they conduct under Part VIIB of the FOI Act.

⁹ See paragraph 3 of Appendix B to the *Legal Services Directions 2017*.

DATE

Annexure A.1 – Procedures in relation to IC review of deemed access refusal decisions

1. Application

1.1 The procedure set out below apply to an application for IC review 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 procedure specifically sets out the process for the conduct of preliminary inquiries and commencement of review of deemed access refusal decisions. For all other matters, paragraphs [x] - [x] of the Direction apply.

2. Preliminary inquiries

2.1 The Information Commissioner will undertake preliminary inquiries under s 54V of the FOI Act. In undertaking preliminary inquiries, the Information Commissioner will require the agency or minister to confirm that the relevant FOI request is deemed to have been refused.

2.2 Agencies and ministers will have 5 business days to respond to the Information Commissioner's preliminary inquiries.

3 Commencement of review

3.1 If the agency or minister confirms that the relevant FOI request is deemed to have been refused, or fails to respond to the Information Commissioner's preliminary inquiries, a s 54Z notice will be issued notifying of the commencement of an IC review.

3.2 The s 54Z notice will be accompanied by a direction under s 55(2)(e) of the FOI Act, requiring the agency or minister to either:

- a) make a revised decision under s 55G if the decision the agency or minister intends to make will result in the giving of access to the requested documents in full and to provide the relevant decision to the applicant and to the Information Commissioner or
- b) make a revised decision under s 55G if the decision the agency or minister intends to make will result in the giving of access to some of the requested documents, and to provide the relevant decision and non-exempt documents to the applicant, and to provide all relevant processing documents and the documents remaining at issue to the Information Commissioner or
- c) make submissions in support of the access refusal if the agency or minister intends refusing access to the requested documents and to send those submissions to both the Information Commissioner and the applicant. The agency or minister must also provide the following information and exempt documents to the Information Commissioner under s 55T of the FOI Act:
 - the FOI request and any correspondence that modifies its scope.
 - the original decision (if the decision appealed is a deemed affirmation of the original decision)
 - submissions in support of the access refusal
 - the names and contact details of anyone who was consulted formally under ss 15(7), 26A or 27A, or informally (including consultations with other Australian Government agencies).
 - if any third parties have been notified of the IC review, a copy of the written notifications.

- copies of any correspondence between the respondent and anyone who was consulted, including file notes of any relevant telephone conversations.
- If the IC review involves exempt matter, a marked up, un-redacted copy of all documents identified within scope of the FOI request that is subject of IC review in an electronic format.

3.3 Agencies and ministers will have 15 business days to respond to the Information Commissioner's written direction.

Annexure A.2 – Procedures in relation to IC review of decision to refuse access to documents only on the basis that they cannot be found or do not exist (s 24A)

1. Application

1.1 This Part applies to an application for IC review of a decision to refuse access to documents only on the basis that the documents cannot be found or do not exist (s 24A).

2. Preliminary inquiries

2.1 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 Information Commissioner will undertake preliminary inquiries under s 54V of the FOI Act. In undertaking preliminary inquiries, the Information Commissioner will require the agency or minister to confirm that the relevant FOI request is deemed to have been refused.

2.2 Agencies and ministers will have 5 business days to respond to the Information Commissioner's preliminary inquiries.

3 Decline to review

3.1 Where the statement of reasons adequately sets out the reasons for refusing access on the basis that the documents cannot be found or do not exist, the application may be declined under s 54W(a)(i).

4. Commencement of review

4.1. Where the statement of reasons does not adequately set out the reasons for refusing access on the basis that the documents cannot be found or do not exist, the Information Commissioner will commence review and notify the agency or minister of the commencement of review under s 54Z of the FOI Act and request the following information:

- the FOI request, and any correspondence that modifies its scope
- a copy of any document that records searches conducted during the request process, including if applicable:
 - Notes kept by individuals conducting searches
 - Correspondence between the FOI decision maker and individuals who conducted searches
 - Any other records of searches or recorded consideration of where to search
- a copy of any document that records the searches conducted following the Information Commissioner's request to undertake searches under s 55V as set out below [see paragraph 4.2].
- a statement of reasons that demonstrate the searches undertaken following the Information Commissioner's request to provide an adequate statement of reasons under s 55E [see paragraph 4.2].

4.2 The Information Commissioner can require an agency or minister to give reasons for their decision if the Commissioner believes the reasons given were inadequate or if no reasons were provided (s 55E(1)(c)).

The Information Commissioner may order an agency or minister to undertake further searches for documents, including where access to a document has been granted but not actually given (s 55V(2)).

4.3 Agencies and ministers will have 5 business days to respond to the Information Commissioner's written direction and request for information.

5. Review

5.1 Where the Information Commissioner is satisfied that reasonable steps have been undertaken to find documents within the scope of the applicant's FOI request, the IC review application may be declined under s 54W(a)(i).

4.2 Where the Information Commissioner is not satisfied that reasonable steps have been undertaken to find documents within the scope of the applicant's FOI request, the application may proceed to a decision under s 55K of the FOI Act.

From: [ESLICK, Jessica](#)
To: [TYDD, Liz](#)
Cc: [OAIC - FOI Commissioner](#); [PEEL, Sara](#)
Subject: [FOR CLEARANCE] Updated IC review procedure directions [SEC=OFFICIAL]
Date: Wednesday, 26 June 2024 3:57:22 PM

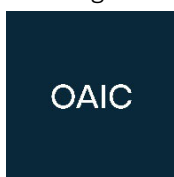
Clearance Snapshot	
Due date	
Fixed or flexible	26 June 2024
If fixed, why?	
Topic for clearance	Updated revised IC review procedure directions
Product (include CM link)	Updated IC review procedure directions: <ul style="list-style-type: none">• Procedure direction for agencies: D2024/012823• Procedure direction for applicants: D2024/012824
Length / no. of pages	<ul style="list-style-type: none">• Procedure direction for agencies: 14 pages• Procedure direction for applicants: 9 pages
External parties	IC review parties
Clearance & consultation	Rocelle Ago, Assistant Commissioner, and FOI Branch directors
Responsible director	Sara Peel, Director, MGE team
Final Clearance by	Elizabeth Tydd, Freedom of Information Commissioner

Dear Liz

Please find the above clearance snapshot in relation to updates to the IC review procedure directions, which Rocelle has cleared. Once you have cleared, we will ask our web manager to publish the directions.

Please note that we have comments in the PD for agencies advising the web manager to 'insert link to landing page'. We will update these comments to name the resources once we have settled them (Rocelle is considering the resources this afternoon).

Kind regards



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Please note: The OAIC will be revising its IC review procedures commencing 1 July 2024. For more information about these revised procedures, including new resources to assist applicants and respondents, see our webpage: [Upcoming changes to Information Commissioner review procedure directions](#).

The OAIC acknowledges Traditional Custodians of Country across Australia and their continuing connection to land, waters and communities. We pay our respect to First Nations people, cultures and Elders past and present.

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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

26 June 2024

¹³ Section 54W(c) of the FOI Act.

From: [HARLOCK,Raewyn](#)
To: [AGO,Rocelle](#); [PIRANI,Toni](#); [FALK,Angelene \(EXPIRED\)](#)
Cc: [OAIC - Commissioner](#); [OAIC - FOI Commissioner](#); [PEEL,Sara](#); [TULLOCH,Karen](#)
Subject: RE: [For approval] IC review procedure directions - Consultation period - Extension and in person discussions [SEC=OFFICIAL]
Date: Tuesday, 6 June 2023 4:38:49 PM

I will ask Comms to extend the due by date on the consultation page of the website.

Raewyn

From: AGO,Rocelle <Rocelle.Ago@oaic.gov.au>
Sent: Tuesday, June 6, 2023 4:37 PM
To: PIRANI,Toni <Toni.Pirani@oaic.gov.au>; FALK,Angelene <Angelene.Falk@oaic.gov.au>
Cc: OAIC - Commissioner <commissioner@oaic.gov.au>; OAIC - FOI Commissioner <FOICommissioner@oaic.gov.au>; PEEL,Sara <Sara.Peel@oaic.gov.au>; TULLOCH,Karen <Karen.Tulloch@oaic.gov.au>; HARLOCK,Raewyn <Raewyn.Harlock@oaic.gov.au>
Subject: RE: [For approval] IC review procedure directions - Consultation period - Extension and in person discussions [SEC=OFFICIAL]

Thanks Toni – we have received additional requests for extensions since last week.

We will extend the consultation period to 30 June 2023.

For agencies that will be making submissions, we will advise that we are happy to meet with them in July to discuss their concerns. I will liaise with you separately regarding timing and logistics.

Regarding the Department of Education's query regarding whether the submission will be made public, I confirm our discussion that we will proceed on the basis that all submissions will be published on our website.

Kind regards
Rocelle

From: PIRANI,Toni <Toni.Pirani@oaic.gov.au>
Sent: Tuesday, June 6, 2023 4:17 PM
To: OAIC - ACFOI <ACFOI@oaic.gov.au>; FALK,Angelene <Angelene.Falk@oaic.gov.au>
Cc: OAIC - Commissioner <commissioner@oaic.gov.au>; OAIC - FOI Commissioner <FOICommissioner@oaic.gov.au>; PEEL,Sara <Sara.Peel@oaic.gov.au>
Subject: RE: [For approval] IC review procedure directions - Consultation period - Extension and in person discussions [SEC=OFFICIAL]

Hi Rocelle,

Apologies – I thought I had responded to this.

I think it would be good if we could extend the time available to agencies to provide a submission and also offer to meet with them in person.

I think if we gave agencies until 30 June to provide a submission that is plenty of time. In relation to meeting with them to discuss their concerns, I would be happy to do so with those agencies who make a submission. This will give us the opportunity to have some understanding of the concerns prior to a discussion. I'd therefore suggest that we plan to have a workshop in the second week of July.

Regards

Toni

From: OAIC - ACFOI <ACFOI@oaic.gov.au>

Sent: Friday, June 2, 2023 6:27 PM

To: FALK,Angelene <Angelene.Falk@oaic.gov.au>; PIRANI,Toni <Toni.Pirani@oaic.gov.au>

Cc: OAIC - Commissioner <commissioner@oaic.gov.au>; OAIC - FOI Commissioner <FOICommissioner@oaic.gov.au>; PEEL,Sara <Sara.Peel@oaic.gov.au>

Subject: [For approval] IC review procedure directions - Consultation period - Extension and in person discussions [SEC=OFFICIAL]

Good evening Commissioners

Further to the emails below, we wanted to provide an update on the consultation process and recommend next steps.

- The OAIC has not received any submissions regarding the consultation drafts.
- The OAIC has received a number of requests from agencies for further time to make submissions. A summary of the period required and other issues raised are set out in the table below:

Agency	Extension required	Other issues
Department of Home Affairs	unspecified	<i>We are particularly concerned about the consultation requirements for our large caseload.</i>
Department of Education	30 June 2023	Does not agree to submission being made public, will make its submission on the basis that we will not make it public. Requests that we advise them if we consider publication is necessary. <i>The department's ability to prepare its response to the consultation in the relatively short time frame provided has been impeded by a number of competing priorities.</i>
Department of Defence	16 June 2023	
Australian Taxation Office	Unspecified	<i>The ATO would like to make submissions on certain aspects of the proposed revisions</i>

		<i>which would likely have a significant impact on the ATO's FOI processing and resources if they were required to be followed in every IC review, and it is unlikely that we will be able to provide considered views by Friday.</i>
Department of Defence	16 June 2023	<i>to enable a comprehensive reply</i>
Attorney-General's Department	23 June 2023	
Department of Infrastructure, Transport, Regional Development, Communications and the Arts	23 June 2023	<i>due to staffing constraints and a higher than usual FOI caseload, we will be unable to finalise our submission by this Friday. ... [The extension] will enable us to give full consideration to the matters raised through the consultation, seek relevant internal stakeholder input and obtain the necessary clearance for our submission.</i>
Department of Veterans' Affairs	30 June 2023	
Department of Foreign Affairs and Trade	9 June 2023	

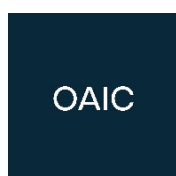
For consideration

The Department of Home Affairs suggested that several agencies would like the opportunity to discuss the rationale and operational impacts of the direction, by way of an OAIC facilitated workshop. I've provided preliminary advice that I would be happy to explain the operational impacts and the rationale and I understand that Commissioner Pirani would also be happy to attend any such meeting or workshop.

Given the request for in person discussions, the number of requests received to provide additional time for written submissions comments and the lack of submissions received to date, I recommend that:

- The consultation period be extended to 30 June 2023, to be promoted through an ICON alert and through email advice to the FOI SES Leadership Group.
- Commissioner Pirani and I facilitate an in person meeting in Canberra (date to be determined) to meet with interested agencies.

Kind regards
Rocelle



Rocelle Ago (she/her)
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Office of the Australian Information Commissioner
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Romina Domenici P +612 9942 4022 E romina.domenici@oaic.gov.au

The OAIC acknowledges Traditional Custodians of Country across Australia and their continuing connection to land, waters and communities. We pay our respect to First Nations people, cultures and Elders past and present.

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From: OAIC - ACFOI
Sent: Monday, May 8, 2023 10:27 AM
To: FALK,Angelene <Angelene.Falk@oaic.gov.au>
Cc: HARDIMAN,Leo <Leo.Hardiman@oaic.gov.au>; OAIC - Commissioner <commissioner@oaic.gov.au>; OAIC - FOI Commissioner <FOICommissioner@oaic.gov.au>
Subject: RE: [For approval] IC review procedure directions - Consultation drafts [SEC=OFFICIAL]

Thank you Angelene, we will keep you updated during the consultation.

Kind regards
Rocelle

From: FALK,Angelene <Angelene.Falk@oaic.gov.au>
Sent: Friday, 5 May 2023 4:52 PM
To: OAIC - ACFOI <ACFOI@oaic.gov.au>
Cc: HARDIMAN,Leo <Leo.Hardiman@oaic.gov.au>; OAIC - Commissioner <commissioner@oaic.gov.au>; OAIC - FOI Commissioner <FOICommissioner@oaic.gov.au>; HARLOCK,Raewyn <Raewyn.Harlock@oaic.gov.au>; TULLOCH,Karen <Karen.Tulloch@oaic.gov.au>; STRATHEARN,Tania <Tania.Strathearn@oaic.gov.au>; THOMAS,Heather <Heather.Thomas@oaic.gov.au>; LODGE,Justin <Justin.Lodge@oaic.gov.au>; WHIP,Caren <Caren.Whip@oaic.gov.au>; STOKES,Andrew <Andrew.Stokes@oaic.gov.au>
Subject: RE: [For approval] IC review procedure directions - Consultation drafts [SEC=OFFICIAL]

Thank you Leo and Rocelle for the additional points, no further comments from me.

Rocelle could you please keep me updated regarding stakeholder feedback you receive during the consultation.

Many thanks

Angelene

From: OAIC - ACFOI <ACFOI@oaic.gov.au>
Sent: Friday, 5 May 2023 3:03 PM
To: FALK,Angelene <Angelene.Falk@oaic.gov.au>
Cc: HARDIMAN,Leo <Leo.Hardiman@oaic.gov.au>; OAIC - Commissioner <commissioner@oaic.gov.au>; OAIC - FOI Commissioner <FOICommissioner@oaic.gov.au>; HARLOCK,Raewyn <Raewyn.Harlock@oaic.gov.au>; TULLOCH,Karen <Karen.Tulloch@oaic.gov.au>; STRATHEARN,Tania <Tania.Strathearn@oaic.gov.au>; THOMAS,Heather <Heather.Thomas@oaic.gov.au>; LODGE,Justin <Justin.Lodge@oaic.gov.au>; WHIP,Caren <Caren.Whip@oaic.gov.au>

Subject: RE: [For approval] IC review procedure directions - Consultation drafts [SEC=OFFICIAL]

Thank you Angelene – Leo and I have made comments within [D2023/008344](#) in relation to the model litigant obligation as well as the proposed deletion to the reference to reserving the right to make submissions later.

Thanks for your comments/amendments in relation to the other issues, we will make those changes.

Kind regards
Rocelle

From: FALK,Angelene <Angelene.Falk@oaic.gov.au>
Sent: Friday, 5 May 2023 2:56 PM
To: OAIC - ACFOI <ACFOI@oaic.gov.au>
Cc: HARDIMAN,Leo <Leo.Hardiman@oaic.gov.au>; OAIC - Commissioner <commissioner@oaic.gov.au>; OAIC - FOI Commissioner <FOICommissioner@oaic.gov.au>; HARLOCK,Raewyn <Raewyn.Harlock@oaic.gov.au>; TULLOCH,Karen <Karen.Tulloch@oaic.gov.au>; STRATHEARN,Tania <Tania.Strathearn@oaic.gov.au>; THOMAS,Heather <Heather.Thomas@oaic.gov.au>; LODGE,Justin <Justin.Lodge@oaic.gov.au>; WHIP,Caren <Caren.Whip@oaic.gov.au>
Subject: RE: [For approval] IC review procedure directions - Consultation drafts [SEC=OFFICIAL]

Rocelle the matter I recalled which considered the issue of “Tribunal” in another context is attached, thank you to Caren.

Regards
Angelene

From: FALK,Angelene
Sent: Thursday, 4 May 2023 5:41 PM
To: OAIC - ACFOI <ACFOI@oaic.gov.au>
Cc: HARDIMAN,Leo <Leo.Hardiman@oaic.gov.au>; OAIC - Commissioner <commissioner@oaic.gov.au>; OAIC - FOI Commissioner <FOICommissioner@oaic.gov.au>; HARLOCK,Raewyn <Raewyn.Harlock@oaic.gov.au>; TULLOCH,Karen <Karen.Tulloch@oaic.gov.au>; STRATHEARN,Tania <Tania.Strathearn@oaic.gov.au>; THOMAS,Heather <Heather.Thomas@oaic.gov.au>; LODGE,Justin <Justin.Lodge@oaic.gov.au>; WHIP,Caren <Caren.Whip@oaic.gov.au>
Subject: RE: [For approval] IC review procedure directions - Consultation drafts

Colleagues thank you for providing the EB and documents.

I have made a small number of comments on the documents for consideration and actioning please.

Rocelle in relation to the conclusion that we are a Tribunal for the purposes of the Legal Services Direction, could you please send through short points on the reasoning? I recall advice on the issue in another context, and have asked Caren to send it through.

Please let me know if you wish to discuss, with a view to settling tomorrow.

Once the documents are settled Andrew will action the website publication to commence the consultation next week.

Many thanks

Angelene

From: OAIC - ACFOI <ACFOI@oaic.gov.au>
Sent: Friday, 28 April 2023 5:33 PM
To: FALK,Angelene <Angelene.Falk@oaic.gov.au>
Cc: HARDIMAN,Leo <Leo.Hardiman@oaic.gov.au>; OAIC - Commissioner <commissioner@oaic.gov.au>; OAIC - FOI Commissioner <FOICommissioner@oaic.gov.au>; HARLOCK,Raewyn <Raewyn.Harlock@oaic.gov.au>; TULLOCH,Karen <Karen.Tulloch@oaic.gov.au>; STRATHEARN,Tania <Tania.Strathearn@oaic.gov.au>; THOMAS,Heather <Heather.Thomas@oaic.gov.au>; LODGE,Justin <Justin.Lodge@oaic.gov.au>
Subject: [For approval] IC review procedure directions - Consultation drafts

Good afternoon Angelene

Following our discussion, we have prepared an executive brief that summarises the proposed amendments to the procedure directions and amended the IC review procedure directions for agencies and applicants as set out in the links below.

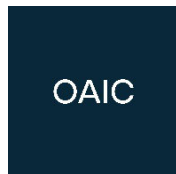
We would like to publish the consultation drafts by 5 May, with comments by 2 June 2023. We anticipate that this will allow sufficient time for agencies to provide comments and for our team to consider comments ahead of the proposed 1 July 2023 implementation date.

Snapshot	
Due date	5 May 2023
Fixed or flexible	Fixed
If fixed, why?	It is proposed that both drafts (Procedure Direction for agencies/ministers and applicants) be published on the OAIC website on Friday 5 May 2023, with comments due by 2 June 2023.
Topic for clearance	IC review procedure directions
Product (e.g. brief / submission)	<ul style="list-style-type: none">• Executive Brief: D2023/007622 (3 pages)• Procedure Direction for agencies/ministers: D2023/008344 (12 pages)• Procedure direction for applicants: D2022/010988 (9 pages)• Website consultation notice: D2023/007821 (3 pages)
Length / no. of pages	See above
External party?	Parties to IC review applications
Clearance & consultation	Leo Hardiman PSM KC, Freedom of Information Commissioner Rocelle Ago, Assistant Commissioner, Freedom of Information

Responsible director	N/A
Final Clearance by	Commissioner

Kind regards

Rocelle



Rocelle Ago (she/her)

Assistant Commissioner, Freedom of information
Office of the Australian Information Commissioner

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The OAIC acknowledges Traditional Custodians of Country across Australia and their continuing connection to land, waters and communities. We pay our respect to First Nations people, cultures and Elders past and present.

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Australian Government

Office of the Australian Information Commissioner

Direction as to certain procedures to be followed in IC reviews

This direction is given under s 55(2)(e)(i) of the *Freedom of Information Act 1982*.

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Direction as to certain procedures to be followed in IC reviews

1. About this Direction

- 1.1 This Direction is given by the Australian Information Commissioner under s 55(2)(e)(i) of the *Freedom of Information Act 1982* (the FOI Act) in relation to Information Commissioner (IC) reviews generally.
- 1.2 The purpose of this Direction is to set out the particular procedures that agencies and ministers are required to follow during IC reviews, including procedures relating to:
 - deemed access refusal decisions
 - a requirement to engage, or make reasonable attempts to engage, with IC review applicants during the IC review for the purpose of genuinely attempting to resolve or narrow the matters at issue in the IC review
 - the production of documents and submissions.
- 1.3 This Direction does not apply to the extent it is inconsistent with a provision of the FOI Act, another enactment or a specific direction made in a particular IC review.
- 1.4 This Direction is not a legislative instrument.¹
- 1.5 This Direction has effect from 1 July 2023.

2. General principles

- 2.1 IC review procedures are found in Part VII of the FOI Act. The IC review process is intended to be an informal, non-adversarial and timely means of external merits review of decisions by agencies and ministers in relation to FOI requests. Part 10 of the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act, to which ministers and agencies must have regard in performing a function or exercising a power under the FOI Act, sets out in detail the process and underlying principles of IC review.
- 2.2 Before commencing an IC review, the Information Commissioner will notify the relevant agency or minister that an applicant has applied for IC review of the agency or minister's decision (s 54Z notice of IC review).²
- 2.3 Section 55(2)(a) of the FOI Act authorises the Information Commissioner to conduct an IC review in whatever way the Information Commissioner considers appropriate. Section 55(2)(d) of the FOI Act allows the Information Commissioner to obtain any

¹ Section 55(3) of the FOI Act.

² Not every application for IC review will proceed to an IC review. The Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* (FOI Guidelines) set out the circumstances in which the Information Commissioner may not conduct a review at [10.81] and [10.85] – [10.86].

information from any person and to make any inquiries that the Information Commissioner considers appropriate.

- 2.4 In general, IC reviews will be conducted on the papers unless there are unusual circumstances to warrant a hearing.³ Therefore, complete and timely production of documents at issue, submissions and any other information that has been requested is important.
- 2.5 Under s 55DA of the FOI Act, agencies and ministers must use their best endeavours to assist the Information Commissioner in the conduct of IC reviews. Under s 55D(1) of the FOI Act, agencies and ministers have the onus of establishing that a decision refusing access is justified or that the Information Commissioner should give a decision that is adverse to the IC review applicant in an IC review of an access refusal decision. The Information Commissioner will make a decision in an IC review on the basis of the evidence before them. Failure to properly satisfy the onus in s 55D(1) by providing the Information Commissioner with complete and appropriate evidence for an access refusal decision will increase the likelihood of a decision being made that is adverse to an agency or minister.
- 2.6 Section 55Z of the FOI Act provides immunity to a person from civil proceedings and penalties if the person gives information, produces a document or answers a question in good faith for the purposes of an IC review.

3. General procedure in relation to IC review of deemed refusal decisions

Preliminary inquiries

- 3.1 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 Information Commissioner will undertake preliminary inquiries under s 54V of the FOI Act. In undertaking preliminary inquiries, the Information Commissioner will require the agency or minister to confirm that the relevant FOI request is deemed to have been refused.
- 3.2 Agencies and ministers will have one week to respond to the Information Commissioner's preliminary inquiries.

Commencement of review

- 3.3 If the agency or minister confirms that the relevant FOI request is deemed to have been refused, or fails to respond to the Information Commissioner's preliminary inquiries, a notice under s 54Z will be issued notifying of the commencement of an IC review. This notice will be accompanied by a direction under s 55(2)(e) of the FOI Act, requiring the agency or minister to either:
 - a. make a revised decision under s 55G if the decision the agency or minister intends to make will result in the giving of access to the requested documents in full and to

³ See *FOI Guidelines* at [10.20] and [10.63].

Direction as to certain procedures to be followed in IC reviews

provide the relevant decision to the applicant and to the Information Commissioner or

- b. make a revised decision under s 55G if the decision the agency or minister intends to make will result in the giving of access to some of the requested documents, and to provide the relevant decision and non-exempt documents to the applicant, and to provide all relevant processing documents and the documents remaining at issue to the Information Commissioner or
 - c. make submissions in support of the access refusal if the agency or minister intends refusing access to the requested documents and to send those submissions to both the Information Commissioner and the applicant. The agency or minister must also provide all relevant processing documents and exempt documents to the Information Commissioner under s 55T of the FOI Act.
- 3.4 Agencies and ministers will have 3 weeks to respond to the Information Commissioner's written direction.

4. General procedure in relation to review of other access refusal and access grant decisions

Commencement of review

- 4.1 The Information Commissioner will issue a notice under s 54Z of the FOI Act to advise the respondent agency or minister of the commencement of the IC review (s 54Z notice).

Requirement to engage with the applicant

- 4.2 The s 54Z notice will also require the agency or minister to engage, 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 in the IC review.
- 4.3 Engagement with IC review applicants will comprise a telephone or video conference between the applicant and the agency or minister. The agency or minister will be responsible for contacting the applicant and making the necessary arrangements for the engagement process. The OAIC will not be involved in making such arrangements or in attending the telephone or video conference.

Response to s 54Z notice

- 4.4 The agency or minister will generally have 8 weeks to respond to the Information Commissioner's s 54Z notice. The 8 week timeframe takes into account the time needed to contact and make arrangements with the applicant for the engagement process, and to reach agreement, where relevant. It is not expected that agencies or ministers will require any additional time. The Information Commissioner will consider any request for an extension of time on a case-by-case basis. However it is expected that it will only be in extenuating circumstances that any further extension to time will be granted.

Direction as to certain procedures to be followed in IC reviews

- 4.5 Respondent agencies and ministers must provide the Information Commissioner with evidence of the action they have taken to address the issues identified in the IC review application, or actions taken to contact the applicant.⁴
- 4.6 The evidence to be provided to the Information Commissioner will include:
- evidence 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
 - evidence of 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
 - evidence of the outcome of the engagement between the agency or minister and the IC review applicant, including any evidence 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.⁵
- 4.7 In the event that not all issues in dispute in the IC review are resolved through the engagement process with the IC review applicant, respondent agencies and ministers should consider whether to make a revised decision under s 55G of the FOI Act.
- 4.8 If the respondent agency or minister decides not to make a revised decision under s 55G giving full access in accordance with the applicant's FOI request, agencies and ministers are required to provide the Information Commissioner with the FOI request processing documents and marked up copies of the exempt documents at issue in the IC review (if applicable) (see [5.2] below).

5. General procedure for production and inspection of documents

Production of documents

- 5.1 The Information Commissioner has various powers to require the production of information and documents under the FOI Act. These powers are outlined in Annexure 1 to this Direction. In addition to the Information Commissioner's information gathering powers under Division 8 of the FOI Act, the Information Commissioner is able to obtain any information from any person, and to make any inquiries, that are considered to be appropriate under s 55(2)(d) of the FOI Act. Therefore, when the Information Commissioner commences an IC review by issuing a notice of IC review, the Information Commissioner will also request relevant information and documents to progress the IC review.

⁴ An agency may not be required to engage in the conciliation process if it is able to provide evidence of having engaged in a similar process at an earlier stage. However, participation in formal statutory processes (for example, the request consultation process outlined in s 24AB of the FOI Act in relation to practical refusals) will not be a basis for not consulting the applicant in relation to the IC review.

⁵ At Annexure 2 to this Direction is an evidence checklist designed to assist agencies and ministers provide relevant evidence relating to the agency or minister's engagement with the applicant during the IC review.

Direction as to certain procedures to be followed in IC reviews

- 5.2 Document production requirements may vary from case to case depending on the issues being considered (application of exemptions, searches, charges or practical refusal).⁶ In relation to IC reviews involving the application of exemptions under the FOI Act, the Information Commissioner will require the agency or minister to provide a marked up and unredacted copy of the documents at issue in electronic format and the documents setting out any relevant consultations (for example, under ss 26A, 27 or 27A of the FOI Act).⁷
- 5.3 In providing the Information Commissioner with a marked up copy of relevant documents, agencies and ministers must ensure that all redactions pursuant to an exemption, or deletions on the basis of relevance pursuant to s 22(1)(a)(ii) of the FOI Act, are clearly marked with reference to the relevant provision of the FOI Act that the redactions or deletions are made under. A schedule of marked up documents must also be included.
- 5.4 In IC reviews where an agency or minister claims that documents cannot be found or do not exist, the Information Commissioner will require the agency or minister to provide evidence of the searches that have been undertaken to find relevant documents.⁸
- 5.5 In IC reviews involving a charge or a practical refusal reason, the Information Commissioner may require the agency or minister to provide a sufficiently representative sample of documents considered to be within the scope of the request.⁹
- 5.6 Agencies and ministers must provide their response within the timeframe set out in the notice, unless an extension of time has been sought and granted. However as noted at [4.4], the Information Commissioner considers that it will only be in extenuating circumstances that any further extension to time will be granted. If an agency or minister requires an extension of time to respond to a notice of IC review, the agency or minister must make a request in writing to the Information Commissioner with supporting evidence of the need for the extension prior to the due date.
- 5.7 Where an agency or minister fails to provide information and documents within the initial or extended timeframe, or requests another extension, the Information Commissioner may proceed to require the provision of information and the production of documents pursuant to s 55R of the FOI Act (discussed at Annexure 1 to this Direction).

Inspection of documents

- 5.8 Inspection of the documents at issue by the Information Commissioner in response to a request for production will only be considered in very limited situations where the

⁶ See *FOI Guidelines* at [10.98].

⁷ See *FOI Guidelines* at [10.100].

⁸ See *FOI Guidelines* at [10.98].

⁹ See *FOI Guidelines* at [3.121] and the IC review decisions in *Adrian Wright and Department of Human Services (Freedom of information)* [2017] AICmr 127 and *Cash World Gold Buyers Pty Ltd and Australian Taxation Office (Freedom of information)* [2017] AICmr 20.

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agency or minister can demonstrate that the circumstances warrant inspection rather than the direct production of copies of the marked up documents.

- 5.9 What constitutes these very limited circumstances is not prescriptive and will be determined on a case-by-case basis. The onus is on the requesting agency or minister to justify that circumstances exist that warrant inspection.
- 5.10 If an agency or minister is of the view that there are circumstances that justify inspection, the Information Commissioner will require the agency or minister to provide a written request for inspection together with supporting reasons prior to the due date in the s 54Z notice of IC review.
- 5.11 The Information Commissioner considers that inspection will not be warranted where the documents at issue are subject to conditional exemptions. The Information Commissioner considers that inspection may be appropriate in some circumstances where the documents at issue are subject to a national security, Cabinet or Parliamentary Budget Office exemption claim (ss 33, 34 and 45A of the FOI Act). However, the requesting agency or minister must satisfy the Information Commissioner that the circumstances warrant inspection.¹⁰
- 5.12 If the Information Commissioner agrees to an agency's or minister's request for inspection, the agency or minister will be required to undertake all necessary arrangements to facilitate the inspection. Unless otherwise agreed, this will occur at the Information Commissioner's office.

6. General procedure in relation to submissions made during an IC review

General principles

- 6.1 All parties to an IC review will be given a reasonable opportunity to present their case through written submissions.
- 6.2 Written submissions will be sought from parties following the completion of the initial triage and early resolution process and once the matter has been assigned to a review adviser for substantive review/case management.
- 6.3 In seeking submissions from agencies and ministers in support of the IC reviewable decision, the OAIC will require the agency or minister to send their submissions to the applicant at the same time as they are sent to the Information Commissioner. 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 Information Commissioner.
- 6.4 Subject to [6.6], the Information Commissioner will not accept any further submissions from either party to the IC review.
- 6.5 The Information Commissioner will generally provide each of the parties with 4 weeks to make their submissions.

¹⁰ The OAIC is able to receive secure electronic transmission of documents. For more information contact the OAIC.

Direction as to certain procedures to be followed in IC reviews

- 6.6 The Information Commissioner will contact the parties after receipt of submissions if procedural fairness requirements are identified or where a preliminary view can be provided to an agency that may result in an agency or minister making a revised decision under s 55G of the FOI Act.

Request to make submissions in confidence


- 6.7 If an agency or minister wishes to make a submission in confidence, a request for the submission to be treated in confidence must be made before providing the submission. Any request for confidentiality must be accompanied by reasons to support such a claim, including whether the submission would reveal the contents of the documents at issue.
- 6.8 Where the Information Commissioner accepts a submission in confidence, agencies and ministers must provide a version of the submission that can be shared with the applicant.¹¹
- 6.9 If the Information Commissioner forms the view that the submission does not disclose exempt matter, or is otherwise not inherently confidential, the Information Commissioner will advise the agency or minister of this view and invite the agency or minister to withdraw the claim for confidentiality with respect to the submission. If the agency or minister does not wish to withdraw the claim for confidentiality they may elect to withdraw the submission because it will not be considered by the Information Commissioner to make a decision under s 55K of the FOI Act on the issues in the IC review.

Consideration of submissions


- 6.10 The Information Commissioner will generally proceed with the IC review on the basis of the evidence provided in response to the s 54Z notice, and submissions.
- 6.11 Where the Information Commissioner makes a decision on IC review pursuant to s 55K of the FOI Act, the Information Commissioner will quote or summarise an agency's or minister's non-confidential submissions in the published decision. If a confidential submission is relied on by the Information Commissioner in making a decision on the IC review, this will be noted in the decision without revealing the confidential material.
- 6.12 In providing submissions, agencies and ministers should be mindful of their obligation to assist the Information Commissioner pursuant to s 55DA of the FOI Act and their onus under s 55D of the FOI Act. As it may be appropriate for an IC review to proceed to a decision under s 55K of the FOI Act on the basis of a response to a notice of IC review, it is in agency's and ministers' interests to put forward all relevant contentions and supporting reasons in response to the notice of review.¹²

¹¹ See *FOI Guidelines* at [10.103].

¹² See *FOI Guidelines* at [10.74].

6.13 Agencies and ministers 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 decision under s 55K of the FOI Act without any further opportunity to make submissions. 

7. Non-compliance with this Direction

7.1 Because the model litigant obligation under the *Legal Services Directions 2017*  ends to Commonwealth entities involved in merits review proceedings, failure to adhere to the requirements of this Direction may amount to non-compliance with the model litigant obligation.¹³

7.2 The Information Commissioner may report non-compliance with this Direction in the Office of the Australian Information Commissioner's Annual Report.

7.3 The Information Commissioner may also report non-compliance with this Direction to the Office of Legal Services Coordination in the Attorney-General's Department.

7.4 The Information Commissioner may also consider investigating the non-compliance under Part VIIB of the FOI Act.

Angelene Falk
Australian Information Commissioner

DATE

¹³ See paragraph 3 of Appendix B to the *Legal Services Directions 2017*.

Annexure 1: Information gathering and document production powers

1. Notice to Produce

- 1.1 Pursuant to s 55R(3) of the FOI Act, the Information Commissioner may issue a written Notice to Produce to require an agency or minister to give information or produce documents of a kind specified in the Notice. A Notice to Produce may also be issued in conjunction with either ss 55T or 55U of the FOI Act (discussed below).
- 1.2 The Information Commissioner will allow at least 2 weeks for agencies and ministers to respond to a Notice to Produce. It is an offence to fail to comply with a Notice to Produce issued by the Information Commissioner.

2. Production of exempt documents generally

- 2.1 Section 55T of the FOI Act concerns the production of exempt documents generally. This section applies when an agency or a minister claims that a document is an exempt document and the document is not covered by s 55U of the FOI Act (discussed below).
- 2.2 Section 55T(2) of the FOI Act provides that, for the purposes of deciding that a document is an exempt document, the Information Commissioner may require the document to be produced. In addition, s 55T(4) of the FOI Act provides that the Information Commissioner may require the production of an exempt document for the purpose of determining whether it is practicable for an agency or a minister to give access to an edited copy of the document.

3. Production of particular exempt documents

- 3.1 Section 55U of the FOI Act concerns the production of documents subject to a national security, Cabinet or Parliamentary Budget Office exemption claim (ss 33, 34 or 45A the FOI Act).
- 3.2 Section 55U(3) of the FOI Act provides that, if the Information Commissioner is not satisfied by evidence on affidavit or otherwise that a document is an exempt document under ss 33, 34 or 45A of the FOI Act, the Information Commissioner may require the document to be produced for examination.
- 3.3 If, after examining the documents, the Information Commissioner is still not satisfied that the documents are exempt under s 33 of the FOI Act, pursuant to s 55ZB of the FOI Act, the Information Commissioner will request the Inspector-General of Intelligence and Security to appear and give evidence on the damage that would or could reasonably be expected to result from the release of the documents.¹⁴

¹⁴ The Information Commissioner has a Memorandum of Understanding with the Inspector-General of Intelligence and Security to facilitate the Information Commissioner's information gathering powers.

Annexure 2: Evidence checklist – IC review compulsory conference

The 'Direction as to certain procedures to be followed in IC review' issued under s 55(2)(e)(i) of the *Freedom of Information Act 1982* by the Australian Information Commissioner requires agencies and ministers to engage, or make reasonable attempts to engage, with IC review applicants during the IC review.

Agencies and ministers must provide the Information Commissioner with evidence of the action they have taken to address the issues identified in the IC review application, or actions taken to contact the applicant. This checklist has been developed to assist agencies provide relevant evidence and can be used as a cover when providing relevant evidence to the OAIC.

1. Contact with IC review applicant

Evidence of earlier engagement in similar process*	<input type="checkbox"/> Attached <input type="checkbox"/> Not applicable
Copy of letter sent to IC review applicant to arrange contact	<input type="checkbox"/> Attached <input type="checkbox"/> Not applicable
Date of Letter	[insert date]
File note of telephone call to IC review applicant	<input type="checkbox"/> Attached <input type="checkbox"/> Not applicable
Copies of written correspondence from IC review applicant	<input type="checkbox"/> Attached <input type="checkbox"/> Not applicable

2. Attempts to resolve issues in dispute

File note of engagement with applicant	<input type="checkbox"/> Attached <input type="checkbox"/> Not applicable
Suggestions made by agency/minister to resolve IC review	<input type="checkbox"/> Attached <input type="checkbox"/> Not applicable
Response provided by applicant, and any suggestions made by applicant to resolve IC review	<input type="checkbox"/> Attached <input type="checkbox"/> Not applicable

3. Outcome of engagement

Outcome of engagement	<input type="checkbox"/> Attached <input type="checkbox"/> Not applicable
Written notification that IC review applicant wishes to withdraw their application for IC review	<input type="checkbox"/> Attached <input type="checkbox"/> Not applicable

* An agency may not be required to engage in the engagement process if it is able to provide evidence of having engaged in a similar process at an earlier stage. However, participation in formal statutory processes (for example, the request consultation process outlined in s 24AB of the FOI Act in relation to practical refusals) will not be a basis for not consulting the applicant in relation to the IC review.



Executive brief

Responsible Executive Member:	Rocelle Ago, Assistant Commissioner, Freedom of information
Prepared by:	Raewyn Harlock
To:	Angelene Falk, Australian Information Commissioner Leo Hardiman, Freedom of Information Commissioner
File ref:	D2023/007622
Date:	27 April 2023
Subject:	Proposed amendment to IC review Procedure Directions affecting agencies and applicants

Purpose and timing

To seek your approval to update the IC review Procedure Directions for agencies/ministers and applicants and to commence external consultation with respect to the updates.

Recommendations

1. That you note the information in this brief.
2. That you approve publication of the draft Procedure Directions (agencies/ministers and applicants) for external consultation.
3. That you note that Part 10 of the FOI Guidelines will be amended upon conclusion of the consultation process.
4. That you approve the FOI Branch making email contact with agencies and ministers active in the IC review space to advise them of the commencement of the consultation period and invite their comments during the consultation period.

Key changes

1. *Deemed access refusals*: The Procedure Direction for agencies/ministers has been updated to reflect new procedures to streamline the handling of IC reviews involving deemed access refusals. This involves undertaking preliminary inquiries with agencies to determine whether a decision is deemed (1 week to respond) followed by the issuing of a s 54Z notice accompanied by a direction under s 55(2)(e), requiring the agency or minister to make a s 55G decision, or, if the agency or minister intends refusing the request, submissions in support of that decision (3 weeks to respond). Processing documents and

exempt matter must be provided by the agency with their response if access to documents is refused.

2. *Notification of IC review/ mandatory engagement with IC review applicants:* The Procedure Direction for agencies/ministers has been updated so that at the commencement of each IC review, the OAIC will issue a s 54Z notice requiring the agency or minister to engage, or make reasonable attempts to engage, with IC review applicants during the IC review for the purpose of genuinely attempting to resolve or narrow the matters at issue in the IC review. Proof of attempts to engage in this process will be required, as will the outcome of the process. The requirement will not apply in relation to deemed access refusal decisions or where the ministers or agencies provide evidence of appropriate consultation during the processing of the FOI request (not including s 24AB consultation).
3. *Production of documents:* The Procedure Direction for agencies/ministers will now require agencies and ministers to provide a marked up and unredacted copy of the exempt documents at issue in the IC review (currently the Information Commissioner 'will generally require' production of these documents). Further, a schedule of marked up documents must be provided (previously a schedule 'should' be provided).
4. *Submissions:* The Procedure Direction for agencies/ministers has been rewritten to specify that submissions will not be required until completion of the initial triage and early resolution process and that only one opportunity will be given to make submissions in support of the reviewable decision (unless procedural fairness issues are identified). Submissions will be sent to the applicant by the agency/minister at the same time they are sent to the OAIC.
5. *Preliminary views:* The Procedure Direction for agencies/ministers has been updated to include a short reference to the use of preliminary views in IC reviews and that in such circumstances the agency/minister may be asked to make a decision under s 55G.
6. *Non-compliance with Direction:* Additional potential regulatory action has been added to the non-compliance section in the Procedure Direction for agencies/ministers: publication in the OAIC's annual report, reporting to the OLSC and investigation under Part VIIB of the FOI Act.
7. The order of the sections in the Procedure Direction for agencies/ministers has been better aligned to reflect the life cycle of an IC review.
8. Minor changes have been made to the Procedure Direction for applicants to reflect the changes made to the Procedure Direction for agencies/ministers. The Information Commissioner's power to decline to continue an IC review if the applicant fails to engage in the compulsory engagement process is highlighted.

Consultation and coordination

The proposed changes have been discussed internally within the FOI Branch and with the Freedom of Information Commissioner and Information Commissioner. The Freedom of Information Commissioner has consulted AGS and confirmed that the compulsory engagement process falls within the scope of the s 55(2)(e) directions power.

It is proposed that both drafts (Procedure Direction for agencies/ministers and applicants) be published on the OAIC website on Friday 5 May 2023, with comments due by 2 June 2023.

Given the potentially contentious introduction of a compulsory engagement process at the commencement of each IC review it is intended that agencies and ministers active in the IC review space be advised of the commencement of the consultation process by email. An ICON alert will also be issued.

The FOI Branch will engage with Strategic Communications with respect to engaging members of the public in relation to consultation on the Procedure Direction for applicants.

Regulatory impact on agencies

The requirement to engage in compulsory conferences with each applicant for IC review will have an administrative impact on agencies and ministers. This impact may be offset in the event that the IC review is resolved early in IC review.

Agencies will no longer be required to make submissions at the commencement of the IC review. Submissions will generally not be required until completion of the initial triage and early resolution process, when the issues in dispute have been settled, and only once the matter has been assigned to a review adviser for substantive review/case management. It is expected this will reduce the regulatory impact on agencies and ministers because they will only need to make one submission that directly addresses the remaining issues in dispute.

Attachments

Attachment A: Draft revised Procedure Direction for agencies/ministers: [D2023/008344](#)

Attachment B: Draft revised Procedure Direction for applicants: [D2022/010988](#)

Attachment C: Summary paper to accompany the Procedure Direction consultation process: [D2023/007821](#)

Recommendations:

- Updates approved
Agreed/Not agreed Signature _____
- Consultation
Agreed/Not agreed
- Key messages
Agreed/Not agreed Date _____

Comments:





Australian Government

Office of the Australian Information Commissioner

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



Angelene Falk

Australian Information Commissioner

1 July 2023

OAIC

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Part 1: About this direction

- 1.1 This direction is given by the Australian Information Commissioner under s 55(2)(e)(i) of the *Freedom of Information Act 1982* (FOI Act) in relation to Information Commissioner reviews (IC reviews).
- 1.2 This written direction sets out the procedure to be followed by applicants for IC reviews undertaken by the Information Commissioner under the FOI Act.
- 1.3 The Information Commissioner 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 Information Commissioner (s 54W(c)).
- 1.4 The Information Commissioner may also give written directions as to the procedure to be followed in relation to a particular IC review (s 55(2)(e)(ii)).
- 1.5 This direction does not apply to the extent it is inconsistent with a provision of the FOI Act, another enactment or a specific direction made in a particular IC review under s 55(2)(e)(ii) of the FOI Act.
- 1.6 Further information relating to the IC review process is published on the Office of the Australian Information Commissioner's (OAIC) [website](#). In particular, [Part 10](#) (Reviews by the Australian Information Commissioner) of the Guidelines issued by the Information Commissioner under s 93A of the FOI Act (FOI Guidelines) describes the principles that inform the OAIC's approach to IC reviews.
- 1.7 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.
- 1.8 This direction has effect from 1 July 2023.

Part 2: The IC review process

- 1.9 IC review procedures are found in Part VII of the FOI Act. The IC review process is intended to be an informal, non-adversarial and timely means of external merits review of FOI decisions made by agencies and ministers. Part 10 of the FOI Guidelines, to which agencies and ministers must have regard when performing a function or exercising a power under the FOI Act, sets out in detail the process and underlying principles of IC review.

Making an application for IC review

- 1.10 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](#).
- 1.11 Where it is not possible for an application to be made online, applications may be sent to the OAIC by:
 - email to foidr@oaic.gov.au

- mail to FOI Regulatory Group, GPO Box 5218, Sydney NSW 2001.

1.12 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
- 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).

1.13 The OAIC 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 OAIC will consider any notices as received when sent to an applicant's preferred contact.

1.14 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
- 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.

1.15 An application for IC review may be made by, or on behalf of, the person who made the FOI request to which decision relates (s 54L(3)). The OAIC 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.

1.16 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.

1.17 The applicant must provide the OAIC 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. However, in circumstances where the original decision was made by the Minister or personally by the principal officer of an agency, or in the case of a deemed access refusal, applicants must apply directly for IC review.

- 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.
 - If an application for IC review is not made within the timeframes in the FOI Act, applicants may apply to the Information Commissioner 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 Information Commissioner 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.

1.18 An application for IC review should also:

- a. identify the aspect(s) of the agency's or Minister's decision about which the IC review is sought
- 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.

1.19 The OAIC must provide 'appropriate assistance' to a person who wishes to apply for IC review and requires assistance to prepare the IC review application (s 54N(3)).

1.20 Section 54N of the FOI Act sets out the requirements for the contents and delivery of an application for IC review. These requirements include giving the OAIC contact details to which notices can be sent and providing a copy of the FOI decision the applicant wants the Information Commissioner to review. An application that does not comply with these requirements may be considered to be invalid.

During the IC review

Changes to contact details

- 1.21 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 Information Commissioner may decide not to undertake an IC review, or not continue to undertake an IC review, if the applicant or their nominated representative cannot be contacted after making reasonable attempts (s 54W(a)(iii)).

Participation in the IC review

- 1.22 Applicants must respond to inquiries from the OAIC within the time provided unless there are 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 why additional time is needed and propose a new date for response. Approval of an extension request is at the discretion of the OAIC.
- 1.23 The OAIC requires agencies and Ministers to engage with the IC review applicant at the commencement of an IC review. The purpose of this engagement is to attempt to resolve the issues identified in the IC review application in an informal and timely way. Agencies are required to contact applicants for IC review shortly after the IC review application is lodged to arrange a suitable time for the engagement process. 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)).
- 1.24 The Information Commissioner may use any technique the Information Commissioner considers appropriate to facilitate an agreed resolution of the matters at issue in the IC review (such as alternative dispute resolution processes - s 55(2)(b)). Where appropriate, and following the compulsory engagement process described above, the OAIC may invite applicants to attend a teleconference to discuss the issues in dispute in the IC review with the agency's or Minister's office and to explore options for resolution, with a view to reaching agreement on some or all of the matters at issue in the IC review.
- 1.25 The Information Commissioner may decide not to undertake an IC review, or not continue to undertake an IC review, if an IC review applicant has failed to cooperate in progressing the IC review application or the IC review without reasonable excuse (s 54W(a)(ii)).

Submissions

- 1.26 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.
- 1.27 Applicants will be invited to make written submissions after the initial triage and early resolution process is complete, and once the application has been assigned to a review adviser

for substantive review/case management. First, the agency or Minister will be asked to make submissions in support of the IC reviewable decision. The agency or Minister will send the applicant a copy of their submissions at the same time as they are sent to the OAIC. The applicant will then have the opportunity to make submissions addressing any issues raised by the agency or the Minister. The applicant is required to send their submissions to the agency or Minister at the same time as they are sent to the OAIC.

- 1.28 The Information Commissioner will generally give the parties (both the applicant and the agency or Minister) 4 weeks to make their submissions.
- 1.29 The Information Commissioner will not accept any further submissions from either party to the IC review unless the Information Commissioner has requested them.
- 1.30 The Information Commissioner will contact the parties after receipt of submissions if procedural fairness requirements have been identified. For information on procedural fairness see [\[3.15\]](#) – [\[3.31\]](#) of Part 3 of the FOI Guidelines.
- 1.31 The OAIC may provide a preliminary view at any time during the IC review. This will outline the case officer's preliminary thinking on the issues in dispute in the IC review. The applicant may be invited in some cases to withdraw the IC review application, depending on the views expressed in the preliminary view
- 1.32 The IC review application and any attachments will be shared with the agency or Minister, as well as any other parties to the review, unless there is a reason not to do so. Any other information and submissions provided to the OAIC by the applicant will be made available to the other parties to the IC review.
- 1.33 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.
- 1.34 Generally, submissions should be made in writing and sent by email or pre-paid post. In limited circumstances, if an applicant is unable to provide written submissions, the OAIC may agree to accept verbal submissions by telephone.

Information Commissioner decisions

- 1.35 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.
- 1.36 When the Information Commissioner makes a decision on IC review under s 55K of the FOI Act, the Information Commissioner will quote or summarise the submissions in the published decision. If a confidential submission is relied on by the Information Commissioner in making a decision on the IC review, this will be noted in the decision without revealing the confidential material.

- 1.37 To protect against the unreasonable disclosure of personal information, the Information Commissioner will consider whether identifying information should be included in published decisions. Natural persons may opt not 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: Procedure for IC review of specific types of decisions

Deemed access refusal decisions

- 1.38 A ‘deemed access refusal’ occurs when the statutory time for making a decision on an FOI request for access to a document has expired and notice of the decision has not been given. In these circumstances the agency or Minister is ‘deemed’ to have refused the FOI request. Where the applicant applies for IC review of a deemed access refusal decision, the OIAC will make inquiries with the agency or Minister.
- 1.39 If, during the IC review, the agency or Minister sends the applicant a written decision on the applicant’s FOI request the OIAC will check whether the applicant is satisfied with the decision. Applicants who are satisfied with the decision and do not wish to proceed with the IC review must advise the OIAC in writing that they withdraw their application for IC review. Applicants who are not satisfied with the agency’s or Minister’s decision must explain why they disagree with the decision and the basis on which they wish to proceed with the IC review. If the applicant does not respond to the OIAC’s correspondence, the Information Commissioner may decide not to undertake an IC review on the basis that the applicant has failed to cooperate in progressing the IC review application without reasonable excuse (s 54W(a)(ii)).

Access refusal decisions

- 1.40 An ‘access refusal decision’ means (s 53A):
- 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 all the 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 (s 21) (see Part 3 of the Guidelines)
 - e. a decision relating to the imposition or amount of a charge (s 29)
 - f. a decision to give access to a document to a ‘qualified person’ (where disclosing the information to the applicant might be detrimental to the applicant’s physical or mental health or well-being) (s 47F(5))

- g. a decision refusing to amend a record of personal information in accordance with an application (s 48)
- h. a decision refusing to annotate a record of personal information in accordance with an application (s 48).

- 1.41 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)).
- 1.42 Given that the agency or Minister bears this onus, it will generally be necessary to undertake inquiries or seek information from the agency or Minister before inviting comment from applicants.

Access grant decisions

- 1.43 An 'access grant decision' means a decision to grant access to a document where there is a requirement to consult a third party (s 53B). Such decisions involve granting the FOI applicant access to information or documents following consultation.
- 1.44 In an IC review of an access grant decision, it is the IC review applicant who bears the onus of establishing that a decision refusing the FOI request is justified, or that the Information Commissioner should give a decision adverse to the FOI applicant (s 55D(2)).
- 1.45 IC review applicants will generally be invited to provide information or submissions which explain why the agency's or Minister's decision is wrong before comment is invited from the agency or Minister.

Part 4: Non-compliance with this direction

- 1.46 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 review as outlined in s 54W(c). This means that, in these cases, the review will be finalised.
- 1.47 Applicants will be provided with the opportunity to explain why the Information Commissioner should not finalise the IC review under s 54W(c) of the FOI Act before a decision is made.

Consultation on draft revisions to the 'Direction as to certain procedures to be followed in Information Commissioner reviews' (for agencies) and the 'Direction as to certain procedures to be followed by applicants in Information Commissioner reviews'

Listen

@ May 2023

The Office of the Australian Information Commissioner (OAIC) is seeking comments from interested stakeholders on the content, practical implications, readability and accessibility of draft revisions to the *'Direction as to certain procedures to be followed in Information Commissioner reviews'* (for agencies) and the *'Direction as to certain procedures to be followed by applicants in Information Commissioner reviews'*.

[View the consultation drafts](#)

Background

Under s 55(2)(e)(ii) of the [Freedom of Information Act 1982](#) (FOI Act) the Australian Information Commissioner has power to give written directions as to the procedure to be followed in relation to IC reviews generally.

The purpose of the *'Direction as to certain procedures to be followed in Information Commissioner reviews'* is to clearly set out the procedures that agencies and ministers are required to follow during IC reviews in respect of the production of documents, engagement with IC review applicants, administration of deemed access refusal decisions and the provision of submissions. The changes in the updated Direction are intended to facilitate greater engagement between applicants and respondent agencies and ministers during the IC review with a view to resolving IC reviews in a more timely and cost effective way.

The purpose of the *'Direction as to certain procedures to be followed by applicants in Information Commissioner reviews'* is to assist IC review applicants better understand how the IC review process operates and their obligations with respect to their IC review application.

The revised 'Direction as to certain procedures to be followed in Information Commissioner reviews':

- clarifies the process for dealing with IC review applications involving deemed access refusal decisions
- requires agencies and ministers to undertake engagement with an applicant at the commencement of an IC review
- clarifies the requirement for agencies and ministers to provide a marked up and unredacted copy of the documents at issue in an IC review, as well as a schedule of documents
- provides that submissions will only be requested after the completion of the initial triage and early resolution process, and following any case management activities that may occur as a result of the compulsory engagement process
- provides that no further submissions will be accepted from either party to an IC review (unless either requested by the OAIC or procedural fairness requirements are identified)
- articulates additional potential regulatory action for non-compliance with the direction.

The *'Direction as to certain procedures to be followed by applicants in Information Commissioner reviews'* has some minor updates to give effect to the changes in the *'Direction as to certain procedures to be followed in Information Commissioner reviews'*.

When the OAIC has considered submissions made in response to this consultation, Part 10 of the FOI Guidelines (Review by the Information Commissioner) will be updated.

How to make comments

Submissions can be made by:

Email	foidr@oaic.gov.au
Post	GPO Box 5218 Sydney NSW 2001

The closing date for comments is **Friday 2 June 2023**.

We intend to make all submissions publicly available. Please indicate when making your submission if it contains confidential information that you do not want made public and why it should not be published. Requests for access to confidential comments will be determined in accordance with the FOI Act. If the OAIC accepts submissions in confidence you must also provide a copy that can be published.

Although you may lodge submissions electronically or by post, electronic lodgement is preferred. To help us meet our accessibility obligations, we would appreciate you providing your submission in a web accessible format or, alternatively, in a format that will allow us to easily convert it to HTML code — for example Rich Text Format (.rtf) or Microsoft Word (.doc or .docx) format.

Privacy Collection statement

The OAIC will use the personal information it collects in the course of this consultation for the purpose of finalising the updates to the guidelines and our ongoing engagement with you.

ROBERTS, Lucy

From: FALK, Angelene (EXPIRED) <Angelene.Falk@oaic.gov.au>
Sent: Tuesday, 15 August 2023 8:57 PM
To: ATTARD, Brenton
Subject: D2023 014511 IC review process - Overview
Attachments: D2023 014511 IC review process - Overview.DOCX

Could you please print this for me thank you.

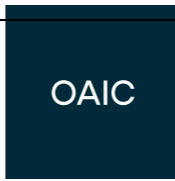
A



Information Commissioner (IC) review process

Stage	Process	Guidelines	Sample letters / guidance	Notes
Stage 1: Intake and Early Resolution / Production of documents	1. Triage: a) Review and acknowledge application (received via email, fax or smartform) for validity <ul style="list-style-type: none"> a. Invalid applications to be finalised under s 54N b. Valid applications – deemed – proceed to ‘Deemed process’ below and invite s 54T application (extension of time to make IC review application) c. Valid applications within time proceed to ‘Assessment’- see below 	10.28 – 10.32 (Application for IC review) 10.41 – 10.44 (extension of time for applying) 10.81 – 10.82 (Preliminary inquiries)	<ul style="list-style-type: none"> • Acknowledgement letter D2022/011173 • Acknowledgement letter where OAIC is respondent D2022/026515 	
	2. Deemed access refusals a) Conduct preliminary inquiries with Respondent and invite the applicant to lodge an application to make an IC review application under s 54T if required. b) If Respondent advises that the FOI request is not deemed to have been refused as the statutory processing time has not expired, the application is invalid and the application will be finalised under s 54N. c) If Respondent advises that the FOI request is deemed to have been refused as the statutory processing time has expired: <ul style="list-style-type: none"> a. Grant the applicant’s s 54T application if required b. Commence review, issue s 54Z/54T letter to the respondent and request relevant documentation d) If the Respondent makes a revised decision, confirm with the applicant whether they wish to proceed e) If the Respondent provides the processing documentation, proceed to ‘Review s 54Z response’ below	10.4 – 10.5 (Deemed decisions) 10.82 (Preliminary inquiries) 10.67 – 10.74 (Revising the decision in the course of an IC review) 10.100 (Steps in the Information Commissioner review process) 10.105 – 10.107 (Deemed refusal or deemed affirmation of original decision)	<ul style="list-style-type: none"> • Notice to commence review (DHA): D2022/019558 • Deemed email templates (proceeds, withdrawals, ITDs) D2022/002690 	<i>Proposed amendments to the procedure directions if implemented will impact on these matters.</i>
	3. Assessment a) Review IC review application and statement of reasons and decide whether to: <ul style="list-style-type: none"> a. Commence review - see below b. Decline under s 54W - see below c. Conduct further enquiries 	10.81 – 10.82 (Preliminary inquiries)	<ul style="list-style-type: none"> • Conducting IC reviews - assessments D2019/002542 • Conducting IC reviews – case categorisation D2020/000377 • Conducting IC reviews: Identification of systemic and significant issues worksheet D2019/001898 	
	4. Notice of commencement of IC review / Request for information (s 54Z) a) Issue notice of commencement of review and request for information, including notifying relevant parties	10.55 (Obtaining information) 10.91 – 10.93 (The Information Commissioner’s powers to gather information) 10.100 (Steps in the Information Commissioner review process) 10.114 – 10.115 (Methods of providing documents to the Information Commissioner)	<ul style="list-style-type: none"> • 54Z notice of IC review D2022/002669 • Opening letter to applicant and 54Z cover email to respondent D2022/026520 • 55A notice of added party to proceeding D2019/009911 	<i>We have previously considered adopting a similar approach to the AAT in relation to the production of submissions – for a copy to be provided to the applicant as well, and then the applicant to have x weeks to provide submissions in response. I</i>
	5. Decline a) Issue intent to decline the applicant if under s 54W(a)(i) and to both applicant and respondent if under s 54W(b)	10.85 – 10.90 (When the Information Commissioner will not review a matter)	<ul style="list-style-type: none"> • Intention to decline (s 54W checklist) D2018/016246 • Closure letter (s 54W checklist) D2018/016247 • Conducting an IC review: Review of preliminary views/s 54W letters D2018/016248 • 54W (b) Intent to decline notice - D2022/011204 	

Stage	Process	Guidelines	Sample letters / guidance	Notes
	<ul style="list-style-type: none"> a. s 54W(a)(i): if the applicant responds, consider the response and determine whether to proceed to close under s 54W or whether further information is required. If the applicant does not respond, proceed to close under s 54W. b. s 54W(b): If the parties do not respond, proceed to close. If the parties respond, consider the response and determine whether to proceed to close under s 54W or whether to re-assess. 		<ul style="list-style-type: none"> • 54W(b) Decision notice D2022/026476 • 54W (a) Decline advice letter to applicant (i) (ii) (iii) D2022/011179 D2022/011181 D2022/011189 • 54W (a) Close letter to Applicant (i) (ii) (iii) D2022/011182 D2022/011183 D2022/011184 	
2: Case Management	8. Review of s 54Z response <ul style="list-style-type: none"> a) If scope of IC review involves ss 33/34 exemptions and the OAIC does not hold the material at issue <ul style="list-style-type: none"> a. Consider whether to issue s 55U notice b. If a s 55U notice has been issued and the Respondent has provided the material at issue, consider whether on further review, more information is required from the applicant or respondent b) For all other reviews, consider: <ul style="list-style-type: none"> a. requests to provide confidential submissions b. whether more information is required from the applicant or respondent, including where a notice to compel the document at issue is required c. whether the request for information should be in the form of an intent to decline to the applicant or a preliminary view to the applicant or respondent 	10.13 – 10.14 (Onus) 10.67 – 10.74 (Revising the decision in the course of an IC review) 10.77 – 10.80 Evidence by the Inspector-General of Intelligence and Security 10.91 – 10.99 (The Information Commissioner’s powers to gather information) 10.108 – 10.113 (Preliminary assessment and view)	<ul style="list-style-type: none"> • Reviews and Investigations case plan: D2023/002296 • Preliminary steps checklist D2018/016244 • Conducting an IC review – general information about case management D2018/016249 • Submissions D2018/016243 • Conducting an IC review: Preliminary view checklist D2018/016245 • IC review case plan D2021/017910 • 55T notice to produce exempt documents - D2019/003535 • 55R notice to produce to agency - D2016/006882 	<i>Review advisers are encouraged to complete the case plan to assist with planning review, identifying and addressing procedural fairness issues and providing a brief document that sets out the history of the case</i>
	7. Informal resolution and procedural fairness steps <ul style="list-style-type: none"> a) Ensure procedural fairness steps have been undertaken and where possible, facilitate resolution through the use of preliminary views/inviting s 55G decisions b) If the application proceeds to a decline under s 54W – see ‘Decline’ process above c) If the application proceeds to a decision under s 55K – see ‘Decision and finalisation’ stage below 	10.52 – 10.62 (General procedure) 10.67 – 10.74 (Revising the decision in the course of an IC review) 10.85 – 10.90 (When the Information Commissioner will not review a matter)		
3: Decision and finalisation	8. Draft decision for clearance <ul style="list-style-type: none"> a) Decision drafted for Director and Assistant Commissioner clearance b) IC review applications involving searches, charges, practical refusals will proceed to the Assistant Commissioner for decision c) All other decisions will proceed to the FOI Commissioner or Information Commissioner for clearance d) At any time during the clearance stage, the matter may need to return to the case management stage. 	10.118 (Written reasons to be given) 10.125 – 10.26 (Compliance with the Information Commissioner’s decision)	<ul style="list-style-type: none"> • Decision writing checklist D2018/016241 • Conducting an IC review- clearance using documents on Resolve check list D2020/005955 • Snapshot for clearance of IC review decisions D2022/001851 • Section 55K decision – s47C D2021/003889 • Section 55K decision – s 47 F D2021/003888 	
	9. Finalisation of Decision <ul style="list-style-type: none"> a) Once the decision has been approved, the decision is assigned a citation and is then sent to the relevant parties. b) For matters that are set aside or varied, a letter seeking confirmation of compliance/appeal is also sent to the Respondent. 	10.125 – 10.126 (Compliance with the Information Commissioner’s decision)	<ul style="list-style-type: none"> • Attachment E of Decision writing checklist D2018/016241 • Section: 55K compliance letter template D2020/012832 	
	10. Return/destruction of exempt material	10.94 (Producing documents claimed to be exempt: general)	<ul style="list-style-type: none"> • Conducting an IC review – general information about case management D2018/016249 	
	11. Publication of decision <ul style="list-style-type: none"> a) The decision is sent to AUSTLII for overnight publication. 	10.118 (Written reasons to be given)		
	12. Summary			



Stage	Process	Guidelines	Sample letters / guidance	Notes
	a) A summary of the decision, noting key points and whether any changes are required to the FOI Guidelines or IC review process, is circulated to the Commissioners, media, legal and FOI Branch.			

From: [OAIC - ACFOI](#)
To: [PEEL,Sara](#); [HARLOCK,Raewyn](#); [PIRANI,Toni](#); [OAIC - FOI Commissioner](#); [FALK,Angelene \(EXPIRED\)](#)
Cc: [TULLOCH,Karen](#); [DOMENICI,Romina](#); [OAIC - Commissioner](#); [AGO,Rocelle](#)
Subject: [For noting] Executive brief: Revised IC review draft procedure directions - Submissions and Workshop
Date: Friday, 7 July 2023 7:01:05 PM

Snapshot	
Due date	11 July 2023
Fixed or flexible	Fixed
If fixed, why?	Workshop – 12 July 2023
Topic for clearance	IC review procedure direction – Submissions and Workshop
Product (e.g. brief / submission)	Brief: D2023/015645
Length / no. of pages	26
External parties	Government agencies
Clearance & consultation	Rocelle Ago
Responsible director	Sara Peel

Dear Toni

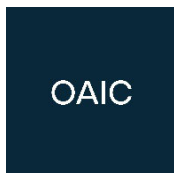
Ahead of the IC review directions workshops scheduled for 12 July 2023, please find the relevant brief summarising the submissions, key themes and proposed agenda at [D2023/015645](#).

For noting:

- The attendees for each workshop will be confirmed early next week, with an updated agenda containing the confirmed attendees to be circulated 11 July 2023.
- We are awaiting submissions from NDIA. We will re-circulate an updated brief/pack once we receive those submissions.
- I am on leave on Monday and Tuesday but will be contactable via mobile.
- [@PEEL,Sara](#), I would be grateful if you could work with [@HARLOCK,Raewyn](#) in developing brief speaking notes for the workshop, particularly around the purpose of the direction and the introduction of the requirement to engage with applicants, as well as the main topics listed in the agenda.

Commissioner [@FALK,Angelene](#) – for your information.

Kind regards



Rocelle Ago (she/her)

Assistant Commissioner, Freedom of information

Office of the Australian Information Commissioner

P +612 9942 4205 **M** **S47F** **E** rocelle.ago@oaic.gov.au

Executive officer to Freedom of Information Commissioner and Assistant Commissioner, Freedom of Information:
Romina Domenici **P** +612 9942 4022 **E** romina.domenici@oaic.gov.au

The OAIC acknowledges Traditional Custodians of Country across Australia and their continuing connection to land, waters and communities. We pay our respect to First Nations people, cultures and Elders past and present.

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From: [HARLOCK,Raewyn](#)
To: [OAIC - ACFOI](#)
Cc: [AGO,Rocelle](#); [PEEL,Sara](#); [STRATHEARN,Tania](#)
Subject: Issue arising from concurrent session on implementation of Procedure Directions
Date: Thursday, 22 June 2023 12:10:00 PM
Attachments: [image001.jpg](#)
[image002.png](#)
[image003.png](#)
[image004.png](#)
[image005.png](#)

Good afternoon Rocelle

On Tuesday afternoon Tania facilitated a really useful discussion with her team on implementing the new procedure directions.

Some issues were identified and I would appreciate having a chat before your meeting with agencies in mid-July.

1. Re: deemed decisions that proceed to IC review (i.e., where the subsequent decision refuses access to either some or all of the documents sought and the applicant elects to continue with the IC review). When we spoke you said there was no intention for reviews that come to the OAIC as deemed would proceed through the compulsory engagement process if the applicant continued with the review after the agency made an actual decision.
I'm not clear of the policy reason for this. Once a decision has been made, these applicants are in the same position as an applicant who is seeking review of a substantive (non-deemed) decision. Why are they not given the opportunity to discuss issues with the agency in the way other applicants are? I note that the current position re: deemed will relieve the Department of Home Affairs from engaging with applicants in relation to a sizeable proportion of their IC reviews.
2. Will we be providing guidance for agencies about what the OAIC considers to be reasonable steps to engage with the applicant for the purposes of the procedure direction?
3. In what circumstances will the OAIC consider granting extensions to the 8-week period to engage with the applicant? Will we issue guidance (or would it be better to wait until a few agencies have applied so we have a better idea of the kinds of issues they may face?)/
4. We discussed developing a Fact Sheet (or similar) which could be attached to the acknowledgement letter (because applicants are unlikely to read/have read the PD). Alternatively we could add some text to the acknowledgement email to let them know that they will be required to engage.
5. There may be a need to add a new workflow to Resolve so I&ER can keep track of agency compliance (otherwise how will they know that the 8 weeks has expired and no response has been received).

Raewyn



Raewyn Harlock (she/her)

Freedom of Information Branch
Office of the Australian Information Commissioner
P +61 2 9297 9425 E raewyn.harlock@oaic.gov.au



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From: [OAIC - ACFOI](#)
To: [HARLOCK,Raewyn](#)
Cc: [AGO,Rocelle](#); [PEEL,Sara](#); [STRATHEARN,Tania](#)
Subject: RE: Issue arising from concurrent session on implementation of Procedure Directions [SEC=OFFICIAL]
Date: Thursday, 22 June 2023 2:49:54 PM
Attachments: [image001.jpg](#)
[image002.png](#)
[image003.png](#)
[image004.png](#)
[image005.png](#)

Hi Raewyn

Please see my response in **red** below.

From: HARLOCK,Raewyn <Raewyn.Harlock@oaic.gov.au>
Sent: Thursday, June 22, 2023 12:11 PM
To: OAIC - ACFOI <ACFOI@oaic.gov.au>
Cc: AGO,Rocelle <Rocelle.Ago@oaic.gov.au>; PEEL,Sara <Sara.Peel@oaic.gov.au>; STRATHEARN,Tania <Tania.Strathearn@oaic.gov.au>
Subject: Issue arising from concurrent session on implementation of Procedure Directions [SEC=OFFICIAL]

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I'm not clear of the policy reason for this. Once a decision has been made, these applicants are in the same position as an applicant who is seeking review of a substantive (non-deemed) decision. Why are they not given the opportunity to discuss issues with the agency in the way other applicants are? I note that the current position re: deemed will relieve the Department of Home Affairs from engaging with applicants in relation to a sizeable proportion of their IC reviews.

I recall our discuss this week that the nature of the deemed process is that we don't have a decision to work with and we are asking for the documents under review – that the compulsory engagement process could be undertaken where the applicant wishes to continue with the review following the agency's revised decision.

2. Will we be providing guidance for agencies about what the OAIC considers to be reasonable steps to engage with the applicant for the purposes of the procedure direction? *I think we should*
3. In what circumstances will the OAIC consider granting extensions to the 8-week period to engage with the applicant? Will we issue guidance (or would it be better to wait until a few agencies have applied so we have a better idea of the kinds of issues they may face?)/ *Potential factors could be where the applicant is unavailable during that period (overseas, medical etc)*
4. We discussed developing a Fact Sheet (or similar) which could be attached to the acknowledgement letter (because applicants are unlikely to read/have read the PD).

Alternatively we could add some text to the acknowledgement email to let them know that they will be required to engage. *I think it will be useful to attach a separate fact sheet that sets out the IC review process and the requirement to engage and our expectations.*

5. There may be a need to add a new workflow to Resolve so I&ER can keep track of agency compliance (otherwise how will they know that the 8 weeks has expired and no response has been received). *I think a new workflow would be useful to be able to capture the data.*

Raewyn



Raewyn Harlock (she/her)

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From: [OAIC - ACFOI](#)
To: [PEEL,Sara](#); [HARLOCK,Raewyn](#); [PIRANI,Toni](#); [OAIC - FOI Commissioner](#); [FALK,Angelene](#)
Cc: [TULLOCH,Karen](#); [DOMENICI,Romina](#); [OAIC - Commissioner](#); [AGO,Rocelle](#)
Subject: [For noting] Executive brief: Revised IC review draft procedure directions - Submissions and Workshop
Date: Friday, 7 July 2023 7:01:06 PM
Attachments: [image001.jpg](#)
[image002.jpg](#)
[image003.jpg](#)

Snapshot	
Due date	11 July 2023
Fixed or flexible	Fixed
If fixed, why?	Workshop – 12 July 2023
Topic for clearance	IC review procedure direction – Submissions and Workshop
Product (e.g. brief / submission)	Brief: D2023/015645
Length / no. of pages	26
External parties	Government agencies
Clearance & consultation	Rocelle Ago
Responsible director	Sara Peel

Dear Toni

Ahead of the IC review directions workshops scheduled for 12 July 2023, please find the relevant brief summarising the submissions, key themes and proposed agenda at [D2023/015645](#).

For noting:

- The attendees for each workshop will be confirmed early next week, with an updated agenda containing the confirmed attendees to be circulated 11 July 2023.
- We are awaiting submissions from NDIA. We will re-circulate an updated brief/pack once we receive those submissions.
- I am on leave on Monday and Tuesday but will be contactable via mobile.
- [@PEEL,Sara](#), I would be grateful if you could work with [@HARLOCK,Raewyn](#) in developing brief speaking notes for the workshop, particularly around the purpose of the direction and the introduction of the requirement to engage with applicants, as well as the main topics listed in the agenda.

Commissioner [@FALK,Angelene](#) – for your information.

Kind regards



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From: [HARLOCK,Raewyn](#)
To: [PEEL,Sara](#)
Subject: Paragraph you questioned comes from the Education submission
Date: Tuesday, 11 July 2023 11:02:00 AM
Attachments: [image001.jpg](#)
[image002.png](#)
[image003.png](#)
[image004.png](#)
[image005.png](#)

[D2023/015010](#)

We also have some concerns with the evidentiary requirements of the engagement process that would be required to be provided to OAIC if these proposed amendments are implemented. In addition to the resource implications referred to above, these processes may limit the ability of the parties to engage in a full and frank discussion of the issues if the statements or concessions made during the engagement process may potentially be taken into account by the IC if the review proceeds. We suggest consideration be given to whether better results may be achieved through the engagement process if it is conducted on a similar “without prejudice” basis as under section 34E of the *Administrative Appeals Tribunal Act 1975* to encourage more open and frank discussions.



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From: [Education - FOI](#)
To: [OAIC - FOI DR](#)
Subject: Draft revisions to procedure directions [SEC=OFFICIAL]
Date: Friday, 30 June 2023 12:04:23 PM

Dear OAIC

Thank you for your email dated 7 June 2023 to the Department of Education, in which you advise that OAIC will be publishing submissions from Commonwealth agencies received in relation to the consultation on the draft revisions to the 'Direction as to certain procedures to be followed in Information Commissioner reviews' and the 'Direction as to certain procedures to be followed by applicants in Information Commissioner reviews'. The department is not making a formal submission in response to this consultation, and as such, we understand this email will not be published.

While we are not making a formal submission, we do have concerns over the proposed requirement for agencies to engage, or make reasonable attempts to engage, with an Information Commissioner (IC) review applicant by telephone or video conference upon receipt of notification of an IC review. While we recognise that discussion with an applicant in some instances may assist in resolving or narrowing the issues in dispute in an IC review, agencies have often already undertaken extensive written and oral engagement with applicants or affected third parties with a view to resolving their concerns before a matter reaches the IC review stage. Therefore, it is not clear that a compulsory telephone or video conference with all applicants after they have applied for IC review is likely to be an efficient use of an agency's FOI resources, or achieve the stated objective of resolving or narrowing the issues in dispute in the IC review. Further, allocating more resources to an IC review matter within the proposed eight week timeframe may hamper agencies in being able to progress other FOI matters within the statutory timeframes under the FOI Act.

We also have some concerns with the evidentiary requirements of the engagement process that would be required to be provided to OAIC if these proposed amendments are implemented. In addition to the resource implications referred to above, these processes may limit the ability of the parties to engage in a full and frank discussion of the issues if the statements or concessions made during the engagement process may potentially be taken into account by the IC if the review proceeds. We suggest consideration be given to whether better results may be achieved through the engagement process if it is conducted on a similar "without prejudice" basis as under section 34E of the *Administrative Appeals Tribunal Act 1975* to encourage more open and frank discussions.

Given the extension to the consultation process to 30 June 2023, we assume the proposed implementation date of 1 July 2023 has been delayed. Having regard to the current Senate inquiry into the operation of Commonwealth FOI laws, we query whether any implementation of amended directions should be deferred until after the Committee's report has been finalised.

Regards

Freedom of Information Team
Department of Education

From: [TULLOCH,Karen](#)
To: [HARLOCK,Raewyn](#)
Cc: [PEEL,Sara](#); [SCOLYER,Jackie](#)
Subject: FW: Update required to the Procedure Direction [SEC=OFFICIAL]
Date: Wednesday, 30 August 2023 11:56:49 AM

Hi Raewyn

As discussed, we should probably flag and raise this with Rocelle as you mentioned. I note Jackie did cc ACFOI and Romina in her email below:

IE: change to the Procedure Direction so that when agencies provide us with submissions, they must also provide us with a telephone contact number, in the event we need to contact them to discuss their submissions/IC review?

Kind regards

Karen

Ph: 02 9942 4061

From: SCOLYER,Jackie <Jackie.Scolyer@oaic.gov.au>

Sent: Wednesday, August 16, 2023 4:22 PM

To: PEEL,Sara <Sara.Peel@oaic.gov.au>

Cc: OAIC - ACFOI <ACFOI@oaic.gov.au>; TULLOCH,Karen <Karen.Tulloch@oaic.gov.au>;
DOMENICI,Romina <Romina.Domenici@oaic.gov.au>

Subject: Update required to the Procedure Direction [SEC=OFFICIAL]

Hi Sara

In speaking with Rocelle earlier today, are we able to make a change to the Procedure Direction so that when agencies provide us with submissions, they must also provide us with a telephone contact number, in the event we need to contact them to discuss their submissions/IC review?

Please let me know if you would like to discuss this.

With thanks,

Jackie

From: [PEEL,Sara](#)
To: [OAIC - ACFOI](#); [BAKER,Heath](#)
Cc: [OAIC FOI Monitoring Guidance and Engagement](#)
Subject: For AC review: IC review Procedure Directions [SEC=OFFICIAL]
Date: Tuesday, 5 March 2024 9:11:19 AM
Attachments: [image001.jpg](#)
[image002.jpg](#)
[image004.jpg](#)

Hi Rocelle

I have drafted the below for Liz as requested yesterday – I understand this email can replace the previously-intended EB on the Procedure Direction. Happy to make any changes/additions.

Grateful for your attention, as well as [@BAKER,Heath](#)'s, to the highlighted sentence to ensure it reflects future expectations in terms of process - I have confirmed the current 8-week period with Heath.

Kind regards

Sara

This email confirms the status of the draft Procedure Directions (PDs) intended to revise/replace the existing PDs made under s 55(2)(e)(ii) of the FOI Act.

As you know, last year, we [published draft revisions to the two PDs](#) for consultation: '*Direction as to certain procedures to be followed in Information Commissioner reviews*' (for agencies) and the '*Direction as to certain procedures to be followed by applicants in Information Commissioner reviews*'.

The revised PD for agencies proposed a new requirement that agencies and ministers undertake engagement with an applicant at the commencement of an IC review – as well other revisions:

- clarifying the process for dealing with IC review applications involving deemed access refusal decisions
- clarifying the requirement for agencies and ministers to provide a marked up and unredacted copy of the documents at issue in an IC review, as well as a schedule of documents
- providing that submissions will only be requested after the completion of the initial triage and early resolution process, and following any case management activities that may occur as a result of the compulsory engagement process
- providing that no further submissions will be accepted from either party to an IC review (unless either requested by the OAIC or procedural fairness requirements are identified)
- articulating additional potential regulatory action for non-compliance with the direction.

In a public consultation process – via written submissions and a subsequent workshop held on 12 July 2023 – agencies expressed some concerns about the revised PDs. Notably, there was resistance to the mandatory nature of the requirement to engage with applicants. Agencies also raised issues around timeframes, the production of documents and other matters. We have previously documented agency concerns:

1. 'Talking Points for Workshop – IC review Procedure Direction': this brief groups and summarises agency concerns thematically and sets out the rationale underpinning key revisions: [D2023/015811](#).
2. Executive Brief: Revised IC review draft procedure directions: Submissions and Workshop – this includes a table summarising each submission: [D2023/015645](#).
3. Notes on the consultation workshop of 12 July 2023 (includes agency feedback): [D2023/016199](#).

In terms of finalising the PDs, once the revisions are settled – and in particular, if the proposed engagement requirement is implemented – we will need to consider commencement and/or transitional arrangements. There is a question as to whether we should apply the engagement requirement retrospectively – notably, for IC review applications received by the OAIC before the

revised PDs are made but that have not yet been allocated. By way of background, we drafted the revised directions in the context that we were working within existing resources and matters were being actioned in chronological order (subject to exception of priority cohorts).

I also note that respondents are now being given 8 weeks to respond to s 54Z notices – this is an extended period (from 3 weeks) consistent with the revised draft PDs. The extended period was intended to accommodate engagement between minister/agency and applicant. **At present, the engagement requirement is not in play however agencies and ministers are generally expected to provide submissions within the 8 week period – this expectation around submissions would not be retained under the proposed arrangements in the new PDs.**

Finally, I confirm that we are progressing revisions to the Guidelines at [Part 10: Review by the Information Commissioner](#). Once the PDs are settled and remade, we will be in a position to reflect updates in the Part 10 Guidelines and finalise a draft for consultation.

Kind regards



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< Please note I am not in the office on Fridays.>

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From: [PEEL,Sara](#)
To: [AGO,Rocelle](#); [OAIC - ACFOI](#)
Cc: [TULLOCH,Karen](#)
Subject: EB for clearance on 7 July 2023 - submissions - procedure direction
Date: Friday, 7 July 2023 12:38:00 AM
Attachments: [image001.jpg](#)
[image002.jpg](#)
[image004.jpg](#)
Importance: High

Snapshot	
Due date	7 July 2023
Fixed or flexible	Flexible – however I understand you wish to clear this before you go on leave early next week. It needs to be provided to Toni ahead of the workshop with agencies on Wednesday 12 July 2023
If fixed, why?	
Topic for clearance	IC review procedure direction – agency submissions
Product (e.g. brief / submission)	EB
Length / no. of pages	15
External parties	
Clearance & consultation	Rocelle Ago
Responsible director	Sara Peel

Hi Rocelle

Please see EB for your clearance, on submissions about the IC review procedure direction, at: D2023/015645.

Karen, there are a couple of things I'd be very grateful if you could help with as this gets cleared. Could you please double check the TRIM references for the submission (on the first page and in the appendix)? Also, formatting the table has been a little tricky due (I think) to the switch to landscape – I wasn't able to add a heading row (First column: Agency, Second column: Key comments), if this is something you are able to add I'd be very grateful. Alternatively just a title above would work: Key points. Thank you!

Please feel free to call my mobile if you wish to discuss.

Kind regards



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< Please note I am not in the office on Fridays.>

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Executive brief

Responsible Executive Member:	Rocelle Ago, Assistant Commissioner FOI
Prepared by:	Sara Peel, Director, Monitoring, Guidance and Engagement
To:	Toni Pirani, FOI Commissioner
Copies:	Karen Tulloch, Raewyn Harlock
File ref:	D2023/015645
Date:	06 July 2023
Subject:	IC review draft procedure direction: submissions

Purpose and timing

The purpose of this Executive Brief is to summarise key points made by agencies in their submissions responding to the draft revised IC review procedure directions.

This Executive Brief has been prepared ahead of the workshop on the IC review procedure directions in Canberra on 12 July 2023. Agencies who made a submission have been invited.

A summary of the submissions are in a table below.

Background

The Australian Information Commissioner may give written directions under s 55(2)(e)(ii) of the FOI Act in relation to procedures to be followed in Information Commissioner (IC) reviews.

The OAIC has revised the [2 existing procedure directions](#) (one for agencies and ministers, and one for IC review applicants). We sought feedback with an extended consultation period closing on Friday 30 June 2023. The following agencies made submissions:

1. Administrative Appeals Tribunal: D2023/014318
2. Australian Federal Police: D2023/015096
3. Australian Tax Office: D2023/015090
4. Attorney-General's Department: D2023/015009
5. Commonwealth Ombudsman: D2023/015094

6. Department of Climate Change, Energy, Environment and Water: D2023/015095
7. Department of Defence: D2023/015089
8. Department of Employment and Workplace Relations: D2023/015092
9. Department of Home Affairs: D2023/015089
10. Services Australia: D2023/015091

We have also received comments from the Department of Education (D2023/015010). We are currently clarifying the status of this, given the department has advised it is not a formal submission and requests we do not publish. It is therefore not included in the summary below.

Key themes

There were a number of themes occurring across several (or more) agency submissions. These include that.

- OAIC should identify issues in dispute at an early stage of the IC review process and communicate this to parties to establish scope, facilitate targeted submissions and an efficient process.
- There should be more information about the steps and process undertaken by the OAIC, including the time-frames that apply to the OAIC.
- Time frames are too short, extensions should be available other than in extenuating circumstances, or guidance should be provided as to what constitutes extenuating circumstances.
- There is significant resistance to the mandatory nature of the requirement to engage with applicants. Agencies raise administrative burden, concerns about risks to staff, limited benefit or utility, as well as a range of other concerns.
- Agencies also consider that there should be flexibility in the method of engagement with applicants – so they are not limited to video and telephone conference – and raise applicants’ needs and preferences. Agencies have also submitted that the OAIC should be involved in the engagement as an independent third party.

