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

Contents

[Part 1: About this direction 2](#_Toc133245607)

[Part 2: The IC review process 2](#_Toc133245608)

[Making an application for IC review 2](#_Toc133245609)

[During the IC review 5](#_Toc133245610)

[Changes to contact details 5](#_Toc133245611)

[Participation in the IC review 5](#_Toc133245612)

[Submissions 5](#_Toc133245613)

[Information Commissioner decisions 6](#_Toc133245614)

[Part 3: Procedure for IC review of specific types of decisions 7](#_Toc133245615)

[Deemed access refusal decisions 7](#_Toc133245616)

[Access refusal decisions 7](#_Toc133245617)

[Access grant decisions 8](#_Toc133245618)

[Part 4: Non-compliance with this direction 8](#_Toc133245619)

# Part 1: About this direction

* 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).
	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.
	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)).
	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)).
	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.
	6. Further information relating to the IC review process is published on the Office of the Australian Information Commissioner’s (OAIC) [website](https://www.oaic.gov.au/). In particular, [Part 10](https://www.oaic.gov.au/freedom-of-information/foi-guidelines/part-10-review-by-the-information-commissioner/) (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.
	7. In addition to this direction, the OAIC service charter, available on our [website](https://www.oaic.gov.au/about-us/our-corporate-information/key-documents/oaic-service-charter/#how-to-make-a-complaint-about-the-services-we-provide), 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.
	8. This direction has effect from 1 July 2023.

# Part 2: The IC review process

* 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 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. 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](https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICR_10).
	2. 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. An IC review application must, at a minimum, include the following contact details:
1. 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
2. a contact telephone number
3. 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. 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. An application for IC review must also include the following information (if relevant):
4. 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
5. If the applicant requires an interpreter, the language or dialect required
6. If the applicant requires any other assistance, the type of assistance required
7. 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. 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.
	2. 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.
	3. The applicant must provide the OAIC with information about the FOI decision, in particular:
8. 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.
9. 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:
		1. the length of the delay in applying for IC review
		2. the reason for the delay
		3. any action taken by the applicant regarding the decision after the agency or Minister made their decision
		4. any prejudice to the agency or the Minister and the general public due to the delay and
		5. the merits of the substantive IC review application.
	1. An application for IC review should also:
10. identify the aspect(s) of the agency’s or Minister’s decision about which the IC review is sought
11. state why the applicant disagrees with the agency’s or Minister’s decision
12. identify which documents the applicant considers have been wrongly refused or which exemptions have been incorrectly applied
13. 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. 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)).
	2. 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. 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. 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.
	2. 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)).
	3. 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.
	4. 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. 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. Applicants will be invited to make written submissions after the initial triage and early resolution process is complete, and once the application has been assignedto 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.
	3. The Information Commissioner will generally give the parties (both the applicant and the agency or Minister) 4 weeks to make their submissions.
	4. The Information Commissioner will not accept any further submissions from either party to the IC review unless the Information Commissioner has requested them.
	5. 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]](https://www.oaic.gov.au/freedom-of-information/freedom-of-information-guidance-for-government-agencies/foi-guidelines/part-3-processing-and-deciding-on-requests-for-access#principles-of-good-decision-making-under-the-foi-act) of Part 3 of the FOI Guidelines.
	6. 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
	7. 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.
	8. 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.
	9. 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. 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. 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.
	3. 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. 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.
	2. 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. An ‘access refusal decision’ means (s 53A):
1. a decision refusing to give access to a document in accordance with a request
2. a decision giving access to a document, but not all the documents, to which the request relates
3. a decision purporting to give access to all documents to which a request relates, but not actually giving that access
4. a decision to defer access to a document for a specified period (s 21) (see Part 3 of the Guidelines)
5. a decision relating to the imposition or amount of a charge (s 29)
6. 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))
7. a decision refusing to amend a record of personal information in accordance with an application (s 48 )
8. a decision refusing to annotate a record of personal information in accordance with an application (s 48).
	1. 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)).
	2. 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. 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.
	2. 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)).
	3. 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. 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.
	2. 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.