- Bullet style



AAT	<p>Comments on process and overview</p> <ul style="list-style-type: none">• Suggests increasing clarity on components and time-frames, including flow chart. For example, the stage of the process in which submissions are requested is not clear.• Not clear how and when identification of the issues in the IC review application occurs. Efficiency will be enhanced if issues are determined by the OAIC as early as possible (at point of notifying the agencies) and conveyed to the parties, enabling them to focus on real issues in dispute, and manage the scope/expectations of further engagement.• This submission makes a range of detailed/technical comments concerning the directions suggests various aspects where clarity could be increased. <p>Time frames</p> <ul style="list-style-type: none">• Time frames are generally too short, given the increased complexity of digital information collection/storage and increasing breadth and volume of requests.• Given the significant variation in complexity, the setting of time periods for the provision of material should be done in consultation with the agency rather than relying on standard time frames. It is usual for a court or tribunal to ask parties how long they need in setting a timetable. This also avoids the need to commit resources to administering extension of time requests.• The 2-week time period (set out in Annexure 1) to respond to a Notice to Produce should instead be set following consultation with the agency (given preparation may be resource intensive and failure to comply is an offence). <p>Response to s 54Z notice and s 55(2)(e) direction</p>
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	<ul style="list-style-type: none"> • Requirement at 3.3b to provide the processing documents and remaining documents at this stage based on a deemed refusal seems premature. Should check with applicant whether they want a review of material exempted under the decision before the material is unnecessarily collected and submitted to the OAIC. • Requirement at 3.3c to make submissions in support of the access refusal – suggest it would be preferable to provide a statement of reasons for the decision; also reiterate comment above about requirement to provide processing and exempt documents. • 3 weeks may be too short in some cases, could refer to the possibility of seeking an extension of the time frame by way of consultation. <p>Engagement requirement</p> <ul style="list-style-type: none"> • The engagement process should only occur where there has been no internal review and the manner in which it should be conducted should be left to the agency, which will have a better understanding of the best way to communicate with the applicant. Engagement requirement may cause delay or annoy the applicant where engagement has already occurred. • Unreasonable to undermine arrangements/protocols for applicants who have engaged in abusive/unreasonable behaviour, refers to managing psychological hazards • Evidence of the engagement could be more proportionately satisfied by the provision of a statement similar to that required by federal courts by section 6 of the <i>Civil Dispute Resolution Act 2011</i>. <p>Production of documents</p> <ul style="list-style-type: none"> • Marking up and schedule requirements can be resource intensive. Suggests referring to the Information Commissioner’s ability to specify alternative requirements, which can be determined in consultation with the agency/minister where appropriate. • Unclear how time-frame in the notice is determined. 8-week time-frame, this is insufficient for the outcome of any engagement to be considered by the OAIC and taken into account in narrowing scope to issues in dispute. Suggest the time-frame is determined in consultation with the agency.
AFP	Engagement requirement

<p>This summarises their public submission.</p> <p>AFP have also submitted a 'confidential submission' with further information. We have requested they provide reasons for us not to publish.</p>	<ul style="list-style-type: none"> Disagrees with compulsory requirement. Raises workplace health and safety implications on the FOI practitioners. FOI practitioners are not trained mediators. Notes time and expense to upskill FOI practitioners in negotiation or to engage external (legal) providers. Attempts at engagement are frequently made at the primary decision or internal review stages. Unlikely to have more success in reaching resolution at the IC stage, particularly without the involvement of an independent third party. <p>Response to s 54Z notice</p> <ul style="list-style-type: none"> Evidence requirements in response to a 54Z notice will place additional reporting and administrative obligations on agencies. Expresses concern that this will add further pressures to the staff workloads, detrimentally affect FOI processing timeframes. <p>Making an application for IC review</p> <ul style="list-style-type: none"> Recommends adding the requirement for an agency reference number to the information that an applicant must provide. Applicants may have multiple FOI matters at various stages – without the reference, it can be difficult to establish which is the relevant matter.
<p>ATO</p>	<p>Commencement of review: s 54Z notice and direction under s 55(2)(e)</p> <ul style="list-style-type: none"> Suggests that we soften language to indicate that the three options in response to a s 55(2)(e) notice (release in full, release in part, refuse access) will generally be applicable, and that extensions might be appropriate in some cases. There are circumstances not covered by the above options – for example, in complex matters it may be still unclear what or how many documents might be caught by a request, and an agency may consider an unreasonable diversion of resources argument. Agencies may not be able to comply with the 3-week time-frame e.g. because of the number or sensitivity of documents or the time lapsed since the decision was made. <p>Engagement requirement</p> <ul style="list-style-type: none"> Considers that either an aspirational or matter specific approach would be preferable.

- Requirement may lead to a 'tick box' exercise without meaningful results in a majority of cases.
- Where disagreements over 'discretionary' matters – such as size/scope of request – are not resolved at initial decision or internal review stages, it is unlikely further engagement will progress the matter. In the case of 'non-discretionary' issues – such as the application of the tax law confidentiality – it is not useful to set out the same reasoning which has not previously been accepted by the applicant.
- Avenues to resolve issues can occur outside the engagement process, such as by investigating issues, exploring options for resolution with other agency officers or with third parties. The ATO assumes that such attempts will not be taken into consideration.
- Notes circumstances where it is appropriate not to engage with applicants beyond what is necessary for their statutory functions, including for WHS reasons. Engagement is also unlikely to be effective where an applicant repetitively seeks access, in cases where an agency has explained why they cannot provide access.

Production of documents

- Submits that they should not be obligated to provide a marked up and unredacted copy of the document at issue in some cases – in particular, evidence to justify an exemption can exist with having regard to those documents. They make some exemption decisions without searching for and collating the documents (e.g. Person A requesting Person B's tax return, in some instances there are also applicable offence provisions). This means they would be searching for and collating documents solely for the purposes of the IC review.

Production of schedule

- Submits that the requirement for a schedule of marked up documents to be provided should not be necessary in every case but only 'where appropriate'. Notes instances where both the nature of the document and redactions are self-evident and that they provide documents in electronic bundles so particular exemptions can be located in seconds.

Timeframes for providing responses

- Express concerns about the position where further time is only provided in 'extenuating' circumstances (in this case, referring to the Direction concerning provision of sample documents). Suggest extensions should be provided where appropriate.

Notes issues such as the number/sensitivity of documents and the time which has lapsed since the original decision contribute to the work involved in responding to an IC review.

- Raises concern about the requirement to make an extension request in writing and with supporting evidence: states that this overlooks 'utmost' efforts towards compliance, competing priorities and factors beyond control.

Limit on submissions after initial exchange:

- Suggests less prescriptive wording, as the circumstances set out in the Direction are not the only circumstances where it might be appropriate to allow a party to make further submissions.

Request to make submissions in confidence

- Expresses lack of understanding as to why this request must be made before providing the submission. Submits that request for confidentiality and a submission could be made at the same time without affecting the OAIC process for dealing with these submissions.

Timeliness of IC Applications

- Referring to the strict timeframe which are proposed for agencies, suggests consideration as to whether an applicant's delay in seeking a review will be a ground for providing an agency with additional time to respond, noting that it is more difficult to respond to aged matters.

Participation in IC review – 'failure to engage'

- Clear enforceable requirements on applicants will assist in making consultations meaningful and productive.
- Provide further information to applicants on what is a failure to engage.
- A failure to provide the information required of an IC applicant in the Direction should be a 'failure to engage'.
- Provide applicants with details about expectations around engagement with the agency and that attending a meeting with no intention to attempt towards resolution is not considered appropriate 'engagement'.

<p>Attorney- General's Department</p>	<p>Timeframes, steps in the process, transparency</p> <ul style="list-style-type: none"> • Suggests greater clarity concerning the time-frames that apply to the OAIC. • The order in which certain steps are to occur in the IC process is unclear (in particular, where the s 54Z notice fits in with other steps). • Detail about certain steps are not explained in the draft direction. For example, there is no explanation about when the OAIC will endeavour to make its decision, nor the timeframe for providing documents to the applicant (if the IC decides to vary the decision) and the timeframe for destruction or return of evidence documents to agencies for discontinued reviews. • The OAIC should commit to status updates to agencies in more circumstances than outlined in the guidelines, and at regular intervals. • Recommends a checklist, or some other method of transparency, about the IC review process. Additional guidance such as a flow chart similar to the AAT flow chart would be useful. <p>Response to s 54Z notice</p> <ul style="list-style-type: none"> • Extensions might be needed more routinely than in 'extenuating circumstances': Sometimes agencies have not been notified of IC review applications for more than 12 months after it was lodged – this additional time means agencies need to re-consult stakeholders on exemption claims, and there is also the engagement requirement to factor in. <p>Engagement requirement</p> <ul style="list-style-type: none"> • Where agencies have not been notified of an IC review application, they cannot – as required in the draft direction – contact applicants shortly after it is lodged (as required in the draft direction). • Suggests that agencies be provided a copy of the review application close to the time of receipt by the OAIC, so they can be proactive from an earlier stage. Alternatively, agencies should be made aware the OAIC has received the notice of review and advised when they can expect to receive a copy. • The guidance could be read to suggest that the engagement requirement only applies to access refusal or access grant decisions (not deemed refusals). This would not appear to take into account third-party consultations. • Without the OAIC's involvement, or a clear framework to support the engagement process, there is the potential for disputes about what has occurred and agreed on during the process. • This process may expose agency staff dealing with abusive applicants to WHS risks.
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	<ul style="list-style-type: none"> • Expresses a strong view that there should be discretion as to the engagement method. Verbal engagement may not be practicable, nor the preference, for applicants who are incarcerated, who are disabled, who are located overseas or who have English as a second language. • Additional OAIC guidance about the engagement process would be helpful and promote consistency, such as templates and information for applicants about appropriate conduct (which could potentially mitigate risks to staff). • Different matters may require different levels of engagement (e.g. deemed refusal compared to a matter where significant negotiation has occurred under a s 24AB process) – it would be helpful to provide some detail about the kind of engagement required in different circumstances. <p>Non-compliance with direction – reports to Office of Legal Services Co-ordination</p> <ul style="list-style-type: none"> • Non-compliance with the procedural direction may not always amount to non-compliance by the agency with its model litigant obligations. Suggests some minor language changes. <p>Format of directions, third parties</p> <ul style="list-style-type: none"> • May be simpler and more effective to have a single direction, addressed to both the agency and the applicant. • Unclear what practice directions (if any) apply to third parties joined to an IC review or whether the process for an IC review in the directions for agencies and applicants may differ where there are other parties to the review.
Department of Climate Change, Energy, the Environment and Water	<p>Engagement requirement:</p> <ul style="list-style-type: none"> • undue administrative burden – creates additional work and increase need for extensions of time, additionally strain its ability to meet its statutory obligations • increased complexity is exacerbated by notification of IC reviews after significant time has passed since the original decision (staff movements and Machinery of Government changes increase the challenge of a consultation process). • objects to mandatory nature – noting they regularly provide submissions to IC reviews where there is no realistic chance that the review will be successful, no benefit in an engagement requirement in these circumstances. <p>Section 54Z</p>

	<p>If the engagement requirement is implemented, submits that the proposed 8 week time period is inadequate (presumably referring to s54Z).</p>
<p>Defence</p>	<p>Engagement requirement:</p> <ul style="list-style-type: none"> • may cause delay when there has already been engagement through the internal review process • it may not be possible to provide further meaningful information to the applicant • suggests optional conferences that can be conducted by any method considered reasonable to the parties, such as email (noting this may also assist anonymous applicants) • parties choosing the method enables agencies to put in place WHS and security protections for staff • considers OAIC involvement in conferences vital, also considers that the OAIC should provide parties with an early high-level merits review assessment and promote informal resolution strategies • if issues are not resolved through engagement, consider requiring the applicant to advise OAIC of the minister/agency response and why they were not satisfied <p>Section 54Z notice:</p> <ul style="list-style-type: none"> • an additional 10 business days, in addition to the 8 weeks, should be provided to respond, if engagement with the applicant is required at the start of the IC review • suggests suspension of the notice if an agreement is reached, in conference, that the agency will review the FOI request with a view to providing a s 55G decision <p>Production of documents:</p> <ul style="list-style-type: none"> • considers requirement for a ‘sufficient representative sample of documents’ to be ambiguous – suggests clarification, for example, by providing a percentage • requests more flexible arrangements for inspection, allowing for inspection at an agency’s premises, for security reasons. <p>IC application / applicant’s submissions:</p>

	<ul style="list-style-type: none"> vital for applicant to articulate their reasons for disagreeing with a particular aspect of the decision at the time they lodge their application – this would lead to more targeted submissions by agencies/ministers and meet procedural fairness requirements. should be compulsory in the IC application for applicants to identify why an agency’s/minister’s decision is wrong. <p>Commencement date:</p> <p>Requests commencement date after 1 October 2023, given resources/training/processes impacts.</p>
DEWR	<p>Section 54Z notice:</p> <ul style="list-style-type: none"> Suggests a 30-day timeframe to make either a revised section 55G decision or provide submissions in support of access refusal of documents, stating this is consistent with other FOI-Act timeframes. <p>Engagement requirement</p> <ul style="list-style-type: none"> Concerned about the compulsory nature, suggests it be discretionary. Applicants may find a forced process of dealing with the agency daunting or frustrating, rather than dealing with the OAIC to which it has applied. Where relationship between parties has broken down, this could be unproductive and entrench an applicant in their position, at a point where third-party intervention by OAIC has been requested and could provide a circuit breaker. If this is compulsory, suggests consideration of specified exemptions to deal with the above circumstances.
Home Affairs	<p>Overview and preference for legislative change</p> <ul style="list-style-type: none"> Detailed submission which accepts numerous aspects of the draft Directions. Recommends elements of the draft direction be removed or rethought particularly where the benefits ‘are unclear and the costs, safety and feasibility of implementation are of concern’. Suggests proposed changes to the directions would be better effected by legislative changes to sections 54L(2) and 54E to enable FOI applicants’ easier access to internal review on deemed refused and substantive decisions.

Commencement

- Recommends commencement is negotiated with agencies so there is time for implementation, requiring:
 - additional staffing resources.
 - staff consultation processes including health and safety assessments
 - system changes including ICT.
 - staff training including updates to Departmental procedural instructions.

Engagement requirement

- Recommends allowing agencies to assess where there is value in engaging with an applicant, when there is no risk to staff.
- Proposed value of requirement is unclear and does not offset administrative burden; also impacts timeliness. Benefit is unclear especially where:
 - no substantive decision has been made.
 - there are exemption claims that the applicant disputes and which cannot be resolved.
 - there is risk the exempt information could be inadvertently disclosed in conversation such as s33 exemptions.
 - the applicant is unwilling/unable to revise the scope to resolve practical refusal issues.
 - the Department consider all searches have been conducted.
- The Department already engages with review applicants at the initial stages of the process where this would assist towards resolution. Applicants may not wish to engage with the Department, hence their application for independent review.
- Unacceptable psychosocial and physical risks to staff when discussing outcomes with disgruntled clients.
- Recommends requirement for telephone/video conference be removed or adjusted. Additional funding needed to implement this including system supports and staffing resources.
- Recommends removing requirements on agencies to provide evidence of engagement – will impact timeliness and benefit is unclear.

Section 54Z notice

- Recommends that when the OIAC issues its s 54Z notice, it provides information about the elements of the decision the applicant disputes and any elements the IC may want specifically covered. This would aid decision makers to understand concerns and better target the drafting of timely submissions.

	<ul style="list-style-type: none"> • Accepts the proposed 8 weeks for response to a 54Z notice, stating this would often remove administration of the extension of time (EOT) process that occurs under the current 3-week time period. Requests that further guidance be provided regarding what constitutes 'extenuating circumstances' for EOT requests. <p>55(2)(e) direction</p> <ul style="list-style-type: none"> • Requests clarity as to what constitutes 'relevant processing documents' (3.3b). It will add significant strain on officers and increase administration if this includes all consultation documents and un-redacted exempt documents. • Sending submissions in support of access refusal to the applicant (3.3c) would lead to further interactions with applicants who disagree with their submissions. This is burdensome and an unreasonable diversion of resources. <p>Production of documents</p> <ul style="list-style-type: none"> • Seeks clarity around the 'extenuating circumstances' in which an extension of time would be granted. <p>Procedure for submissions</p> <ul style="list-style-type: none"> • Disagrees with requirement for agencies to send submission to applicant. Considers OAIC should do this as the party responsible for conducting the review. This avoids client confusion resulting in the OAIC missing out on client responses impacting procedural fairness and decision making. • Supports considerations of approaches that will reduce the need for multiple submissions for reviews to improve timeliness for all parties. To be feasible, the initial request for submissions would need to detail the issues at dispute from the client and the IC. There needs to be ability to go beyond the proposed 4-week period for submissions where circumstances prevent agencies meeting this deadline.
Services Australia	<p>Engagement requirement</p> <ul style="list-style-type: none"> • Considers it should be facilitated by an independent third party including due to procedural fairness reasons. Significant administrative burden. Fraught approach whereby an agency is both the ADR facilitator and participant – it means agencies will be unable to robustly represent their own interests.

	<ul style="list-style-type: none">• Shifts an independent third-party burden onto agencies and does not allow for departure from the process. This is restrictive and unnecessarily rigid in circumstances where the obligation as a model litigant to engage on a proper basis in ADR already applies.• There is already engagement with applicants in the initial request and review processes - this takes into account an applicant's preferred mode of communication, or access to communication channels. This engagement also takes into account restricted servicing arrangements in place to counter inappropriate, threatening or aggressive behaviours. Conferencing without third-party facilitation is potentially harmful to staff. T• Where engagement by conference is not appropriate, suggests a suitable alternative is a requirement to notify OAIC of the reasons for <i>not</i> engaging in its preferred ADR channels.• Recognises role for proactive engagement with some applicants, with regard to the individual circumstances of the case (such as deemed refusal matters).
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Attachments

Attachment A: Submission by Administrative Appeals Tribunal: D2023/014318

Attachment B: Submission by Australian Federal Police: D2023/015096

Attachment C: Submission by Australian Tax Office: D2023/015090

Attachment D: Submission by Attorney-General’s Department: D2023/015009

Attachment E: Submission by Commonwealth Ombudsman: D2023/015094

Attachment F: Submission by Department of Climate Change, Energy, Environment and Water: D2023/015095

Attachment G: Submission by Department of Defence: D2023/015089

Attachment H: Submission by Department of Employment and Workplace Relations: D2023/015092

Attachment I: Submission by Department of Home Affairs: D2023/015089

Attachment J: Submission by Services Australia: D2023/015091

Recommendations

- Key messages
Agreed/Not agreed

Signature _____

Date _____

Comments:

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Heading 2

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Heading 5

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[Callout Textbox B, use No Spacing style]

Table 1 – Table Caption Sample

Title	Title	Title
• Bullet	1. Number	Text

¹ Footnote 1

² Footnote 2

³ Footnote 3

Attachment A



From: [AGO,Rocelle](#)
To: [PEEL,Sara](#); [OAIC - ACFOI](#); [TULLOCH,Karen](#)
Subject: RE: EB for clearance on 7 July 2023 - submissions - procedure direction [SEC=OFFICIAL]
Date: Friday, 7 July 2023 9:57:14 AM
Attachments: [image001.jpg](#)
[image002.jpg](#)
[image003.jpg](#)
Importance: High

Hi Sara

Thanks very much for sending this brief across.

[@TULLOCH,Karen](#) I've made some amendments and also have requested some information about the workshop attendees and a proposed agenda.

I'll be in a meetings between 10-12 but have a fairly free day to clear the brief when it comes back to me.

Kind regards

Rocelle



Rocelle Ago (she/her)
Assistant Commissioner, Freedom of information
Office of the Australian Information Commissioner
P +612 9942 4205 M [s47F](#) E rocelle.ago@oaic.gov.au

Executive officer to Freedom of Information Commissioner and Assistant Commissioner, Freedom of Information: Romina Domenici P +612 9942 4022 E romina.domenici@oaic.gov.au
The OAIC acknowledges Traditional Custodians of Country across Australia and their continuing connection to land, waters and communities. We pay our respect to First Nations people, cultures and Elders past and present.
[Subscribe to Information Matters](#)

From: PEEL,Sara <Sara.Peel@oaic.gov.au>
Sent: Friday, July 7, 2023 12:39 AM
To: AGO,Rocelle <Rocelle.Ago@oaic.gov.au>; OAIC - ACFOI <ACFOI@oaic.gov.au>
Cc: TULLOCH,Karen <Karen.Tulloch@oaic.gov.au>
Subject: EB for clearance on 7 July 2023 - submissions - procedure direction [SEC=OFFICIAL]
Importance: High

Snapshot	
Due date	7 July 2023
Fixed or flexible	Flexible – however I understand you wish to clear this before you go on leave early next week. It needs to be provided to Toni ahead of the workshop with agencies on Wednesday 12 July 2023
If fixed, why?	
Topic for clearance	IC review procedure direction – agency submissions
Product (e.g. brief / submission)	EB
Length / no. of pages	15
External parties	
Clearance & consultation	Rocelle Ago
Responsible director	Sara Peel

Hi Rocelle

Please see EB for your clearance, on submissions about the IC review procedure direction, at: D2023/015645.

Karen, there are a couple of things I'd be very grateful if you could help with as this gets cleared. Could you please double check the TRIM references for the submission (on the first page and in

the appendix)? Also, formatting the table has been a little tricky due (I think) to the switch to landscape – I wasn't able to add a heading row (First column: Agency, Second column: Key comments), if this is something you are able to add I'd be very grateful. Alternatively just a title above would work: Key points. Thank you!

Please feel free to call my mobile if you wish to discuss.

Kind regards



Sara Peel (she/her)

Director, FOI Regulatory Branch

Office of the Australian Information Commissioner

Sydney | **P** +61 2 9942 4142 **E** sara.peel@oaic.gov.au

< Please note I am not in the office on Fridays.>

The OAIC acknowledges Traditional Custodians of Country across Australia and their continuing connection to land, waters and communities. We pay our respect to First Nations people, cultures and Elders past and present.

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Executive brief

Responsible Executive Member:	Rocelle Ago, Assistant Commissioner FOI
Prepared by:	Sara Peel, Director, Monitoring, Guidance and Engagement
To:	Toni Pirani, FOI Commissioner
Copies:	Karen Tulloch, Raewyn Harlock
File ref:	D2023/015645
Date:	06 July 2023
Subject:	<u>Revised IC review draft procedure direction-submissions: Submissions and Workshop</u>

Purpose and timing

~~The purpose of this Executive Brief is to provide you a summarise summary of the key themes/feedback from agencies' submissions points made by agencies in their submissions responding~~ to the draft revised IC review procedure directions.

~~This Executive Brief has been prepared~~ ahead of the workshop on the IC review procedure directions in Canberra on 12 July 2023. ~~Agencies who made a submission have been invited.~~

Recommendations

- That you note the information set out in this brief ahead of the workshop on 12 July 2023, particularly the submissions made by the following agencies who will be attending the workshop:
 -
- That you approve the proposed agenda for the workshop.

~~A summary of the submissions are in a table below.~~

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Background

Consultation

The Australian Information Commissioner may give written directions under s 55(2)(e)(ii) of the FOI Act in relation to procedures to be followed in Information Commissioner (IC) reviews.

The OAIC has revised the [2 existing procedure directions](#) (one for agencies and ministers, and one for IC review applicants). We sought feedback with an extended consultation period closing on **Friday 30 June 2023**. In making submissions, agencies were advised:

We intend to make all submissions publicly available. Please indicate when making your submission if it contains confidential information that you do not want made public and why it should not be published. Requests for access to confidential comments will be determined in accordance with the FOI Act. If the OAIC accepts submissions in confidence you must also provide a copy that can be published.

7

Submissions

The following agencies made submissions:

1. Administrative Appeals Tribunal: ~~D2023/014318~~ [D2023/014318](#)
2. Australian Federal Police: ~~D2023/015096~~ [D2023/015096](#)
3. Australian Tax Office: ~~D2023/015090~~ [D2023/015090](#)
4. Attorney-General's Department: ~~D2023/015009~~ [D2023/015009](#)
5. Commonwealth Ombudsman: ~~D2023/015094~~ [D2023/015094](#)
6. Department of Climate Change, Energy, Environment and Water: ~~D2023/015095~~ [D2023/015095](#)
7. Department of Defence: ~~D2023/015095~~ [D2023/015089](#)
8. Department of Employment and Workplace Relations: ~~D2023/015092~~ [D2023/015092](#)
9. Department of Home Affairs: ~~D2023/015089~~ [D2023/015089](#)
10. Services Australia: ~~D2023/015091~~ [D2023/015091](#)

We have also received comments from the Department of Education (~~D2023/015010~~ [D2023/015010](#)). We are currently clarifying the status of this, given the department has advised it is not a formal submission and requests we do not publish. It is therefore not included in the summary below.

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OAIC

A summary of the submissions are in a table below.

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Key themes and feedback

There were a number of themes /feedback occurring across several (or more) agency submissions. These include that:

- 1. The OAIC should identify issues in dispute at an early stage of the IC review process and communicate this to parties to establish scope, facilitate targeted submissions and an efficient process.
- 2. There should be more information about the steps and process undertaken by the OAIC, including the time-frames that apply to the OAIC.
- 3. Time frames are too short, extensions should be available other than in extenuating circumstances, or guidance should be provided as to what constitutes extenuating circumstances.
- 4. There is significant resistance to the mandatory nature of the requirement to engage with applicants. Agencies raise administrative burden, concerns about risks to staff, limited benefit or utility, as well as a range of other concerns.
- 5. Agencies also consider that there should be flexibility in the method of engagement with applicants – so they are not limited to video and telephone conference – and raise applicants’ needs and preferences. Agencies have also submitted that the OAIC should be involved in the engagement as an independent third party.

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A summary of the submissions is further set out at **Attachment A**.are in

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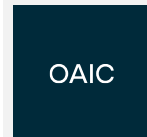
AAT	<p>Comments on process and overview</p> <ul style="list-style-type: none"> • Suggests increasing clarity on components and time frames, including flow chart. For example, the stage of the process in which submissions are requested is not clear. • Not clear how and when identification of the issues in the IC review application occurs. Efficiency will be enhanced if issues are determined by the OAIC as early as possible (at point of notifying the agencies) and conveyed to the parties, enabling them to focus on real issues in dispute, and manage the scope/expectations of further engagement. • This submission makes a range of detailed/technical comments concerning the directions suggests various aspects where clarity could be increased. <p>Time frames</p> <ul style="list-style-type: none"> • Time frames are generally too short, given the increased complexity of digital information collection/storage and increasing breadth and volume of requests. • Given the significant variation in complexity, the setting of time periods for the provision of material should be done in consultation with the agency rather than relying on standard time frames. It is usual for a court or tribunal to ask parties how long they need in setting a timetable. This also avoids the need to commit resources to administering extension of time requests. • The 2-week time period (set out in Annexure 1) to respond to a Notice to Produce should instead be set following consultation with the agency (given preparation may be resource intensive and failure to comply is an offence). <p>Response to s 54Z notice and s 55(2)(e) direction</p> <ul style="list-style-type: none"> • Requirement at 3.3b to provide the processing documents and remaining documents at this stage based on a deemed refusal seems premature. Should check with applicant whether they want a review of material exempted under the decision before the material is unnecessarily collected and submitted to the OAIC. • Requirement at 3.3c to make submissions in support of the access refusal—suggest it would be preferable to provide a statement of reasons for the decision; also reiterate comment
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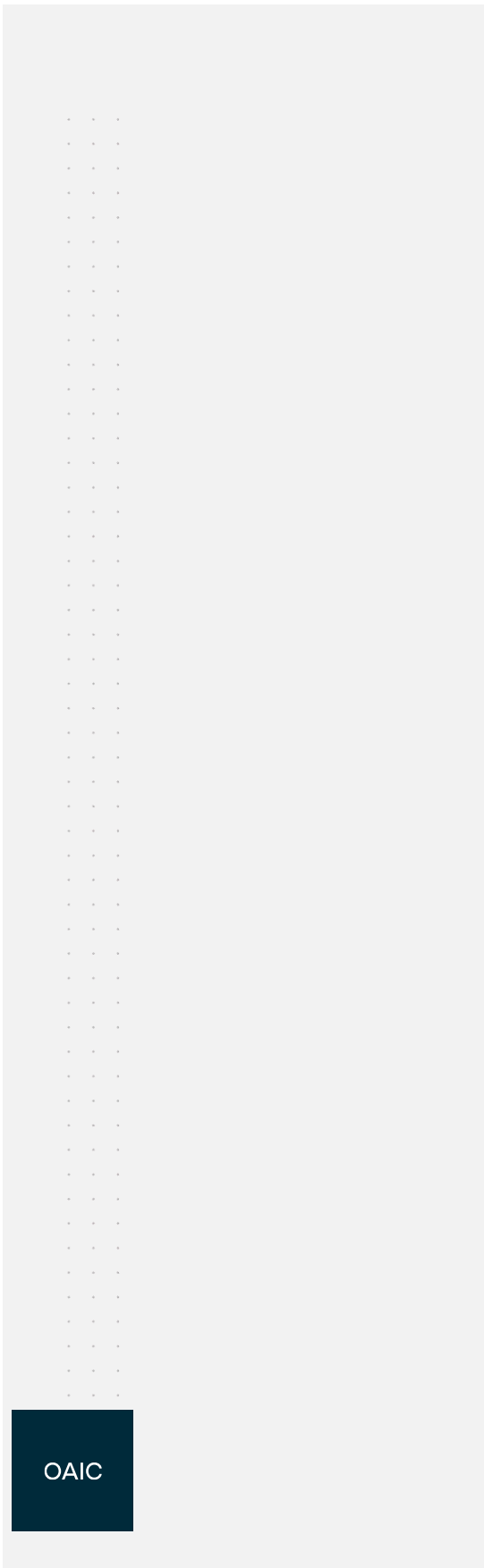
	<p>above about requirement to provide processing and exempt documents.</p> <ul style="list-style-type: none"> 3 weeks may be too short in some cases, could refer to the possibility of seeking an extension of the time frame by way of consultation. <p>Engagement requirement</p> <ul style="list-style-type: none"> The engagement process should only occur where there has been no internal review and the manner in which it should be conducted should be left to the agency, which will have a better understanding of the best way to communicate with the applicant. Engagement requirement may cause delay or annoy the applicant where engagement has already occurred. Unreasonable to undermine arrangements/protocols for applicants who have engaged in abusive/unreasonable behaviour, refers to managing psychological hazards Evidence of the engagement could be more proportionately satisfied by the provision of a statement similar to that required by federal courts by section 6 of the <i>Civil Dispute Resolution Act 2011</i>. <p>Production of documents</p> <ul style="list-style-type: none"> Marking up and schedule requirements can be resource intensive. Suggests referring to the Information Commissioner's ability to specify alternative requirements, which can be determined in consultation with the agency/minister where appropriate. Unclear how time frame in the notice is determined. 8 week time frame, this is insufficient for the outcome of any engagement to be considered by the OAIC and taken into account in narrowing scope to issues in dispute. Suggest the time frame is determined in consultation with the agency.
<p>AFP</p> <p>This summarises their public submission.</p> <p>AFP have also submitted a 'confidential submission' with further information. We have requested they provide reasons</p>	<p>Engagement requirement</p> <ul style="list-style-type: none"> Disagrees with compulsory requirement. Raises workplace health and safety implications on the FOI practitioners. FOI practitioners are not trained mediators. Notes time and expense to upskill FOI practitioners in negotiation or to engage external (legal) providers. Attempts at engagement are frequently made at the primary decision or internal review stages. Unlikely to have more success in reaching resolution at the IC stage, particularly without the involvement of an independent third party. <p>Response to s 54Z notice</p> <ul style="list-style-type: none"> Evidence requirements in response to a 54Z notice will place additional reporting and administrative obligations on agencies.

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<p>for us not to publish.</p>	<p>Expresses concern that this will add further pressures to the staff workloads, detrimentally affect FOI processing timeframes.</p> <p>Making an application for IC review</p> <ul style="list-style-type: none"> • Recommends adding the requirement for an agency reference number to the information that an applicant must provide. Applicants may have multiple FOI matters at various stages—without the reference, it can be difficult to establish which is the relevant matter.
<p>ATO</p>	<p>Commencement of review: s 54Z notice and direction under s 55(2)(e)</p> <ul style="list-style-type: none"> • Suggests that we soften language to indicate that the three options in response to a s 55(2)(e) notice (release in full, release in part, refuse access) will generally be applicable, and that extensions might be appropriate in some cases. • There are circumstances not covered by the above options—for example, in complex matters it may be still unclear what or how many documents might be caught by a request, and an agency may consider an unreasonable diversion of resources argument. • Agencies may not be able to comply with the 3-week time frame e.g. because of the number or sensitivity of documents or the time lapsed since the decision was made. <p>Engagement requirement</p> <ul style="list-style-type: none"> • Considers that either an aspirational or matter specific approach would be preferable. • Requirement may lead to a ‘tick box’ exercise without meaningful results in a majority of cases. • Where disagreements over ‘discretionary’ matters—such as size/scope of request—are not resolved at initial decision or internal review stages, it is unlikely further engagement will progress the matter. In the case of ‘non-discretionary’ issues—such as the application of the tax law confidentiality—it is not useful to set out the same reasoning which has not previously been accepted by the applicant. • Avenues to resolve issues can occur outside the engagement process, such as by investigating issues, exploring options for resolution with other agency officers or with third parties. The ATO assumes that such attempts will not be taken into consideration. • Notes circumstances where it is appropriate not to engage with applicants beyond what is necessary for their statutory functions, including for WHS reasons. Engagement is also unlikely to be effective where an applicant repetitively seeks access, in cases where an agency has explained why they cannot provide access. <p>Production of documents</p>



- Submits that they should not be obligated to provide a marked up and unredacted copy of the document at issue in some cases— in particular, evidence to justify an exemption can exist with having regard to those documents. They make some exemption decisions without searching for and collating the documents (e.g. Person A requesting Person B’s tax return, in some instances there are also applicable offence provisions). This means they would be searching for and collating documents solely for the purposes of the IC review.

Production of schedule

- Submits that the requirement for a schedule of marked up documents to be provided should not be necessary in every case but only ‘where appropriate’. Notes instances where both the nature of the document and redactions are self-evident and that they provide documents in electronic bundles so particular exemptions can be located in seconds.

Timeframes for providing responses

- Express concerns about the position where further time is only provided in ‘extenuating’ circumstances (in this case, referring to the Direction concerning provision of sample documents). Suggest extensions should be provided where appropriate. Notes issues such as the number/sensitivity of documents and the time which has lapsed since the original decision contribute to the work involved in responding to an IC review.
- Raises concern about the requirement to make an extension request in writing and with supporting evidence: states that this overlooks ‘utmost’ efforts towards compliance, competing priorities and factors beyond control.

Limit on submissions after initial exchange:

- Suggests less prescriptive wording, as the circumstances set out in the Direction are not the only circumstances where it might be appropriate to allow a party to make further submissions.

Request to make submissions in confidence

- Expresses lack of understanding as to why this request must be made before providing the submission. Submits that request for confidentiality and a submission could be made at the same time without affecting the OAIC process for dealing with these submissions.

Timeliness of IC Applications

- Referring to the strict timeframe which are proposed for agencies, suggests consideration as to whether an applicant’s delay in

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seeking a review will be a ground for providing an agency with additional time to respond, noting that it is more difficult to respond to aged matters.

Participation in IC review—‘failure to engage’

- Clear enforceable requirements on applicants will assist in making consultations meaningful and productive.
- Provide further information to applicants on what is a failure to engage.
- A failure to provide the information required of an IC applicant in the Direction should be a ‘failure to engage’.
- Provide applicants with details about expectations around engagement with the agency and that attending a meeting with no intention to attempt towards resolution is not considered appropriate ‘engagement’.

Attorney-
General’s
Department

Timeframes, steps in the process, transparency

- Suggests greater clarity concerning the time frames that apply to the OAIC.
- The order in which certain steps are to occur in the IC process is unclear (in particular, where the s 54Z notice fits in with other steps).
- Detail about certain steps are not explained in the draft direction. For example, there is no explanation about when the OAIC will endeavour to make its decision, nor the timeframe for providing documents to the applicant (if the IC decides to vary the decision) and the timeframe for destruction or return of evidence documents to agencies for discontinued reviews.
- The OAIC should commit to status updates to agencies in more circumstances than outlined in the guidelines, and at regular intervals.
- Recommends a checklist, or some other method of transparency, about the IC review process. Additional guidance such as a flow chart similar to the [AAT flow chart](#) would be useful.

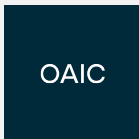
Response to s 54Z notice

- Extensions might be needed more routinely than in ‘extenuating circumstances’. Sometimes agencies have not been notified of IC review applications for more than 12 months after it was lodged—this additional time means agencies need to re-consult stakeholders on exemption claims, and there is also the engagement requirement to factor in.

Engagement requirement

- Where agencies have not been notified of an IC review application, they cannot—as required in the draft direction—contact applicants shortly after it is lodged (as required in the draft direction).

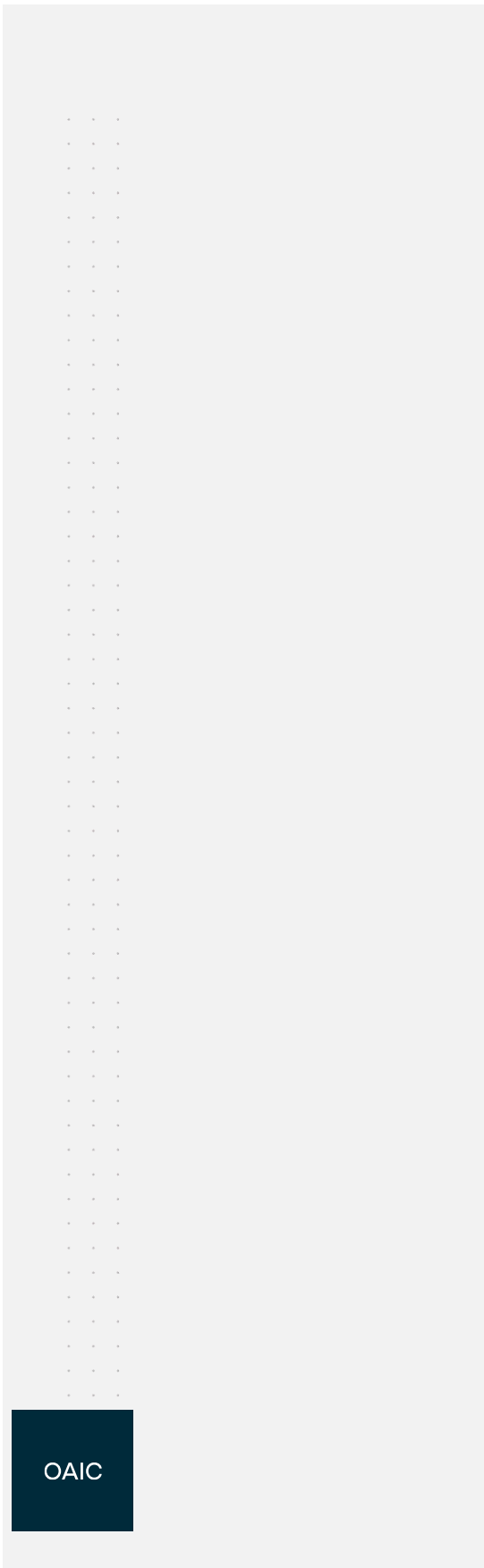
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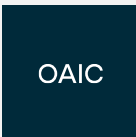
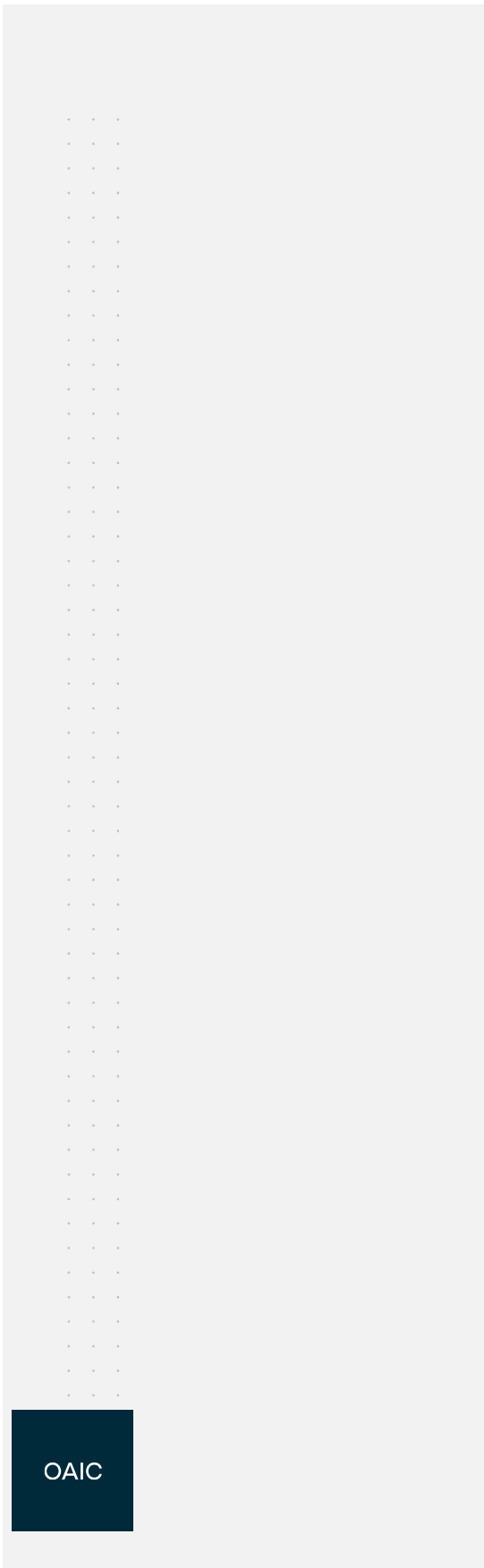
	<ul style="list-style-type: none"> • Suggests that agencies be provided a copy of the review application close to the time of receipt by the OAIC, so they can be proactive from an earlier stage. Alternatively, agencies should be made aware the OAIC has received the notice of review and advised when they can expect to receive a copy. • The guidance could be read to suggest that the engagement requirement only applies to access refusal or access grant decisions (not deemed refusals). This would not appear to take into account third party consultations. • Without the OAIC's involvement, or a clear framework to support the engagement process, there is the potential for disputes about what has occurred and agreed on during the process. • This process may expose agency staff dealing with abusive applicants to WHS risks. • Expresses a strong view that there should be discretion as to the engagement method. Verbal engagement may not be practicable, nor the preference, for applicants who are incarcerated, who are disabled, who are located overseas or who have English as a second language. • Additional OAIC guidance about the engagement process would be helpful and promote consistency, such as templates and information for applicants about appropriate conduct (which could potentially mitigate risks to staff). • Different matters may require different levels of engagement (e.g. deemed refusal compared to a matter where significant negotiation has occurred under a s 24AB process)—it would be helpful to provide some detail about the kind of engagement required in different circumstances. <p>Non-compliance with direction—reports to Office of Legal Services Co-ordination</p> <ul style="list-style-type: none"> • Non-compliance with the procedural direction may not always amount to non-compliance by the agency with its model litigant obligations. Suggests some minor language changes. <p>Format of directions, third parties</p> <ul style="list-style-type: none"> • May be simpler and more effective to have a single direction, addressed to both the agency and the applicant. • Unclear what practice directions (if any) apply to third parties joined to an IC review or whether the process for an IC review in the directions for agencies and applicants may differ where there are other parties to the review.
Department of Climate Change, Energy, the Environment and Water	<p>Engagement requirement:</p> <ul style="list-style-type: none"> • undue administrative burden—creates additional work and increase need for extensions of time, additionally strain its ability to meet its statutory obligations • increased complexity is exacerbated by notification of IC reviews after significant time has passed since the original decision (staff



	<p>movements and Machinery of Government changes increase the challenge of a consultation process):</p> <ul style="list-style-type: none"> objects to mandatory nature—noting they regularly provide submissions to IC reviews where there is no realistic chance that the review will be successful, no benefit in an engagement requirement in these circumstances. <p>Section 54Z</p> <p>If the engagement requirement is implemented, submits that the proposed 8 week time period is inadequate (presumably referring to s54Z):</p>
Defence	<p>Engagement requirement:</p> <ul style="list-style-type: none"> may cause delay when there has already been engagement through the internal review process it may not be possible to provide further meaningful information to the applicant suggests optional conferences that can be conducted by any method considered reasonable to the parties, such as email (noting this may also assist anonymous applicants) parties choosing the method enables agencies to put in place WHS and security protections for staff considers OAIC involvement in conferences vital, also considers that the OAIC should provide parties with an early high level merits review assessment and promote informal resolution strategies if issues are not resolved through engagement, consider requiring the applicant to advise OAIC of the minister/agency response and why they were not satisfied <p>Section 54Z notice:</p> <ul style="list-style-type: none"> an additional 10 business days, in addition to the 8 weeks, should be provided to respond, if engagement with the applicant is required at the start of the IC review suggests suspension of the notice if an agreement is reached, in conference, that the agency will review the FOI request with a view to providing a s 55G decision <p>Production of documents:</p> <ul style="list-style-type: none"> considers requirement for a ‘sufficient representative sample of documents’ to be ambiguous—suggests clarification, for example, by providing a percentage requests more flexible arrangements for inspection, allowing for inspection at an agency’s premises, for security reasons. <p>IC application / applicant’s submissions:</p> <ul style="list-style-type: none"> vital for applicant to articulate their reasons for disagreeing with a particular aspect of the decision at the time they lodge their



	<p>application—this would lead to more targeted submissions by agencies/ministers and meet procedural fairness requirements.</p> <ul style="list-style-type: none"> • should be compulsory in the IC application for applicants to identify why an agency’s/minister’s decision is wrong. <p>Commencement date:</p> <p>Requests commencement date after 1 October 2023, given resources/training/processes impacts.</p>
DEWR	<p>Section 54Z notice:</p> <ul style="list-style-type: none"> • Suggests a 30-day timeframe to make either a revised section 55G decision or provide submissions in support of access refusal of documents, stating this is consistent with other FOI-Act timeframes. <p>Engagement requirement</p> <ul style="list-style-type: none"> • Concerned about the compulsory nature, suggests it be discretionary. • Applicants may find a forced process of dealing with the agency daunting or frustrating, rather than dealing with the OAIC to which it has applied. • Where relationship between parties has broken down, this could be unproductive and entrench an applicant in their position, at a point where third-party intervention by OAIC has been requested and could provide a circuit breaker. • If this is compulsory, suggests consideration of specified exemptions to deal with the above circumstances.
Home Affairs	<p>Overview and preference for legislative change</p> <ul style="list-style-type: none"> • Detailed submission which accepts numerous aspects of the draft Directions. • Recommends elements of the draft direction be removed or rethought particularly where the benefits ‘are unclear and the costs, safety and feasibility of implementation are of concern’. • Suggests proposed changes to the directions would be better effected by legislative changes to sections 54L(2) and 54E to enable FOI applicants’ easier access to internal review on deemed refused and substantive decisions. <p>Commencement</p> <ul style="list-style-type: none"> • Recommends commencement is negotiated with agencies so there is time for implementation, requiring: <ul style="list-style-type: none"> ○ additional staffing resources. ○ staff consultation processes including health and safety assessments ○ system changes including ICT.



- staff training including updates to Departmental procedural instructions.

Engagement requirement

- ◆ Recommends allowing agencies to assess where there is value in engaging with an applicant, when there is no risk to staff.
- ◆ Proposed value of requirement is unclear and does not offset administrative burden; also impacts timeliness. Benefit is unclear especially where:
 - no substantive decision has been made.
 - there are exemption claims that the applicant disputes and which cannot be resolved.
 - there is risk the exempt information could be inadvertently disclosed in conversation such as s33 exemptions.
 - the applicant is unwilling/unable to revise the scope to resolve practical refusal issues.
 - the Department consider all searches have been conducted.
- ◆ The Department already engages with review applicants at the initial stages of the process where this would assist towards resolution. Applicants may not wish to engage with the Department, hence their application for independent review.
- ◆ Unacceptable psychosocial and physical risks to staff when discussing outcomes with disgruntled clients.
- ◆ Recommends requirement for telephone/video conference be removed or adjusted. Additional funding needed to implement this including system supports and staffing resources.
- ◆ Recommends removing requirements on agencies to provide evidence of engagement — will impact timeliness and benefit is unclear.

Section 54Z notice

- ◆ Recommends that when the OAIC issues its s 54Z notice, it provides information about the elements of the decision the applicant disputes and any elements the IC may want specifically covered. This would aid decision makers to understand concerns and better target the drafting of timely submissions.
- ◆ Accepts the proposed 8 weeks for response to a 54Z notice, stating this would often remove administration of the extension of time (EOT) process that occurs under the current 3-week time period. Requests that further guidance be provided regarding what constitutes 'extenuating circumstances' for EOT requests.

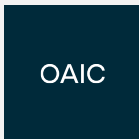
55(2)(e) direction

- ◆ Requests clarity as to what constitutes 'relevant processing documents' (3.3b). It will add significant strain on officers and increase administration if this includes all consultation documents and un-redacted exempt documents.
- ◆ Sending submissions in support of access refusal to the applicant (3.3c) would lead to further interactions with applicants who

	<p>disagree with their submissions. This is burdensome and an unreasonable diversion of resources.</p> <p>Production of documents</p> <ul style="list-style-type: none"> Seeks clarity around the 'extenuating circumstances' in which an extension of time would be granted. <p>Procedure for submissions</p> <ul style="list-style-type: none"> Disagrees with requirement for agencies to send submission to applicant. Considers OAIC should do this as the party responsible for conducting the review. This avoids client confusion resulting in the OAIC missing out on client responses impacting procedural fairness and decision making. Supports considerations of approaches that will reduce the need for multiple submissions for reviews to improve timeliness for all parties. To be feasible, the initial request for submissions would need to detail the issues at dispute from the client and the IC. There needs to be ability to go beyond the proposed 4 week period for submissions where circumstances prevent agencies meeting this deadline.
<p>Services Australia</p>	<p>Engagement requirement</p> <ul style="list-style-type: none"> Considers it should be facilitated by an independent third party including due to procedural fairness reasons. Significant administrative burden. Fraught approach whereby an agency is both the ADR facilitator and participant – it means agencies will be unable to robustly represent their own interests. Shifts an independent third party burden onto agencies and does not allow for departure from the process. This is restrictive and unnecessarily rigid in circumstances where the obligation as a model litigant to engage on a proper basis in ADR already applies. There is already engagement with applicants in the initial request and review processes – this takes into account an applicant's preferred mode of communication, or access to communication channels. This engagement also takes into account restricted servicing arrangements in place to counter inappropriate, threatening or aggressive behaviours. Conferencing without third party facilitation is potentially harmful to staff. T Where engagement by conference is not appropriate, suggests a suitable alternative is a requirement to notify OAIC of the reasons for not engaging in its preferred ADR channels. Recognises role for proactive engagement with some applicants, with regard to the individual circumstances of the case (such as deemed refusal matters).

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Workshop





Attachments

Attachment A: Submission by Administrative Appeals Tribunal: D2023/014318

Attachment B: Submission by Australian Federal Police: D2023/015096

Attachment C: Submission by Australian Tax Office: D2023/015090

Attachment D: Submission by Attorney-General's Department: D2023/015009

Attachment E: Submission by Commonwealth Ombudsman: D2023/015094

Attachment F: Submission by Department of Climate Change, Energy, Environment and Water: D2023/015095

Attachment G: Submission by Department of Defence: D2023/015089

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Attachment H: Submission by Department of
Employment and Workplace Relations:
D2023/015092

Attachment I: Submission by Department of Home
Affairs: D2023/015089

Attachment J: Submission by Services Australia:
D2023/015091

Recommendations

Key messages

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Attachment A

Agency	Comments
AAT	<p>Comments on process and overview</p> <ul style="list-style-type: none"> • <u>Suggests increasing clarity on components and time-frames, including flow chart. For example, the stage of the process in which submissions are requested is not clear.</u> • <u>Not clear how and when identification of the issues in the IC review application occurs. Efficiency will be enhanced if issues are determined by the OAIC as early as possible (at point of notifying the agencies) and conveyed to the parties, enabling them to focus on real issues in dispute, and manage the scope/expectations of further engagement.</u> • <u>This submission makes a range of detailed/technical comments concerning the directions and suggests various aspects where clarity could be increased.</u> <p>Time frames</p> <ul style="list-style-type: none"> • <u>Time frames are generally too short, given the increased complexity of digital information collection/storage and increasing breadth and volume of requests.</u> • <u>Given the significant variation in complexity, the setting of time periods for the provision of material should be done in consultation with the agency rather than relying on standard time frames. It is usual for a court or tribunal to ask parties how long they need in setting a timetable. This also avoids the need to commit resources to administering extension of time requests.</u> • <u>The 2-week time period (set out in Annexure 1) to respond to a Notice to Produce should instead be set following consultation with the agency (given preparation may be resource intensive and failure to comply is an offence).</u> <p>Response to s 54Z notice and s 55(2)(e) direction</p>

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Agency	Comments
	<ul style="list-style-type: none"> • Requirement at 3.3b to provide the processing documents and remaining documents at this stage based on a deemed refusal seems premature. Should check with applicant whether they want a review of material exempted under the decision before the material is unnecessarily collected and submitted to the OAIC. • Requirement at 3.3c to make submissions in support of the access refusal – suggest it would be preferable to provide a statement of reasons for the decision; also reiterate comment above about requirement to provide processing and exempt documents. • 3 weeks may be too short in some cases, could refer to the possibility of seeking an extension of the time frame by way of consultation. <p>Engagement requirement</p> <ul style="list-style-type: none"> • The engagement process should only occur where there has been no internal review and the manner in which it should be conducted should be left to the agency, which will have a better understanding of the best way to communicate with the applicant. Engagement requirement may cause delay or annoy the applicant where engagement has already occurred. • Unreasonable to undermine arrangements/protocols for applicants who have engaged in abusive/unreasonable behaviour, refers to managing psychological hazards • Evidence of the engagement could be more proportionately satisfied by the provision of a statement similar to that required by federal courts by section 6 of the <i>Civil Dispute Resolution Act 2011</i>. <p>Production of documents</p> <ul style="list-style-type: none"> • Marking up and schedule requirements can be resource intensive. Suggests referring to the Information Commissioner’s ability to specify alternative requirements, which can be determined in consultation with the agency/minister where appropriate. • Unclear how time-frame in the notice is determined. 8-week time-frame, this is insufficient for the outcome of any engagement to be considered by the OAIC and taken into account in narrowing scope to issues in dispute. Suggest the time-frame is determined in consultation with the agency.
AFP	<p>Engagement requirement</p> <ul style="list-style-type: none"> • Disagrees with compulsory requirement. Raises workplace health and safety implications on the FOI practitioners.

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Agency	Comments
<p>This summarises their public submission.</p> <p>AFP have also submitted a 'confidential submission' with further information. We have requested they provide reasons for us not to publish.</p>	<ul style="list-style-type: none"> FOI practitioners are not trained mediators. Notes time and expense to upskill FOI practitioners in negotiation or to engage external (legal) providers. Attempts at engagement are frequently made at the primary decision or internal review stages. Unlikely to have more success in reaching resolution at the IC stage, particularly without the involvement of an independent third party. <p>Response to s 54Z notice</p> <ul style="list-style-type: none"> Evidence requirements in response to a 54Z notice will place additional reporting and administrative obligations on agencies. Expresses concern that this will add further pressures to the staff workloads, detrimentally affect FOI processing timeframes. <p>Making an application for IC review</p> <ul style="list-style-type: none"> Recommends adding the requirement for an agency reference number to the information that an applicant must provide. Applicants may have multiple FOI matters at various stages – without the reference, it can be difficult to establish which is the relevant matter.
<p>ATO</p>	<p>Commencement of review: s 54Z notice and direction under s 55(2)(e)</p> <ul style="list-style-type: none"> Suggests that we soften language to indicate that the three options in response to a s 55(2)(e) notice (release in full, release in part, refuse access) will generally be applicable, and that extensions might be appropriate in some cases. There are circumstances not covered by the above options – for example, in complex matters it may be still unclear what or how many documents might be caught by a request, and an agency may consider an unreasonable diversion of resources argument. Agencies may not be able to comply with the 3-week time-frame e.g. because of the number or sensitivity of documents or the time lapsed since the decision was made. <p>Engagement requirement</p> <ul style="list-style-type: none"> Considers that either an aspirational or matter specific approach would be preferable. Requirement may lead to a 'tick box' exercise without meaningful results in a majority of cases.

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Agency	Comments
	<ul style="list-style-type: none"> • <u>Where disagreements over ‘discretionary’ matters – such as size/scope of request – are not resolved at initial decision or internal review stages, it is unlikely further engagement will progress the matter. In the case of ‘non-discretionary’ issues – such as the application of the tax law confidentiality – it is not useful to set out the same reasoning which has not previously been accepted by the applicant.</u> • <u>Avenues to resolve issues can occur outside the engagement process, such as by investigating issues, exploring options for resolution with other agency officers or with third parties. The ATO assumes that such attempts will not be taken into consideration.</u> • <u>Notes circumstances where it is appropriate not to engage with applicants beyond what is necessary for their statutory functions, including for WHS reasons. Engagement is also unlikely to be effective where an applicant repetitively seeks access, in cases where an agency has explained why they cannot provide access.</u> <p>Production of documents</p> <ul style="list-style-type: none"> • <u>Submits that they should not be obligated to provide a marked up and unredacted copy of the document at issue in some cases – in particular, evidence to justify an exemption can exist with having regard to those documents. They make some exemption decisions without searching for and collating the documents (e.g. Person A requesting Person B’s tax return, in some instances there are also applicable offence provisions). This means they would be searching for and collating documents solely for the purposes of the IC review.</u> <p>Production of schedule</p> <ul style="list-style-type: none"> • <u>Submits that the requirement for a schedule of marked up documents to be provided should not be necessary in every case but only ‘where appropriate’. Notes instances where both the nature of the document and redactions are self-evident and that they provide documents in electronic bundles so particular exemptions can be located in seconds.</u> <p>Timeframes for providing responses</p> <ul style="list-style-type: none"> • <u>Express concerns about the position where further time is only provided in ‘extenuating’ circumstances (in this case, referring to the Direction concerning provision of sample documents). Suggest extensions should be provided where appropriate. Notes issues such</u>

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Agency	Comments
	<p><u>as the number/sensitivity of documents and the time which has lapsed since the original decision contribute to the work involved in responding to an IC review.</u></p> <ul style="list-style-type: none"> <u>Raises concern about the requirement to make an extension request in writing and with supporting evidence: states that this overlooks 'utmost' efforts towards compliance, competing priorities and factors beyond control.</u> <p><u>Limit on submissions after initial exchange:</u></p> <ul style="list-style-type: none"> <u>Suggests less prescriptive wording, as the circumstances set out in the Direction are not the only circumstances where it might be appropriate to allow a party to make further submissions.</u> <p><u>Request to make submissions in confidence</u></p> <ul style="list-style-type: none"> <u>Expresses lack of understanding as to why this request must be made before providing the submission. Submits that request for confidentiality and a submission could be made at the same time without affecting the OAIC process for dealing with these submissions.</u> <p><u>Timeliness of IC Applications</u></p> <ul style="list-style-type: none"> <u>Referring to the strict timeframe which are proposed for agencies, suggests consideration as to whether an applicant's delay in seeking a review will be a ground for providing an agency with additional time to respond, noting that it is more difficult to respond to aged matters.</u> <p><u>Participation in IC review - 'failure to engage'</u></p> <ul style="list-style-type: none"> <u>Clear enforceable requirements on applicants will assist in making consultations meaningful and productive.</u> <u>Provide further information to applicants on what is a failure to engage.</u> <u>A failure to provide the information required of an IC applicant in the Direction should be a 'failure to engage'.</u> <u>Provide applicants with details about expectations around engagement with the agency and that attending a meeting with no intention to attempt towards resolution is not considered appropriate 'engagement'.</u>

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Agency	Comments
<u>Attorney-General's Department</u>	<p>Timeframes, steps in the process, transparency</p> <ul style="list-style-type: none"> • <u>Suggests greater clarity concerning the time-frames that apply to the OAIC.</u> • <u>The order in which certain steps are to occur in the IC process is unclear (in particular, where the s 54Z notice fits in with other steps).</u> • <u>Detail about certain steps are not explained in the draft direction. For example, there is no explanation about when the OAIC will endeavour to make its decision, nor the timeframe for providing documents to the applicant (if the IC decides to vary the decision) and the timeframe for destruction or return of evidence documents to agencies for discontinued reviews.</u> • <u>The OAIC should commit to status updates to agencies in more circumstances than outlined in the guidelines, and at regular intervals.</u> • <u>Recommends a checklist, or some other method of transparency, about the IC review process. Additional guidance such as a flow chart similar to the AAT flow chart would be useful.</u> <p>Response to s 54Z notice</p> <ul style="list-style-type: none"> • <u>Extensions might be needed more routinely than in 'extenuating circumstances'. Sometimes agencies have not been notified of IC review applications for more than 12 months after it was lodged – this additional time means agencies need to re-consult stakeholders on exemption claims, and there is also the engagement requirement to factor in.</u> <p>Engagement requirement</p> <ul style="list-style-type: none"> • <u>Where agencies have not been notified of an IC review application, they cannot – as required in the draft direction – contact applicants shortly after it is lodged (as required in the draft direction).</u> • <u>Suggests that agencies be provided a copy of the review application close to the time of receipt by the OAIC, so they can be proactive from an earlier stage. Alternatively, agencies should be made aware the OAIC has received the notice of review and advised when they can expect to receive a copy.</u> • <u>The guidance could be read to suggest that the engagement requirement only applies to access refusal or access grant decisions (not deemed refusals). This would not appear to take into account third-party consultations.</u> • <u>Without the OAIC's involvement, or a clear framework to support the engagement process, there is the potential for disputes about what has occurred and agreed on during the process.</u> • <u>This process may expose agency staff dealing with abusive applicants to WHS risks.</u>

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Agency	Comments
	<ul style="list-style-type: none"> • <u>Expresses a strong view that there should be discretion as to the engagement method. Verbal engagement may not be practicable, nor the preference, for applicants who are incarcerated, who are disabled, who are located overseas or who have English as a second language.</u> • <u>Additional OAIC guidance about the engagement process would be helpful and promote consistency, such as templates and information for applicants about appropriate conduct (which could potentially mitigate risks to staff).</u> • <u>Different matters may require different levels of engagement (e.g. deemed refusal compared to a matter where significant negotiation has occurred under a s 24AB process) – it would be helpful to provide some detail about the kind of engagement required in different circumstances.</u> <p>Non-compliance with direction – reports to Office of Legal Services Co-ordination</p> <ul style="list-style-type: none"> • <u>Non-compliance with the procedural direction may not always amount to non-compliance by the agency with its model litigant obligations. Suggests some minor language changes.</u> <p>Format of directions, third parties</p> <ul style="list-style-type: none"> • <u>May be simpler and more effective to have a single direction, addressed to both the agency and the applicant.</u> • <u>Unclear what practice directions (if any) apply to third parties joined to an IC review or whether the process for an IC review in the directions for agencies and applicants may differ where there are other parties to the review.</u>
<u>Department of Climate Change, Energy, the Environment and Water</u>	<p>Engagement requirement:</p> <ul style="list-style-type: none"> • <u>undue administrative burden – creates additional work and increase need for extensions of time, additionally strain its ability to meet its statutory obligations</u> • <u>increased complexity is exacerbated by notification of IC reviews after significant time has passed since the original decision (staff movements and Machinery of Government changes increase the challenge of a consultation process).</u> • <u>objects to mandatory nature – noting they regularly provide submissions to IC reviews where there is no realistic chance that the review will be successful, no benefit in an engagement requirement in these circumstances.</u> <p>Section 54Z</p>

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Agency	Comments
	If the engagement requirement is implemented, submits that the proposed 8 week time period is inadequate (presumably referring to s54Z).
Defence	<p>Engagement requirement:</p> <ul style="list-style-type: none"> • <u>may cause delay when there has already been engagement through the internal review process</u> • <u>it may not be possible to provide further meaningful information to the applicant</u> • <u>suggests optional conferences that can be conducted by any method considered reasonable to the parties, such as email (noting this may also assist anonymous applicants)</u> • <u>parties choosing the method enables agencies to put in place WHS and security protections for staff</u> • <u>considers OAIC involvement in conferences vital, also considers that the OAIC should provide parties with an early high-level merits review assessment and promote informal resolution strategies</u> • <u>if issues are not resolved through engagement, consider requiring the applicant to advise OAIC of the minister/agency response and why they were not satisfied</u> <p>Section 54Z notice:</p> <ul style="list-style-type: none"> • <u>an additional 10 business days, in addition to the 8 weeks, should be provided to respond, if engagement with the applicant is required at the start of the IC review</u> • <u>suggests suspension of the notice if an agreement is reached, in conference, that the agency will review the FOI request with a view to providing a s 55G decision</u> <p>Production of documents:</p> <ul style="list-style-type: none"> • <u>considers requirement for a ‘sufficient representative sample of documents’ to be ambiguous – suggests clarification, for example, by providing a percentage</u> • <u>requests more flexible arrangements for inspection, allowing for inspection at an agency’s premises, for security reasons.</u> <p>IC application / applicant’s submissions:</p>

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Agency	Comments
	<ul style="list-style-type: none"> • <u>vital for applicant to articulate their reasons for disagreeing with a particular aspect of the decision at the time they lodge their application – this would lead to more targeted submissions by agencies/ministers and meet procedural fairness requirements.</u> • <u>should be compulsory in the IC application for applicants to identify why an agency’s/minister’s decision is wrong.</u> <p>Commencement date: <u>Requests commencement date after 1 October 2023, given resources/training/processes impacts.</u></p>
DEWR	<p>Section 54Z notice:</p> <ul style="list-style-type: none"> • <u>Suggests a 30-day timeframe to make either a revised section 55G decision or provide submissions in support of access refusal of documents, stating this is consistent with other FOI-Act timeframes.</u> <p>Engagement requirement</p> <ul style="list-style-type: none"> • <u>Concerned about the compulsory nature, suggests it be discretionary.</u> • <u>Applicants may find a forced process of dealing with the agency daunting or frustrating, rather than dealing with the OAIC to which it has applied.</u> • <u>Where relationship between parties has broken down, this could be unproductive and entrench an applicant in their position, at a point where third-party intervention by OAIC has been requested and could provide a circuit breaker.</u> • <u>If this is compulsory, suggests consideration of specified exemptions to deal with the above circumstances.</u>
Home Affairs	<p>Overview and preference for legislative change</p> <ul style="list-style-type: none"> • <u>Detailed submission which accepts numerous aspects of the draft Directions.</u> • <u>Recommends elements of the draft direction be removed or rethought particularly where the benefits ‘are unclear and the costs, safety and feasibility of implementation are of concern’.</u> • <u>Suggests proposed changes to the directions would be better effected by legislative changes to sections 54L(2) and 54E to enable FOI applicants’ easier access to internal review on deemed refused and substantive decisions.</u>

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Agency	Comments
	<p>Commencement</p> <ul style="list-style-type: none"> • <u>Recommends commencement is negotiated with agencies so there is time for implementation, requiring:</u> <ul style="list-style-type: none"> ○ <u>additional staffing resources.</u> ○ <u>staff consultation processes including health and safety assessments.</u> ○ <u>system changes including ICT.</u> ○ <u>staff training including updates to Departmental procedural instructions.</u> <p>Engagement requirement</p> <ul style="list-style-type: none"> • <u>Recommends allowing agencies to assess where there is value in engaging with an applicant, when there is no risk to staff.</u> • <u>Proposed value of requirement is unclear and does not offset administrative burden; also impacts timeliness. Benefit is unclear especially where:</u> <ul style="list-style-type: none"> ○ <u>no substantive decision has been made.</u> ○ <u>there are exemption claims that the applicant disputes and which cannot be resolved.</u> ○ <u>there is risk the exempt information could be inadvertently disclosed in conversation such as s33 exemptions.</u> ○ <u>the applicant is unwilling/unable to revise the scope to resolve practical refusal issues.</u> ○ <u>the Department consider all searches have been conducted.</u> • <u>The Department already engages with review applicants at the initial stages of the process where this would assist towards resolution. Applicants may not wish to engage with the Department, hence their application for independent review.</u> • <u>Unacceptable psychosocial and physical risks to staff when discussing outcomes with disgruntled clients.</u> • <u>Recommends requirement for telephone/video conference be removed or adjusted. Additional funding needed to implement this including system supports and staffing resources.</u> • <u>Recommends removing requirements on agencies to provide evidence of engagement – will impact timeliness and benefit is unclear.</u> <p>Section 54Z notice</p>

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Agency	Comments
	<ul style="list-style-type: none"> • <u>Recommends that when the OAIC issues its s 54Z notice, it provides information about the elements of the decision the applicant disputes and any elements the IC may want specifically covered. This would aid decision makers to understand concerns and better target the drafting of timely submissions.</u> • <u>Accepts the proposed 8 weeks for response to a 54Z notice, stating this would often remove administration of the extension of time (EOT) process that occurs under the current 3-week time period. Requests that further guidance be provided regarding what constitutes 'extenuating circumstances' for EOT requests.</u> <p>55(2)(e) direction</p> <ul style="list-style-type: none"> • <u>Requests clarity as to what constitutes 'relevant processing documents' (3.3b). It will add significant strain on officers and increase administration if this includes all consultation documents and un-redacted exempt documents.</u> • <u>Sending submissions in support of access refusal to the applicant (3.3c) would lead to further interactions with applicants who disagree with their submissions. This is burdensome and an unreasonable diversion of resources.</u> <p>Production of documents</p> <ul style="list-style-type: none"> • <u>Seeks clarity around the 'extenuating circumstances' in which an extension of time would be granted.</u> <p>Procedure for submissions</p> <ul style="list-style-type: none"> • <u>Disagrees with requirement for agencies to send submission to applicant. Considers OAIC should do this as the party responsible for conducting the review. This avoids client confusion resulting in the OAIC missing out on client responses impacting procedural fairness and decision making.</u> • <u>Supports considerations of approaches that will reduce the need for multiple submissions for reviews to improve timeliness for all parties. To be feasible, the initial request for submissions would need to detail the issues at dispute from the client and the IC. There needs to be ability to go beyond the proposed 4-week period for submissions where circumstances prevent agencies meeting this deadline.</u>

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Agency	Comments
Services Australia	<p data-bbox="333 359 607 384">Engagement requirement</p> <ul style="list-style-type: none"> <li data-bbox="376 400 1682 488">• <u>Considers it should be facilitated by an independent third party including due to procedural fairness reasons. Significant administrative burden. Fraught approach whereby an agency is both the ADR facilitator and participant – it means agencies will be unable to robustly represent their own interests.</u> <li data-bbox="376 491 1664 549">• <u>Shifts an independent third-party burden onto agencies and does not allow for departure from the process. This is restrictive and unnecessarily rigid in circumstances where the obligation as a model litigant to engage on a proper basis in ADR already applies.</u> <li data-bbox="376 552 1675 667">• <u>There is already engagement with applicants in the initial request and review processes - this takes into account an applicant's preferred mode of communication, or access to communication channels. This engagement also takes into account restricted servicing arrangements in place to counter inappropriate, threatening or aggressive behaviours. Conferencing without third-party facilitation is potentially harmful to staff. T</u> <li data-bbox="376 670 1709 727">• <u>Where engagement by conference is not appropriate, suggests a suitable alternative is a requirement to notify OAIC of the reasons for <i>not</i> engaging in its preferred ADR channels.</u> <li data-bbox="376 730 1664 788">• <u>Recognises role for proactive engagement with some applicants, with regard to the individual circumstances of the case (such as deemed refusal matters).</u>

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From: [PEEL,Sara](#)
To: [AGO,Rocelle](#); [OAIC - ACFOI](#)
Cc: [HARLOCK,Raewyn](#); [TULLOCH,Karen](#); [DOMENICI,Romina](#)
Subject: For urgent clearance - talking points for workshop on Wednesday
Date: Monday, 10 July 2023 6:22:00 PM
Attachments: [image001.jpg](#)
[image002.jpg](#)
[Talking points - IC review procedure direction - forum 12 July 2023.docx](#)
[image003.jpg](#)
Importance: High

Snapshot	
Due date	11 July 2023 – morning if possible
Fixed or flexible	Flexible – however this needs to be provided to Toni ahead of the workshop with agencies on Wednesday 12 July 2023
If fixed, why?	
Topic for clearance	IC review procedure direction – talking points for workshop 12 July 2023
Product (e.g. brief / submission)	Talking points document to accompany Executive Brief
Length / no. of pages	5
External parties	Government agencies
Clearance & consultation	Rocelle Ago
Responsible director	Sara Peel

Dear Rocelle

As discussed, I have **attached** the talking points document (with thanks to Raewyn who did the bulk of this work).

Kind regards

Sara



Sara Peel (she/her)
 Director, FOI Regulatory Branch
 Office of the Australian Information Commissioner
 Sydney | **P** +61 2 9942 4142 **E** sara.peel@oaic.gov.au

< Please note I am not in the office on Fridays.>

The OAIC acknowledges Traditional Custodians of Country across Australia and their continuing connection to land, waters and communities. We pay our respect to First Nations people, cultures and Elders past and present.

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Talking points for workshop: IC review procedure direction

Date:	15 July 2023
Time:	10am to 11.30am
Location:	Flex ISPT at 4 National Circuit in Barton

Agenda

Time	Item	Durations
10:00	Acknowledgement of country, welcome and overview Toni Pirani, Acting Freedom of Information Commissioner	(10 minutes)
10.10	Topic 1: Response to s 54Z notice – Engagement process and evidence requirements	(30 minutes)
10:40	Topic 2: Response to s 54Z notice – Timeframes	(15 minutes)
10:55	Topic 3: Production of documents – Providing marked up and unredacted copies of documents	(10 minutes)
11:05	Topic 4: Requests to make submissions in confidence	(10 minutes)
11:15	Close	

Acknowledgement of country, welcome and overview (10 minutes) Toni Pirani, Acting Freedom of Information Commissioner

Overview

- Thank you for coming and for making a submission in response to our draft revisions to the [2 draft IC Review Procedure Directions](#).
- *This is a workshop for agencies who have made a submission during the consultation period to assist us to understand and address issues that have been raised.*
- The purpose of the revised ‘*Direction as to certain procedures to be followed in Information Commissioner reviews*’ is to set out the procedures that agencies and ministers are required to follow during IC reviews in respect of the production of documents, engagement with IC review applicants, administration of deemed access refusal decisions and the provision of submissions.

- The purpose of the revised '*Direction as to certain procedures to be followed by applicants in Information Commissioner reviews*' is to assist IC review applicants better understand how the IC review process operates and their obligations with respect to their IC review application.
- Submissions closed on 30 June 2023 and we have started the process of reviewing the feedback set out in submissions.

Topic 1: Response to s 54Z notice – Engagement process and evidence requirements (30 minutes)

- Mandatory requirement for agencies to engage with applicants as part of the IC review
- Agencies must provide evidence of their engagement/attempts to engage with each applicant

Rationale

- Gives agencies an opportunity to explain their decision – many applicants do not read/do not understand the s 26 statement of reasons (better understanding may lead to resolution – for example with s 38 matters)
- Allows for the narrowing of scope of the IC review
- Early resolution reduces agency workload
- Evidence requirement supports mandatory nature of the procedure direction and ensures genuine attempts are made to contact IC review applicants and engage with the issues in dispute

Agency submissions

- Undue administrative burden
- Additional expense for which they are not funded
- Staff safety
- Mandatory nature
- Increased complexities when there are delays issuing s 54Z notice (staff movements, MOG changes)
- Often no ability to provide applicant with further meaningful information
- By the time a matter gets to IC review the agency will generally have exhausted avenues for productive engagement with the applicant.
- Without knowing the applicant's reasons for seeking review it is difficult to negotiate (often the application form does not contain reasons for seeking review).
- Phone/video requirement – should be able to be conducted by any method considered reasonable to the parties, such as email (e.g. anonymous applicants, applicants with disabilities)
- OAIC should be involved as external/independent third-party
- FOI staff not trained mediators
- Value proposition not clear (versus administrative burden and risks to staff)
- Agency may have already engaged with applicant (e.g., under s 24AB)
- Requirement to provide evidence of engagement may limit ability of parties to engage fully if statements/concessions made during the engagement may potentially be taken into account by the IC if the review proceeds. (Section 34E of the *Administrative Appeals Tribunal Act 1975* contains a 'without prejudice' provision to encourage more open and frank discussions.)

- In some agencies decision making is at SES level – FOI staff will not have authority to make decisions re: s 55G and will need to consult SES staff – not practical within 8 weeks.
- Exemptions such as s 33 do not lend themselves to open discussion with members of the public.

Topic 2: Response to s 54Z notice – Timeframes (15 minutes)

- 8 weeks for agencies to respond to s 54Z notice. This period includes
 - contacting applicant
 - engaging with applicant
 - providing evidence of engagement + outcome of engagement
 - if no 55G decision is made to provide full access to the requested documents providing the OAIC with the FOI request processing documents and marked up copies of the exempt documents at issue in the IC review (if applicable).

Agency submissions

- Too short
- Needs to take complexities of individual cases into account
- Needs to be negotiated with respondent agency
- Concerns extensions will only be given in ‘extenuating’ circumstances (should be greater flexibility here) – for example, when the OAIC delays sending the s 54Z notice - up to 12 months delay in some cases making collation of documents etc more difficult)
- No timeframes for OAIC action

Rationale

- 8 weeks combines the current 3 weeks to respond to a s 54Z notice with an additional month to contact and engage with the applicant.
- 8 weeks should be adequate time to engage with the applicant and produce documents.
- Capacity to extend this period is provided in the PD.

Other timeframe changes

- 1 week for agencies to respond to a preliminary enquiry regarding a deemed access refusal decision (OAIC only seeks confirmation whether the request has been refused).
- 3 weeks for the agency to respond to a s 54Z notice (following confirmation that the decision is deemed).
- ‘At least 2 weeks’ to respond to a s 55R notice to produce. This provision replicates the existing provision in the current PD.

The OAIC currently gives agencies 1 week to respond to PIs re: deemed and 3 weeks to respond to s 54Z notices. As a result, there is no change, rather a codification of existing arrangements.

There is a capacity in all of these to extend the time for agencies to respond based on the individual circumstances of the review.

Topic 3: Production of documents – Providing marked up and unredacted copies of documents (10 minutes)

- The revised PD makes no change to the current position with respect to the production of the documents in dispute in the IC review (see 10.1000, 10.102 and 10.14 of Part 10 of the Guidelines and 3.2 and 3.3 of the current PD). That is, to conduct the IC review the IC needs a copy of the document/s with the exempt matter clearly marked.
- There may be confusion in relation to this point – some agencies think we need two sets of exempt documents: one ‘clean’ and one with redactions applied. It may be better to describe this as one copy of the documents at issue in the IC review with exemptions applied clearly marked so a reader can see the underlying text.

Agency submissions

- ATO makes some exemption decisions without searching for and collating the documents (e.g. Person A requesting Person B’s tax return, in some instances there are also applicable offence provisions). To comply with this requirement involves searching for and collating documents solely for the purposes of the IC review.

Rationale for requirement

- The IC must view the documents to decide whether they are exempt or not. For example, Person B’s tax return may contain PI belonging to Person A – without viewing the document it is not possible to make that determination.

Topic 4: Requests to make submissions in confidence (10 minutes)

- Agencies must request permission to make confidential submissions before providing their submissions – need to include reasons to support the claim (consistent with current/existing provision)
- If the IC agrees to accepting a submission in confidence a version that can be shared must also be provided (consistent with current/existing provision)
- NEW: If the Information Commissioner decides the submission is not inherently confidential, or does not disclose exempt matter, the agency will be invited to withdraw the claim for confidentiality or withdraw the submission and it will not be considered as part of the IC review.

Agency submissions

- Don’t understand why request for confidentiality needs to be made before making submission (why can’t it be done at the same time?)

Rationale

- The OAIC’s starting position is that all submissions will be shared with the parties to the IC review (see [5.2] of the current PD and 10.103 of Part 10 of the FOI Guidelines).
- Where agencies seek to depart from this position, they need to provide clear reasons because accepting submissions in confidence has procedural fairness implications for the IC review applicant.

- Deciding whether IC will accept confidential submissions before they are prepared will reduce duplication in that an agency will know in advance whether they need to provide 2 versions of the submissions (confidential and one that can be shared).

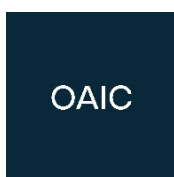
Close

From: [PEEL,Sara](#)
To: [OAIC - ACFOI](#); [HARLOCK,Raewyn](#); [PIRANI,Toni](#); [OAIC - FOI Commissioner](#)
Cc: [TULLOCH,Karen](#); [DOMENICI,Romina](#); [OAIC - Commissioner](#); [AGO,Rocelle](#); [FALK,Angelene \(EXPIRED\)](#)
Subject: Revisions: RE: [For noting] Executive brief: Revised IC review draft procedure directions - Submissions and Workshop
Date: Monday, 10 July 2023 3:26:00 PM

Dear Toni

This EB has been revised today to account for various updates communicated by agencies concerning their attendance at the workshop, and submissions. Most notably, DFAT has lodged a submission which is now included, however we are no longer expecting a submission from NDIA. We understand a DVA submission is imminent and we will update again once received. Happy to discuss of course.

Sara



Sara Peel (she/her)
Director, FOI Regulatory Branch
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< Please note I am not in the office on Fridays.>

The OAIC acknowledges Traditional Custodians of Country across Australia and their continuing connection to land, waters and communities. We pay our respect to First Nations people, cultures and Elders past and present.

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From: OAIC - ACFOI <ACFOI@oaic.gov.au>
Sent: Friday, July 7, 2023 7:01 PM
To: PEEL,Sara <Sara.Peel@oaic.gov.au>; HARLOCK,Raewyn <Raewyn.Harlock@oaic.gov.au>; PIRANI,Toni <Toni.Pirani@oaic.gov.au>; OAIC - FOI Commissioner <FOICommissioner@oaic.gov.au>; FALK,Angelene <Angelene.Falk@oaic.gov.au>
Cc: TULLOCH,Karen <Karen.Tulloch@oaic.gov.au>; DOMENICI,Romina <Romina.Domenici@oaic.gov.au>; OAIC - Commissioner <commissioner@oaic.gov.au>; AGO,Rocelle <Rocelle.Ago@oaic.gov.au>
Subject: [For noting] Executive brief: Revised IC review draft procedure directions - Submissions and Workshop

Snapshot	
Due date	11 July 2023
Fixed or flexible	Fixed
If fixed, why?	Workshop – 12 July 2023
Topic for clearance	IC review procedure direction – Submissions and Workshop
Product (e.g. brief / submission)	Brief: D2023/015645
Length / no. of pages	26
External parties	Government agencies
Clearance & consultation	Rocelle Ago

Dear Toni

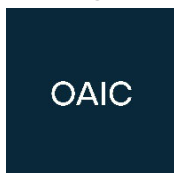
Ahead of the IC review directions workshops scheduled for 12 July 2023, please find the relevant brief summarising the submissions, key themes and proposed agenda at [D2023/015645](#).

For noting:

- The attendees for each workshop will be confirmed early next week, with an updated agenda containing the confirmed attendees to be circulated 11 July 2023.
- We are awaiting submissions from NDIA. We will re-circulate an updated brief/pack once we receive those submissions.
- I am on leave on Monday and Tuesday but will be contactable via mobile.
- [@PEEL,Sara](#), I would be grateful if you could work with [@HARLOCK,Raewyn](#) in developing brief speaking notes for the workshop, particularly around the purpose of the direction and the introduction of the requirement to engage with applicants, as well as the main topics listed in the agenda.

Commissioner [@FALK,Angelene](#) – for your information.

Kind regards



Rocelle Ago (she/her)
Assistant Commissioner, Freedom of information
Office of the Australian Information Commissioner
P +612 9942 4205 M [s47F](#) E rocelle.ago@oaic.gov.au

Executive officer to Freedom of Information Commissioner and Assistant Commissioner, Freedom of Information:
Romina Domenici P +612 9942 4022 E romina.domenici@oaic.gov.au

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From: [PEEL,Sara](#)
To: [OAIC - ACFOI](#); [HARLOCK,Raewyn](#); [PIRANI,Toni](#); [OAIC - FOI Commissioner](#)
Cc: [TULLOCH,Karen](#); [DOMENICI,Romina](#); [OAIC - Commissioner](#); [AGO,Rocelle](#); [FALK,Angelene \(EXPIRED\)](#)
Subject: Further update - DVA submission - RE: Revisions: RE: [For noting] Executive brief: Revised IC review draft procedure directions - Submissions and Workshop
Date: Tuesday, 11 July 2023 3:11:00 PM

Dear Toni

This EB has been just updated again as the DVA submission arrived this afternoon – it is now summarised: [D2023/015645](#). We've also added in the final list attendees and updated workshop arrangements.

DVA raises a number of issues of note including that they may not be able to comply with the intended implementation date in July 2023, and raises impacts on their client base of the engagement requirement (clients with vulnerabilities).

Kind regards

Sara

From: PEEL,Sara

Sent: Monday, July 10, 2023 3:26 PM

To: OAIC - ACFOI <ACFOI@oaic.gov.au>; HARLOCK,Raewyn <Raewyn.Harlock@oaic.gov.au>; PIRANI,Toni <Toni.Pirani@oaic.gov.au>; OAIC - FOI Commissioner <FOICommissioner@oaic.gov.au>

Cc: TULLOCH,Karen <Karen.Tulloch@oaic.gov.au>; DOMENICI,Romina <Romina.Domenici@oaic.gov.au>; OAIC - Commissioner <commissioner@oaic.gov.au>; AGO,Rocelle <Rocelle.Ago@oaic.gov.au>; FALK,Angelene <Angelene.Falk@oaic.gov.au>

Subject: Revisions: RE: [For noting] Executive brief: Revised IC review draft procedure directions - Submissions and Workshop

Dear Toni

This EB has been revised today to account for various updates communicated by agencies concerning their attendance at the workshop, and submissions. Most notably, DFAT has lodged a submission which is now included, however we are no longer expecting a submission from NDIA. We understand a DVA submission is imminent and we will update again once received.

Happy to discuss of course.

Sara



Sara Peel (she/her)
Director, FOI Regulatory Branch
Office of the Australian Information Commissioner
Sydney | P +61 2 9942 4142 E sara.peel@oaic.gov.au

< Please note I am not in the office on Fridays.>

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From: OAIC - ACFOI <ACFOI@oaic.gov.au>

Sent: Friday, July 7, 2023 7:01 PM

To: PEEL,Sara <Sara.Peel@oaic.gov.au>; HARLOCK,Raewyn <Raewyn.Harlock@oaic.gov.au>; PIRANI,Toni <Toni.Pirani@oaic.gov.au>; OAIC - FOI Commissioner <FOICommissioner@oaic.gov.au>; FALK,Angelene <Angelene.Falk@oaic.gov.au>

Cc: TULLOCH,Karen <Karen.Tulloch@oaic.gov.au>; DOMENICI,Romina <Romina.Domenici@oaic.gov.au>; OAIC - Commissioner <commissioner@oaic.gov.au>; AGO,Rocelle <Rocelle.Ago@oaic.gov.au>

Subject: [For noting] Executive brief: Revised IC review draft procedure directions - Submissions

and Workshop

Snapshot	
Due date	11 July 2023
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Length / no. of pages	26
External parties	Government agencies
Clearance & consultation	Rocelle Ago
Responsible director	Sara Peel

Dear Toni

Ahead of the IC review directions workshops scheduled for 12 July 2023, please find the relevant brief summarising the submissions, key themes and proposed agenda at [D2023/015645](#).

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- The attendees for each workshop will be confirmed early next week, with an updated agenda containing the confirmed attendees to be circulated 11 July 2023.
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Commissioner [@FALK,Angelene](#) – for your information.

Kind regards



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From: [PEEL,Sara](#)
To: [DOMENICI,Romina](#)
Subject: RE: notes from July 2023 IC review Procedure Direction workshop [SEC=OFFICIAL]
Date: Thursday, 13 July 2023 4:46:00 PM
Attachments: [image001.jpg](#)
[image002.jpg](#)
[image003.jpg](#)

Hi Romina, I've added some content, and so I've reordered your points a little so it hangs together with my additional points. I hope that's okay. It is all in markup. Given the focus is on capturing stakeholder comments, I have also added a few words to the title.

Happy to discuss of course,
Sara

From: DOMENICI,Romina <Romina.Domenici@oaic.gov.au>
Sent: Thursday, July 13, 2023 12:03 PM
To: PEEL,Sara <Sara.Peel@oaic.gov.au>
Subject: FW: notes from July 2023 IC review Procedure Direction workshop [SEC=OFFICIAL]

From: DOMENICI,Romina
Sent: Thursday, July 13, 2023 10:07 AM
To: AGO,Rocelle <Rocelle.Ago@oaic.gov.au>
Subject: notes from July 2023 IC review Procedure Direction workshop

Hi Rocelle

As an FYI, here are my notes from yesterday's workshop . [D2023/016199](#)

Thanks

Romina



Romina Domenici (she/her)
Executive Officer to Acting FOI Commissioner, Toni Pirani &
Assistant Commissioner, Freedom of Information, Rocelle Ago
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Canberra | GPO Box 5288 Sydney NSW 2001
P +61 2 9942 4022 **E** romina.domenici@oaic.gov.au

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Stakeholder comments at IC Reviews Procedure Direction: Workshop 12 July 2023

Agency	Attendees
DEWR	s47F ██████████, Principal Government Lawyer
Defence Yes	s47F ██████████ s47F ██████████ - Special Advisor Freedom of Information, Review
DCCEEW Yes	s47F ██████████ – Principal Legal Officer s47F ██████████
Commonwealth Ombudsman Yes	s47F ██████████, Senior Assistant Ombudsman, Defence, Investigations
Services Australia Yes	s47F ██████████, General Counsel, FOI ad Ombudsman Branch
ATO Yes	s47F ██████████ – Deputy General Counsel
Home Affairs Yes	s47F ██████████ – A/g Director, FOI s47F ██████████
AGD Yes	s47F ██████████, Director, FOI and Privacy, Strategy and Governance Branch
AAT Yes	s47F ██████████, Legal officer (observer)
AFP Yes	s47F ██████████ Principal Lawyer and Chief Counsel (FOI and Privacy)
DFAT Yes	s47F ██████████ Seconded lawyer, FOI Section, Public Interest Law Branch s47F ██████████
DVA Yes	s47F ██████████, Director Information Law

Topic 1: Response to s 54Z notice – Engagement process and evidence requirements

- ~~4.2 and 4.3: Make wording clearer as confused about how to engage~~
- FOI Commissioner discussed the reasons for introducing this requirement, including that some cases are not significantly developed when they come to us as an independent arbiter.
- FOI Commissioner confirmed ~~NB~~ ~~The~~ ~~that~~ requirement will not apply in relation to deemed access refusal decisions or where the ministers or agencies provide evidence of appropriate consultation during the processing of the FOI request (not including s 24AB consultation).
- FOI Commissioner confirmed ~~Verbal~~ ~~verbal~~ interaction is preferred, as well as the process. ~~Sufficient engagement what does it look like:~~ following notification of commencement of IC review, engage with applicant, then advise of engagement and provide evidence (8 weeks to do so)
- Participants raised concerns about repeated engagement, some raised that they are already engaging with applicants, ~~Issue or already engaging with applicants but not with all of them (Home Affairs).~~
- . FOI Commissioner confirmed that repeated engagement is not required: if you have engaged, and can show this by providing evidence to the OAIC, the engagement

process does not need to be repeated. Participants requested this be clarified in the direction.

- There had been some misinterpretation by participants on 4.2 and 4.3: Make wording clearer as confused about how to engage and when this requirement applies.
- Some participants challenged the benefit of engagement requirement (Home Affairs). DHA expressed fundamental disagreement that this type of engagement needs to happen.
- Others supported in general but expressed concerns about the mandatory nature of the engagement without exceptions/carve-outs.
 - Participants referenced AAT mediation guidelines which have an element of flexibility
 - Concerns about risks:
 - Engagement sometimes is restricted around matters involving s33 exemptions given issues around national security. Requested flexibility to the rule as doesn't specifically note any particular exemptions (DFAT, Defence, SA and Home Affairs)
 - engagement with journalists with vulnerability to subsequent media reporting on items discussed– agencies have protocols for dealing with media
 - staff disclose, or come under pressure to disclose, something they should not disclose (this is easier to manage in writing) e.g. in cases involving personal information (separated parents/domestic violence) leading to privacy risks, as well as s 33 matters
 - DHA commented that sometimes FOI requests are made in a legal context, as an alternative to subpoena where the applicant thinks they may not get documents they need via that process. They would need to put processes in place to manage this risk.
 - Concerns about behaviours of some applicants, and staff welfare (noting agency profiles differ in relation to their client cohort)
 - Some applicants will deliberately not engage with agencies (Assistant Commissioner advised that 'reasonable steps' to engage need to be made in those matters).
 - Concerns about logistics including resource implications of managing large volume of phone calls, seeks guidance on this.
 - No direction about specific applicants, anon/SPOC/right to know.
- Assistant Commissioner acknowledged challenges (such as applicant behaviours) but stated that in the majority of matters engagement is helpful
- It would be helpful if the s 54Z notice was very clear about what the applicant is disputing or what the OAIC is interested in.
- Guidance on the engagement process would be useful.

- Suggested Smart-smart form update: proposed checklist to the applicant at commencement of the IC review – ie what don't you understand about the SOR, are you open to being contacted from the agency, what are your contact details.
- ~~Engagement sometimes is restricted given issued around national security.~~
- Prefer that Engagement engagement with applicant ~~to would~~ include OAIC as a 3rd party; this could prevent applicants getting agitated or parties coming away with a different view of what was agreed.
- Participants expressed some confusion about timing of the various steps, for example, whether the Potential-mandatory engagement with the agency —is pre or post submissions?, and at what point agencies provide evidence of engagement.
- ~~Issue: already engaging with applicants but not with all (Home Affairs).~~
- Have requested flexibility to the rule as doesn't specifically note any particular exemptions (DFAT, Defence, SA and Home Affairs)
- Issue: no direction about specific applicants, anon/SPOC/right to know
- Update guidance for revised Direction
- ~~—~~

Topic 2: Response to s 54Z notice – Timeframes

- Incentivise agencies to engage by allowing extra time (if they have not engaged already). DVA suggested optional requirement, where an agency has either a 2 week period to respond to the s 54Z notice without engagement, but has an 8-week period to respond if incorporating the engagement process.
- Agencies expressed concern about the use of the term 'extenuating circumstances' for extensions to time (including at 4.4). Discussed challenges of responding efficiently after the passage of time (e.g. due to MOG). Assistant Commissioner discussed that we may consider that extenuating circumstances; we look towards what is reasonable, and also clarified what documents are expected within that 8-week period, and that a s55G decision is not expected in that time.
- ~~4.4: EOT justify reasonable circumstances~~
- ~~If 55-G decision proceeds to advise OAIC and timeframes discussed~~
- Include in guidance (that days are working days, are only M-F not including public holidays) or shutdown

Topic 3: Production of documents – Providing marked up and unredacted copies of documents; sample documents

- Flexibility to engage without documentation: there are some matters where the agency does not have the documents because the requested documents are exempt on the face of it (e.g. secrecy provisions apply)
- Inspection at premises to be built into revised direction
- Discussion of redacted documents led to discussion of audio and video files and marking these up (suggestion to provide both an edited and unedited file)

- Congensi has gone – bigger files how to transfer across? – Romina to follow up with Brenton

Topic 4: Requests to make submissions in confidence

- Agencies to hold back sending confidential submissions until they have made the request to do so and it has been approved
- DHA: what happens if the IC does not accept the reasons for the confidential submission?
- Discussion by FOI Commissioner and Assistant Commissioner: onus is on agency to provide it in a form that is unreasonable; if there's a disagreement, we like to think we can resolve it; usually if it is a request that relates to national security or similar then we are likely to approve the request.

Questions posed:

1. Process going forward
2. Timeline for implementation
3. Potential transitional process
4. Potential for trial period

NB - All keen on a session on the implementation of the revised Direction

From: [PEEL,Sara](#)
To: [PEEL,Sara](#)
Subject: IC review Procedure Directions [SEC=OFFICIAL]
Date: Monday, 4 March 2024 9:21:39 PM
Attachments: [image001.jpg](#)
[image002.jpg](#)
[image004.jpg](#)

Dear Rocelle

This email confirms the status of the draft Procedure Directions (PDs).

As you know, last year, we [published draft revisions to the two PDs](#) for consultation: '*Direction as to certain procedures to be followed in Information Commissioner reviews*' (for agencies) and the '*Direction as to certain procedures to be followed by applicants in Information Commissioner reviews*'.

The revised PD for agencies proposed a new requirement that agencies and ministers undertake engagement with an applicant at the commencement of an IC review – as well other revisions:

- clarifying the process for dealing with IC review applications involving deemed access refusal decisions
- clarifying the requirement for agencies and ministers to provide a marked up and unredacted copy of the documents at issue in an IC review, as well as a schedule of documents
- providing that submissions will only be requested after the completion of the initial triage and early resolution process, and following any case management activities that may occur as a result of the compulsory engagement process
- providing that no further submissions will be accepted from either party to an IC review (unless either requested by the OAIC or procedural fairness requirements are identified)
- articulating additional potential regulatory action for non-compliance with the direction.

In a public consultation process – via written submissions and a subsequent workshop held on 12 July 2023 – agencies expressed some concerns about the revised PDs. Notably, there was resistance to the mandatory nature of the requirement to engage with applicants. Agencies also raised issues around timeframes, the production of documents and other matters. We have previously documented agency concerns:

1. 'Talking Points for Workshop – IC review Procedure Direction': this brief groups and summarises agency concerns thematically and sets out the rationale underpinning key revisions: [D2023/015811](#).
2. Executive Brief: Revised IC review draft procedure directions: Submissions and Workshop – this includes a table summarising each submission: [D2023/015645](#)
3. Notes on the workshop of 12 July 2023 (including agency feedback): [D2023/016199](#).

In terms of finalising the PDs, once the revisions are settled – and in particular, if the proposed consultation requirement is implemented – we will need to consider commencement and/or transitional arrangements. There is a question as to whether we should apply the engagement requirement retrospectively – notably, for IC review applications received by the OAIC before the revised PDs are made but that have not yet been allocated. By way of background, we drafted the revised directions in the context that we were working within existing resources and matters were being actioned in chronological order (subject to exception of priority cohorts).

I also note that respondents are now being given 8 weeks to respond to s 54Z notices – this is an extended period (from 3 weeks) consistent with the revised draft PDs. The extended period was intended to accommodate engagement between minister/agency and applicant. At present, the engagement requirement is not in play however agencies and ministers are generally expected to provide submissions within the 8 week period – this expectation around submissions would not be retained under the proposed arrangements in the new PDs.

Finally, I confirm that we are progressing revisions to the Guidelines at [Part 10: Review by the](#)

[Information Commissioner](#). Once the PDs are settled and remade, we will be in a position to reflect updates in the Part 10 Guidelines and finalise a draft for consultation.

Kind regards



Sara Peel (she/her)
Director, FOI Branch
Office of the Australian Information Commissioner
Sydney | **P** +61 2 9942 4142 **E** sara.peel@oaic.gov.au

< Please note I am not in the office on Fridays.>

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From: [BAKER,Heath](#)
To: [PEEL,Sara](#)
Subject: RE: Timeframes for agencies to provide documents [SEC=OFFICIAL]
Date: Monday, 4 March 2024 7:30:07 PM
Attachments: [image001.jpg](#)
[image002.jpg](#)
[image003.jpg](#)

Just one thing... I don't think we've notified the agencies about priority cohorts, so the team hasn't implemented this aspect yet. (Also, we didn't implement 12 weeks over the Christmas period.)

From: PEEL,Sara <Sara.Peel@oaic.gov.au>
Sent: Monday, March 4, 2024 5:34 PM
To: BAKER,Heath <Heath.Baker@oaic.gov.au>
Subject: RE: Timeframes for agencies to provide documents [SEC=OFFICIAL]
Thank you Heath!

From: BAKER,Heath <Heath.Baker@oaic.gov.au>
Sent: Monday, March 4, 2024 4:57 PM
To: PEEL,Sara <Sara.Peel@oaic.gov.au>
Subject: FW: Timeframes for agencies to provide documents [SEC=OFFICIAL]
This is the last email I can find... Turns out the email from Toni was a 'let us know if you have any concerns', so looks like it was Toni's call not Angelene's.
Heath

From: PIRANI,Toni <Toni.Pirani@oaic.gov.au>
Sent: Monday, October 30, 2023 8:35 AM
To: FALK,Angelene <Angelene.Falk@oaic.gov.au>
Cc: AGO,Rocelle <Rocelle.Ago@oaic.gov.au>; HAMPTON,Elizabeth <Elizabeth.Hampton@oaic.gov.au>; BAKER,Heath <Heath.Baker@oaic.gov.au>
Subject: RE: Timeframes for agencies to provide documents [SEC=OFFICIAL]
Hi Angelene
Yes, at the moment we intend to continue with the current process of requesting documents and submissions at the same time.
Regards
Toni

From: FALK,Angelene <Angelene.Falk@oaic.gov.au>
Sent: Wednesday, October 25, 2023 11:56 AM
To: PIRANI,Toni <Toni.Pirani@oaic.gov.au>
Cc: AGO,Rocelle <Rocelle.Ago@oaic.gov.au>; HAMPTON,Elizabeth <Elizabeth.Hampton@oaic.gov.au>; BAKER,Heath <Heath.Baker@oaic.gov.au>
Subject: RE: Timeframes for agencies to provide documents [SEC=OFFICIAL]
Thank you Toni for your email.
Just to clarify: Will the s54Z notice request documents and submissions at the same time?
I'm looking at the consultation draft of the Direction which gives 8 weeks at para 4.4 to respond to the notice and engage with the applicant, then at para 6.5, 4 weeks to make submissions after the ER process and assignment for case management.
Many thanks and happy to discuss as needed.
Angelene

From: PIRANI,Toni <Toni.Pirani@oaic.gov.au>
Sent: Tuesday, October 24, 2023 4:14 PM

To: FALK,Angelene <Angelene.Falk@oaic.gov.au>

Cc: AGO,Rocelle <Rocelle.Ago@oaic.gov.au>; HAMPTON,Elizabeth <Elizabeth.Hampton@oaic.gov.au>; BAKER,Heath <Heath.Baker@oaic.gov.au>

Subject: Timeframes for agencies to provide documents [SEC=OFFICIAL]

Dear Angelene

As discussed briefly, I wanted to let you know we are considering a change to the timeframe we give agencies to provide us with documents pursuant to s54Z of the FOI Act.

Paragraph 3.7 of the current [Direction as to certain procedures to be followed in IC reviews](#) gives ministers and agencies three weeks to respond to the Information Commissioner's request for documents, submissions and any other information in the notice of IC review.

The draft [Direction](#) (paragraph 4.4), about which we consulted agencies several months ago, gives ministers and agencies 8 weeks.

For most IC reviews, we are considering implementing this change to 8 weeks shortly. (For priority cohorts, we will keep the period as 3 weeks and be clear with agencies that the shorter period is due to the matter being a priority.)

There are several reasons we are considering implementing this change to 8 weeks now:

- it responds to agency feedback that they are currently finding it difficult to meet our timeframes particularly as we press agencies to respond to us on older matters
- it gives agencies more time to try and resolve the matter with the applicant (we will encourage them to use the additional time to do this)
- our staff will need to respond to fewer extension of time requests.

In addition to this change, we are also considering giving agencies a further 4 weeks (12 weeks in total) if the 8 week period covers the Christmas holidays. This recognises the reality the agencies are usually short-staffed over this period, and it leads to a spike in extension of time requests to the OAIC.

Given the caseload we are working through, we do not consider these changes will make any material difference to the time it will take to close these cases which, at the moment sit in a queue once the documents are provided. (The surge team will not be helping with matters that have reached this stage.)

Please let me know if you have any concerns with this approach or if it would be preferable for us to meet to discuss.

Regards

Toni



Toni Pirani (she/her)

Freedom of Information Commissioner

Office of the Australian Information Commissioner

Canberra | GPO Box 5288 Sydney NSW 2001

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E toni.pirani@oaic.gov.au

Executive Officer Romina Domenici email: romina.domenici@oaic.gov.au

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From: [PEEL,Sara](#)
To: [OAIC - ACFOI](#); [BAKER,Heath](#)
Cc: [OAIC FOI Monitoring Guidance and Engagement](#)
Subject: For AC review: IC review Procedure Directions [SEC=OFFICIAL]
Date: Tuesday, 5 March 2024 9:11:19 AM

Hi Rocelle

I have drafted the below for Liz as requested yesterday – I understand this email can replace the previously-intended EB on the Procedure Direction. Happy to make any changes/additions. Grateful for your attention, as well as [@BAKER,Heath](#)'s, to the highlighted sentence to ensure it reflects future expectations in terms of process - I have confirmed the current 8-week period with Heath.

Kind regards

Sara

This email confirms the status of the draft Procedure Directions (PDs) intended to revise/replace the existing PDs made under s 55(2)(e)(ii) of the FOI Act.

As you know, last year, we [published draft revisions to the two PDs](#) for consultation: '*Direction as to certain procedures to be followed in Information Commissioner reviews*' (for agencies) and the '*Direction as to certain procedures to be followed by applicants in Information Commissioner reviews*'.

The revised PD for agencies proposed a new requirement that agencies and ministers undertake engagement with an applicant at the commencement of an IC review – as well other revisions:

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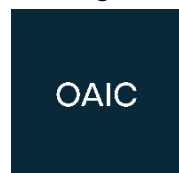
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Finally, I confirm that we are progressing revisions to the Guidelines at [Part 10: Review by the Information Commissioner](#). Once the PDs are settled and remade, we will be in a position to reflect updates in the Part 10 Guidelines and finalise a draft for consultation.

Kind regards



Sara Peel (she/her)
Director, FOI Branch
Office of the Australian Information Commissioner
Sydney | **P** +61 2 9942 4142 **E** sara.peel@oaic.gov.au

< Please note I am not in the office on Fridays.>

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From: [AGO,Rocelle](#)
To: [TYDD,Liz](#)
Cc: [PEEL,Sara](#)
Subject: Draft Procedure Direction [SEC=OFFICIAL]
Date: Tuesday, 5 March 2024 10:41:17 AM
Attachments: [image001.jpg](#)
[image002.jpg](#)
[image003.jpg](#)

Dear Liz

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Kind regards



Rocelle Ago (she/her)

Assistant Commissioner, Freedom of information

Office of the Australian Information Commissioner

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From: [TYDD,Liz](#)
To: [AGO,Rocelle](#)
Cc: [PEEL,Sara](#)
Subject: RE: Draft Procedure Direction [SEC=OFFICIAL]
Date: Monday, 11 March 2024 5:28:17 PM
Attachments: [image001.jpg](#)
[image002.jpg](#)
[image004.jpg](#)

Dear Rocelle

2 or 3 additions – please review but from my perspective finalised for submission to Angelene
Kind regards and thanks to all contributors

Liz

From: AGO,Rocelle <Rocelle.Ago@oaic.gov.au>
Sent: Tuesday, March 5, 2024 10:41 AM
To: TYDD,Liz <Elizabeth.Tydd@oaic.gov.au>
Cc: PEEL,Sara <Sara.Peel@oaic.gov.au>
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To: [TYDD,Liz](#)
Cc: [PEEL,Sara](#)
Subject: RE: Draft Procedure Direction [SEC=OFFICIAL]
Date: Monday, 11 March 2024 5:34:06 PM
Attachments: [image001.jpg](#)
[image002.jpg](#)
[image003.jpg](#)

Dear Liz

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Kind regards

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Cc: PEEL,Sara <Sara.Peel@oaic.gov.au>
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From: [ESLICK, Jessica](#)
To: [PEEL, Sara](#)
Subject: RE: Draft Procedure Direction [SEC=OFFICIAL]
Date: Tuesday, 12 March 2024 4:35:43 PM
Attachments: [image001.jpg](#)
[image002.jpg](#)
[image003.jpg](#)

Hi Sara

I've located Liz's highlight regarding s 55E, at para 5.5 of the proposed Procedure Direction ([D2023/015645](#)), which appears as:

In IC reviews involving a charge or a practical refusal reason, the Information Commissioner may require the agency or minister to provide a sufficiently representative sample of documents considered to be within the scope of the request. ^[1] The OAIC has developed templates to assist decision makers [sic] in providing cogent reasons for this decision. Those reasons must be adequate s55E.

I have considered ss 26 and 55E of the FOI Act. I have also considered the EM to the [Freedom of Information Amendment \(Reform\) Bill 2010 – Parliament of Australia \(aph.gov.au\)](#), which says:

Proposed section 55E empowers the Information Commissioner to request reasons for a decision from an agency or Minister who made a decision if the Commissioner believes the reasons given are inadequate or if no reasons have been provided (contrary to the requirement under existing section 26).

In that light, could I suggest that we flesh out para 5.5 to say, for example:

The OAIC has developed templates to assist decision makers to state the reasons for a practical refusal decision, which should show a rational connection between the findings of material fact, the decision maker's understanding of the relevant statutory provisions, and the decision itself ([s 26\(1\)](#) of the FOI Act; paragraph [\[3.182\]](#) of the FOI Guidelines). During an IC review, if the Information believes that no such statement of reasons has been provided, or that a statement of reasons that has been provided is inadequate, the Information Commissioner may give notice under [s 55E\(2\)](#) of the FOI Act requiring the decision maker to provide an adequate statement of reasons as mentioned in s 26(1).

I've briefly discussed the above with Rocelle and she's asked us to put our suggestion in a comment, and to respond to the other comments and highlight, which are:

- Para 4.4: Liz's change from 8 weeks to 6 weeks as the response time for s 54Z notices – I suggest we note that currently we give 8 weeks (I sent a message to Heath who advised)
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We may also need to make a comment on:

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Finally, Rocelle asked if we could put Attachment A (the draft direction) into a separate document with its own TRIM link.

Should we discuss the above?

Jess

From: PEEL, Sara <Sara.Peel@oaic.gov.au>
Sent: Tuesday, March 12, 2024 2:55 PM
To: ESLICK, Jessica <Jessica.Eslick@oaic.gov.au>
Subject: FW: Draft Procedure Direction [SEC=OFFICIAL]

From: AGO, Rocelle <Rocelle.Ago@oaic.gov.au>
Sent: Monday, March 11, 2024 5:34 PM
To: TYDD, Liz <Elizabeth.Tydd@oaic.gov.au>

Cc: PEEL,Sara <Sara.Peel@oaic.gov.au>

Subject: RE: Draft Procedure Direction [SEC=OFFICIAL]

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^[1] See FOI Guidelines at [3.121] and the IC review decisions in *Adrian Wright and Department of Human Services (Freedom of information)* [2017] AICmr 127 and *Cash World Gold Buyers Pty Ltd and Australian Taxation Office (Freedom of information)* [2017] AICmr 20.

From: [PEEL,Sara](#)
To: [ESLICK,Jessica](#)
Subject: RE: Draft Procedure Direction [SEC=OFFICIAL]
Date: Tuesday, 12 March 2024 5:15:00 PM
Attachments: [image001.jpg](#)
[image002.jpg](#)
[image003.jpg](#)

Hi Jess

That looks good, thank you. I've made some small tweaks to the suggested text re s 55E, below – what do you think?

The OAIC has developed templates to assist decision makers to state the reasons for a practical refusal decision. These should show a rational connection between the findings of material fact, the decision maker's understanding of the relevant statutory provisions, and the decision itself ([s 26\(1\)](#) of the FOI Act; paragraph [\[3.182\]](#) of the FOI Guidelines). Where the Information Commissioner believes that the statement of reasons is inadequate, or has not been provided, the Information Commissioner may require the decision maker to provide an adequate statement of reasons under s 26(1) (s 55E).

On start date, please add a comment at 1 July 2023 amending to 1 July 2024:

We need to consider transitional arrangements and in particular, whether there are separate processes to follow for backlog matters and incoming matters.

It would be good if we could address this point in the document itself (i.e. draft some text about commencement/transitional arrangements into the PD) but I don't have that info yet – I'll let you know if I hear anything. Rocelle and Liz are considering this issue.

I think we're all good to move forward with this – call me if there were elements you're not sure of/still want to discuss.

Thanks
Sara

From: ESLICK,Jessica <Jessica.Eslick@oaic.gov.au>
Sent: Tuesday, March 12, 2024 4:36 PM
To: PEEL,Sara <Sara.Peel@oaic.gov.au>
Subject: RE: Draft Procedure Direction [SEC=OFFICIAL]

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Finally, I confirm that we are progressing revisions to the Guidelines at [Part 10: Review by the Information Commissioner](#). A draft is currently before me

Once the PDs are settled and remade, we will be in a position to reflect updates in the Part 10 Guidelines.

As an aside, I have often considered whether the FOI Guidelines, as issued under s 93A, should be used for guidance around decision making on formal requests and obligations around the disclosure log/IPS, and rather than outlining the OAIC's IC review process, given the general power to issue procedure directions under s 55(2). It may reduce duplication between the Guidelines and the procedure direction and also provide clarity around regulatory messaging.

Kind regards

Rocelle Ago (she/her)
Assistant Commissioner, Freedom of information



Office of the Australian Information Commissioner
P +612 9942 4205 M **s47F** E rocelle.ago@oaic.gov.au

The OAIC acknowledges Traditional Custodians of Country across Australia and their continuing connection to land, waters and communities. We pay our respect to First Nations people, cultures and Elders past and present.

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^[1] See *FOI Guidelines* at [3.121] and the IC review decisions in *Adrian Wright and Department of Human Services (Freedom of information)* [2017] AICmr 127 and *Cash World Gold Buyers Pty Ltd and Australian Taxation Office (Freedom of information)* [2017] AICmr 20.

From: [AGO,Rocelle](#)
To: [HARLOCK,Raewyn](#)
Cc: [PEEL,Sara](#)
Subject: Proposed amended procedure directions and Part 10 of the FOI Guidelines [SEC=OFFICIAL]
Date: Monday, 6 May 2024 3:49:03 PM
Importance: High

Hi Raewyn

As discussed, can you please review the procedure directions for agencies and applicants, with a view to sending me via email of any amendments I will need to action (ie no need to carry out the amendments yourself).

Please include the proposed amendments to Part 10 of the FOI guidelines as you flagged over the phone.

Document	Link	Notes
Procedure Direction: Agencies	D2024/012002	This is largely not marked up given the substantive changes
Procedure Direction: Applicants	D2024/012047	Marked up
Part 10 – FOI Guidelines	D2024/012047	Marked up

Kind regards
Rocelle



Australian Government

Office of the Australian Information Commissioner

Proposed direction

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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 1.1~~ This Direction applies to applications to the Information Commissioner for a review of a decision under the *Freedom of Information Act 1982* (Cth) (FOI Act). This direction is given by the Australian Information Commissioner under s 55(2)(e)(i) of the *Freedom of Information Act 1982* (FOI Act) in relation to Information Commissioner reviews (IC reviews).

1.2 This written direction sets out the procedure to be followed by applicants for IC reviews undertaken by the Information Commissioner under the FOI Act.

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 the Information Commissioner (IC) for a review of a decision under the FOI Act (IC review).¹

The Information Commissioner 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 Information Commissioner (s 54W(c)).

~~1.4~~ The Information Commissioner may also give written directions as to the procedure to be followed in relation to a particular IC review (s 55(2)(e)(iii)).

~~1.5~~ This direction does not apply to the extent it is inconsistent with a provision of the FOI Act, another enactment or a specific direction made in a particular IC review under s 55(2)(e)(ii) of the FOI Act.

1.6⁵ Further information relating to the IC review process is published on the Office of the Australian Information Commissioner's (OAIC) website. In particular, Part 10 (Reviews by the Australian Information Commissioner) of the Guidelines issued by the Information Commissioner under s 93A of the FOI Act (FOI Guidelines) describes the principles that inform the OAIC's approach to IC reviews.

1.7⁶ 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.

~~1.8⁷ This direction applies to IC review applications received, has effect from 1 July 20232024. For IC review applications received before 1 July 2024, specific directions may be made in the context of these IC reviews. This Direction is not a legislative instrument.²~~

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¹ Section 55(2)(e)(ii) of the FOI Act

² Section 55(3) of the FOI Act.

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'. Access refusal decisions

1.40 — An 'access refusal decision' means (s 53A):

- 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 all the 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 (s 21) (see Part 3 of the Guidelines)
- e. a decision relating to the imposition or amount of a charge (s 29)
- f. a decision to give access to a document to a 'qualified person' (where disclosing the information to the applicant might be detrimental to the applicant's physical or mental health or well-being) (s 47F(5))
- g. a decision refusing to amend a record of personal information in accordance with an application (s 48)
- h. a decision refusing to annotate a record of personal information in accordance with an application (s 48)

1.41 — 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 Information should give a decision adverse to the person who made the request (s 55D(2)).

1.42 — Given that the agency or Minister bears this onus, it will generally be necessary to undertake inquiries or seek information from the agency or Minister before inviting comment from applicants.

IC review means Information Commissioner review.

Part 2: The IC review process Matters applying to all applications

2.1 — This Part applies to all IC review applications.

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General principles

2.2 ~~1.9~~ 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,~~
- ~~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 The IC review process is intended to be an informal, non-adversarial and timely means of external merits review of FOI decisions made by agencies and ministers. Part 10 of the FOI Guidelines, to which agencies and ministers must have regard when performing a function or exercising a power under the FOI Act, sets out in detail the process and underlying principles of IC review.~~

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.~~

Making an application for IC review

2.4 ~~1.10~~ 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. [The online form is located at: https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICR_10.](https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICR_10)⁷

~~1.11 Where it is not possible for an application to be made online, applications may be sent to the OAIC by:~~

<u>Postal address</u>	<u>GPO Box 5218</u> <u>Sydney NSW 2001</u>
<u>Email address</u>	<u>FOIDR@oaic.gov.au</u>
<u>Fax</u>	<u>+61 2 9284 9666</u>

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 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>.

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• [email to foidr@oaic.gov.au](mailto:emailto:foidr@oaic.gov.au)

• mail to FOI Regulatory Group, GPO Box 5218, Sydney NSW 2001.

~~2.51-12~~ 2.51-12 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
- 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).

~~1.13-2.6~~ 1.13-2.6 The OAIC 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 OAIC will consider any notices as received when sent to an applicant's preferred contact.

~~2.7~~ ~~1.14~~ 2.7 1.14 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
- 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.

~~1.15-2.8~~ 1.15-2.8 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 OAIC 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.

Commented [E2]: Added 4 Apr 2024.

~~1.16-2.9~~ 1.16-2.9 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.

~~1.17-2.10~~ 1.17-2.10 The applicant must provide the OAIC 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](#). [However, in 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 in the case of where they are seeking review of a deemed access refusal, applicants must apply directly for IC review.](#)

Commented [E3]: Updated wording slightly to try to make clearer per Attachment B on 4 Apr 2024.

- 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.⁸
 - If an application for IC review is not made within the timeframes in the FOI Act, applicants may apply to the Information Commissioner 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 Information Commissioner 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.

Commented [JE4]: The draft Part 10 of the FOI Guidelines (D2022/009530) cover s 54T at para 10.46 and I have put a comment at that para noting that the same kind of information is here.

Para 10.46 adds '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', and we may consider whether that detail should also be here.

~~1.18~~ ~~2.11~~ An application for IC review should also:

- a. identify the **aspect(s) of the agency's or Minister's parts of the decision about which they you want the Information Commissioner to review is sought**
- 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.

Commented [E5]: Updated 4 Apr 2024.

~~1.19~~ ~~2.12~~ The OAIC must provide 'appropriate assistance' to a person who wishes to apply for IC review and requires assistance to prepare the IC review application (s 54N(3)).

~~1.20~~ ~~2.13~~ Section 54N of the FOI Act sets out the requirements for the contents and delivery of an application for IC review. These requirements include giving the OAIC contact details to which notices can be sent and providing a copy of the FOI decision the applicant wants the Information Commissioner to review. An application that does not comply with these requirements may be considered to be invalid.

⁸ [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 \(the agency or minister\).](#)

During the IC review

Changes to contact details

1.21 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 Information Commissioner may decide not to undertake an IC review, or not continue to undertake an IC review, if the applicant or their nominated representative cannot be contacted after making reasonable attempts (s 54W(a)(iii)).

Participation in the IC review Engagement between parties at the commencement of an IC review

2.15 The OAIC requires agencies and Ministers to provide information regarding engagement, and/or reasonable attempts to engage, with the applicant to resolve or narrow the issues in dispute in the IC review.

Method of engagement

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

2.17 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

2.18 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.

2.19 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

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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)(iii)).

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General principles Responding to requests for information from the OAIC

1.22-2.21 Applicants must respond to inquiries from the OAIC within the time provided unless there are 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 why additional time is needed and propose a new date for response. Approval of an extension request is at the discretion of the OAIC.

1.23-2.22 -The OAIC expects that applicants and agencies will ~~treat our officers~~ engage with the IC review process, with respect and courtesy.⁹ The Information Commissioner expects that applicants and agencies participate in the IC review, including engagement with each other at the beginning of the IC review, with respect and courtesy. The parties' meaningful participation in engagement with each other would mean that they are more likely to resolve the issues in the IC review.

Commented [RA6]: Format to be addressed.

Receiving revised decisions under s 55G

Commented [JE7]: Added 4 Apr 2024.

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2.20 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
- 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.

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2.21 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).

Commented [RA8]: While there is a separate section for agencies on deemed refusals, I think the process is largely for agencies to understand and the takeaway for applicants is they may receive a s 55G decision.

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⁹ OAIC service charter.

At the commencement of an IC review

1.243 The OAIC requires agencies and Ministers to engage with the IC review applicant at the commencement of an IC review. The purpose of this engagement is to attempt to resolve the issues identified in the IC review application in an informal and timely way. Agencies are required to contact applicants for IC review shortly after the IC review application is lodged receiving the Information Commissioner's notice of IC review under s 54Z to arrange a suitable time for the engagement process. 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)).

1.24 The Information Commissioner may use any technique the Information Commissioner considers appropriate to facilitate an agreed resolution of the matters at issue in the IC review (such as alternative dispute resolution processes—s 55(2)(b)). Where appropriate, and following the compulsory engagement process described above, the OAIC may invite applicants to attend a teleconference to discuss the issues in dispute in the IC review with the agency's or Minister's office and to explore options for resolution, with a view to reaching agreement on some or all of the matters at issue in the IC review.

Receiving revised decisions under s 55G

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Commented [JE9]: Added 4 Apr 2024.

1.25 An agency or minister may make a 'revised decision' under s 55G of the FOI Act during an IC review, giving access to further material. 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 undertake an IC review, or not continue to undertake an IC review, if an IC review applicant has failed to cooperate in progressing the IC review application or the IC review without reasonable excuse (ss 54W(a) and 54W(c) of the FOI Act(iii)).

Submissions

2.23 1.26 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

2.24 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.

2.25 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 decision under s 55K of the FOI Act without any further opportunity to make submissions.

2.26 IC review applicants should not expect the opportunity for further submissions. Any request for extensions of time should only be made where exceptional circumstances can be demonstrated this is because extensions of time will only be granted in exceptional circumstances.

1.27 Applicants will be invited to make written submissions after the initial triage and early resolution process is complete, and once the application has been assigned to a review adviser for substantive review/case management. First, the agency or Minister will be asked to make submissions in support of the IC reviewable decision. The agency or Minister will send the applicant a copy of their submissions at the same time as they are sent to the OAIC. The applicant will then have the opportunity to make submissions addressing any issues raised by the agency or the Minister. The applicant is required to send their submissions to the agency or Minister at the same time as they are sent to the OAIC.

1.28 The Information Commissioner will generally give the parties (both the applicant and the agency or Minister) 4 weeks to make their submissions.

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~~1.29 The Information Commissioner will not accept any further submissions from either party to the IC review unless the Information Commissioner has requested them.~~

~~1.30 The Information Commissioner will contact the parties after receipt of submissions if procedural fairness requirements have been identified. For information on procedural fairness see [3.15]—[3.31] of Part 3 of the FOI Guidelines.~~

~~1.31—2.28~~ The OAIC may provide a preliminary view at any time during the IC review. This will outline the case officer's preliminary thinking on the issues in dispute in the IC review. The applicant may be invited in some cases to withdraw their IC review application, [or make submissions in response to a preliminary view](#), depending on the views expressed in the preliminary view.

~~1.32—2.29~~ The IC review application and any attachments will be shared with the agency or Minister, as well as any other parties to the review, unless there is a reason not to do so. 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

~~1.33—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.

Changes to contact details

~~2.14 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 Information Commissioner may decide not to undertake an IC review, or not continue to undertake an IC review, if the applicant or their nominated representative cannot be contacted after making reasonable attempts (s 54W(a)(iii)).~~

~~Decisions made under s 55K of the FOI Act 1.34 Generally, submissions should be made in writing and sent by email or pre-paid post. In limited circumstances, if an applicant is unable to provide written submissions, the OAIC may agree to accept verbal submissions by telephone.~~

Information Commissioner decisions

~~1.35 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

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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.

~~1.362.32~~ 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. When the Information Commissioner makes a decision on IC review under s 55K of the FOI Act, the Information Commissioner will quote or summarise the submissions in the published decision. If a confidential submission is relied on by the Information Commissioner in making a decision on the IC review, this will be noted in the decision without revealing the confidential material.

~~1.37~~ 2.33 To protect against the unreasonable disclosure of personal information, the Information Commissioner will consider whether identifying information should be included in published decisions. Natural persons ~~will may opt not to~~ 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: Procedure for IC review of specific types of decisions

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Deemed access refusal decisions

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1.38 — A ‘deemed access refusal’ occurs when the statutory time for making a decision on an FOI request for access to a document has expired and notice of the decision has not been given. In these circumstances the agency or Minister is ‘deemed’ to have refused the FOI request. Where the applicant applies for IC review of a deemed access refusal decision, the OAIIC will make inquiries with the agency or Minister.

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~~1.39 — If, during the IC review, the agency or Minister sends the applicant a written decision on the applicant’s FOI request, the OAIIC will check confirm whether with the applicant is whether they are satisfied with the decision. Applicants who are satisfied with the decision and do not wish to proceed with the IC review must advise the OAIIC in writing that they withdraw their application for IC review. Applicants who are not satisfied with the agency’s or Minister’s decision must explain why they disagree with the decision and the basis on which they wish to proceed with the IC review. If the applicant does not respond to the OAIIC’s correspondence, the Information Commissioner may decide not to undertake an IC review on the basis that the applicant has failed to cooperate in progressing the IC review application without reasonable excuse (s 54W(a)(ii)) or for non-compliance with the procedure direction (s 54W(c)).~~

~~Access refusal decisions~~

~~1.40 — An ‘access refusal decision’ means (s 53A):~~

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- ~~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 all the 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 (s 21) (see Part 3 of the Guidelines)~~
- ~~e. a decision relating to the imposition or amount of a charge (s 29)~~
- ~~f. a decision to give access to a document to a 'qualified person' (where disclosing the information to the applicant might be detrimental to the applicant's physical or mental health or well-being) (s 47F(5))~~
- ~~g. a decision refusing to amend a record of personal information in accordance with an application (s 48)~~

~~h. a decision refusing to annotate a record of personal information in accordance with an application (s 48).~~

~~1.41 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)).~~

~~1.42 Given that the agency or Minister bears this onus, it will generally be necessary to undertake inquiries or seek information from the agency or Minister before inviting comment from applicants.~~

~~Access grant decisions~~

~~1.43 An 'access grant decision' means a decision to grant access to a document where there is a requirement to consult a third party (s 53B). Such decisions involve granting the FOI applicant access to information or documents following consultation.~~

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~~1.44 In an IC review of an access grant decision, it is the IC review applicant who bears the onus of establishing that a decision refusing the FOI request is justified, or that the Information Commissioner should give a decision adverse to the FOI applicant (s 55D(2)).~~

~~1.45 IC review applicants will generally be invited to provide information or submissions which explain why the agency's or Minister's decision is wrong before comment is invited from the agency or Minister.~~

Part 43: Non-compliance with this direction

~~3.1 This Part applies to all IC review applications.~~

~~1.463.2 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 review as outlined in s 54W(c). This means that, in these cases, the review will be finalised.~~

~~1.473.3 Applicants will be provided with the opportunity to explain why the Information Commissioner should not finalise the IC review under s 54W(c) of the FOI Act before a decision is made.~~

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Attachment B

Summaries of updates and agencies' submissions

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Proposed new paragraph	Summary of agencies' submissions	
<p>1.8—Direction has effect from 1 July 2023</p>	<p>N/A</p>	<p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>we could state, for example:</p> <p>For IC review agencies and ministers must have regard to Part 10 of the FOI Guidelines issued under s 93A of the FOI Act which sets out the general principles and expectations of the Information Commissioner regarding IC reviews. Specific directions may be made in the context of these IC reviews.</p>
<p>1.13—OAIC contacting applicants</p> <ul style="list-style-type: none"> Paragraph 1.13 explains that the OAIC will contact applicants using their preferred contact method. Paragraph 1.13 also states 'Where an applicant has listed a preferred contact method as well as other contact information, the OAIC will consider any notices as received when sent to an applicant's preferred contact'. 	<ul style="list-style-type: none"> The AAT submits that we may wish to consider referring to an exception where there is evidence of non-receipt, such as a returned letter or email non-delivery message. 	<p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>review and would consider finalising the IC review under s 54W(a)(iii) (cannot contact applicant after making reasonable attempts).</p> <ul style="list-style-type: none"> We consider that it is not worthwhile discussing our power under s 54W(1)(a)(iii) here, at the beginning of the procedure direction.
<p>1.15—Who can be an IC review applicant?</p> <ul style="list-style-type: none"> Paragraph 1.15 refers to s 54L(3), namely that an IC review application may be made by the person who made the request to which the decision relates, and the proceeding paragraphs 1.16 to 1.20 set out the requirements for the IC review application. 	<ul style="list-style-type: none"> The AAT queries whether the requirements for IC review applications of access grant decisions (s 54M) are the same as those discussed at paragraphs 1.16 to 1.20. 	<p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>access grant decisions.</p> <ul style="list-style-type: none"> Minor updates may be required to following paragraphs, such as to para 1.18(c) so that we refer to 'wrongly granted' rather than 'wrongly refused'.
<p>1.17(a)—Information that must be provided with IC review application:</p> <ul style="list-style-type: none"> Paragraph 1.17 states that 'The applicant must provide the OAIC with about the FOI decision, in particular (a)... (b)... (c)... (d)...'. Paragraph 1.17(a) states that the applicant should say whether the decision under review is an original decision or internal review decision, and notes 'it is usually better to seek internal review first...' (emphasis added) 	<ul style="list-style-type: none"> Defence proposes that we consider making internal review compulsory, in circumstances which allow it. This would allow for agencies and ministers to have further meaningful engagement with the applicant before they seek an IC review in an attempt to resolve the issues in an informal and timely way, thus reducing the workload for the OAIC. ATO submits that it is unclear whether there will be any requirement on the applicant to either seek internal review or provide details on why they did not consider it appropriate in the circumstances (ATO). 	<p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <ul style="list-style-type: none"> We could consider making clearer by way of a separate dot point that, for example 'applicants have a choice between applying for internal or IC review of a decision, unless the decision was made by the Minister or personally by the principal officer of an agency, or is a deemed access refusal decision. In those cases, applicants must directly apply for IC review.'

Proposed new paragraph	Summary of agencies' submissions	
<p>1.17(b) – Information to be provided with IC review application</p> <ul style="list-style-type: none"> Paragraph 1.17(b) notes that ‘In most cases, an application for IC review must be made within 60 days of the applicant being notified of the ... decision ...’. (emphasis added) 	<ul style="list-style-type: none"> The AAT submits that we may wish to consider whether the date of receipt of the decision is also relevant. 	<p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>will con Given that by ema distinguish between the date a notice is given and the date received. The 60 day time limit for applying for IC review of an access refusal decision is also generous, which lessens the need to distinguish between when a notice is given, and received.</p>
<p>1.17 (general) Agency reference number</p>	<ul style="list-style-type: none"> AFP submits that applicants should also be required to provide the agency reference number for the FOI decision. 	<p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>is already to coop se</p>
<p>1.18 – Further information to be provided with IC review application:</p> <ul style="list-style-type: none"> Paragraph 1.18 advises that ‘An application for IC review should also: (a) ... (b) ... (c) ... (d) ...’, such as the aspects of the decision about which they seek the IC review. (emphasis added) 	<ul style="list-style-type: none"> ATO submits that given the mandatory consultation requirement proposed to be put on agencies it would appear appropriate for applicants to be required to provide the information set out in this paragraph prior to any consultation occurring. ATO also queries whether a failure to provide this information would be considered a ‘failure to engage’. 	<p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>subheading during the IC review), and does not need to be discussed in this section, the first section (under the subheading Making an application for IC review).</p> <ul style="list-style-type: none"> We are required to provide appropriate assistance to a person who wishes to make an IC review application, and requires assistance (s 54N(3)), and therefore it is not appropriate to emphasise the power to finalise an IC review at the application stage).
<p>1.18(a) – Further requirements of IC review application</p> <ul style="list-style-type: none"> Paragraph 1.18(a) says that an application should ‘identify the aspect(s) of the ... decision about which the IC review is sought’. 	<ul style="list-style-type: none"> AGD submits that this wording may be confusing for some readers, and could alternatively say “identify the parts of the decision you want the Information Commissioner to review”. Defence submits that at para 1.18, the revisions suggest that an IC review application should identify why the agency's or minister's decision is wrong. Defence proposes making this compulsory, saying that would assist the agency or minister to better understand and resolve the issues in a meaningful, informal and timely way. 	<p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>the pa that providing the information listed in para 1.18 is already framed as a requirement, stating ‘should’.</p>
<p>1.23 Engagement to resolve issues (issue 1)</p>	<ul style="list-style-type: none"> AAT submits that engagement should only be required if there has been no internal review of the decision. 	<p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>procedu require reason request in a manner that complies with s 15 (s 15(3)), such as during an internal review process.</p>

Proposed new paragraph	Summary of agencies' submissions	
<p>1.23 Engagement to resolve issues (issue 2)</p> <ul style="list-style-type: none"> Paragraph 1.23 states 'Agencies are required to contact applicants for IC review shortly after the IC review application is lodged to arrange a suitable time for the engagement process.' (emphasis added) 	<ul style="list-style-type: none"> AAT, AFP, and the Commonwealth Ombudsman submit that paragraph 1.23 should say that agencies are required to contact applicants to arrange the engagement after receiving the s 54Z notice. AFP in particular notes that there can be a delay between an IC review application and s 54Z notice. 	<p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p>
<p>1.23 Engagement to resolve issues (issue 3)</p>	<ul style="list-style-type: none"> ATO submits it would also be helpful to provide applicants with further details about what is expected of them in terms of participating in agency engagement and that simply attending a meeting with no intention to attempt to resolve the review application would be not considered appropriate 'engagement'. 	<p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>discuss respectful engagement.</p>
<p>1.31 – Preliminary view</p> <ul style="list-style-type: none"> Paragraph 1.31 states 'The OAIC may provide a preliminary view at any time ... The applicant may be invited in some cases to withdraw the IC review application, depending on the views expressed in the preliminary view'. 	<ul style="list-style-type: none"> The AAT submits that if there is an opportunity for the parties to provide information in response to the preliminary view, it may be useful to state this. Such a view may raise a fact or issue that can be addressed. 	<p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>which says:</p> <p>Formatted: Heading 1 - Right Aligned</p> <p>material submitted by both parties and provide a preliminary view as to the merits 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.</p>
<p>Revised decisions are not referred to in the draft procedure direction</p>	<ul style="list-style-type: none"> N/A (observed by OAIC) 	<p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>says:</p> <p>Formatted: Heading 1 - Right Aligned</p> <p>A decision of 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.</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p>
<p>General</p>	<ul style="list-style-type: none"> AGD queries if it may be simpler and more effective for all users of the FOI system to have a single direction, addressed to both the agency and the applicant. This would ensure all parties have a consistent understanding of the IC review process. By comparison, we note the AAT General Practice Direction (General Practice Direction.pdf (aat.gov.au)), under s 18B of the Administrative Appeals Tribunal Act 1975 applies to all parties to a review and appears to provide greater consistency in the explanation of process and responsibilities. 	<p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>they require to gain the benefit of an IC review.</p>

Proposed new paragraph	Summary of agencies' submissions	
<p>General</p>	<ul style="list-style-type: none"> AGD submits that it is unclear what practice directions (if any) apply to third parties joined to an IC review or whether the process for an IC review in the directions for agencies and applicants may differ where there are other parties to the review. 	<p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>sufficient also engage which gives them the required information about the IC review process and their rights and obligations in relation to the IC review.</p>
<p>General</p>	<ul style="list-style-type: none"> ATO submits that a delay in seeking a review by an applicant should be a ground for providing an agency with additional time to respond. 	<p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>our re applicant for an IC FOI Act, which include to facilitate and promote public access to information, promptly and at the lowest reasonable cost.</p>

[Angelene Falk](#)
[Australian Information Commissioner](#)

DATE

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From: [HARLOCK,Raewyn](#)
To: [AGO,Rocelle](#)
Cc: [PEEL,Sara](#)
Subject: RE: Proposed amended procedure directions and Part 10 of the FOI Guidelines [SEC=OFFICIAL]
Date: Monday, 6 May 2024 5:03:33 PM

Dear Rocelle

I have compared the 2 documents (applicant and agency PD) and note:

1. The applicant PD refers to the IC (see 2.3 and 2.5). I think it would be more responsive to the audience to say 'Information Commissioner' where it is necessary to refer to that position (I note that most references are to the OAIC so question whether there needs to be consistency).
2. While generally onus is more of an issue for the agency, I think there is benefit in having a paragraph about onus in the applicant PD because **third party applicants** bear the onus in access grant reviews. In that context it may be a good idea to let applicants in access refusal reviews know that it's up to the agency to make their case.
3. 2.15 of applicant PD refers to agencies having to provide information about engagement but doesn't introduce what the engagement is, when it will occur or why. Applicants will need to know this, what to expect and the OAIC's expectations about their role before going into methods of engagement and what agencies have to provide.
4. 2.21 of applicant PD – the heading and the content of the paragraph are inconsistent – one refers to responding to requests for information and the other responding to inquiries. These are not necessarily the same thing.
5. There is an explanation of a preliminary view in the applicant PD (2.28) (i.e., outlines the case officer's thinking) that is missing in 3.31 of the agency PD.
6. 2.11 of the agency PD is missing a word or 2 in the first line.
7. 3.1 of the agency PD says 'This Part applies to all IC review applications, other than applications for IC review of the decisions set out in Part 4.' I was confused as to whether Part 4 was a reference to Part 4 (Part IV) of the FOI Act or Part 4 of **this Direction**. I think **this Direction** needs to be added.
8. 3.7 in the agency PD is about providing an adequate statement of reasons. Should the agency be required to send this to the FOI applicant at the same time (as they are required to do with submissions)?

I haven't identified anything else that is inconsistent or that is in the agency PD that should be in the applicant PD.

Raewyn

From: AGO,Rocelle <Rocelle.Ago@oaic.gov.au>
Sent: Monday, May 6, 2024 3:49 PM
To: HARLOCK,Raewyn <Raewyn.Harlock@oaic.gov.au>
Cc: PEEL,Sara <Sara.Peel@oaic.gov.au>
Subject: Proposed amended procedure directions and Part 10 of the FOI Guidelines [SEC=OFFICIAL]
Importance: High

From: [AGO,Rocelle](#)
To: [TYDD,Liz](#)
Cc: [HARLOCK,Raewyn](#); [PEEL,Sara](#)
Subject: Procedure Directions and Part 10 of the FOI Guidelines: Proposed amendments [SEC=OFFICIAL]
Date: Monday, 6 May 2024 7:37:26 PM

Dear Liz

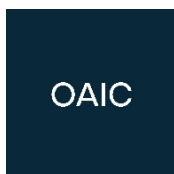
Please find below for your approval, links to the revised procedure directions and Part 10 of the FOI Guidelines:

Document	Link	Notes
Procedure Direction: Agencies	D2024/012002	Marked up based on previous version you provided on 6 May 2024: Please find proposed amendments to paragraph: 1.5 (typo) 3.1 Addition of 'This Direction' to make it very clear. Signature: Amended to you as Acting Information Commissioner Annexure A.1 para 2.3 – proposed amendment to capture the essence of our discussion but to provide clarity of expectations on agencies and ministers Annexure A.2 para 2.1: Removal of references to deemed provisions (typo) Annexure A.2 para 2.3: proposed amendment to capture the essence of our discussion but to provide clarity of expectations on agencies and ministers
Procedure Direction: Applicants	D2024/012047	Changes marked up reflect changes to current procedure direction as published on OAIC website: Suggestions for consistency and minimising duplication
FOI Guidelines	D2024/012010	Changes marked up reflect changes to current Part 10 of the FOI Guidelines as published on OAIC website: Suggestions for consistency and minimising duplication I've suggested a significant change, including deleting all of the current content under the section 'Steps in an IC review' Following your review, it may need to come back to the team for a thorough proofread

Our implementation timeline is set out below:

Task	Time period
Procedure Directions and FOI Guidelines to proceed to IC	6 May 2024
Develop FAQs / high level summary of changes Develop IC review external guidance (forms/checklists)	7 May 2024
Approval of procedure directions and FOI Guidelines Part 10 by Information Commissioner	8 May 2024
Advise FOI Branch of approval of procedure directions and Part 10 FOI Guidelines, including high level summary of changes	8 May 2024
Publish procedure directions, FOI Guidelines and summary statements into dedicated page, noting effect from 1 July 2024. Include FAQs	14 May 2024
ICON alert: Special edition	14 May 2024
Meet with FOI Branch to discuss changes / Q&A	17 May 2024
Development, implementation and testing of <ul style="list-style-type: none"> • Resolve workflows • Process documents 	31 May 2024
Staff training and engagement	Early June 2024
ICON alert	June 2024 (to confirm with MGE)
Archive previous direction and replace with new direction	1 July 2024
ICON alert: Special edition	1 July 2024

Kind regards



Rocelle Ago (she/her)

Assistant Commissioner, Freedom of information
Office of the Australian Information Commissioner

P +612 9942 4205 M s47F E rocelle.ago@oaic.gov.au

The OAIC acknowledges Traditional Custodians of Country across Australia and their continuing connection to land, waters and communities. We pay our respect to First Nations people, cultures and Elders past and present.

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Part 1: About this direction

Application

~~1.1 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). This direction is given by the Australian Information Commissioner under s 55(2)(e)(i) of the *Freedom of Information Act 1982* (FOI Act) in relation to Information Commissioner reviews (IC reviews).

1.2 This written direction sets out the procedure to be followed by applicants for IC reviews undertaken by the Information Commissioner under the FOI Act.

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 the Information Commissioner (IC) for a review of a decision under the FOI Act (IC review).¹

~~The Information Commissioner 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 Information Commissioner (s 54W(e)).~~

~~1.4 The Information Commissioner may also give written directions as to the procedure to be followed in relation to a particular IC review (s 55(2)(e)(iii)).~~

~~1.5 This direction does not apply to the extent it is inconsistent with a provision of the FOI Act, another enactment or a specific direction made in a particular IC review under s 55(2)(e)(ii) of the FOI Act.~~

1.65 Further information relating to the IC review process is published on the Office of the Australian Information Commissioner's (OAIC) website. In particular, Part 10 (Reviews by the Australian Information Commissioner) of the Guidelines issued by the Information Commissioner under s 93A of the FOI Act (FOI Guidelines) describes the principles that inform the ~~OAIC's~~ IC's approach to IC reviews.

1.76 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.

~~1.87 This direction applies to IC review applications received~~ has effect from 1 July 20232024. For IC review applications received before 1 July 2024, specific directions may be made in the context of these IC reviews. This Direction is not a legislative instrument.²

¹ Section 55(2)(e)(ii) of the FOI Act

² Section 55(3) of the FOI Act.

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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'. Access refusal decisions

1.40 An 'access refusal decision' means (s 53A):

- 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 all the 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 (s 21) (see Part 3 of the Guidelines)
- e. a decision relating to the imposition or amount of a charge (s 29)
- f. a decision to give access to a document to a 'qualified person' (where disclosing the information to the applicant might be detrimental to the applicant's physical or mental health or well-being) (s 47F(5))
- g. a decision refusing to amend a record of personal information in accordance with an application (s 49)
- h. a decision refusing to annotate a record of personal information in accordance with an application (s 49).

1.41 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 Information should give a decision adverse to the person who made the request (s 55D(2)).

1.42 Given that the agency or Minister bears this onus, it will generally be necessary to undertake inquiries or seek information from the agency or Minister before inviting comment from applicants.

IC review means Information Commissioner review.

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Part 2: The IC review process Matters applying to all applications

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2.1 This Part applies to all IC review applications.

General principles

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2.2 1.9 IC review procedures are found in Part VII of the FOI Act.

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2.3 In relation to each IC review, the IC must:

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

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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 The IC review process is intended to be an informal, non-adversarial and timely means of external merits review of FOI decisions made by agencies and ministers. Part 10 of the FOI Guidelines, to which agencies and ministers must have regard when performing a function or exercising a power under the FOI Act, sets out in detail the process and underlying principles of IC review.

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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:

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- 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.

2.5 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 Information should give a decision adverse to the person who made the request (s 55D(2)).

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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].

Making an application for IC review

~~2.46~~ ~~1.10~~ — 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. [The online form is located at: https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICR_10](https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICR_10).⁷

~~1.11~~ — Where it is not possible for an application to be made online, applications may be sent to the OAIC by:

Postal address [GPO Box 5218](#)
[Sydney NSW 2001](#)

Email address FOIDR@oaic.gov.au

Fax [+61 2 9284 9666](tel:+61292849666)

• [email to foidr@oaic.gov.au](mailto:foidr@oaic.gov.au)

• [mail to FOI Regulatory Group, GPO Box 5218, Sydney NSW 2001.](mailto:FOI_Regulatory_Group@oaic.gov.au)

~~2.57~~~~1.12~~ — ~~1.12~~ 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
- 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).

~~1.13~~ ~~2.68~~ — The ~~OAIC-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 ~~OAIC-IC~~ will consider any notices as received when sent to an applicant's preferred contact.

~~2.79~~ ~~1.14~~ — 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
- 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.

~~1.15~~ ~~2.810~~ — 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](#)

⁷ 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>.

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an IC review of that access grant decision (s 54M(3)(a)). The ~~OAIC~~ 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.

Commented [E2]: Added 4 Apr 2024.

~~1.16~~ ~~2.911~~ 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.

~~1.17~~ ~~2.192~~ The applicant must provide the ~~OAIC~~ 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. ~~However~~ The - in 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 in the case of where they are seeking review of a deemed access refusal, applicants must apply directly for IC review.
 - 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.⁸
 - If an application for IC review is not made within the timeframes in the FOI Act, applicants may apply to the Information Commissioner 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 Information Commissioner 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.

Commented [E3]: Updated wording slightly to try to make clearer per Attachment B on 4 Apr 2024.

Commented [JE4]: The draft Part 10 of the FOI Guidelines (D2022/009530) cover s 54T at para 10.46 and I have put a comment at that para noting that the same kind of information is here.

Para 10.46 adds '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', and we may consider whether that detail should also be here.

~~1.18~~ ~~2.113~~ An application for IC review should also:

⁸ [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 \(the agency or minister\).](#)

- a. identify the aspect(s) of the agency's or Minister's parts of the decision about which they want the Information Commissioner to review is sought
- 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.

Commented [E5]: Updated 4 Apr 2024.

1.19–2.124 The OAIC-IC must provide 'appropriate assistance' to a person who wishes to apply for IC review and requires assistance to prepare the IC review application (s 54N(3)).

1.20–2.135 Section 54N of the FOI Act sets out the requirements for the contents and delivery of an application for IC review. These requirements include giving the OAIC-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. An application that does not comply with these requirements may be considered to be invalid.

During the IC review

Changes to contact details

1.21 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 Information Commissioner may decide not to undertake an IC review, or not continue to undertake an IC review, if the applicant or their nominated representative cannot be contacted after making reasonable attempts (s 54W(a)(iii)).

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Participation in the IC review Engagement between parties at the commencement of an IC review

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2.156 The OAIC requires agencies and Ministers to engage with the IC review applicant to resolve or narrow the issues in dispute in the IC review, provide information regarding engagement, and/or reasonable attempts to engage, with the applicant to resolve or narrow the issues in dispute in the IC review.

Method of engagement

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

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2.18 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.

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Demonstration of engagement or attempts to engage

2.19 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.

2.20 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)).

General principles Responding to requests for information from the OAIC

1.222.21 Applicants must respond to ~~inquiries~~ requests for information from the OAIC within the time provided unless there are 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 why additional time is needed and propose a new date for response. Approval of an extension request is at the discretion of the OAIC.

~~1.23-2.22 -The OAIC expects that applicants and agencies will treat our officers engage with the IC review process, with respect and courtesy. The Information Commissioner expects that applicants and agencies participate in the IC review, including engagement with each other at the beginning of the IC review, with respect and courtesy. The parties' meaningful participation in engagement with each other would mean that they are more likely to resolve the issues in the IC review.~~

Receiving revised decisions under s 55G

2.23 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
- 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.

⁹ OAIC service charter.

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Commented [RA8]: While there is a separate section for agencies on deemed refusals, I think the process is largely for agencies to understand and the takeaway for applicants is they may receive a s 55G decision.

2.24 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).

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At the commencement of an IC review

1.243 The OAIC requires agencies and Ministers to engage with the IC review applicant at the commencement of an IC review. The purpose of this engagement is to attempt to resolve the issues identified in the IC review application in an informal and timely way. Agencies are required to contact applicants for IC review shortly after the IC review application is lodged receiving the Information Commissioner's notice of IC review under s 54Z to arrange a suitable time for the engagement process. 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)).

1.24 The Information Commissioner may use any technique the Information Commissioner considers appropriate to facilitate an agreed resolution of the matters at issue in the IC review (such as alternative dispute resolution processes—s 55(2)(b)). Where appropriate, and following the compulsory engagement process described above, the OAIC may invite applicants to attend a teleconference to discuss the issues in dispute in the IC review with the agency's or Minister's office and to explore options for resolution, with a view to reaching agreement on some or all of the matters at issue in the IC review.

Receiving revised decisions under s 55G

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1.25 An agency or minister may make a 'revised decision' under s 55G of the FOI Act during an IC review, giving access to further material. 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 undertake an IC review, or not continue to undertake an IC review, if an IC review applicant has failed to cooperate in progressing the IC review application or the IC review without reasonable excuse (ss 54W(a) and 54W(c) of the FOI Act(ii)).

Submissions

2.235 1.26 — 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

2.26 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.

2.27 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 decision under s 55K of the FOI Act without any further opportunity to make submissions.

2.28 IC review applicants should not expect the opportunity for further submissions. Any request for extensions of time should only be made where exceptional circumstances can be demonstrated this is because extensions of time will only be granted in exceptional circumstances.

1.27 Applicants will be invited to make written submissions after the initial triage and early resolution process is complete, and once the application has been assigned to a review adviser for substantive review/case management. First, the agency or Minister will be asked to make submissions in support of the IC reviewable decision. The agency or Minister will send the applicant a copy of their submissions at the same time as they are sent to the OAIC. The applicant will then have the opportunity to make submissions addressing any issues raised by the agency or the Minister. The applicant is required to send their submissions to the agency or Minister at the same time as they are sent to the OAIC.

1.28 The Information Commissioner will generally give the parties (both the applicant and the agency or Minister) 4 weeks to make their submissions.

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~~1.29~~ The Information Commissioner will not accept any further submissions from either party to the IC review unless the Information Commissioner has requested them.

~~1.30~~ The Information Commissioner will contact the parties after receipt of submissions if procedural fairness requirements have been identified. For information on procedural fairness see [3.15]—[3.31] of Part 3 of the FOI Guidelines.

~~1.31~~ ~~2.28~~ The OAC may provide a preliminary view at any time during the IC review. This will outline the case officer's preliminary thinking on the issues in dispute in the IC review. The applicant may be invited in some cases to withdraw their IC review application, or make submissions in response to a preliminary view, depending on the views expressed in the preliminary view

~~1.32~~ ~~2.2929~~ The IC review application and any attachments will be shared with the agency or Minister, as well as any other parties to the review, unless there is a reason not to do so. Any other information and submissions provided to the OAC by the applicant will be made available to the other parties to the IC review.

Request to make submissions in confidence

~~1.33~~ ~~2.3030~~ Applicants can apply to the OAC to make a submission in confidence. The applicant must give reasons why they want to make a confidential submission and the OAC will consider those reasons and decide whether to accept the submission on a confidential basis. If the OAC agrees to treat a submission confidentially, the applicant may be required to provide a second version of the submission which can be shared.

Changes to contact details

~~2.31~~ ~~14~~ An applicant or nominated representative must advise the OAC if there are any changes to their contact details as soon as it is possible to do so. The Information Commissioner may decide not to undertake an IC review, or not continue to undertake an IC review, if the applicant or their nominated representative cannot be contacted after making reasonable attempts (s 54W(a)(iii)).

~~1.34~~ Generally, submissions should be made in writing and sent by email or pre-paid post. In limited circumstances, if an applicant is unable to provide written submissions, the OAC may agree to accept verbal submissions by telephone.

Information Commissioner decisions

~~1.35~~ ~~32~~ ~~1~~ 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

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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.

~~1.362.323~~ ——— 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. When the Information Commissioner makes a decision on IC review under s 55K of the FOI Act, the Information Commissioner will quote or summarise the submissions in the published decision. If a confidential submission is relied on by the Information Commissioner in making a decision on the IC review, this will be noted in the decision without revealing the confidential material.

~~1.37~~ ~~2.334~~ To protect against the unreasonable disclosure of personal information, the Information Commissioner will consider whether identifying information should be included in published decisions. Natural persons ~~will may opt not to~~ 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: Procedure for IC review of specific types of decisions

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Deemed access refusal decisions

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1.38 — A ‘deemed access refusal’ occurs when the statutory time for making a decision on an FOI request for access to a document has expired and notice of the decision has not been given. In these circumstances the agency or Minister is ‘deemed’ to have refused the FOI request. Where the applicant applies for IC review of a deemed access refusal decision, the OAIIC will make inquiries with the agency or Minister.

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~~1.39 — If, during the IC review, the agency or Minister sends the applicant a written decision on the applicant's FOI request, the OAIIC will check confirm whether with the applicant is whether they are satisfied with the decision. Applicants who are satisfied with the decision and do not wish to proceed with the IC review must advise the OAIIC in writing that they withdraw their application for IC review. Applicants who are not satisfied with the agency's or Minister's decision must explain why they disagree with the decision and the basis on which they wish to proceed with the IC review. If the applicant does not respond to the OAIIC's correspondence, the Information Commissioner may decide not to undertake an IC review on the basis that the applicant has failed to cooperate in progressing the IC review application without reasonable excuse (s 54W(a)(ii)) or for non-compliance with the procedure direction (s 54W(c)).~~

~~Access refusal decisions~~

~~1.40 — An 'access refusal decision' means (s 53A):~~

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- ~~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 all the 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 (s 21) (see Part 3 of the Guidelines)~~
- ~~e. a decision relating to the imposition or amount of a charge (s 29)~~
- ~~f. a decision to give access to a document to a 'qualified person' (where disclosing the information to the applicant might be detrimental to the applicant's physical or mental health or well-being) (s 47F(5))~~
- ~~g. a decision refusing to amend a record of personal information in accordance with an application (s 48)~~

~~h. a decision refusing to annotate a record of personal information in accordance with an application (s 48).~~

~~1.41 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)).~~

~~1.42 Given that the agency or Minister bears this onus, it will generally be necessary to undertake inquiries or seek information from the agency or Minister before inviting comment from applicants.~~

~~Access grant decisions~~

~~1.43 An 'access grant decision' means a decision to grant access to a document where there is a requirement to consult a third party (s 53B). Such decisions involve granting the FOI applicant access to information or documents following consultation.~~

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~~1.44 In an IC review of an access grant decision, it is the IC review applicant who bears the onus of establishing that a decision refusing the FOI request is justified, or that the Information Commissioner should give a decision adverse to the FOI applicant (s 55D(2)).~~

~~1.45 IC review applicants will generally be invited to provide information or submissions which explain why the agency's or Minister's decision is wrong before comment is invited from the agency or Minister.~~

Part 43: Non-compliance with this direction

~~3.1 This Part applies to all IC review applications.~~

~~1.463.2 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 review as outlined in s 54W(c). This means that, in these cases, the review will be finalised.~~

~~1.473.3 Applicants will be provided with the opportunity to explain why the Information Commissioner should not finalise the IC review under s 54W(c) of the FOI Act before a decision is made.~~

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Attachment B

Summaries of updates and agencies' submissions

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Proposed new paragraph	Summary of agencies' submissions	
<p>1.8—Direction has effect from 1 July 2023</p>	<p>N/A</p>	<p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>we could state, for example:</p> <p>For IC review agencies and ministers must have regard to Part 10 of the FOI Guidelines issued under s 93A of the FOI Act which sets out the general principles and expectations of the Information Commissioner regarding IC reviews. Specific directions may be made in the context of these IC reviews.</p>
<p>1.13—OAIC contacting applicants</p> <ul style="list-style-type: none"> Paragraph 1.13 explains that the OAIC will contact applicants using their preferred contact method. Paragraph 1.13 also states 'Where an applicant has listed a preferred contact method as well as other contact information, the OAIC will consider any notices as received when sent to an applicant's preferred contact'. 	<ul style="list-style-type: none"> The AAT submits that we may wish to consider referring to an exception where there is evidence of non-receipt, such as a returned letter or email non-delivery message. 	<p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>review and would consider finalising the IC review under s 54W(a)(iii) (cannot contact applicant after making reasonable attempts).</p> <ul style="list-style-type: none"> We consider that it is not worthwhile discussing our power under s 54W(1)(a)(iii) here, at the beginning of the procedure direction.
<p>1.15—Who can be an IC review applicant?</p> <ul style="list-style-type: none"> Paragraph 1.15 refers to s 54L(3), namely that an IC review application may be made by the person who made the request to which the decision relates, and the proceeding paragraphs 1.16 to 1.20 set out the requirements for the IC review application. 	<ul style="list-style-type: none"> The AAT queries whether the requirements for IC review applications of access grant decisions (s 54M) are the same as those discussed at paragraphs 1.16 to 1.20. 	<p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>access grant decisions.</p> <ul style="list-style-type: none"> Minor updates may be required to following paragraphs, such as to para 1.18(c) so that we refer to 'wrongly granted' rather than 'wrongly refused'.
<p>1.17(a)—Information that must be provided with IC review application:</p> <ul style="list-style-type: none"> Paragraph 1.17 states that 'The applicant must provide the OAIC with about the FOI decision, in particular (a)... (b)... (c)... (d)...'. Paragraph 1.17(a) states that the applicant should say whether the decision under review is an original decision or internal review decision, and notes 'it is usually better to seek internal review first...' (emphasis added) 	<ul style="list-style-type: none"> Defence proposes that we consider making internal review compulsory, in circumstances which allow it. This would allow for agencies and ministers to have further meaningful engagement with the applicant before they seek an IC review in an attempt to resolve the issues in an informal and timely way, thus reducing the workload for the OAIC. ATO submits that it is unclear whether there will be any requirement on the applicant to either seek internal review or provide details on why they did not consider it appropriate in the circumstances (ATO). 	<p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <ul style="list-style-type: none"> We could consider making clearer by way of a separate dot point that, for example 'applicants have a choice between applying for internal or IC review of a decision, unless the decision was made by the Minister or personally by the principal officer of an agency, or is a deemed access refusal decision. In those cases, applicants must directly apply for IC review.'

Proposed new paragraph	Summary of agencies' submissions	
<p>1.17(b) – Information to be provided with IC review application</p> <ul style="list-style-type: none"> Paragraph 1.17(b) notes that 'In most cases, an application for IC review must be made within 60 days of the applicant being notified of the ... decision ...'. (emphasis added) 	<ul style="list-style-type: none"> The AAT submits that we may wish to consider whether the date of receipt of the decision is also relevant. 	<p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>will con Given that by ema distinguish between the date a notice is given and the date received. The 60-day time limit for applying for IC review of an access refusal decision is also generous, which lessens the need to distinguish between when a notice is given, and received.</p>
<p>1.17 (general) Agency reference number</p>	<ul style="list-style-type: none"> AFP submits that applicants should also be required to provide the agency reference number for the FOI decision. 	<p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>is already to coop se</p>
<p>1.18 – Further information to be provided with IC review application:</p> <ul style="list-style-type: none"> Paragraph 1.18 advises that 'An application for IC review should also: (a) ... (b) ... (c) ... (d) ...', such as the aspects of the decision about which they seek the IC review. (emphasis added) 	<ul style="list-style-type: none"> ATO submits that given the mandatory consultation requirement proposed to be put on agencies it would appear appropriate for applicants to be required to provide the information set out in this paragraph prior to any consultation occurring. ATO also queries whether a failure to provide this information would be considered a 'failure to engage'. 	<p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>subheading 'During the IC review', and does not need to be discussed in this section, the first section (under the subheading Making an application for IC review):</p> <ul style="list-style-type: none"> We are required to provide appropriate assistance to a person who wishes to make an IC review application, and requires assistance (s 54N(3)), and therefore it is not appropriate to emphasise the power to finalise an IC review at the application stage):
<p>1.18(a) – Further requirements of IC review application</p> <ul style="list-style-type: none"> Paragraph 1.18(a) says that an application should 'identify the aspect(s) of the ... decision about which the IC review is sought'. 	<ul style="list-style-type: none"> AGD submits that this wording may be confusing for some readers, and could alternatively say "identify the parts of the decision you want the Information Commissioner to review". Defence submits that at para 1.18, the revisions suggest that an IC review application should identify why the agency's or minister's decision is wrong. Defence proposes making this compulsory, saying that would assist the agency or minister to better understand and resolve the issues in a meaningful, informal and timely way. 	<p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>the pa that providing the information listed in para 1.18 is already framed as a requirement, stating 'should'.</p>
<p>1.23 Engagement to resolve issues (issue 1)</p>	<ul style="list-style-type: none"> AAT submits that engagement should only be required if there has been no internal review of the decision. 	<p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>procedu require reason request in a manner that complies with s 15 (s 15(3)), such as during an internal review process.</p>

Proposed new paragraph	Summary of agencies' submissions	
<p>1.23 Engagement to resolve issues (issue 2)</p> <ul style="list-style-type: none"> Paragraph 1.23 states 'Agencies are required to contact applicants for IC review shortly after the IC review application is lodged to arrange a suitable time for the engagement process.' (emphasis added) 	<ul style="list-style-type: none"> AAT, AFP, and the Commonwealth Ombudsman submit that paragraph 1.23 should say that agencies are required to contact applicants to arrange the engagement after receiving the s 54Z notice. AFP in particular notes that there can be a delay between an IC review application and s 54Z notice. 	<p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p>
<p>1.23 Engagement to resolve issues (issue 3)</p>	<ul style="list-style-type: none"> ATO submits it would also be helpful to provide applicants with further details about what is expected of them in terms of participating in agency engagement and that simply attending a meeting with no intention to attempt to resolve the review application would be not considered appropriate 'engagement'. 	<p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>discuss respectful engagement.</p>
<p>1.31 – Preliminary view</p> <ul style="list-style-type: none"> Paragraph 1.31 states 'The OAIC may provide a preliminary view at any time ... The applicant may be invited in some cases to withdraw the IC review application, depending on the views expressed in the preliminary view'. 	<ul style="list-style-type: none"> The AAT submits that if there is an opportunity for the parties to provide information in response to the preliminary view, it may be useful to state this. Such a view may raise a fact or issue that can be addressed. 	<p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>which says:</p> <p>Formatted: Heading 1 - Right Aligned</p> <p>material submitted by both parties and provide a preliminary view as to the merits 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.</p>
<p>Revised decisions are not referred to in the draft procedure direction</p>	<ul style="list-style-type: none"> N/A (observed by OAIC) 	<p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>says:</p> <p>Formatted: Heading 1 - Right Aligned</p> <p>A decision of 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.</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p>
<p>General</p>	<ul style="list-style-type: none"> AGD queries if it may be simpler and more effective for all users of the FOI system to have a single direction, addressed to both the agency and the applicant. This would ensure all parties have a consistent understanding of the IC review process. By comparison, we note the AAT General Practice Direction (General Practice Direction.pdf (aat.gov.au)), under s 18B of the Administrative Appeals Tribunal Act 1975 applies to all parties to a review and appears to provide greater consistency in the explanation of process and responsibilities. 	<p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>they require to gain the benefit of an IC review.</p>

Proposed new paragraph	Summary of agencies' submissions	
General	<ul style="list-style-type: none"> AGD submits that it is unclear what practice directions (if any) apply to third parties joined to an IC review or whether the process for an IC review in the directions for agencies and applicants may differ where there are other parties to the review. 	<p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>sufficient also engage which gives them the required information about the IC review process and their rights and obligations in relation to the IC review.</p>
General	<ul style="list-style-type: none"> ATO submits that a delay in seeking a review by an applicant should be a ground for providing an agency with additional time to respond. 	<p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>Formatted: Heading 1 - Right Aligned</p> <p>Formatted: Heading 1 - Right Aligned, No bullets or numbering</p> <p>our re applicant for an IC FOI Act, which include to facilitate and promote public access to information, promptly and at the lowest reasonable cost.</p>

[Angelene Falk](#)
[Australian Information Commissioner](#)

DATE

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From: [AGO,Rocelle](#)
To: [TYDD,Liz](#)
Cc: [HARLOCK,Raewyn](#); [PEEL,Sara](#)
Subject: RE: Procedure Directions and Part 10 of the FOI Guidelines: Proposed amendments [SEC=OFFICIAL]
Date: Wednesday, 8 May 2024 5:27:03 PM
Attachments: [image001.jpg](#)
[image002.jpg](#)
[image004.jpg](#)

Dear Liz

Thank you for confirming your approval – we will proceed to finalise and implement.

Kind regards

Rocelle

From: TYDD,Liz <Elizabeth.Tydd@oaic.gov.au>
Sent: Wednesday, May 8, 2024 4:54 PM
To: AGO,Rocelle <Rocelle.Ago@oaic.gov.au>
Cc: HARLOCK,Raewyn <Raewyn.Harlock@oaic.gov.au>; PEEL,Sara <Sara.Peel@oaic.gov.au>
Subject: RE: Procedure Directions and Part 10 of the FOI Guidelines: Proposed amendments [SEC=OFFICIAL]

Dear Rocelle, Raewyn and Sara

Oh my – its done! Thank you all for your herculean effort in updating this series of important guidance materials. I hope over time that our collective efforts distil the guidance further please proceed asap!

Kind regards

Liz

From: AGO,Rocelle <Rocelle.Ago@oaic.gov.au>
Sent: Monday, May 6, 2024 7:37 PM
To: TYDD,Liz <Elizabeth.Tydd@oaic.gov.au>
Cc: HARLOCK,Raewyn <Raewyn.Harlock@oaic.gov.au>; PEEL,Sara <Sara.Peel@oaic.gov.au>
Subject: Procedure Directions and Part 10 of the FOI Guidelines: Proposed amendments [SEC=OFFICIAL]

Dear Liz

Please find below for your approval, links to the revised procedure directions and Part 10 of the FOI Guidelines:

Document	Link	Notes
Procedure Direction: Agencies	D2024/012002	Marked up based on previous version you provided on 6 May 2024: Please find proposed amendments to paragraph:

		<p>1.5 (typo)</p> <p>3.1 Addition of 'This Direction' to make it very clear.</p> <p>Signature: Amended to you as Acting Information Commissioner</p> <p>Annexure A.1 para 2.3 – proposed amendment to capture the essence of our discussion but to provide clarity of expectations on agencies and ministers</p> <p>Annexure A.2 para 2.1: Removal of references to deemed provisions (typo)</p> <p>Annexure A.2 para 2.3: proposed amendment to capture the essence of our discussion but to provide clarity of expectations on agencies and ministers</p>
Procedure Direction: Applicants	D2024/012047	Changes marked up reflect changes to current procedure direction as published on OAIC website: Suggestions for consistency and minimising duplication
FOI Guidelines	D2024/012010	<p>Changes marked up reflect changes to current Part 10 of the FOI Guidelines as published on OAIC website: Suggestions for consistency and minimising duplication I've suggested a significant change, including deleting all of the current content under the section 'Steps in an IC review'</p> <p>Following your review, it may need to come back to the team for a thorough proofread</p>

Our implementation timeline is set out below:

Task	Time period
Procedure Directions and FOI Guidelines to proceed to IC	6 May 2024
Develop FAQs / high level summary of changes	7 May 2024
Develop IC review external guidance (forms/checklists)	
Approval of procedure directions and FOI Guidelines Part 10 by Information Commissioner	8 May 2024
Advise FOI Branch of approval of procedure directions and Part 10 FOI Guidelines, including high level summary of changes	8 May 2024
Publish procedure directions, FOI Guidelines and	14 May 2024

summary statements into dedicated page, noting effect from 1 July 2024.	
Include FAQs	
ICON alert: Special edition	14 May 2024
Meet with FOI Branch to discuss changes / Q&A	17 May 2024
Development, implementation and testing of <ul style="list-style-type: none"> • Resolve workflows • Process documents 	31 May 2024
Staff training and engagement	Early June 2024
ICON alert	June 2024 (to confirm with MGE)
Archive previous direction and replace with new direction	1 July 2024
ICON alert: Special edition	1 July 2024

Kind regards



Rocelle Ago (she/her)

Assistant Commissioner, Freedom of information
Office of the Australian Information Commissioner

P +612 9942 4205 **M** S47F **E** rocelle.ago@oaic.gov.au

The OAIC acknowledges Traditional Custodians of Country across Australia and their continuing connection to land, waters and communities. We pay our respect to First Nations people, cultures and Elders past and present.

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Executive brief

Responsible Executive Member:	Rocelle Ago, Assistant Commissioner FOI
Prepared by:	Jessica Eslick and Sara Peel, Director, Monitoring, Guidance and Engagement
To:	Elizabeth Tydd, FOI Commissioner
Copies:	Karen Tulloch, Raewyn Harlock
File ref:	
Date:	26 March 2024
Subject:	Proposed updates to draft IC review procedure direction for agencies

Purpose and timing

To inform you of the proposed updates to the draft IC review procedure direction for agencies (titled 'Direction as to certain procedures to be followed in IC review reviews') (the draft direction),

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Your as at 13 March 2024

Recommendations

1. That you note our proposed updates to the draft direction via comments to the following 10 paragraphs of the draft direction (Attachment A):

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- 1. [paragraph 1.5](#)
- 2. [paragraph 2.1](#)
- 3. [paragraph 2.3](#)
- 4. [paragraph 4.4](#)
- 5. [paragraph 5.1](#)
- 6. [paragraph 5.2](#)
- 7. [paragraph 5.4](#)
- 8. [paragraph 6.4](#)
- 9. [paragraph 6.5](#)
- 10. [paragraph 6.6](#)

2. That you note our summary of the submissions in response to our consultation, whether we have proposed updates to the draft direction in light of those submissions, and our rationale /comments. Note that only 3 of the proposed updates to the draft direction listed above, contained in paras 1.5 (date of effect), and 4.4 and 6.6 (timeframes for responses) at Attachment A, are relevant to those submissions (Attachment B).

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Background

The Australian Information Commissioner may give written directions under s 55(2)(e)(ii) of the FOI Act in relation to procedures to be followed in Information Commissioner (IC) reviews.

The Information Commissioner has issued 2 directions under s 55(2)(e)(ii), which are currently in effect:

- [Direction as to certain procedures to be followed in Information Commissioner reviews](#), which has had effect from 26 February 2018.
- [Direction as to certain procedures to be followed by applicants in Information Commissioner reviews](#), which had had effect from 1 September 2021.

On 9 May 2023, we sought comments from, or [consulted](#), interested stakeholders on draft revisions to each of the 2 directions.

In its consultation, we advised stakeholders:

We intend to make all submissions publicly available. Please indicate when making your submission if it contains confidential information that you do not want made public and why it should not be published. Requests for access to confidential comments will be determined in accordance with the FOI Act. If the OAIC accepts submissions in confidence you must also provide a copy that can be published.

Between 8 June 2023 and 6 July 2023, we received submissions on the draft direction from 11 agencies as follows:

1. Administrative Appeals Tribunal on 8 June 2023
2. Attorney-General's Department on 30 June 2023
3. Australian Federal Police on 30 June 2023
4. Australian Tax Office on 30 June 2023
5. Commonwealth Ombudsman on 30 June 2023
6. Department of Climate Change, Energy, Environment and Water on 30 June 2023
7. Department of Defence on 30 June 2023
8. Department of Employment and Workplace Relations on 1 July 2023
9. Department of Foreign Affairs and Trade on 6 July 2023
10. Department of Home Affairs on 30 June 2023
11. Services Australia on 30 June 2023

Related brief [D2023/015645](#) contains TRIM links to those submissions at its Attachment B.

Attachments

1. **Attachment A:** Proposed updated draft direction (with proposed updates in highlight and comments).
2. **Attachment B:** Summary of agencies' submissions in response to our consultation on the draft direction, whether we have proposed (at Attachment A) to update the draft direction in response to those submissions, and our rationale/comments.

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Attachment A

Proposed direction



Australian Government

Office of the Australian Information Commissioner

Direction as to certain procedures to be followed in IC reviews

This direction is given under s 55(2)(e)(i) of the *Freedom of Information Act 1982*.

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Direction as to certain procedures to be followed in IC reviews

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1. About this Direction

- 1.1 This Direction is given by the Australian Information Commissioner under s 55(2)(e)(i) of the *Freedom of Information Act 1982* (the FOI Act) in relation to Information Commissioner (IC) reviews generally.
- 1.2 The purpose of this Direction is to set out the particular procedures that agencies and ministers are required to follow during IC reviews, including procedures relating to:
 - deemed access refusal decisions
 - a requirement to engage, or make reasonable attempts to engage, with IC review applicants during the IC review for the purpose of genuinely attempting to resolve or narrow the matters at issue in the IC review
 - the production of documents and submissions.
- 1.3 This Direction does not apply to the extent it is inconsistent with a provision of the FOI Act, another enactment or a specific direction made in a particular IC review.
- 1.4 This Direction is not a legislative instrument.¹
- 1.5 This Direction has effect from 1 July 2024.

2. General principles

- 2.1 IC review procedures are found in Part VII of the FOI Act. The IC review process is intended to be an informal, non-adversarial and timely means of external merits review of decisions by agencies and ministers in relation to FOI requests. Part 10 of the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act, to which ministers and agencies must have regard in performing a function or exercising a power under the FOI Act, sets out in detail the process and underlying principles of IC review.
- 2.2 Before commencing an IC review, the Information Commissioner will notify the relevant agency or minister that an applicant has applied for IC review of the agency or minister's decision (s 54Z notice of IC review).²
- 2.3 Section 55(2)(a) of the FOI Act authorises the Information Commissioner to conduct an IC review in whatever way the Information Commissioner considers appropriate. Section 55(2)(d) of the FOI Act allows the Information Commissioner to obtain any information from any person and to make any inquiries that the Information Commissioner considers appropriate.
- 2.4 In general, IC reviews will be conducted on the papers unless there are unusual circumstances to warrant a hearing.³ Therefore, complete and timely production of

Commented [JE1]: We need to consider transitional arrangements and in particular, whether there are separate processes to follow for backlog matters and incoming matters.

Commented [RA2R1]: For consideration:

This Direction applies to all IC review applications received from 1 July 2024.

Liz - we discussed potentially having a separate process for backlog matters, please let us know if you would us to include the following reference?

For IC review applications received before 1 July 2024, agencies and ministers must have regard to Part 10 of the Guidelines issued under s 93A of the FOI Act which sets out the general principles and expectations of the Information Commissioner regarding IC reviews. Specific directions may be made in the context of these IC reviews.

Commented [JE3]: We could consider rewording to 'summarises the process of IC review, and sets out in details the underlying principles of IC review'.

Commented [JE4]: Note this really means request as per the revised EM 2010 ([ParlInfo - Freedom of Information Amendment \(Reform\) Bill 2010](#) ([aph.gov.au](#))).

"Proposed paragraph 55(2)(d) allows the Information Commissioner to obtain any information from any person, and to make any inquiries, that he or she considers appropriate. This is also consistent with the intention that Information Commissioner review be conducted with as little formality as possible. For example, it would allow the Information Commissioner to make early inquiries to an agency and to request information about the agency's decision. Such inquiries may facilitate the Information Commissioner forming a preliminary view about the merit of a decision. The Information Commissioner also has compulsory information gathering powers under proposed section 55R."

¹ Section 55(3) of the FOI Act.

² Not every application for IC review will proceed to an IC review. The Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* (FOI Guidelines) set out the circumstances in which the Information Commissioner may not conduct a review at [10.81] and [10.85] – [10.86].

³ See *FOI Guidelines* at [10.20] and [10.63].

documents at issue, submissions and any other information that has been requested is important.

- 2.5 Under s 55DA of the FOI Act, agencies and ministers must use their best endeavours to assist the Information Commissioner in the conduct of IC reviews. Under s 55D(1) of the FOI Act, agencies and ministers have the onus of establishing that a decision refusing access is justified or that the Information Commissioner should give a decision that is adverse to the IC review applicant in an IC review of an access refusal decision. The Information Commissioner will make a decision in an IC review on the basis of the evidence before them. Failure to properly satisfy the onus in s 55D(1) by providing the Information Commissioner with complete and appropriate evidence for an access refusal decision will increase the likelihood of a decision being made that is adverse to an agency or minister.
- 2.6 Section 55Z of the FOI Act provides immunity to a person from civil proceedings and penalties if the person gives information, produces a document or answers a question in good faith for the purposes of an IC review.

3. General procedure in relation to IC review of deemed refusal decisions

Preliminary inquiries

- 3.1 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 Information Commissioner will undertake preliminary inquiries under s 54V of the FOI Act. In undertaking preliminary inquiries, the Information Commissioner will require the agency or minister to confirm that the relevant FOI request is deemed to have been refused.
- 3.2 Agencies and ministers will have one week to respond to the Information Commissioner's preliminary inquiries.

Commencement of review

- 3.3 If the agency or minister confirms that the relevant FOI request is deemed to have been refused, or fails to respond to the Information Commissioner's preliminary inquiries, a notice under s 54Z will be issued notifying of the commencement of an IC review. This notice will be accompanied by a direction under s 55(2)(e) of the FOI Act, requiring the agency or minister to either:
 - a. make a revised decision under s 55G if the decision the agency or minister intends to make will result in the giving of access to the requested documents in full and to provide the relevant decision to the applicant and to the Information Commissioner or
 - b. make a revised decision under s 55G if the decision the agency or minister intends to make will result in the giving of access to some of the requested documents, and to provide the relevant decision and non-exempt documents to the applicant, and to provide all relevant processing documents and the documents remaining at issue to the Information Commissioner or
 - c. make submissions in support of the access refusal if the agency or minister intends refusing access to the requested documents and to send those submissions to both the

Information Commissioner and the applicant. The agency or minister must also provide all relevant processing documents and exempt documents to the Information Commissioner under s 55T of the FOI Act.

- 3.4 Agencies and ministers will have 3 weeks to respond to the Information Commissioner's written direction.
4. General procedure in relation to review of other access refusal and access grant decisions

Commencement of review

- 4.1 The Information Commissioner will issue a notice under s 54Z of the FOI Act to advise the respondent agency or minister of the commencement of the IC review (s 54Z notice).

Requirement to engage with the applicant

- 4.2 The s 54Z notice will also require the agency or minister to engage, 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 in the IC review.
- 4.3 Engagement with IC review applicants will comprise a telephone or video conference between the applicant and the agency or minister. The agency or minister will be responsible for contacting the applicant and making the necessary arrangements for the engagement process. The OAIC will not be involved in making such arrangements or in attending the telephone or video conference.

Response to s 54Z notice

Timeframe

- 4.4 The agency or minister will generally have 6 weeks to respond to the Information Commissioner's s 54Z notice. The 6 week timeframe takes into account the time needed to contact and make arrangements with the applicant for the engagement process, and to reach agreement, where relevant. It is not expected that agencies or ministers will require any additional time. The Information Commissioner will consider any request for an extension of time on a case-by-case basis. However it is expected that it will only be in extenuating circumstances that any further extension to time will be granted.

Evidence

- 4.5 Respondent agencies and ministers must provide the Information Commissioner with evidence of the action they have taken to address the issues identified in the IC review application, or actions taken to contact the applicant.⁴
- 4.6 The evidence to be provided to the Information Commissioner will include:

⁴ An agency may not be required to engage in the conciliation process if it is able to provide evidence of having engaged in a similar process at an earlier stage. However, participation in formal statutory processes (for example, the request consultation process outlined in s 24AB of the FOI Act in relation to practical refusals) will not be a basis for not consulting the applicant in relation to the IC review.

Commented [T5]: Ive changed to 6 weeks Im sure that agencies wanted 8 but we cant justify that approach

Commented [JE6R5]: Note that the Intake & Early Resolution team, sending s 54Z notices, is currently giving 8 weeks for responses.

Commented [RA7R5]: Jess - Intake is giving 8 weeks because of the proposed timeframe as listed in this draft revised procedure direction.

Thanks Liz - I don't disagree about the 6 week timeframe.

Based on the current draft of the direction, the requirement to engage with the applicant and the timeframe will apply to **all** matters (including cohort matters) - are you comfortable with that approach or would like flexibility built in?

- evidence 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
- evidence of 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
- evidence of the outcome of the engagement between the agency or minister and the IC review applicant, including any evidence 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.⁵

4.7 In the event that not all issues in dispute in the IC review are resolved through the engagement process with the IC review applicant, respondent agencies and ministers should consider whether to make a revised decision under s 55G of the FOI Act.

4.8 If the respondent agency or minister decides not to make a revised decision under s 55G giving full access in accordance with the applicant's FOI request, agencies and ministers are required to provide the Information Commissioner with the FOI request processing documents and marked up copies of the exempt documents at issue in the IC review (if applicable) (see [5.2] below).

5. General procedure for production and inspection of documents

Production of documents

5.1 The Information Commissioner has various powers to require the production of information and documents under the FOI Act. These powers are outlined in Annexure 1 to this Direction. In addition to the Information Commissioner's information gathering powers under Division 8 of the FOI Act, the Information Commissioner is able to obtain any information from any person, and to make any inquiries, that are considered to be appropriate under s 55(2)(d) of the FOI Act. Therefore, when the Information Commissioner commences an IC review by issuing a notice of IC review, the Information Commissioner will also request relevant information and documents to progress the IC review as follows:

Commented [E8]: Suggest bringing this sentence to the start of this paragraph, and then inserting para 10.116 of draft Part 10 of the FOI Guidelines:

The OAIC's request for documents may initially be informal. However, if the respondent does not comply with this informal request, the documents may be requested under a provision of the FOI Act that compels production by the respondent within a specified timeframe. If necessary [insert beginning of this para of the draft direction].

Deleted: .

⁵ At Annexure 2 to this Direction is an evidence checklist designed to assist agencies and ministers provide relevant evidence relating to the agency or minister's engagement with the applicant during the IC review.

Scope of IC review

Information to be provided by Respondent

Access refusal - Exemptions (Part IV Divisions 2 and 3, except ss 33, 34, 45A)

- The original FOI request and any correspondence with the FOI applicant that modifies the scope of the FOI request
- Copies of correspondence including file notes of relevant telephone conversations between the respondent and anyone consulted
- A marked up and unredacted copy of the documents at issue where material claimed to be exempt is highlighted with reference to the exemptions applied
- Any submissions in support of the exemptions claimed, including the application of s 11B of the FOI Act in relation to conditional exemptions
- If any third parties are notified of the IC review, a copy of the written notifications under s 54P

Access refusal – Exemptions (Part IV Division 2, ss 33, 34, 45A)

- The original FOI request and any correspondence with the FOI applicant that modifies the scope of the FOI request
- Copies of correspondence including file notes of relevant telephone conversations between the respondent and anyone consulted
- Evidence, on affidavit or otherwise, including by way of submissions, that documents are exempt under ss 33, 34, or 45A
- If any third parties are notified of the IC review, a copy of the written notifications under s 54P
- A statement identifying whether the document(s) subject to IC review and which are claimed to be exempt under s 33 relate directly or indirectly to the intelligence functions of the ACIC and the AFP. The statement should 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*)

Access refusal –FOI request does not fall within FOI Act: Part I and ss 4, 5.6, 6A, 7, 12, 20 and Schedules to the FOI Act

- The original FOI request and any correspondence with the FOI applicant that modifies the scope of the FOI request
- Information about the nature of the document in question
- The respondent's response to the FOI applicant
- Any submissions in support of the respondent's decision that the FOI request does not fall within the FOI Act

Access grant (Part IV Divisions 2 and 3 ss 47, 47F and 47G)

- The original FOI request and any correspondence with the FOI applicant that modifies the scope of the FOI request
- Copies of correspondence with the third party
- The documents in dispute
- The reasons for the decision to release the documents despite the third party's objections
- Any submissions in support of the agency's or minister's decision to grant access

Access refusal – Charges (Part III, s 29)

- The original FOI request and any correspondence with the FOI applicant that modifies the scope of the FOI request
- A copy of the preliminary estimate of charge notice sent to the FOI applicant and the FOI applicant's response
- A copy of the charges notice sent to the FOI applicant
- Any further explanation the respondent wishes to provide as to why the charge was imposed or how it was calculated, including any documentary evidence which supports the respondent's calculation of the charge
- Any submissions in support of the respondent's decision to impose a charge or in the alternative, a revised decision under s 55G of the FOI Act waiving the charge in full.

Commented [A9]: Proposed changes to reflect

- submissions will not be routinely requested during initial s 54Z notification process
- request for confirmation regarding genuine attempts made to resolve matter with applicant.

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Commented [RH10]: Not sure if I've mentioned this elsewhere however some agencies misinterpret this as requiring 2 sets of documents - one marked up (i.e., redactions applied) and one 'clean'. This is time consuming to unravel if there are lots of documents.

I've been trying to come up with a way to better describe one set of documents in which the content of the document and the exemptions that apply to that part of the document are both apparent. Any ideas?

Commented [RH11]: I assume this is used instead of decision because if the FOI Act does not apply there is no requirement to produce a statement of reasons under s 26.

Scope of IC review	Information to be provided by Respondent
<u>Access refusal – Refusal to amend or annotate a record of personal information (Part IV)</u>	<ul style="list-style-type: none"> • <u>A copy of the documents that were given to the FOI applicant</u> • <u>The reasons why the respondent considers that no amendment should be made under s 50, or the reasons why the requested annotation of records was not made under s 51</u> • <u>Any submissions in support of the respondent’s decision to refuse to amend or annotate a record of personal information</u>
<u>Access refusal – Failure to provide all documents / Adequacy of searches (Part III, s 24A)</u>	<ul style="list-style-type: none"> • <u>The FOI request and any correspondence that modifies its scope</u> • <u>A copy of any document that records the searches conducted, including if applicable:</u> <ul style="list-style-type: none"> ○ <u>Notes kept by individuals conducting searches</u> ○ <u>Correspondence between the FOI decision maker and individuals who undertook searches</u> ○ <u>Any other records of searches or recorded consideration of where to search</u> • <u>Any other relevant information that the respondent wishes to provide in support of its decision</u>
<u>Access refusal – Practical refusal (Part III, s 24)</u>	<ul style="list-style-type: none"> • <u>The original FOI request and any correspondence with the FOI applicant that modifies the scope of the FOI request</u> • <u>Copies of any correspondence including file notes of telephone conversations relating to the respondent’s request consultation process, including a copy of the letter sent to the FOI applicant and the FOI applicant’s response (if any)</u> • <u>Records that demonstrate the number of documents and/or pages encompassed by the FOI request, including but not limited to notes of any searches conducted and consultations with relevant staff members</u> • <u>An estimate of the number of hours of processing time involved and a breakdown of this time to demonstrate how the time was estimated</u> • <u>Evidence of document sampling if undertaken</u> • <u>The names and contact details of anyone who was consulted by the respondent, formally under ss 15(7), 26A or 27A, or informally (including consultation with other government agencies).</u> • <u>Any submissions in support of the respondent’s decision</u>
<u>Access refusal – information as to existence of certain documents (Part III s 25)</u>	<ul style="list-style-type: none"> • <u>Submissions in support of the respondent’s decision (relevant documents will not be requested in the first instance).</u>

Commented [A9]: Proposed changes to reflect

- submissions will not be routinely requested during initial s 54Z notification process
- request for confirmation regarding genuine attempts made to resolve matter with applicant.

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Commented [RH12]: Should this be ‘Australian Government’ agencies? (State covered by the reference to s 26A earlier in the sentence).

Scope of IC review	Information to be provided by Respondent
<p><u>Access refusal – Deemed refusal or deemed affirmation of original decision</u></p>	<ul style="list-style-type: none"> The written reasons for the decision (see [10.111]). The original decision (if the decision appealed is a deemed affirmation of the original decision) Other documents as listed above depending on the nature of the decision Submissions in support of the access refusal If the respondent subsequently makes a revised decision to grant access to some or all of the requested documents, a copy of the written reasons for decision The FOI request and any correspondence that modifies its scope. The names and contact details of anyone who was consulted formally under ss 15(7), 26A or 27A, or informally (including consultations with other Australian Government agencies). If any third parties have been notified of the IC review, a copy of the written notifications. Copies of any correspondence between the respondent and anyone who was consulted, including file notes of any relevant telephone conversations. If the IC review involves exempt matter, a marked up and un-redacted copy of all documents identified within scope of the FOI request that is subject of IC review in an electronic format.

Commented [A9]: Proposed changes to reflect

-submissions will not be routinely requested during initial s 54Z notification process
-request for confirmation regarding genuine attempts made to resolve matter with applicant.

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Commented [RH13]: This doesn't make sense (and the referenece to 10.111 is in the current part however 10.111 is about preliminary views so I can't work out what has gone wrong here.

Commented [RH14]: This is the only way I can make sense of this requirement.

Commented [A15]: For noting: Consider whether submissions are sought at this stage, given there is no statement of reasons provided

Commented [RH16]: This should be the first item.

- 5.2 In providing the Information Commissioner with a marked up copy of relevant documents, agencies and ministers must ensure that all redactions pursuant to an exemption, or deletions on the basis of relevance pursuant to s 22(1)(a)(ii) of the FOI Act, are clearly marked with reference to the relevant provision of the FOI Act that the redactions or deletions are made under. A schedule of marked up documents must also be included.
- 5.3 Agencies and ministers must provide their response within the timeframe set out in the notice, unless an extension of time has been sought and granted. However as noted at [4.4], the Information Commissioner considers that it will only be in extenuating circumstances that any further extension to time will be granted. If an agency or minister requires an extension of time to respond to a notice of IC review, the agency or minister must make a request in writing to the Information Commissioner with supporting evidence of the need for the extension prior to the due date.
- 5.4 Where an agency or minister fails to provide information and documents within the initial or extended timeframe, or requests another extension, the Information Commissioner may proceed to require the provision of information and the production of documents pursuant to s 55R of the FOI Act (discussed at Annexure 1 to this Direction).

Commented [JE18]: Suggest we say 'marked up and unredacted' and explain/define.

Deleted: <#>Document production requirements may vary from case to case depending on the issues being considered (application of exemptions, searches, charges or practical refusal).⁶ In relation to IC reviews involving the application of exemptions under the FOI Act, the Information Commissioner will require the agency or minister to provide a marked up and unredacted copy of the documents at issue in electronic format and the documents setting out any relevant consultations (for example, under ss 26A, 27 or 27A of the FOI Act).⁷¶

Deleted: <#>In IC reviews where an agency or minister claims that documents cannot be found or do not exist, the Information Commissioner will require the agency or minister to provide evidence of the searches that have been undertaken to find relevant documents.⁸ ¶
In IC reviews involving a charge or a practical refusal reason, the Information Commissioner may require the agency or minister to provide a sufficiently representative sample of documents considered to be within the scope of the request.⁹ The OAIC has developed templates to assist decision makers in providing cogent reasons for this decision. Those reasons must be adequate s55E.¶

Commented [RA22]: For consideration: Liz - given the enforcement approach we are taking, regarding moving to using regulatory powers, it may assist if we include here that notices may be issued to the Chief Operating Officer:

A notice under s 55R of the FOI Act may be issued to the Chief Operating Officer of the relevant agency.

Commented [E23R22]: Should we also refer to ss 55T and 55U here given the above suggested changes, i.e. to state in line with draft Part 10 of FOI Guidelines that the request may initially be informal?

Inspection of documents

- 5.5 Inspection of the documents at issue by the Information Commissioner in response to a request for production will only be considered in very limited situations where the agency or minister can demonstrate that the circumstances warrant inspection rather than the direct production of copies of the marked up documents.

- 5.6 What constitutes these very limited circumstances is not prescriptive and will be determined on a case-by-case basis. The onus is on the requesting agency or minister to justify that circumstances exist that warrant inspection.
- 5.7 If an agency or minister is of the view that there are circumstances that justify inspection, the Information Commissioner will require the agency or minister to provide a written request for inspection together with supporting reasons prior to the due date in the s 54Z notice of IC review.
- 5.8 The Information Commissioner considers that inspection will not be warranted where the documents at issue are subject to conditional exemptions. The Information Commissioner considers that inspection may be appropriate in some circumstances where the documents at issue are subject to a national security, Cabinet or Parliamentary Budget Office exemption claim (ss 33, 34 and 45A of the FOI Act). However, the requesting agency or minister must satisfy the Information Commissioner that the circumstances warrant inspection.¹⁰
- 5.9 If the Information Commissioner agrees to an agency's or minister's request for inspection, the agency or minister will be required to undertake all necessary arrangements to facilitate the inspection. Unless otherwise agreed, this will occur at the Information Commissioner's office.

6. General procedure in relation to submissions made during an IC review

General principles

- 6.1 All parties to an IC review will be given a reasonable opportunity to present their case through written submissions.
- 6.2 Written submissions will be sought from parties following the completion of the initial triage and early resolution process and once the matter has been assigned to a review adviser for substantive review/case management.
- 6.3 In seeking submissions from agencies and ministers in support of the IC reviewable decision, the OAIC will require the agency or minister to send their submissions to the applicant at the same time as they are sent to the Information Commissioner. 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 Information Commissioner.
- 6.4 Agencies should approach the preparation of submissions on the basis of comprehensively addressing all issues. Agencies should not expect the opportunity for further submissions. Subject to [6.6], the Information Commissioner will not accept any further submissions from either party to the IC review.
- 6.5 The Information Commissioner will generally provide each of the parties with 4 weeks to make their submissions.

Commented [RA24]: For consideration: To provide us flexibility, we could also note that is dependent on the nature of the information requested (for example, if there is only a clarification question, then we would not expect 4 weeks. Please see proposed wording below:

Depending on the nature of the information requested, the Information Commissioner will generally provide each of the parties with 4 weeks to make their submissions. A shorter timeframe may be provided where the review is expedited or prioritised by the OAIC.

¹⁰ The OAIC is able to receive secure electronic transmission of documents. For more information contact the OAIC.

- 6.6 The Information Commissioner will contact the parties after receipt of submissions if procedural fairness requirements are identified or where a preliminary view can be provided to an agency that may result in an agency or minister making a revised decision under s 55G of the FOI Act.

Request to make submissions in confidence

- 6.7 If an agency or minister wishes to make a submission in confidence, a request for the submission to be treated in confidence must be made before providing the submission. Any request for confidentiality must be accompanied by reasons to support such a claim, including whether the submission would reveal the contents of the documents at issue.
- 6.8 Where the Information Commissioner accepts a submission in confidence, agencies and ministers must provide a version of the submission that can be shared with the applicant.¹¹
- 6.9 If the Information Commissioner forms the view that the submission does not disclose exempt matter, or is otherwise not inherently confidential, the Information Commissioner will advise the agency or minister of this view and invite the agency or minister to withdraw the claim for confidentiality with respect to the submission. If the agency or minister does not wish to withdraw the claim for confidentiality they may elect to withdraw the submission because it will not be considered by the Information Commissioner to make a decision under s 55K of the FOI Act on the issues in the IC review.

Consideration of submissions

- 6.10 The Information Commissioner will generally proceed with the IC review on the basis of the evidence provided in response to the s 54Z notice, and submissions.
- 6.11 Where the Information Commissioner makes a decision on IC review pursuant to s 55K of the FOI Act, the Information Commissioner will quote or summarise an agency's or minister's non-confidential submissions in the published decision. If a confidential submission is relied on by the Information Commissioner in making a decision on the IC review, this will be noted in the decision without revealing the confidential material.
- 6.12 In providing submissions, agencies and ministers should be mindful of their obligation to assist the Information Commissioner pursuant to s 55DA of the FOI Act and their onus under s 55D of the FOI Act. As it may be appropriate for an IC review to proceed to a decision under s 55K of the FOI Act on the basis of a response to a notice of IC review, it is in agency's and ministers' interests to put forward all relevant contentions and supporting reasons in response to the notice of review.¹²
- 6.13 Agencies and ministers 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 decision under s 55K of the FOI Act without any further opportunity to make submissions.

¹¹ See *FOI Guidelines* at [10.103].

¹² See *FOI Guidelines* at [10.74].

Commented [JE25]: Should this para be moved down to sit with para 6.10 under Consideration of submissions. Suggest we also remove/summarise the following paras of draft Part 10 of the FOI Guidelines and insert them or a suitable version of them under para 6.10:

10.126 The IC review officer will consider the IC review application and the material supplied by the respondent. The IC review officer may ask the respondent or the applicant to provide additional information or submissions at this stage.

10.127 After preliminary assessment of all the material by the IC review officer, the IC review officer may decide to form a preliminary view of the issues in the IC review and advise the respondent or the applicant, as relevant.

10.128 If the preliminary view is against the respondent, the preliminary view will be provided to the respondent. The Information Commissioner or the IC review officer will then invite the respondent to issue a revised decision in line with the preliminary view or make submissions in response to it.

10.129 If the preliminary view is against the applicant, the preliminary view will be provided to the applicant. The IC review officer will then invite the applicant to withdraw the IC review application in writing or make submissions in response to the preliminary view.

10.130 It should also be noted that in exceptional cases, where the Information Commissioner has personally inspected the documents and formed the view that they should be released in part or in full, the Information Commissioner may provide the respondent with their preliminary view. The respondent will be given the opportunity to make a revised decision or make further submissions before the IC review proceeds to a decision under s 55K. Any submissions provided by the respondent in response to this preliminary view will be provided to the IC review applicant for comment unless the respondent asks that the submissions be treated in confidence and adequate reasons by way of submissions are provided to support the claim. Where the Information Commissioner accepts the submission in confidence, respondents must provide a version of the submissions that can be shared with the applicant.

10.131 In relation to preliminary assessments, any submissions received during this process will generally be shared with the parties.

7. Non-compliance with this Direction

- 7.1 Because the model litigant obligation under the *Legal Services Directions 2017* extends to Commonwealth entities involved in merits review proceedings, failure to adhere to the requirements of this Direction may amount to non-compliance with the model litigant obligation.¹³
- 7.2 The Information Commissioner may report non-compliance with this Direction in the Office of the Australian Information Commissioner's Annual Report.
- 7.3 The Information Commissioner may also report non-compliance with this Direction to the Office of Legal Services Coordination in the Attorney-General's Department.
- 7.4 The Information Commissioner may also consider investigating the non-compliance under Part VIIIB of the FOI Act.

Angelene Falk
Australian Information Commissioner

DATE

¹³ See paragraph 3 of Appendix B to the *Legal Services Directions 2017*.

Annexure 1: Information gathering and document production powers

1. Notice to Produce

- 1.1 Pursuant to s 55R(3) of the FOI Act, the Information Commissioner may issue a written Notice to Produce to require an agency or minister to give information or produce documents of a kind specified in the Notice. A Notice to Produce may also be issued in conjunction with either ss 55T or 55U of the FOI Act (discussed below).
- 1.2 The Information Commissioner will allow at least 2 weeks for agencies and ministers to respond to a Notice to Produce. It is an offence to fail to comply with a Notice to Produce issued by the Information Commissioner.

2. Production of exempt documents generally

- 2.1 Section 55T of the FOI Act concerns the production of exempt documents generally. This section applies when an agency or a minister claims that a document is an exempt document and the document is not covered by s 55U of the FOI Act (discussed below).
- 2.2 Section 55T(2) of the FOI Act provides that, for the purposes of deciding that a document is an exempt document, the Information Commissioner may require the document to be produced. In addition, s 55T(4) of the FOI Act provides that the Information Commissioner may require the production of an exempt document for the purpose of determining whether it is practicable for an agency or a minister to give access to an edited copy of the document.

3. Production of particular exempt documents

- 3.1 Section 55U of the FOI Act concerns the production of documents subject to a national security, Cabinet or Parliamentary Budget Office exemption claim (ss 33, 34 or 45A the FOI Act).
- 3.2 Section 55U(3) of the FOI Act provides that, if the Information Commissioner is not satisfied by evidence on affidavit or otherwise that a document is an exempt document under ss 33, 34 or 45A of the FOI Act, the Information Commissioner may require the document to be produced for examination.
- 3.3 If, after examining the documents, the Information Commissioner is still not satisfied that the documents are exempt under s 33 of the FOI Act, pursuant to s 55ZB of the FOI Act, the Information Commissioner will request the Inspector-General of Intelligence and Security to appear and give evidence on the damage that would or could reasonably be expected to result from the release of the documents.¹⁴

¹⁴ The Information Commissioner has a Memorandum of Understanding with the Inspector-General of Intelligence and Security to facilitate the Information Commissioner's information gathering powers.

Annexure 2: Evidence checklist – IC review compulsory conference

The 'Direction as to certain procedures to be followed in IC review' issued under s 55(2)(e)(i) of the Freedom of Information Act 1982 by the Australian Information Commissioner requires agencies and ministers to engage, or make reasonable attempts to engage, with IC review applicants during the IC review.

Agencies and ministers must provide the Information Commissioner with evidence of the action they have taken to address the issues identified in the IC review application, or actions taken to contact the applicant. This checklist has been developed to assist agencies provide relevant evidence and can be used as a cover when providing relevant evidence to the OAIC.

1. Contact with IC review applicant

Evidence of earlier engagement in similar process*	<input type="checkbox"/> Attached <input type="checkbox"/> Not applicable
Copy of letter sent to IC review applicant to arrange contact	<input type="checkbox"/> Attached <input type="checkbox"/> Not applicable
Date of Letter	[insert date]
File note of telephone call to IC review applicant	<input type="checkbox"/> Attached <input type="checkbox"/> Not applicable
Copies of written correspondence from IC review applicant	<input type="checkbox"/> Attached <input type="checkbox"/> Not applicable

2. Attempts to resolve issues in dispute

File note of engagement with applicant	<input type="checkbox"/> Attached <input type="checkbox"/> Not applicable
Suggestions made by agency/minister to resolve IC review	<input type="checkbox"/> Attached <input type="checkbox"/> Not applicable
Response provided by applicant, and any suggestions made by applicant to resolve IC review	<input type="checkbox"/> Attached <input type="checkbox"/> Not applicable

3. Outcome of engagement

Outcome of engagement	<input type="checkbox"/> Attached <input type="checkbox"/> Not applicable
Written notification that IC review applicant wishes to withdraw their application for IC review	<input type="checkbox"/> Attached <input type="checkbox"/> Not applicable

* An agency may not be required to engage in the engagement process if it is able to provide evidence of having engaged in a similar process at an earlier stage. However, participation in formal statutory processes (for example, the request consultation process outlined in s 24AB of the FOI Act in relation to practical refusals) will not be a basis for not consulting the applicant in relation to the IC review.

Attachment B

Summaries of updates and agencies' submissions

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>1.5</p> <p>Direction has effect from 1 July 2023</p>	<ul style="list-style-type: none"> Concerns about ability to comply with Direction by 1 July 2023, recommends implementation date be extended to at least 1 October 2023 (DVA). 	<ul style="list-style-type: none"> <u>Updated</u>: This Direction has effect from 1 July 2024. <u>Comments</u>: We should potentially have a separate process for backlog matters, e.g. for IC review applications received before 1 July 2024, agencies and ministers must have regard to Part 10 of the FOI Guidelines issued under s 93A of the FOI Act which sets out the general principles and expectations of the Information Commissioner regarding IC reviews. Specific directions may be made in the context of these IC reviews.
<p>3.3</p> <p>Deemed decisions</p>	<ul style="list-style-type: none"> Requirement to provide processing documents to OAIC at same time as making a revised decision to give access in part under s 55G appears to be premature given that applicant may withdraw after receiving the revised decision (AAT). Requirement to make submissions in support of deemed access refusal decision should be framed as requirement to give reasons for deemed access refusal decision (AAT). 	<ul style="list-style-type: none"> <u>Not updated</u> <u>Comments</u>: We could remove the requirement to provide processing documents at the time of making a revised decision or submissions/giving reasons for the deemed decision. We could instead add to the Procedure Direction that we will ask the applicant whether they wish to proceed with their IC review application and, if so, the process under the next heading, 'General procedure ...' will apply, including engagement. We could consider whether submissions in support of deemed access refusal decisions should be framed as reasons for decision. For example, paragraph [3.161] of the FOI Guidelines explains: <ul style="list-style-type: none"> Where an access refusal decision is deemed to have been made before a substantive decision is made, the agency or minister continues to have an obligation to provide a statement of reasons on the FOI request. This obligation to provide a statement of reasons on the FOI request continues until any IC review of the deemed decision is finalised.
<p>4.2</p> <p>Engage the IC review applicant</p>	<ul style="list-style-type: none"> Engagement may have little value in many matters, for example where agencies have already engaged with the applicant during the FOI process, and where the matter relates to exemptions that do not 	<ul style="list-style-type: none"> <u>Not updated</u>

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
	<p>allow for open discussion with the applicant (such as the national security, defence or international relations exemptions in s 33) (AAT).</p> <ul style="list-style-type: none"> • There should be exceptions to engagement in some matters. For example, engagement may not be suitable where applicant repetitively requests access to documents (ATO). Engagement could be satisfied by a statement under s 6 of the <i>Civil Dispute Resolution Act 2011</i> as can be given in Federal Court of Australia matters (AAT). • Engagement is inconsistent with trauma-informed approach when interacting with veterans (DVA) • Work health and safety risks to staff engaging with applicants who exhibit unreasonable and abusive behaviours (AFP, ATO; Defence). 	<ul style="list-style-type: none"> • <u>Rationale:</u> Anecdotally, we hear from applicants that they do not always have the opportunity to engage with agencies about their FOI requests. • Engagement can lead to early resolution of matters, and overall reduce agencies' workloads, and give efficient outcomes to applicants. • In our experience, many applicants do not read or understand the reasons for the FOI decisions. Engagement can therefore give the opportunity for agencies to (1) explain their decisions to applicants, and (2) potentially resolve a matter, or narrow its scope.
4.3 Telephone or video conference	<ul style="list-style-type: none"> • Telephone or video conference may not be appropriate for applicant's who are incarcerated, disabled, overseas, or have English as a second language (AGD). • Requirement for telephone or video conference should be removed or adjusted; additional funding needed to implement that requirement, including system supports and staffing resources (DHA). • Applicants may prefer other forms of communication, and agencies may have other contact arrangements in place (AAT; Services Australia). 	<ul style="list-style-type: none"> • <u>Not updated</u> • <u>Rationale:</u> As above

Commented [JE26]: To discuss. Suggest agencies take into account applicant's preference, and any contact arrangements that the agency has put in place (assuming in both cases the only other contact option is 'write only'). The other issues appear to be issues that would not necessarily be resolved by changing the contact method to writing, but rather referring the applicant for representation. The procedure direction could discuss extending timeframes where the agency gives the applicant referral for representation, e.g. social or legal.

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>4.3</p> <p>OAIC will not be involved in the engagement</p>	<ul style="list-style-type: none"> • OAIC involvement in conferences is vital, including OAIC's high-level preliminary view and promotion of 'informal resolution strategies' (Defence). • Unmediated engagement is unlikely to lead to a resolution given that the benefit of IC review comes from the OAIC's external qualified review (DFAT). • staff are not trained as mediators (various agencies). 	<ul style="list-style-type: none"> • <u>Not updated</u> • <u>Rationale:</u> As above
<p>4.4 and 6.5</p> <p>Eight weeks to respond to s 54Z notice, including engagement ... only in extenuating circumstances for extension of time (4.4)</p> <p>Four weeks for submissions (6.5)</p>	<ul style="list-style-type: none"> • Timeframes are generally too short (AAT). • Threshold of 'extenuating circumstances' for extensions of time would appear to several of the agencies to be too high. • The AAT considers that timeframes should be set in consultation with the parties. 	<ul style="list-style-type: none"> • <u>Updated para 4.4:</u> Updated from 8 weeks to 6 weeks for s 54Z response • <u>No update to para 6.5:</u> Maintained 4 weeks for submissions • <u>Comments:</u> Respondents are now being given 8 weeks to respond to s 54Z notices – this is an extended period (from 3 weeks) consistent with the revised draft PDs. The extended period was intended to accommodate engagement between minister/agency and applicant. At present, the engagement requirement is not in play however agencies and ministers are generally expected to provide submissions within the 8 week period – this expectation around submissions would not be retained under the proposed arrangements in the new procedure directions (for agencies, and for applicants).

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>5.2 and 5.3</p> <p>Marked up and unredacted copy of the documents at issue in electronic format</p> <p>Schedule of marked up documents must also be included</p>	<ul style="list-style-type: none"> AAT considered that marking up and schedule requirements can be resource intensive. ATO noted that it makes some exemption decisions without searching for and collating the documents, e.g. Person A requesting Person B's tax return, and such decisions can be justified without providing the OAIC with the documents. The ATO also noted that schedules are not necessary where documents can quickly be found in electronic files. 	<ul style="list-style-type: none"> <u>Not updated</u> <u>Rationale:</u> IC must view the documents to decide whether they are exempt or not. Marked up documents assist the Information Commissioner in making their decision, noting the onus on agencies to establish their case (s 55D).
<p>5.5</p> <p>IC reviews involving a charge or a practical refusal reason, the Information Commissioner may require the agency or minister to provide a sufficiently representative sample of documents considered to be within the scope of the request</p>	<ul style="list-style-type: none"> DFAT and Defence request clarification as to what is needed (such as a percentage). DFAT in particular submits that providing a representative sample of documents would be an unreasonable diversion of resources. 	<ul style="list-style-type: none"> <u>Not updated</u> <u>Rationale:</u> Requirement to provide representative sample of between 10 to 15% of the documents within the scope of the request has been considered to be an appropriate sample size for the purposes of calculating processing time when deciding whether a practical refusal reason exists (paragraph [3.121] of the FOI Guidelines).

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>6.7</p> <p>Request submissions to be treated in confidence must be made before providing the submissions</p>	<ul style="list-style-type: none"> ATO and DFAT have expressed concern about the process of requesting to make confidential submissions. ATO queries why the request must be made before providing the submissions, and says that the request could be made at the same time as the submissions. DFAT seeks clarity for circumstances where the Information Commissioner refuses the request to make confidential submissions. 	<ul style="list-style-type: none"> <u>Not updated</u> <u>Rationale:</u> OAIC's starting position is that all submissions will be shared with the parties to the IC review (reflected in 5.3 of the current direction and consistent with 10.103 of FOI Guidelines - Part 10: Review by IC). Where agencies seek to depart from this position, they need to provide clear reasons – accepting submissions in confidence has procedural fairness implications. Deciding whether IC will accept confidential submissions ahead of their preparation reduces duplication – an agency will know in advance whether they need to provide 2 versions of the submissions (one confidential and one that can be shared)
<p>N/A</p> <p>Timeframes that apply to the OAIC</p>	<ul style="list-style-type: none"> AGD suggests explanation about when OAIC will endeavour to make its decision, timeframe for providing documents to the applicant (if IC varies the decision, timeframe for destruction or return of evidence documents to agencies) AGD and AAT suggest a flow chart of the IC review process. The AGD refers to the AAT's flow chart. 	<ul style="list-style-type: none"> <u>Not updated</u> <u>Rationale:</u> Neither the FOI Act nor our other legislation does provides for timeframes for IC reviews. Section 55(2)(a) provides that the Information Commissioner may otherwise conduct an IC review in whatever way they consider appropriate, and s 55(4)(c) provides that without limiting subsection (2), the Information Commissioner must conduct the IC review in as timely a manner as is possible given the matters mentioned in subparagraphs (a)(i) to (iii).

Commented [JE27]: I understand that we have published a flow chart and we could provide a link to that flow chart.

We could provide brief information in Annexure 1 about IC's obligation to return documents that agencies have produced.

Executive brief

Responsible Executive Member:	Rocelle Ago, Assistant Commissioner FOI
Prepared by:	Jessica Eslick and Sara Peel, Director, Monitoring, Guidance and Engagement
To:	Elizabeth Tydd, FOI Commissioner
Copies:	Karen Tulloch, Raewyn Harlock
File ref:	
Date:	2 April 2024
Subject:	Proposed updates to draft IC review procedure direction for agencies

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Purpose and timing

To inform you of the proposed updates to the draft IC review procedure direction for applicants (titled 'Direction as to certain procedures to be followed in by applicants in Information Commissioner reviews') (the draft direction),

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Your as at 13 March 2024

Recommendations

1. That you note our proposed updates to the draft direction via comments to the following 10 paragraphs of the draft direction (Attachment A),

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1. paragraph 1.5

2. paragraph 2.1

3. paragraph 2.3

4. paragraph 4.4

5. paragraph 5.1

6. paragraph 5.2

7. paragraph 5.4

8. paragraph 6.4

9. paragraph 6.5

10. paragraph 6.6

2. That you note our summary of the submissions in response to our consultation, whether we have proposed updates to the draft direction in light of those submissions, and our rationale /comments. Note that only 3 of the proposed updates to the draft direction listed above, contained in paras 1.5 (date of effect), and 4.4 and 6.6 (timeframes for responses) at Attachment A, are relevant to those submissions (**Attachment B**).

Background

The Australian Information Commissioner may give written directions under s 55(2)(e)(ii) of the FOI Act in relation to procedures to be followed in Information Commissioner (IC) reviews.

The Information Commissioner has issued 2 directions under s 55(2)(e)(ii), which are currently in effect:

- [Direction as to certain procedures to be followed in Information Commissioner reviews](#), which has had effect from 26 February 2018.
- [Direction as to certain procedures to be followed by applicants in Information Commissioner reviews](#), which had had effect from 1 September 2021.

On 9 May 2023, we sought comments from, or [consulted](#), interested stakeholders on draft revisions to each of the 2 directions.

In [our](#) consultation, we advised stakeholders:

We intend to make all submissions publicly available. Please indicate when making your submission if it contains confidential information that you do not want made public and why it should not be published. Requests for access to confidential comments will be determined in accordance with the FOI Act. If the OAIC accepts submissions in confidence you must also provide a copy that can be published.

Between 8 June 2023 and 6 July 2023, we received submissions on [the draft direction](#) from 11 agencies as follows:

1. Administrative Appeals Tribunal on 8 June 2023
2. Attorney-General's Department on 30 June 2023
3. Australian Federal Police on 30 June 2023
4. Australian Tax Office on 30 June 2023
5. Commonwealth Ombudsman on 30 June 2023
6. Department of Climate Change, Energy, Environment and Water on 30 June 2023
7. Department of Defence on 30 June 2023
8. Department of Employment and Workplace Relations on 1 July 2023
9. Department of Foreign Affairs and Trade on 6 July 2023
10. Department of Home Affairs on 30 June 2023
11. Services Australia on 30 June 2023

Related brief [D2023/015645](#) contains TRIM links to those submissions at its Attachment B.

Attachments

1. **Attachment A:** Proposed updated draft direction (with proposed updates in highlight and comments).

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2. **Attachment B:** Summary of agencies' submissions in response to our consultation on the draft direction, whether we have proposed (at Attachment A) to update the draft direction in response to those submissions, and our rationale/comments.

Attachment A

Proposed direction



Australian Government

Office of the Australian Information Commissioner

Direction as to certain procedures to be followed in IC reviews

This direction is given under s 55(2)(e)(i) of the *Freedom of Information Act 1982*.

Contents

Direction as to certain procedures to be followed in IC reviews

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1. About this Direction

- 1.1 This Direction is given by the Australian Information Commissioner under s 55(2)(e)(i) of the *Freedom of Information Act 1982* (the FOI Act) in relation to Information Commissioner (IC) reviews generally.
- 1.2 The purpose of this Direction is to set out the particular procedures that agencies and ministers are required to follow during IC reviews, including procedures relating to:
 - deemed access refusal decisions
 - a requirement to engage, or make reasonable attempts to engage, with IC review applicants during the IC review for the purpose of genuinely attempting to resolve or narrow the matters at issue in the IC review
 - the production of documents and submissions.
- 1.3 This Direction does not apply to the extent it is inconsistent with a provision of the FOI Act, another enactment or a specific direction made in a particular IC review.
- 1.4 This Direction is not a legislative instrument.¹
- 1.5 This Direction has effect from 1 July 2024.

2. General principles

- 2.1 IC review procedures are found in Part VII of the FOI Act. The IC review process is intended to be an informal, non-adversarial and timely means of external merits review of decisions by agencies and ministers in relation to FOI requests. Part 10 of the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act, to which ministers and agencies must have regard in performing a function or exercising a power under the FOI Act, sets out in detail the process and underlying principles of IC review.
- 2.2 Before commencing an IC review, the Information Commissioner will notify the relevant agency or minister that an applicant has applied for IC review of the agency or minister's decision (s 54Z notice of IC review).²
- 2.3 Section 55(2)(a) of the FOI Act authorises the Information Commissioner to conduct an IC review in whatever way the Information Commissioner considers appropriate. Section 55(2)(d) of the FOI Act allows the Information Commissioner to obtain any information from any person and to make any inquiries that the Information Commissioner considers appropriate.
- 2.4 In general, IC reviews will be conducted on the papers unless there are unusual circumstances to warrant a hearing.³ Therefore, complete and timely production of

Commented [JE1]: We need to consider transitional arrangements and in particular, whether there are separate processes to follow for backlog matters and incoming matters.

Commented [RA2R1]: For consideration:

This Direction applies to all IC review applications received from 1 July 2024.

Liz - we discussed potentially having a separate process for backlog matters, please let us know if you would us to include the following reference?

For IC review applications received before 1 July 2024, agencies and ministers must have regard to Part 10 of the Guidelines issued under s 93A of the FOI Act which sets out the general principles and expectations of the Information Commissioner regarding IC reviews. Specific directions may be made in the context of these IC reviews.

Commented [JE3]: We could consider rewording to 'summarises the process of IC review, and sets out in details the underlying principles of IC review'.

Commented [JE4]: Note this really means request as per the revised EM 2010 ([ParlInfo - Freedom of Information Amendment \(Reform\) Bill 2010](#) ([aph.gov.au](#))).

"Proposed paragraph 55(2)(d) allows the Information Commissioner to obtain any information from any person, and to make any inquiries, that he or she considers appropriate. This is also consistent with the intention that Information Commissioner review be conducted with as little formality as possible. For example, it would allow the Information Commissioner to make early inquiries to an agency and to request information about the agency's decision. Such inquiries may facilitate the Information Commissioner forming a preliminary view about the merit of a decision. The Information Commissioner also has compulsory information gathering powers under proposed section 55R."

¹ Section 55(3) of the FOI Act.

² Not every application for IC review will proceed to an IC review. The Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* (FOI Guidelines) set out the circumstances in which the Information Commissioner may not conduct a review at [10.81] and [10.85] – [10.86].

³ See *FOI Guidelines* at [10.20] and [10.63].

documents at issue, submissions and any other information that has been requested is important.

- 2.5 Under s 55DA of the FOI Act, agencies and ministers must use their best endeavours to assist the Information Commissioner in the conduct of IC reviews. Under s 55D(1) of the FOI Act, agencies and ministers have the onus of establishing that a decision refusing access is justified or that the Information Commissioner should give a decision that is adverse to the IC review applicant in an IC review of an access refusal decision. The Information Commissioner will make a decision in an IC review on the basis of the evidence before them. Failure to properly satisfy the onus in s 55D(1) by providing the Information Commissioner with complete and appropriate evidence for an access refusal decision will increase the likelihood of a decision being made that is adverse to an agency or minister.
- 2.6 Section 55Z of the FOI Act provides immunity to a person from civil proceedings and penalties if the person gives information, produces a document or answers a question in good faith for the purposes of an IC review.

3. General procedure in relation to IC review of deemed refusal decisions

Preliminary inquiries

- 3.1 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 Information Commissioner will undertake preliminary inquiries under s 54V of the FOI Act. In undertaking preliminary inquiries, the Information Commissioner will require the agency or minister to confirm that the relevant FOI request is deemed to have been refused.
- 3.2 Agencies and ministers will have one week to respond to the Information Commissioner's preliminary inquiries.

Commencement of review

- 3.3 If the agency or minister confirms that the relevant FOI request is deemed to have been refused, or fails to respond to the Information Commissioner's preliminary inquiries, a notice under s 54Z will be issued notifying of the commencement of an IC review. This notice will be accompanied by a direction under s 55(2)(e) of the FOI Act, requiring the agency or minister to either:
 - a. make a revised decision under s 55G if the decision the agency or minister intends to make will result in the giving of access to the requested documents in full and to provide the relevant decision to the applicant and to the Information Commissioner or
 - b. make a revised decision under s 55G if the decision the agency or minister intends to make will result in the giving of access to some of the requested documents, and to provide the relevant decision and non-exempt documents to the applicant, and to provide all relevant processing documents and the documents remaining at issue to the Information Commissioner or
 - c. make submissions in support of the access refusal if the agency or minister intends refusing access to the requested documents and to send those submissions to both the

Information Commissioner and the applicant. The agency or minister must also provide all relevant processing documents and exempt documents to the Information Commissioner under s 55T of the FOI Act.

- 3.4 Agencies and ministers will have 3 weeks to respond to the Information Commissioner's written direction.
4. General procedure in relation to review of other access refusal and access grant decisions

Commencement of review

- 4.1 The Information Commissioner will issue a notice under s 54Z of the FOI Act to advise the respondent agency or minister of the commencement of the IC review (s 54Z notice).

Requirement to engage with the applicant

- 4.2 The s 54Z notice will also require the agency or minister to engage, 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 in the IC review.
- 4.3 Engagement with IC review applicants will comprise a telephone or video conference between the applicant and the agency or minister. The agency or minister will be responsible for contacting the applicant and making the necessary arrangements for the engagement process. The OAIC will not be involved in making such arrangements or in attending the telephone or video conference.

Response to s 54Z notice

Timeframe

- 4.4 The agency or minister will generally have 6 weeks to respond to the Information Commissioner's s 54Z notice. The 6 week timeframe takes into account the time needed to contact and make arrangements with the applicant for the engagement process, and to reach agreement, where relevant. It is not expected that agencies or ministers will require any additional time. The Information Commissioner will consider any request for an extension of time on a case-by-case basis. However it is expected that it will only be in extenuating circumstances that any further extension to time will be granted.

Evidence

- 4.5 Respondent agencies and ministers must provide the Information Commissioner with evidence of the action they have taken to address the issues identified in the IC review application, or actions taken to contact the applicant.⁴
- 4.6 The evidence to be provided to the Information Commissioner will include:

⁴ An agency may not be required to engage in the conciliation process if it is able to provide evidence of having engaged in a similar process at an earlier stage. However, participation in formal statutory processes (for example, the request consultation process outlined in s 24AB of the FOI Act in relation to practical refusals) will not be a basis for not consulting the applicant in relation to the IC review.

Commented [T5]: Ive changed to 6 weeks Im sure that agencies wanted 8 but we cant justify that approach

Commented [JE6R5]: Note that the Intake & Early Resolution team, sending s 54Z notices, is currently giving 8 weeks for responses.

Commented [RA7R5]: Jess - Intake is giving 8 weeks because of the proposed timeframe as listed in this draft revised procedure direction.

Thanks Liz - I don't disagree about the 6 week timeframe.

Based on the current draft of the direction, the requirement to engage with the applicant and the timeframe will apply to **all** matters (including cohort matters) - are you comfortable with that approach or would like flexibility built in?

- evidence 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
- evidence of 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
- evidence of the outcome of the engagement between the agency or minister and the IC review applicant, including any evidence 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.⁵

4.7 In the event that not all issues in dispute in the IC review are resolved through the engagement process with the IC review applicant, respondent agencies and ministers should consider whether to make a revised decision under s 55G of the FOI Act.

4.8 If the respondent agency or minister decides not to make a revised decision under s 55G giving full access in accordance with the applicant's FOI request, agencies and ministers are required to provide the Information Commissioner with the FOI request processing documents and marked up copies of the exempt documents at issue in the IC review (if applicable) (see [5.2] below).

5. General procedure for production and inspection of documents

Production of documents

5.1 The Information Commissioner has various powers to require the production of information and documents under the FOI Act. These powers are outlined in Annexure 1 to this Direction. In addition to the Information Commissioner's information gathering powers under Division 8 of the FOI Act, the Information Commissioner is able to obtain any information from any person, and to make any inquiries, that are considered to be appropriate under s 55(2)(d) of the FOI Act. Therefore, when the Information Commissioner commences an IC review by issuing a notice of IC review, the Information Commissioner will also request relevant information and documents to progress the IC review as follows:

Commented [E8]: Suggest bringing this sentence to the start of this paragraph, and then inserting para 10.116 of draft Part 10 of the FOI Guidelines:

The OAIC's request for documents may initially be informal. However, if the respondent does not comply with this informal request, the documents may be requested under a provision of the FOI Act that compels production by the respondent within a specified timeframe. If necessary [insert beginning of this para of the draft direction].

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⁵ At Annexure 2 to this Direction is an evidence checklist designed to assist agencies and ministers provide relevant evidence relating to the agency or minister's engagement with the applicant during the IC review.

Scope of IC review

Information to be provided by Respondent

Access refusal - Exemptions (Part IV Divisions 2 and 3, except ss 33, 34, 45A)

- The original FOI request and any correspondence with the FOI applicant that modifies the scope of the FOI request
- Copies of correspondence including file notes of relevant telephone conversations between the respondent and anyone consulted
- A marked up and unredacted copy of the documents at issue where material claimed to be exempt is highlighted with reference to the exemptions applied
- Any submissions in support of the exemptions claimed, including the application of s 11B of the FOI Act in relation to conditional exemptions
- If any third parties are notified of the IC review, a copy of the written notifications under s 54P

Access refusal – Exemptions (Part IV Division 2, ss 33, 34, 45A)

- The original FOI request and any correspondence with the FOI applicant that modifies the scope of the FOI request
- Copies of correspondence including file notes of relevant telephone conversations between the respondent and anyone consulted
- Evidence, on affidavit or otherwise, including by way of submissions, that documents are exempt under ss 33, 34, or 45A
- If any third parties are notified of the IC review, a copy of the written notifications under s 54P
- A statement identifying whether the document(s) subject to IC review and which are claimed to be exempt under s 33 relate directly or indirectly to the intelligence functions of the ACIC and the AFP. The statement should 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*)

Access refusal –FOI request does not fall within FOI Act: Part I and ss 4, 5.6, 6A, 7, 12, 20 and Schedules to the FOI Act

- The original FOI request and any correspondence with the FOI applicant that modifies the scope of the FOI request
- Information about the nature of the document in question
- The respondent's response to the FOI applicant
- Any submissions in support of the respondent's decision that the FOI request does not fall within the FOI Act

Access grant (Part IV Divisions 2 and 3 ss 47, 47F and 47G)

- The original FOI request and any correspondence with the FOI applicant that modifies the scope of the FOI request
- Copies of correspondence with the third party
- The documents in dispute
- The reasons for the decision to release the documents despite the third party's objections
- Any submissions in support of the agency's or minister's decision to grant access

Access refusal – Charges (Part III, s 29)

- The original FOI request and any correspondence with the FOI applicant that modifies the scope of the FOI request
- A copy of the preliminary estimate of charge notice sent to the FOI applicant and the FOI applicant's response
- A copy of the charges notice sent to the FOI applicant
- Any further explanation the respondent wishes to provide as to why the charge was imposed or how it was calculated, including any documentary evidence which supports the respondent's calculation of the charge
- Any submissions in support of the respondent's decision to impose a charge or in the alternative, a revised decision under s 55G of the FOI Act waiving the charge in full.

Commented [A9]: Proposed changes to reflect

- submissions will not be routinely requested during initial s 54Z notification process
- request for confirmation regarding genuine attempts made to resolve matter with applicant.

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Commented [RH10]: Not sure if I've mentioned this elsewhere however some agencies misinterpret this as requiring 2 sets of documents - one marked up (i.e., redactions applied) and one 'clean'. This is time consuming to unravel if there are lots of documents.

I've been trying to come up with a way to better describe one set of documents in which the content of the document and the exemptions that apply to that part of the document are both apparent. Any ideas?

Commented [RH11]: I assume this is used instead of decision because if the FOI Act does not apply there is no requirement to produce a statement of reasons under s 26.

Scope of IC review	Information to be provided by Respondent
<u>Access refusal – Refusal to amend or annotate a record of personal information (Part IV)</u>	<ul style="list-style-type: none"> • <u>A copy of the documents that were given to the FOI applicant</u> • <u>The reasons why the respondent considers that no amendment should be made under s 50, or the reasons why the requested annotation of records was not made under s 51</u> • <u>Any submissions in support of the respondent’s decision to refuse to amend or annotate a record of personal information</u>
<u>Access refusal – Failure to provide all documents / Adequacy of searches (Part III, s 24A)</u>	<ul style="list-style-type: none"> • <u>The FOI request and any correspondence that modifies its scope</u> • <u>A copy of any document that records the searches conducted, including if applicable:</u> <ul style="list-style-type: none"> ○ <u>Notes kept by individuals conducting searches</u> ○ <u>Correspondence between the FOI decision maker and individuals who undertook searches</u> ○ <u>Any other records of searches or recorded consideration of where to search</u> • <u>Any other relevant information that the respondent wishes to provide in support of its decision</u>
<u>Access refusal – Practical refusal (Part III, s 24)</u>	<ul style="list-style-type: none"> • <u>The original FOI request and any correspondence with the FOI applicant that modifies the scope of the FOI request</u> • <u>Copies of any correspondence including file notes of telephone conversations relating to the respondent’s request consultation process, including a copy of the letter sent to the FOI applicant and the FOI applicant’s response (if any)</u> • <u>Records that demonstrate the number of documents and/or pages encompassed by the FOI request, including but not limited to notes of any searches conducted and consultations with relevant staff members</u> • <u>An estimate of the number of hours of processing time involved and a breakdown of this time to demonstrate how the time was estimated</u> • <u>Evidence of document sampling if undertaken</u> • <u>The names and contact details of anyone who was consulted by the respondent, formally under ss 15(7), 26A or 27A, or informally (including consultation with other government agencies).</u> • <u>Any submissions in support of the respondent’s decision</u>
<u>Access refusal – information as to existence of certain documents (Part III s 25)</u>	<ul style="list-style-type: none"> • <u>Submissions in support of the respondent’s decision (relevant documents will not be requested in the first instance).</u>

Commented [A9]: Proposed changes to reflect

- submissions will not be routinely requested during initial s 54Z notification process
- request for confirmation regarding genuine attempts made to resolve matter with applicant.

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Commented [RH12]: Should this be ‘Australian Government’ agencies? (State covered by the reference to s 26A earlier in the sentence).

Scope of IC review	Information to be provided by Respondent
<p><u>Access refusal – Deemed refusal or deemed affirmation of original decision</u></p>	<ul style="list-style-type: none"> The written reasons for the decision (see [10.111]). The original decision (if the decision appealed is a deemed affirmation of the original decision) Other documents as listed above depending on the nature of the decision Submissions in support of the access refusal If the respondent subsequently makes a revised decision to grant access to some or all of the requested documents, a copy of the written reasons for decision The FOI request and any correspondence that modifies its scope. The names and contact details of anyone who was consulted formally under ss 15(7), 26A or 27A, or informally (including consultations with other Australian Government agencies). If any third parties have been notified of the IC review, a copy of the written notifications. Copies of any correspondence between the respondent and anyone who was consulted, including file notes of any relevant telephone conversations. If the IC review involves exempt matter, a marked up and un-redacted copy of all documents identified within scope of the FOI request that is subject of IC review in an electronic format.

Commented [A9]: Proposed changes to reflect

-submissions will not be routinely requested during initial s 54Z notification process
-request for confirmation regarding genuine attempts made to resolve matter with applicant.

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Commented [RH13]: This doesn't make sense (and the referenece to 10.111 is in the current part however 10.111 is about preliminary views so I can't work out what has gone wrong here.

Commented [RH14]: This is the only way I can make sense of this requirement.

Commented [A15]: For noting: Consider whether submissions are sought at this stage, given there is no statement of reasons provided

Commented [RH16]: This should be the first item.

- 5.2 In providing the Information Commissioner with a marked up copy of relevant documents, agencies and ministers must ensure that all redactions pursuant to an exemption, or deletions on the basis of relevance pursuant to s 22(1)(a)(ii) of the FOI Act, are clearly marked with reference to the relevant provision of the FOI Act that the redactions or deletions are made under. A schedule of marked up documents must also be included.
- 5.3 Agencies and ministers must provide their response within the timeframe set out in the notice, unless an extension of time has been sought and granted. However as noted at [4.4], the Information Commissioner considers that it will only be in extenuating circumstances that any further extension to time will be granted. If an agency or minister requires an extension of time to respond to a notice of IC review, the agency or minister must make a request in writing to the Information Commissioner with supporting evidence of the need for the extension prior to the due date.
- 5.4 Where an agency or minister fails to provide information and documents within the initial or extended timeframe, or requests another extension, the Information Commissioner may proceed to require the provision of information and the production of documents pursuant to s 55R of the FOI Act (discussed at Annexure 1 to this Direction).

Commented [JE18]: Suggest we say 'marked up and unredacted' and explain/define.

Deleted: <#>Document production requirements may vary from case to case depending on the issues being considered (application of exemptions, searches, charges or practical refusal).⁶ In relation to IC reviews involving the application of exemptions under the FOI Act, the Information Commissioner will require the agency or minister to provide a marked up and unredacted copy of the documents at issue in electronic format and the documents setting out any relevant consultations (for example, under ss 26A, 27 or 27A of the FOI Act).⁷¶

Deleted: <#>In IC reviews where an agency or minister claims that documents cannot be found or do not exist, the Information Commissioner will require the agency or minister to provide evidence of the searches that have been undertaken to find relevant documents.⁸ ¶
In IC reviews involving a charge or a practical refusal reason, the Information Commissioner may require the agency or minister to provide a sufficiently representative sample of documents considered to be within the scope of the request.⁹ The OAIC has developed templates to assist decision makers in providing cogent reasons for this decision. Those reasons must be adequate s55E.¶

Commented [RA22]: For consideration: Liz - given the enforcement approach we are taking, regarding moving to using regulatory powers, it may assist if we include here that notices may be issued to the Chief Operating Officer:

A notice under s 55R of the FOI Act may be issued to the Chief Operating Officer of the relevant agency.

Commented [E23R22]: Should we also refer to ss 55T and 55U here given the above suggested changes, i.e. to state in line with draft Part 10 of FOI Guidelines that the request may initially be informal?

Inspection of documents

- 5.5 Inspection of the documents at issue by the Information Commissioner in response to a request for production will only be considered in very limited situations where the agency or minister can demonstrate that the circumstances warrant inspection rather than the direct production of copies of the marked up documents.

- 5.6 What constitutes these very limited circumstances is not prescriptive and will be determined on a case-by-case basis. The onus is on the requesting agency or minister to justify that circumstances exist that warrant inspection.
- 5.7 If an agency or minister is of the view that there are circumstances that justify inspection, the Information Commissioner will require the agency or minister to provide a written request for inspection together with supporting reasons prior to the due date in the s 54Z notice of IC review.
- 5.8 The Information Commissioner considers that inspection will not be warranted where the documents at issue are subject to conditional exemptions. The Information Commissioner considers that inspection may be appropriate in some circumstances where the documents at issue are subject to a national security, Cabinet or Parliamentary Budget Office exemption claim (ss 33, 34 and 45A of the FOI Act). However, the requesting agency or minister must satisfy the Information Commissioner that the circumstances warrant inspection.¹⁰
- 5.9 If the Information Commissioner agrees to an agency's or minister's request for inspection, the agency or minister will be required to undertake all necessary arrangements to facilitate the inspection. Unless otherwise agreed, this will occur at the Information Commissioner's office.

6. General procedure in relation to submissions made during an IC review

General principles

- 6.1 All parties to an IC review will be given a reasonable opportunity to present their case through written submissions.
- 6.2 Written submissions will be sought from parties following the completion of the initial triage and early resolution process and once the matter has been assigned to a review adviser for substantive review/case management.
- 6.3 In seeking submissions from agencies and ministers in support of the IC reviewable decision, the OAIC will require the agency or minister to send their submissions to the applicant at the same time as they are sent to the Information Commissioner. 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 Information Commissioner.
- 6.4 Agencies should approach the preparation of submissions on the basis of comprehensively addressing all issues. Agencies should not expect the opportunity for further submissions. Subject to [6.6], the Information Commissioner will not accept any further submissions from either party to the IC review.
- 6.5 The Information Commissioner will generally provide each of the parties with 4 weeks to make their submissions.

Commented [RA24]: For consideration: To provide us flexibility, we could also note that is dependent on the nature of the information requested (for example, if there is only a clarification question, then we would not expect 4 weeks. Please see proposed wording below:

Depending on the nature of the information requested, the Information Commissioner will generally provide each of the parties with 4 weeks to make their submissions. A shorter timeframe may be provided where the review is expedited or prioritised by the OAIC.

¹⁰ The OAIC is able to receive secure electronic transmission of documents. For more information contact the OAIC.

- 6.6 The Information Commissioner will contact the parties after receipt of submissions if procedural fairness requirements are identified or where a preliminary view can be provided to an agency that may result in an agency or minister making a revised decision under s 55G of the FOI Act.

Request to make submissions in confidence

- 6.7 If an agency or minister wishes to make a submission in confidence, a request for the submission to be treated in confidence must be made before providing the submission. Any request for confidentiality must be accompanied by reasons to support such a claim, including whether the submission would reveal the contents of the documents at issue.
- 6.8 Where the Information Commissioner accepts a submission in confidence, agencies and ministers must provide a version of the submission that can be shared with the applicant.¹¹
- 6.9 If the Information Commissioner forms the view that the submission does not disclose exempt matter, or is otherwise not inherently confidential, the Information Commissioner will advise the agency or minister of this view and invite the agency or minister to withdraw the claim for confidentiality with respect to the submission. If the agency or minister does not wish to withdraw the claim for confidentiality they may elect to withdraw the submission because it will not be considered by the Information Commissioner to make a decision under s 55K of the FOI Act on the issues in the IC review.

Consideration of submissions

- 6.10 The Information Commissioner will generally proceed with the IC review on the basis of the evidence provided in response to the s 54Z notice, and submissions.
- 6.11 Where the Information Commissioner makes a decision on IC review pursuant to s 55K of the FOI Act, the Information Commissioner will quote or summarise an agency's or minister's non-confidential submissions in the published decision. If a confidential submission is relied on by the Information Commissioner in making a decision on the IC review, this will be noted in the decision without revealing the confidential material.
- 6.12 In providing submissions, agencies and ministers should be mindful of their obligation to assist the Information Commissioner pursuant to s 55DA of the FOI Act and their onus under s 55D of the FOI Act. As it may be appropriate for an IC review to proceed to a decision under s 55K of the FOI Act on the basis of a response to a notice of IC review, it is in agency's and ministers' interests to put forward all relevant contentions and supporting reasons in response to the notice of review.¹²
- 6.13 Agencies and ministers 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 decision under s 55K of the FOI Act without any further opportunity to make submissions.

¹¹ See *FOI Guidelines* at [10.103].

¹² See *FOI Guidelines* at [10.74].

Commented [JE25]: Should this para be moved down to sit with para 6.10 under Consideration of submissions. Suggest we also remove/summarise the following paras of draft Part 10 of the FOI Guidelines and insert them or a suitable version of them under para 6.10:

10.126 The IC review officer will consider the IC review application and the material supplied by the respondent. The IC review officer may ask the respondent or the applicant to provide additional information or submissions at this stage.

10.127 After preliminary assessment of all the material by the IC review officer, the IC review officer may decide to form a preliminary view of the issues in the IC review and advise the respondent or the applicant, as relevant.

10.128 If the preliminary view is against the respondent, the preliminary view will be provided to the respondent. The Information Commissioner or the IC review officer will then invite the respondent to issue a revised decision in line with the preliminary view or make submissions in response to it.

10.129 If the preliminary view is against the applicant, the preliminary view will be provided to the applicant. The IC review officer will then invite the applicant to withdraw the IC review application in writing or make submissions in response to the preliminary view.

10.130 It should also be noted that in exceptional cases, where the Information Commissioner has personally inspected the documents and formed the view that they should be released in part or in full, the Information Commissioner may provide the respondent with their preliminary view. The respondent will be given the opportunity to make a revised decision or make further submissions before the IC review proceeds to a decision under s 55K. Any submissions provided by the respondent in response to this preliminary view will be provided to the IC review applicant for comment unless the respondent asks that the submissions be treated in confidence and adequate reasons by way of submissions are provided to support the claim. Where the Information Commissioner accepts the submission in confidence, respondents must provide a version of the submissions that can be shared with the applicant.

10.131 In relation to preliminary assessments, any submissions received during this process will generally be shared with the parties.

7. Non-compliance with this Direction

- 7.1 Because the model litigant obligation under the *Legal Services Directions 2017* extends to Commonwealth entities involved in merits review proceedings, failure to adhere to the requirements of this Direction may amount to non-compliance with the model litigant obligation.¹³
- 7.2 The Information Commissioner may report non-compliance with this Direction in the Office of the Australian Information Commissioner's Annual Report.
- 7.3 The Information Commissioner may also report non-compliance with this Direction to the Office of Legal Services Coordination in the Attorney-General's Department.
- 7.4 The Information Commissioner may also consider investigating the non-compliance under Part VIIIB of the FOI Act.

Angelene Falk
Australian Information Commissioner

DATE

¹³ See paragraph 3 of Appendix B to the *Legal Services Directions 2017*.

Annexure 1: Information gathering and document production powers

1. Notice to Produce

- 1.1 Pursuant to s 55R(3) of the FOI Act, the Information Commissioner may issue a written Notice to Produce to require an agency or minister to give information or produce documents of a kind specified in the Notice. A Notice to Produce may also be issued in conjunction with either ss 55T or 55U of the FOI Act (discussed below).
- 1.2 The Information Commissioner will allow at least 2 weeks for agencies and ministers to respond to a Notice to Produce. It is an offence to fail to comply with a Notice to Produce issued by the Information Commissioner.

2. Production of exempt documents generally

- 2.1 Section 55T of the FOI Act concerns the production of exempt documents generally. This section applies when an agency or a minister claims that a document is an exempt document and the document is not covered by s 55U of the FOI Act (discussed below).
- 2.2 Section 55T(2) of the FOI Act provides that, for the purposes of deciding that a document is an exempt document, the Information Commissioner may require the document to be produced. In addition, s 55T(4) of the FOI Act provides that the Information Commissioner may require the production of an exempt document for the purpose of determining whether it is practicable for an agency or a minister to give access to an edited copy of the document.

3. Production of particular exempt documents

- 3.1 Section 55U of the FOI Act concerns the production of documents subject to a national security, Cabinet or Parliamentary Budget Office exemption claim (ss 33, 34 or 45A the FOI Act).
- 3.2 Section 55U(3) of the FOI Act provides that, if the Information Commissioner is not satisfied by evidence on affidavit or otherwise that a document is an exempt document under ss 33, 34 or 45A of the FOI Act, the Information Commissioner may require the document to be produced for examination.
- 3.3 If, after examining the documents, the Information Commissioner is still not satisfied that the documents are exempt under s 33 of the FOI Act, pursuant to s 55ZB of the FOI Act, the Information Commissioner will request the Inspector-General of Intelligence and Security to appear and give evidence on the damage that would or could reasonably be expected to result from the release of the documents.¹⁴

¹⁴ The Information Commissioner has a Memorandum of Understanding with the Inspector-General of Intelligence and Security to facilitate the Information Commissioner's information gathering powers.

Annexure 2: Evidence checklist – IC review compulsory conference

The 'Direction as to certain procedures to be followed in IC review' issued under s 55(2)(e)(i) of the Freedom of Information Act 1982 by the Australian Information Commissioner requires agencies and ministers to engage, or make reasonable attempts to engage, with IC review applicants during the IC review.

Agencies and ministers must provide the Information Commissioner with evidence of the action they have taken to address the issues identified in the IC review application, or actions taken to contact the applicant. This checklist has been developed to assist agencies provide relevant evidence and can be used as a cover when providing relevant evidence to the OAIC.

1. Contact with IC review applicant

Evidence of earlier engagement in similar process*	<input type="checkbox"/> Attached <input type="checkbox"/> Not applicable
Copy of letter sent to IC review applicant to arrange contact	<input type="checkbox"/> Attached <input type="checkbox"/> Not applicable
Date of Letter	[insert date]
File note of telephone call to IC review applicant	<input type="checkbox"/> Attached <input type="checkbox"/> Not applicable
Copies of written correspondence from IC review applicant	<input type="checkbox"/> Attached <input type="checkbox"/> Not applicable

2. Attempts to resolve issues in dispute

File note of engagement with applicant	<input type="checkbox"/> Attached <input type="checkbox"/> Not applicable
Suggestions made by agency/minister to resolve IC review	<input type="checkbox"/> Attached <input type="checkbox"/> Not applicable
Response provided by applicant, and any suggestions made by applicant to resolve IC review	<input type="checkbox"/> Attached <input type="checkbox"/> Not applicable

3. Outcome of engagement

Outcome of engagement	<input type="checkbox"/> Attached <input type="checkbox"/> Not applicable
Written notification that IC review applicant wishes to withdraw their application for IC review	<input type="checkbox"/> Attached <input type="checkbox"/> Not applicable

* An agency may not be required to engage in the engagement process if it is able to provide evidence of having engaged in a similar process at an earlier stage. However, participation in formal statutory processes (for example, the request consultation process outlined in s 24AB of the FOI Act in relation to practical refusals) will not be a basis for not consulting the applicant in relation to the IC review.

Attachment B

Summaries of updates and agencies' submissions

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>1.5</p> <p>Direction has effect from 1 July 2023</p>	<ul style="list-style-type: none"> Concerns about ability to comply with Direction by 1 July 2023, recommends implementation date be extended to at least 1 October 2023 (DVA). 	<ul style="list-style-type: none"> <u>Updated</u>: This Direction has effect from 1 July 2024. <u>Comments</u>: We should potentially have a separate process for backlog matters, e.g. for IC review applications received before 1 July 2024, agencies and ministers must have regard to Part 10 of the FOI Guidelines issued under s 93A of the FOI Act which sets out the general principles and expectations of the Information Commissioner regarding IC reviews. Specific directions may be made in the context of these IC reviews.
<p>3.3</p> <p>Deemed decisions</p>	<ul style="list-style-type: none"> Requirement to provide processing documents to OAIC at same time as making a revised decision to give access in part under s 55G appears to be premature given that applicant may withdraw after receiving the revised decision (AAT). Requirement to make submissions in support of deemed access refusal decision should be framed as requirement to give reasons for deemed access refusal decision (AAT). 	<ul style="list-style-type: none"> <u>Not updated</u> <u>Comments</u>: We could remove the requirement to provide processing documents at the time of making a revised decision or submissions/giving reasons for the deemed decision. We could instead add to the Procedure Direction that we will ask the applicant whether they wish to proceed with their IC review application and, if so, the process under the next heading, 'General procedure ...' will apply, including engagement. We could consider whether submissions in support of deemed access refusal decisions should be framed as reasons for decision. For example, paragraph [3.161] of the FOI Guidelines explains: <ul style="list-style-type: none"> Where an access refusal decision is deemed to have been made before a substantive decision is made, the agency or minister continues to have an obligation to provide a statement of reasons on the FOI request. This obligation to provide a statement of reasons on the FOI request continues until any IC review of the deemed decision is finalised.
<p>4.2</p> <p>Engage the IC review applicant</p>	<ul style="list-style-type: none"> Engagement may have little value in many matters, for example where agencies have already engaged with the applicant during the FOI process, and where the matter relates to exemptions that do not 	<ul style="list-style-type: none"> <u>Not updated</u>

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
	<p>allow for open discussion with the applicant (such as the national security, defence or international relations exemptions in s 33) (AAT).</p> <ul style="list-style-type: none"> • There should be exceptions to engagement in some matters. For example, engagement may not be suitable where applicant repetitively requests access to documents (ATO). Engagement could be satisfied by a statement under s 6 of the <i>Civil Dispute Resolution Act 2011</i> as can be given in Federal Court of Australia matters (AAT). • Engagement is inconsistent with trauma-informed approach when interacting with veterans (DVA) • Work health and safety risks to staff engaging with applicants who exhibit unreasonable and abusive behaviours (AFP, ATO; Defence). 	<ul style="list-style-type: none"> • <u>Rationale:</u> Anecdotally, we hear from applicants that they do not always have the opportunity to engage with agencies about their FOI requests. • Engagement can lead to early resolution of matters, and overall reduce agencies' workloads, and give efficient outcomes to applicants. • In our experience, many applicants do not read or understand the reasons for the FOI decisions. Engagement can therefore give the opportunity for agencies to (1) explain their decisions to applicants, and (2) potentially resolve a matter, or narrow its scope.
4.3 Telephone or video conference	<ul style="list-style-type: none"> • Telephone or video conference may not be appropriate for applicant's who are incarcerated, disabled, overseas, or have English as a second language (AGD). • Requirement for telephone or video conference should be removed or adjusted; additional funding needed to implement that requirement, including system supports and staffing resources (DHA). • Applicants may prefer other forms of communication, and agencies may have other contact arrangements in place (AAT; Services Australia). 	<ul style="list-style-type: none"> • <u>Not updated</u> • <u>Rationale:</u> As above

Commented [JE26]: To discuss. Suggest agencies take into account applicant's preference, and any contact arrangements that the agency has put in place (assuming in both cases the only other contact option is 'write only'). The other issues appear to be issues that would not necessarily be resolved by changing the contact method to writing, but rather referring the applicant for representation. The procedure direction could discuss extending timeframes where the agency gives the applicant referral for representation, e.g. social or legal.

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>4.3</p> <p>OAIC will not be involved in the engagement</p>	<ul style="list-style-type: none"> • OAIC involvement in conferences is vital, including OAIC's high-level preliminary view and promotion of 'informal resolution strategies' (Defence). • Unmediated engagement is unlikely to lead to a resolution given that the benefit of IC review comes from the OAIC's external qualified review (DFAT). • staff are not trained as mediators (various agencies). 	<ul style="list-style-type: none"> • <u>Not updated</u> • <u>Rationale:</u> As above
<p>4.4 and 6.5</p> <p>Eight weeks to respond to s 54Z notice, including engagement ... only in extenuating circumstances for extension of time (4.4)</p> <p>Four weeks for submissions (6.5)</p>	<ul style="list-style-type: none"> • Timeframes are generally too short (AAT). • Threshold of 'extenuating circumstances' for extensions of time would appear to several of the agencies to be too high. • The AAT considers that timeframes should be set in consultation with the parties. 	<ul style="list-style-type: none"> • <u>Updated para 4.4:</u> Updated from 8 weeks to 6 weeks for s 54Z response • <u>No update to para 6.5:</u> Maintained 4 weeks for submissions • <u>Comments:</u> Respondents are now being given 8 weeks to respond to s 54Z notices – this is an extended period (from 3 weeks) consistent with the revised draft PDs. The extended period was intended to accommodate engagement between minister/agency and applicant. At present, the engagement requirement is not in play however agencies and ministers are generally expected to provide submissions within the 8 week period – this expectation around submissions would not be retained under the proposed arrangements in the new procedure directions (for agencies, and for applicants).

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>5.2 and 5.3</p> <p>Marked up and unredacted copy of the documents at issue in electronic format</p> <p>Schedule of marked up documents must also be included</p>	<ul style="list-style-type: none"> AAT considered that marking up and schedule requirements can be resource intensive. ATO noted that it makes some exemption decisions without searching for and collating the documents, e.g. Person A requesting Person B's tax return, and such decisions can be justified without providing the OAIC with the documents. The ATO also noted that schedules are not necessary where documents can quickly be found in electronic files. 	<ul style="list-style-type: none"> <u>Not updated</u> <u>Rationale:</u> IC must view the documents to decide whether they are exempt or not. Marked up documents assist the Information Commissioner in making their decision, noting the onus on agencies to establish their case (s 55D).
<p>5.5</p> <p>IC reviews involving a charge or a practical refusal reason, the Information Commissioner may require the agency or minister to provide a sufficiently representative sample of documents considered to be within the scope of the request</p>	<ul style="list-style-type: none"> DFAT and Defence request clarification as to what is needed (such as a percentage). DFAT in particular submits that providing a representative sample of documents would be an unreasonable diversion of resources. 	<ul style="list-style-type: none"> <u>Not updated</u> <u>Rationale:</u> Requirement to provide representative sample of between 10 to 15% of the documents within the scope of the request has been considered to be an appropriate sample size for the purposes of calculating processing time when deciding whether a practical refusal reason exists (paragraph [3.121] of the FOI Guidelines).

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>6.7</p> <p>Request submissions to be treated in confidence must be made before providing the submissions</p>	<ul style="list-style-type: none"> ATO and DFAT have expressed concern about the process of requesting to make confidential submissions. ATO queries why the request must be made before providing the submissions, and says that the request could be made at the same time as the submissions. DFAT seeks clarity for circumstances where the Information Commissioner refuses the request to make confidential submissions. 	<ul style="list-style-type: none"> <u>Not updated</u> <u>Rationale:</u> OAIC's starting position is that all submissions will be shared with the parties to the IC review (reflected in 5.3 of the current direction and consistent with 10.103 of FOI Guidelines - Part 10: Review by IC). Where agencies seek to depart from this position, they need to provide clear reasons – accepting submissions in confidence has procedural fairness implications. Deciding whether IC will accept confidential submissions ahead of their preparation reduces duplication – an agency will know in advance whether they need to provide 2 versions of the submissions (one confidential and one that can be shared)
<p>N/A</p> <p>Timeframes that apply to the OAIC</p>	<ul style="list-style-type: none"> AGD suggests explanation about when OAIC will endeavour to make its decision, timeframe for providing documents to the applicant (if IC varies the decision, timeframe for destruction or return of evidence documents to agencies) AGD and AAT suggest a flow chart of the IC review process. The AGD refers to the AAT's flow chart. 	<ul style="list-style-type: none"> <u>Not updated</u> <u>Rationale:</u> Neither the FOI Act nor our other legislation does provides for timeframes for IC reviews. Section 55(2)(a) provides that the Information Commissioner may otherwise conduct an IC review in whatever way they consider appropriate, and s 55(4)(c) provides that without limiting subsection (2), the Information Commissioner must conduct the IC review in as timely a manner as is possible given the matters mentioned in subparagraphs (a)(i) to (iii).

Commented [JE27]: I understand that we have published a flow chart and we could provide a link to that flow chart.

We could provide brief information in Annexure 1 about IC's obligation to return documents that agencies have produced.

Executive brief

Responsible Executive Member:	Rocelle Ago, Assistant Commissioner FOI
Prepared by:	Jessica Eslick and Sara Peel, Director, Monitoring, Guidance and Engagement
To:	Elizabeth Tydd, FOI Commissioner
Copies:	Karen Tulloch, Raewyn Harlock
File ref:	D2024/008712
Date:	2 April 2024
Subject:	Proposed updates to draft IC review procedure direction for <u>applicants</u>

Deleted: 26 March 2024

Deleted: agencies

Purpose and timing

To inform you of the proposed updates to the draft IC review procedure direction for applicants (titled 'Direction as to certain procedures to be followed in by applicants in Information Commissioner reviews') (the draft direction),

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Your as at 13 March 2024

Recommendations

1. That you note our proposed updates to the draft direction via comments to the following paragraphs of the draft direction (Attachment A):
 1. paragraph x
 2. xx
2. That you note our summary of the submissions in response to our consultation, whether we have proposed updates to the draft direction in light of those submissions, and our rationale /comments (**Attachment B**).

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Background

The Australian Information Commissioner may give written directions under s 55(2)(e)(ii) of the FOI Act in relation to procedures to be followed in Information Commissioner (IC) reviews.

The Information Commissioner has issued 2 directions under s 55(2)(e)(ii), which are currently in effect:

- [Direction as to certain procedures to be followed in Information Commissioner reviews](#), which has had effect from 26 February 2018.
- [Direction as to certain procedures to be followed by applicants in Information Commissioner reviews](#), which had had effect from 1 September 2021.

On 9 May 2023, we sought comments from, or consulted, interested stakeholders on draft revisions to each of the 2 directions.

In our consultation, we advised stakeholders:

We intend to make all submissions publicly available. Please indicate when making your submission if it contains confidential information that you do not want made public and why it should not be published. Requests for access to confidential comments will be determined in accordance with the FOI Act. If the OAIC accepts submissions in confidence you must also provide a copy that can be published.

Between 8 June 2023 and 6 July 2023, we received submissions on the draft direction from **6 agencies** as follows:

1. Administrative Appeals Tribunal on 8 June 2023
2. Attorney-General's Department on 30 June 2023
3. Australian Federal Police on 30 June 2023
4. Australian Tax Office on 30 June 2023
5. Commonwealth Ombudsman on 30 June 2023
6. Department of Defence on 30 June 2023

Related brief [D2023/015645](#) contains TRIM links to those submissions at its Attachment B.

Attachments

1. **Attachment A:** Proposed updated draft direction (with proposed updates in highlight and comments).
2. **Attachment B:** Summary of agencies' submissions in response to our consultation on the draft direction, whether we have proposed (at Attachment A) to update the draft direction in response to those submissions, and our rationale/comments.

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Attachment A

Proposed direction



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

- 1.1 This direction is given by the Australian Information Commissioner under s 55(2)(e)(i) of the Freedom of Information Act 1982 (FOI Act) in relation to Information Commissioner reviews (IC reviews).
- 1.2 This written direction sets out the procedure to be followed by applicants for IC reviews undertaken by the Information Commissioner under the FOI Act.
- 1.3 The Information Commissioner 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 Information Commissioner (s 54W(c)).
- 1.4 The Information Commissioner may also give written directions as to the procedure to be followed in relation to a particular IC review (s 55(2)(e)(ii)).
- 1.5 This direction does not apply to the extent it is inconsistent with a provision of the FOI Act, another enactment or a specific direction made in a particular IC review under s 55(2)(e)(ii) of the FOI Act.
- 1.6 Further information relating to the IC review process is published on the Office of the Australian Information Commissioner's (OAIC) website. In particular, Part 10 (Reviews by the Australian Information Commissioner) of the Guidelines issued by the Information Commissioner under s 93A of the FOI Act (FOI Guidelines) describes the principles that inform the OAIC's approach to IC reviews.
- 1.7 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.
- 1.8 This direction has effect from 1 July 2023.

Part 2: The IC review process

- 1.9 IC review procedures are found in Part VII of the FOI Act. The IC review process is intended to be an informal, non-adversarial and timely means of external merits review of FOI decisions made by agencies and ministers. Part 10 of the FOI Guidelines, to which agencies and ministers must have regard when performing a function or exercising a power under the FOI Act, sets out in detail the process and underlying principles of IC review.

Making an application for IC review

- 1.10 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.
- 1.11 Where it is not possible for an application to be made online, applications may be sent to the OAIC by:
 - email to foidr@oaic.gov.au
 - mail to FOI Regulatory Group, GPO Box 5218, Sydney NSW 2001.
- 1.12 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

- 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).
- 1.13 The OAIC 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 OAIC will consider any notices as received when sent to an applicant's preferred contact.
- 1.14 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
 - 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.
- 1.15 An application for IC review may be made by, or on behalf of, the person who made the FOI request to which decision relates (s 54L(3)). The OAIC 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.
- 1.16 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.
- 1.17 The applicant must provide the OAIC 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. However, in circumstances where the original decision was made by the Minister or personally by the principal officer of an agency, or in the case of a deemed access refusal, applicants must apply directly for IC review.
 - 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.
 - If an application for IC review is not made within the timeframes in the FOI Act, applicants may apply to the Information Commissioner 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 Information Commissioner 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.

1.18 An application for IC review should also:

- a. identify the aspect(s) of the agency's or Minister's decision about which the IC review is sought
- 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.

1.19 The OAIC must provide 'appropriate assistance' to a person who wishes to apply for IC review and requires assistance to prepare the IC review application (s 54N(3)).

1.20 Section 54N of the FOI Act sets out the requirements for the contents and delivery of an application for IC review. These requirements include giving the OAIC contact details to which notices can be sent and providing a copy of the FOI decision the applicant wants the Information Commissioner to review. An application that does not comply with these requirements may be considered to be invalid.

During the IC review

Changes to contact details

1.21 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 Information Commissioner may decide not to undertake an IC review, or not continue to undertake an IC review, if the applicant or their nominated representative cannot be contacted after making reasonable attempts (s 54W(a)(iii)).

Participation in the IC review

1.22 Applicants must respond to inquiries from the OAIC within the time provided unless there are 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 why additional time is needed and propose a new date for response. Approval of an extension request is at the discretion of the OAIC.

1.23 The OAIC requires agencies and Ministers to engage with the IC review applicant at the commencement of an IC review. The purpose of this engagement is to attempt to resolve the issues identified in the IC review application in an informal and timely way. Agencies are required to contact applicants for IC review shortly after the IC review application is lodged to arrange a suitable time for

the engagement process. 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)).

- 1.24 The Information Commissioner may use any technique the Information Commissioner considers appropriate to facilitate an agreed resolution of the matters at issue in the IC review (such as alternative dispute resolution processes - s 55(2)(b)). Where appropriate, and following the compulsory engagement process described above, the OAIC may invite applicants to attend a teleconference to discuss the issues in dispute in the IC review with the agency's or Minister's office and to explore options for resolution, with a view to reaching agreement on some or all of the matters at issue in the IC review.
- 1.25 The Information Commissioner may decide not to undertake an IC review, or not continue to undertake an IC review, if an IC review applicant has failed to cooperate in progressing the IC review application or the IC review without reasonable excuse (s 54W(a)(ii)).

Submissions

- 1.26 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.
- 1.27 Applicants will be invited to make written submissions after the initial triage and early resolution process is complete, and once the application has been assigned to a review adviser for substantive review/case management. First, the agency or Minister will be asked to make submissions in support of the IC reviewable decision. The agency or Minister will send the applicant a copy of their submissions at the same time as they are sent to the OAIC. The applicant will then have the opportunity to make submissions addressing any issues raised by the agency or the Minister. The applicant is required to send their submissions to the agency or Minister at the same time as they are sent to the OAIC.
- 1.28 The Information Commissioner will generally give the parties (both the applicant and the agency or Minister) 4 weeks to make their submissions.
- 1.29 The Information Commissioner will not accept any further submissions from either party to the IC review unless the Information Commissioner has requested them.
- 1.30 The Information Commissioner will contact the parties after receipt of submissions if procedural fairness requirements have been identified. For information on procedural fairness see [3.15] — [3.31] of Part 3 of the FOI Guidelines.
- 1.31 The OAIC may provide a preliminary view at any time during the IC review. This will outline the case officer's preliminary thinking on the issues in dispute in the IC review. The applicant may be invited in some cases to withdraw the IC review application, depending on the views expressed in the preliminary view
- 1.32 The IC review application and any attachments will be shared with the agency or Minister, as well as any other parties to the review, unless there is a reason not to do so. Any other information and submissions provided to the OAIC by the applicant will be made available to the other parties to the IC review.
- 1.33 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.

- 1.34 Generally, submissions should be made in writing and sent by email or pre-paid post. In limited circumstances, if an applicant is unable to provide written submissions, the OAIC may agree to accept verbal submissions by telephone.

Information Commissioner decisions

- 1.35 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.
- 1.36 When the Information Commissioner makes a decision on IC review under s 55K of the FOI Act, the Information Commissioner will quote or summarise the submissions in the published decision. If a confidential submission is relied on by the Information Commissioner in making a decision on the IC review, this will be noted in the decision without revealing the confidential material.
- 1.37 To protect against the unreasonable disclosure of personal information, the Information Commissioner will consider whether identifying information should be included in published decisions. Natural persons may opt not 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: Procedure for IC review of specific types of decisions

Deemed access refusal decisions

- 1.38 A 'deemed access refusal' occurs when the statutory time for making a decision on an FOI request for access to a document has expired and notice of the decision has not been given. In these circumstances the agency or Minister is 'deemed' to have refused the FOI request. Where the applicant applies for IC review of a deemed access refusal decision, the OAIC will make inquiries with the agency or Minister.
- 1.39 If, during the IC review, the agency or Minister sends the applicant a written decision on the applicant's FOI request the OAIC will check whether the applicant is satisfied with the decision. Applicants who are satisfied with the decision and do not wish to proceed with the IC review must advise the OAIC in writing that they withdraw their application for IC review. Applicants who are not satisfied with the agency's or Minister's decision must explain why they disagree with the 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 undertake an IC review on the basis that the applicant has failed to cooperate in progressing the IC review application without reasonable excuse (s 54W(a)(ii)).

Access refusal decisions

- 1.40 An 'access refusal decision' means (s 53A):
- 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 all the 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 (s 21) (see Part 3 of the Guidelines)
 - e. a decision relating to the imposition or amount of a charge (s 29)
 - f. a decision to give access to a document to a 'qualified person' (where disclosing the information to the applicant might be detrimental to the applicant's physical or mental health or well-being) (s 47F(5))
 - g. a decision refusing to amend a record of personal information in accordance with an application (s 48)
 - h. a decision refusing to annotate a record of personal information in accordance with an application (s 48).
- 1.41 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)).
- 1.42 Given that the agency or Minister bears this onus, it will generally be necessary to undertake inquiries or seek information from the agency or Minister before inviting comment from applicants.

Access grant decisions

- 1.43 An 'access grant decision' means a decision to grant access to a document where there is a requirement to consult a third party (s 53B). Such decisions involve granting the FOI applicant access to information or documents following consultation.
- 1.44 In an IC review of an access grant decision, it is the IC review applicant who bears the onus of establishing that a decision refusing the FOI request is justified, or that the Information Commissioner should give a decision adverse to the FOI applicant (s 55D(2)).
- 1.45 IC review applicants will generally be invited to provide information or submissions which explain why the agency's or Minister's decision is wrong before comment is invited from the agency or Minister.

Part 4: Non-compliance with this direction

- 1.46 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 review as outlined in s 54W(c). This means that, in these cases, the review will be finalised.
- 1.47 Applicants will be provided with the opportunity to explain why the Information Commissioner should not finalise the IC review under s 54W(c) of the FOI Act before a decision is made.

Attachment B

Summaries of updates and agencies' submissions

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
1.5 Direction has effect from 1 July 2023	<ul style="list-style-type: none"> Expressed in draft direction as having effect from 1 July 2023 	<ul style="list-style-type: none"> <u>Updated:</u> This Direction has effect from 1 July 2024. <u>Comments:</u> We should potentially have a separate process for backlog matters, e.g. for IC review applications received before 1 July 2024, agencies and ministers must have regard to Part 10 of the FOI Guidelines issued under s 93A of the FOI Act which sets out the general principles and expectations of the Information Commissioner regarding IC reviews. Specific directions may be made in the context of these IC reviews.
Paragraph 1.13 -	<ul style="list-style-type: none"> “the OAIC will consider any notices as received when sent to an applicant’s preferred contact” The OAIC may wish to consider referring to an exception where there is evidence of non-receipt, such as a returned letter or email non delivery message (AAT) 	<ul style="list-style-type: none"> <u>To review the sentence highlighted and consider AAT’s suggestion.</u>
Paragraph 1.15 – who may make an application for IC review	<ul style="list-style-type: none"> This paragraph refers only to applications made by, or on behalf of, the person who made the original FOI request. It does not refer to applications made by affected third parties for review of access grant decisions. It is not clear whether there may be any differences in relation to the application requirements set out in subsequent paragraphs for such applications (AAT). 	<ul style="list-style-type: none">
17(a)	<ul style="list-style-type: none"> Defence proposes that the 1C consider making internal review compulsory, in circumstances which allow it. This would allow for agencies and ministers to have further meaningful engagement with the applicant before they seek an 1C review in an attempt to resolve the issues in an informal 	<ul style="list-style-type: none">

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
	and timely way, thus reducing the workload for the OAIC (Defence).	
Paragraph 1.17(b) – “date of the FOI decision	<ul style="list-style-type: none"> • The OAIC may wish to consider whether the date of receipt of the decision is also relevant (AAT) • Paragraph 1.17 identifies the information the applicant must provide when making a request for an IC review. The AFP recommends adding the requirement for an applicant to provide the agency reference number for the FOI decision to be reviewed. The AFP often have applicants with multiple FOI matters at various stages of completion or review. If the applicant does not provide the AFP specific reference number, it can be difficult to establish what matter they are requesting is reviewed (AFP). • At paragraph 1.17a, it notes the OAIC considers it is ‘usually’ better for an applicant to seek an internal review. It is unclear from this statement whether there will be any requirement on the applicant to either seek the review or provide details on why they did not consider it appropriate in the circumstances (ATO). • Noting the strict timeframe which are proposed for agencies – see for example the discussion in paragraph 5.6 of the proposed directions for Agencies – consideration should be given to whether a delay in seeking a review by an applicant will be a ground for providing an agency with additional time to respond; noting that it is generally more difficult and time consuming to respond to aged matters (ATO). 	<ul style="list-style-type: none"> •
Paragraph 1.18(a) – “identify the aspect(s) of the	<ul style="list-style-type: none"> • This wording may be confusing for some readers. One option for consideration, assuming the applicant is the reader, is “identify the parts of the decision you want the Information Commissioner to review”. If the OAIC and the respondent may 	<ul style="list-style-type: none"> •

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
agency's or Minister's decision about which the IC review is sought"	<p>rely on what is set out in the IC review application about the matters referred to in paragraph 1.18 to help define the scope of the review and what is required to be provided by the respondent during the review, this could be stated in the direction to help manage expectations (AGD).</p> <ul style="list-style-type: none"> • In paragraph 1.18, there is a reference to what an IC review application 'should' contain. In the context of the mandatory consultation requirement proposed to be put on agencies it would appear appropriate for applicants to be required to provide the information set out in this paragraph prior to any consultation occurring (ATO). • would a failure to provide this information be considered a 'failure to engage'. It would also be helpful to provide applicants with further details about what is expected of them in terms of participating in agency engagement and that simply attending a meeting with no intention to attempt to resolve the review application would be not considered appropriate 'engagement' (ATO). • at paragraph 1. 18, the revisions suggest that an 1C review application should also, inter alia, identify why the agency's or minister's decision is wrong. Defence proposes making this compulsory as part of the 1C review application. Clarifying the issues under review would assist the agency or minister to better understand them and could lead to the issues being resolved in a meaningful, informal and timely way (Defence). 	
Paragraph 1.23 – “OAIC requires agencies and Ministers to engage with the IC review	<ul style="list-style-type: none"> • As noted above in relation to other direction, we consider the requirement to engage with the applicant should only apply where there has been no internal review of the decision. The third sentence states that agencies are required to contact applicants for IC review shortly after the IC review application is lodged to arrange a suitable time for the engagement 	<ul style="list-style-type: none"> •

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
applicant at the commencement of an IC review”	<p>process. We query whether the reference to the IC review application being lodged should be a reference to the agency or minister being notified of the IC review application. As noted above, the preferable way in which engagement is undertaken should be a matter for the agency or minister to determine (AAT).</p> <ul style="list-style-type: none"> Paragraph 1.23 states ‘agencies are required to contact applicants for IC review shortly after the IC review application is lodged to arrange a suitable time for the engagement process.’ If the Direction as currently drafted is implemented, the AFP is concerned this wording creates expectations for the applicant that agencies may not be able to meet, particularly if there is a delay between the IC review application being lodged and the agency being notified under s 54Z. We recommend this wording is amended to reflect that agencies are required to contact applicants shortly after agencies are notified by the OAIC that an IC review application is lodged (AFP). at paragraph 1.23 of the Applicant Direction, it states “Agencies are required to contact applicants for IC review shortly after the IC review application is lodged.” This may result in unreasonable expectations by applicants about when they are to be contacted by agencies. Agencies usually only become aware of a request of IC review when notified by the OAIC under section 54Z of the FOI Act which may be some time after an application is lodged with the OAIC (Commonwealth Ombudsman). 	
Paragraph 1.31 – “preliminary view	<ul style="list-style-type: none"> If there is an opportunity for the parties to provide information in response to the preliminary view, it may be useful to state this. Such a view may raise a fact or issue that can be addressed (AGD). 	<ul style="list-style-type: none">

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
General	<ul style="list-style-type: none"> AGD queries if it may be simpler and more effective for all users of the FOI system to have a single direction, addressed to both the agency and the applicant. This would ensure all parties have a consistent understanding of the IC review process. By comparison, we note the AAT General Practice Direction (General-Practice-Direction.pdf (aat.gov.au)), under s 18B of the Administrative Appeals Tribunal Act 1975 applies to all parties to a review and appears to provide greater consistency in the explanation of process and responsibilities (AGD) 	<ul style="list-style-type: none">
General	<ul style="list-style-type: none"> It is also unclear what practice directions (if any) apply to third parties joined to an IC review or whether the process for an IC review in the directions for agencies and applicants may differ where there are other parties to the review (AGD) 	<ul style="list-style-type: none">
	<ul style="list-style-type: none"> 	<ul style="list-style-type: none">
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Executive brief

Responsible Executive Member:	Rocelle Ago, Assistant Commissioner FOI
Prepared by:	Jessica Eslick and Sara Peel, Director, Monitoring, Guidance and Engagement
To:	Elizabeth Tydd, FOI Commissioner
Copies:	Karen Tulloch, Raewyn Harlock
File ref:	D2024/008712
Date:	2 April 2024
Subject:	Proposed updates to draft IC review procedure direction for <u>applicants</u>

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Purpose and timing

To inform you of the proposed updates to the draft IC review procedure direction for applicants (titled 'Direction as to certain procedures to be followed in by applicants in Information Commissioner reviews') (the draft direction),

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Your as at 13 March 2024

Recommendations

1. That you note our proposed updates to the draft direction via comments to the following paragraphs of the draft direction (Attachment A):
 1. paragraph x
 2. xx
2. That you note our summary of the submissions in response to our consultation, whether we have proposed updates to the draft direction in light of those submissions, and our rationale /comments (**Attachment B**).

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Background

The Australian Information Commissioner may give written directions under s 55(2)(e)(ii) of the FOI Act in relation to procedures to be followed in Information Commissioner (IC) reviews.

The Information Commissioner has issued 2 directions under s 55(2)(e)(ii), which are currently in effect:

- [Direction as to certain procedures to be followed in Information Commissioner reviews](#), which has had effect from 26 February 2018.
- [Direction as to certain procedures to be followed by applicants in Information Commissioner reviews](#), which had had effect from 1 September 2021.

On 9 May 2023, we sought comments from, or consulted, interested stakeholders on draft revisions to each of the 2 directions.

In our consultation, we advised stakeholders:

We intend to make all submissions publicly available. Please indicate when making your submission if it contains confidential information that you do not want made public and why it should not be published. Requests for access to confidential comments will be determined in accordance with the FOI Act. If the OAIC accepts submissions in confidence you must also provide a copy that can be published.

Between 8 June 2023 and 6 July 2023, we received submissions on the draft direction from **6 agencies** as follows:

1. Administrative Appeals Tribunal on 8 June 2023
2. Attorney-General's Department on 30 June 2023
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Related brief [D2023/015645](#) contains TRIM links to those submissions at its Attachment B.

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Attachment A

Proposed direction



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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- 1.6 Further information relating to the IC review process is published on the Office of the Australian Information Commissioner's (OAIC) website. In particular, Part 10 (Reviews by the Australian Information Commissioner) of the Guidelines issued by the Information Commissioner under s 93A of the FOI Act (FOI Guidelines) describes the principles that inform the OAIC's approach to IC reviews.
- 1.7 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.
- 1.8 This direction has effect from 1 July 2023.

Part 2: The IC review process

- 1.9 IC review procedures are found in Part VII of the FOI Act. The IC review process is intended to be an informal, non-adversarial and timely means of external merits review of FOI decisions made by agencies and ministers. Part 10 of the FOI Guidelines, to which agencies and ministers must have regard when performing a function or exercising a power under the FOI Act, sets out in detail the process and underlying principles of IC review.

Making an application for IC review

- 1.10 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.
- 1.11 Where it is not possible for an application to be made online, applications may be sent to the OAIC by:
 - email to foidr@oaic.gov.au
 - mail to FOI Regulatory Group, GPO Box 5218, Sydney NSW 2001.
- 1.12 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

- 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).
- 1.13 The OAIC 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 OAIC will consider any notices as received when sent to an applicant's preferred contact.
- 1.14 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
 - 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.
- 1.15 An application for IC review may be made by, or on behalf of, the person who made the FOI request to which decision relates (s 54L(3)). The OAIC 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.
- 1.16 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.
- 1.17 The applicant must provide the OAIC 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. However, in circumstances where the original decision was made by the Minister or personally by the principal officer of an agency, or in the case of a deemed access refusal, applicants must apply directly for IC review.
 - 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.
 - If an application for IC review is not made within the timeframes in the FOI Act, applicants may apply to the Information Commissioner 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 Information Commissioner 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.

1.18 An application for IC review should also:

- a. identify the aspect(s) of the agency's or Minister's decision about which the IC review is sought
- 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.

1.19 The OAIC must provide 'appropriate assistance' to a person who wishes to apply for IC review and requires assistance to prepare the IC review application (s 54N(3)).

1.20 Section 54N of the FOI Act sets out the requirements for the contents and delivery of an application for IC review. These requirements include giving the OAIC contact details to which notices can be sent and providing a copy of the FOI decision the applicant wants the Information Commissioner to review. An application that does not comply with these requirements may be considered to be invalid.

During the IC review

Changes to contact details

1.21 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 Information Commissioner may decide not to undertake an IC review, or not continue to undertake an IC review, if the applicant or their nominated representative cannot be contacted after making reasonable attempts (s 54W(a)(iii)).

Participation in the IC review

1.22 Applicants must respond to inquiries from the OAIC within the time provided unless there are 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 why additional time is needed and propose a new date for response. Approval of an extension request is at the discretion of the OAIC.

1.23 The OAIC requires agencies and Ministers to engage with the IC review applicant at the commencement of an IC review. The purpose of this engagement is to attempt to resolve the issues identified in the IC review application in an informal and timely way. Agencies are required to contact applicants for IC review shortly after the IC review application is lodged to arrange a suitable time for

the engagement process. 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)).

- 1.24 The Information Commissioner may use any technique the Information Commissioner considers appropriate to facilitate an agreed resolution of the matters at issue in the IC review (such as alternative dispute resolution processes - s 55(2)(b)). Where appropriate, and following the compulsory engagement process described above, the OAIC may invite applicants to attend a teleconference to discuss the issues in dispute in the IC review with the agency's or Minister's office and to explore options for resolution, with a view to reaching agreement on some or all of the matters at issue in the IC review.
- 1.25 The Information Commissioner may decide not to undertake an IC review, or not continue to undertake an IC review, if an IC review applicant has failed to cooperate in progressing the IC review application or the IC review without reasonable excuse (s 54W(a)(ii)).

Submissions

- 1.26 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.
- 1.27 Applicants will be invited to make written submissions after the initial triage and early resolution process is complete, and once the application has been assigned to a review adviser for substantive review/case management. First, the agency or Minister will be asked to make submissions in support of the IC reviewable decision. The agency or Minister will send the applicant a copy of their submissions at the same time as they are sent to the OAIC. The applicant will then have the opportunity to make submissions addressing any issues raised by the agency or the Minister. The applicant is required to send their submissions to the agency or Minister at the same time as they are sent to the OAIC.
- 1.28 The Information Commissioner will generally give the parties (both the applicant and the agency or Minister) 4 weeks to make their submissions.
- 1.29 The Information Commissioner will not accept any further submissions from either party to the IC review unless the Information Commissioner has requested them.
- 1.30 The Information Commissioner will contact the parties after receipt of submissions if procedural fairness requirements have been identified. For information on procedural fairness see [3.15] — [3.31] of Part 3 of the FOI Guidelines.
- 1.31 The OAIC may provide a preliminary view at any time during the IC review. This will outline the case officer's preliminary thinking on the issues in dispute in the IC review. The applicant may be invited in some cases to withdraw the IC review application, depending on the views expressed in the preliminary view
- 1.32 The IC review application and any attachments will be shared with the agency or Minister, as well as any other parties to the review, unless there is a reason not to do so. Any other information and submissions provided to the OAIC by the applicant will be made available to the other parties to the IC review.
- 1.33 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.

- 1.34 Generally, submissions should be made in writing and sent by email or pre-paid post. In limited circumstances, if an applicant is unable to provide written submissions, the OAIC may agree to accept verbal submissions by telephone.

Information Commissioner decisions

- 1.35 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.
- 1.36 When the Information Commissioner makes a decision on IC review under s 55K of the FOI Act, the Information Commissioner will quote or summarise the submissions in the published decision. If a confidential submission is relied on by the Information Commissioner in making a decision on the IC review, this will be noted in the decision without revealing the confidential material.
- 1.37 To protect against the unreasonable disclosure of personal information, the Information Commissioner will consider whether identifying information should be included in published decisions. Natural persons may opt not 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: Procedure for IC review of specific types of decisions

Deemed access refusal decisions

- 1.38 A 'deemed access refusal' occurs when the statutory time for making a decision on an FOI request for access to a document has expired and notice of the decision has not been given. In these circumstances the agency or Minister is 'deemed' to have refused the FOI request. Where the applicant applies for IC review of a deemed access refusal decision, the OAIC will make inquiries with the agency or Minister.
- 1.39 If, during the IC review, the agency or Minister sends the applicant a written decision on the applicant's FOI request the OAIC will check whether the applicant is satisfied with the decision. Applicants who are satisfied with the decision and do not wish to proceed with the IC review must advise the OAIC in writing that they withdraw their application for IC review. Applicants who are not satisfied with the agency's or Minister's decision must explain why they disagree with the 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 undertake an IC review on the basis that the applicant has failed to cooperate in progressing the IC review application without reasonable excuse (s 54W(a)(ii)).

Access refusal decisions

- 1.40 An 'access refusal decision' means (s 53A):
- 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 all the 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 (s 21) (see Part 3 of the Guidelines)
 - e. a decision relating to the imposition or amount of a charge (s 29)
 - f. a decision to give access to a document to a 'qualified person' (where disclosing the information to the applicant might be detrimental to the applicant's physical or mental health or well-being) (s 47F(5))
 - g. a decision refusing to amend a record of personal information in accordance with an application (s 48)
 - h. a decision refusing to annotate a record of personal information in accordance with an application (s 48).
- 1.41 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)).
- 1.42 Given that the agency or Minister bears this onus, it will generally be necessary to undertake inquiries or seek information from the agency or Minister before inviting comment from applicants.

Access grant decisions

- 1.43 An 'access grant decision' means a decision to grant access to a document where there is a requirement to consult a third party (s 53B). Such decisions involve granting the FOI applicant access to information or documents following consultation.
- 1.44 In an IC review of an access grant decision, it is the IC review applicant who bears the onus of establishing that a decision refusing the FOI request is justified, or that the Information Commissioner should give a decision adverse to the FOI applicant (s 55D(2)).
- 1.45 IC review applicants will generally be invited to provide information or submissions which explain why the agency's or Minister's decision is wrong before comment is invited from the agency or Minister.

Part 4: Non-compliance with this direction

- 1.46 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 review as outlined in s 54W(c). This means that, in these cases, the review will be finalised.
- 1.47 Applicants will be provided with the opportunity to explain why the Information Commissioner should not finalise the IC review under s 54W(c) of the FOI Act before a decision is made.

Attachment B

Summaries of updates and agencies' submissions

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>1.8</p> <p>Direction has effect from 1 July 2023</p>	<ul style="list-style-type: none"> Expressed in draft direction as having effect from 1 July 2023 	<ul style="list-style-type: none"> <u>Updated</u>: This Direction has effect from 1 July 2024. <u>Comments</u>: We should potentially have a separate process for backlog matters, e.g. for IC review applications received before 1 July 2024, agencies and ministers must have regard to Part 10 of the FOI Guidelines issued under s 93A of the FOI Act which sets out the general principles and expectations of the Information Commissioner regarding IC reviews. Specific directions may be made in the context of these IC reviews.
<p>1.13</p> <p>Contacting applicants</p>	<ul style="list-style-type: none"> Paragraph 1.13 explains that the OAIC will contact applicants using their preferred contact method. Paragraph 1.13 also states 'Where an applicant has listed a preferred contact method as well as other contact information, the OAIC will consider any notices as received when sent to an applicant's preferred contact'. The AAT submits that we may wish to consider referring to an exception where there is evidence of non-receipt, such as a returned letter or email non delivery message. 	<ul style="list-style-type: none"> <u>Not updated</u>. <u>Comments</u>: Review the sentence highlighted and consider AAT's suggestion.
<p>1.15</p> <p>Who can be an IC review applicant?</p>	<ul style="list-style-type: none"> Paragraph 1.15 refers to s 54L(3), namely that an IC review application may be made by the person who made the request to which the decision relates, and the preceding paragraphs 1.16 to 1.20 set out the requirements for the IC review application. The AAT queries whether the requirements for IC review applications of access grant decisions (s 54M) are the same as those discussed at paragraphs 1.16 to 1.20. 	<ul style="list-style-type: none"> <u>Not updated</u>. <u>Comments</u>: Consider updating para 1.15 to refer to s 54M(3) (application for IC review of access grant decisions).
<p>1.17(a)</p>	<ul style="list-style-type: none"> Paragraph 1.17 discusses the information that the applicant must provide the OAIC with about the FOI decision. 	<ul style="list-style-type: none"> <u>Not updated</u>.

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>Requirements of IC review application: Usually better to seek internal review first</p>	<ul style="list-style-type: none"> Paragraph 1.17(a) notes that 'it is usually better to seek internal review first ...'. Defence proposes that we consider making internal review compulsory, in circumstances which allow it. This would allow for agencies and ministers to have further meaningful engagement with the applicant before they seek an IC review in an attempt to resolve the issues in an informal and timely way, thus reducing the workload for the OAIC. ATO submits that it is unclear whether there will be any requirement on the applicant to either seek the review or provide details on why they did not consider it appropriate in the circumstances (ATO). 	<ul style="list-style-type: none"> <u>Not updated.</u> <u>Comments:</u> Consider putting Defence's suggestion on the legislative issues register: D2019/001559. Consider updating para 1.17(a) to explain that an IC review applicant is not required to apply for an internal review before applying for an IC review. The wording could for example be consistent with the draft FOI Guidelines at paragraph [10.3].
<p>1.17(b) Requirements of IC review application: Notice of decision given versus received</p>	<ul style="list-style-type: none"> Paragraph 1.17(b) notes that 'In most cases, an application for IC review must be made within 60 days of the applicant being notified of the ... decision ...'. The AAT submits that we may wish to consider whether the date of receipt of the decision is also relevant. 	<ul style="list-style-type: none"> <u>Not updated.</u> <u>Comments:</u> Consider definition of 'notice of decision given' and 'receipt'.
<p>1.17 Agency reference number</p>	<ul style="list-style-type: none"> AFP submits that applicants should also be required to provide the agency reference number for the FOI decision. 	<ul style="list-style-type: none"> <u>Not updated.</u> <u>Comments:</u> The applicant is already generally required to provide a copy of the decision (s 54N(1)(b)), which should state the agency reference number.
<p>Other</p>	<ul style="list-style-type: none"> ATO submits that a delay in seeking a review by an applicant should be a ground for providing an agency with additional time to respond. 	<ul style="list-style-type: none">
	<ul style="list-style-type: none"> 	<ul style="list-style-type: none">
<p>1.18(a) Further requirements of</p>	<ul style="list-style-type: none"> Paragraph 1.18(a) says that an application s AGD submits that his wording may be confusing for some readers. One option for consideration, assuming the applicant is the reader, 	<ul style="list-style-type: none">

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>IC review application</p> <p>Identify the aspect(s) of decision about which the IC review is sought”</p>	<p>is “identify the parts of the decision you want the Information Commissioner to review”. If the OAIC and the respondent may rely on what is set out in the IC review application about the matters referred to in paragraph 1.18 to help define the scope of the review and what is required to be provided by the respondent during the review, this could be stated in the direction to help manage expectations (AGD).</p> <ul style="list-style-type: none"> • In paragraph 1.18, there is a reference to what an IC review application ‘should’ contain. In the context of the mandatory consultation requirement proposed to be put on agencies it would appear appropriate for applicants to be required to provide the information set out in this paragraph prior to any consultation occurring (ATO). • would a failure to provide this information be considered a ‘failure to engage’. It would also be helpful to provide applicants with further details about what is expected of them in terms of participating in agency engagement and that simply attending a meeting with no intention to attempt to resolve the review application would be not considered appropriate ‘engagement’ (ATO). • at paragraph 1. 18, the revisions suggest that an 1C review application should also, inter alia, identify why the agency’s or minister’s decision is wrong. Defence proposes making this compulsory as part of the 1C review application. Clarifying the issues under review would assist the agency or minister to better understand them and could lead to the issues being resolved in a meaningful, informal and timely way (Defence). 	
<p>Paragraph 1.23 – “OAIC requires agencies and Ministers to engage with the IC review applicant at the</p>	<ul style="list-style-type: none"> • As noted above in relation to other direction, we consider the requirement to engage with the applicant should only apply where there has been no internal review of the decision. The third sentence states that agencies are required to contact applicants for IC review shortly after the IC review application is lodged to arrange a suitable time for the engagement process. We query whether the reference to the IC review application being lodged should be a 	<ul style="list-style-type: none"> •

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
commencement of an IC review"	<p>reference to the agency or minister being notified of the IC review application. As noted above, the preferable way in which engagement is undertaken should be a matter for the agency or minister to determine (AAT).</p> <ul style="list-style-type: none"> Paragraph 1.23 states 'agencies are required to contact applicants for IC review shortly after the IC review application is lodged to arrange a suitable time for the engagement process.' If the Direction as currently drafted is implemented, the AFP is concerned this wording creates expectations for the applicant that agencies may not be able to meet, particularly if there is a delay between the IC review application being lodged and the agency being notified under s 54Z. We recommend this wording is amended to reflect that agencies are required to contact applicants shortly after agencies are notified by the OAIC that an IC review application is lodged (AFP). at paragraph 1.23 of the Applicant Direction, it states "Agencies are required to contact applicants for IC review shortly after the IC review application is lodged." This may result in unreasonable expectations by applicants about when they are to be contacted by agencies. Agencies usually only become aware of a request of IC review when notified by the OAIC under section 54Z of the FOI Act which may be some time after an application is lodged with the OAIC (Commonwealth Ombudsman). 	
Paragraph 1.31 – "preliminary view	<ul style="list-style-type: none"> If there is an opportunity for the parties to provide information in response to the preliminary view, it may be useful to state this. Such a view may raise a fact or issue that can be addressed (AGD). 	<ul style="list-style-type: none">
General	<ul style="list-style-type: none"> AGD queries if it may be simpler and more effective for all users of the FOI system to have a single direction, addressed to both the agency and the applicant. This would ensure all parties have a consistent understanding of the IC review process. By comparison, we note the AAT General Practice Direction (General-Practice-Direction.pdf (aat.gov.au)), under s 18B of the Administrative Appeals Tribunal Act 1975 applies to all parties to a review and 	<ul style="list-style-type: none">

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
	appears to provide greater consistency in the explanation of process and responsibilities (AGD)	
General	<ul style="list-style-type: none"> • it is also unclear what practice directions (if any) apply to third parties joined to an IC review or whether the process for an IC review in the directions for agencies and applicants may differ where there are other parties to the review (AGD) 	<ul style="list-style-type: none"> •
	<ul style="list-style-type: none"> • 	<ul style="list-style-type: none"> •
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Executive brief

Responsible Executive Member:	Rocelle Ago, Assistant Commissioner FOI
Prepared by:	Jessica Eslick and Sara Peel, Director, Monitoring, Guidance and Engagement
To:	Elizabeth Tydd, FOI Commissioner
Copies:	Karen Tulloch, Raewyn Harlock
File ref:	D2024/008712
Date:	2 April 2024
Subject:	Proposed updates to draft IC review procedure direction for <u>applicants</u>

Deleted: 26 March 2024

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Purpose and timing

To inform you of the proposed updates to the draft IC review procedure direction for applicants (titled 'Direction as to certain procedures to be followed in by applicants in Information Commissioner reviews') (the draft direction),

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Your as at 13 March 2024

Recommendations

1. That you note our proposed updates to the draft direction via comments to the following paragraphs of the draft direction (Attachment A):
 1. paragraph x
 2. xx
2. That you note our summary of the submissions in response to our consultation, whether we have proposed updates to the draft direction in light of those submissions, and our rationale /comments (**Attachment B**).

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Background

The Australian Information Commissioner may give written directions under s 55(2)(e)(ii) of the FOI Act in relation to procedures to be followed in Information Commissioner (IC) reviews.

The Information Commissioner has issued 2 directions under s 55(2)(e)(ii), which are currently in effect:

- [Direction as to certain procedures to be followed in Information Commissioner reviews](#), which has had effect from 26 February 2018.
- [Direction as to certain procedures to be followed by applicants in Information Commissioner reviews](#), which had had effect from 1 September 2021.

On 9 May 2023, we sought comments from, or consulted, interested stakeholders on draft revisions to each of the 2 directions.

In our consultation, we advised stakeholders:

We intend to make all submissions publicly available. Please indicate when making your submission if it contains confidential information that you do not want made public and why it should not be published. Requests for access to confidential comments will be determined in accordance with the FOI Act. If the OAIC accepts submissions in confidence you must also provide a copy that can be published.

Between 8 June 2023 and 6 July 2023, we received submissions on the draft direction from **6 agencies** as follows:

1. Administrative Appeals Tribunal on 8 June 2023
2. Attorney-General's Department on 30 June 2023
3. Australian Federal Police on 30 June 2023
4. Australian Tax Office on 30 June 2023
5. Commonwealth Ombudsman on 30 June 2023
6. Department of Defence on 30 June 2023

Related brief [D2023/015645](#) contains TRIM links to those submissions at its Attachment B.

Attachments

1. **Attachment A:** Proposed updated draft direction (with proposed updates in highlight and comments).
2. **Attachment B:** Summary of agencies' submissions in response to our consultation on the draft direction, whether we have proposed (at Attachment A) to update the draft direction in response to those submissions, and our rationale/comments.

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Attachment A

Proposed direction



Australian Government

Office of the Australian Information Commissioner

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

Contents

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Part 4: Non-compliance with this direction	Error! Bookmark not defined.

Part 1: About this direction

- 1.1 This direction is given by the Australian Information Commissioner under s 55(2)(e)(i) of the Freedom of Information Act 1982 (FOI Act) in relation to Information Commissioner reviews (IC reviews).
- 1.2 This written direction sets out the procedure to be followed by applicants for IC reviews undertaken by the Information Commissioner under the FOI Act.
- 1.3 The Information Commissioner 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 Information Commissioner (s 54W(c)).
- 1.4 The Information Commissioner may also give written directions as to the procedure to be followed in relation to a particular IC review (s 55(2)(e)(ii)).
- 1.5 This direction does not apply to the extent it is inconsistent with a provision of the FOI Act, another enactment or a specific direction made in a particular IC review under s 55(2)(e)(ii) of the FOI Act.
- 1.6 Further information relating to the IC review process is published on the Office of the Australian Information Commissioner's (OAIC) website. In particular, Part 10 (Reviews by the Australian Information Commissioner) of the Guidelines issued by the Information Commissioner under s 93A of the FOI Act (FOI Guidelines) describes the principles that inform the OAIC's approach to IC reviews.
- 1.7 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.
- 1.8 This direction has effect from 1 July 2023.

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- 1.9 IC review procedures are found in Part VII of the FOI Act. The IC review process is intended to be an informal, non-adversarial and timely means of external merits review of FOI decisions made by agencies and ministers. Part 10 of the FOI Guidelines, to which agencies and ministers must have regard when performing a function or exercising a power under the FOI Act, sets out in detail the process and underlying principles of IC review.

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- 1.10 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.
- 1.11 Where it is not possible for an application to be made online, applications may be sent to the OAIC by:
 - email to foidr@oaic.gov.au
 - mail to FOI Regulatory Group, GPO Box 5218, Sydney NSW 2001.
- 1.12 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

- 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).
- 1.13 The OAIC 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 OAIC will consider any notices as received when sent to an applicant's preferred contact.
- 1.14 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
 - 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.
- 1.15 An application for IC review may be made by, or on behalf of, the person who made the FOI request to which decision relates (s 54L(3)). The OAIC 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.
- 1.16 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.
- 1.17 The applicant must provide the OAIC 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. However, in circumstances where the original decision was made by the Minister or personally by the principal officer of an agency, or in the case of a deemed access refusal, applicants must apply directly for IC review.
 - 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.
 - If an application for IC review is not made within the timeframes in the FOI Act, applicants may apply to the Information Commissioner 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 Information Commissioner 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.

1.18 An application for IC review should also:

- a. identify the aspect(s) of the agency's or Minister's decision about which the IC review is sought
- 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.

1.19 The OAIC must provide 'appropriate assistance' to a person who wishes to apply for IC review and requires assistance to prepare the IC review application (s 54N(3)).

1.20 Section 54N of the FOI Act sets out the requirements for the contents and delivery of an application for IC review. These requirements include giving the OAIC contact details to which notices can be sent and providing a copy of the FOI decision the applicant wants the Information Commissioner to review. An application that does not comply with these requirements may be considered to be invalid.

During the IC review

Changes to contact details

1.21 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 Information Commissioner may decide not to undertake an IC review, or not continue to undertake an IC review, if the applicant or their nominated representative cannot be contacted after making reasonable attempts (s 54W(a)(iii)).

Participation in the IC review

1.22 Applicants must respond to inquiries from the OAIC within the time provided unless there are 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 why additional time is needed and propose a new date for response. Approval of an extension request is at the discretion of the OAIC.

1.23 The OAIC requires agencies and Ministers to engage with the IC review applicant at the commencement of an IC review. The purpose of this engagement is to attempt to resolve the issues identified in the IC review application in an informal and timely way. Agencies are required to contact applicants for IC review shortly after the IC review application is lodged to arrange a suitable time for

the engagement process. 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)).

- 1.24 The Information Commissioner may use any technique the Information Commissioner considers appropriate to facilitate an agreed resolution of the matters at issue in the IC review (such as alternative dispute resolution processes - s 55(2)(b)). Where appropriate, and following the compulsory engagement process described above, the OAIC may invite applicants to attend a teleconference to discuss the issues in dispute in the IC review with the agency's or Minister's office and to explore options for resolution, with a view to reaching agreement on some or all of the matters at issue in the IC review.
- 1.25 The Information Commissioner may decide not to undertake an IC review, or not continue to undertake an IC review, if an IC review applicant has failed to cooperate in progressing the IC review application or the IC review without reasonable excuse (s 54W(a)(ii)).

Submissions

- 1.26 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.
- 1.27 Applicants will be invited to make written submissions after the initial triage and early resolution process is complete, and once the application has been assigned to a review adviser for substantive review/case management. First, the agency or Minister will be asked to make submissions in support of the IC reviewable decision. The agency or Minister will send the applicant a copy of their submissions at the same time as they are sent to the OAIC. The applicant will then have the opportunity to make submissions addressing any issues raised by the agency or the Minister. The applicant is required to send their submissions to the agency or Minister at the same time as they are sent to the OAIC.
- 1.28 The Information Commissioner will generally give the parties (both the applicant and the agency or Minister) 4 weeks to make their submissions.
- 1.29 The Information Commissioner will not accept any further submissions from either party to the IC review unless the Information Commissioner has requested them.
- 1.30 The Information Commissioner will contact the parties after receipt of submissions if procedural fairness requirements have been identified. For information on procedural fairness see [3.15] — [3.31] of Part 3 of the FOI Guidelines.
- 1.31 The OAIC may provide a preliminary view at any time during the IC review. This will outline the case officer's preliminary thinking on the issues in dispute in the IC review. The applicant may be invited in some cases to withdraw the IC review application, depending on the views expressed in the preliminary view
- 1.32 The IC review application and any attachments will be shared with the agency or Minister, as well as any other parties to the review, unless there is a reason not to do so. Any other information and submissions provided to the OAIC by the applicant will be made available to the other parties to the IC review.
- 1.33 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.

- 1.34 Generally, submissions should be made in writing and sent by email or pre-paid post. In limited circumstances, if an applicant is unable to provide written submissions, the OAIC may agree to accept verbal submissions by telephone.

Information Commissioner decisions

- 1.35 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.
- 1.36 When the Information Commissioner makes a decision on IC review under s 55K of the FOI Act, the Information Commissioner will quote or summarise the submissions in the published decision. If a confidential submission is relied on by the Information Commissioner in making a decision on the IC review, this will be noted in the decision without revealing the confidential material.
- 1.37 To protect against the unreasonable disclosure of personal information, the Information Commissioner will consider whether identifying information should be included in published decisions. Natural persons may opt not 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: Procedure for IC review of specific types of decisions

Deemed access refusal decisions

- 1.38 A 'deemed access refusal' occurs when the statutory time for making a decision on an FOI request for access to a document has expired and notice of the decision has not been given. In these circumstances the agency or Minister is 'deemed' to have refused the FOI request. Where the applicant applies for IC review of a deemed access refusal decision, the OAIC will make inquiries with the agency or Minister.
- 1.39 If, during the IC review, the agency or Minister sends the applicant a written decision on the applicant's FOI request the OAIC will check whether the applicant is satisfied with the decision. Applicants who are satisfied with the decision and do not wish to proceed with the IC review must advise the OAIC in writing that they withdraw their application for IC review. Applicants who are not satisfied with the agency's or Minister's decision must explain why they disagree with the 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 undertake an IC review on the basis that the applicant has failed to cooperate in progressing the IC review application without reasonable excuse (s 54W(a)(ii)).

Access refusal decisions

- 1.40 An 'access refusal decision' means (s 53A):
- 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 all the 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 (s 21) (see Part 3 of the Guidelines)
 - e. a decision relating to the imposition or amount of a charge (s 29)
 - f. a decision to give access to a document to a 'qualified person' (where disclosing the information to the applicant might be detrimental to the applicant's physical or mental health or well-being) (s 47F(5))
 - g. a decision refusing to amend a record of personal information in accordance with an application (s 48)
 - h. a decision refusing to annotate a record of personal information in accordance with an application (s 48).
- 1.41 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)).
- 1.42 Given that the agency or Minister bears this onus, it will generally be necessary to undertake inquiries or seek information from the agency or Minister before inviting comment from applicants.

Access grant decisions

- 1.43 An 'access grant decision' means a decision to grant access to a document where there is a requirement to consult a third party (s 53B). Such decisions involve granting the FOI applicant access to information or documents following consultation.
- 1.44 In an IC review of an access grant decision, it is the IC review applicant who bears the onus of establishing that a decision refusing the FOI request is justified, or that the Information Commissioner should give a decision adverse to the FOI applicant (s 55D(2)).
- 1.45 IC review applicants will generally be invited to provide information or submissions which explain why the agency's or Minister's decision is wrong before comment is invited from the agency or Minister.

Part 4: Non-compliance with this direction

- 1.46 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 review as outlined in s 54W(c). This means that, in these cases, the review will be finalised.
- 1.47 Applicants will be provided with the opportunity to explain why the Information Commissioner should not finalise the IC review under s 54W(c) of the FOI Act before a decision is made.

Attachment B

Summaries of updates and agencies' submissions

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>1.8</p> <p>Direction has effect from 1 July 2023</p>	<ul style="list-style-type: none"> Expressed in draft direction as having effect from 1 July 2023 	<ul style="list-style-type: none"> <u>Updated</u>: This Direction has effect from 1 July 2024. <u>Comments</u>: We should potentially have a separate process for backlog matters, e.g. for IC review applications received before 1 July 2024, agencies and ministers must have regard to Part 10 of the FOI Guidelines issued under s 93A of the FOI Act which sets out the general principles and expectations of the Information Commissioner regarding IC reviews. Specific directions may be made in the context of these IC reviews.
<p>1.13</p> <p>Contacting applicants</p>	<ul style="list-style-type: none"> Paragraph 1.13 explains that the OAIC will contact applicants using their preferred contact method. Paragraph 1.13 also states 'Where an applicant has listed a preferred contact method as well as other contact information, the OAIC will consider any notices as received when sent to an applicant's preferred contact'. The AAT submits that we may wish to consider referring to an exception where there is evidence of non-receipt, such as a returned letter or email non delivery message. 	<ul style="list-style-type: none"> <u>Not updated</u>. <u>Comments</u>: Review the sentence highlighted and consider AAT's suggestion.
<p>1.15</p> <p>Who can be an IC review applicant?</p>	<ul style="list-style-type: none"> Paragraph 1.15 refers to s 54L(3), namely that an IC review application may be made by the person who made the request to which the decision relates, and the preceding paragraphs 1.16 to 1.20 set out the requirements for the IC review application. The AAT queries whether the requirements for IC review applications of access grant decisions (s 54M) are the same as those discussed at paragraphs 1.16 to 1.20. 	<ul style="list-style-type: none"> <u>Not updated</u>. <u>Comments</u>: Consider updating para 1.15 to refer to s 54M(3) (application for IC review of access grant decisions).
<p>1.17(a)</p>	<ul style="list-style-type: none"> Paragraph 1.17 discusses the information that the applicant must provide the OAIC with about the FOI decision. 	<ul style="list-style-type: none"> <u>Not updated</u>.

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>Information to be provided with IC review application: Usually better to seek internal review first</p>	<ul style="list-style-type: none"> Paragraph 1.17(a) notes that 'it is usually better to seek internal review first ...'. Defence proposes that we consider making internal review compulsory, in circumstances which allow it. This would allow for agencies and ministers to have further meaningful engagement with the applicant before they seek an IC review in an attempt to resolve the issues in an informal and timely way, thus reducing the workload for the OAIC. ATO submits that it is unclear whether there will be any requirement on the applicant to either seek the review or provide details on why they did not consider it appropriate in the circumstances (ATO). 	<ul style="list-style-type: none"> <u>Not updated.</u> <u>Comments:</u> Consider putting Defence's suggestion on the legislative issues register: D2019/001559. Consider updating para 1.17(a) to explain that an IC review applicant is not required to apply for an internal review before applying for an IC review. The wording could for example be consistent with the draft FOI Guidelines at paragraph [10.3].
<p>1.17(b) Information to be provided with IC review application: Notice of decision given versus received</p>	<ul style="list-style-type: none"> Paragraph 1.17(b) notes that 'In most cases, an application for IC review must be made within 60 days of the applicant being notified of the ... decision ...'. The AAT submits that we may wish to consider whether the date of receipt of the decision is also relevant. 	<ul style="list-style-type: none"> <u>Not updated.</u> <u>Comments:</u> Consider definition of 'notice of decision given' and 'receipt'.
<p>1.17 Agency reference number</p>	<ul style="list-style-type: none"> AFP submits that applicants should also be required to provide the agency reference number for the FOI decision. 	<ul style="list-style-type: none"> <u>Not updated.</u> <u>Comments:</u> The applicant is already generally required to provide a copy of the decision (s 54N(1)(b)), which should state the agency reference number.
<p>Other</p>	<ul style="list-style-type: none"> ATO submits that a delay in seeking a review by an applicant should be a ground for providing an agency with additional time to respond. 	<ul style="list-style-type: none">
<p>1.18 Further information to be provided with</p>	<ul style="list-style-type: none"> Paragraph 1.18 advises that 'An application for IC review should also: (a) ... (b) ... (c) ... (d) ...'. 	<ul style="list-style-type: none">

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>IC review application</p> <p>Should or required to provide the information</p>	<ul style="list-style-type: none"> • ATO submits that given the mandatory consultation requirement proposed to be put on agencies it would appear appropriate for applicants to be required to provide the information set out in this paragraph prior to any consultation occurring. • ATO also queries whether a failure to provide this information would be considered a 'failure to engage'. • ATO also submits it would also be helpful to provide applicants with further details about what is expected of them in terms of participating in agency engagement and that simply attending a meeting with no intention to attempt to resolve the review application would be not considered appropriate 'engagement'. 	
<p>1.18(a)</p> <p>Further requirements of IC review application</p> <p>Identify the aspect(s) of decision about which the IC review is sought</p>	<ul style="list-style-type: none"> • Paragraph 1.18(a) says that an application should 'identify the aspect(s) of the ... decision about which the IC review is sought'. • AGD submits that this wording may be confusing for some readers, and could alternatively say "identify the parts of the decision you want the Information Commissioner to review". • Defence submits that identifying why the agency's or minister's decision is wrong should be compulsory, and would assist the agency or minister to better understand and resolve the issues in a meaningful, informal and timely way. 	<ul style="list-style-type: none"> •
<p>1.23</p> <p>Engagement to resolve issues</p>	<ul style="list-style-type: none"> • AAT submits that engagement should only be required if there has been no internal review of the decision. • AAT, AFP, and the Commonwealth Ombudsman submit that paragraph 1.23 should say that agencies are required to contact applicants to arrange the engagement after receiving the s 54Z notice, rather than after the IC review application is lodged. AFP in particular notes that there can be a delay between an IC review application and s 54Z notice. 	<ul style="list-style-type: none"> •
	<ul style="list-style-type: none"> • 	<ul style="list-style-type: none"> •

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
1.31 Preliminary view	<ul style="list-style-type: none"> Paragraph 1.31 states 'The OAIC may provide a preliminary view at any time ... The applicant may be invited in some cases to withdraw the IC review application, depending on the views expressed in the preliminary view'. The AAT submits that if there is an opportunity for the parties to provide information in response to the preliminary view, it may be useful to state this. Such a view may raise a fact or issue that can be addressed. 	<ul style="list-style-type: none"> <u>Updated</u> <u>Rationale: Responsive to AAT's submissions:</u> <u>Para 10.60 of the draft FOI Guidelines says:</u> the OAIC's IC review officer may review the material submitted by both parties and provide a preliminary view as to the merits 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 <u>Para 10.119 says:</u> Submissions as to the issues identified in the preliminary view will be sought from the relevant party. Further information about the process that will be followed when a preliminary view is issued can be found in the 'Direction as to certain procedures to be following in Information Commissioner reviews' on the OAIC's website.
General	<ul style="list-style-type: none"> AGD queries if it may be simpler and more effective for all users of the FOI system to have a single direction, addressed to both the agency and the applicant. This would ensure all parties have a consistent understanding of the IC review process. By comparison, we note the AAT General Practice Direction (General-Practice-Direction.pdf (aat.gov.au)), under s 18B of the Administrative Appeals Tribunal Act 1975 applies to all parties to a review and appears to provide greater consistency in the explanation of process and responsibilities (AGD) 	<ul style="list-style-type: none">
General	<ul style="list-style-type: none"> AGD: it is also unclear what practice directions (if any) apply to third parties joined to an IC review or whether the process for an IC review in the directions for agencies and applicants may differ where there are other parties to the review 	<ul style="list-style-type: none">

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
	•	•
	•	•
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Executive brief

Responsible Executive Member:	Rocelle Ago, Assistant Commissioner FOI
Prepared by:	Jessica Eslick and Sara Peel, Director, Monitoring, Guidance and Engagement
To:	Elizabeth Tydd, FOI Commissioner
Copies:	Karen Tulloch, Raewyn Harlock
File ref:	D2024/008712
Date:	2 April 2024
Subject:	Proposed updates to draft IC review procedure direction for <u>applicants</u>

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Purpose and timing

To inform you of the proposed updates to the draft IC review procedure direction for applicants (titled 'Direction as to certain procedures to be followed in by applicants in Information Commissioner reviews') (the draft direction),

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Your as at 13 March 2024

Recommendations

1. That you note our proposed updates to the draft direction via comments to the following paragraphs of the draft direction (Attachment A):
 1. paragraph x
 2. xx
2. That you note our summary of the submissions in response to our consultation, whether we have proposed updates to the draft direction in light of those submissions, and our rationale /comments (**Attachment B**).

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Background

The Australian Information Commissioner may give written directions under s 55(2)(e)(ii) of the FOI Act in relation to procedures to be followed in Information Commissioner (IC) reviews.

The Information Commissioner has issued 2 directions under s 55(2)(e)(ii), which are currently in effect:

- [Direction as to certain procedures to be followed in Information Commissioner reviews](#), which has had effect from 26 February 2018.
- [Direction as to certain procedures to be followed by applicants in Information Commissioner reviews](#), which had had effect from 1 September 2021.

On 9 May 2023, we sought comments from, or consulted, interested stakeholders on draft revisions to each of the 2 directions.

In our consultation, we advised stakeholders:

We intend to make all submissions publicly available. Please indicate when making your submission if it contains confidential information that you do not want made public and why it should not be published. Requests for access to confidential comments will be determined in accordance with the FOI Act. If the OAIC accepts submissions in confidence you must also provide a copy that can be published.

Between 8 June 2023 and 6 July 2023, we received submissions on the draft direction from **6 agencies** as follows:

1. Administrative Appeals Tribunal on 8 June 2023
2. Attorney-General's Department on 30 June 2023
3. Australian Federal Police on 30 June 2023
4. Australian Tax Office on 30 June 2023
5. Commonwealth Ombudsman on 30 June 2023
6. Department of Defence on 30 June 2023

Related brief [D2023/015645](#) contains TRIM links to those submissions at its Attachment B.

Attachments

1. **Attachment A:** Proposed updated draft direction (with proposed updates in highlight and comments).
2. **Attachment B:** Summary of agencies' submissions in response to our consultation on the draft direction, whether we have proposed (at Attachment A) to update the draft direction in response to those submissions, and our rationale/comments.

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Attachment A

Proposed direction



Australian Government

Office of the Australian Information Commissioner

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

Contents

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Part 3: Procedure for IC review of specific types of decisions	Error! Bookmark not defined.
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Access grant decisions.....	Error! Bookmark not defined.
Part 4: Non-compliance with this direction	Error! Bookmark not defined.

Part 1: About this direction

- 1.1 This direction is given by the Australian Information Commissioner under s 55(2)(e)(i) of the Freedom of Information Act 1982 (FOI Act) in relation to Information Commissioner reviews (IC reviews).
- 1.2 This written direction sets out the procedure to be followed by applicants for IC reviews undertaken by the Information Commissioner under the FOI Act.
- 1.3 The Information Commissioner 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 Information Commissioner (s 54W(c)).
- 1.4 The Information Commissioner may also give written directions as to the procedure to be followed in relation to a particular IC review (s 55(2)(e)(ii)).
- 1.5 This direction does not apply to the extent it is inconsistent with a provision of the FOI Act, another enactment or a specific direction made in a particular IC review under s 55(2)(e)(ii) of the FOI Act.
- 1.6 Further information relating to the IC review process is published on the Office of the Australian Information Commissioner's (OAIC) website. In particular, Part 10 (Reviews by the Australian Information Commissioner) of the Guidelines issued by the Information Commissioner under s 93A of the FOI Act (FOI Guidelines) describes the principles that inform the OAIC's approach to IC reviews.
- 1.7 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.
- 1.8 This direction has effect from 1 July 2023.

Part 2: The IC review process

- 1.9 IC review procedures are found in Part VII of the FOI Act. The IC review process is intended to be an informal, non-adversarial and timely means of external merits review of FOI decisions made by agencies and ministers. Part 10 of the FOI Guidelines, to which agencies and ministers must have regard when performing a function or exercising a power under the FOI Act, sets out in detail the process and underlying principles of IC review.

Making an application for IC review

- 1.10 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.
- 1.11 Where it is not possible for an application to be made online, applications may be sent to the OAIC by:
 - email to foidr@oaic.gov.au
 - mail to FOI Regulatory Group, GPO Box 5218, Sydney NSW 2001.
- 1.12 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

- 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).
- 1.13 The OAIC 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 OAIC will consider any notices as received when sent to an applicant's preferred contact.
- 1.14 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
 - 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.
- 1.15 An application for IC review may be made by, or on behalf of, the person who made the FOI request to which decision relates (s 54L(3)). The OAIC 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.
- 1.16 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.
- 1.17 The applicant must provide the OAIC 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. However, in circumstances where the original decision was made by the Minister or personally by the principal officer of an agency, or in the case of a deemed access refusal, applicants must apply directly for IC review.
 - 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.
 - If an application for IC review is not made within the timeframes in the FOI Act, applicants may apply to the Information Commissioner 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 Information Commissioner 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.

1.18 An application for IC review should also:

- a. identify the aspect(s) of the agency's or Minister's decision about which the IC review is sought
- 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.

1.19 The OAIC must provide 'appropriate assistance' to a person who wishes to apply for IC review and requires assistance to prepare the IC review application (s 54N(3)).

1.20 Section 54N of the FOI Act sets out the requirements for the contents and delivery of an application for IC review. These requirements include giving the OAIC contact details to which notices can be sent and providing a copy of the FOI decision the applicant wants the Information Commissioner to review. An application that does not comply with these requirements may be considered to be invalid.

During the IC review

Changes to contact details

1.21 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 Information Commissioner may decide not to undertake an IC review, or not continue to undertake an IC review, if the applicant or their nominated representative cannot be contacted after making reasonable attempts (s 54W(a)(iii)).

Participation in the IC review

1.22 Applicants must respond to inquiries from the OAIC within the time provided unless there are 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 why additional time is needed and propose a new date for response. Approval of an extension request is at the discretion of the OAIC.

1.23 The OAIC requires agencies and Ministers to engage with the IC review applicant at the commencement of an IC review. The purpose of this engagement is to attempt to resolve the issues identified in the IC review application in an informal and timely way. Agencies are required to contact applicants for IC review shortly after the IC review application is lodged to arrange a suitable time for

the engagement process. 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)).

- 1.24 The Information Commissioner may use any technique the Information Commissioner considers appropriate to facilitate an agreed resolution of the matters at issue in the IC review (such as alternative dispute resolution processes - s 55(2)(b)). Where appropriate, and following the compulsory engagement process described above, the OAIC may invite applicants to attend a teleconference to discuss the issues in dispute in the IC review with the agency's or Minister's office and to explore options for resolution, with a view to reaching agreement on some or all of the matters at issue in the IC review.
- 1.25 The Information Commissioner may decide not to undertake an IC review, or not continue to undertake an IC review, if an IC review applicant has failed to cooperate in progressing the IC review application or the IC review without reasonable excuse (s 54W(a)(ii)).

Submissions

- 1.26 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.
- 1.27 Applicants will be invited to make written submissions after the initial triage and early resolution process is complete, and once the application has been assigned to a review adviser for substantive review/case management. First, the agency or Minister will be asked to make submissions in support of the IC reviewable decision. The agency or Minister will send the applicant a copy of their submissions at the same time as they are sent to the OAIC. The applicant will then have the opportunity to make submissions addressing any issues raised by the agency or the Minister. The applicant is required to send their submissions to the agency or Minister at the same time as they are sent to the OAIC.
- 1.28 The Information Commissioner will generally give the parties (both the applicant and the agency or Minister) 4 weeks to make their submissions.
- 1.29 The Information Commissioner will not accept any further submissions from either party to the IC review unless the Information Commissioner has requested them.
- 1.30 The Information Commissioner will contact the parties after receipt of submissions if procedural fairness requirements have been identified. For information on procedural fairness see [3.15] — [3.31] of Part 3 of the FOI Guidelines.
- 1.31 The OAIC may provide a preliminary view at any time during the IC review. This will outline the case officer's preliminary thinking on the issues in dispute in the IC review. The applicant may be invited in some cases to withdraw the IC review application, depending on the views expressed in the preliminary view
- 1.32 The IC review application and any attachments will be shared with the agency or Minister, as well as any other parties to the review, unless there is a reason not to do so. Any other information and submissions provided to the OAIC by the applicant will be made available to the other parties to the IC review.
- 1.33 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.

- 1.34 Generally, submissions should be made in writing and sent by email or pre-paid post. In limited circumstances, if an applicant is unable to provide written submissions, the OAIC may agree to accept verbal submissions by telephone.

Information Commissioner decisions

- 1.35 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.
- 1.36 When the Information Commissioner makes a decision on IC review under s 55K of the FOI Act, the Information Commissioner will quote or summarise the submissions in the published decision. If a confidential submission is relied on by the Information Commissioner in making a decision on the IC review, this will be noted in the decision without revealing the confidential material.
- 1.37 To protect against the unreasonable disclosure of personal information, the Information Commissioner will consider whether identifying information should be included in published decisions. Natural persons may opt not 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: Procedure for IC review of specific types of decisions

Deemed access refusal decisions

- 1.38 A 'deemed access refusal' occurs when the statutory time for making a decision on an FOI request for access to a document has expired and notice of the decision has not been given. In these circumstances the agency or Minister is 'deemed' to have refused the FOI request. Where the applicant applies for IC review of a deemed access refusal decision, the OAIC will make inquiries with the agency or Minister.
- 1.39 If, during the IC review, the agency or Minister sends the applicant a written decision on the applicant's FOI request the OAIC will check whether the applicant is satisfied with the decision. Applicants who are satisfied with the decision and do not wish to proceed with the IC review must advise the OAIC in writing that they withdraw their application for IC review. Applicants who are not satisfied with the agency's or Minister's decision must explain why they disagree with the 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 undertake an IC review on the basis that the applicant has failed to cooperate in progressing the IC review application without reasonable excuse (s 54W(a)(ii)).

Access refusal decisions

- 1.40 An 'access refusal decision' means (s 53A):
- 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 all the 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 (s 21) (see Part 3 of the Guidelines)
 - e. a decision relating to the imposition or amount of a charge (s 29)
 - f. a decision to give access to a document to a 'qualified person' (where disclosing the information to the applicant might be detrimental to the applicant's physical or mental health or well-being) (s 47F(5))
 - g. a decision refusing to amend a record of personal information in accordance with an application (s 48)
 - h. a decision refusing to annotate a record of personal information in accordance with an application (s 48).
- 1.41 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)).
- 1.42 Given that the agency or Minister bears this onus, it will generally be necessary to undertake inquiries or seek information from the agency or Minister before inviting comment from applicants.

Access grant decisions

- 1.43 An 'access grant decision' means a decision to grant access to a document where there is a requirement to consult a third party (s 53B). Such decisions involve granting the FOI applicant access to information or documents following consultation.
- 1.44 In an IC review of an access grant decision, it is the IC review applicant who bears the onus of establishing that a decision refusing the FOI request is justified, or that the Information Commissioner should give a decision adverse to the FOI applicant (s 55D(2)).
- 1.45 IC review applicants will generally be invited to provide information or submissions which explain why the agency's or Minister's decision is wrong before comment is invited from the agency or Minister.

Part 4: Non-compliance with this direction

- 1.46 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 review as outlined in s 54W(c). This means that, in these cases, the review will be finalised.
- 1.47 Applicants will be provided with the opportunity to explain why the Information Commissioner should not finalise the IC review under s 54W(c) of the FOI Act before a decision is made.

Attachment B

Summaries of updates and agencies' submissions

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>1.8</p> <p>Direction has effect from 1 July 2023</p>	<ul style="list-style-type: none"> Expressed in draft direction as having effect from 1 July 2023 	<ul style="list-style-type: none"> <u>Updated</u>: This Direction has effect from 1 July 2024. <u>Comments</u>: As stated in the corresponding EB on the procedure direction for agencies (D2024/007050), we should potentially have a separate process for backlog matters, e.g. for IC review applications received before 1 July 2024, agencies and ministers must have regard to Part 10 of the FOI Guidelines issued under s 93A of the FOI Act which sets out the general principles and expectations of the Information Commissioner regarding IC reviews. Specific directions may be made in the context of these IC reviews.
<p>1.13</p> <p>OAIC contacting applicants</p>	<ul style="list-style-type: none"> Paragraph 1.13 explains that the OAIC will contact applicants using their preferred contact method. Paragraph 1.13 also states 'Where an applicant has listed a preferred contact method as well as other contact information, the OAIC will consider any notices as received when sent to an applicant's preferred contact'. The AAT submits that we may wish to consider referring to an exception where there is evidence of non-receipt, such as a returned letter or email non delivery message. 	<ul style="list-style-type: none"> <u>Not updated</u>. <u>Comments</u>: Review the meaning of 'the OAIC will consider any notices as received when sent to an applicant's preferred contact' and update to make clearer. Note that the existing IC review procedure for applicants contains the same wording at para 1.13.
<p>1.15</p> <p>Who can be an IC review applicant?</p>	<ul style="list-style-type: none"> Paragraph 1.15 refers to s 54L(3), namely that an IC review application may be made by the person who made the request to which the decision relates, and the proceeding paragraphs 1.16 to 1.20 set out the requirements for the IC review application. The AAT queries whether the requirements for IC review applications of access grant decisions (s 54M) are the same as those discussed at paragraphs 1.16 to 1.20. 	<ul style="list-style-type: none"> <u>Not updated</u>. <u>Comments</u>: Consider updating para 1.15 to refer to s 54M(3) (application for IC review of access grant decisions).

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>1.17(a)</p> <p>Information that must be provided with IC review application:</p> <p>Whether decision under review is an original or internal review decision</p> <p>Usually better to seek internal review first</p>	<ul style="list-style-type: none"> Paragraph 1.17 states that 'The applicant must provide the OAIC with about the FOI decision, in particular (a) ... (b) ... (c) ... (d) ...'. Paragraph 1.17(a) states that the applicant should say whether the decision under review is an original decision or internal review decision, and notes 'it is usually better to seek internal review first ...'. Defence proposes that we consider making internal review compulsory, in circumstances which allow it. This would allow for agencies and ministers to have further meaningful engagement with the applicant before they seek an IC review in an attempt to resolve the issues in an informal and timely way, thus reducing the workload for the OAIC. ATO submits that it is unclear whether there will be any requirement on the applicant to either seek internal review or provide details on why they did not consider it appropriate in the circumstances (ATO). 	<ul style="list-style-type: none"> <u>Not updated.</u> <u>Comments:</u> Consider putting Defence's suggestion that internal review be compulsory before applying for IC review, unless exceptions apply (for example if a decision was made by a minister (ss 54(1), 54A(1)), on the legislative issues register: D2019/001559. Consider updating para 1.17(a) to explain that an IC review applicant is not required to apply for an internal review before applying for an IC review. The wording could for example be consistent with the draft FOI Guidelines at paragraph [10.3] (D2022/009530).
<p>1.17(b)</p> <p>Information to be provided with IC review application:</p> <p>Notice of decision given versus received</p>	<ul style="list-style-type: none"> Paragraph 1.17(b) notes that 'In most cases, an application for IC review must be made within 60 days of the applicant being notified of the ... decision ...'. The AAT submits that we may wish to consider whether the date of receipt of the decision is also relevant. 	<ul style="list-style-type: none"> <u>Not updated.</u> <u>Comments:</u> Consider whether 'notice of decision given' means when decision is received. Refer to AAT web page Time limits.
<p>1.17 (general)</p> <p>Agency reference number</p>	<ul style="list-style-type: none"> AFP submits that applicants should also be required to provide the agency reference number for the FOI decision. 	<ul style="list-style-type: none"> <u>Not updated.</u> <u>Comments:</u> The applicant is already generally required to provide a copy of the decision (s 54N(1)(b)), which should state the agency reference number.

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>1.18</p> <p>Further information to be provided with IC review application:</p> <p>Should or required to provide the information</p>	<ul style="list-style-type: none"> Paragraph 1.18 advises that 'An application for IC review should also: (a) ... (b) ... (c) ... (d) ...', such as the aspects of the decision about which they seek the IC review. ATO submits that given the mandatory consultation requirement proposed to be put on agencies it would appear appropriate for applicants to be required to provide the information set out in this paragraph prior to any consultation occurring. ATO also queries whether a failure to provide this information would be considered a 'failure to engage'. 	<ul style="list-style-type: none"> <u>Not updated.</u> <u>Comments:</u> Consider a cross-reference between or combining of para 1.18 and para 1.25, which refers to finalising an IC review under s 54W(a)(ii) if an applicant has failed to cooperate in progressing the IC review application or the IC review without reasonable excuse.
<p>1.18(a)</p> <p>Further requirements of IC review application</p> <p>Identify the aspect(s) of decision about which the IC review is sought</p>	<ul style="list-style-type: none"> Paragraph 1.18(a) says that an application should 'identify the aspect(s) of the ... decision about which the IC review is sought'. AGD submits that this wording may be confusing for some readers, and could alternatively say "identify the parts of the decision you want the Information Commissioner to review". Defence submits that identifying why the agency's or minister's decision is wrong should be compulsory, and would assist the agency or minister to better understand and resolve the issues in a meaningful, informal and timely way. 	<ul style="list-style-type: none"> <u>Not updated.</u> <u>Comments:</u> Consider updating. For example, paras 1.18(a), (b), and (c) could alternatively say 'identify which documents the applicant believes the decision maker should give them' and 'advise why the applicant believes the decision maker should give them those documents'. Consider advising that the requirements are not compulsory, but the OAIC may consider that if the applicant does not meet the requirements, their IC review application should be finalised under s 54W(a)(ii) (failure to cooperate in progress IC review application).

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
1.23 Engagement to resolve issues	<ul style="list-style-type: none"> AAT submits that engagement should only be required if there has been no internal review of the decision. AAT, AFP, and the Commonwealth Ombudsman submit that paragraph 1.23 should say that agencies are required to contact applicants to arrange the engagement after receiving the s 54Z notice, rather than after the IC review application is lodged. AFP in particular notes that there can be a delay between an IC review application and s 54Z notice. ATO also submits it would also be helpful to provide applicants with further details about what is expected of them in terms of participating in agency engagement and that simply attending a meeting with no intention to attempt to resolve the review application would be not considered appropriate 'engagement'. 	<ul style="list-style-type: none">
	<ul style="list-style-type: none"> 	<ul style="list-style-type: none">
1.31 Preliminary view	<ul style="list-style-type: none"> Paragraph 1.31 states 'The OAIC may provide a preliminary view at any time ... The applicant may be invited in some cases to withdraw the IC review application, depending on the views expressed in the preliminary view'. The AAT submits that if there is an opportunity for the parties to provide information in response to the preliminary view, it may be useful to state this. Such a view may raise a fact or issue that can be addressed. 	<ul style="list-style-type: none"> <u>Updated</u> <u>Rationale: Responsive to AAT's submissions:</u> <u>Para 10.60 of the draft FOI Guidelines says:</u> the OAIC's IC review officer may review the material submitted by both parties and provide a preliminary view as to the merits 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 <u>Para 10.119 says:</u> Submissions as to the issues identified in the preliminary view will be sought from the relevant party. Further information about the process that will be followed when a preliminary view is issued can be found in the 'Direction as to certain procedures to be following in Information Commissioner reviews' on the OAIC's website.

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
General	<ul style="list-style-type: none"> AGD queries if it may be simpler and more effective for all users of the FOI system to have a single direction, addressed to both the agency and the applicant. This would ensure all parties have a consistent understanding of the IC review process. By comparison, we note the AAT General Practice Direction (General-Practice-Direction.pdf (aat.gov.au)), under s 18B of the Administrative Appeals Tribunal Act 1975 applies to all parties to a review and appears to provide greater consistency in the explanation of process and responsibilities (AGD) 	<ul style="list-style-type: none">
General	<ul style="list-style-type: none"> AGD: it is also unclear what practice directions (if any) apply to third parties joined to an IC review or whether the process for an IC review in the directions for agencies and applicants may differ where there are other parties to the review 	<ul style="list-style-type: none">
Other	<ul style="list-style-type: none"> ATO submits that a delay in seeking a review by an applicant should be a ground for providing an agency with additional time to respond. 	<ul style="list-style-type: none">
	<ul style="list-style-type: none"> 	<ul style="list-style-type: none">
	<ul style="list-style-type: none"> 	<ul style="list-style-type: none">

Executive brief

Responsible Executive Member:	Rocelle Ago, Assistant Commissioner FOI
Prepared by:	Jessica Eslick and Sara Peel, Director, Monitoring, Guidance and Engagement
To:	Elizabeth Tydd, FOI Commissioner
Copies:	Karen Tulloch, Raewyn Harlock
File ref:	D2024/008712
Date:	2 April 2024
Subject:	Proposed updates to draft IC review procedure direction for <u>applicants</u>

Deleted: 26 March 2024

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Purpose and timing

To inform you of the proposed updates to the draft IC review procedure direction for applicants (titled 'Direction as to certain procedures to be followed in by applicants in Information Commissioner reviews') (the draft direction),

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Your as at 13 March 2024

Recommendations

1. That you note our proposed updates to the draft direction via comments to the following paragraphs of the draft direction (Attachment A):
 1. paragraph x
 2. xx
2. That you note our summary of the submissions in response to our consultation, whether we have proposed updates to the draft direction in light of those submissions, and our rationale /comments (**Attachment B**).

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Background

The Australian Information Commissioner may give written directions under s 55(2)(e)(ii) of the FOI Act in relation to procedures to be followed in Information Commissioner (IC) reviews.

The Information Commissioner has issued 2 directions under s 55(2)(e)(ii), which are currently in effect:

- [Direction as to certain procedures to be followed in Information Commissioner reviews](#), which has had effect from 26 February 2018.
- [Direction as to certain procedures to be followed by applicants in Information Commissioner reviews](#), which had had effect from 1 September 2021.

On 9 May 2023, we sought comments from, or consulted, interested stakeholders on draft revisions to each of the 2 directions.

In our consultation, we advised stakeholders:

We intend to make all submissions publicly available. Please indicate when making your submission if it contains confidential information that you do not want made public and why it should not be published. Requests for access to confidential comments will be determined in accordance with the FOI Act. If the OAIC accepts submissions in confidence you must also provide a copy that can be published.

Between 8 June 2023 and 6 July 2023, we received submissions on the draft direction from **6 agencies** as follows:

1. Administrative Appeals Tribunal on 8 June 2023
2. Attorney-General's Department on 30 June 2023
3. Australian Federal Police on 30 June 2023
4. Australian Tax Office on 30 June 2023
5. Commonwealth Ombudsman on 30 June 2023
6. Department of Defence on 30 June 2023

Related brief [D2023/015645](#) contains TRIM links to those submissions at its Attachment B.

Attachments

1. **Attachment A:** Proposed updated draft direction (with proposed updates in highlight and comments).
2. **Attachment B:** Summary of agencies' submissions in response to our consultation on the draft direction, whether we have proposed (at Attachment A) to update the draft direction in response to those submissions, and our rationale/comments.

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Attachment A

Proposed direction



Australian Government

Office of the Australian Information Commissioner

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

Contents

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Access grant decisions.....	Error! Bookmark not defined.
Part 4: Non-compliance with this direction	Error! Bookmark not defined.

Part 1: About this direction

- 1.1 This direction is given by the Australian Information Commissioner under s 55(2)(e)(i) of the Freedom of Information Act 1982 (FOI Act) in relation to Information Commissioner reviews (IC reviews).
- 1.2 This written direction sets out the procedure to be followed by applicants for IC reviews undertaken by the Information Commissioner under the FOI Act.
- 1.3 The Information Commissioner 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 Information Commissioner (s 54W(c)).
- 1.4 The Information Commissioner may also give written directions as to the procedure to be followed in relation to a particular IC review (s 55(2)(e)(ii)).
- 1.5 This direction does not apply to the extent it is inconsistent with a provision of the FOI Act, another enactment or a specific direction made in a particular IC review under s 55(2)(e)(ii) of the FOI Act.
- 1.6 Further information relating to the IC review process is published on the Office of the Australian Information Commissioner's (OAIC) website. In particular, Part 10 (Reviews by the Australian Information Commissioner) of the Guidelines issued by the Information Commissioner under s 93A of the FOI Act (FOI Guidelines) describes the principles that inform the OAIC's approach to IC reviews.
- 1.7 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.
- 1.8 This direction has effect from 1 July 2023.

Part 2: The IC review process

- 1.9 IC review procedures are found in Part VII of the FOI Act. The IC review process is intended to be an informal, non-adversarial and timely means of external merits review of FOI decisions made by agencies and ministers. Part 10 of the FOI Guidelines, to which agencies and ministers must have regard when performing a function or exercising a power under the FOI Act, sets out in detail the process and underlying principles of IC review.

Making an application for IC review

- 1.10 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.
- 1.11 Where it is not possible for an application to be made online, applications may be sent to the OAIC by:
 - email to foidr@oaic.gov.au
 - mail to FOI Regulatory Group, GPO Box 5218, Sydney NSW 2001.
- 1.12 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

- 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).
- 1.13 The OAIC 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 OAIC will consider any notices as received when sent to an applicant's preferred contact.
- 1.14 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
 - 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.
- 1.15 An application for IC review may be made by, or on behalf of, the person who made the FOI request to which decision relates (s 54L(3)). The OAIC 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.
- 1.16 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.
- 1.17 The applicant must provide the OAIC 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. However, in circumstances where the original decision was made by the Minister or personally by the principal officer of an agency, or in the case of a deemed access refusal, applicants must apply directly for IC review.
 - 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.
 - If an application for IC review is not made within the timeframes in the FOI Act, applicants may apply to the Information Commissioner 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 Information Commissioner 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.

1.18 An application for IC review should also:

- a. identify the aspect(s) of the agency's or Minister's decision about which the IC review is sought
- 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.

1.19 The OAIC must provide 'appropriate assistance' to a person who wishes to apply for IC review and requires assistance to prepare the IC review application (s 54N(3)).

1.20 Section 54N of the FOI Act sets out the requirements for the contents and delivery of an application for IC review. These requirements include giving the OAIC contact details to which notices can be sent and providing a copy of the FOI decision the applicant wants the Information Commissioner to review. An application that does not comply with these requirements may be considered to be invalid.

During the IC review

Changes to contact details

1.21 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 Information Commissioner may decide not to undertake an IC review, or not continue to undertake an IC review, if the applicant or their nominated representative cannot be contacted after making reasonable attempts (s 54W(a)(iii)).

Participation in the IC review

1.22 Applicants must respond to inquiries from the OAIC within the time provided unless there are 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 why additional time is needed and propose a new date for response. Approval of an extension request is at the discretion of the OAIC.

1.23 The OAIC requires agencies and Ministers to engage with the IC review applicant at the commencement of an IC review. The purpose of this engagement is to attempt to resolve the issues identified in the IC review application in an informal and timely way. Agencies are required to contact applicants for IC review shortly after the IC review application is lodged to arrange a suitable time for

the engagement process. 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)).

- 1.24 The Information Commissioner may use any technique the Information Commissioner considers appropriate to facilitate an agreed resolution of the matters at issue in the IC review (such as alternative dispute resolution processes - s 55(2)(b)). Where appropriate, and following the compulsory engagement process described above, the OAIC may invite applicants to attend a teleconference to discuss the issues in dispute in the IC review with the agency's or Minister's office and to explore options for resolution, with a view to reaching agreement on some or all of the matters at issue in the IC review.
- 1.25 The Information Commissioner may decide not to undertake an IC review, or not continue to undertake an IC review, if an IC review applicant has failed to cooperate in progressing the IC review application or the IC review without reasonable excuse (s 54W(a)(ii)).

Submissions

- 1.26 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.
- 1.27 Applicants will be invited to make written submissions after the initial triage and early resolution process is complete, and once the application has been assigned to a review adviser for substantive review/case management. First, the agency or Minister will be asked to make submissions in support of the IC reviewable decision. The agency or Minister will send the applicant a copy of their submissions at the same time as they are sent to the OAIC. The applicant will then have the opportunity to make submissions addressing any issues raised by the agency or the Minister. The applicant is required to send their submissions to the agency or Minister at the same time as they are sent to the OAIC.
- 1.28 The Information Commissioner will generally give the parties (both the applicant and the agency or Minister) 4 weeks to make their submissions.
- 1.29 The Information Commissioner will not accept any further submissions from either party to the IC review unless the Information Commissioner has requested them.
- 1.30 The Information Commissioner will contact the parties after receipt of submissions if procedural fairness requirements have been identified. For information on procedural fairness see [3.15] — [3.31] of Part 3 of the FOI Guidelines.
- 1.31 The OAIC may provide a preliminary view at any time during the IC review. This will outline the case officer's preliminary thinking on the issues in dispute in the IC review. The applicant may be invited in some cases to withdraw the IC review application, depending on the views expressed in the preliminary view
- 1.32 The IC review application and any attachments will be shared with the agency or Minister, as well as any other parties to the review, unless there is a reason not to do so. Any other information and submissions provided to the OAIC by the applicant will be made available to the other parties to the IC review.
- 1.33 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.

- 1.34 Generally, submissions should be made in writing and sent by email or pre-paid post. In limited circumstances, if an applicant is unable to provide written submissions, the OAIC may agree to accept verbal submissions by telephone.

Information Commissioner decisions

- 1.35 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.
- 1.36 When the Information Commissioner makes a decision on IC review under s 55K of the FOI Act, the Information Commissioner will quote or summarise the submissions in the published decision. If a confidential submission is relied on by the Information Commissioner in making a decision on the IC review, this will be noted in the decision without revealing the confidential material.
- 1.37 To protect against the unreasonable disclosure of personal information, the Information Commissioner will consider whether identifying information should be included in published decisions. Natural persons may opt not 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: Procedure for IC review of specific types of decisions

Deemed access refusal decisions

- 1.38 A 'deemed access refusal' occurs when the statutory time for making a decision on an FOI request for access to a document has expired and notice of the decision has not been given. In these circumstances the agency or Minister is 'deemed' to have refused the FOI request. Where the applicant applies for IC review of a deemed access refusal decision, the OAIC will make inquiries with the agency or Minister.
- 1.39 If, during the IC review, the agency or Minister sends the applicant a written decision on the applicant's FOI request the OAIC will check whether the applicant is satisfied with the decision. Applicants who are satisfied with the decision and do not wish to proceed with the IC review must advise the OAIC in writing that they withdraw their application for IC review. Applicants who are not satisfied with the agency's or Minister's decision must explain why they disagree with the 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 undertake an IC review on the basis that the applicant has failed to cooperate in progressing the IC review application without reasonable excuse (s 54W(a)(ii)).

Access refusal decisions

- 1.40 An 'access refusal decision' means (s 53A):
- 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 all the 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 (s 21) (see Part 3 of the Guidelines)
 - e. a decision relating to the imposition or amount of a charge (s 29)
 - f. a decision to give access to a document to a 'qualified person' (where disclosing the information to the applicant might be detrimental to the applicant's physical or mental health or well-being) (s 47F(5))
 - g. a decision refusing to amend a record of personal information in accordance with an application (s 48)
 - h. a decision refusing to annotate a record of personal information in accordance with an application (s 48).
- 1.41 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)).
- 1.42 Given that the agency or Minister bears this onus, it will generally be necessary to undertake inquiries or seek information from the agency or Minister before inviting comment from applicants.

Access grant decisions

- 1.43 An 'access grant decision' means a decision to grant access to a document where there is a requirement to consult a third party (s 53B). Such decisions involve granting the FOI applicant access to information or documents following consultation.
- 1.44 In an IC review of an access grant decision, it is the IC review applicant who bears the onus of establishing that a decision refusing the FOI request is justified, or that the Information Commissioner should give a decision adverse to the FOI applicant (s 55D(2)).
- 1.45 IC review applicants will generally be invited to provide information or submissions which explain why the agency's or Minister's decision is wrong before comment is invited from the agency or Minister.

Part 4: Non-compliance with this direction

- 1.46 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 review as outlined in s 54W(c). This means that, in these cases, the review will be finalised.
- 1.47 Applicants will be provided with the opportunity to explain why the Information Commissioner should not finalise the IC review under s 54W(c) of the FOI Act before a decision is made.

Attachment B

Summaries of updates and agencies' submissions

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>1.8</p> <p>Direction has effect from 1 July 2023</p>	<ul style="list-style-type: none"> Expressed in draft direction as having effect from 1 July 2023 	<ul style="list-style-type: none"> <u>Updated</u>: This Direction has effect from 1 July 2024. <u>Comments</u>: As stated in the corresponding EB on the procedure direction for agencies (D2024/007050), we should potentially have a separate process for backlog matters, e.g. for IC review applications received before 1 July 2024, agencies and ministers must have regard to Part 10 of the FOI Guidelines issued under s 93A of the FOI Act which sets out the general principles and expectations of the Information Commissioner regarding IC reviews. Specific directions may be made in the context of these IC reviews.
<p>1.13</p> <p>OAIC contacting applicants</p>	<ul style="list-style-type: none"> Paragraph 1.13 explains that the OAIC will contact applicants using their preferred contact method. Paragraph 1.13 also states 'Where an applicant has listed a preferred contact method as well as other contact information, the OAIC will consider any notices as received when sent to an applicant's preferred contact'. The AAT submits that we may wish to consider referring to an exception where there is evidence of non-receipt, such as a returned letter or email non delivery message. 	<ul style="list-style-type: none"> <u>Not updated</u>. <u>Comments</u>: Review the meaning of 'the OAIC will consider any notices as received when sent to an applicant's preferred contact' and update to make clearer. Note that the existing IC review procedure for applicants contains the same wording at para 1.13.
<p>1.15</p> <p>Who can be an IC review applicant?</p>	<ul style="list-style-type: none"> Paragraph 1.15 refers to s 54L(3), namely that an IC review application may be made by the person who made the request to which the decision relates, and the proceeding paragraphs 1.16 to 1.20 set out the requirements for the IC review application. The AAT queries whether the requirements for IC review applications of access grant decisions (s 54M) are the same as those discussed at paragraphs 1.16 to 1.20. 	<ul style="list-style-type: none"> <u>Not updated</u>. <u>Comments</u>: Consider updating para 1.15 to refer to s 54M(3) (application for IC review of access grant decisions).

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>1.17(a)</p> <p>Information that must be provided with IC review application:</p> <p>Whether decision under review is an original or internal review decision</p> <p>Usually better to seek internal review first</p>	<ul style="list-style-type: none"> Paragraph 1.17 states that 'The applicant must provide the OAIC with about the FOI decision, in particular (a) ... (b) ... (c) ... (d) ...'. Paragraph 1.17(a) states that the applicant should say whether the decision under review is an original decision or internal review decision, and notes 'it is usually better to seek internal review first ...'. Defence proposes that we consider making internal review compulsory, in circumstances which allow it. This would allow for agencies and ministers to have further meaningful engagement with the applicant before they seek an IC review in an attempt to resolve the issues in an informal and timely way, thus reducing the workload for the OAIC. ATO submits that it is unclear whether there will be any requirement on the applicant to either seek internal review or provide details on why they did not consider it appropriate in the circumstances (ATO). 	<ul style="list-style-type: none"> <u>Not updated.</u> <u>Comments:</u> Consider putting Defence's suggestion that internal review be compulsory before applying for IC review, unless exceptions apply (for example if a decision was made by a minister (ss 54(1), 54A(1)), on the legislative issues register: D2019/001559. Consider updating para 1.17(a) to explain that an IC review applicant is not required to apply for an internal review before applying for an IC review. The wording could for example be consistent with the draft FOI Guidelines at paragraph [10.3] (D2022/009530).
<p>1.17(b)</p> <p>Information to be provided with IC review application:</p> <p>Notice of decision given versus received</p>	<ul style="list-style-type: none"> Paragraph 1.17(b) notes that 'In most cases, an application for IC review must be made within 60 days of the applicant being notified of the ... decision ...'. The AAT submits that we may wish to consider whether the date of receipt of the decision is also relevant. 	<ul style="list-style-type: none"> <u>Not updated.</u> <u>Comments:</u> Consider whether 'notice of decision given' means when decision is received. Refer to AAT web page Time limits.
<p>1.17 (general)</p> <p>Agency reference number</p>	<ul style="list-style-type: none"> AFP submits that applicants should also be required to provide the agency reference number for the FOI decision. 	<ul style="list-style-type: none"> <u>Not updated.</u> <u>Comments:</u> The applicant is already generally required to provide a copy of the decision (s 54N(1)(b)), which should state the agency reference number.

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>1.18</p> <p>Further information to be provided with IC review application:</p> <p>Should or required to provide the information</p>	<ul style="list-style-type: none"> Paragraph 1.18 advises that 'An application for IC review should also: (a) ... (b) ... (c) ... (d) ...', such as the aspects of the decision about which they seek the IC review. ATO submits that given the mandatory consultation requirement proposed to be put on agencies it would appear appropriate for applicants to be required to provide the information set out in this paragraph prior to any consultation occurring. ATO also queries whether a failure to provide this information would be considered a 'failure to engage'. 	<ul style="list-style-type: none"> <u>Not updated.</u> <u>Comments:</u> Consider a cross-reference between or combining of para 1.18 and para 1.25, which refers to finalising an IC review under s 54W(a)(ii) if an applicant has failed to cooperate in progressing the IC review application or the IC review without reasonable excuse.
<p>1.18(a)</p> <p>Further requirements of IC review application</p> <p>Identify the aspect(s) of decision about which the IC review is sought</p>	<ul style="list-style-type: none"> Paragraph 1.18(a) says that an application should 'identify the aspect(s) of the ... decision about which the IC review is sought'. AGD submits that this wording may be confusing for some readers, and could alternatively say "identify the parts of the decision you want the Information Commissioner to review". Defence submits that identifying why the agency's or minister's decision is wrong should be compulsory, and would assist the agency or minister to better understand and resolve the issues in a meaningful, informal and timely way. 	<ul style="list-style-type: none"> <u>Not updated.</u> <u>Comments:</u> Consider updating. For example, paras 1.18(a), (b), and (c) could alternatively say 'identify which documents the applicant believes the decision maker should give them' and 'advise why the applicant believes the decision maker should give them those documents'. Consider advising that the requirements are not compulsory, but the OAIC may consider that if the applicant does not meet the requirements, their IC review application should be finalised under s 54W(a)(ii) (failure to cooperate in progress IC review application).
<p>1.23</p> <p>Engagement to resolve issues (issue 1)</p>	<ul style="list-style-type: none"> AAT submits that engagement should only be required if there has been no internal review of the decision. 	<ul style="list-style-type: none"> <u>Not updated.</u> <u>Comments:</u> As stated in relation to para 1.17(a), consider putting on the legislative issues register: D2019/001559 that internal review should be compulsory before applying for IC review, unless exceptions apply (for example if a decision was made by a minister (ss 54(1), 54A(1)).
<p>1.23</p> <p>Engagement to resolve issues (issue 2)</p>	<ul style="list-style-type: none"> AAT, AFP, and the Commonwealth Ombudsman submit that paragraph 1.23 should say that agencies are required to contact applicants to arrange the engagement after receiving the s 54Z notice, rather than after the IC review application is lodged. AFP in particular notes that there can be a delay between an IC review application and s 54Z notice. 	<ul style="list-style-type: none"> <u>Not updated.</u> <u>Comments:</u> Consider updating para 1.23 to say 'after receiving the OAIC's notice of IC review under s 54Z'.

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>1.23</p> <p>Engagement to resolve issues (issue 3)</p>	<ul style="list-style-type: none"> ATO also submits it would also be helpful to provide applicants with further details about what is expected of them in terms of participating in agency engagement and that simply attending a meeting with no intention to attempt to resolve the review application would be not considered appropriate 'engagement'. 	<ul style="list-style-type: none"> <u>Not updated.</u> <u>Comments:</u> Consider updating para 1.23 to refer to the information listed in para 1.18, and state that they should bring that information to the 'engagement process'. Consider describing 'engagement process' in line with the corresponding EB on the procedure direction for agencies (D2024/007050) and draft IC review procedure direction within at paras 4.3 and 4.4: <p><i>4.3 Engagement with IC review applicants will comprise a telephone or video conference between the applicant and the agency or minister. The agency or minister will be responsible for contacting the applicant and making the necessary arrangements for the engagement process. The OAIC will not be involved in making such arrangements or in attending the telephone or video conference.</i></p> <p><i>4.4 Some IC review 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, such as in writing to the applicant, to attempt to resolve the issue between the parties or narrow the issues in dispute.</i></p>

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
1.31 Preliminary view	<ul style="list-style-type: none"> Paragraph 1.31 states 'The OAIC may provide a preliminary view at any time ... The applicant may be invited in some cases to withdraw the IC review application, depending on the views expressed in the preliminary view'. The AAT submits that if there is an opportunity for the parties to provide information in response to the preliminary view, it may be useful to state this. Such a view may raise a fact or issue that can be addressed. 	<ul style="list-style-type: none"> <u>Not updated.</u> <u>Comments: Consider updating in response to the AAT's submissions, and in consideration of paragraphs [10.60] and [10.119] of the draft FOI Guidelines which say (D2022/009530):</u> <i>10.60 ... the OAIC's IC review officer may review the material submitted by both parties and provide a preliminary view as to the merits 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.</i> <i>10.119 Submissions as to the issues identified in the preliminary view will be sought from the relevant party. Further information about the process that will be followed when a preliminary view is issued can be found in the 'Direction as to certain procedures to be following in Information Commissioner reviews' on the OAIC's website.</i>
General	<ul style="list-style-type: none"> AGD queries if it may be simpler and more effective for all users of the FOI system to have a single direction, addressed to both the agency and the applicant. This would ensure all parties have a consistent understanding of the IC review process. By comparison, we note the AAT General Practice Direction (General-Practice-Direction.pdf (aat.gov.au)), under s 18B of the Administrative Appeals Tribunal Act 1975 applies to all parties to a review and appears to provide greater consistency in the explanation of process and responsibilities. 	<ul style="list-style-type: none"> <u>Not updated.</u> <u>Comments:</u>
General	<ul style="list-style-type: none"> AGD submits that it is unclear what practice directions (if any) apply to third parties joined to an IC review or whether the process for an IC review in the directions for agencies and applicants may differ where there are other parties to the review. 	<ul style="list-style-type: none"> <u>Not updated.</u> <u>Comments:</u>
General	<ul style="list-style-type: none"> ATO submits that a delay in seeking a review by an applicant should be a ground for providing an agency with additional time to respond. 	<ul style="list-style-type: none"> <u>Not updated.</u> <u>Comments:</u>

Executive brief

Responsible Executive Member:	Rocelle Ago, Assistant Commissioner FOI
Prepared by:	Jessica Eslick and Sara Peel, Director, Monitoring, Guidance and Engagement
To:	Elizabeth Tydd, FOI Commissioner
Copies:	Karen Tulloch, Raewyn Harlock
File ref:	D2024/008712
Date:	2 April 2024
Subject:	Proposed updates to draft IC review procedure direction for <u>applicants</u>

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Purpose and timing

To inform you of the proposed updates to the draft IC review procedure direction for applicants (titled 'Direction as to certain procedures to be followed in by applicants in Information Commissioner reviews') (the draft direction),

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Your as at 13 March 2024

Recommendations

1. That you note our proposed updates to the draft direction via comments to the following paragraphs of the draft direction (Attachment A):
 1. paragraph x
 2. xx
2. That you note our summary of the submissions in response to our consultation, whether we have proposed updates to the draft direction in light of those submissions, and our rationale /comments (**Attachment B**).

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Background

The Australian Information Commissioner may give written directions under s 55(2)(e)(ii) of the FOI Act in relation to procedures to be followed in Information Commissioner (IC) reviews.

The Information Commissioner has issued 2 directions under s 55(2)(e)(ii), which are currently in effect:

- [Direction as to certain procedures to be followed in Information Commissioner reviews](#), which has had effect from 26 February 2018.
- [Direction as to certain procedures to be followed by applicants in Information Commissioner reviews](#), which had had effect from 1 September 2021.

On 9 May 2023, we sought comments from, or consulted, interested stakeholders on draft revisions to each of the 2 directions.

In our consultation, we advised stakeholders:

We intend to make all submissions publicly available. Please indicate when making your submission if it contains confidential information that you do not want made public and why it should not be published. Requests for access to confidential comments will be determined in accordance with the FOI Act. If the OAIC accepts submissions in confidence you must also provide a copy that can be published.

Between 8 June 2023 and 6 July 2023, we received submissions on the draft direction from **6 agencies** as follows:

1. Administrative Appeals Tribunal on 8 June 2023
2. Attorney-General's Department on 30 June 2023
3. Australian Federal Police on 30 June 2023
4. Australian Tax Office on 30 June 2023
5. Commonwealth Ombudsman on 30 June 2023
6. Department of Defence on 30 June 2023

Related brief [D2023/015645](#) contains TRIM links to those submissions at its Attachment B.

Attachments

1. **Attachment A:** Proposed updated draft direction (with proposed updates in highlight and comments).
2. **Attachment B:** Summary of agencies' submissions in response to our consultation on the draft direction, whether we have proposed (at Attachment A) to update the draft direction in response to those submissions, and our rationale/comments.

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Attachment A

Proposed direction



Australian Government

Office of the Australian Information Commissioner

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

Contents

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Access grant decisions.....	Error! Bookmark not defined.
Part 4: Non-compliance with this direction	Error! Bookmark not defined.

Part 1: About this direction

- 1.1 This direction is given by the Australian Information Commissioner under s 55(2)(e)(i) of the Freedom of Information Act 1982 (FOI Act) in relation to Information Commissioner reviews (IC reviews).
- 1.2 This written direction sets out the procedure to be followed by applicants for IC reviews undertaken by the Information Commissioner under the FOI Act.
- 1.3 The Information Commissioner 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 Information Commissioner (s 54W(c)).
- 1.4 The Information Commissioner may also give written directions as to the procedure to be followed in relation to a particular IC review (s 55(2)(e)(ii)).
- 1.5 This direction does not apply to the extent it is inconsistent with a provision of the FOI Act, another enactment or a specific direction made in a particular IC review under s 55(2)(e)(ii) of the FOI Act.
- 1.6 Further information relating to the IC review process is published on the Office of the Australian Information Commissioner's (OAIC) website. In particular, Part 10 (Reviews by the Australian Information Commissioner) of the Guidelines issued by the Information Commissioner under s 93A of the FOI Act (FOI Guidelines) describes the principles that inform the OAIC's approach to IC reviews.
- 1.7 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.
- 1.8 This direction has effect from 1 July 2023.

Part 2: The IC review process

- 1.9 IC review procedures are found in Part VII of the FOI Act. The IC review process is intended to be an informal, non-adversarial and timely means of external merits review of FOI decisions made by agencies and ministers. Part 10 of the FOI Guidelines, to which agencies and ministers must have regard when performing a function or exercising a power under the FOI Act, sets out in detail the process and underlying principles of IC review.

Making an application for IC review

- 1.10 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.
- 1.11 Where it is not possible for an application to be made online, applications may be sent to the OAIC by:
 - email to foidr@oaic.gov.au
 - mail to FOI Regulatory Group, GPO Box 5218, Sydney NSW 2001.
- 1.12 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

- 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).
- 1.13 The OAIC 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 OAIC will consider any notices as received when sent to an applicant's preferred contact.
- 1.14 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
 - 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.
- 1.15 An application for IC review may be made by, or on behalf of, the person who made the FOI request to which decision relates (s 54L(3)). The OAIC 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.
- 1.16 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.
- 1.17 The applicant must provide the OAIC 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. However, in circumstances where the original decision was made by the Minister or personally by the principal officer of an agency, or in the case of a deemed access refusal, applicants must apply directly for IC review.
 - 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.
 - If an application for IC review is not made within the timeframes in the FOI Act, applicants may apply to the Information Commissioner 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 Information Commissioner 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.

1.18 An application for IC review should also:

- a. identify the aspect(s) of the agency's or Minister's decision about which the IC review is sought
- 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.

1.19 The OAIC must provide 'appropriate assistance' to a person who wishes to apply for IC review and requires assistance to prepare the IC review application (s 54N(3)).

1.20 Section 54N of the FOI Act sets out the requirements for the contents and delivery of an application for IC review. These requirements include giving the OAIC contact details to which notices can be sent and providing a copy of the FOI decision the applicant wants the Information Commissioner to review. An application that does not comply with these requirements may be considered to be invalid.

During the IC review

Changes to contact details

1.21 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 Information Commissioner may decide not to undertake an IC review, or not continue to undertake an IC review, if the applicant or their nominated representative cannot be contacted after making reasonable attempts (s 54W(a)(iii)).

Participation in the IC review

1.22 Applicants must respond to inquiries from the OAIC within the time provided unless there are 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 why additional time is needed and propose a new date for response. Approval of an extension request is at the discretion of the OAIC.

1.23 The OAIC requires agencies and Ministers to engage with the IC review applicant at the commencement of an IC review. The purpose of this engagement is to attempt to resolve the issues identified in the IC review application in an informal and timely way. Agencies are required to contact applicants for IC review shortly after the IC review application is lodged to arrange a suitable time for

the engagement process. 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)).

- 1.24 The Information Commissioner may use any technique the Information Commissioner considers appropriate to facilitate an agreed resolution of the matters at issue in the IC review (such as alternative dispute resolution processes - s 55(2)(b)). Where appropriate, and following the compulsory engagement process described above, the OAIC may invite applicants to attend a teleconference to discuss the issues in dispute in the IC review with the agency's or Minister's office and to explore options for resolution, with a view to reaching agreement on some or all of the matters at issue in the IC review.
- 1.25 The Information Commissioner may decide not to undertake an IC review, or not continue to undertake an IC review, if an IC review applicant has failed to cooperate in progressing the IC review application or the IC review without reasonable excuse (s 54W(a)(ii)).

Submissions

- 1.26 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.
- 1.27 Applicants will be invited to make written submissions after the initial triage and early resolution process is complete, and once the application has been assigned to a review adviser for substantive review/case management. First, the agency or Minister will be asked to make submissions in support of the IC reviewable decision. The agency or Minister will send the applicant a copy of their submissions at the same time as they are sent to the OAIC. The applicant will then have the opportunity to make submissions addressing any issues raised by the agency or the Minister. The applicant is required to send their submissions to the agency or Minister at the same time as they are sent to the OAIC.
- 1.28 The Information Commissioner will generally give the parties (both the applicant and the agency or Minister) 4 weeks to make their submissions.
- 1.29 The Information Commissioner will not accept any further submissions from either party to the IC review unless the Information Commissioner has requested them.
- 1.30 The Information Commissioner will contact the parties after receipt of submissions if procedural fairness requirements have been identified. For information on procedural fairness see [3.15] — [3.31] of Part 3 of the FOI Guidelines.
- 1.31 The OAIC may provide a preliminary view at any time during the IC review. This will outline the case officer's preliminary thinking on the issues in dispute in the IC review. The applicant may be invited in some cases to withdraw the IC review application, depending on the views expressed in the preliminary view
- 1.32 The IC review application and any attachments will be shared with the agency or Minister, as well as any other parties to the review, unless there is a reason not to do so. Any other information and submissions provided to the OAIC by the applicant will be made available to the other parties to the IC review.
- 1.33 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.

- 1.34 Generally, submissions should be made in writing and sent by email or pre-paid post. In limited circumstances, if an applicant is unable to provide written submissions, the OAIC may agree to accept verbal submissions by telephone.

Information Commissioner decisions

- 1.35 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.
- 1.36 When the Information Commissioner makes a decision on IC review under s 55K of the FOI Act, the Information Commissioner will quote or summarise the submissions in the published decision. If a confidential submission is relied on by the Information Commissioner in making a decision on the IC review, this will be noted in the decision without revealing the confidential material.
- 1.37 To protect against the unreasonable disclosure of personal information, the Information Commissioner will consider whether identifying information should be included in published decisions. Natural persons may opt not 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: Procedure for IC review of specific types of decisions

Deemed access refusal decisions

- 1.38 A 'deemed access refusal' occurs when the statutory time for making a decision on an FOI request for access to a document has expired and notice of the decision has not been given. In these circumstances the agency or Minister is 'deemed' to have refused the FOI request. Where the applicant applies for IC review of a deemed access refusal decision, the OAIC will make inquiries with the agency or Minister.
- 1.39 If, during the IC review, the agency or Minister sends the applicant a written decision on the applicant's FOI request the OAIC will check whether the applicant is satisfied with the decision. Applicants who are satisfied with the decision and do not wish to proceed with the IC review must advise the OAIC in writing that they withdraw their application for IC review. Applicants who are not satisfied with the agency's or Minister's decision must explain why they disagree with the 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 undertake an IC review on the basis that the applicant has failed to cooperate in progressing the IC review application without reasonable excuse (s 54W(a)(ii)).

Access refusal decisions

- 1.40 An 'access refusal decision' means (s 53A):
- 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 all the 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 (s 21) (see Part 3 of the Guidelines)
 - e. a decision relating to the imposition or amount of a charge (s 29)
 - f. a decision to give access to a document to a 'qualified person' (where disclosing the information to the applicant might be detrimental to the applicant's physical or mental health or well-being) (s 47F(5))
 - g. a decision refusing to amend a record of personal information in accordance with an application (s 48)
 - h. a decision refusing to annotate a record of personal information in accordance with an application (s 48).
- 1.41 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)).
- 1.42 Given that the agency or Minister bears this onus, it will generally be necessary to undertake inquiries or seek information from the agency or Minister before inviting comment from applicants.

Access grant decisions

- 1.43 An 'access grant decision' means a decision to grant access to a document where there is a requirement to consult a third party (s 53B). Such decisions involve granting the FOI applicant access to information or documents following consultation.
- 1.44 In an IC review of an access grant decision, it is the IC review applicant who bears the onus of establishing that a decision refusing the FOI request is justified, or that the Information Commissioner should give a decision adverse to the FOI applicant (s 55D(2)).
- 1.45 IC review applicants will generally be invited to provide information or submissions which explain why the agency's or Minister's decision is wrong before comment is invited from the agency or Minister.

Part 4: Non-compliance with this direction

- 1.46 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 review as outlined in s 54W(c). This means that, in these cases, the review will be finalised.
- 1.47 Applicants will be provided with the opportunity to explain why the Information Commissioner should not finalise the IC review under s 54W(c) of the FOI Act before a decision is made.

Attachment B

Summaries of updates and agencies' submissions

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>1.8</p> <p>Direction has effect from 1 July 2023</p>	<ul style="list-style-type: none"> Expressed in draft direction as having effect from 1 July 2023 	<ul style="list-style-type: none"> <u>Updated</u>: This Direction has effect from 1 July 2024. <u>Comments</u>: As stated in the corresponding EB on the procedure direction for agencies (D2024/007050), we should potentially have a separate process for backlog matters, e.g. for IC review applications received before 1 July 2024, agencies and ministers must have regard to Part 10 of the FOI Guidelines issued under s 93A of the FOI Act which sets out the general principles and expectations of the Information Commissioner regarding IC reviews. Specific directions may be made in the context of these IC reviews.
<p>1.13</p> <p>OAIC contacting applicants</p>	<ul style="list-style-type: none"> Paragraph 1.13 explains that the OAIC will contact applicants using their preferred contact method. Paragraph 1.13 also states 'Where an applicant has listed a preferred contact method as well as other contact information, the OAIC will consider any notices as received when sent to an applicant's preferred contact'. The AAT submits that we may wish to consider referring to an exception where there is evidence of non-receipt, such as a returned letter or email non delivery message. 	<ul style="list-style-type: none"> <u>Not updated</u>. <u>Comments</u>: Review the meaning of 'the OAIC will consider any notices as received when sent to an applicant's preferred contact' and update to make clearer. Note that the existing IC review procedure for applicants contains the same wording at para 1.13.
<p>1.15</p> <p>Who can be an IC review applicant?</p>	<ul style="list-style-type: none"> Paragraph 1.15 refers to s 54L(3), namely that an IC review application may be made by the person who made the request to which the decision relates, and the proceeding paragraphs 1.16 to 1.20 set out the requirements for the IC review application. The AAT queries whether the requirements for IC review applications of access grant decisions (s 54M) are the same as those discussed at paragraphs 1.16 to 1.20. 	<ul style="list-style-type: none"> <u>Not updated</u>. <u>Comments</u>: Consider updating para 1.15 to refer to s 54M(3) (application for IC review of access grant decisions).

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>1.17(a)</p> <p>Information that must be provided with IC review application:</p> <p>Whether decision under review is an original or internal review decision</p> <p>Usually better to seek internal review first</p>	<ul style="list-style-type: none"> Paragraph 1.17 states that 'The applicant must provide the OAIC with about the FOI decision, in particular (a) ... (b) ... (c) ... (d) ...'. Paragraph 1.17(a) states that the applicant should say whether the decision under review is an original decision or internal review decision, and notes 'it is usually better to seek internal review first ...'. Defence proposes that we consider making internal review compulsory, in circumstances which allow it. This would allow for agencies and ministers to have further meaningful engagement with the applicant before they seek an IC review in an attempt to resolve the issues in an informal and timely way, thus reducing the workload for the OAIC. ATO submits that it is unclear whether there will be any requirement on the applicant to either seek internal review or provide details on why they did not consider it appropriate in the circumstances (ATO). 	<ul style="list-style-type: none"> <u>Not updated.</u> <u>Comments:</u> Consider putting Defence's suggestion that internal review be compulsory before applying for IC review, unless exceptions apply (for example if a decision was made by a minister (ss 54(1), 54A(1)), on the legislative issues register: D2019/001559. Consider updating para 1.17(a) to explain that an IC review applicant is not required to apply for an internal review before applying for an IC review. The wording could for example be consistent with the draft FOI Guidelines at paragraph [10.3] (D2022/009530).
<p>1.17(b)</p> <p>Information to be provided with IC review application:</p> <p>Notice of decision given versus received</p>	<ul style="list-style-type: none"> Paragraph 1.17(b) notes that 'In most cases, an application for IC review must be made within 60 days of the applicant being notified of the ... decision ...'. The AAT submits that we may wish to consider whether the date of receipt of the decision is also relevant. 	<ul style="list-style-type: none"> <u>Not updated.</u> <u>Comments:</u> Consider whether 'notice of decision given' means when decision is received. Refer to AAT web page Time limits.
<p>1.17 (general)</p> <p>Agency reference number</p>	<ul style="list-style-type: none"> AFP submits that applicants should also be required to provide the agency reference number for the FOI decision. 	<ul style="list-style-type: none"> <u>Not updated.</u> <u>Comments:</u> The applicant is already generally required to provide a copy of the decision (s 54N(1)(b)), which should state the agency reference number.

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>1.18</p> <p>Further information to be provided with IC review application:</p> <p>Should or required to provide the information</p>	<ul style="list-style-type: none"> Paragraph 1.18 advises that 'An application for IC review should also: (a) ... (b) ... (c) ... (d) ...', such as the aspects of the decision about which they seek the IC review. ATO submits that given the mandatory consultation requirement proposed to be put on agencies it would appear appropriate for applicants to be required to provide the information set out in this paragraph prior to any consultation occurring. ATO also queries whether a failure to provide this information would be considered a 'failure to engage'. 	<ul style="list-style-type: none"> <u>Not updated.</u> <u>Comments:</u> Consider a cross-reference between or combining of para 1.18 and para 1.25, which refers to finalising an IC review under s 54W(a)(ii) if an applicant has failed to cooperate in progressing the IC review application or the IC review without reasonable excuse.
<p>1.18(a)</p> <p>Further requirements of IC review application</p> <p>Identify the aspect(s) of decision about which the IC review is sought</p>	<ul style="list-style-type: none"> Paragraph 1.18(a) says that an application should 'identify the aspect(s) of the ... decision about which the IC review is sought'. AGD submits that this wording may be confusing for some readers, and could alternatively say "identify the parts of the decision you want the Information Commissioner to review". Defence submits that identifying why the agency's or minister's decision is wrong should be compulsory, and would assist the agency or minister to better understand and resolve the issues in a meaningful, informal and timely way. 	<ul style="list-style-type: none"> <u>Not updated.</u> <u>Comments:</u> Consider updating. For example, paras 1.18(a), (b), and (c) could alternatively say 'identify which documents the applicant believes the decision maker should give them' and 'advise why the applicant believes the decision maker should give them those documents'. Consider advising that the requirements are not compulsory, but the OAIC may consider that if the applicant does not meet the requirements, their IC review application should be finalised under s 54W(a)(ii) (failure to cooperate in progress IC review application).
<p>1.23</p> <p>Engagement to resolve issues (issue 1)</p>	<ul style="list-style-type: none"> AAT submits that engagement should only be required if there has been no internal review of the decision. 	<ul style="list-style-type: none"> <u>Not updated.</u> <u>Comments:</u> As stated in relation to para 1.17(a), consider putting on the legislative issues register: D2019/001559 that internal review should be compulsory before applying for IC review, unless exceptions apply (for example if a decision was made by a minister (ss 54(1), 54A(1)).
<p>1.23</p> <p>Engagement to resolve issues (issue 2)</p>	<ul style="list-style-type: none"> AAT, AFP, and the Commonwealth Ombudsman submit that paragraph 1.23 should say that agencies are required to contact applicants to arrange the engagement after receiving the s 54Z notice, rather than after the IC review application is lodged. AFP in particular notes that there can be a delay between an IC review application and s 54Z notice. 	<ul style="list-style-type: none"> <u>Not updated.</u> <u>Comments:</u> Consider updating para 1.23 to say 'after receiving the OAIC's notice of IC review under s 54Z'.

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>1.23</p> <p>Engagement to resolve issues (issue 3)</p>	<ul style="list-style-type: none"> ATO also submits it would also be helpful to provide applicants with further details about what is expected of them in terms of participating in agency engagement and that simply attending a meeting with no intention to attempt to resolve the review application would be not considered appropriate 'engagement'. 	<ul style="list-style-type: none"> <u>Not updated.</u> <u>Comments:</u> Consider updating para 1.23 to refer to the information listed in para 1.18, and state that they should bring that information to the 'engagement process'. Consider describing 'engagement process' in line with the corresponding EB on the procedure direction for agencies (D2024/007050) and draft IC review procedure direction within at paras 4.3 and 4.4: <p><i>4.3 Engagement with IC review applicants will comprise a telephone or video conference between the applicant and the agency or minister. The agency or minister will be responsible for contacting the applicant and making the necessary arrangements for the engagement process. The OAIC will not be involved in making such arrangements or in attending the telephone or video conference.</i></p> <p><i>4.4 Some IC review 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, such as in writing to the applicant, to attempt to resolve the issue between the parties or narrow the issues in dispute.</i></p>

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
1.31 Preliminary view	<ul style="list-style-type: none"> Paragraph 1.31 states 'The OAIC may provide a preliminary view at any time ... The applicant may be invited in some cases to withdraw the IC review application, depending on the views expressed in the preliminary view'. The AAT submits that if there is an opportunity for the parties to provide information in response to the preliminary view, it may be useful to state this. Such a view may raise a fact or issue that can be addressed. 	<ul style="list-style-type: none"> <u>Not updated.</u> <u>Comments: Consider updating in response to the AAT's submissions, and in consideration of paragraphs [10.60] and [10.119] of the draft FOI Guidelines which say (D2022/009530):</u> <i>10.60 ... the OAIC's IC review officer may review the material submitted by both parties and provide a preliminary view as to the merits 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.</i> <i>10.119 Submissions as to the issues identified in the preliminary view will be sought from the relevant party. Further information about the process that will be followed when a preliminary view is issued can be found in the 'Direction as to certain procedures to be following in Information Commissioner reviews' on the OAIC's website.</i>
Part 3 (paras 1.38 to 1.42) Procedure for IC review of specific types of decisions Revised decisions	<ul style="list-style-type: none"> N/A 	<ul style="list-style-type: none"> <u>Update required:</u> to para 1.39 – Deemed access refusal decisions, to include revised s 55G decisions. <u>Comment:</u> We should consider the draft Part 10 of the FOI Guidelines at paras 10.123 onwards regarding deemed decisions, and paras 10.75 onwards regarding revised decisions Update to para 1.39 could say 'If ... the agency or Minister gives the applicant reasons for its deemed decision (before the Information Commissioner commences to undertake an IC review) or makes a revised decision under s 55G (after the Information Commissioner commences to undertake an IC review under s 54Z), the OAIC will check whether the applicant is satisfied with the decision.'

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
General	<ul style="list-style-type: none"> AGD queries if it may be simpler and more effective for all users of the FOI system to have a single direction, addressed to both the agency and the applicant. This would ensure all parties have a consistent understanding of the IC review process. By comparison, we note the AAT General Practice Direction (General-Practice-Direction.pdf (aat.gov.au)), under s 18B of the Administrative Appeals Tribunal Act 1975 applies to all parties to a review and appears to provide greater consistency in the explanation of process and responsibilities. 	<ul style="list-style-type: none"> Not updated. Comments:
General	<ul style="list-style-type: none"> AGD submits that it is unclear what practice directions (if any) apply to third parties joined to an IC review or whether the process for an IC review in the directions for agencies and applicants may differ where there are other parties to the review. 	<ul style="list-style-type: none"> Not updated. Comments:
General	<ul style="list-style-type: none"> ATO submits that a delay in seeking a review by an applicant should be a ground for providing an agency with additional time to respond. 	<ul style="list-style-type: none"> Not updated. Comments:

Executive brief

Responsible Executive Member:	Rocelle Ago, Assistant Commissioner FOI
Prepared by:	Jessica Eslick and Sara Peel, Director, Monitoring, Guidance and Engagement
To:	Elizabeth Tydd, FOI Commissioner
Copies:	Karen Tulloch, Raewyn Harlock
File ref:	D2024/008712
Date:	3 April 2024
Subject:	Proposed updates to draft IC review procedure direction for <u>applicants</u>

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Purpose and timing

To inform you of the proposed updates to the draft IC review procedure direction for applicants (titled 'Direction as to certain procedures to be followed in by applicants in Information Commissioner reviews') (the draft direction),

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Your as at 13 March 2024

Recommendations

1. That you note our proposed updates to the draft direction via comments to the following paragraphs of the draft direction (Attachment A):
 1. paragraph x
 2. xx
2. That you note our summary of the submissions in response to our consultation, whether we have proposed updates to the draft direction in light of those submissions, and our rationale /comments (**Attachment B**).

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Background

The Australian Information Commissioner may give written directions under s 55(2)(e)(ii) of the FOI Act in relation to procedures to be followed in Information Commissioner (IC) reviews.

The Information Commissioner has issued 2 directions under s 55(2)(e)(ii), which are currently in effect:

- Direction as to certain procedures to be followed in Information Commissioner reviews, which has had effect from 26 February 2018.
- Direction as to certain procedures to be followed by applicants in Information Commissioner reviews, which had had effect from 1 September 2021.

On 9 May 2023, we sought comments from, or consulted, interested stakeholders on draft revisions to each of the 2 directions.

In our consultation, we advised stakeholders:

We intend to make all submissions publicly available. Please indicate when making your submission if it contains confidential information that you do not want made public and why it should not be published. Requests for access to confidential comments will be determined in accordance with the FOI Act. If the OAIC accepts submissions in confidence you must also provide a copy that can be published.

Between 8 June 2023 and 6 July 2023, we received submissions on the draft direction from **6 agencies** as follows:

1. Administrative Appeals Tribunal on 8 June 2023
2. Attorney-General's Department on 30 June 2023
3. Australian Federal Police on 30 June 2023
4. Australian Tax Office on 30 June 2023
5. Commonwealth Ombudsman on 30 June 2023
6. Department of Defence on 30 June 2023

Related brief [D2023/015645](#) contains TRIM links to those submissions at its Attachment B.

Attachments

1. **Attachment A:** Proposed updated draft direction (with proposed updates in highlight and comments).
2. **Attachment B:** Summary of agencies' submissions in response to our consultation on the draft direction, whether we have proposed (at Attachment A) to update the draft direction in response to those submissions, and our rationale/comments.

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Attachment A

Proposed direction



Australian Government

Office of the Australian Information Commissioner

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

Contents

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Part 3: Procedure for IC review of specific types of decisions	Error! Bookmark not defined.
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Access refusal decisions.....	Error! Bookmark not defined.
Access grant decisions.....	Error! Bookmark not defined.
Part 4: Non-compliance with this direction	Error! Bookmark not defined.

Part 1: About this direction

- 1.1 This direction is given by the Australian Information Commissioner under s 55(2)(e)(i) of the Freedom of Information Act 1982 (FOI Act) in relation to Information Commissioner reviews (IC reviews).
- 1.2 This written direction sets out the procedure to be followed by applicants for IC reviews undertaken by the Information Commissioner under the FOI Act.
- 1.3 The Information Commissioner 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 Information Commissioner (s 54W(c)).
- 1.4 The Information Commissioner may also give written directions as to the procedure to be followed in relation to a particular IC review (s 55(2)(e)(ii)).
- 1.5 This direction does not apply to the extent it is inconsistent with a provision of the FOI Act, another enactment or a specific direction made in a particular IC review under s 55(2)(e)(ii) of the FOI Act.
- 1.6 Further information relating to the IC review process is published on the Office of the Australian Information Commissioner's (OAIC) website. In particular, Part 10 (Reviews by the Australian Information Commissioner) of the Guidelines issued by the Information Commissioner under s 93A of the FOI Act (FOI Guidelines) describes the principles that inform the OAIC's approach to IC reviews.
- 1.7 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.
- 1.8 This direction has effect from 1 July 2023.

Part 2: The IC review process

- 1.9 IC review procedures are found in Part VII of the FOI Act. The IC review process is intended to be an informal, non-adversarial and timely means of external merits review of FOI decisions made by agencies and ministers. Part 10 of the FOI Guidelines, to which agencies and ministers must have regard when performing a function or exercising a power under the FOI Act, sets out in detail the process and underlying principles of IC review.

Making an application for IC review

- 1.10 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.
- 1.11 Where it is not possible for an application to be made online, applications may be sent to the OAIC by:
 - email to foidr@oaic.gov.au
 - mail to FOI Regulatory Group, GPO Box 5218, Sydney NSW 2001.
- 1.12 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

- 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).
- 1.13 The OAIC 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 OAIC will consider any notices as received when sent to an applicant's preferred contact.
- 1.14 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
 - 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.
- 1.15 An application for IC review may be made by, or on behalf of, the person who made the FOI request to which decision relates (s 54L(3)). The OAIC 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.
- 1.16 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.
- 1.17 The applicant must provide the OAIC 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. However, in circumstances where the original decision was made by the Minister or personally by the principal officer of an agency, or in the case of a deemed access refusal, applicants must apply directly for IC review.
 - 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.
 - If an application for IC review is not made within the timeframes in the FOI Act, applicants may apply to the Information Commissioner 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 Information Commissioner 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.

1.18 An application for IC review should also:

- a. identify the aspect(s) of the agency's or Minister's decision about which the IC review is sought
- 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.

1.19 The OAIC must provide 'appropriate assistance' to a person who wishes to apply for IC review and requires assistance to prepare the IC review application (s 54N(3)).

1.20 Section 54N of the FOI Act sets out the requirements for the contents and delivery of an application for IC review. These requirements include giving the OAIC contact details to which notices can be sent and providing a copy of the FOI decision the applicant wants the Information Commissioner to review. An application that does not comply with these requirements may be considered to be invalid.

During the IC review

Changes to contact details

1.21 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 Information Commissioner may decide not to undertake an IC review, or not continue to undertake an IC review, if the applicant or their nominated representative cannot be contacted after making reasonable attempts (s 54W(a)(iii)).

Participation in the IC review

1.22 Applicants must respond to inquiries from the OAIC within the time provided unless there are 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 why additional time is needed and propose a new date for response. Approval of an extension request is at the discretion of the OAIC.

1.23 The OAIC requires agencies and Ministers to engage with the IC review applicant at the commencement of an IC review. The purpose of this engagement is to attempt to resolve the issues identified in the IC review application in an informal and timely way. Agencies are required to contact applicants for IC review shortly after the IC review application is lodged to arrange a suitable time for

the engagement process. 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)).

- 1.24 The Information Commissioner may use any technique the Information Commissioner considers appropriate to facilitate an agreed resolution of the matters at issue in the IC review (such as alternative dispute resolution processes - s 55(2)(b)). Where appropriate, and following the compulsory engagement process described above, the OAIC may invite applicants to attend a teleconference to discuss the issues in dispute in the IC review with the agency's or Minister's office and to explore options for resolution, with a view to reaching agreement on some or all of the matters at issue in the IC review.
- 1.25 The Information Commissioner may decide not to undertake an IC review, or not continue to undertake an IC review, if an IC review applicant has failed to cooperate in progressing the IC review application or the IC review without reasonable excuse (s 54W(a)(ii)).

Submissions

- 1.26 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.
- 1.27 Applicants will be invited to make written submissions after the initial triage and early resolution process is complete, and once the application has been assigned to a review adviser for substantive review/case management. First, the agency or Minister will be asked to make submissions in support of the IC reviewable decision. The agency or Minister will send the applicant a copy of their submissions at the same time as they are sent to the OAIC. The applicant will then have the opportunity to make submissions addressing any issues raised by the agency or the Minister. The applicant is required to send their submissions to the agency or Minister at the same time as they are sent to the OAIC.
- 1.28 The Information Commissioner will generally give the parties (both the applicant and the agency or Minister) 4 weeks to make their submissions.
- 1.29 The Information Commissioner will not accept any further submissions from either party to the IC review unless the Information Commissioner has requested them.
- 1.30 The Information Commissioner will contact the parties after receipt of submissions if procedural fairness requirements have been identified. For information on procedural fairness see [3.15] — [3.31] of Part 3 of the FOI Guidelines.
- 1.31 The OAIC may provide a preliminary view at any time during the IC review. This will outline the case officer's preliminary thinking on the issues in dispute in the IC review. The applicant may be invited in some cases to withdraw the IC review application, depending on the views expressed in the preliminary view
- 1.32 The IC review application and any attachments will be shared with the agency or Minister, as well as any other parties to the review, unless there is a reason not to do so. Any other information and submissions provided to the OAIC by the applicant will be made available to the other parties to the IC review.
- 1.33 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.

- 1.34 Generally, submissions should be made in writing and sent by email or pre-paid post. In limited circumstances, if an applicant is unable to provide written submissions, the OAIC may agree to accept verbal submissions by telephone.

Information Commissioner decisions

- 1.35 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.
- 1.36 When the Information Commissioner makes a decision on IC review under s 55K of the FOI Act, the Information Commissioner will quote or summarise the submissions in the published decision. If a confidential submission is relied on by the Information Commissioner in making a decision on the IC review, this will be noted in the decision without revealing the confidential material.
- 1.37 To protect against the unreasonable disclosure of personal information, the Information Commissioner will consider whether identifying information should be included in published decisions. Natural persons may opt not 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: Procedure for IC review of specific types of decisions

Deemed access refusal decisions

- 1.38 A 'deemed access refusal' occurs when the statutory time for making a decision on an FOI request for access to a document has expired and notice of the decision has not been given. In these circumstances the agency or Minister is 'deemed' to have refused the FOI request. Where the applicant applies for IC review of a deemed access refusal decision, the OAIC will make inquiries with the agency or Minister.
- 1.39 If, during the IC review, the agency or Minister sends the applicant a written decision on the applicant's FOI request the OAIC will check whether the applicant is satisfied with the decision. Applicants who are satisfied with the decision and do not wish to proceed with the IC review must advise the OAIC in writing that they withdraw their application for IC review. Applicants who are not satisfied with the agency's or Minister's decision must explain why they disagree with the 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 undertake an IC review on the basis that the applicant has failed to cooperate in progressing the IC review application without reasonable excuse (s 54W(a)(ii)).

Access refusal decisions

- 1.40 An 'access refusal decision' means (s 53A):
- 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 all the 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 (s 21) (see Part 3 of the Guidelines)
 - e. a decision relating to the imposition or amount of a charge (s 29)
 - f. a decision to give access to a document to a 'qualified person' (where disclosing the information to the applicant might be detrimental to the applicant's physical or mental health or well-being) (s 47F(5))
 - g. a decision refusing to amend a record of personal information in accordance with an application (s 48)
 - h. a decision refusing to annotate a record of personal information in accordance with an application (s 48).
- 1.41 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)).
- 1.42 Given that the agency or Minister bears this onus, it will generally be necessary to undertake inquiries or seek information from the agency or Minister before inviting comment from applicants.

Access grant decisions

- 1.43 An 'access grant decision' means a decision to grant access to a document where there is a requirement to consult a third party (s 53B). Such decisions involve granting the FOI applicant access to information or documents following consultation.
- 1.44 In an IC review of an access grant decision, it is the IC review applicant who bears the onus of establishing that a decision refusing the FOI request is justified, or that the Information Commissioner should give a decision adverse to the FOI applicant (s 55D(2)).
- 1.45 IC review applicants will generally be invited to provide information or submissions which explain why the agency's or Minister's decision is wrong before comment is invited from the agency or Minister.

Part 4: Non-compliance with this direction

- 1.46 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 review as outlined in s 54W(c). This means that, in these cases, the review will be finalised.
- 1.47 Applicants will be provided with the opportunity to explain why the Information Commissioner should not finalise the IC review under s 54W(c) of the FOI Act before a decision is made.

Attachment B

Summaries of updates and agencies' submissions

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
1.8 – Direction has effect from 1 July 2023	<ul style="list-style-type: none"> N/A 	<p><u>Updated:</u></p> <ul style="list-style-type: none"> This Direction has effect from 1 July 2024. The update is not in response to agencies' submissions. <p><u>Comments:</u></p> <ul style="list-style-type: none"> As stated in the corresponding EB on the procedure direction for agencies (D2024/007050), we should potentially have a separate process for backlog matters. We could state, for example: <p><i>For IC review applications received before 1 July 2024, agencies and ministers must have regard to Part 10 of the FOI Guidelines issued under s 93A of the FOI Act which sets out the general principles and expectations of the Information Commissioner regarding IC reviews. Specific directions may be made in the context of these IC reviews.</i></p>

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>1.13 – OAIC contacting applicants</p> <ul style="list-style-type: none"> Paragraph 1.13 explains that the OAIC will contact applicants using their preferred contact method. Paragraph 1.13 also states ‘Where an applicant has listed a preferred contact method as well as other contact information, the OAIC will consider any notices as received when sent to an applicant’s preferred contact’. 	<ul style="list-style-type: none"> The AAT submits that we may wish to consider referring to an exception where there is evidence of non-receipt, such as a returned letter or email non delivery message. 	<p><u>Not updated</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> Review the meaning of ‘the OAIC will consider any notices as received when sent to an applicant’s preferred contact’ and update to make clearer. Note that the existing IC review procedure for applicants contains the same wording at para 1.13. In practice if the OAIC cannot contact an applicant, we may not be able to continue with the IC review and will consider use of our decline powers. However we consider it’s not worth including here. If we send it to you, we consider you got it. AAT refers to exceptions, we don’t think worth talking abt declines upfront in PD – our FOI Reg action guide Freedom of information regulatory action policy OAIC
<p>1.15</p> <p>Who can be an IC review applicant?</p>	<ul style="list-style-type: none"> Paragraph 1.15 refers to s 54L(3), namely that an IC review application may be made by the person who made the request to which the decision relates, and the proceeding paragraphs 1.16 to 1.20 set out the requirements for the IC review application. The AAT queries whether the requirements for IC review applications of access grant decisions (s 54M) are the same as those discussed at paragraphs 1.16 to 1.20. 	<ul style="list-style-type: none"> <u>Not updated.</u> <u>Comments:</u> Consider updating para 1.15 to refer to s 54M(3) (application for IC review of access grant decisions). <u>Update this – looks like an omission I’ve checked and the leg provisions are parrallel for these 2 cohorts of applicants.</u>

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>1.17(a)</p> <p>Information that must be provided with IC review application:</p> <p>Whether decision under review is an original or internal review decision</p> <p>Usually better to seek internal review first</p> <ul style="list-style-type: none"> Paragraph 1.17 states that 'The applicant must provide the OAIC with about the FOI decision, in particular (a) ... (b) ... (c) ... (d) ...'. Paragraph 1.17(a) states that the applicant should say whether the decision under review is an original decision or internal review decision, and notes 'it is usually better to seek internal review first ...' 	<ul style="list-style-type: none"> Defence proposes that we consider making internal review compulsory, in circumstances which allow it. This would allow for agencies and ministers to have further meaningful engagement with the applicant before they seek an IC review in an attempt to resolve the issues in an informal and timely way, thus reducing the workload for the OAIC. ATO submits that it is unclear whether there will be any requirement on the applicant to either seek internal review or provide details on why they did not consider it appropriate in the circumstances (ATO). 	<ul style="list-style-type: none"> <u>Not updated.</u> <u>Comments:</u> Consider putting Defence's suggestion that internal review be compulsory before applying for IC review, unless exceptions apply (for example if a decision was made by a minister (ss 54(1), 54A(1)), on the legislative issues register: D2019/001559. Consider updating para 1.17(a) to explain that an IC review applicant is not required to apply for an internal review before applying for an IC review. The wording could for example be consistent with the draft FOI Guidelines at paragraph [10.3] (D2022/009530). This is beyond scope of this PD and would require change to the legislative. They're asking for us clarification of when there's a choice and when there's not. Whether necessary – does it need to be in this direction We might put it in there because we've talked about – put something in the table which says we've considered this point by the ATO – here are the resources that clarify when you can apply for internal review and when you can't. this PD is how to manage an IC review that's on foot, so it's not the best place to go into detail about what happens before the application. Add this: FOI applicants have a choice of internal or IC review except where a minister has made the original decision, or the decision is deemed. Point taken by ATO, added to services.

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>1.17(b)</p> <p>Information to be provided with IC review application: Notice of decision given versus received</p>	<ul style="list-style-type: none"> Paragraph 1.17(b) notes that 'In most cases, an application for IC review must be made within 60 days of the applicant being notified of the ... decision ...'. The AAT submits that we may wish to consider whether the date of receipt of the decision is also relevant. 	<ul style="list-style-type: none"> <u>Not updated.</u> <u>Comments:</u> Consider whether 'notice of decision given' means when decision is received. Refer to AAT web page Time limits. <u>Limitation dates – would start postage – In practice, most notices and corro with applicants is undertaken by email; less frequent that delivering by post – and 60 days is quite a long time. This appears to be our established position – existing 1.13 states 'as received' this appears appropriate when vast majority of corro is by email and 60 days is a generous period of time. No change is needed.</u>
<p>1.17 (general)</p> <p>Agency reference number</p>	<ul style="list-style-type: none"> AFP submits that applicants should also be required to provide the agency reference number for the FOI decision. 	<ul style="list-style-type: none"> <u>Not updated.</u> <u>Comments:</u> The applicant is already generally required to provide a copy of the decision (s 54N(1)(b)), which should state the agency reference number.

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>1.18</p> <p>Further information to be provided with IC review application:</p> <p>Should or required to provide the information</p> <ul style="list-style-type: none"> Paragraph 1.18 advises that 'An application for IC review should also: (a) ... (b) ... (c) ... (d) ...', such as the aspects of the decision about which they seek the IC review. 	<ul style="list-style-type: none"> ATO submits that given the mandatory consultation requirement proposed to be put on agencies it would appear appropriate for applicants to be required to provide the information set out in this paragraph prior to any consultation occurring. ATO also queries whether a failure to provide this information would be considered a 'failure to engage'. 	<ul style="list-style-type: none"> <u>Not updated.</u> <u>Comments:</u> Consider a cross-reference between or combining of para 1.18 and para 1.25, which refers to finalising an IC review under s 54W(a)(ii) if an applicant has failed to cooperate in progressing the IC review application or the IC review without reasonable excuse. <u>This is mandatory; should equals you have to.- we frame it as a requirement – should – 1.23 notes the decline power at 54W(a)(ii) in the context of applicant's failure to engagement. Combined effect of 1.22m 1.25, 1.23, and don't know if want to say more about it upfront. Considered issue</u> <u>1.22 deals with enquiries that would apply if don't give that information upfrtong</u> <u>We do actually frame as requirement</u> <u>We have an assistance provision so don't want to emphasise that.</u>

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>1.18(a)</p> <p>Further requirements of IC review application</p> <p>Identify the aspect(s) of decision about which the IC review is sought</p>	<ul style="list-style-type: none"> Paragraph 1.18(a) says that an application should 'identify the aspect(s) of the ... decision about which the IC review is sought'. AGD submits that this wording may be confusing for some readers, and could alternatively say "identify the parts of the decision you want the Information Commissioner to review". Defence submits that identifying why the agency's or minister's decision is wrong should be compulsory, and would assist the agency or minister to better understand and resolve the issues in a meaningful, informal and timely way. 	<ul style="list-style-type: none"> <u>Not updated.</u> <u>Comments:</u> Consider updating. For example, paras 1.18(a), (b), and (c) could alternatively say 'identify which documents the applicant believes the decision maker should give them' and 'advise why the applicant believes the decision maker should give them those documents'. Consider advising that the requirements are not compulsory, but the OAIc may consider that if the applicant does not meet the requirements, their IC review application should be finalised under s 54W(a)(ii) (failure to cooperate in progress IC review application). Defence Saying why wrong is too high a threshold – they're not lawyers AGD – identify parts instead of aspects – accept AGD's thing.

<p>1.23 Engagement to resolve issues (issue 1)</p>	<ul style="list-style-type: none"> AAT submits that engagement should only be required if there has been no internal review of the decision. 	<ul style="list-style-type: none"> <u>Not updated.</u> <u>Comments:</u> As stated in relation to para 1.17(a), consider putting on the legislative issues register: D2019/001559 that internal review should be compulsory before applying for IC review, unless exceptions apply (for example if a decision was made by a minister (ss 54(1), 54A(1))). <u>We think – benefit if there has been an internal review – we haven’t changed the PD it’s our understanding that it applies – if they can show they’ve engaged already with the</u> <u>See 4.7 of draft other EB – if engagement has occurred during the internal review process, that may meet the requirements of the procedural direction – it’s not clear that the engagement can be before the IC review lodged but it’s possibly useful to clarify to cover past engagement. Have a look at the notes – DHA brought this up at the consultation</u> <u>Let’s land in the table – do we need to clarify – the internal review – presumably the AAT are raising this because there will already have been a conference about scope and issues – perhaps revise aspects of the PD to make clear we do include past aspects of engagement.</u> <u>Put it in the table – raise with Rocelle about engagement requirement applying – about meeting the engagement requirement if engagement has happened prior to the IC review application.</u> Does engagement before the IC review application count. If pre-IC review engagement counts, we need to read through the 2 documents.
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Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>1.23 Engagement to resolve issues (issue 2)</p>	<ul style="list-style-type: none"> AAT, AFP, and the Commonwealth Ombudsman submit that paragraph 1.23 should say that agencies are required to contact applicants to arrange the engagement after receiving the s 54Z notice, rather than after the IC review application is lodged. AFP in particular notes that there can be a delay between an IC review application and s 54Z notice. 	<ul style="list-style-type: none"> <u>Not updated.</u> <u>Comments:</u> Consider updating para 1.23 to say 'after receiving the OAIC's notice of IC review under s 54Z'.

<p>1.23 Engagement to resolve issues (issue 3)</p>	<ul style="list-style-type: none"> • ATO also submits it would also be helpful to provide applicants with further details about what is expected of them in terms of participating in agency engagement and that simply attending a meeting with no intention to attempt to resolve the review application would be not considered appropriate 'engagement'. 	<ul style="list-style-type: none"> • <u>Not updated.</u> • <u>Comments:</u> Consider updating para 1.23 to refer to the information listed in para 1.18, and state that they should bring that information to the 'engagement process'. • <u>We could say FOI matters are more likely to resolve if the applicant is prepared for the conference. It's up to the agency to set the terms of the engagement. When we do the behaviour section we can say something about the engagement process – dealing with agencies in the engagement process – we expect applicants to treat staff members with respect – from Service Charter – if Rocelle and Liz – sa – add as new Part 2 – subheading Applicants participation in engagement process and IC review. Conduct of parties.</u> • Consider describing 'engagement process' in line with the corresponding EB on the procedure direction for agencies (D2024/007050) and draft IC review procedure direction within at paras 4.3 and 4.4: <p><i>4.3 Engagement with IC review applicants will comprise a telephone or video conference between the applicant and the agency or minister. The agency or minister will be responsible for contacting the applicant and making the necessary arrangements for the engagement process. The OAIC will not be involved in making such arrangements or in attending the telephone or video conference.</i></p> <p><i>4.4 Some IC review 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, such as in writing to the applicant, to attempt to</i></p>
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Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
		<p><i>resolve the issue between the parties or narrow the issues in dispute.</i></p>
<p>1.31 Preliminary view</p>	<ul style="list-style-type: none"> • Paragraph 1.31 states 'The OAIC may provide a preliminary view at any time ... The applicant may be invited in some cases to withdraw the IC review application, depending on the views expressed in the preliminary view'. • The AAT submits that if there is an opportunity for the parties to provide information in response to the preliminary view, it may be useful to state this. Such a view may raise a fact or issue that can be addressed. 	<ul style="list-style-type: none"> • <u>Not updated.</u> • <u>Comments: Consider updating in response to the AAT's submissions, and in consideration of paragraphs [10.60] and [10.119] of the draft FOI Guidelines which say (D2022/009530):</u> <p><i>10.60 ... the OAIC's IC review officer may review the material submitted by both parties and provide a preliminary view as to the merits 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.</i></p> <p><i>10.119 Submissions as to the issues identified in the preliminary view will be sought from the relevant party. Further information about the process that will be followed when a preliminary view is issued can be found in the 'Direction as to certain procedures to be following in Information Commissioner reviews' on the OAIC's website.</i></p> <p>The applicant may be invited in some cases to make a submission in response and/or withdraw. OAIC reg policy might have something.</p>

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>Part 3 (paras 1.38 to 1.42)</p> <p>Procedure for IC review of specific types of decisions</p> <p>Revised decisions</p>	<ul style="list-style-type: none"> N/A 	<ul style="list-style-type: none"> <u>Update required:</u> to para 1.39 – Deemed access refusal decisions, to include revised s 55G decisions. <u>Comment:</u> We should consider the draft Part 10 of the FOI Guidelines at paras 10.123 onwards regarding deemed decisions, and paras 10.75 onwards regarding revised decisions Update to para 1.39 could say ‘If ... the agency or Minister gives the applicant reasons for its deemed decision (before the Information Commissioner commences to undertake an IC review) or makes a revised decision under s 55G (after the Information Commissioner commences to undertake an IC review under s 54Z), the OAIC will check whether the applicant is satisfied with the decision.
<p>General</p>	<ul style="list-style-type: none"> AGD queries if it may be simpler and more effective for all users of the FOI system to have a single direction, addressed to both the agency and the applicant. This would ensure all parties have a consistent understanding of the IC review process. By comparison, we note the AAT General Practice Direction (General-Practice-Direction.pdf (aat.gov.au)), under s 18B of the Administrative Appeals Tribunal Act 1975 applies to all parties to a review and appears to provide greater consistency in the explanation of process and responsibilities. 	<ul style="list-style-type: none"> <u>Not updated.</u> <u>Comments:</u> <u>We can say 2 procedure direction increases accessibility for applicants = long procedure direction detracts accessibility.</u>

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
General	<ul style="list-style-type: none"> AGD submits that it is unclear what practice directions (if any) apply to third parties joined to an IC review or whether the process for an IC review in the directions for agencies and applicants may differ where there are other parties to the review. 	<ul style="list-style-type: none"> <u>Not updated.</u> <u>Comments:</u> <u>Third parties being consulted – we don't need a practice direction for them. They're a party to the matter but only re consultation. – guidelines explain their role.</u>
General	<ul style="list-style-type: none"> ATO submits that a delay in seeking a review by an applicant should be a ground for providing an agency with additional time to respond. 	<ul style="list-style-type: none"> <u>Not updated.</u> <u>Comments:</u> <u>This is contrary to the objectives of the procedure direction which seeks to Forster efficiency and expediency.</u>

From: [ESLICK, Jessica](#)
To: [OAIC - ACFOI](#)
Cc: [PEEL, Sara](#)
Subject: Doc 10 Draft EB on proposed updates to draft IC review procedure direction (for applicants)
Date: Thursday, 4 April 2024 12:46:00 PM
Attachments: [image001.jpg](#)
[image002.jpg](#)
[image003.jpg](#)

Dear Rocelle

Please refer to the table at Attachment B in the above draft EB: [D2024/008712](#).

I have reproduced the table below in the body of this email for your ease of reference.

We will await your comments, and update the EB, with a view to finalising the EB, accordingly.

Attachment B

Summaries of updates and agencies' submissions

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
1.8 – Direction has effect from 1 July 2023	• N/A	<p><u>Updated:</u></p> <ul style="list-style-type: none"> This Direction has effect from 1 July 2024. The update is not in response to agencies' submissions. <p><u>Comments:</u></p> <ul style="list-style-type: none"> As stated in the corresponding EB on the procedure direction for agencies (D2024/007050), we should potentially have a separate process for backlog matters. We could state, for example: <p><i>For IC review applications received before 1 July 2024, agencies and ministers must have regard to Part 10 of the FOI Guidelines issued under s 93A of the FOI Act which sets out the general principles and expectations of the Information Commissioner regarding IC reviews. Specific directions may be made in the context of these IC reviews.</i></p>
1.13 – OAIC contacting applicants	<ul style="list-style-type: none"> The AAT submits that we may wish to consider referring to an exception where there is evidence of non-receipt, such as a returned letter or email non delivery message. 	<p><u>Not update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> Note that the existing IC review procedure for applicants contains the same wording at para 1.13. In practice, if we cannot contact an applicant, we may not be able to continue with the IC review and would consider finalising the IC review under s 54W(a)(iii) (cannot contact applicant after making reasonable attempts). We consider that it is not worthwhile discussing our power under s 54W(1)(a)(iii) here, at the beginning of the procedure direction.
1.15 – Who can be an IC review applicant?	<ul style="list-style-type: none"> The AAT queries whether the requirements for IC review applications of access grant decisions (s 54M) are the same as those discussed at paragraphs 1.16 to 1.20. 	<p><u>Update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> Update para 1.15 to refer to s 54M(3) (application for IC review of access grant decisions), given that the information requested in the following paragraphs can apply to applications for IC review of access grant decisions. Minor updates may be required to following paragraphs, such as to para 1.18(c) so that we refer to 'wrongly granted' rather than 'wrongly refused'.
1.17(a) – Information that must be provided with IC review application:	<ul style="list-style-type: none"> Defence proposes that we consider making internal review compulsory, in circumstances which allow it. This would allow for agencies and ministers to have further meaningful engagement with the applicant before they seek an IC review in an attempt to resolve the issues in an informal and timely way, thus reducing the workload for the OAIC. ATO submits that it is unclear whether there will be any requirement on the applicant to either seek internal review or provide details on why they did not consider it appropriate in the circumstances (ATO). 	<p><u>Not update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> Requiring applicants to seek internal review before seeking IC review is outside the scope of the procedural direction, and would require legislative change. We could consider making clearer by way of a separate dot point that, for example 'applicants have a choice between applying for internal or IC review of a decision, unless the decision was made by the Minister or personally by the principal officer of an agency, or is a deemed access refusal decision. In those cases, applicants must directly apply for IC review.
1.17(b) – Information to be provided with IC review application	<ul style="list-style-type: none"> The AAT submits that we may wish to consider whether the date of receipt of the decision is also relevant. 	<p><u>Not update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> Para 1.13 (above para 1.17) says 'the OAIC will consider any notices as received when sent ...'. Given that agencies and the OAIC mostly send notices by email, we consider that no change is required to distinguish between the date a notice is given and the date received. The 60 day time limit for applying for IC review of an access refusal decision is also generous, which lessens the need to distinguish between when a notice is given, and received.
1.17 (general) Agency reference number	<ul style="list-style-type: none"> AFP submits that applicants should also be required to provide the agency reference 	<p><u>Not update.</u></p> <p><u>Comments:</u></p>

	number for the FOI decision.	<ul style="list-style-type: none"> The applicant is already generally required to provide a copy of the decision (s 54N(1)(b)), which should state the agency reference number.
1.18 – Further information to be provided with IC review application: <ul style="list-style-type: none"> Paragraph 1.18 advises that ‘An application for IC review should also: (a) ... (b) ... (c) ... (d) ...’, such as the aspects of the decision about which they seek the IC review. (emphasis added) 	<ul style="list-style-type: none"> ATO submits that given the mandatory consultation requirement proposed to be put on agencies it would appear appropriate for applicants to be required to provide the information set out in this paragraph prior to any consultation occurring. ATO also queries whether a failure to provide this information would be considered a ‘failure to engage’. 	<p><u>Not update.</u> <u>Comments:</u></p> <ul style="list-style-type: none"> Providing the information listed in para 1.18 is already framed as a requirement, stating ‘should’. The power to finalise an IC review for failure to cooperate (s 54W(a)(ii)) is discussed in the second section of this part of the direction (under the subheading During the IC review), and does not need to be discussed in this section, the first section (under the subheading Making an application for IC review). We are required to provide appropriate assistance to a person who wishes to make an IC review application, and requires assistance (s 54N(3)), and therefore it is not appropriate to emphasise the power to finalise an IC review at the application stage).
1.18(a) – Further requirements of IC review application <ul style="list-style-type: none"> Paragraph 1.18(a) says that an application should ‘identify the aspect(s) of the ... decision about which the IC review is sought’. 	<ul style="list-style-type: none"> AGD submits that this wording may be confusing for some readers, and could alternatively say “identify the parts of the decision you want the Information Commissioner to review”. Defence submits that at para 1.18, the revisions suggest that an IC review application should identify why the agency’s or minister’s decision is wrong. Defence proposes making this compulsory, saying that would assist the agency or minister to better understand and resolve the issues in a meaningful, informal and timely way. 	<p><u>Update</u> <u>Comments:</u></p> <ul style="list-style-type: none"> Update in line with AGD’s proposal ‘identify the parts of the decision you want the Information Commissioner to review’. In relation to Defence’s submission, we note that providing the information listed in para 1.18 is already framed as a requirement, stating ‘should’.
1.23 Engagement to resolve issues (issue 1)	<ul style="list-style-type: none"> AAT submits that engagement should only be required if there has been no internal review of the decision. 	<p><u>Update</u></p> <ul style="list-style-type: none"> Clarify in both applicants and agencies procedure directions that engagement would not be required if they have evidence of engagement with the applicant that is above their duty to take reasonable steps to assist the person to make the request in a manner that complies with s 15 (s 15(3)), such as during an internal review process.
1.23 Engagement to resolve issues (issue 2) <ul style="list-style-type: none"> Paragraph 1.23 states ‘Agencies are required to contact applicants for IC review shortly after the IC review application is lodged to arrange a suitable time for the engagement process.’ (emphasis added) 	<ul style="list-style-type: none"> AAT, AFP, and the Commonwealth Ombudsman submit that paragraph 1.23 should say that agencies are required to contact applicants to arrange the engagement after receiving the s 54Z notice. AFP in particular notes that there can be a delay between an IC review application and s 54Z notice. 	<p><u>Update</u> <u>Comments:</u></p> <ul style="list-style-type: none"> Consider updating para 1.23 to say ‘after receiving the OAIC’s notice of IC review under s 54Z’.
1.23 Engagement to resolve issues (issue 3)	<ul style="list-style-type: none"> ATO submits it would also be helpful to provide applicants with further details about what is expected of them in terms of participating in agency engagement and that simply attending a meeting with no intention to attempt to resolve the review application would be not considered appropriate ‘engagement’. 	<p><u>Update</u> <u>Comments:</u></p> <ul style="list-style-type: none"> Consider updating para 1.23 to say that the engagement may be more likely to resolve the matter if both parties are well prepared for the engagement. Consider updating para above, para 1.22 to discuss respectful engagement.
1.31 – Preliminary view <ul style="list-style-type: none"> Paragraph 1.31 states ‘The OAIC may provide a preliminary view at any time ... The applicant may be invited in some cases to withdraw the IC review application, depending on the views expressed in the preliminary view’. 	<ul style="list-style-type: none"> The AAT submits that if there is an opportunity for the parties to provide information in response to the preliminary view, it may be useful to state this. Such a view may raise a fact or issue that can be addressed. 	<p><u>Update.</u> <u>Comments:</u></p> <ul style="list-style-type: none"> Update to clarify that the OAIC will invite the applicant to withdraw or make submissions in response to a preliminary view, in line with paras [10.60] of the draft FOI Guidelines (D2022/009530) which says: <i>10.60 ... the OAIC’s IC review officer may review the material submitted by both parties and provide a preliminary view as to the merits 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.</i>
Revised decisions are not referred to in the draft procedure direction	<ul style="list-style-type: none"> N/A (observed by OAIC) 	<p><u>Update.</u> <u>Comment:</u></p> <ul style="list-style-type: none"> In part 2, under subheading During the IC review, insert a sub-subheading ‘Receiving revised decisions under s 55G’ and insert content in line with para 1079 of draft Part 10 of the FOI Guidelines which says: <i>A 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.</i> Then add references to the Information Commissioner’s powers under 54W(a) and

General	<ul style="list-style-type: none"> • AGD queries if it may be simpler and more effective for all users of the FOI system to have a single direction, addressed to both the agency and the applicant. This would ensure all parties have a consistent understanding of the IC review process. By comparison, we note the AAT General Practice Direction (General-Practice-Direction.pdf (aat.gov.au)), under s 18B of the Administrative Appeals Tribunal Act 1975 applies to all parties to a review and appears to provide greater consistency in the explanation of process and responsibilities. 	<p>54W(c).</p> <p><u>Nbt update.</u> <u>Comments:</u></p> <ul style="list-style-type: none"> • <u>We consider that having 2 procedure directions means that we have one particular procedure direction that is targeted to applicants and increases their accessibility to the information that they require to gain the benefit of an IC review.</u>
General	<ul style="list-style-type: none"> • AGD submits that it is unclear what practice directions (if any) apply to third parties joined to an IC review or whether the process for an IC review in the directions for agencies and applicants may differ where there are other parties to the review. 	<p><u>Nbt update.</u> <u>Comments:</u></p> <ul style="list-style-type: none"> • We consider that third parties do not require a procedure direction, and that their role is sufficiently discussed in the FOI Guidelines. Agencies also engage with third parties by way of consultation, which gives them the required information about the IC review process and their rights and obligations in relation to the IC review.
General	<ul style="list-style-type: none"> • ATO submits that a delay in seeking a review by an applicant should be a ground for providing an agency with additional time to respond. 	<p><u>Nbt update.</u> <u>Comments:</u></p> <ul style="list-style-type: none"> • To give agencies greater time to respond to our requests for information on the basis that the applicant has been granted an extension for applying for an IC review would not further the objects of the FOI Act, which include to facilitate and promote public access to information, promptly and at the lowest reasonable cost.

Kind regards



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The OAIC acknowledges Traditional Custodians of Country across Australia and their continuing connection to land, waters and communities. We pay our respect to First Nations people, cultures and Elders past and present.
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Executive brief

Responsible Executive Member:	Rocelle Ago, Assistant Commissioner FOI
Prepared by:	Jessica Eslick and Sara Peel, Director, Monitoring, Guidance and Engagement
To:	Elizabeth Tydd, FOI Commissioner
Copies:	Karen Tulloch, Raewyn Harlock
File ref:	D2024/008712
Date:	3 April 2024
Subject:	Proposed updates to draft IC review procedure direction for <u>applicants</u>

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Purpose and timing

To inform you of the proposed updates to the draft IC review procedure direction for applicants (titled 'Direction as to certain procedures to be followed in by applicants in Information Commissioner reviews') (the draft direction),

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Your as at 13 March 2024

Recommendations

1. That you note our proposed updates to the draft direction via comments to the following paragraphs of the draft direction (Attachment A):
 1. paragraph x
 2. xx
2. That you note our summary of the submissions in response to our consultation, whether we have proposed updates to the draft direction in light of those submissions, and our rationale /comments (**Attachment B**).

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Background

The Australian Information Commissioner may give written directions under s 55(2)(e)(ii) of the FOI Act in relation to procedures to be followed in Information Commissioner (IC) reviews.

The Information Commissioner has issued 2 directions under s 55(2)(e)(ii), which are currently in effect:

- [Direction as to certain procedures to be followed in Information Commissioner reviews](#), which has had effect from 26 February 2018.
- [Direction as to certain procedures to be followed by applicants in Information Commissioner reviews](#), which had had effect from 1 September 2021.

On 9 May 2023, we sought comments from, or consulted, interested stakeholders on draft revisions to each of the 2 directions.

In our consultation, we advised stakeholders:

We intend to make all submissions publicly available. Please indicate when making your submission if it contains confidential information that you do not want made public and why it should not be published. Requests for access to confidential comments will be determined in accordance with the FOI Act. If the OAIC accepts submissions in confidence you must also provide a copy that can be published.

Between 8 June 2023 and 6 July 2023, we received submissions on the draft direction from **6 agencies** as follows:

1. Administrative Appeals Tribunal on 8 June 2023
2. Attorney-General's Department on 30 June 2023
3. Australian Federal Police on 30 June 2023
4. Australian Tax Office on 30 June 2023
5. Commonwealth Ombudsman on 30 June 2023
6. Department of Defence on 30 June 2023

Related brief [D2023/015645](#) contains TRIM links to those submissions at its Attachment B.

Attachments

1. **Attachment A:** Proposed updated draft direction (with proposed updates in highlight and comments).
2. **Attachment B:** Summary of agencies' submissions in response to our consultation on the draft direction, whether we have proposed (at Attachment A) to update the draft direction in response to those submissions, and our rationale/comments.

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Attachment A

Proposed direction



Australian Government

Office of the Australian Information Commissioner

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

Contents

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Part 1: About this direction

- 1.1 This direction is given by the Australian Information Commissioner under s 55(2)(e)(i) of the Freedom of Information Act 1982 (FOI Act) in relation to Information Commissioner reviews (IC reviews).
- 1.2 This written direction sets out the procedure to be followed by applicants for IC reviews undertaken by the Information Commissioner under the FOI Act.
- 1.3 The Information Commissioner 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 Information Commissioner (s 54W(c)).
- 1.4 The Information Commissioner may also give written directions as to the procedure to be followed in relation to a particular IC review (s 55(2)(e)(ii)).
- 1.5 This direction does not apply to the extent it is inconsistent with a provision of the FOI Act, another enactment or a specific direction made in a particular IC review under s 55(2)(e)(ii) of the FOI Act.
- 1.6 Further information relating to the IC review process is published on the Office of the Australian Information Commissioner's (OAIC) website. In particular, Part 10 (Reviews by the Australian Information Commissioner) of the Guidelines issued by the Information Commissioner under s 93A of the FOI Act (FOI Guidelines) describes the principles that inform the OAIC's approach to IC reviews.
- 1.7 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.
- 1.8 This direction has effect from 1 July 2023.

Part 2: The IC review process

- 1.9 IC review procedures are found in Part VII of the FOI Act. The IC review process is intended to be an informal, non-adversarial and timely means of external merits review of FOI decisions made by agencies and ministers. Part 10 of the FOI Guidelines, to which agencies and ministers must have regard when performing a function or exercising a power under the FOI Act, sets out in detail the process and underlying principles of IC review.

Making an application for IC review

- 1.10 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.
- 1.11 Where it is not possible for an application to be made online, applications may be sent to the OAIC by:
 - email to foidr@oaic.gov.au
 - mail to FOI Regulatory Group, GPO Box 5218, Sydney NSW 2001.
- 1.12 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

- 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).
- 1.13 The OAIC 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 OAIC will consider any notices as received when sent to an applicant's preferred contact.
- 1.14 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
 - 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.
- 1.15 An application for IC review may be made by, or on behalf of, the person who made the FOI request to which decision relates (s 54L(3)). The OAIC 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.
- 1.16 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.
- 1.17 The applicant must provide the OAIC 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. However, in circumstances where the original decision was made by the Minister or personally by the principal officer of an agency, or in the case of a deemed access refusal, applicants must apply directly for IC review.
 - 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.
 - If an application for IC review is not made within the timeframes in the FOI Act, applicants may apply to the Information Commissioner 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 Information Commissioner 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.

1.18 An application for IC review should also:

- a. identify the aspect(s) of the agency's or Minister's decision about which the IC review is sought
- 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.

1.19 The OAIC must provide 'appropriate assistance' to a person who wishes to apply for IC review and requires assistance to prepare the IC review application (s 54N(3)).

1.20 Section 54N of the FOI Act sets out the requirements for the contents and delivery of an application for IC review. These requirements include giving the OAIC contact details to which notices can be sent and providing a copy of the FOI decision the applicant wants the Information Commissioner to review. An application that does not comply with these requirements may be considered to be invalid.

During the IC review

Changes to contact details

1.21 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 Information Commissioner may decide not to undertake an IC review, or not continue to undertake an IC review, if the applicant or their nominated representative cannot be contacted after making reasonable attempts (s 54W(a)(iii)).

Participation in the IC review

1.22 Applicants must respond to inquiries from the OAIC within the time provided unless there are 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 why additional time is needed and propose a new date for response. Approval of an extension request is at the discretion of the OAIC.

1.23 The OAIC requires agencies and Ministers to engage with the IC review applicant at the commencement of an IC review. The purpose of this engagement is to attempt to resolve the issues identified in the IC review application in an informal and timely way. Agencies are required to contact applicants for IC review shortly after the IC review application is lodged to arrange a suitable time for

the engagement process. 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)).

- 1.24 The Information Commissioner may use any technique the Information Commissioner considers appropriate to facilitate an agreed resolution of the matters at issue in the IC review (such as alternative dispute resolution processes - s 55(2)(b)). Where appropriate, and following the compulsory engagement process described above, the OAIC may invite applicants to attend a teleconference to discuss the issues in dispute in the IC review with the agency's or Minister's office and to explore options for resolution, with a view to reaching agreement on some or all of the matters at issue in the IC review.
- 1.25 The Information Commissioner may decide not to undertake an IC review, or not continue to undertake an IC review, if an IC review applicant has failed to cooperate in progressing the IC review application or the IC review without reasonable excuse (s 54W(a)(ii)).

Submissions

- 1.26 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.
- 1.27 Applicants will be invited to make written submissions after the initial triage and early resolution process is complete, and once the application has been assigned to a review adviser for substantive review/case management. First, the agency or Minister will be asked to make submissions in support of the IC reviewable decision. The agency or Minister will send the applicant a copy of their submissions at the same time as they are sent to the OAIC. The applicant will then have the opportunity to make submissions addressing any issues raised by the agency or the Minister. The applicant is required to send their submissions to the agency or Minister at the same time as they are sent to the OAIC.
- 1.28 The Information Commissioner will generally give the parties (both the applicant and the agency or Minister) 4 weeks to make their submissions.
- 1.29 The Information Commissioner will not accept any further submissions from either party to the IC review unless the Information Commissioner has requested them.
- 1.30 The Information Commissioner will contact the parties after receipt of submissions if procedural fairness requirements have been identified. For information on procedural fairness see [3.15] — [3.31] of Part 3 of the FOI Guidelines.
- 1.31 The OAIC may provide a preliminary view at any time during the IC review. This will outline the case officer's preliminary thinking on the issues in dispute in the IC review. The applicant may be invited in some cases to withdraw the IC review application, depending on the views expressed in the preliminary view
- 1.32 The IC review application and any attachments will be shared with the agency or Minister, as well as any other parties to the review, unless there is a reason not to do so. Any other information and submissions provided to the OAIC by the applicant will be made available to the other parties to the IC review.
- 1.33 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.

- 1.34 Generally, submissions should be made in writing and sent by email or pre-paid post. In limited circumstances, if an applicant is unable to provide written submissions, the OAIC may agree to accept verbal submissions by telephone.

Information Commissioner decisions

- 1.35 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.
- 1.36 When the Information Commissioner makes a decision on IC review under s 55K of the FOI Act, the Information Commissioner will quote or summarise the submissions in the published decision. If a confidential submission is relied on by the Information Commissioner in making a decision on the IC review, this will be noted in the decision without revealing the confidential material.
- 1.37 To protect against the unreasonable disclosure of personal information, the Information Commissioner will consider whether identifying information should be included in published decisions. Natural persons may opt not 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: Procedure for IC review of specific types of decisions

Deemed access refusal decisions

- 1.38 A 'deemed access refusal' occurs when the statutory time for making a decision on an FOI request for access to a document has expired and notice of the decision has not been given. In these circumstances the agency or Minister is 'deemed' to have refused the FOI request. Where the applicant applies for IC review of a deemed access refusal decision, the OAIC will make inquiries with the agency or Minister.
- 1.39 If, during the IC review, the agency or Minister sends the applicant a written decision on the applicant's FOI request the OAIC will check whether the applicant is satisfied with the decision. Applicants who are satisfied with the decision and do not wish to proceed with the IC review must advise the OAIC in writing that they withdraw their application for IC review. Applicants who are not satisfied with the agency's or Minister's decision must explain why they disagree with the 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 undertake an IC review on the basis that the applicant has failed to cooperate in progressing the IC review application without reasonable excuse (s 54W(a)(ii)).

Access refusal decisions

- 1.40 An 'access refusal decision' means (s 53A):
- 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 all the 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 (s 21) (see Part 3 of the Guidelines)
 - e. a decision relating to the imposition or amount of a charge (s 29)
 - f. a decision to give access to a document to a 'qualified person' (where disclosing the information to the applicant might be detrimental to the applicant's physical or mental health or well-being) (s 47F(5))
 - g. a decision refusing to amend a record of personal information in accordance with an application (s 48)
 - h. a decision refusing to annotate a record of personal information in accordance with an application (s 48).
- 1.41 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)).
- 1.42 Given that the agency or Minister bears this onus, it will generally be necessary to undertake inquiries or seek information from the agency or Minister before inviting comment from applicants.

Access grant decisions

- 1.43 An 'access grant decision' means a decision to grant access to a document where there is a requirement to consult a third party (s 53B). Such decisions involve granting the FOI applicant access to information or documents following consultation.
- 1.44 In an IC review of an access grant decision, it is the IC review applicant who bears the onus of establishing that a decision refusing the FOI request is justified, or that the Information Commissioner should give a decision adverse to the FOI applicant (s 55D(2)).
- 1.45 IC review applicants will generally be invited to provide information or submissions which explain why the agency's or Minister's decision is wrong before comment is invited from the agency or Minister.

Part 4: Non-compliance with this direction

- 1.46 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 review as outlined in s 54W(c). This means that, in these cases, the review will be finalised.
- 1.47 Applicants will be provided with the opportunity to explain why the Information Commissioner should not finalise the IC review under s 54W(c) of the FOI Act before a decision is made.

Attachment B

Summaries of updates and agencies' submissions

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
1.8 – Direction has effect from 1 July 2023	<ul style="list-style-type: none"> • N/A 	<p><u>Updated:</u></p> <ul style="list-style-type: none"> • This Direction has effect from 1 July 2024. The update is not in response to agencies' submissions. <p><u>Comments:</u></p> <ul style="list-style-type: none"> • As stated in the corresponding EB on the procedure direction for agencies (D2024/007050), we should potentially have a separate process for backlog matters. • We could state, for example: <p><i>For IC review applications received before 1 July 2024, agencies and ministers must have regard to Part 10 of the FOI Guidelines issued under s 93A of the FOI Act which sets out the general principles and expectations of the Information Commissioner regarding IC reviews. Specific directions may be made in the context of these IC reviews.</i></p>

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>1.13 – OAIC contacting applicants</p> <ul style="list-style-type: none"> Paragraph 1.13 explains that the OAIC will contact applicants using their preferred contact method. Paragraph 1.13 also states ‘Where an applicant has listed a preferred contact method as well as other contact information, the OAIC will consider any notices as received when sent to an applicant’s preferred contact’. 	<ul style="list-style-type: none"> The AAT submits that we may wish to consider referring to an exception where there is evidence of non-receipt, such as a returned letter or email non delivery message. 	<p><u>Not update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> Note that the existing IC review procedure for applicants contains the same wording at para 1.13. In practice, if we cannot contact an applicant, we may not be able to continue with the IC review and would consider finalising the IC review under s 54W(a)(iii) (cannot contact applicant after making reasonable attempts). We consider that it is not worthwhile discussing our power under s 54W(1)(a)(iii) here, at the beginning of the procedure direction.
<p>1.15 – Who can be an IC review applicant?</p> <ul style="list-style-type: none"> Paragraph 1.15 refers to s 54L(3), namely that an IC review application may be made by the person who made the request to which the decision relates, and the proceeding paragraphs 1.16 to 1.20 set out the requirements for the IC review application. 	<ul style="list-style-type: none"> The AAT queries whether the requirements for IC review applications of access grant decisions (s 54M) are the same as those discussed at paragraphs 1.16 to 1.20. 	<p><u>Update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> Update para 1.15 to refer to s 54M(3) (application for IC review of access grant decisions), given that the information requested in the following paragraphs can apply to applications for IC review of access grant decisions. Minor updates may be required to following paragraphs, such as to para 1.18(c) so that we refer to ‘wrongly granted’ rather than ‘wrongly refused’.

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>1.17(a) – Information that must be provided with IC review application:</p> <ul style="list-style-type: none"> Paragraph 1.17 states that ‘The applicant must provide the OAIC with about the FOI decision, in particular (a) ... (b) ... (c) ... (d) ...’. Paragraph 1.17(a) states that the applicant should say whether the decision under review is an original decision or internal review decision, and notes ‘it is usually better to seek internal review first ...’ (emphasis added) 	<ul style="list-style-type: none"> Defence proposes that we consider making internal review compulsory, in circumstances which allow it. This would allow for agencies and ministers to have further meaningful engagement with the applicant before they seek an 1C review in an attempt to resolve the issues in an informal and timely way, thus reducing the workload for the OAIC. ATO submits that it is unclear whether there will be any requirement on the applicant to either seek internal review or provide details on why they did not consider it appropriate in the circumstances (ATO). 	<p><u>Not update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> Requiring applicants to seek internal review before seeking IC review is outside the scope of the procedural direction, and would require legislative change. We could consider making clearer by way of a separate dot point that, for example ‘applicants have a choice between applying for internal or IC review of a decision, unless the decision was made by the Minister or personally by the principal officer of an agency, or is a deemed access refusal decision. In those cases, applicants must directly apply for IC review.
<p>1.17(b) – Information to be provided with IC review application</p> <ul style="list-style-type: none"> Paragraph 1.17(b) notes that ‘In most cases, an application for IC review must be made within 60 days of the applicant being notified of the ... decision ...’ (emphasis added) 	<ul style="list-style-type: none"> The AAT submits that we may wish to consider whether the date of receipt of the decision is also relevant. 	<p><u>Not update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> Para 1.13 (above para 1.17) says ‘the OAIC will consider any notices as received when sent ...’. Given that agencies and the OAIC mostly send notices by email, we consider that no change is required to distinguish between the date a notice is given and the date received. The 60 day time limit for applying for IC review of an access refusal decision is also generous, which lessens the need to distinguish between when a notice is given, and received.
<p>1.17 (general) Agency reference number</p>	<ul style="list-style-type: none"> AFP submits that applicants should also be required to provide the agency reference number for the FOI decision. 	<p><u>Not update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> The applicant is already generally required to provide a copy of the decision (s 54N(1)(b)), which should state the agency reference number.

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>1.18 – Further information to be provided with IC review application:</p> <ul style="list-style-type: none"> Paragraph 1.18 advises that ‘An application for IC review should also: (a) ... (b) ... (c) ... (d) ...’, such as the aspects of the decision about which they seek the IC review. (emphasis added) 	<ul style="list-style-type: none"> ATO submits that given the mandatory consultation requirement proposed to be put on agencies it would appear appropriate for applicants to be required to provide the information set out in this paragraph prior to any consultation occurring. ATO also queries whether a failure to provide this information would be considered a ‘failure to engage’. 	<p><u>Not update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> Providing the information listed in para 1.18 is already framed as a requirement, stating ‘should’. The power to finalise an IC review for failure to cooperate (s 54W(a)(ii) is discussed in the second section of this part of the direction (under the subheading During the IC review), and does not need to be discussed in this section, the first section (under the subheading Making an application for IC review). We are required to provide appropriate assistance to a person who wishes to make an IC review application, and requires assistance (s 54N(3)), and therefore it is not appropriate to emphasise the power to finalise an IC review at the application stage).
<p>1.18(a) – Further requirements of IC review application</p> <ul style="list-style-type: none"> Paragraph 1.18(a) says that an application should ‘identify the aspect(s) of the ... decision about which the IC review is sought’. 	<ul style="list-style-type: none"> AGD submits that this wording may be confusing for some readers, and could alternatively say “identify the parts of the decision you want the Information Commissioner to review”. Defence submits that at para 1.18, the revisions suggest that an IC review application should identify why the agency’s or minister’s decision is wrong. Defence proposes making this compulsory, saying that would assist the agency or minister to better understand and resolve the issues in a meaningful, informal and timely way. 	<p><u>Update</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> Update in line with AGD’s proposal ‘identify the parts of the decision you want the Information Commissioner to review’. In relation to Defence’s submission, we note that providing the information listed in para 1.18 is already framed as a requirement, stating ‘should’.

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>1.23</p> <p>Engagement to resolve issues (issue 1)</p>	<ul style="list-style-type: none"> AAT submits that engagement should only be required if there has been no internal review of the decision. 	<p><u>Update</u></p> <ul style="list-style-type: none"> Clarify in both applicants and agencies procedure directions that engagement would not be required if they have evidence of engagement with the applicant that is above their duty to take reasonable steps to assist the person to make the request in a manner that complies with s 15 (s 15(3)), such as during an internal review process.
<p>1.23</p> <p>Engagement to resolve issues (issue 2)</p> <ul style="list-style-type: none"> Paragraph 1.23 states 'Agencies are required to contact applicants for IC review shortly after the IC review application is lodged to arrange a suitable time for the engagement process.' (emphasis added) 	<ul style="list-style-type: none"> AAT, AFP, and the Commonwealth Ombudsman submit that paragraph 1.23 should say that agencies are required to contact applicants to arrange the engagement after receiving the s 54Z notice. AFP in particular notes that there can be a delay between an IC review application and s 54Z notice. 	<p><u>Update</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> Consider updating para 1.23 to say 'after receiving the OAIC's notice of IC review under s 54Z'.
<p>1.23</p> <p>Engagement to resolve issues (issue 3)</p>	<ul style="list-style-type: none"> ATO submits it would also be helpful to provide applicants with further details about what is expected of them in terms of participating in agency engagement and that simply attending a meeting with no intention to attempt to resolve the review application would be not considered appropriate 'engagement'. 	<p><u>Update</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> Consider updating para 1.23 to say that the engagement may be more likely to resolve the matter if both parties are well prepared for the engagement. Consider updating para above, para 1.22 to discuss respectful engagement.

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>1.31 – Preliminary view</p> <ul style="list-style-type: none"> Paragraph 1.31 states 'The OAIIC may provide a preliminary view at any time ... The applicant may be invited in some cases to withdraw the IC review application, depending on the views expressed in the preliminary view'. 	<ul style="list-style-type: none"> The AAT submits that if there is an opportunity for the parties to provide information in response to the preliminary view, it may be useful to state this. Such a view may raise a fact or issue that can be addressed. 	<p><u>Update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> Update to clarify that the OAIIC will invite the applicant to withdraw or make submissions in response to a preliminary view, in line with paras [10.60] of the draft FOI Guidelines (D2022/009530) which says: <p><i>10.60 ... the OAIIC's IC review officer may review the material submitted by both parties and provide a preliminary view as to the merits 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.</i></p>
<p>Revised decisions are not referred to in the draft procedure direction</p>	<ul style="list-style-type: none"> N/A (observed by OAIIC) 	<p><u>Update.</u></p> <p><u>Comment:</u></p> <ul style="list-style-type: none"> In part 2, under subheading During the IC review, insert a sub-subheading 'Receiving revised decisions under s 55G' and insert content in line with para 1079 of draft Part 10 of the FOI Guidelines which says: <p><i>A decision does not automatically conclude the IC review. The revised decision becomes the decision under review (s 55G(2)(b)). The OAIIC will generally consult the IC review applicant as to whether they want to continue the IC review on the basis of the revised decision.</i></p> <ul style="list-style-type: none"> Then add references to the Information Commissioner's powers under 54W(a) and 54W(c).

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
General	<ul style="list-style-type: none"> AGD queries if it may be simpler and more effective for all users of the FOI system to have a single direction, addressed to both the agency and the applicant. This would ensure all parties have a consistent understanding of the IC review process. By comparison, we note the AAT General Practice Direction (General-Practice-Direction.pdf (aat.gov.au)), under s 18B of the Administrative Appeals Tribunal Act 1975 applies to all parties to a review and appears to provide greater consistency in the explanation of process and responsibilities. 	<p><u>Not update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> <u>We consider that having 2 procedure directions means that we have one particular procedure direction that is targeted to applicants and increases their accessibility to the information that they require to gain the benefit of an IC review.</u>
General	<ul style="list-style-type: none"> AGD submits that it is unclear what practice directions (if any) apply to third parties joined to an IC review or whether the process for an IC review in the directions for agencies and applicants may differ where there are other parties to the review. 	<p><u>Not update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> We consider that third parties do not require a procedure direction, and that their role is sufficiently discussed in the FOI Guidelines. Agencies also engage with third parties by way of consultation, which gives them the required information about the IC review process and their rights and obligations in relation to the IC review.
General	<ul style="list-style-type: none"> ATO submits that a delay in seeking a review by an applicant should be a ground for providing an agency with additional time to respond. 	<p><u>Not update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> To give agencies greater time to respond to our requests for information on the basis that the applicant has been granted an extension for applying for an IC review would not further the objects of the FOI Act, which include to facilitate and promote public access to information, promptly and at the lowest reasonable cost.

From: [OAIIC - ACFOI](#)
 To: [ESLUICK, Jessica](#)
 Cc: [PEEL, Sara](#)
 Subject: Doc 12 RE: Draft EB on proposed updates to draft IC review procedure direction (for applicants) [SEC=OFFICIAL]
 Date: Thursday, 4 April 2024 1:20:12 PM
 Attachments: [imaoe001.inq](#)
[imaoe002.inq](#)
[imaoe003.inq](#)
[imaoe005.inq](#)

Dear Jess
 Thank you – please see comments below.

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments	RA Comments
1.8 – Direction has effect from 1 July 2023	• N/A	<p>Updated:</p> <ul style="list-style-type: none"> This Direction has effect from 1 July 2024. The update is not in response to agencies' submissions. <p>Comments:</p> <ul style="list-style-type: none"> As stated in the corresponding EB on the procedure direction for agencies (D2024-007050), we should potentially have a separate process for backlog matters. We could state, for example: <i>For IC review applications received before 1 July 2024, agencies and ministers must have regard to Part 10 of the FOI Guidelines issued under s 93A of the FOI Act which sets out the general principles and expectations of the Information Commissioner regarding IC reviews. Specific directions may be made in the context of these IC reviews.</i> 	<u>Agree with the suggested amendment.</u>
1.13 – OAIIC contacting applicants <ul style="list-style-type: none"> Paragraph 1.13 explains that the OAIIC will contact applicants using their preferred contact method. Paragraph 1.13 also states 'Where an applicant has listed a preferred contact method as well as other contact information, the OAIIC will consider any notices as received when sent to an applicant's preferred contact.' 	<ul style="list-style-type: none"> The AAT submits that we may wish to consider referring to an exception where there is evidence of non-receipt, such as a returned letter or email non delivery message. 	<p>Not update.</p> <p>Comments:</p> <ul style="list-style-type: none"> Note that the existing IC review procedure for applicants contains the same wording at para 1.13. In practice, if we cannot contact an applicant, we may not be able to continue with the IC review and would consider finalising the IC review under s 54W(a)(iii) (cannot contact applicant after making reasonable attempts). We consider that it is not worthwhile discussing our power under s 54W(1)(a)(iii) here, at the beginning of the procedure direction. 	<u>The wording is sufficient in my view.</u>
1.15 – Who can be an IC review applicant? <ul style="list-style-type: none"> Paragraph 1.15 refers to s 54L(3), namely that an IC review application may be made by the person who made the request to which the decision relates, and the proceeding paragraphs 1.16 to 1.20 set out the requirements for the IC review application. 	<ul style="list-style-type: none"> The AAT queries whether the requirements for IC review applications of access grant decisions (s 54M) are the same as those discussed at paragraphs 1.16 to 1.20. 	<p>Update.</p> <p>Comments:</p> <ul style="list-style-type: none"> Update para 1.15 to refer to s 54M(3) (application for IC review of access grant decisions), given that the information requested in the following paragraphs can apply to applications for IC review of access grant decisions. Minor updates may be required to following paragraphs, such as to para 1.18(c) so that we refer to 'wrongly granted' rather than 'wrongly refused'. 	<u>Agree</u>
1.17(a) – Information that must be provided with IC review application: <ul style="list-style-type: none"> Paragraph 1.17 states that 'The applicant must provide the OAIIC with about the FOI decision, in particular (a) ... (b) ... (c) ... (d) ...'. Paragraph 1.17(a) states that the applicant should say whether the decision under review is an original decision or internal review decision, and notes 'it is usually better to seek internal review first ...' (emphasis added) 	<ul style="list-style-type: none"> Defence proposes that we consider making internal review compulsory, in circumstances which allow it. This would allow for agencies and ministers to have further meaningful engagement with the applicant before they seek an IC review in an attempt to resolve the issues in an informal and timely way, thus reducing the workload for the OAIIC. ATO submits that it is unclear whether there will be any requirement on the applicant to either seek internal review or provide details on why they did not consider it appropriate in the circumstances (ATO). 	<p>Not update.</p> <p>Comments:</p> <ul style="list-style-type: none"> Requiring applicants to seek internal review before seeking IC review is outside the scope of the procedural direction, and would require legislative change. We could consider making clearer by way of a separate dot point that, for example 'applicants have a choice between applying for internal or IC review of a decision, unless the decision was made by the Minister or personally by the principal officer of an agency, or is a deemed access refusal decision. In those cases, applicants must directly apply for IC review.' 	<p>I don't think we can require applicants, but we can encourage internal review, consistent with Part 9 of the FOI Guidelines which provides:</p> <p>The Information Commissioner 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. Internal review can be quicker than external review and enables an agency to take a fresh look at its original decision.</p> <p>I suggest making it clearer as recommended.</p>
1.17(b) – Information to be provided with IC review application <ul style="list-style-type: none"> Paragraph 1.17(b) notes that 'In most cases, an application for IC review must be made within 60 days of the applicant being notified of the ... decision ...' (emphasis added) 	<ul style="list-style-type: none"> The AAT submits that we may wish to consider whether the date of receipt of the decision is also relevant. 	<p>Not update.</p> <p>Comments:</p> <ul style="list-style-type: none"> Para 1.13 (above para 1.17) says 'the OAIIC will consider any notices as received when sent ...'. Given that agencies and the OAIIC mostly send notices by email, we consider that no change is required to distinguish between the date a notice is given and the date received. The 60 day time limit for applying for IC review of an access refusal decision is also generous, which lessens the need to distinguish between when 	<u>Could we include a footnote that reflects the Electronic Transactions Act -see para 3.139 of the FOI Guidelines.</u>

1.17 (general) Agency reference number	<ul style="list-style-type: none"> AFP submits that applicants should also be required to provide the agency reference number for the FOI decision. 	<p>a notice is given, and received.</p> <p>Not update. Comments:</p> <ul style="list-style-type: none"> The applicant is already generally required to provide a copy of the decision (s 54N(1)(b)), which should state the agency reference number. 	
1.18 – Further information to be provided with IC review application: <ul style="list-style-type: none"> Paragraph 1.18 advises that ‘An application for IC review should also: (a) ... (b) ... (c) ... (d) ...’, such as the aspects of the decision about which they seek the IC review. (emphasis added) 	<ul style="list-style-type: none"> ATO submits that given the mandatory consultation requirement proposed to be put on agencies it would appear appropriate for applicants to be required to provide the information set out in this paragraph prior to any consultation occurring. ATO also queries whether a failure to provide this information would be considered a ‘failure to engage’. 	<p>Not update. Comments:</p> <ul style="list-style-type: none"> Providing the information listed in para 1.18 is already framed as a requirement, stating ‘should’. The power to finalise an IC review for failure to cooperate (s 54W(a)(ii)) is discussed in the second section of this part of the direction (under the subheading ‘During the IC review’), and does not need to be discussed in this section, the first section (under the subheading ‘Making an application for IC review’). We are required to provide appropriate assistance to a person who wishes to make an IC review application, and requires assistance (s 54N(3)), and therefore it is not appropriate to emphasise the power to finalise an IC review at the application stage). 	
1.18(a) – Further requirements of IC review application <ul style="list-style-type: none"> Paragraph 1.18(a) says that an application should ‘identify the aspect(s) of the ... decision about which the IC review is sought’. 	<ul style="list-style-type: none"> AGD submits that this wording may be confusing for some readers, and could alternatively say ‘identify the parts of the decision you want the Information Commissioner to review’. Defence submits that at para 1.18, the revisions suggest that an IC review application should identify why the agency’s or minister’s decision is wrong. Defence proposes making this compulsory, saying that would assist the agency or minister to better understand and resolve the issues in a meaningful, informal and timely way. 	<p>Update Comments:</p> <ul style="list-style-type: none"> Update in line with AGD’s proposal ‘identify the parts of the decision you want the Information Commissioner to review’. In relation to Defence’s submission, we note that providing the information listed in para 1.18 is already framed as a requirement, stating ‘should’. 	Agree
1.23 Engagement to resolve issues (issue 1)	<ul style="list-style-type: none"> AAT submits that engagement should only be required if there has been no internal review of the decision. 	<p>Update Comments:</p> <ul style="list-style-type: none"> Clarify in both applicants and agencies procedure directions that engagement would not be required if they have evidence of engagement with the applicant that is above their duty to take reasonable steps to assist the person to make the request in a manner that complies with s 15 (s 15(3)), such as during an internal review process. 	Agree subject to use of ‘separate to their duty’ rather than ‘above their duty’
1.23 Engagement to resolve issues (issue 2) <ul style="list-style-type: none"> Paragraph 1.23 states ‘Agencies are required to contact applicants for IC review shortly after the IC review application is lodged to arrange a suitable time for the engagement process.’ (emphasis added) 	<ul style="list-style-type: none"> AAT, AFP, and the Commonwealth Ombudsman submit that paragraph 1.23 should say that agencies are required to contact applicants to arrange the engagement after receiving the s 54Z notice. AFP in particular notes that there can be a delay between an IC review application and s 54Z notice. 	<p>Update Comments:</p> <ul style="list-style-type: none"> Consider updating para 1.23 to say ‘after receiving the OAIC’s notice of IC review under s 54Z’. 	Agree
1.23 Engagement to resolve issues (issue 3)	<ul style="list-style-type: none"> ATO submits it would also be helpful to provide applicants with further details about what is expected of them in terms of participating in agency engagement and that simply attending a meeting with no intention to attempt to resolve the review application would be not considered appropriate ‘engagement’. 	<p>Update Comments:</p> <ul style="list-style-type: none"> Consider updating para 1.23 to say that the engagement may be more likely to resolve the matter if both parties are well prepared for the engagement. Consider updating para above, para 1.22 to discuss respectful engagement. 	Agree
1.31 – Preliminary view <ul style="list-style-type: none"> Paragraph 1.31 states ‘The OAIC may provide a preliminary view at any time ... The applicant may be invited in some cases to withdraw the IC review application, depending on the views expressed in the preliminary view’. 	<ul style="list-style-type: none"> The AAT submits that if there is an opportunity for the parties to provide information in response to the preliminary view, it may be useful to state this. Such a view may raise a fact or issue that can be addressed. 	<p>Update. Comments:</p> <ul style="list-style-type: none"> Update to clarify that the OAIC will invite the applicant to withdraw or make submissions in response to a preliminary view, in line with paras [10.60] of the draft FOI Guidelines (D2022/009530) which says: 10.60 ... the OAIC’s IC review officer may review the material submitted by both parties and provide a preliminary view as 	Agree

		to the merits 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.	
Revised decisions are not referred to in the draft procedure direction	• N/A (observed by OAIC)	Update. Comments: <ul style="list-style-type: none"> In part 2, under subheading During the IC review, insert a sub-subheading 'Receiving revised decisions under s 55G' and insert content in line with para 1079 of draft Part 10 of the FOI Guidelines which says: A 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. Then add references to the Information Commissioner's powers under 54W(a) and 54W(c). 	Agree
General	• AGD queries if it may be simpler and more effective for all users of the FOI system to have a single direction, addressed to both the agency and the applicant. This would ensure all parties have a consistent understanding of the IC review process. By comparison, we note the AAT General Practice Direction (General-Practice-Direction.pdf (aat.gov.au)), under s 18B of the Administrative Appeals Tribunal Act 1975 applies to all parties to a review and appears to provide greater consistency in the explanation of process and responsibilities.	Not update. Comments: <ul style="list-style-type: none"> We consider that having 2 procedure directions means that we have one particular procedure direction that is targeted to applicants and increases their accessibility to the information that they require to gain the benefit of an IC review. 	Agree
General	• AGD submits that it is unclear what practice directions (if any) apply to third parties joined to an IC review or whether the process for an IC review in the directions for agencies and applicants may differ where there are other parties to the review.	Not update. Comments: <ul style="list-style-type: none"> We consider that third parties do not require a procedure direction, and that their role is sufficiently discussed in the FOI Guidelines. Agencies also engage with third parties by way of consultation, which gives them the required information about the IC review process and their rights and obligations in relation to the IC review. 	Could we include a reference to the Director for respondents on engagement with third parties? (s 54P notices requirement to consult etc)
General	• ATO submits that a delay in seeking a review by an applicant should be a ground for providing an agency with additional time to respond.	Not update. Comments: <ul style="list-style-type: none"> To give agencies greater time to respond to our requests for information on the basis that the applicant has been granted an extension for applying for an IC review would not further the objects of the FOI Act, which include to facilitate and promote public access to information, promptly and at the lowest reasonable cost. 	Agree

Thanks
Rocelle

From: ESLUCK, Jessica <Jessica.Eslick@oaic.gov.au>

Sent: Thursday, April 4, 2024 12:47 PM

To: OAIC - ACFOI <ACFOI@oaic.gov.au>

Cc: PEEL, Sara <Sara.Peel@oaic.gov.au>

Subject: Draft EB on proposed updates to draft IC review procedure direction (for applicants) [SEC=OFFICIAL]

Dear Rocelle

Please refer to the table at Attachment B in the above draft EB: [D2024/008712](#).

I have reproduced the table below in the body of this email for your ease of reference.

We will await your comments, and update the EB, with a view to finalising the EB, accordingly.

Attachment B Summaries of updates and agencies' submissions

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
1.8 – Direction has effect from 1 July 2023	• N/A	Updated: <ul style="list-style-type: none"> This Direction has effect from 1 July 2024. The update is not in response to agencies' submissions. Comments: <ul style="list-style-type: none"> As stated in the corresponding EB on the procedure direction for agencies (D2024/007050), we should potentially have a separate process for backlog matters. We could state, for example: <i>For IC review applications received before 1 July 2024, agencies and ministers must have regard to Part 10 of the FOI Guidelines issued under s 93A of the FOI Act which sets out the general principles and</i>

		<i>expectations of the Information Commissioner regarding IC reviews. Specific directions may be made in the context of these IC reviews.</i>
1.13 – OAIC contacting applicants • Paragraph 1.13 explains that the OAIC will contact applicants using their preferred contact method. • Paragraph 1.13 also states 'Where an applicant has listed a preferred contact method as well as other contact information, the OAIC will consider any notices as received when sent to an applicant's preferred contact'.	• The AAT submits that we may wish to consider referring to an exception where there is evidence of non-receipt, such as a returned letter or email non delivery message.	Not update. Comments: • Note that the existing IC review procedure for applicants contains the same wording at para 1.13. • In practice, if we cannot contact an applicant, we may not be able to continue with the IC review and would consider finalising the IC review under s 54W(a)(iii) (cannot contact applicant after making reasonable attempts). • We consider that it is not worthwhile discussing our power under s 54W(1)(a)(iii) here, at the beginning of the procedure direction.
1.15 – Who can be an IC review applicant? • Paragraph 1.15 refers to s 54L(3), namely that an IC review application may be made by the person who made the request to which the decision relates, and the proceeding paragraphs 1.16 to 1.20 set out the requirements for the IC review application.	• The AAT queries whether the requirements for IC review applications of access grant decisions (s 54M) are the same as those discussed at paragraphs 1.16 to 1.20.	Update. Comments: • Update para 1.15 to refer to s 54M(3) (application for IC review of access grant decisions), given that the information requested in the following paragraphs can apply to applications for IC review of access grant decisions. • Minor updates may be required to following paragraphs, such as to para 1.18(c) so that we refer to 'wrongly granted' rather than 'wrongly refused'.
1.17(a) – Information that must be provided with IC review application: • Paragraph 1.17 states that 'The applicant must provide the OAIC with about the FOI decision, in particular (a) ... (b) ... (c) ... (d) ...'. • Paragraph 1.17(a) states that the applicant should say whether the decision under review is an original decision or internal review decision , and notes 'it is usually better to seek internal review first ...' (emphasis added)	• Defence proposes that we consider making internal review compulsory, in circumstances which allow it. This would allow for agencies and ministers to have further meaningful engagement with the applicant before they seek an IC review in an attempt to resolve the issues in an informal and timely way, thus reducing the workload for the OAIC. • ATO submits that it is unclear whether there will be any requirement on the applicant to either seek internal review or provide details on why they did not consider it appropriate in the circumstances (ATO).	Not update. Comments: • Requiring applicants to seek internal review before seeking IC review is outside the scope of the procedural direction, and would require legislative change. • We could consider making clearer by way of a separate dot point that, for example 'applicants have a choice between applying for internal or IC review of a decision, unless the decision was made by the Minister or personally by the principal officer of an agency, or is a deemed access refusal decision. In those cases, applicants must directly apply for IC review.
1.17(b) – Information to be provided with IC review application • Paragraph 1.17(b) notes that 'In most cases, an application for IC review must be made within 60 days of the applicant being notified of the ... decision ...' (emphasis added)	• The AAT submits that we may wish to consider whether the date of receipt of the decision is also relevant.	Not update. Comments: • Para 1.13 (above para 1.17) says 'the OAIC will consider any notices as received when sent ...'. Given that agencies and the OAIC mostly send notices by email, we consider that no change is required to distinguish between the date a notice is given and the date received. The 60 day time limit for applying for IC review of an access refusal decision is also generous, which lessens the need to distinguish between when a notice is given, and received.
1.17 (general) Agency reference number	• AFP submits that applicants should also be required to provide the agency reference number for the FOI decision.	Not update. Comments: • The applicant is already generally required to provide a copy of the decision (s 54N(1)(b)), which should state the agency reference number.
1.18 – Further information to be provided with IC review application: • Paragraph 1.18 advises that 'An application for IC review should also: (a) ... (b) ... (c) ... (d) ...', such as the aspects of the decision about which they seek the IC review. (emphasis added)	• ATO submits that given the mandatory consultation requirement proposed to be put on agencies it would appear appropriate for applicants to be required to provide the information set out in this paragraph prior to any consultation occurring. • ATO also queries whether a failure to provide this information would be considered a 'failure to engage'.	Not update. Comments: • Providing the information listed in para 1.18 is already framed as a requirement, stating 'should'. • The power to finalise an IC review for failure to cooperate (s 54W(a)(ii)) is discussed in the second section of this part of the direction (under the subheading <i>During the IC review</i>), and does not need to be discussed in this section, the first section (under the subheading <i>Making an application for IC review</i>). • We are required to provide appropriate assistance to a person who wishes to make an IC review application, and requires assistance (s 54N(3)), and therefore it is not appropriate to emphasise the power to finalise an IC review at the application stage).
1.18(a) – Further requirements of IC review application • Paragraph 1.18(a) says that an application should 'identify the aspect(s) of the ... decision about which the IC review is sought'.	• AGD submits that this wording may be confusing for some readers, and could alternatively say "identify the parts of the decision you want the Information Commissioner to review". • Defence submits that at para 1.18, the revisions suggest that an IC review application should identify why the agency's or minister's decision is wrong. Defence proposes making this compulsory, saying that would assist the agency or minister to better understand and resolve the issues in a meaningful, informal and timely way.	Update. Comments: • Update in line with AGD's proposal 'identify the parts of the decision you want the Information Commissioner to review'. • In relation to Defence's submission, we note that providing the information listed in para 1.18 is already framed as a requirement, stating 'should'.
1.23 Engagement to resolve issues (issue 1)	• AAT submits that engagement should only be required if there has been no internal review of the decision.	Update. • Clarify in both applicants and agencies procedure directions that engagement would not be required if they have evidence of engagement with the applicant that is above their duty to take reasonable steps to assist the person to make the request in a manner that complies with s 15 (s 15(3)), such as during an internal review process.
1.23 Engagement to resolve issues (issue 2) • Paragraph 1.23 states 'Agencies are required to contact applicants for IC review shortly after the IC review application is lodged to arrange a suitable time for the engagement process.' (emphasis added)	• AAT, AFP, and the Commonwealth Ombudsman submit that paragraph 1.23 should say that agencies are required to contact applicants to arrange the engagement after receiving the s 54Z notice. AFP in particular notes that there can be a delay between an IC review application and s 54Z notice.	Update. Comments: • Consider updating para 1.23 to say 'after receiving the OAIC's notice of IC review under s 54Z'.
1.23 Engagement to resolve issues (issue 3)	• ATO submits it would also be helpful to provide applicants with further details about what is expected of them in terms of participating in agency engagement and that simply attending a meeting with no intention to attempt to resolve the review application would be not considered appropriate 'engagement'.	Update. Comments: • Consider updating para 1.23 to say that the engagement may be more likely to resolve the matter if both parties are well prepared for the engagement. • Consider updating para above, para 1.22 to discuss respectful engagement.
1.31 – Preliminary view • Paragraph 1.31 states 'The OAIC may provide a	• The AAT submits that if there is an opportunity for the parties to provide information in response to	Update. Comments:

<p>preliminary view at any time ... The applicant may be invited in some cases to withdraw the IC review application, depending on the views expressed in the preliminary view'.</p>	<p>the preliminary view, it may be useful to state this. Such a view may raise a fact or issue that can be addressed.</p>	<ul style="list-style-type: none"> Update to clarify that the OAIC will invite the applicant to withdraw or make submissions in response to a preliminary view, in line with paras [10.60] of the draft FOI Guidelines (D2022/009530) which says: <p>10.60 ... the OAIC's IC review officer may review the material submitted by both parties and provide a preliminary view as to the merits 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.</p>
<p>Revised decisions are not referred to in the draft procedure direction</p>	<ul style="list-style-type: none"> N/A (observed by OAIC) 	<p><u>Update.</u> <u>Comment:</u></p> <ul style="list-style-type: none"> In part 2, under subheading 'During the IC review', insert a sub-subheading 'Receiving revised decisions under s 55G' and insert content in line with para 1079 of draft Part 10 of the FOI Guidelines which says: <p>A 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.</p> <ul style="list-style-type: none"> Then add references to the Information Commissioner's powers under 54W(a) and 54W(c).
<p>General</p>	<ul style="list-style-type: none"> AGD queries if it may be simpler and more effective for all users of the FOI system to have a single direction, addressed to both the agency and the applicant. This would ensure all parties have a consistent understanding of the IC review process. By comparison, we note the AAT General Practice Direction (General-Practice-Direction.pdf (aat.gov.au)), under s 18B of the Administrative Appeals Tribunal Act 1975 applies to all parties to a review and appears to provide greater consistency in the explanation of process and responsibilities. 	<p><u>Not update.</u> <u>Comments:</u></p> <ul style="list-style-type: none"> We consider that having 2 procedure directions means that we have one particular procedure direction that is targeted to applicants and increases their accessibility to the information that they require to gain the benefit of an IC review.
<p>General</p>	<ul style="list-style-type: none"> AGD submits that it is unclear what practice directions (if any) apply to third parties joined to an IC review or whether the process for an IC review in the directions for agencies and applicants may differ where there are other parties to the review. 	<p><u>Not update.</u> <u>Comments:</u></p> <ul style="list-style-type: none"> We consider that third parties do not require a procedure direction, and that their role is sufficiently discussed in the FOI Guidelines. Agencies also engage with third parties by way of consultation, which gives them the required information about the IC review process and their rights and obligations in relation to the IC review.
<p>General</p>	<ul style="list-style-type: none"> ATO submits that a delay in seeking a review by an applicant should be a ground for providing an agency with additional time to respond. 	<p><u>Not update.</u> <u>Comments:</u></p> <ul style="list-style-type: none"> To give agencies greater time to respond to our requests for information on the basis that the applicant has been granted an extension for applying for an IC review would not further the objects of the FOI Act, which include to facilitate and promote public access to information, promptly and at the lowest reasonable cost.

Kind regards



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The OAIC acknowledges Traditional Custodians of Country across Australia and their continuing connection to land, waters and communities. We pay our respect to First Nations people, cultures and Elders past and present.
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From: [ESLICK, Jessica](#)
 To: [OAIC - ACFOI](#)
 Cc: [PEEL, Sara](#)
 Subject: Doc 13 RE: Draft EB on proposed updates to draft IC review procedure direction (for applicants) [SEC=OFFICIAL]
 Date: Thursday, 4 April 2024 5:26:00 PM
 Attachments: [image001.png](#)
[image004.jpg](#)
[image006.jpg](#)
[image002.jpg](#)

Dear Rocelle
 I have updated the draft procedure direction (for applicants) at Attachment A of the EB in line with your comments in the table below: [D2024/008712](#).
 The exception is the comment that I have highlighted in the table below, which I understand relates to the draft procedure direction for agencies – though could you clarify before I update that direction?
 The EB itself, preceding Attachment A, is also up to date as at today. I have kept on tracked changes, and will await your review before we settle the EB.
 Kind regards
 Jess

From: OAIC - ACFOI <ACFOI@oaic.gov.au>
 Sent: Thursday, April 4, 2024 1:20 PM
 To: ESLICK, Jessica <Jessica.Eslick@oaic.gov.au>
 Cc: PEEL, Sara <Sara.Peel@oaic.gov.au>
 Subject: RE: Draft EB on proposed updates to draft IC review procedure direction (for applicants) [SEC=OFFICIAL]
 Dear Jess
 Thank you – please see comments below.

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments	RA Comments
1.8 – Direction has effect from 1 July 2023	• N/A	Updated: <ul style="list-style-type: none"> This Direction has effect from 1 July 2024. The update is not in response to agencies' submissions. Comments: <ul style="list-style-type: none"> As stated in the corresponding EB on the procedure direction for agencies (D2024/007050), we should potentially have a separate process for backlog matters. We could state, for example: <i>For IC review applications received before 1 July 2024, agencies and ministers must have regard to Part 10 of the FOI Guidelines issued under s 93A of the FOI Act which sets out the general principles and expectations of the Information Commissioner regarding IC reviews. Specific directions may be made in the context of these IC reviews.</i> 	I agree with the suggested amendment.
1.13 – OAIC contacting applicants <ul style="list-style-type: none"> Paragraph 1.13 explains that the OAIC will contact applicants using their preferred contact method. Paragraph 1.13 also states 'Where an applicant has listed a preferred contact method as well as other contact information, the OAIC will consider any notices as received when sent to an applicant's preferred contact'. 	• The AAT submits that we may wish to consider referring to an exception where there is evidence of non-receipt, such as a returned letter or email non delivery message.	Not update. Comments: <ul style="list-style-type: none"> Note that the existing IC review procedure for applicants contains the same wording at para 1.13. In practice, if we cannot contact an applicant, we may not be able to continue with the IC review and would consider finalising the IC review under s 54W(a)(iii) (cannot contact applicant after making reasonable attempts). We consider that it is not worthwhile discussing our power under s 54W(1)(a)(iii) here, at the beginning of the procedure direction. 	The wording is sufficient in my view.
1.15 – Who can be an IC review applicant? <ul style="list-style-type: none"> Paragraph 1.15 refers to s 54L(3), namely that an IC review application may be made by the person who made the request to which the decision relates, and the proceeding paragraphs 1.16 to 1.20 set out the requirements for the IC review application. 	• The AAT queries whether the requirements for IC review applications of access grant decisions (s 54M) are the same as those discussed at paragraphs 1.16 to 1.20.	Update. Comments: <ul style="list-style-type: none"> Update para 1.15 to refer to s 54M(3) (application for IC review of access grant decisions), given that the information requested in the following paragraphs can apply to applications for IC review of access grant decisions. Minor updates may be required to following paragraphs, such as to para 1.18(c) so that we refer to 'wrongly granted' rather than 'wrongly refused'. 	Agree
1.17(a) – Information that must be provided with IC review application: <ul style="list-style-type: none"> Paragraph 1.17 states that 'The applicant must provide the OAIC with about the FOI decision, in particular (a) ... (b) ... (c) ... (d) ...'. Paragraph 1.17(a) states that the applicant should say whether the decision under review is an original decision or internal review decision, and notes 'it is usually better to seek internal review first ...' (emphasis added) 	• Defence proposes that we consider making internal review compulsory, in circumstances which allow it. This would allow for agencies and ministers to have further meaningful engagement with the applicant before they seek an IC review in an attempt to resolve the issues in an informal and timely way, thus reducing the workload for the OAIC. <ul style="list-style-type: none"> ATO submits that it is unclear whether there will be any requirement on the applicant to either seek internal review or provide details on why they did not consider it appropriate in the circumstances (ATO). 	Not update. Comments: <ul style="list-style-type: none"> Requiring applicants to seek internal review before seeking IC review is outside the scope of the procedural direction, and would require legislative change. We could consider making clearer by way of a separate dot point that, for example 'applicants have a choice between applying for internal or IC review of a decision, unless the decision was made by the Minister or personally by the principal officer of an agency, or is a deemed access refusal decision. In those cases, applicants must directly apply for IC review. 	don't think we can require applicants, but we can encourage internal review, consistent with Part 9 of the FOI Guidelines which provides: The Information Commissioner 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. Internal review can be quicker than external review and enables an agency to take a fresh look at its original decision. I suggest making it clearer as recommended.
1.17(b) – Information to be provided with IC review application <ul style="list-style-type: none"> Paragraph 1.17(b) notes that 'In most cases, an 	• The AAT submits that we may wish to consider whether the date of receipt of the decision is also relevant.	Not update. Comments: <ul style="list-style-type: none"> Para 1.13 (above para 1.17) says 'the OAIC will consider any notices as 	Could we include a footnote that reflects the Electronic Transactions Act -see para 3.139 of the FOI Guidelines.

	application for IC review must be made within 60 days of the applicant being notified of the ... decision (emphasis added)		received when sent ...'. Given that agencies and the OAIC mostly send notices by email, we consider that no change is required to distinguish between the date a notice is given and the date received. The 60 day time limit for applying for IC review of an access refusal decision is also generous, which lessens the need to distinguish between when a notice is given, and received.	
1.17 (general) Agency reference number	• AFP submits that applicants should also be required to provide the agency reference number for the FOI decision.	Not update. Comments:	• The applicant is already generally required to provide a copy of the decision (s 54N(1)(b)), which should state the agency reference number.	
1.18 – Further information to be provided with IC review application: • Paragraph 1.18 advises that 'An application for IC review should also: (a) ... (b) ... (c) ... (d) ...', such as the aspects of the decision about which they seek the IC review. (emphasis added)	• ATO submits that given the mandatory consultation requirement proposed to be put on agencies it would appear appropriate for applicants to be required to provide the information set out in this paragraph prior to any consultation occurring. • ATO also queries whether a failure to provide this information would be considered a 'failure to engage'.	Not update. Comments:	• Providing the information listed in para 1.18 is already framed as a requirement, stating 'should'. • The power to finalise an IC review for failure to cooperate (s 54W(a)(ii)) is discussed in the second section of this part of the direction (under the subheading During the IC review), and does not need to be discussed in this section, the first section (under the subheading Making an application for IC review). • We are required to provide appropriate assistance to a person who wishes to make an IC review application, and requires assistance (s 54N(3)), and therefore it is not appropriate to emphasise the power to finalise an IC review at the application stage).	
1.18(a) – Further requirements of IC review application • Paragraph 1.18(a) says that an application should 'identify the aspect(s) of the ... decision about which the IC review is sought'.	• AGD submits that this wording may be confusing for some readers, and could alternatively say 'identify the parts of the decision you want the Information Commissioner to review'. • Defence submits that at para 1.18, the revisions suggest that an IC review application should identify why the agency's or minister's decision is wrong. Defence proposes making this compulsory, saying that would assist the agency or minister to better understand and resolve the issues in a meaningful, informal and timely way.	Update Comments:	• Update in line with AGD's proposal 'identify the parts of the decision you want the Information Commissioner to review'. • In relation to Defence's submission, we note that providing the information listed in para 1.18 is already framed as a requirement, stating 'should'.	Agree
1.23 Engagement to resolve issues (issue 1)	• AAT submits that engagement should only be required if there has been no internal review of the decision.	Update Comments:	• Clarify in both applicants and agencies procedure directions that engagement would not be required if they have evidence of engagement with the applicant that is above their duty to take reasonable steps to assist the person to make the request in a manner that complies with s 15 (s 15(3)), such as during an internal review process.	Agree subject to use of 'separate to their duty' rather than 'above their duty'
1.23 Engagement to resolve issues (issue 2) • Paragraph 1.23 states 'Agencies are required to contact applicants for IC review shortly after the IC review application is lodged to arrange a suitable time for the engagement process.' (emphasis added)	• AAT, AFP, and the Commonwealth Ombudsman submit that paragraph 1.23 should say that agencies are required to contact applicants to arrange the engagement after receiving the s 54Z notice. AFP in particular notes that there can be a delay between an IC review application and s 54Z notice.	Update Comments:	• Consider updating para 1.23 to say 'after receiving the OAIC's notice of IC review under s 54Z'.	Agree
1.23 Engagement to resolve issues (issue 3)	• ATO submits it would also be helpful to provide applicants with further details about what is expected of them in terms of participating in agency engagement and that simply attending a meeting with no intention to attempt to resolve the review application would be not considered appropriate 'engagement'.	Update Comments:	• Consider updating para 1.23 to say that the engagement may be more likely to resolve the matter if both parties are well prepared for the engagement. • Consider updating para above, para 1.22 to discuss respectful engagement.	Agree
1.31 – Preliminary view	• The AAT submits that if there	Update.		Agree

<p>• Paragraph 1.31 states 'The OAIC may provide a preliminary view at any time ... The applicant may be invited in some cases to withdraw the IC review application, depending on the views expressed in the preliminary view'.</p>	<p>is an opportunity for the parties to provide information in response to the preliminary view, it may be useful to state this. Such a view may raise a fact or issue that can be addressed.</p>	<p>Comments:</p> <ul style="list-style-type: none"> • Update to clarify that OAIC will invite the applicant to withdraw or make submissions in response to a preliminary view, in line with paras [10.60] of the draft FOI Guidelines (D2022/009530) which says: <p>10.60 ... the OAIC's IC review officer may review the material submitted by both parties and provide a preliminary view as to the merits 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.</p>	
<p>Revised decisions are not referred to in the draft procedure direction</p>	<p>• N/A (observed by OAIC)</p>	<p>Update. Comment:</p> <ul style="list-style-type: none"> • In part 2, under subheading During the IC review, insert a sub-subheading 'Receiving revised decisions under s 55G' and insert content in line with para 1079 of draft Part 10 of the FOI Guidelines which says: <p>A 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.</p> <ul style="list-style-type: none"> • Then add references to the Information Commissioner's powers under 54W(a) and 54W(c). 	<p>Agree</p>
<p>General</p>	<p>• AGD queries if it may be simpler and more effective for all users of the FOI system to have a single direction, addressed to both the agency and the applicant. This would ensure all parties have a consistent understanding of the IC review process. By comparison, we note the AAT General Practice Direction (General Practice Direction.pdf (aat.gov.au)), under s 18B of the Administrative Appeals Tribunal Act 1975 applies to all parties to a review and appears to provide greater consistency in the explanation of process and responsibilities.</p>	<p>Not update. Comments:</p> <ul style="list-style-type: none"> • We consider that having 2 procedure directions means that we have one particular procedure direction that is targeted to applicants and increases their accessibility to the information that they require to gain the benefit of an IC review. 	<p>Agree</p>
<p>General</p>	<p>• AGD submits that it is unclear what practice directions (if any) apply to third parties joined to an IC review or whether the process for an IC review in the directions for agencies and applicants may differ where there are other parties to the review.</p>	<p>Not update. Comments:</p> <ul style="list-style-type: none"> • We consider that third parties do not require a procedure direction, and that their role is sufficiently discussed in the FOI Guidelines. Agencies also engage with third parties by way of consultation, which gives them the required information about the IC review process and their rights and obligations in relation to the IC review. 	<p>Could we include a reference to the Director for respondents on engagement with third parties? (s 54P notices, requirement to consult etc)</p>
<p>General</p>	<p>• ATO submits that a delay in seeking a review by an applicant should be a ground for providing an agency with additional time to respond.</p>	<p>Not update. Comments:</p> <ul style="list-style-type: none"> • To give agencies greater time to respond to our requests for information on the basis that the applicant has been granted an extension for applying for an IC review would not further the objects of the FOI Act, which include to facilitate and promote public access to information, promptly and at the lowest reasonable cost. 	<p>Agree</p>

Thanks
Rocelle

From: ESLUCK, Jessica <Jessica.Esluck@oaic.gov.au>

Sent: Thursday, April 4, 2024 12:47 PM

To: OAIC - ACFOI <ACFOI@oaic.gov.au>

Cc: PEEL, Sara <Sara.Peel@oaic.gov.au>

Subject: Draft EB on proposed updates to draft IC review procedure direction (for applicants) [SEC=OFFICIAL]

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		<ul style="list-style-type: none"> This Direction has effect from 1 July 2024. The update is not in response to agencies' submissions. <p>Comments:</p> <ul style="list-style-type: none"> As stated in the corresponding EB on the procedure direction for agencies (D2024/007050), we should potentially have a separate process for backlog matters. We could state, for example: <p><i>For IC review applications received before 1 July 2024, agencies and ministers must have regard to Part 10 of the FOI Guidelines issued under s 93A of the FOI Act which sets out the general principles and expectations of the Information Commissioner regarding IC reviews. Specific directions may be made in the context of these IC reviews.</i></p>	
1.13 – OAIC contacting applicants	<ul style="list-style-type: none"> Paragraph 1.13 explains that the OAIC will contact applicants using their preferred contact method. Paragraph 1.13 also states 'Where an applicant has listed a preferred contact method as well as other contact information, the OAIC will consider any notices as received when sent to an applicant's preferred contact'. 	<ul style="list-style-type: none"> The AAT submits that we may wish to consider referring to an exception where there is evidence of non-receipt, such as a returned letter or email non delivery message. 	<p>Not update.</p> <p>Comments:</p> <ul style="list-style-type: none"> Note that the existing IC review procedure for applicants contains the same wording at para 1.13. In practice, if we cannot contact an applicant, we may not be able to continue with the IC review and would consider finalising the IC review under s 54W(a)(iii) (cannot contact applicant after making reasonable attempts). We consider that it is not worthwhile discussing our power under s 54W(1)(a)(iii) here, at the beginning of the procedure direction.
1.15 – Who can be an IC review applicant?	<ul style="list-style-type: none"> Paragraph 1.15 refers to s 54L(3), namely that an IC review application may be made by the person who made the request to which the decision relates, and the proceeding paragraphs 1.16 to 1.20 set out the requirements for the IC review application. 	<ul style="list-style-type: none"> The AAT queries whether the requirements for IC review applications of access grant decisions (s 54M) are the same as those discussed at paragraphs 1.16 to 1.20. 	<p>Update.</p> <p>Comments:</p> <ul style="list-style-type: none"> Update para 1.15 to refer to s 54M(3) (application for IC review of access grant decisions), given that the information requested in the following paragraphs can apply to applications for IC review of access grant decisions. Minor updates may be required to following paragraphs, such as to para 1.18(c) so that we refer to 'wrongly granted' rather than 'wrongly refused'.
1.17(a) – Information that must be provided with IC review application:	<ul style="list-style-type: none"> Paragraph 1.17 states that 'The applicant must provide the OAIC with about the FOI decision, in particular (a) ... (b) ... (c) ... (d) ...'. Paragraph 1.17(a) states that the applicant should say whether the decision under review is an original decision or internal review decision, and notes 'it is usually better to seek internal review first ...' (emphasis added) 	<ul style="list-style-type: none"> Defence proposes that we consider making internal review compulsory, in circumstances which allow it. This would allow for agencies and ministers to have further meaningful engagement with the applicant before they seek an IC review in an attempt to resolve the issues in an informal and timely way, thus reducing the workload for the OAIC. ATO submits that it is unclear whether there will be any requirement on the applicant to either seek internal review or provide details on why they did not consider it appropriate in the circumstances (ATO). 	<p>Not update.</p> <p>Comments:</p> <ul style="list-style-type: none"> Requiring applicants to seek internal review before seeking IC review is outside the scope of the procedural direction, and would require legislative change. We could consider making clearer by way of a separate dot point that, for example 'applicants have a choice between applying for internal or IC review of a decision, unless the decision was made by the Minister or personally by the principal officer of an agency, or is a deemed access refusal decision. In those cases, applicants must directly apply for IC review.
1.17(b) – Information to be provided with IC review application	<ul style="list-style-type: none"> Paragraph 1.17(b) notes that 'In most cases, an application for IC review must be made within 60 days of the applicant being notified of the ... decision ...' (emphasis added) 	<ul style="list-style-type: none"> The AAT submits that we may wish to consider whether the date of receipt of the decision is also relevant. 	<p>Not update.</p> <p>Comments:</p> <ul style="list-style-type: none"> Para 1.13 (above para 1.17) says 'the OAIC will consider any notices as received when sent ...'. Given that agencies and the OAIC mostly send notices by email, we consider that no change is required to distinguish between the date a notice is given and the date received. The 60 day time limit for applying for IC review of an access refusal decision is also generous, which lessens the need to distinguish between when a notice is given, and received.
1.17 (general) Agency reference number		<ul style="list-style-type: none"> AFP submits that applicants should also be required to provide the agency reference number for the FOI decision. 	<p>Not update.</p> <p>Comments:</p> <ul style="list-style-type: none"> The applicant is already generally required to provide a copy of the decision (s 54N(1)(b)), which should state the agency reference number.
1.18 – Further information to be provided with IC review application:	<ul style="list-style-type: none"> Paragraph 1.18 advises that 'An application for IC review should also: (a) ... (b) ... (c) ... (d) ...', such as the aspects of the decision about which they seek the IC review. (emphasis added) 	<ul style="list-style-type: none"> ATO submits that given the mandatory consultation requirement proposed to be put on agencies it would appear appropriate for applicants to be required to provide the information set out in this paragraph prior to any consultation occurring. ATO also queries whether a failure to provide this information would be considered a 'failure to engage'. 	<p>Not update.</p> <p>Comments:</p> <ul style="list-style-type: none"> Providing the information listed in para 1.18 is already framed as a requirement, stating 'should'. The power to finalise an IC review for failure to cooperate (s 54W(a)(ii)) is discussed in the second section of this part of the direction (under the subheading <i>During the IC review</i>), and does not need to be discussed in this section, the first section (under the subheading <i>Making an application for IC review</i>). We are required to provide appropriate assistance to a person who wishes to make an IC review application, and requires assistance (s 54N(3)), and therefore it is not appropriate to emphasise the power to finalise an IC review at the application stage).
1.18(a) – Further requirements of IC review application	<ul style="list-style-type: none"> Paragraph 1.18(a) says that an application should 'identify the aspect(s) of the ... decision about which the IC review is sought'. 	<ul style="list-style-type: none"> AGD submits that this wording may be confusing for some readers, and could alternatively say 'identify the parts of the decision you want the Information Commissioner to review'. Defence submits that at para 1.18, the revisions suggest that an IC review application should identify why the agency's or minister's decision is wrong. Defence proposes making this compulsory, saying that would assist the agency or minister to better understand and resolve the issues in a meaningful, informal and timely way. 	<p>Update.</p> <p>Comments:</p> <ul style="list-style-type: none"> Update in line with AGD's proposal 'identify the parts of the decision you want the Information Commissioner to review'. In relation to Defence's submission, we note that providing the information listed in para 1.18 is already framed as a requirement, stating 'should'.
1.23 Engagement to resolve issues (issue 1)		<ul style="list-style-type: none"> AAT submits that engagement should only be required if there has been no internal review of the decision. 	<p>Update.</p> <p>Comments:</p> <ul style="list-style-type: none"> Clarify in both applicants and agencies procedure directions that engagement would not be required if they have evidence of engagement with the applicant that is above their duty to take reasonable steps to assist the person to make the request in a manner that complies with s 15 (s 15(3)), such as during an internal review process.
1.23 Engagement to resolve issues (issue 2)	<ul style="list-style-type: none"> Paragraph 1.23 states 'Agencies are required to contact applicants for IC review shortly after the IC review application is 	<ul style="list-style-type: none"> AAT, AFP, and the Commonwealth Ombudsman submit that paragraph 1.23 should say that agencies are required to contact applicants to arrange the engagement after receiving the s 54Z notice. AFP in particular notes that there 	<p>Update.</p> <p>Comments:</p> <ul style="list-style-type: none"> Consider updating para 1.23 to say 'after receiving the OAIC's notice of IC review under s 54Z'.

	<p>lodged to arrange a suitable time for the engagement process.' (emphasis added)</p>	<p>can be a delay between an IC review application and s 54Z notice.</p>	
1.23	<p>Engagement to resolve issues (issue 3)</p>	<ul style="list-style-type: none"> ATO submits it would also be helpful to provide applicants with further details about what is expected of them in terms of participating in agency engagement and that simply attending a meeting with no intention to attempt to resolve the review application would be not considered appropriate 'engagement'. 	<p>Update Comments:</p> <ul style="list-style-type: none"> Consider updating para 1.23 to say that the engagement may be more likely to resolve the matter if both parties are well prepared for the engagement. Consider updating para above, para 1.22 to discuss respectful engagement.
1.31 – Preliminary view	<ul style="list-style-type: none"> Paragraph 1.31 states 'The OAIC may provide a preliminary view at any time ... The applicant may be invited in some cases to withdraw the IC review application, depending on the views expressed in the preliminary view'. 	<ul style="list-style-type: none"> The AAT submits that if there is an opportunity for the parties to provide information in response to the preliminary view, it may be useful to state this. Such a view may raise a fact or issue that can be addressed. 	<p>Update. Comments:</p> <ul style="list-style-type: none"> Update to clarify that the OAIC will invite the applicant to withdraw or make submissions in response to a preliminary view, in line with paras (10.60) of the draft FOI Guidelines (D2022/009530) which says: <p><i>10.60 ... the OAIC's IC review officer may review the material submitted by both parties and provide a preliminary view as to the merits 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.</i></p>
Revised decisions are not referred to in the draft procedure direction		<ul style="list-style-type: none"> N/A (observed by OAIC) 	<p>Update. Comment:</p> <ul style="list-style-type: none"> In part 2, under subheading During the IC review, insert a sub-subheading 'Receiving revised decisions under s 55G' and insert content in line with para 1079 of draft Part 10 of the FOI Guidelines which says: <p><i>A 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.</i></p> <ul style="list-style-type: none"> Then add references to the Information Commissioner's powers under 54W(a) and 54W(c).
General		<ul style="list-style-type: none"> AGD queries if it may be simpler and more effective for all users of the FOI system to have a single direction, addressed to both the agency and the applicant. This would ensure all parties have a consistent understanding of the IC review process. By comparison, we note the AAT General Practice Direction (General-Practice-Direction.pdf (aat.gov.au)), under s 18B of the Administrative Appeals Tribunal Act 1975 applies to all parties to a review and appears to provide greater consistency in the explanation of process and responsibilities. 	<p>Not update. Comments:</p> <ul style="list-style-type: none"> We consider that having 2 procedure directions means that we have one particular procedure direction that is targeted to applicants and increases their accessibility to the information that they require to gain the benefit of an IC review.
General		<ul style="list-style-type: none"> AGD submits that it is unclear what practice directions (if any) apply to third parties joined to an IC review or whether the process for an IC review in the directions for agencies and applicants may differ where there are other parties to the review. 	<p>Not update. Comments:</p> <ul style="list-style-type: none"> We consider that third parties do not require a procedure direction, and that their role is sufficiently discussed in the FOI Guidelines. Agencies also engage with third parties by way of consultation, which gives them the required information about the IC review process and their rights and obligations in relation to the IC review.
General		<ul style="list-style-type: none"> ATO submits that a delay in seeking a review by an applicant should be a ground for providing an agency with additional time to respond. 	<p>Not update. Comments:</p> <ul style="list-style-type: none"> To give agencies greater time to respond to our requests for information on the basis that the applicant has been granted an extension for applying for an IC review would not further the objects of the FOI Act, which include to facilitate and promote public access to information promptly and at the lowest reasonable cost.

Kind regards



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The OAIC acknowledges Traditional Custodians of Country across Australia and their continuing connection to land, waters and communities. We pay our respect to First Nations people, cultures and Elders past and present.
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Executive brief

Responsible Executive Member:	Rocelle Ago, Assistant Commissioner FOI
Prepared by:	Jessica Eslick and Sara Peel, Director, Monitoring, Guidance and Engagement
To:	Elizabeth Tydd, FOI Commissioner
Copies:	Karen Tulloch, Raewyn Harlock
File ref:	D2024/008712
Date:	4 April 2024
Subject:	Proposed updates to draft IC review procedure direction for <u>applicants</u>

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Purpose and timing

To inform you of the proposed updates to the draft IC review procedure direction for applicants (titled 'Direction as to certain procedures to be followed in by applicants in Information Commissioner reviews') (the draft direction),

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Your as at 13 March 2024

Recommendations

1. That you note our proposed updates to the draft direction via comments to the draft direction (Attachment A).
2. That you note our summary of the submissions in response to our consultation, whether we have proposed updates to the draft direction in light of those submissions, and our rationale /comments (**Attachment B**).

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Background

The Australian Information Commissioner may give written directions under s 55(2)(e)(ii) of the FOI Act in relation to procedures to be followed in Information Commissioner (IC) reviews.

The Information Commissioner has issued 2 directions under s 55(2)(e)(ii), which are currently in effect:

- [Direction as to certain procedures to be followed in Information Commissioner reviews](#), which has had effect from 26 February 2018.
- [Direction as to certain procedures to be followed by applicants in Information Commissioner reviews](#), which had had effect from 1 September 2021.

On 9 May 2023, we sought comments from, or consulted, interested stakeholders on draft revisions to each of the 2 directions.

In our consultation, we advised stakeholders:

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We intend to make all submissions publicly available. Please indicate when making your submission if it contains confidential information that you do not want made public and why it should not be published. Requests for access to confidential comments will be determined in accordance with the FOI Act. If the OAIC accepts submissions in confidence you must also provide a copy that can be published.

Between 8 June 2023 and 6 July 2023, we received submissions on the draft direction from **6 agencies** as follows:

1. Administrative Appeals Tribunal on 8 June 2023
2. Attorney-General's Department on 30 June 2023
3. Australian Federal Police on 30 June 2023
4. Australian Tax Office on 30 June 2023
5. Commonwealth Ombudsman on 30 June 2023
6. Department of Defence on 30 June 2023

Related brief [D2023/015645](#) contains TRIM links to those submissions at its Attachment B.

Attachments

1. **Attachment A:** Proposed updated draft direction (with proposed updates in highlight and comments).
2. **Attachment B:** Summary of agencies' submissions in response to our consultation on the draft direction, whether we have proposed (at Attachment A) to update the draft direction in response to those submissions, and our rationale/comments.

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Attachment A

Proposed direction



Australian Government

Office of the Australian Information Commissioner

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

Contents

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Part 3: Procedure for IC review of specific types of decisions	Error! Bookmark not defined.	Deleted: 7
Deemed access refusal decisions	Error! Bookmark not defined.	Deleted: 7
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Part 1: About this direction

- 1.1 This direction is given by the Australian Information Commissioner under s 55(2)(e)(i) of the Freedom of Information Act 1982 (FOI Act) in relation to Information Commissioner reviews (IC reviews).
- 1.2 This written direction sets out the procedure to be followed by applicants for IC reviews undertaken by the Information Commissioner under the FOI Act.
- 1.3 The Information Commissioner 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 Information Commissioner (s 54W(c)).
- 1.4 The Information Commissioner may also give written directions as to the procedure to be followed in relation to a particular IC review (s 55(2)(e)(ii)).
- 1.5 This direction does not apply to the extent it is inconsistent with a provision of the FOI Act, another enactment or a specific direction made in a particular IC review under s 55(2)(e)(ii) of the FOI Act.
- 1.6 Further information relating to the IC review process is published on the Office of the Australian Information Commissioner's (OAIC) website. In particular, Part 10 (Reviews by the Australian Information Commissioner) of the Guidelines issued by the Information Commissioner under s 93A of the FOI Act (FOI Guidelines) describes the principles that inform the OAIC's approach to IC reviews.
- 1.7 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.
- 1.8 This direction has effect from 1 July **2024**.

Part 2: The IC review process

- 1.9 IC review procedures are found in Part VII of the FOI Act. The IC review process is intended to be an informal, non-adversarial and timely means of external merits review of FOI decisions made by agencies and ministers. Part 10 of the FOI Guidelines, to which agencies and ministers must have regard when performing a function or exercising a power under the FOI Act, sets out in detail the process and underlying principles of IC review.

Making an application for IC review

- 1.10 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.
- 1.11 Where it is not possible for an application to be made online, applications may be sent to the OAIC by:
 - email to foidr@oaic.gov.au
 - mail to FOI Regulatory Group, GPO Box 5218, Sydney NSW 2001.
- 1.12 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

Commented [E1]: Updated from 1 Jul 2023 to 1 Jul 2024.

As stated in the corresponding EB on the procedure direction for agencies ([D2024/007050](#)), we should potentially have a separate process for backlog matters.

We could state, for example:

For IC review applications received before 1 July 2024, agencies and ministers must have regard to Part 10 of the FOI Guidelines issued under s 93A of the FOI Act which sets out the general principles and expectations of the Information Commissioner regarding IC reviews. Specific directions may be made in the context of these IC reviews.

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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).

1.13 The OAIC 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 OAIC will consider any notices as received when sent to an applicant's preferred contact.

1.14 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
- 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.

1.15 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 OAIC 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.

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1.16 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.

1.17 The applicant must provide the OAIC 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.**
 - 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

Commented [E3]: Updated wording slightly to try to make clearer per Attachment B on 4 Apr 2024.

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documents requested, or within 30 days of a decision granting access to documents to another person¹.

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- If an application for IC review is not made within the timeframes in the FOI Act, applicants may apply to the Information Commissioner 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 Information Commissioner 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.

1.18 An application for IC review should also:

- a. identify the **parts of the decision you want 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.

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1.19 The OAIC must provide 'appropriate assistance' to a person who wishes to apply for IC review and requires assistance to prepare the IC review application (s 54N(3)).

1.20 Section 54N of the FOI Act sets out the requirements for the contents and delivery of an application for IC review. These requirements include giving the OAIC contact details to which notices can be sent and providing a copy of the FOI decision the applicant wants the Information Commissioner to review. An application that does not comply with these requirements may be considered to be invalid.

During the IC review

Changes to contact details

1.21 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 Information Commissioner may decide not to undertake an IC review, or not continue to undertake an IC review, if the applicant or their nominated representative cannot be contacted after making reasonable attempts (s 54W(a)(iii)).

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¹ 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).

Participation in the IC review

General principles

- 1.22 Applicants must respond to inquiries from the OAIC within the time provided unless there are 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 why additional time is needed and propose a new date for response. Approval of an extension request is at the discretion of the OAIC.

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The OAIC expects that applicants and agencies will treat our officers with respect and courtesy.² The Information Commissioner expects that applicants and agencies participate in the IC review, including engagement with each other at the beginning of the IC review, with respect and courtesy. The parties' meaningful participation in engagement with each other would mean that they are more likely to resolve the issues in the IC review.

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At the commencement of an IC review

- 1.23 The OAIC requires agencies and Ministers to engage with the IC review applicant at the commencement of an IC review. The purpose of this engagement is to attempt to resolve the issues identified in the IC review application in an informal and timely way. Agencies are required to contact applicants for IC review shortly after receiving the Information Commissioner's notice of IC review under s 54z to arrange a suitable time for the engagement process. 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)).

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- 1.24 The Information Commissioner may use any technique the Information Commissioner considers appropriate to facilitate an agreed resolution of the matters at issue in the IC review (such as alternative dispute resolution processes - s 55(2)(b)). Where appropriate, and following the compulsory engagement process described above, the OAIC may invite applicants to attend a teleconference to discuss the issues in dispute in the IC review with the agency's or Minister's office and to explore options for resolution, with a view to reaching agreement on some or all of the matters at issue in the IC review.

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Receiving revised decisions under s 55G

- 1.25 An agency or minister may make a 'revised decision' under s 55G of the FOI Act during an IC review, giving access to further material. 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, (ss 54W(a) and 54W(c) of the FOI Act).

² OAIC service charter.

Submissions

- 1.26 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.
- 1.27 Applicants will be invited to make written submissions after the initial triage and early resolution process is complete, and once the application has been assigned to a review adviser for substantive review/case management. First, the agency or Minister will be asked to make submissions in support of the IC reviewable decision. The agency or Minister will send the applicant a copy of their submissions at the same time as they are sent to the OAIC. The applicant will then have the opportunity to make submissions addressing any issues raised by the agency or the Minister. The applicant is required to send their submissions to the agency or Minister at the same time as they are sent to the OAIC.
- 1.28 The Information Commissioner will generally give the parties (both the applicant and the agency or Minister) 4 weeks to make their submissions.
- 1.29 The Information Commissioner will not accept any further submissions from either party to the IC review unless the Information Commissioner has requested them.
- 1.30 The Information Commissioner will contact the parties after receipt of submissions if procedural fairness requirements have been identified. For information on procedural fairness see [3.15] – [3.31] of Part 3 of the FOI Guidelines.
- 1.31 The OAIC may provide a preliminary view at any time during the IC review. This will outline the case officer's preliminary thinking on the issues in dispute in the IC review. The applicant may be invited in some cases to withdraw their IC review application, [or make submissions in response to a preliminary view](#), depending on the views expressed in the preliminary view
- 1.32 The IC review application and any attachments will be shared with the agency or Minister, as well as any other parties to the review, unless there is a reason not to do so. Any other information and submissions provided to the OAIC by the applicant will be made available to the other parties to the IC review.
- 1.33 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.
- 1.34 Generally, submissions should be made in writing and sent by email or pre-paid post. In limited circumstances, if an applicant is unable to provide written submissions, the OAIC may agree to accept verbal submissions by telephone.

Information Commissioner decisions

- 1.35 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.
- 1.36 When the Information Commissioner makes a decision on IC review under s 55K of the FOI Act, the Information Commissioner will quote or summarise the submissions in the published decision. If a

confidential submission is relied on by the Information Commissioner in making a decision on the IC review, this will be noted in the decision without revealing the confidential material.

- 1.37 To protect against the unreasonable disclosure of personal information, the Information Commissioner will consider whether identifying information should be included in published decisions. Natural persons may opt not 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: Procedure for IC review of specific types of decisions

Deemed access refusal decisions

- 1.38 A 'deemed access refusal' occurs when the statutory time for making a decision on an FOI request for access to a document has expired and notice of the decision has not been given. In these circumstances the agency or Minister is 'deemed' to have refused the FOI request. Where the applicant applies for IC review of a deemed access refusal decision, the OAIC will make inquiries with the agency or Minister.
- 1.39 If, during the IC review, the agency or Minister sends the applicant a written decision on the applicant's FOI request the OAIC will check whether the applicant is satisfied with the decision. Applicants who are satisfied with the decision and do not wish to proceed with the IC review must advise the OAIC in writing that they withdraw their application for IC review. Applicants who are not satisfied with the agency's or Minister's decision must explain why they disagree with the 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 undertake an IC review on the basis that the applicant has failed to cooperate in progressing the IC review application without reasonable excuse (s 54W(a)(ii)).

Access refusal decisions

- 1.40 An 'access refusal decision' means (s 53A):
- 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 all the 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 (s 21) (see Part 3 of the Guidelines)
 - e. a decision relating to the imposition or amount of a charge (s 29)
 - f. a decision to give access to a document to a 'qualified person' (where disclosing the information to the applicant might be detrimental to the applicant's physical or mental health or well-being) (s 47F(5))
 - g. a decision refusing to amend a record of personal information in accordance with an application (s 48)

h. a decision refusing to annotate a record of personal information in accordance with an application (s 48).

1.41 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)).

1.42 Given that the agency or Minister bears this onus, it will generally be necessary to undertake inquiries or seek information from the agency or Minister before inviting comment from applicants.

Access grant decisions

1.43 An 'access grant decision' means a decision to grant access to a document where there is a requirement to consult a third party (s 53B). Such decisions involve granting the FOI applicant access to information or documents following consultation.

1.44 In an IC review of an access grant decision, it is the IC review applicant who bears the onus of establishing that a decision refusing the FOI request is justified, or that the Information Commissioner should give a decision adverse to the FOI applicant (s 55D(2)).

1.45 IC review applicants will generally be invited to provide information or submissions which explain why the agency's or Minister's decision is wrong before comment is invited from the agency or Minister.

Part 4: Non-compliance with this direction

1.46 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 review as outlined in s 54W(c). This means that, in these cases, the review will be finalised.

1.47 Applicants will be provided with the opportunity to explain why the Information Commissioner should not finalise the IC review under s 54W(c) of the FOI Act before a decision is made.

Attachment B

Summaries of updates and agencies' submissions

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
1.8 – Direction has effect from 1 July 2023	<ul style="list-style-type: none"> • N/A 	<p><u>Updated:</u></p> <ul style="list-style-type: none"> • This Direction has effect from 1 July 2024. The update is not in response to agencies' submissions. <p><u>Comments:</u></p> <ul style="list-style-type: none"> • As stated in the corresponding EB on the procedure direction for agencies (D2024/007050), we should potentially have a separate process for backlog matters. • We could state, for example: <p><i>For IC review applications received before 1 July 2024, agencies and ministers must have regard to Part 10 of the FOI Guidelines issued under s 93A of the FOI Act which sets out the general principles and expectations of the Information Commissioner regarding IC reviews. Specific directions may be made in the context of these IC reviews.</i></p>

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>1.13 – OAIC contacting applicants</p> <ul style="list-style-type: none"> Paragraph 1.13 explains that the OAIC will contact applicants using their preferred contact method. Paragraph 1.13 also states ‘Where an applicant has listed a preferred contact method as well as other contact information, the OAIC will consider any notices as received when sent to an applicant’s preferred contact’. 	<ul style="list-style-type: none"> The AAT submits that we may wish to consider referring to an exception where there is evidence of non-receipt, such as a returned letter or email non delivery message. 	<p><u>Not update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> Note that the existing IC review procedure for applicants contains the same wording at para 1.13. In practice, if we cannot contact an applicant, we may not be able to continue with the IC review and would consider finalising the IC review under s 54W(a)(iii) (cannot contact applicant after making reasonable attempts). We consider that it is not worthwhile discussing our power under s 54W(1)(a)(iii) here, at the beginning of the procedure direction.
<p>1.15 – Who can be an IC review applicant?</p> <ul style="list-style-type: none"> Paragraph 1.15 refers to s 54L(3), namely that an IC review application may be made by the person who made the request to which the decision relates, and the proceeding paragraphs 1.16 to 1.20 set out the requirements for the IC review application. 	<ul style="list-style-type: none"> The AAT queries whether the requirements for IC review applications of access grant decisions (s 54M) are the same as those discussed at paragraphs 1.16 to 1.20. 	<p><u>Update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> Update para 1.15 to refer to s 54M(3) (application for IC review of access grant decisions), given that the information requested in the following paragraphs can apply to applications for IC review of access grant decisions. Minor updates may be required to following paragraphs, such as to para 1.18(c) so that we refer to ‘wrongly granted’ rather than ‘wrongly refused’.

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>1.17(a) – Information that must be provided with IC review application:</p> <ul style="list-style-type: none"> Paragraph 1.17 states that ‘The applicant must provide the OAIC with about the FOI decision, in particular (a) ... (b) ... (c) ... (d) ...’. Paragraph 1.17(a) states that the applicant should say whether the decision under review is an original decision or internal review decision, and notes ‘it is usually better to seek internal review first ...’ (emphasis added) 	<ul style="list-style-type: none"> Defence proposes that we consider making internal review compulsory, in circumstances which allow it. This would allow for agencies and ministers to have further meaningful engagement with the applicant before they seek an 1C review in an attempt to resolve the issues in an informal and timely way, thus reducing the workload for the OAIC. ATO submits that it is unclear whether there will be any requirement on the applicant to either seek internal review or provide details on why they did not consider it appropriate in the circumstances (ATO). 	<p><u>Not update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> Requiring applicants to seek internal review before seeking IC review is outside the scope of the procedural direction, and would require legislative change. We could consider making clearer by way of a separate dot point that, for example ‘applicants have a choice between applying for internal or IC review of a decision, unless the decision was made by the Minister or personally by the principal officer of an agency, or is a deemed access refusal decision. In those cases, applicants must directly apply for IC review.
<p>1.17(b) – Information to be provided with IC review application</p> <ul style="list-style-type: none"> Paragraph 1.17(b) notes that ‘In most cases, an application for IC review must be made within 60 days of the applicant being notified of the ... decision ...’ (emphasis added) 	<ul style="list-style-type: none"> The AAT submits that we may wish to consider whether the date of receipt of the decision is also relevant. 	<p><u>Not update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> Para 1.13 (above para 1.17) says ‘the OAIC will consider any notices as received when sent ...’. Given that agencies and the OAIC mostly send notices by email, we consider that no change is required to distinguish between the date a notice is given and the date received. The 60 day time limit for applying for IC review of an access refusal decision is also generous, which lessens the need to distinguish between when a notice is given, and received.
<p>1.17 (general) Agency reference number</p>	<ul style="list-style-type: none"> AFP submits that applicants should also be required to provide the agency reference number for the FOI decision. 	<p><u>Not update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> The applicant is already generally required to provide a copy of the decision (s 54N(1)(b)), which should state the agency reference number.

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>1.18 – Further information to be provided with IC review application:</p> <ul style="list-style-type: none"> Paragraph 1.18 advises that ‘An application for IC review should also: (a) ... (b) ... (c) ... (d) ...’, such as the aspects of the decision about which they seek the IC review. (emphasis added) 	<ul style="list-style-type: none"> ATO submits that given the mandatory consultation requirement proposed to be put on agencies it would appear appropriate for applicants to be required to provide the information set out in this paragraph prior to any consultation occurring. ATO also queries whether a failure to provide this information would be considered a ‘failure to engage’. 	<p><u>Not update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> Providing the information listed in para 1.18 is already framed as a requirement, stating ‘should’. The power to finalise an IC review for failure to cooperate (s 54W(a)(ii) is discussed in the second section of this part of the direction (under the subheading During the IC review), and does not need to be discussed in this section, the first section (under the subheading Making an application for IC review). We are required to provide appropriate assistance to a person who wishes to make an IC review application, and requires assistance (s 54N(3)), and therefore it is not appropriate to emphasise the power to finalise an IC review at the application stage).
<p>1.18(a) – Further requirements of IC review application</p> <ul style="list-style-type: none"> Paragraph 1.18(a) says that an application should ‘identify the aspect(s) of the ... decision about which the IC review is sought’. 	<ul style="list-style-type: none"> AGD submits that this wording may be confusing for some readers, and could alternatively say “identify the parts of the decision you want the Information Commissioner to review”. Defence submits that at para 1.18, the revisions suggest that an IC review application should identify why the agency's or minister's decision is wrong. Defence proposes making this compulsory, saying that would assist the agency or minister to better understand and resolve the issues in a meaningful, informal and timely way. 	<p><u>Update</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> Update in line with AGD’s proposal ‘identify the parts of the decision you want the Information Commissioner to review’. In relation to Defence’s submission, we note that providing the information listed in para 1.18 is already framed as a requirement, stating ‘should’.

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>1.23</p> <p>Engagement to resolve issues (issue 1)</p>	<ul style="list-style-type: none"> AAT submits that engagement should only be required if there has been no internal review of the decision. 	<p><u>Update</u></p> <ul style="list-style-type: none"> Clarify in both applicants and agencies procedure directions that engagement would not be required if they have evidence of engagement with the applicant that is above their duty to take reasonable steps to assist the person to make the request in a manner that complies with s 15 (s 15(3)), such as during an internal review process.
<p>1.23</p> <p>Engagement to resolve issues (issue 2)</p> <ul style="list-style-type: none"> Paragraph 1.23 states 'Agencies are required to contact applicants for IC review shortly after the IC review application is lodged to arrange a suitable time for the engagement process.' (emphasis added) 	<ul style="list-style-type: none"> AAT, AFP, and the Commonwealth Ombudsman submit that paragraph 1.23 should say that agencies are required to contact applicants to arrange the engagement after receiving the s 54Z notice. AFP in particular notes that there can be a delay between an IC review application and s 54Z notice. 	<p><u>Update</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> Consider updating para 1.23 to say 'after receiving the OAIC's notice of IC review under s 54Z'.
<p>1.23</p> <p>Engagement to resolve issues (issue 3)</p>	<ul style="list-style-type: none"> ATO submits it would also be helpful to provide applicants with further details about what is expected of them in terms of participating in agency engagement and that simply attending a meeting with no intention to attempt to resolve the review application would be not considered appropriate 'engagement'. 	<p><u>Update</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> Consider updating para 1.23 to say that the engagement may be more likely to resolve the matter if both parties are well prepared for the engagement. Consider updating para above, para 1.22 to discuss respectful engagement.

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>1.31 – Preliminary view</p> <ul style="list-style-type: none"> Paragraph 1.31 states 'The OAIIC may provide a preliminary view at any time ... The applicant may be invited in some cases to withdraw the IC review application, depending on the views expressed in the preliminary view'. 	<ul style="list-style-type: none"> The AAT submits that if there is an opportunity for the parties to provide information in response to the preliminary view, it may be useful to state this. Such a view may raise a fact or issue that can be addressed. 	<p><u>Update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> Update to clarify that the OAIIC will invite the applicant to withdraw or make submissions in response to a preliminary view, in line with paras [10.60] of the draft FOI Guidelines (D2022/009530) which says: <p><i>10.60 ... the OAIIC's IC review officer may review the material submitted by both parties and provide a preliminary view as to the merits 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.</i></p>
<p>Revised decisions are not referred to in the draft procedure direction</p>	<ul style="list-style-type: none"> N/A (observed by OAIIC) 	<p><u>Update.</u></p> <p><u>Comment:</u></p> <ul style="list-style-type: none"> In part 2, under subheading During the IC review, insert a sub-subheading 'Receiving revised decisions under s 55G' and insert content in line with para 1079 of draft Part 10 of the FOI Guidelines which says: <p><i>A decision does not automatically conclude the IC review. The revised decision becomes the decision under review (s 55G(2)(b)). The OAIIC will generally consult the IC review applicant as to whether they want to continue the IC review on the basis of the revised decision.</i></p> <ul style="list-style-type: none"> Then add references to the Information Commissioner's powers under 54W(a) and 54W(c).

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
General	<ul style="list-style-type: none"> AGD queries if it may be simpler and more effective for all users of the FOI system to have a single direction, addressed to both the agency and the applicant. This would ensure all parties have a consistent understanding of the IC review process. By comparison, we note the AAT General Practice Direction (General-Practice-Direction.pdf (aat.gov.au)), under s 18B of the Administrative Appeals Tribunal Act 1975 applies to all parties to a review and appears to provide greater consistency in the explanation of process and responsibilities. 	<p><u>Not update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> <u>We consider that having 2 procedure directions means that we have one particular procedure direction that is targeted to applicants and increases their accessibility to the information that they require to gain the benefit of an IC review.</u>
General	<ul style="list-style-type: none"> AGD submits that it is unclear what practice directions (if any) apply to third parties joined to an IC review or whether the process for an IC review in the directions for agencies and applicants may differ where there are other parties to the review. 	<p><u>Not update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> We consider that third parties do not require a procedure direction, and that their role is sufficiently discussed in the FOI Guidelines. Agencies also engage with third parties by way of consultation, which gives them the required information about the IC review process and their rights and obligations in relation to the IC review.
General	<ul style="list-style-type: none"> ATO submits that a delay in seeking a review by an applicant should be a ground for providing an agency with additional time to respond. 	<p><u>Not update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> To give agencies greater time to respond to our requests for information on the basis that the applicant has been granted an extension for applying for an IC review would not further the objects of the FOI Act, which include to facilitate and promote public access to information, promptly and at the lowest reasonable cost.

From: ESLICK_Jessica
To: OAIC-ACFOI
Cc: PEEL_Sara; BAKER_Heath
Subject: Doc 15 RE: Draft EB on proposed updates to draft IC review procedure direction (for applicants) [SEC=OFFICIAL]
Date: Friday, 5 April 2024 10:56:00 AM
Attachments: [imaoe007.png](#)
[imaoe003.jpg](#)
[imaoe004.jpg](#)

Hi Rocelle

Further to your below email, I have added a discussion on consultation with third parties at para 5.5 of the draft direction (Attachment A of EB [D2024/008712](#)). The direction is therefore ready for your further review.

Jess

From: OAIC - ACFOI <ACFOI@oaic.gov.au>
Sent: Thursday, April 4, 2024 5:29 PM
To: ESLICK,Jessica <Jessica.Eslick@oaic.gov.au>
Cc: PEEL,Sara <Sara.Peel@oaic.gov.au>; BAKER,Heath <Heath.Baker@oaic.gov.au>
Subject: RE: Draft EB on proposed updates to draft IC review procedure direction (for applicants) [SEC=OFFICIAL]
 Thanks Jess - yes the comment was in relation to the procedure direction for agencies. Apologies for the confusion!
 Thanks for all your work on this!
 Rocelle

From: ESLICK,Jessica <Jessica.Eslick@oaic.gov.au>
Sent: Thursday, April 4, 2024 5:26:45 PM
To: OAIC - ACFOI <ACFOI@oaic.gov.au>
Cc: PEEL,Sara <Sara.Peel@oaic.gov.au>; BAKER,Heath <Heath.Baker@oaic.gov.au>
Subject: RE: Draft EB on proposed updates to draft IC review procedure direction (for applicants) [SEC=OFFICIAL]
 Dear Rocelle

I have updated the draft procedure direction (for applicants) at Attachment A of the EB in line with your comments in the table below: [D2024/008712](#). The exception is the comment that I have highlighted in the table below, which I understand relates to the draft procedure direction for agencies – though could you clarify before I update that direction? The EB itself, preceding Attachment A, is also up to date as at today. I have kept on tracked changes, and will await your review before we settle the EB.

Kind regards
 Jess

From: OAIC - ACFOI <ACFOI@oaic.gov.au>
Sent: Thursday, April 4, 2024 1:20 PM
To: ESLICK,Jessica <Jessica.Eslick@oaic.gov.au>
Cc: PEEL,Sara <Sara.Peel@oaic.gov.au>
Subject: RE: Draft EB on proposed updates to draft IC review procedure direction (for applicants) [SEC=OFFICIAL]
 Dear Jess
 Thank you – please see comments below.

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments	RA RA Comments
1.8 – Direction has effect from 1 July 2023	• N/A	<p>Updated.</p> <ul style="list-style-type: none"> This Direction has effect from 1 July 2024. The update is not in response to agencies' submissions. <p>Comments:</p> <ul style="list-style-type: none"> As stated in the corresponding EB on the procedure direction for agencies (D2024/007050), we should potentially have a separate process for backlog matters. We could state, for example: <i>For IC review applications received before 1 July 2024, agencies and ministers must have regard to Part 10 of the FOI Guidelines issued under s 93A of the FOI Act which sets out the general principles and expectations of the Information Commissioner regarding IC reviews. Specific directions may be made in the context of these IC reviews.</i> 	I agree with the suggested amendment.
1.13 – OAIC contacting applicants <ul style="list-style-type: none"> Paragraph 1.13 explains that the OAIC will contact applicants using their preferred contact method. Paragraph 1.13 also states 'Where an applicant has listed a preferred contact method as well as other contact information, the OAIC will consider any notices as received when sent to an applicant's preferred contact'. 	<ul style="list-style-type: none"> The AAT submits that we may wish to consider referring to an exception where there is evidence of non-receipt, such as a returned letter or email non delivery message. 	<p>Not update.</p> <p>Comments:</p> <ul style="list-style-type: none"> Note that the existing IC review procedure for applicants contains the same wording at para 1.13. In practice, if we cannot contact an applicant, we may not be able to continue with the IC review and would consider finalising the IC review under s 54W(a)(iii) (cannot contact applicant after making reasonable attempts). We consider that it is not worthwhile discussing our power under s 54W(1)(a) (iii) here, at the beginning of the procedure direction. 	The wording is sufficient in my view.
1.15 – Who can be an IC review applicant? <ul style="list-style-type: none"> Paragraph 1.15 refers to s 54L(3), namely that an IC review application may be made by the person who made the request to which the decision relates, and the proceeding paragraphs 1.16 to 1.20 set out the requirements for the IC review application. 	<ul style="list-style-type: none"> The AAT queries whether the requirements for IC review applications of access grant decisions (s 54M) are the same as those discussed at paragraphs 1.16 to 1.20. 	<p>Update.</p> <p>Comments:</p> <ul style="list-style-type: none"> Update para 1.15 to refer to s 54M(3) (application for IC review of access grant decisions), given that the information requested in the following paragraphs can apply to applications for IC review of access grant decisions. Minor updates may be required to following paragraphs, such as to para 1.18(c) so that we refer to 'wrongly granted' rather than 'wrongly refused'. 	Agree
1.17(a) – Information that must be provided with IC review application: <ul style="list-style-type: none"> Paragraph 1.17 states that 'The applicant must provide the OAIC with about the FOI decision, in particular (a) ... (b) ... (c) 	<ul style="list-style-type: none"> Defence proposes that we consider making internal review compulsory, in circumstances which allow it. This would allow for agencies and ministers to have further meaningful engagement with the 	<p>Not update.</p> <p>Comments:</p> <ul style="list-style-type: none"> Requiring applicants to seek internal review before seeking IC review is outside the scope of the procedural direction, and would require legislative 	<p>I don't think we can require applicants, but we can encourage internal review, consistent with Part 9 of the FOI Guidelines which provides:</p> <p>The Information Commissioner 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. Internal review can be quicker than external review and enables an agency to take a fresh look at its original</p>

<p>... (d) ...'.</p> <ul style="list-style-type: none"> Paragraph 1.17(a) states that the applicant should say whether the decision under review is an original decision or internal review decision, and notes 'it is usually better to seek internal review first ...' (emphasis added) 	<p>applicant before they seek an IC review in an attempt to resolve the issues in an informal and timely way, thus reducing the workload for the OAIC.</p> <ul style="list-style-type: none"> ATO submits that it is unclear whether there will be any requirement on the applicant to either seek internal review or provide details on why they did not consider it appropriate in the circumstances (ATO). 	<p>change.</p> <ul style="list-style-type: none"> We could consider making clearer by way of a separate dot point that, for example 'applicants have a choice between applying for internal or IC review of a decision, unless the decision was made by the Minister or personally by the principal officer of an agency, or is a deemed access refusal decision. In those cases, applicants must directly apply for IC review. 	<p>decision. suggest making it clearer as recommended.</p>
<p>1.17(b) – Information to be provided with IC review application</p> <ul style="list-style-type: none"> Paragraph 1.17(b) notes that 'In most cases, an application for IC review must be made within 60 days of the applicant being notified of the ... decision ...' (emphasis added) 	<ul style="list-style-type: none"> The AAT submits that we may wish to consider whether the date of receipt of the decision is also relevant. 	<p>Not update. Comments:</p> <ul style="list-style-type: none"> Para 1.13 (above para 1.17) says 'the OAIC will consider any notices as received when sent ...'. Given that agencies and the OAIC mostly send notices by email, we consider that no change is required to distinguish between the date a notice is given and the date received. The 60 day time limit for applying for IC review of an access refusal decision is also generous, which lessens the need to distinguish between when a notice is given, and received. 	<p>Could we include a footnote that reflects the Electronic Transactions Act -see para 3.139 of the FOI Guidelines.</p>
<p>1.17 (general) Agency reference number</p>	<ul style="list-style-type: none"> AFP submits that applicants should also be required to provide the agency reference number for the FOI decision. 	<p>Not update. Comments:</p> <ul style="list-style-type: none"> The applicant is already generally required to provide a copy of the decision (s 54N(1)(b)), which should state the agency reference number. 	
<p>1.18 – Further information to be provided with IC review application:</p> <ul style="list-style-type: none"> Paragraph 1.18 advises that 'An application for IC review should also: (a) ... (b) ... (c) ... (d) ...', such as the aspects of the decision about which they seek the IC review. (emphasis added) 	<ul style="list-style-type: none"> ATO submits that given the mandatory consultation requirement proposed to be put on agencies it would appear appropriate for applicants to be required to provide the information set out in this paragraph prior to any consultation occurring. ATO also queries whether a failure to provide this information would be considered a 'failure to engage'. 	<p>Not update. Comments:</p> <ul style="list-style-type: none"> Providing the information listed in para 1.18 is already framed as a requirement, stating 'should'. The power to finalise an IC review for failure to cooperate (s 54W(a)(ii)) is discussed in the second section of this part of the direction (under the subheading During the IC review), and does not need to be discussed in this section, the first section (under the subheading Making an application for IC review). We are required to provide appropriate assistance to a person who wishes to make an IC review application, and requires assistance (s 54N(3)), and therefore it is not appropriate to emphasise the power to finalise an IC review at the application stage). 	
<p>1.18(a) – Further requirements of IC review application</p> <ul style="list-style-type: none"> Paragraph 1.18(a) says that an application should 'identify the aspect(s) of the ... decision about which the IC review is sought'. 	<ul style="list-style-type: none"> AGD submits that this wording may be confusing for some readers, and could alternatively say 'identify the parts of the decision you want the Information Commissioner to review'. Defence submits that at para 1.18, the revisions suggest that an IC review application should identify why the agency's or minister's decision is wrong. Defence proposes making this compulsory, saying that would assist the agency or minister to better understand and resolve the issues in a meaningful, informal and timely way. 	<p>Update Comments:</p> <ul style="list-style-type: none"> Update in line with AGD's proposal 'identify the parts of the decision you want the Information Commissioner to review'. In relation to Defence's submission, we note that providing the information listed in para 1.18 is already framed as a requirement, stating 'should'. 	<p>Agree</p>
<p>1.23 Engagement to resolve issues (issue 1)</p>	<ul style="list-style-type: none"> AAT submits that engagement should only be required if there has been no internal review of the decision. 	<p>Update</p> <ul style="list-style-type: none"> Clarify in both applicants and agencies procedure directions that engagement would not be required if they have evidence of engagement with the applicant that is above their duty to take reasonable steps to assist the person to make the request in a manner that complies with s 15 (s 15(3)), such as during an internal review process. 	<p>Agree subject to use of 'separate to their duty' rather than 'above their duty'</p>
<p>1.23 Engagement to resolve issues (issue 2)</p> <ul style="list-style-type: none"> Paragraph 1.23 states 'Agencies are required to contact applicants for IC review shortly 	<ul style="list-style-type: none"> AAT, AFP, and the Commonwealth Ombudsman submit that paragraph 1.23 should say that agencies are required to contact applicants to arrange the engagement after receiving the s 54Z 	<p>Update Comments:</p> <ul style="list-style-type: none"> Consider updating para 1.23 to say 'after receiving the OAIC's notice of IC review under s 54Z'. 	<p>Agree</p>

	after the IC review application is lodged to arrange a suitable time for the engagement process.' (emphasis added)	notice. AFP in particular notes that there can be a delay between an IC review application and s 54Z notice.		
1.23	Engagement to resolve issues (issue 3)	<ul style="list-style-type: none"> ATO submits it would also be helpful to provide applicants with further details about what is expected of them in terms of participating in agency engagement and that simply attending a meeting with no intention to attempt to resolve the review application would be not considered appropriate 'engagement'. 	<p>Update</p> <p>Comments:</p> <ul style="list-style-type: none"> Consider updating para 1.23 to say that the engagement may be more likely to resolve the matter if both parties are well prepared for the engagement. Consider updating para above, para 1.22 to discuss respectful engagement. 	Agree
1.31	<p>Preliminary view</p> <ul style="list-style-type: none"> Paragraph 1.31 states 'The OAIC may provide a preliminary view at any time ... The applicant may be invited in some cases to withdraw the IC review application, depending on the views expressed in the preliminary view'. 	<ul style="list-style-type: none"> The AAT submits that if there is an opportunity for the parties to provide information in response to the preliminary view, it may be useful to state this. Such a view may raise a fact or issue that can be addressed. 	<p>Update</p> <p>Comments:</p> <ul style="list-style-type: none"> Update to clarify that the OAIC will invite the applicant to withdraw or make submissions in response to a preliminary view, in line with paras [10.60] of the draft FOI Guidelines (D2022/009530) which says: <p>10.60 ... the OAIC's IC review officer may review the material submitted by both parties and provide a preliminary view as to the merits 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.</p>	Agree
	Revised decisions are not referred to in the draft procedure direction	<ul style="list-style-type: none"> N/A (observed by OAIC) 	<p>Update</p> <p>Comment:</p> <ul style="list-style-type: none"> In part 2, under subheading During the IC review, insert a sub-subheading 'Receiving revised decisions under s 55G' and insert content in line with para 1079 of draft Part 10 of the FOI Guidelines which says: <p>A 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.</p> <ul style="list-style-type: none"> Then add references to the Information Commissioner's powers under 54W(a) and 54W(c). 	Agree
General		<ul style="list-style-type: none"> AGD queries if it may be simpler and more effective for all users of the FOI system to have a single direction, addressed to both the agency and the applicant. This would ensure all parties have a consistent understanding of the IC review process. By comparison, we note the AAT General Practice Direction (General-Practice-Direction.pdf (aat.gov.au)), under s 18B of the Administrative Appeals Tribunal Act 1975 applies to all parties to a review and appears to provide greater consistency in the explanation of process and responsibilities. 	<p>Not update.</p> <p>Comments:</p> <ul style="list-style-type: none"> We consider that having 2 procedure directions means that we have one particular procedure direction that is targeted to applicants and increases their accessibility to the information that they require to gain the benefit of an IC review. 	Agree
General		<ul style="list-style-type: none"> AGD submits that it is unclear what practice directions (if any) apply to third parties joined to an IC review or whether the process for an IC review in the directions for agencies and applicants may differ where there are other parties to the review. 	<p>Not update.</p> <p>Comments:</p> <ul style="list-style-type: none"> We consider that third parties do not require a procedure direction, and that their role is sufficiently discussed in the FOI Guidelines. Agencies also engage with third parties by way of consultation, which gives them the required information about the IC review process and their rights and obligations in relation to the IC review. 	Could we include a reference to the Director for respondents on engagement with third parties? (s 54P notices, requirement to consult etc)
General		<ul style="list-style-type: none"> ATO submits that a delay in seeking a review by an applicant should be a ground for providing an agency with additional time to respond. 	<p>Not update.</p> <p>Comments:</p> <ul style="list-style-type: none"> To give agencies greater time to respond to our requests for information on the basis that the applicant has been granted an extension for applying for an IC review would not further the objects of the FOI Act, which include to facilitate and promote public access to information, promptly and at the lowest 	Agree

reasonable cost.

Thanks
Rocelle

From: ESLUICK, Jessica <Jessica.Eslick@oaic.gov.au>

Sent: Thursday, April 4, 2024 12:47 PM

To: OAIC - ACFOI <ACFOI@oaic.gov.au>

Cc: PEEL, Sara <Sara.Peel@oaic.gov.au>

Subject: Draft EB on proposed updates to draft IC review procedure direction (for applicants) [SEC=OFFICIAL]

Dear Rocelle

Please refer to the table at Attachment B in the above draft EB: [D2024/008712](#)

I have reproduced the table below in the body of this email for your ease of reference.

We will await your comments, and update the EB, with a view to finalising the EB, accordingly.

Attachment B Summaries of updates and agencies' submissions

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
1.8 – Direction has effect from 1 July 2023	• N/A	<u>Update:</u> • This Direction has effect from 1 July 2024. The update is not in response to agencies' submissions. <u>Comments:</u> • As stated in the corresponding EB on the procedure direction for agencies (D2024/007050), we should potentially have a separate process for backlog matters. • We could state, for example: <i>For IC review applications received before 1 July 2024, agencies and ministers must have regard to Part 10 of the FOI Guidelines issued under s 93A of the FOI Act which sets out the general principles and expectations of the Information Commissioner regarding IC reviews. Specific directions may be made in the context of these IC reviews.</i>
1.13 – OAIC contacting applicants • Paragraph 1.13 explains that the OAIC will contact applicants using their preferred contact method. • Paragraph 1.13 also states 'Where an applicant has listed a preferred contact method as well as other contact information, the OAIC will consider any notices as received when sent to an applicant's preferred contact.'	• The AAT submits that we may wish to consider referring to an exception where there is evidence of non-receipt, such as a returned letter or email non delivery message.	<u>Not update.</u> <u>Comments:</u> • Note that the existing IC review procedure for applicants contains the same wording at para 1.13. • In practice, if we cannot contact an applicant, we may not be able to continue with the IC review and would consider finalising the IC review under s 54W(a)(iii) (cannot contact applicant after making reasonable attempts). • We consider that it is not worthwhile discussing our power under s 54W(1)(a)(iii) here, at the beginning of the procedure direction.
1.15 – Who can be an IC review applicant? • Paragraph 1.15 refers to s 54L(3), namely that an IC review application may be made by the person who made the request to which the decision relates, and the proceeding paragraphs 1.16 to 1.20 set out the requirements for the IC review application.	• The AAT queries whether the requirements for IC review applications of access grant decisions (s 54M) are the same as those discussed at paragraphs 1.16 to 1.20.	<u>Update.</u> <u>Comments:</u> • Update para 1.15 to refer to s 54M(3) (application for IC review of access grant decisions), given that the information requested in the following paragraphs can apply to applications for IC review of access grant decisions. • Minor updates may be required to following paragraphs, such as to para 1.18(c) so that we refer to 'wrongly granted' rather than 'wrongly refused'.
1.17(a) – Information that must be provided with IC review application: • Paragraph 1.17 states that 'The applicant must provide the OAIC with about the FOI decision, in particular (a) ... (b) ... (c) ... (d) ...'. • Paragraph 1.17(a) states that the applicant should say whether the decision under review is an original decision or internal review decision , and notes 'it is usually better to seek internal review first ...' (emphasis added)	• Defence proposes that we consider making internal review compulsory, in circumstances which allow it. This would allow for agencies and ministers to have further meaningful engagement with the applicant before they seek an IC review in an attempt to resolve the issues in an informal and timely way, thus reducing the workload for the OAIC. • ATO submits that it is unclear whether there will be any requirement on the applicant to either seek internal review or provide details on why they did not consider it appropriate in the circumstances (ATO).	<u>Not update.</u> <u>Comments:</u> • Requiring applicants to seek internal review before seeking IC review is outside the scope of the procedural direction, and would require legislative change. • We could consider making clearer by way of a separate dot point that, for example 'applicants have a choice between applying for internal or IC review of a decision, unless the decision was made by the Minister or personally by the principal officer of an agency, or is a deemed access refusal decision. In those cases, applicants must directly apply for IC review.
1.17(b) – Information to be provided with IC review application • Paragraph 1.17(b) notes that 'In most cases, an application for IC review must be made within 60 days of the applicant being notified of the ... decision ...' (emphasis added)	• The AAT submits that we may wish to consider whether the date of receipt of the decision is also relevant.	<u>Not update.</u> <u>Comments:</u> • Para 1.13 (above para 1.17) says 'the OAIC will consider any notices as received when sent ...'. Given that agencies and the OAIC mostly send notices by email, we consider that no change is required to distinguish between the date a notice is given and the date received. The 60 day time limit for applying for IC review of an access refusal decision is also generous, which lessens the need to distinguish between when a notice is given, and received.
1.17 (general) Agency reference number	• AFP submits that applicants should also be required to provide the agency reference number for the FOI decision.	<u>Not update.</u> <u>Comments:</u> • The applicant is already generally required to provide a copy of the decision (s 54N(1)(b)), which should state the agency reference number.
1.18 – Further information to be provided with IC review application: • Paragraph 1.18 advises that 'An application for IC review should also: (a) ... (b) ... (c) ... (d) ...', such as the aspects of the decision about which they seek the IC review. (emphasis added)	• ATO submits that given the mandatory consultation requirement proposed to be put on agencies it would appear appropriate for applicants to be required to provide the information set out in this paragraph prior to any consultation occurring. • ATO also queries whether a failure to provide this information would be considered a 'failure to engage'.	<u>Not update.</u> <u>Comments:</u> • Providing the information listed in para 1.18 is already framed as a requirement, stating 'should'. • The power to finalise an IC review for failure to cooperate (s 54W(a)(ii) is discussed in the second section of this part of the direction (under the subheading During the IC review), and does not need to be discussed in this section, the first section (under the subheading Making an application for IC review). • We are required to provide appropriate assistance to a person who wishes to make an IC review application, and requires assistance (s 54N(3)), and therefore it is not appropriate to emphasise the power to finalise an IC review at the application stage).
1.18(a) – Further requirements of IC review application • Paragraph 1.18(a) says that an application should 'identify the aspect(s) of the ... decision about which the IC review is sought'.	• AGD submits that this wording may be confusing for some readers, and could alternatively say 'identify the parts of the decision you want the Information Commissioner to review'.	<u>Update</u> <u>Comments:</u> • Update in line with AGD's proposal 'identify the parts of the decision you want the Information Commissioner to review'.

	<ul style="list-style-type: none"> Defence submits that at para 1.18, the revisions suggest that an IC review application should identify why the agency's or minister's decision is wrong. Defence proposes making this compulsory, saying that would assist the agency or minister to better understand and resolve the issues in a meaningful, informal and timely way. 	<ul style="list-style-type: none"> In relation to Defence's submission, we note that providing the information listed in para 1.18 is already framed as a requirement, stating 'should'.
1.23 Engagement to resolve issues (issue 1)	<ul style="list-style-type: none"> AAT submits that engagement should only be required if there has been no internal review of the decision. 	<p>Update</p> <ul style="list-style-type: none"> Clarify in both applicants and agencies procedure directions that engagement would not be required if they have evidence of engagement with the applicant that is above their duty to take reasonable steps to assist the person to make the request in a manner that complies with s 15 (s 15(3)), such as during an internal review process.
1.23 Engagement to resolve issues (issue 2)	<ul style="list-style-type: none"> Paragraph 1.23 states 'Agencies are required to contact applicants for IC review shortly after the IC review application is lodged to arrange a suitable time for the engagement process.' (emphasis added) 	<p>Update</p> <p>Comments:</p> <ul style="list-style-type: none"> Consider updating para 1.23 to say 'after receiving the OAIC's notice of IC review under s 54Z'.
1.23 Engagement to resolve issues (issue 3)	<ul style="list-style-type: none"> ATO submits it would also be helpful to provide applicants with further details about what is expected of them in terms of participating in agency engagement and that simply attending a meeting with no intention to attempt to resolve the review application would be not considered appropriate 'engagement'. 	<p>Update</p> <p>Comments:</p> <ul style="list-style-type: none"> Consider updating para 1.23 to say that the engagement may be more likely to resolve the matter if both parties are well prepared for the engagement. Consider updating para above, para 1.22 to discuss respectful engagement.
1.31 – Preliminary view	<ul style="list-style-type: none"> Paragraph 1.31 states 'The OAIC may provide a preliminary view at any time ... The applicant may be invited in some cases to withdraw the IC review application, depending on the views expressed in the preliminary view'. 	<p>Update.</p> <p>Comments:</p> <ul style="list-style-type: none"> Update to clarify that the OAIC will invite the applicant to withdraw or make submissions in response to a preliminary view, in line with paras [10.60] of the draft FOI Guidelines (D2022/009530) which says: <p>10.60 ... the OAIC's IC review officer may review the material submitted by both parties and provide a preliminary view as to the merits 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.</p>
Revised decisions are not referred to in the draft procedure direction	<ul style="list-style-type: none"> N/A (observed by OAIC) 	<p>Update.</p> <p>Comment:</p> <ul style="list-style-type: none"> In part 2, under subheading During the IC review, insert a sub-subheading 'Receiving revised decisions under s 55G' and insert content in line with para 1079 of draft Part 10 of the FOI Guidelines which says: <p>A 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.</p> <ul style="list-style-type: none"> Then add references to the Information Commissioner's powers under 54W(a) and 54W(c).
General	<ul style="list-style-type: none"> AGD queries if it may be simpler and more effective for all users of the FOI system to have a single direction, addressed to both the agency and the applicant. This would ensure all parties have a consistent understanding of the IC review process. By comparison, we note the AAT General Practice Direction (General Practice Direction.pdf (aat.gov.au)), under s 18B of the Administrative Appeals Tribunal Act 1975 applies to all parties to a review and appears to provide greater consistency in the explanation of process and responsibilities. 	<p>Not update.</p> <p>Comments:</p> <ul style="list-style-type: none"> We consider that having 2 procedure directions means that we have one particular procedure direction that is targeted to applicants and increases their accessibility to the information that they require to gain the benefit of an IC review.
General	<ul style="list-style-type: none"> AGD submits that it is unclear what practice directions (if any) apply to third parties joined to an IC review or whether the process for an IC review in the directions for agencies and applicants may differ where there are other parties to the review. 	<p>Not update.</p> <p>Comments:</p> <ul style="list-style-type: none"> We consider that third parties do not require a procedure direction, and that their role is sufficiently discussed in the FOI Guidelines. Agencies also engage with third parties by way of consultation, which gives them the required information about the IC review process and their rights and obligations in relation to the IC review.
General	<ul style="list-style-type: none"> ATO submits that a delay in seeking a review by an applicant should be a ground for providing an agency with additional time to respond. 	<p>Not update.</p> <p>Comments:</p> <ul style="list-style-type: none"> To give agencies greater time to respond to our requests for information on the basis that the applicant has been granted an extension for applying for an IC review would not further the objects of the FOI Act, which include to facilitate and promote public access to information, promptly and at the lowest reasonable cost.

Kind regards



Jessica Eslick (she/her)
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Monitoring, Guidance and Engagement
Freedom of Information Branch
Office of the Australian Information Commissioner
Sydney
P +61 2 9942 4119 E jessica.eslick@oaic.gov.au

The OAIC acknowledges Traditional Custodians of Country across Australia and their continuing connection to land, waters and communities. We pay our respect to First Nations people, cultures and Elders past and present.
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Executive brief

Responsible Executive Member:	Rocelle Ago, Assistant Commissioner FOI
Prepared by:	Jessica Eslick and Sara Peel, Director, Monitoring, Guidance and Engagement
To:	Elizabeth Tydd, FOI Commissioner
Copies:	Karen Tulloch, Raewyn Harlock
File ref:	D2024/008712
Date:	4 April 2024
Subject:	Proposed updates to draft IC review procedure direction for <u>applicants</u>

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Purpose and timing

To inform you of the proposed updates to the draft IC review procedure direction for applicants (titled 'Direction as to certain procedures to be followed in by applicants in Information Commissioner reviews') (the draft direction),

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Your as at 13 March 2024

Recommendations

1. That you note our proposed updates to the draft direction via comments to the draft direction (Attachment A).
2. That you note our summary of the submissions in response to our consultation, whether we have proposed updates to the draft direction in light of those submissions, and our rationale /comments (**Attachment B**).

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Background

The Australian Information Commissioner may give written directions under s 55(2)(e)(ii) of the FOI Act in relation to procedures to be followed in Information Commissioner (IC) reviews.

The Information Commissioner has issued 2 directions under s 55(2)(e)(ii), which are currently in effect:

- [Direction as to certain procedures to be followed in Information Commissioner reviews](#), which has had effect from 26 February 2018.
- [Direction as to certain procedures to be followed by applicants in Information Commissioner reviews](#), which had had effect from 1 September 2021.

On 9 May 2023, we sought comments from, or consulted, interested stakeholders on draft revisions to each of the 2 directions.

In our consultation, we advised stakeholders:

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We intend to make all submissions publicly available. Please indicate when making your submission if it contains confidential information that you do not want made public and why it should not be published. Requests for access to confidential comments will be determined in accordance with the FOI Act. If the OAIC accepts submissions in confidence you must also provide a copy that can be published.

Between 8 June 2023 and 6 July 2023, we received submissions on the draft direction from **6 agencies** as follows:

1. Administrative Appeals Tribunal on 8 June 2023
2. Attorney-General's Department on 30 June 2023
3. Australian Federal Police on 30 June 2023
4. Australian Tax Office on 30 June 2023
5. Commonwealth Ombudsman on 30 June 2023
6. Department of Defence on 30 June 2023

Related brief [D2023/015645](#) contains TRIM links to those submissions at its Attachment B.

Attachments

1. **Attachment A:** Proposed updated draft direction (with proposed updates in highlight and comments).
2. **Attachment B:** Summary of agencies' submissions in response to our consultation on the draft direction, whether we have proposed (at Attachment A) to update the draft direction in response to those submissions, and our rationale/comments.

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Attachment A

Proposed direction



Australian Government

Office of the Australian Information Commissioner

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

Contents

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Part 4: Non-compliance with this direction	Error! Bookmark not defined.	Deleted: 8

Part 1: About this direction

- 1.1 This direction is given by the Australian Information Commissioner under s 55(2)(e)(i) of the Freedom of Information Act 1982 (FOI Act) in relation to Information Commissioner reviews (IC reviews).
- 1.2 This written direction sets out the procedure to be followed by applicants for IC reviews undertaken by the Information Commissioner under the FOI Act.
- 1.3 The Information Commissioner 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 Information Commissioner (s 54W(c)).
- 1.4 The Information Commissioner may also give written directions as to the procedure to be followed in relation to a particular IC review (s 55(2)(e)(ii)).
- 1.5 This direction does not apply to the extent it is inconsistent with a provision of the FOI Act, another enactment or a specific direction made in a particular IC review under s 55(2)(e)(ii) of the FOI Act.
- 1.6 Further information relating to the IC review process is published on the Office of the Australian Information Commissioner's (OAIC) website. In particular, Part 10 (Reviews by the Australian Information Commissioner) of the Guidelines issued by the Information Commissioner under s 93A of the FOI Act (FOI Guidelines) describes the principles that inform the OAIC's approach to IC reviews.
- 1.7 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.
- 1.8 This direction has effect from 1 July 2024.

Part 2: The IC review process

- 1.9 IC review procedures are found in Part VII of the FOI Act. The IC review process is intended to be an informal, non-adversarial and timely means of external merits review of FOI decisions made by agencies and ministers. Part 10 of the FOI Guidelines, to which agencies and ministers must have regard when performing a function or exercising a power under the FOI Act, sets out in detail the process and underlying principles of IC review.

Making an application for IC review

- 1.10 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. [The online form is located at: https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICR_10.](https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICR_10)
- 1.11 Where it is not possible for an application to be made online, applications may be sent to the OAIC by:

Postal address GPO Box 5218
Sydney NSW 2001

Email address FOIDR@oaic.gov.au

Fax +61 2 9284 9666

- 1.12 An IC review application must, at a minimum, include the following contact details:

Commented [E1]: Updated from 1 Jul 2023 to 1 Jul 2024.

As stated in the corresponding EB on the procedure direction for agencies ([D2024/007050](#)), we should potentially have a separate process for backlog matters.

We could state, for example:

For IC review applications received before 1 July 2024, agencies and ministers must have regard to Part 10 of the FOI Guidelines issued under s 93A of the FOI Act which sets out the general principles and expectations of the Information Commissioner regarding IC reviews. Specific directions may be made in the context of these IC reviews.

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• mail to FOI Regulatory Group, GPO Box 5218, Sydney NSW 2001. ¶

- 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
- 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).

1.13 The OAIC 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 OAIC will consider any notices as received when sent to an applicant's preferred contact.

1.14 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
- 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.

1.15 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 OAIC 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.

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Commented [E2]: Added 4 Apr 2024.

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1.16 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.

1.17 The applicant must provide the OAIC 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.
 - 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

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documents requested, or within 30 days of a decision granting access to documents to another person¹.

- If an application for IC review is not made within the timeframes in the FOI Act, applicants may apply to the Information Commissioner 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 Information Commissioner 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.

1.18 An application for IC review should also:

- a. identify the **parts of the decision you want 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.

1.19 The OAIC must provide 'appropriate assistance' to a person who wishes to apply for IC review and requires assistance to prepare the IC review application (s 54N(3)).

1.20 Section 54N of the FOI Act sets out the requirements for the contents and delivery of an application for IC review. These requirements include giving the OAIC contact details to which notices can be sent and providing a copy of the FOI decision the applicant wants the Information Commissioner to review. An application that does not comply with these requirements may be considered to be invalid.

During the IC review

Changes to contact details

1.21 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 Information Commissioner may decide not to undertake an IC review, or not continue to undertake an IC review, if the applicant or their nominated representative cannot be contacted after making reasonable attempts (s 54W(a)(iii)).

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Para 10.46 adds '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', and we may consider whether that detail should also be here.

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¹ 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).

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Participation in the IC review

General principles

- 1.22 Applicants must respond to inquiries from the OAIC within the time provided unless there are 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 why additional time is needed and propose a new date for response. Approval of an extension request is at the discretion of the OAIC.

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The OAIC expects that applicants and agencies will treat our officers with respect and courtesy.² The Information Commissioner expects that applicants and agencies participate in the IC review, including engagement with each other at the beginning of the IC review, with respect and courtesy. The parties' meaningful participation in engagement with each other would mean that they are more likely to resolve the issues in the IC review.

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At the commencement of an IC review

- 1.23 The OAIC requires agencies and Ministers to engage with the IC review applicant at the commencement of an IC review. The purpose of this engagement is to attempt to resolve the issues identified in the IC review application in an informal and timely way. Agencies are required to contact applicants for IC review shortly after receiving the Information Commissioner's notice of IC review under s 54z to arrange a suitable time for the engagement process. 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)).

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- 1.24 The Information Commissioner may use any technique the Information Commissioner considers appropriate to facilitate an agreed resolution of the matters at issue in the IC review (such as alternative dispute resolution processes - s 55(2)(b)). Where appropriate, and following the compulsory engagement process described above, the OAIC may invite applicants to attend a teleconference to discuss the issues in dispute in the IC review with the agency's or Minister's office and to explore options for resolution, with a view to reaching agreement on some or all of the matters at issue in the IC review.

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Receiving revised decisions under s 55G

- 1.25 An agency or minister may make a 'revised decision' under s 55G of the FOI Act during an IC review, giving access to further material. 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, (ss 54W(a) and 54W(c) of the FOI Act).

² OAIC service charter.

Submissions

- 1.26 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.
- 1.27 Applicants will be invited to make written submissions after the initial triage and early resolution process is complete, and once the application has been assigned to a review adviser for substantive review/case management. First, the agency or Minister will be asked to make submissions in support of the IC reviewable decision. The agency or Minister will send the applicant a copy of their submissions at the same time as they are sent to the OAIC. The applicant will then have the opportunity to make submissions addressing any issues raised by the agency or the Minister. The applicant is required to send their submissions to the agency or Minister at the same time as they are sent to the OAIC.
- 1.28 The Information Commissioner will generally give the parties (both the applicant and the agency or Minister) 4 weeks to make their submissions.
- 1.29 The Information Commissioner will not accept any further submissions from either party to the IC review unless the Information Commissioner has requested them.
- 1.30 The Information Commissioner will contact the parties after receipt of submissions if procedural fairness requirements have been identified. For information on procedural fairness see [3.15] – [3.31] of Part 3 of the FOI Guidelines.
- 1.31 The OAIC may provide a preliminary view at any time during the IC review. This will outline the case officer's preliminary thinking on the issues in dispute in the IC review. The applicant may be invited in some cases to withdraw their IC review application, [or make submissions in response to a preliminary view](#), depending on the views expressed in the preliminary view
- 1.32 The IC review application and any attachments will be shared with the agency or Minister, as well as any other parties to the review, unless there is a reason not to do so. Any other information and submissions provided to the OAIC by the applicant will be made available to the other parties to the IC review.
- 1.33 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.
- 1.34 Generally, submissions should be made in writing and sent by email or pre-paid post. In limited circumstances, if an applicant is unable to provide written submissions, the OAIC may agree to accept verbal submissions by telephone.

Information Commissioner decisions

- 1.35 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.
- 1.36 When the Information Commissioner makes a decision on IC review under s 55K of the FOI Act, the Information Commissioner will quote or summarise the submissions in the published decision. If a

confidential submission is relied on by the Information Commissioner in making a decision on the IC review, this will be noted in the decision without revealing the confidential material.

- 1.37 To protect against the unreasonable disclosure of personal information, the Information Commissioner will consider whether identifying information should be included in published decisions. Natural persons may opt not 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: Procedure for IC review of specific types of decisions

Deemed access refusal decisions

- 1.38 A 'deemed access refusal' occurs when the statutory time for making a decision on an FOI request for access to a document has expired and notice of the decision has not been given. In these circumstances the agency or Minister is 'deemed' to have refused the FOI request. Where the applicant applies for IC review of a deemed access refusal decision, the OAIC will make inquiries with the agency or Minister.
- 1.39 If, during the IC review, the agency or Minister sends the applicant a written decision on the applicant's FOI request the OAIC will check whether the applicant is satisfied with the decision. Applicants who are satisfied with the decision and do not wish to proceed with the IC review must advise the OAIC in writing that they withdraw their application for IC review. Applicants who are not satisfied with the agency's or Minister's decision must explain why they disagree with the 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 undertake an IC review on the basis that the applicant has failed to cooperate in progressing the IC review application without reasonable excuse (s 54W(a)(ii)).

Access refusal decisions

- 1.40 An 'access refusal decision' means (s 53A):
- 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 all the 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 (s 21) (see Part 3 of the Guidelines)
 - e. a decision relating to the imposition or amount of a charge (s 29)
 - f. a decision to give access to a document to a 'qualified person' (where disclosing the information to the applicant might be detrimental to the applicant's physical or mental health or well-being) (s 47F(5))
 - g. a decision refusing to amend a record of personal information in accordance with an application (s 48)

h. a decision refusing to annotate a record of personal information in accordance with an application (s 48).

- 1.41 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)).
- 1.42 Given that the agency or Minister bears this onus, it will generally be necessary to undertake inquiries or seek information from the agency or Minister before inviting comment from applicants.

Access grant decisions

- 1.43 An 'access grant decision' means a decision to grant access to a document where there is a requirement to consult a third party (s 53B). Such decisions involve granting the FOI applicant access to information or documents following consultation.
- 1.44 In an IC review of an access grant decision, it is the IC review applicant who bears the onus of establishing that a decision refusing the FOI request is justified, or that the Information Commissioner should give a decision adverse to the FOI applicant (s 55D(2)).
- 1.45 IC review applicants will generally be invited to provide information or submissions which explain why the agency's or Minister's decision is wrong before comment is invited from the agency or Minister.

Part 4: Non-compliance with this direction

- 1.46 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 review as outlined in s 54W(c). This means that, in these cases, the review will be finalised.
- 1.47 Applicants will be provided with the opportunity to explain why the Information Commissioner should not finalise the IC review under s 54W(c) of the FOI Act before a decision is made.

Attachment B

Summaries of updates and agencies' submissions

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
1.8 – Direction has effect from 1 July 2023	<ul style="list-style-type: none"> N/A 	<p><u>Updated:</u></p> <ul style="list-style-type: none"> This Direction has effect from 1 July 2024. The update is not in response to agencies' submissions. <p><u>Comments:</u></p> <ul style="list-style-type: none"> As stated in the corresponding EB on the procedure direction for agencies (D2024/007050), we should potentially have a separate process for backlog matters. We could state, for example: <p><i>For IC review applications received before 1 July 2024, agencies and ministers must have regard to Part 10 of the FOI Guidelines issued under s 93A of the FOI Act which sets out the general principles and expectations of the Information Commissioner regarding IC reviews. Specific directions may be made in the context of these IC reviews.</i></p>

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>1.13 – OAIC contacting applicants</p> <ul style="list-style-type: none"> Paragraph 1.13 explains that the OAIC will contact applicants using their preferred contact method. Paragraph 1.13 also states ‘Where an applicant has listed a preferred contact method as well as other contact information, the OAIC will consider any notices as received when sent to an applicant’s preferred contact’. 	<ul style="list-style-type: none"> The AAT submits that we may wish to consider referring to an exception where there is evidence of non-receipt, such as a returned letter or email non delivery message. 	<p><u>Not update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> Note that the existing IC review procedure for applicants contains the same wording at para 1.13. In practice, if we cannot contact an applicant, we may not be able to continue with the IC review and would consider finalising the IC review under s 54W(a)(iii) (cannot contact applicant after making reasonable attempts). We consider that it is not worthwhile discussing our power under s 54W(1)(a)(iii) here, at the beginning of the procedure direction.
<p>1.15 – Who can be an IC review applicant?</p> <ul style="list-style-type: none"> Paragraph 1.15 refers to s 54L(3), namely that an IC review application may be made by the person who made the request to which the decision relates, and the proceeding paragraphs 1.16 to 1.20 set out the requirements for the IC review application. 	<ul style="list-style-type: none"> The AAT queries whether the requirements for IC review applications of access grant decisions (s 54M) are the same as those discussed at paragraphs 1.16 to 1.20. 	<p><u>Update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> Update para 1.15 to refer to s 54M(3) (application for IC review of access grant decisions), given that the information requested in the following paragraphs can apply to applications for IC review of access grant decisions. Minor updates may be required to following paragraphs, such as to para 1.18(c) so that we refer to ‘wrongly granted’ rather than ‘wrongly refused’.

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>1.17(a) – Information that must be provided with IC review application:</p> <ul style="list-style-type: none"> Paragraph 1.17 states that ‘The applicant must provide the OAIC with about the FOI decision, in particular (a) ... (b) ... (c) ... (d) ...’. Paragraph 1.17(a) states that the applicant should say whether the decision under review is an original decision or internal review decision, and notes ‘it is usually better to seek internal review first ...’ (emphasis added) 	<ul style="list-style-type: none"> Defence proposes that we consider making internal review compulsory, in circumstances which allow it. This would allow for agencies and ministers to have further meaningful engagement with the applicant before they seek an 1C review in an attempt to resolve the issues in an informal and timely way, thus reducing the workload for the OAIC. ATO submits that it is unclear whether there will be any requirement on the applicant to either seek internal review or provide details on why they did not consider it appropriate in the circumstances (ATO). 	<p><u>Not update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> Requiring applicants to seek internal review before seeking IC review is outside the scope of the procedural direction, and would require legislative change. We could consider making clearer by way of a separate dot point that, for example ‘applicants have a choice between applying for internal or IC review of a decision, unless the decision was made by the Minister or personally by the principal officer of an agency, or is a deemed access refusal decision. In those cases, applicants must directly apply for IC review.
<p>1.17(b) – Information to be provided with IC review application</p> <ul style="list-style-type: none"> Paragraph 1.17(b) notes that ‘In most cases, an application for IC review must be made within 60 days of the applicant being notified of the ... decision ...’ (emphasis added) 	<ul style="list-style-type: none"> The AAT submits that we may wish to consider whether the date of receipt of the decision is also relevant. 	<p><u>Not update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> Para 1.13 (above para 1.17) says ‘the OAIC will consider any notices as received when sent ...’. Given that agencies and the OAIC mostly send notices by email, we consider that no change is required to distinguish between the date a notice is given and the date received. The 60 day time limit for applying for IC review of an access refusal decision is also generous, which lessens the need to distinguish between when a notice is given, and received.
<p>1.17 (general) Agency reference number</p>	<ul style="list-style-type: none"> AFP submits that applicants should also be required to provide the agency reference number for the FOI decision. 	<p><u>Not update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> The applicant is already generally required to provide a copy of the decision (s 54N(1)(b)), which should state the agency reference number.

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>1.18 – Further information to be provided with IC review application:</p> <ul style="list-style-type: none"> Paragraph 1.18 advises that ‘An application for IC review should also: (a) ... (b) ... (c) ... (d) ...’, such as the aspects of the decision about which they seek the IC review. (emphasis added) 	<ul style="list-style-type: none"> ATO submits that given the mandatory consultation requirement proposed to be put on agencies it would appear appropriate for applicants to be required to provide the information set out in this paragraph prior to any consultation occurring. ATO also queries whether a failure to provide this information would be considered a ‘failure to engage’. 	<p><u>Not update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> Providing the information listed in para 1.18 is already framed as a requirement, stating ‘should’. The power to finalise an IC review for failure to cooperate (s 54W(a)(ii) is discussed in the second section of this part of the direction (under the subheading During the IC review), and does not need to be discussed in this section, the first section (under the subheading Making an application for IC review). We are required to provide appropriate assistance to a person who wishes to make an IC review application, and requires assistance (s 54N(3)), and therefore it is not appropriate to emphasise the power to finalise an IC review at the application stage).
<p>1.18(a) – Further requirements of IC review application</p> <ul style="list-style-type: none"> Paragraph 1.18(a) says that an application should ‘identify the aspect(s) of the ... decision about which the IC review is sought’. 	<ul style="list-style-type: none"> AGD submits that this wording may be confusing for some readers, and could alternatively say “identify the parts of the decision you want the Information Commissioner to review”. Defence submits that at para 1.18, the revisions suggest that an IC review application should identify why the agency's or minister's decision is wrong. Defence proposes making this compulsory, saying that would assist the agency or minister to better understand and resolve the issues in a meaningful, informal and timely way. 	<p><u>Update</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> Update in line with AGD’s proposal ‘identify the parts of the decision you want the Information Commissioner to review’. In relation to Defence’s submission, we note that providing the information listed in para 1.18 is already framed as a requirement, stating ‘should’.

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>1.23</p> <p>Engagement to resolve issues (issue 1)</p>	<ul style="list-style-type: none"> AAT submits that engagement should only be required if there has been no internal review of the decision. 	<p><u>Update</u></p> <ul style="list-style-type: none"> Clarify in both applicants and agencies procedure directions that engagement would not be required if they have evidence of engagement with the applicant that is above their duty to take reasonable steps to assist the person to make the request in a manner that complies with s 15 (s 15(3)), such as during an internal review process.
<p>1.23</p> <p>Engagement to resolve issues (issue 2)</p> <ul style="list-style-type: none"> Paragraph 1.23 states 'Agencies are required to contact applicants for IC review shortly after the IC review application is lodged to arrange a suitable time for the engagement process.' (emphasis added) 	<ul style="list-style-type: none"> AAT, AFP, and the Commonwealth Ombudsman submit that paragraph 1.23 should say that agencies are required to contact applicants to arrange the engagement after receiving the s 54Z notice. AFP in particular notes that there can be a delay between an IC review application and s 54Z notice. 	<p><u>Update</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> Consider updating para 1.23 to say 'after receiving the OAIC's notice of IC review under s 54Z'.
<p>1.23</p> <p>Engagement to resolve issues (issue 3)</p>	<ul style="list-style-type: none"> ATO submits it would also be helpful to provide applicants with further details about what is expected of them in terms of participating in agency engagement and that simply attending a meeting with no intention to attempt to resolve the review application would be not considered appropriate 'engagement'. 	<p><u>Update</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> Consider updating para 1.23 to say that the engagement may be more likely to resolve the matter if both parties are well prepared for the engagement. Consider updating para above, para 1.22 to discuss respectful engagement.

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>1.31 – Preliminary view</p> <ul style="list-style-type: none"> Paragraph 1.31 states 'The OAIIC may provide a preliminary view at any time ... The applicant may be invited in some cases to withdraw the IC review application, depending on the views expressed in the preliminary view'. 	<ul style="list-style-type: none"> The AAT submits that if there is an opportunity for the parties to provide information in response to the preliminary view, it may be useful to state this. Such a view may raise a fact or issue that can be addressed. 	<p><u>Update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> Update to clarify that the OAIIC will invite the applicant to withdraw or make submissions in response to a preliminary view, in line with paras [10.60] of the draft FOI Guidelines (D2022/009530) which says: <p><i>10.60 ... the OAIIC's IC review officer may review the material submitted by both parties and provide a preliminary view as to the merits 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.</i></p>
<p>Revised decisions are not referred to in the draft procedure direction</p>	<ul style="list-style-type: none"> N/A (observed by OAIIC) 	<p><u>Update.</u></p> <p><u>Comment:</u></p> <ul style="list-style-type: none"> In part 2, under subheading During the IC review, insert a sub-subheading 'Receiving revised decisions under s 55G' and insert content in line with para 1079 of draft Part 10 of the FOI Guidelines which says: <p><i>A decision does not automatically conclude the IC review. The revised decision becomes the decision under review (s 55G(2)(b)). The OAIIC will generally consult the IC review applicant as to whether they want to continue the IC review on the basis of the revised decision.</i></p> <ul style="list-style-type: none"> Then add references to the Information Commissioner's powers under 54W(a) and 54W(c).

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
General	<ul style="list-style-type: none"> AGD queries if it may be simpler and more effective for all users of the FOI system to have a single direction, addressed to both the agency and the applicant. This would ensure all parties have a consistent understanding of the IC review process. By comparison, we note the AAT General Practice Direction (General-Practice-Direction.pdf (aat.gov.au)), under s 18B of the Administrative Appeals Tribunal Act 1975 applies to all parties to a review and appears to provide greater consistency in the explanation of process and responsibilities. 	<p><u>Not update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> <u>We consider that having 2 procedure directions means that we have one particular procedure direction that is targeted to applicants and increases their accessibility to the information that they require to gain the benefit of an IC review.</u>
General	<ul style="list-style-type: none"> AGD submits that it is unclear what practice directions (if any) apply to third parties joined to an IC review or whether the process for an IC review in the directions for agencies and applicants may differ where there are other parties to the review. 	<p><u>Not update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> We consider that third parties do not require a procedure direction, and that their role is sufficiently discussed in the FOI Guidelines. Agencies also engage with third parties by way of consultation, which gives them the required information about the IC review process and their rights and obligations in relation to the IC review.
General	<ul style="list-style-type: none"> ATO submits that a delay in seeking a review by an applicant should be a ground for providing an agency with additional time to respond. 	<p><u>Not update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> To give agencies greater time to respond to our requests for information on the basis that the applicant has been granted an extension for applying for an IC review would not further the objects of the FOI Act, which include to facilitate and promote public access to information, promptly and at the lowest reasonable cost.

Executive brief

Responsible Executive Member:	Rocelle Ago, Assistant Commissioner FOI
Prepared by:	Jessica Eslick and Sara Peel, Director, Monitoring, Guidance and Engagement
To:	Elizabeth Tydd, FOI Commissioner
Copies:	Karen Tulloch, Raewyn Harlock
File ref:	D2024/008712
Date:	4 April 2024
Subject:	Proposed updates to draft IC review procedure direction for applicants

Purpose and timing

To inform you of the proposed updates to the draft IC review procedure direction for applicants (titled 'Direction as to certain procedures to be followed in by applicants in Information Commissioner reviews') (the draft direction).

Recommendations

1. That you note our proposed updates to the draft direction via comments to the draft direction (**Attachment A**).
2. That you note our summary of the submissions in response to our consultation, whether we have proposed updates to the draft direction in light of those submissions, and our rationale /comments (**Attachment B**).

Background

The Australian Information Commissioner may give written directions under s 55(2)(e)(ii) of the FOI Act in relation to procedures to be followed in Information Commissioner (IC) reviews.

The Information Commissioner has issued 2 directions under s 55(2)(e)(ii), which are currently in effect:

- [Direction as to certain procedures to be followed in Information Commissioner reviews](#), which has had effect from 26 February 2018.
- [Direction as to certain procedures to be followed by applicants in Information Commissioner reviews](#), which had had effect from 1 September 2021.

On 9 May 2023, we sought comments from, or [consulted](#), interested stakeholders on draft revisions to each of the 2 directions.

In our consultation, we advised stakeholders:

We intend to make all submissions publicly available. Please indicate when making your submission if it contains confidential information that you do not want made public and why it should not be published. Requests for access to confidential comments will be determined in accordance with the FOI Act. If the OAIC accepts submissions in confidence you must also provide a copy that can be published.

Between 8 June 2023 and 6 July 2023, we received submissions on the draft direction from **6 agencies** as follows:

1. Administrative Appeals Tribunal on 8 June 2023
2. Attorney-General's Department on 30 June 2023
3. Australian Federal Police on 30 June 2023
4. Australian Tax Office on 30 June 2023
5. Commonwealth Ombudsman on 30 June 2023
6. Department of Defence on 30 June 2023

Related brief [D2023/015645](#) contains TRIM links to those submissions at its Attachment B.

Attachments

1. **Attachment A:** Proposed updated draft direction (with proposed updates in highlight and comments).
2. **Attachment B:** Summary of agencies' submissions in response to our consultation on the draft direction, whether we have proposed (at Attachment A) to update the draft direction in response to those submissions, and our rationale/comments.

Attachment A

Proposed direction



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

- 1.1 This direction is given by the Australian Information Commissioner under s 55(2)(e)(i) of the Freedom of Information Act 1982 (FOI Act) in relation to Information Commissioner reviews (IC reviews).
- 1.2 This written direction sets out the procedure to be followed by applicants for IC reviews undertaken by the Information Commissioner under the FOI Act.
- 1.3 The Information Commissioner 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 Information Commissioner (s 54W(c)).
- 1.4 The Information Commissioner may also give written directions as to the procedure to be followed in relation to a particular IC review (s 55(2)(e)(ii)).
- 1.5 This direction does not apply to the extent it is inconsistent with a provision of the FOI Act, another enactment or a specific direction made in a particular IC review under s 55(2)(e)(ii) of the FOI Act.
- 1.6 Further information relating to the IC review process is published on the Office of the Australian Information Commissioner's (OAIC) website. In particular, Part 10 (Reviews by the Australian Information Commissioner) of the Guidelines issued by the Information Commissioner under s 93A of the FOI Act (FOI Guidelines) describes the principles that inform the OAIC's approach to IC reviews.
- 1.7 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.
- 1.8 This direction applies to IC review applications received from 1 July 2024. For IC review applications received before 1 July 2024, specific directions may be made in the context of these IC reviews.

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Part 2: The IC review process

- 1.9 IC review procedures are found in Part VII of the FOI Act. The IC review process is intended to be an informal, non-adversarial and timely means of external merits review of FOI decisions made by agencies and ministers. Part 10 of the FOI Guidelines, to which agencies and ministers must have regard when performing a function or exercising a power under the FOI Act, sets out in detail the process and underlying principles of IC review.

Making an application for IC review

- 1.10 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. The online form is located at: https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICR_10.
- 1.11 Where it is not possible for an application to be made online, applications may be sent to the OAIC by:

Postal address [GPO Box 5218](#)
[Sydney NSW 2001](#)

Email address FOIDR@oaic.gov.au

Fax [+61 2 9284 9666](tel:+61292849666)

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- 1.12 An IC review application must, at a minimum, include the following contact details:

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• mail to FOI Regulatory Group, GPO Box 5218, Sydney NSW 2001. ¶

- 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
 - 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).
- 1.13 The OAIC 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 OAIC will consider any notices as received when sent to an applicant's preferred contact.
- 1.14 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
 - 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.
- 1.15 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 OAIC 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.
- 1.16 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.
- 1.17 The applicant must provide the OAIC 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.](#)
 - 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

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documents requested, or within 30 days of a decision granting access to documents to another person¹.

- If an application for IC review is not made within the timeframes in the FOI Act, applicants may apply to the Information Commissioner 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 Information Commissioner 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.

1.18 An application for IC review should also:

- a. identify the **parts of the decision you want 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.

1.19 The OAIC must provide 'appropriate assistance' to a person who wishes to apply for IC review and requires assistance to prepare the IC review application (s 54N(3)).

1.20 Section 54N of the FOI Act sets out the requirements for the contents and delivery of an application for IC review. These requirements include giving the OAIC contact details to which notices can be sent and providing a copy of the FOI decision the applicant wants the Information Commissioner to review. An application that does not comply with these requirements may be considered to be invalid.

During the IC review

Changes to contact details

1.21 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 Information Commissioner may decide not to undertake an IC review, or not continue to undertake an IC review, if the applicant or their nominated representative cannot be contacted after making reasonable attempts (s 54W(a)(iii)).

¹ 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).

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Para 10.46 adds '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', and we may consider whether that detail should also be here.

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Participation in the IC review

General principles

1.22 Applicants must respond to inquiries from the OAIC within the time provided unless there are 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 why additional time is needed and propose a new date for response. Approval of an extension request is at the discretion of the OAIC.

1.23 The OAIC expects that applicants and agencies will engage with the IC review process, with respect and courtesy.²

At the commencement of an IC review

1.24 The OAIC requires agencies and Ministers to engage with the IC review applicant at the commencement of an IC review. The purpose of this engagement is to attempt to resolve the issues identified in the IC review application in an informal and timely way. Agencies are required to contact applicants for IC review shortly after receiving the Information Commissioner's notice of IC review under s 54Z to arrange a suitable time for the engagement process. 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)).

1.24 The Information Commissioner may use any technique the Information Commissioner considers appropriate to facilitate an agreed resolution of the matters at issue in the IC review (such as alternative dispute resolution processes - s 55(2)(b)). Where appropriate, and following the compulsory engagement process described above, the OAIC may invite applicants to attend a teleconference to discuss the issues in dispute in the IC review with the agency's or Minister's office and to explore options for resolution, with a view to reaching agreement on some or all of the matters at issue in the IC review.

Receiving revised decisions under s 55G

1.25 An agency or minister may make a 'revised decision' under s 55G of the FOI Act during an IC review, giving access to further material. 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

1.26 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.

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² OAIC service charter.

- 1.27 Applicants will be invited to make written submissions after the initial triage and early resolution process is complete, and once the application has been assigned to a review adviser for substantive review/case management. First, the agency or Minister will be asked to make submissions in support of the IC reviewable decision. The agency or Minister will send the applicant a copy of their submissions at the same time as they are sent to the OAIC. The applicant will then have the opportunity to make submissions addressing any issues raised by the agency or the Minister. The applicant is required to send their submissions to the agency or Minister at the same time as they are sent to the OAIC.
- 1.28 The Information Commissioner will generally give the parties (both the applicant and the agency or Minister) 4 weeks to make their submissions.
- 1.29 The Information Commissioner will not accept any further submissions from either party to the IC review unless the Information Commissioner has requested them.
- 1.30 The Information Commissioner will contact the parties after receipt of submissions if procedural fairness requirements have been identified. For information on procedural fairness see [3.15] — [3.31] of Part 3 of the FOI Guidelines.
- 1.31 The OAIC may provide a preliminary view at any time during the IC review. This will outline the case officer's preliminary thinking on the issues in dispute in the IC review. The applicant may be invited in some cases to withdraw their IC review application, [or make submissions in response to a preliminary view](#), depending on the views expressed in the preliminary view.
- 1.32 The IC review application and any attachments will be shared with the agency or Minister, as well as any other parties to the review, unless there is a reason not to do so. Any other information and submissions provided to the OAIC by the applicant will be made available to the other parties to the IC review.
- 1.33 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.
- 1.34 Generally, submissions should be made in writing and sent by email or pre-paid post. In limited circumstances, if an applicant is unable to provide written submissions, the OAIC may agree to accept verbal submissions by telephone.

Information Commissioner decisions

- 1.35 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.
- 1.36 When the Information Commissioner makes a decision on IC review under s 55K of the FOI Act, the Information Commissioner will quote or summarise the submissions in the published decision. If a confidential submission is relied on by the Information Commissioner in making a decision on the IC review, this will be noted in the decision without revealing the confidential material.
- 1.37 To protect against the unreasonable disclosure of personal information, the Information Commissioner will consider whether identifying information should be included in published decisions. Natural persons may opt not 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: Procedure for IC review of specific types of decisions

Deemed access refusal decisions

- 1.38 A 'deemed access refusal' occurs when the statutory time for making a decision on an FOI request for access to a document has expired and notice of the decision has not been given. In these circumstances the agency or Minister is 'deemed' to have refused the FOI request. Where the applicant applies for IC review of a deemed access refusal decision, the OAIIC will make inquiries with the agency or Minister.
- 1.39 If, during the IC review, the agency or Minister sends the applicant a written decision on the applicant's FOI request, the OAIIC will confirm with the applicant whether they are satisfied with the decision. Applicants who are satisfied with the decision and do not wish to proceed with the IC review must advise the OAIIC in writing that they withdraw their application for IC review. Applicants who are not satisfied with the agency's or Minister's decision must explain why they disagree with the decision and the basis on which they wish to proceed with the IC review. If the applicant does not respond to the OAIIC's correspondence, the Information Commissioner may decide not to undertake an IC review on the basis that the applicant has failed to cooperate in progressing the IC review application without reasonable excuse (s 54W(a)(ii)) or for non-compliance with the procedure direction (s 54W(c)).

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Access refusal decisions

- 1.40 An 'access refusal decision' means (s 53A):
- a decision refusing to give access to a document in accordance with a request
 - a decision giving access to a document, but not all the documents, to which the request relates
 - a decision purporting to give access to all documents to which a request relates, but not actually giving that access
 - a decision to defer access to a document for a specified period (s 21) (see Part 3 of the Guidelines)
 - a decision relating to the imposition or amount of a charge (s 29)
 - a decision to give access to a document to a 'qualified person' (where disclosing the information to the applicant might be detrimental to the applicant's physical or mental health or well-being) (s 47F(5))
 - a decision refusing to amend a record of personal information in accordance with an application (s 48)
 - a decision refusing to annotate a record of personal information in accordance with an application (s 48).
- 1.41 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)).

- 1.42 Given that the agency or Minister bears this onus, it will generally be necessary to undertake inquiries or seek information from the agency or Minister before inviting comment from applicants.

Access grant decisions

- 1.43 An 'access grant decision' means a decision to grant access to a document where there is a requirement to consult a third party (s 53B). Such decisions involve granting the FOI applicant access to information or documents following consultation.
- 1.44 In an IC review of an access grant decision, it is the IC review applicant who bears the onus of establishing that a decision refusing the FOI request is justified, or that the Information Commissioner should give a decision adverse to the FOI applicant (s 55D(2)).
- 1.45 IC review applicants will generally be invited to provide information or submissions which explain why the agency's or Minister's decision is wrong before comment is invited from the agency or Minister.

Part 4: Non-compliance with this direction

- 1.46 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 review as outlined in s 54W(c). This means that, in these cases, the review will be finalised.
- 1.47 Applicants will be provided with the opportunity to explain why the Information Commissioner should not finalise the IC review under s 54W(c) of the FOI Act before a decision is made.

Attachment B

Summaries of updates and agencies' submissions

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
1.8 – Direction has effect from 1 July 2023	<ul style="list-style-type: none"> N/A 	<p><u>Updated:</u></p> <ul style="list-style-type: none"> This Direction has effect from 1 July 2024. The update is not in response to agencies' submissions. <p><u>Comments:</u></p> <ul style="list-style-type: none"> As stated in the corresponding EB on the procedure direction for agencies (D2024/007050), we should potentially have a separate process for backlog matters. We could state, for example: <p><i>For IC review applications received before 1 July 2024, agencies and ministers must have regard to Part 10 of the FOI Guidelines issued under s 93A of the FOI Act which sets out the general principles and expectations of the Information Commissioner regarding IC reviews. Specific directions may be made in the context of these IC reviews.</i></p>

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>1.13 – OAIC contacting applicants</p> <ul style="list-style-type: none"> Paragraph 1.13 explains that the OAIC will contact applicants using their preferred contact method. Paragraph 1.13 also states ‘Where an applicant has listed a preferred contact method as well as other contact information, the OAIC will consider any notices as received when sent to an applicant’s preferred contact’. 	<ul style="list-style-type: none"> The AAT submits that we may wish to consider referring to an exception where there is evidence of non-receipt, such as a returned letter or email non delivery message. 	<p><u>Not update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> Note that the existing IC review procedure for applicants contains the same wording at para 1.13. In practice, if we cannot contact an applicant, we may not be able to continue with the IC review and would consider finalising the IC review under s 54W(a)(iii) (cannot contact applicant after making reasonable attempts). We consider that it is not worthwhile discussing our power under s 54W(1)(a)(iii) here, at the beginning of the procedure direction.
<p>1.15 – Who can be an IC review applicant?</p> <ul style="list-style-type: none"> Paragraph 1.15 refers to s 54L(3), namely that an IC review application may be made by the person who made the request to which the decision relates, and the proceeding paragraphs 1.16 to 1.20 set out the requirements for the IC review application. 	<ul style="list-style-type: none"> The AAT queries whether the requirements for IC review applications of access grant decisions (s 54M) are the same as those discussed at paragraphs 1.16 to 1.20. 	<p><u>Update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> Update para 1.15 to refer to s 54M(3) (application for IC review of access grant decisions), given that the information requested in the following paragraphs can apply to applications for IC review of access grant decisions. Minor updates may be required to following paragraphs, such as to para 1.18(c) so that we refer to ‘wrongly granted’ rather than ‘wrongly refused’.

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>1.17(a) – Information that must be provided with IC review application:</p> <ul style="list-style-type: none"> Paragraph 1.17 states that ‘The applicant must provide the OAIC with about the FOI decision, in particular (a) ... (b) ... (c) ... (d) ...’. Paragraph 1.17(a) states that the applicant should say whether the decision under review is an original decision or internal review decision, and notes ‘it is usually better to seek internal review first ...’ (emphasis added) 	<ul style="list-style-type: none"> Defence proposes that we consider making internal review compulsory, in circumstances which allow it. This would allow for agencies and ministers to have further meaningful engagement with the applicant before they seek an 1C review in an attempt to resolve the issues in an informal and timely way, thus reducing the workload for the OAIC. ATO submits that it is unclear whether there will be any requirement on the applicant to either seek internal review or provide details on why they did not consider it appropriate in the circumstances (ATO). 	<p><u>Not update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> Requiring applicants to seek internal review before seeking IC review is outside the scope of the procedural direction, and would require legislative change. We could consider making clearer by way of a separate dot point that, for example ‘applicants have a choice between applying for internal or IC review of a decision, unless the decision was made by the Minister or personally by the principal officer of an agency, or is a deemed access refusal decision. In those cases, applicants must directly apply for IC review.
<p>1.17(b) – Information to be provided with IC review application</p> <ul style="list-style-type: none"> Paragraph 1.17(b) notes that ‘In most cases, an application for IC review must be made within 60 days of the applicant being notified of the ... decision ...’ (emphasis added) 	<ul style="list-style-type: none"> The AAT submits that we may wish to consider whether the date of receipt of the decision is also relevant. 	<p><u>Not update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> Para 1.13 (above para 1.17) says ‘the OAIC will consider any notices as received when sent ...’. Given that agencies and the OAIC mostly send notices by email, we consider that no change is required to distinguish between the date a notice is given and the date received. The 60 day time limit for applying for IC review of an access refusal decision is also generous, which lessens the need to distinguish between when a notice is given, and received.
<p>1.17 (general) Agency reference number</p>	<ul style="list-style-type: none"> AFP submits that applicants should also be required to provide the agency reference number for the FOI decision. 	<p><u>Not update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> The applicant is already generally required to provide a copy of the decision (s 54N(1)(b)), which should state the agency reference number.

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>1.18 – Further information to be provided with IC review application:</p> <ul style="list-style-type: none"> Paragraph 1.18 advises that ‘An application for IC review should also: (a) ... (b) ... (c) ... (d) ...’, such as the aspects of the decision about which they seek the IC review. (emphasis added) 	<ul style="list-style-type: none"> ATO submits that given the mandatory consultation requirement proposed to be put on agencies it would appear appropriate for applicants to be required to provide the information set out in this paragraph prior to any consultation occurring. ATO also queries whether a failure to provide this information would be considered a ‘failure to engage’. 	<p><u>Not update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> Providing the information listed in para 1.18 is already framed as a requirement, stating ‘should’. The power to finalise an IC review for failure to cooperate (s 54W(a)(ii) is discussed in the second section of this part of the direction (under the subheading During the IC review), and does not need to be discussed in this section, the first section (under the subheading Making an application for IC review). We are required to provide appropriate assistance to a person who wishes to make an IC review application, and requires assistance (s 54N(3)), and therefore it is not appropriate to emphasise the power to finalise an IC review at the application stage).
<p>1.18(a) – Further requirements of IC review application</p> <ul style="list-style-type: none"> Paragraph 1.18(a) says that an application should ‘identify the aspect(s) of the ... decision about which the IC review is sought’. 	<ul style="list-style-type: none"> AGD submits that this wording may be confusing for some readers, and could alternatively say “identify the parts of the decision you want the Information Commissioner to review”. Defence submits that at para 1.18, the revisions suggest that an IC review application should identify why the agency's or minister's decision is wrong. Defence proposes making this compulsory, saying that would assist the agency or minister to better understand and resolve the issues in a meaningful, informal and timely way. 	<p><u>Update</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> Update in line with AGD’s proposal ‘identify the parts of the decision you want the Information Commissioner to review’. In relation to Defence’s submission, we note that providing the information listed in para 1.18 is already framed as a requirement, stating ‘should’.

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>1.23</p> <p>Engagement to resolve issues (issue 1)</p>	<ul style="list-style-type: none"> AAT submits that engagement should only be required if there has been no internal review of the decision. 	<p><u>Update</u></p> <ul style="list-style-type: none"> Clarify in both applicants and agencies procedure directions that engagement would not be required if they have evidence of engagement with the applicant that is above their duty to take reasonable steps to assist the person to make the request in a manner that complies with s 15 (s 15(3)), such as during an internal review process.
<p>1.23</p> <p>Engagement to resolve issues (issue 2)</p> <ul style="list-style-type: none"> Paragraph 1.23 states 'Agencies are required to contact applicants for IC review shortly after the IC review application is lodged to arrange a suitable time for the engagement process.' (emphasis added) 	<ul style="list-style-type: none"> AAT, AFP, and the Commonwealth Ombudsman submit that paragraph 1.23 should say that agencies are required to contact applicants to arrange the engagement after receiving the s 54Z notice. AFP in particular notes that there can be a delay between an IC review application and s 54Z notice. 	<p><u>Update</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> Consider updating para 1.23 to say 'after receiving the OAIC's notice of IC review under s 54Z'.
<p>1.23</p> <p>Engagement to resolve issues (issue 3)</p>	<ul style="list-style-type: none"> ATO submits it would also be helpful to provide applicants with further details about what is expected of them in terms of participating in agency engagement and that simply attending a meeting with no intention to attempt to resolve the review application would be not considered appropriate 'engagement'. 	<p><u>Update</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> Consider updating para 1.23 to say that the engagement may be more likely to resolve the matter if both parties are well prepared for the engagement. Consider updating para above, para 1.22 to discuss respectful engagement.

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
<p>1.31 – Preliminary view</p> <ul style="list-style-type: none"> Paragraph 1.31 states 'The OAIIC may provide a preliminary view at any time ... The applicant may be invited in some cases to withdraw the IC review application, depending on the views expressed in the preliminary view'. 	<ul style="list-style-type: none"> The AAT submits that if there is an opportunity for the parties to provide information in response to the preliminary view, it may be useful to state this. Such a view may raise a fact or issue that can be addressed. 	<p><u>Update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> Update to clarify that the OAIIC will invite the applicant to withdraw or make submissions in response to a preliminary view, in line with paras [10.60] of the draft FOI Guidelines (D2022/009530) which says: <p><i>10.60 ... the OAIIC's IC review officer may review the material submitted by both parties and provide a preliminary view as to the merits 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.</i></p>
<p>Revised decisions are not referred to in the draft procedure direction</p>	<ul style="list-style-type: none"> N/A (observed by OAIIC) 	<p><u>Update.</u></p> <p><u>Comment:</u></p> <ul style="list-style-type: none"> In part 2, under subheading During the IC review, insert a sub-subheading 'Receiving revised decisions under s 55G' and insert content in line with para 1079 of draft Part 10 of the FOI Guidelines which says: <p><i>A decision does not automatically conclude the IC review. The revised decision becomes the decision under review (s 55G(2)(b)). The OAIIC will generally consult the IC review applicant as to whether they want to continue the IC review on the basis of the revised decision.</i></p> <ul style="list-style-type: none"> Then add references to the Information Commissioner's powers under 54W(a) and 54W(c).

Proposed new paragraph	Summary of agencies' submissions	Updated/not updated, reasons/comments
General	<ul style="list-style-type: none"> AGD queries if it may be simpler and more effective for all users of the FOI system to have a single direction, addressed to both the agency and the applicant. This would ensure all parties have a consistent understanding of the IC review process. By comparison, we note the AAT General Practice Direction (General-Practice-Direction.pdf (aat.gov.au)), under s 18B of the Administrative Appeals Tribunal Act 1975 applies to all parties to a review and appears to provide greater consistency in the explanation of process and responsibilities. 	<p><u>Not update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> <u>We consider that having 2 procedure directions means that we have one particular procedure direction that is targeted to applicants and increases their accessibility to the information that they require to gain the benefit of an IC review.</u>
General	<ul style="list-style-type: none"> AGD submits that it is unclear what practice directions (if any) apply to third parties joined to an IC review or whether the process for an IC review in the directions for agencies and applicants may differ where there are other parties to the review. 	<p><u>Not update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> We consider that third parties do not require a procedure direction, and that their role is sufficiently discussed in the FOI Guidelines. Agencies also engage with third parties by way of consultation, which gives them the required information about the IC review process and their rights and obligations in relation to the IC review.
General	<ul style="list-style-type: none"> ATO submits that a delay in seeking a review by an applicant should be a ground for providing an agency with additional time to respond. 	<p><u>Not update.</u></p> <p><u>Comments:</u></p> <ul style="list-style-type: none"> To give agencies greater time to respond to our requests for information on the basis that the applicant has been granted an extension for applying for an IC review would not further the objects of the FOI Act, which include to facilitate and promote public access to information, promptly and at the lowest reasonable cost.

Proposed direction



Australian Government

Office of the Australian Information Commissioner

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

Contents

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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 (Reviews 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.

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- 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.

2.5 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

2.6 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.

2.7 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.⁸ An application that does not comply with these requirements may be considered to be invalid.

Contact details and assistance

An IC review application must, at a minimum, include the following contact details:

- 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
- 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 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>.

⁸ Section 54N of the FOI Act

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• mail to FOI Regulatory Group, GPO Box 5218, Sydney NSW 2001.¶

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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).

2.8 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.

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2.9 An application for IC review must also include the following information (if relevant):

- 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
- If the applicant requires an interpreter, the language or dialect required
- 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.⁹
- 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.

2.10 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.

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2.11 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)).

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The notice of decision and details about the review request

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2.11 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.

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2.12 The applicant must provide the IC with information about the FOI decision, in particular:

- 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.

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⁹ 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.¹⁰
 - 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:
 - the length of the delay in applying for IC review
 - the reason for the delay
 - any action taken by the applicant regarding the decision after the agency or minister made their decision
 - any prejudice to the agency or the minister and the general public due to the delay and
 - the merits of the substantive IC review application.

2.13 An application for IC review should also:

- identify the parts of the decision you want the Information Commissioner to review,
- state why the applicant disagrees with the agency's or minister's decision
- identify which documents the applicant considers have been wrongly refused or which exemptions have been incorrectly applied
- 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

2.16 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.

¹⁰ 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).

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Para 10.46 adds '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', and we may consider whether that detail should also be here.

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1.21 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 Information Commissioner may decide not to undertake an IC review, or not continue to undertake an IC review, if the applicant or their nominated representative cannot be contacted after making reasonable attempts (s 54W(a)(iii)).¶
Participation in the IC review

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Method of engagement

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

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2.18 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

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2.19 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:

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- 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.

2.20 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)(iii)).

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Responding to requests for information from the OAIC

2.21 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.

2.22 The OAIC expects that applicants and agencies will engage with the IC review process, with respect and courtesy.¹¹

¹¹ OAIC service charter.

Receiving revised decisions under s 55G

2.23 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
- 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.

2.24 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

2.25 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

2.26 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.

2.27 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 the agency or Minister, as well as any other parties to the review, unless there is a reason not to do so. 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

2.32 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.

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At the commencement of an IC review¶
1.243 The OAIC requires agencies and Ministers to engage with the IC review applicant at the commencement of an IC review. The purpose of this engagement is to attempt to resolve the issues identified in the IC review application in an informal and timely way. Agencies are required to contact applicants for IC review shortly after the IC review application is lodgedreceiving the Information Commissioner's notice of IC review under s 54Z to arrange a suitable time for the engagement process. 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)). ¶

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Deleted: <#>1.31 2.28 The OAIC may provide a preliminary

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2.33 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.

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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.¹² 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 commence or finalise the IC review.

Elizabeth Tydd,
Acting Australian Information Commissioner

DATE

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Commented [ET19]: Is this our process - Im not sure about this because it's a counter balance in some circumstances. I am comfortable to name applicants. Can you advise please?

Moved up [1]: Access refusal decisions

1.40 An 'access refusal decision' means (s 53A):

- a decision refusing to give access to a document in accordance with a request
- a decision giving access to a document, but not all the documents, to which the request relates
- a decision purporting to give access to all documents to which a request relates, but not actually giving that access
- a decision to defer access to a document for a specified period (s 21) (see Part 3 of the Guidelines)
- a decision relating to the imposition or amount of a charge (s 29)
- a decision to give access to a document to a 'qualified person' (where disclosing the information to the applicant might be detrimental to the applicant's physical or mental health or well-being) (s 47F(5))
- a decision refusing to amend a record of personal information in accordance with an application (s 48)
- a decision refusing to annotate a record of personal information in accordance with an application (s 48)

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Attachment B

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¹² Section 54W(c) of the FOI Act

From: [ESLICK, Jessica](#)
To: [OAIC - ACFOI](#)
Cc: [PEEL, Sara](#)
Subject: Doc 2 New TRIM links for procedure directions/comments on timeframes
Date: Tuesday, 14 May 2024 4:33:00 PM
Attachments: [image001.jpg](#)
[image002.jpg](#)
[image003.jpg](#)

Dear Rocelle

Further to this morning's MGE meeting, I have created 2 new documents for the procedure directions (PDs), giving them new TRIM links, and accepted all changes:

- Procedure direction for agencies: [D2024/012823](#)
- Procedure direction for applicants: [D2024/012824](#)

The PD for applicants has several comments that still need to be addressed (I have not started addressing comments).

The PD for agencies has fewer comments (I only addressed one minor formatting comment). Furthermore, in light of our meeting of 9 May 2024, and some of your queries about timeframes in the FAQs on the PD for agencies document ([D2024/012089](#)), I have made further comments to the PD for agencies. In particular, I have set out below all timeframes in the PD for agencies, and highlighted in yellow where I have made comments against 4 paragraphs in the PD for agencies:

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Please advise whether I can work on the PDs further toward their finalisation.

Jess

Jessica Eslick (she/her)
Senior Adviser
Monitoring, Guidance and Engagement



Freedom of Information Branch
Office of the Australian Information Commissioner
Sydney
P +61 2 9942 4119 **E** Jessica.Eslick@oaic.gov.au

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Proposed direction



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 (Reviews 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.
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Commented [RA1]: Note: Included for consistency with Agencies PD

Commented [ET2]: We have abbreviated once already

Commented [ET3]: Can we hyperlink here please

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.
- 2.5 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

- 2.6 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_10.⁷
- 2.7 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.⁸ An application that does not comply with these requirements may be considered to be invalid.

Contact details and assistance

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 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>.

⁸ Section 54N of the FOI Act

Commented [ET4]: Rocelle can you check that this is able to be uploaded

Commented [ET5]: Should we continue to provide post I do worry about accessibility and my preference is to retain

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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).

2.8 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.

2.9 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.⁹

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.

2.10 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.

Commented [E8]: Added 4 Apr 2024.

2.11 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)).

Commented [ET9]: Apologies Ive created a problem with numbering here

The notice of decision and details about the review request

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2.11 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.

2.12 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.

Commented [E11]: Updated wording slightly to try to make clearer per Attachment B on 4 Apr 2024.

⁹ 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.¹⁰
 - 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.

Commented [JE12]: The draft Part 10 of the FOI Guidelines (D2022/009530) cover s 54T at para 10.46 and I have put a comment at that para noting that the same kind of information is here.

Para 10.46 adds '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', and we may consider whether that detail should also be here.

2.13 An application for IC review should also:

- a. identify the parts of the decision you want 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.

Commented [E13]: Updated 4 Apr 2024.

Commented [ET14]: In this doc we use a capital M but in others we use lower case, is there a reason?

During the IC review

Engagement between parties at the commencement of an IC review

2.16 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.

¹⁰ 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).

Method of engagement

- 2.17 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 the engagement process. The OAIC will not be involved in making such arrangements or in attending the telephone or video conference.
- 2.18 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

- 2.19 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.
- 2.20 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

- 2.21 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.
- 2.22 The OAIC expects that applicants and agencies will engage with the IC review process, with respect and courtesy.¹¹

Commented [RA15]: Format to be addressed.

¹¹ [OAIC service charter](#).

Receiving revised decisions under s 55G

2.23 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
- 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.

2.24 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).

Commented [JE16]: Added 4 Apr 2024.

Commented [RA17]: While there is a separate section for agencies on deemed refusals, I think the process is largely for agencies to understand and the takeaway for applicants is they may receive a s 55G decision.

Submissions

2.25 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

- 2.26 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.
- 2.27 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 the agency or Minister, as well as any other parties to the review, unless there is a reason not to do so. 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

- 2.32 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.

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Acting Australian Information Commissioner

DATE

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From: [OAIC - ACFOI](#)
To: [ESLICK, Jessica](#)
Cc: [PEEL, Sara](#)
Subject: Doc 4 RE: New TRIM links for procedure directions/comments on timeframes [SEC=OFFICIAL]
Date: Tuesday, 14 May 2024 6:13:32 PM
Attachments: [image001.jpg](#)
[image002.jpg](#)
[image003.jpg](#)

Thanks Jess – much appreciated!

I've addressed all of those timeline issues and any residual comments for Liz. I would be grateful if you could please prepare final versions and double check the paragraph numbering (there is some weird formatting issue!) and then we can move to issue with Part 10.

Thanks again for your work on this!

From: ESLICK, Jessica <Jessica.Eslick@oaic.gov.au>
Sent: Tuesday, May 14, 2024 4:33 PM
To: OAIC - ACFOI <ACFOI@oaic.gov.au>
Cc: PEEL, Sara <Sara.Peel@oaic.gov.au>
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Jessica Eslick (she/her)

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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.

2.5 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

2.6 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_10.⁷

2.7 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.⁸ An application that does not comply with these requirements may be considered to be invalid.

Contact details and assistance

An IC review application must, at a minimum, include the following contact details:

- 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
- 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 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>.

⁸ Section 54N of the FOI Act

Commented [ET4]: Rocelle can you check that this is able to be uploaded

Commented [RA5R4]: Yes

Commented [ET6]: Should we continue to provide post I do worry about accessibility and my preference is to retain

Commented [RA7R6]: Further information about providing by post is set out at the link in footnote 7

Commented [ET8]: Ive repositioned as there is duplication and accessibility issues to be addressed

Commented [ET9]: Heading please

- 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).
- 2.8 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.
- 2.9 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.⁹
 - 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.
- 2.10 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.
- 2.11 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)).

Commented [E10]: Added 4 Apr 2024.

Commented [ET11]: Apologies Ive created a problem with numbering here

Commented [ET12]: Heading please

The notice of decision and details about the review request

- 2.12 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.
- 2.13 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.

Commented [E13]: Updated wording slightly to try to make clearer per Attachment B on 4 Apr 2024.

⁹ 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.¹⁰
 - 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.

Commented [JE14]: The draft Part 10 of the FOI Guidelines (D2022/009530) cover s 54T at para 10.46 and I have put a comment at that para noting that the same kind of information is here.

Para 10.46 adds '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', and we may consider whether that detail should also be here.

2.14 An application for IC review should also:

- a. identify the parts of the decision you want 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.

Commented [E15]: Updated 4 Apr 2024.

Commented [ET16]: In this doc we use a capital M but in others we use lower case, is there a reason?

Commented [RA17R16]: Lower case minister

During the IC review

Engagement between parties at the commencement of an IC review

2.15 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.

¹⁰ 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).

Method of engagement

- 2.16 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 the engagement process. The OAIC will not be involved in making such arrangements or in attending the telephone or video conference.
- 2.17 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

- 2.18 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.
- 2.19 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

- 2.20 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.
- 2.21 The OAIC expects that applicants and agencies will engage with the IC review process, with respect and courtesy.¹¹

Commented [RA18]: Format to be addressed.

¹¹ [OAIC service charter](#).

Receiving revised decisions under s 55G

2.22 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
- 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.

2.23 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).

Commented [JE19]: Added 4 Apr 2024.

Commented [RA20]: While there is a separate section for agencies on deemed refusals, I think the process is largely for agencies to understand and the takeaway for applicants is they may receive a s 55G decision.

Submissions

2.24 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

2.25 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.

2.26 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.

2.27 The IC review application and any attachments will be shared with the agency or Minister, as well as any other parties to the review, unless there is a reason not to do so. 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

2.28 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

2.29 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.

- 2.30 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.
- 2.31 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.

Commented [ET21]: Is this our process - Im not sure about this because it's a counter balance in some circumstances. I am comfortable to name applicants. Can you advise please?

Commented [RA22R21]: This is our usual process - de-identification of the IC review applicant mitigates the risk of identifying third parties also

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.¹² 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 commence or finalise the IC review .

Elizabeth Tydd
Acting Australian Information Commissioner

DATE

¹² Section 54W(c) of the FOI Act

From: [ESLICK, Jessica](#)
To: [OAIC - ACFOI](#)
Cc: [PEEL, Sara](#)
Subject: Doc 6 RE: New TRIM links for procedure directions/comments on timeframes [SEC=OFFICIAL]
Date: Wednesday, 15 May 2024 12:10:00 PM
Attachments: [image001.jpg](#)
[image002.jpg](#)
[image004.jpg](#)

Dear Rocelle

Please now find the PD for applicants here: [D2024/012824](#).

I have amended the paragraph formatting issue, and in this case I have amended formatting issues with the footnotes. I have also deleted all comments except for one in which I responded to Liz, and a few that you made only yesterday evening (in case Liz needs to see them?).

We also say 'Proposed direction' at top of document and I have put a comment querying when to remove this.

I can fully finalise, but I thought I should bring the above to your attention before entirely deleting all comments, and removing 'Proposed direction'.

Jess

From: ESLICK, Jessica
Sent: Wednesday, May 15, 2024 10:32 AM
To: OAIC - ACFOI <ACFOI@oaic.gov.au>
Cc: PEEL, Sara <Sara.Peel@oaic.gov.au>
Subject: RE: New TRIM links for procedure directions/comments on timeframes [SEC=OFFICIAL]
Hi Rocelle

I have worked through the PD for agencies: [D2024/012823](#)

My last questions on timeframes are:

- Para 2.11 – I updated the first dot point to say 15 business days (regarding revised decisions giving access in full) – should the second dot point (regarding revised decisions giving access in part) remain with a 10 business day timeframe, or also be updated to 15 business days?
- Annexure A.1 – deemed decisions – I have added 'generally' regarding 5 business days for s 54V response at para 2.2 – should Annexure A.2 – section 24A refusals – be updated in the same fashion? Para 2.2 of that annexure says 5 business days, without saying 'generally'

My other questions are:

- Should I now insert para cross references wherever there are yellow highlights?
- Should I fix the footnote formatting (different size font, indents, etc)

While you consider, I will work through the PD for applicants.

Jess

From: AGO, Rocelle <Rocelle.Ago@oaic.gov.au>
Sent: Wednesday, May 15, 2024 10:01 AM
To: ESLICK, Jessica <Jessica.Eslick@oaic.gov.au>
Cc: PEEL, Sara <Sara.Peel@oaic.gov.au>
Subject: RE: New TRIM links for procedure directions/comments on timeframes [SEC=OFFICIAL]
Thanks Jess please update the timeframes and delete all comments.

From: ESLICK, Jessica <Jessica.Eslick@oaic.gov.au>
Sent: Wednesday, May 15, 2024 10:00 AM
To: AGO, Rocelle <Rocelle.Ago@oaic.gov.au>
Cc: PEEL, Sara <Sara.Peel@oaic.gov.au>

Subject: RE: New TRIM links for procedure directions/comments on timeframes [SEC=OFFICIAL]

Hi Rocelle

I am tidying up the PDs now. Could you confirm I am right to simply update timeframes (e.g. from 14 to 15 business days), and delete comments between you and me about them (or does Liz need to see these updates and comments)?

Jess

From: OAIC - ACFOI <ACFOI@oaic.gov.au>

Sent: Tuesday, May 14, 2024 6:13 PM

To: ESLICK, Jessica <Jessica.Eslick@oaic.gov.au>

Cc: PEEL, Sara <Sara.Peel@oaic.gov.au>

Subject: RE: New TRIM links for procedure directions/comments on timeframes [SEC=OFFICIAL]

Thanks Jess – much appreciated!

I've addressed all of those timeline issues and any residual comments for Liz. I would be grateful if you could please prepare final versions and double check the paragraph numbering (there is some weird formatting issue!) and then we can move to issue with Part 10.

Thanks again for your work on this!

From: ESLICK, Jessica <Jessica.Eslick@oaic.gov.au>

Sent: Tuesday, May 14, 2024 4:33 PM

To: OAIC - ACFOI <ACFOI@oaic.gov.au>

Cc: PEEL, Sara <Sara.Peel@oaic.gov.au>

Subject: New TRIM links for procedure directions/comments on timeframes [SEC=OFFICIAL]

Dear Rocelle

Further to this morning's MGE meeting, I have created 2 new documents for the procedure directions (PDs), giving them new TRIM links, and accepted all changes:

- Procedure direction for agencies: [D2024/012823](#)
- Procedure direction for applicants: [D2024/012824](#)

The PD for applicants has several comments that still need to be addressed (I have not started addressing comments).

The PD for agencies has fewer comments (I only addressed one minor formatting comment).

Furthermore, in light of our meeting of 9 May 2024, and some of your queries about timeframes in the FAQs on the PD for agencies document ([D2024/012089](#)), I have made further comments to the PD for agencies. In particular, I have set out below all timeframes in the PD for agencies, and highlighted in yellow where I have made comments against 4 paragraphs in the PD for agencies:

- Para 2.11 – 14 and 10 business days to give access to documents further to revised decisions in full, and in part, respectively (I have added comment to consider whether these timeframes should be the same)
- Para 3.3 – Generally 5 business days to respond to s 54V notices (I have added comment that 'generally' has been inserted)
- Para 3.6 – 28 business days for responding to s 54Z notice (I have added comment 'to discuss updating to 30 business days')
- Para 3.18 – generally 10 business days to respond to information gathering power notices
- Para 3.33 – 4 weeks to make submissions in event of third party consultation during IC review (I have added comment 'To consider updating to business days in line with other timeframes in direction')
- Para 3.36 – 28 days to advise whether implemented s 55K decision or whether will be seeking review
- Annexure A.1 (deemed access refusal decisions)

- para 2.2 – 5 business days to respond to s 54V notices
- para 2.3 – 15 business days of the commencement of the review process, to make a revised decision or provide submissions
- para 3.3 - 15 business days to respond to the IC's written direction
- Annexure A.2 (access refusal decisions based on s 24A – documents cannot be found or do not exist)
 - Para 2.2 – 5 business days to respond to s 54V notices
 - Para 2.3 – 15 business days to provide information, including statement of reasons
 - Para 4.3 – 15 business days to respond to the IC's written direction and request for information including provision of an adequate statement of reasons

Please advise whether I can work on the PDs further toward their finalisation.

Jess



Jessica Eslick (she/her)

Senior Adviser

Monitoring, Guidance and Engagement

Freedom of Information Branch

Office of the Australian Information Commissioner

Sydney

P +61 2 9942 4119 **E** Jessica.Eslick@oaic.gov.au

The OAIC acknowledges Traditional Custodians of Country across Australia and their continuing connection to land, waters and communities. We pay our respect to First Nations people, cultures and Elders past and present.

[Subscribe to Information Matters](#)

Proposed direction

Commented [JE1]: Query at what stage to remove.



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.

Commented [ET2]: Can we hyperlink here please

Commented [JE3R2]: Added to Part 10 on website, understanding that Comms will use the same URL for the updated Part 10.

- 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.
- 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_10.⁷
- 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.⁸ 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 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>.

⁸ Section 54N of the FOI Act.

Commented [ET4]: Rocelle can you check that this is able to be uploaded

Commented [RA5R4]: Yes

- 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.⁹
 - 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.

⁹ 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.¹⁰
 - 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 you want 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

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the engagement process. The OAIIC 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 OAIIC

- 2.22 Applicants must respond to requests for information from the OAIIC 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 OAIIC 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 OAIIC.
- 2.23 The OAIIC expects that applicants and agencies will engage with the IC review process, with respect and courtesy.¹¹

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

¹¹ [OAIIC 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 OAIIC 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 OAIIC'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 OAIIC 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.
- 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 the agency or Minister, as well as any other parties to the review, unless there is a reason not to do so. Any other information and submissions provided to the OAIIC 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 OAIIC to make a submission in confidence. The applicant must give reasons why they want to make a confidential submission and the OAIIC will consider those reasons and decide whether to accept the submission on a confidential basis. If the OAIIC 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.

Commented [ET6]: Is this our process - Im not sure about this because it's a counter balance in some circumstances. I am comfortable to name applicants. Can you advise please?

Commented [RA7R6]: This is our usual process - de-identification of the IC review applicant mitigates the risk of identifying third parties also

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.¹² 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 commence or finalise the IC review.

Elizabeth Tydd
Acting Australian Information Commissioner

DATE

¹² Section 54W(c) of the FOI Act.

From: [OAIC - ACFOI](#)
To: [ESLICK, Jessica](#)
Cc: [PEEL, Sara](#)
Subject: Doc 8 RE: New TRIM links for procedure directions/comments on timeframes [SEC=OFFICIAL]
Date: Wednesday, 15 May 2024 12:50:10 PM
Attachments: [image001.jpg](#)
[image002.jpg](#)
[image003.jpg](#)

Hi Jess

Thanks so much!

PD agencies: I've responded to your comments and resolved the 'generally' issue for deemed – not required as I've changed the wording under 'preliminary inquiries' from 'will make inquiries' to 'may make inquiries'.

PD applicants: I've noted the top as 'Direction to commence 1 July 2024' – it may be useful to include a similar heading in the PD agencies document?

Let's finalise, thank you!

Kind regards

Rocelle

From: ESLICK, Jessica <Jessica.Eslick@oaic.gov.au>
Sent: Wednesday, May 15, 2024 12:10 PM
To: OAIC - ACFOI <ACFOI@oaic.gov.au>
Cc: PEEL, Sara <Sara.Peel@oaic.gov.au>
Subject: RE: New TRIM links for procedure directions/comments on timeframes [SEC=OFFICIAL]

Dear Rocelle

Please now find the PD for applicants here: [D2024/012824](#).

I have amended the paragraph formatting issue, and in this case I have amended formatting issues with the footnotes. I have also deleted all comments except for one in which I responded to Liz, and a few that you made only yesterday evening (in case Liz needs to see them?).

We also say 'Proposed direction' at top of document and I have put a comment querying when to remove this.

I can fully finalise, but I thought I should bring the above to your attention before entirely deleting all comments, and removing 'Proposed direction'.

Jess

From: ESLICK, Jessica
Sent: Wednesday, May 15, 2024 10:32 AM
To: OAIC - ACFOI <[ACFOI@oaic.gov.au](#)>
Cc: PEEL, Sara <[Sara.Peel@oaic.gov.au](#)>
Subject: RE: New TRIM links for procedure directions/comments on timeframes [SEC=OFFICIAL]

Hi Rocelle

I have worked through the PD for agencies: [D2024/012823](#)

My last questions on timeframes are:

- Para 2.11 – I updated the first dot point to say 15 business days (regarding revised decisions giving access in full) – should the second dot point (regarding revised decisions giving access in part) remain with a 10 business day timeframe, or also be updated to 15 business days?
- Annexure A.1 – deemed decisions – I have added 'generally' regarding 5 business days for s 54V response at para 2.2 – should Annexure A.2 – section 24A refusals – be updated in the same fashion? Para 2.2 of that annexure says 5 business days, without saying 'generally'

My other questions are:

- Should I now insert para cross references wherever there are yellow highlights?
- Should I fix the footnote formatting (different size font, indents, etc)

While you consider, I will work through the PD for applicants.

Jess

From: AGO,Rocelle <Rocelle.Ago@oaic.gov.au>

Sent: Wednesday, May 15, 2024 10:01 AM

To: ESLICK,Jessica <Jessica.Eslick@oaic.gov.au>

Cc: PEEL,Sara <Sara.Peel@oaic.gov.au>

Subject: RE: New TRIM links for procedure directions/comments on timeframes [SEC=OFFICIAL]

Thanks Jess please update the timeframes and delete all comments.

From: ESLICK,Jessica <Jessica.Eslick@oaic.gov.au>

Sent: Wednesday, May 15, 2024 10:00 AM

To: AGO,Rocelle <Rocelle.Ago@oaic.gov.au>

Cc: PEEL,Sara <Sara.Peel@oaic.gov.au>

Subject: RE: New TRIM links for procedure directions/comments on timeframes [SEC=OFFICIAL]

Hi Rocelle

I am tidying up the PDs now. Could you confirm I am right to simply update timeframes (e.g. from 14 to 15 business days), and delete comments between you and me about them (or does Liz need to see these updates and comments)?

Jess

From: OAIC - ACFOI <ACFOI@oaic.gov.au>

Sent: Tuesday, May 14, 2024 6:13 PM

To: ESLICK,Jessica <Jessica.Eslick@oaic.gov.au>

Cc: PEEL,Sara <Sara.Peel@oaic.gov.au>

Subject: RE: New TRIM links for procedure directions/comments on timeframes [SEC=OFFICIAL]

Thanks Jess – much appreciated!

I've addressed all of those timeline issues and any residual comments for Liz. I would be grateful if you could please prepare final versions and double check the paragraph numbering (there is some weird formatting issue!) and then we can move to issue with Part 10.

Thanks again for your work on this!

From: ESLICK,Jessica <Jessica.Eslick@oaic.gov.au>

Sent: Tuesday, May 14, 2024 4:33 PM

To: OAIC - ACFOI <ACFOI@oaic.gov.au>

Cc: PEEL,Sara <Sara.Peel@oaic.gov.au>

Subject: New TRIM links for procedure directions/comments on timeframes [SEC=OFFICIAL]

Dear Rocelle

Further to this morning's MGE meeting, I have created 2 new documents for the procedure directions (PDs), giving them new TRIM links, and accepted all changes:

- Procedure direction for agencies: [D2024/012823](#)
- Procedure direction for applicants: [D2024/012824](#)

The PD for applicants has several comments that still need to be addressed (I have not started addressing comments).

The PD for agencies has fewer comments (I only addressed one minor formatting comment).

Furthermore, in light of our meeting of 9 May 2024, and some of your queries about timeframes in the FAQs on the PD for agencies document ([D2024/012089](#)), I have made further comments to the PD for agencies. In particular, I have set out below all timeframes in the PD for agencies,

and highlighted in yellow where I have made comments against 4 paragraphs in the PD for agencies:

- Para 2.11 – 14 and 10 business days to give access to documents further to revised decisions in full, and in part, respectively (I have added comment to consider whether these timeframes should be the same)
- Para 3.3 – Generally 5 business days to respond to s 54V notices (I have added comment that 'generally' has been inserted)
- Para 3.6 – 28 business days for responding to s 54Z notice (I have added comment 'to discuss updating to 30 business days')
- Para 3.18 – generally 10 business days to respond to information gathering power notices
- Para 3.33 – 4 weeks to make submissions in event of third party consultation during IC review (I have added comment 'To consider updating to business days in line with other timeframes in direction')
- Para 3.36 – 28 days to advise whether implemented s 55K decision or whether will be seeking review
- Annexure A.1 (deemed access refusal decisions)
 - para 2.2 – 5 business days to respond to s 54V notices
 - para 2.3 – 15 business days of the commencement of the review process, to make a revised decision or provide submissions
 - para 3.3 - 15 business days to respond to the IC's written direction
- Annexure A.2 (access refusal decisions based on s 24A – documents cannot be found or do not exist)
 - Para 2.2 – 5 business days to respond to s 54V notices
 - Para 2.3 – 15 business days to provide information, including statement of reasons
 - Para 4.3 – 15 business days to respond to the IC's written direction and request for information including provision of an adequate statement of reasons

Please advise whether I can work on the PDs further toward their finalisation.

Jess



Jessica Eslick (she/her)

Senior Adviser

Monitoring, Guidance and Engagement

Freedom of Information Branch

Office of the Australian Information Commissioner

Sydney

P +61 2 9942 4119 **E** Jessica.Eslick@oaic.gov.au

The OAIC acknowledges Traditional Custodians of Country across Australia and their continuing connection to land, waters and communities. We pay our respect to First Nations people, cultures and Elders past and present.

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Direction to commence 1 July 2024



Australian Government

Office of the Australian Information Commissioner

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

Contents

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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

Commented [ET1]: Can we hyperlink here please

Commented [JE2R1]: Added to Part 10 on website, understanding that Comms will use the same URL for the updated Part 10.

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.
- 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_10.⁷
- 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.⁸ 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 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>.

⁸ Section 54N of the FOI Act.

Commented [ET3]: Rocelle can you check that this is able to be uploaded

Commented [RA4R3]: Yes

- 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.⁹
 - 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.

⁹ 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.¹⁰
 - 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 you want 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

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the engagement process. The OAIIC 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 OAIIC

- 2.22 Applicants must respond to requests for information from the OAIIC 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 OAIIC 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 OAIIC.
- 2.23 The OAIIC expects that applicants and agencies will engage with the IC review process, with respect and courtesy.¹¹

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

¹¹ [OAIIC 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 OAIIC 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 OAIIC'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 OAIIC 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.
- 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 the agency or Minister, as well as any other parties to the review, unless there is a reason not to do so. Any other information and submissions provided to the OAIIC 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 OAIIC to make a submission in confidence. The applicant must give reasons why they want to make a confidential submission and the OAIIC will consider those reasons and decide whether to accept the submission on a confidential basis. If the OAIIC 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.

Commented [ET5]: Is this our process - Im not sure about this because it's a counter balance in some circumstances. I am comfortable to name applicants. Can you advise please?

Commented [RA6R5]: This is our usual process - de-identification of the IC review applicant mitigates the risk of identifying third parties also

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.¹² 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 commence or finalise the IC review.

Elizabeth Tydd
Acting Australian Information Commissioner

DATE

¹² Section 54W(c) of the FOI Act.