

Part 10 —

# Review by the Information Commissioner

Version 1.10, February 2022

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- 10.1 Part 10 of the Guidelines covers the broad principles and procedures in the Information Commissioner review process as set out under Part VII of the FOI Act. This Part also provides guidance to agencies in relation to the practice of the Information Commissioner with respect to the steps in an IC review, the decision and the relevant appeal rights.<sup>1</sup>

## What decisions can the Information Commissioner review?

- 10.2 A person<sup>2</sup> who disagrees with an agency's or minister's decision following a request for access to a document or for amendment or annotation of personal records may apply to the Information Commissioner for review under Part VII (IC review). It is not necessary to go through the agency's internal review process before applying for an IC review. However, 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 an IC review. An agency's internal review process gives the agency an opportunity to reconsider the initial decision, usually at a more senior level, and the result may well meet the applicant's needs in a shorter timeframe than is available in the IC review process. Internal review is not available if the decision was made by a minister or personally by the principal officer of an agency.<sup>3</sup>
- 10.3 The Information Commissioner can review the following decisions by an agency or minister:
- an 'access refusal decision' (s 54L(2)(a), discussed below at [10.6])
  - an 'access grant decision' (s 54M(2)(a), discussed below at [10.7])
  - a refusal to extend the period for applying for internal review under s 54B (s 54L(2)(c))
  - an agency internal review decision made under s 54C (ss 54L(2)(b) and 54M(2)(b)).

## Deemed decisions

- 10.4 The Information Commissioner may also review decisions that are deemed to have been made by an agency or minister where the statutory timeframe was not met. This may happen:
- at first instance (following a request for access to information (s 15AC) or for amendment to a personal record (s 51DA)), or
  - following an application for internal review (where the original decision is taken to have been affirmed under s 54D).
- 10.5 Where a decision is deemed and the Information Commissioner has allowed the agency or minister further time to make an actual decision, and the agency or minister complies with

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<sup>1</sup> The Office of the Information Commissioner has issued a Freedom of Information Regulatory Action Policy which provides guidance on the approach of the Australian Information Commissioner to the exercise of FOI regulatory powers, including in undertaking IC reviews, investigation of FOI complaints and conducting FOI own motion investigations. The Policy is available on the OAIC website, [www.oaic.gov.au](http://www.oaic.gov.au)

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

<sup>3</sup> For detailed advice about internal review, see Part 9 of these Guidelines.

the extension, the actual decision is substituted for the deemed decision for the purposes of the IC review (s 54Y(2)).

## Access refusal decisions

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

## Access grant decisions

- 10.7 An ‘access grant decision’ is defined in s 53B to mean a decision to grant access to a document where there is a requirement to consult with a third party under ss 26A, 27 or 27A. The agency or minister will have decided that the document:
- is not exempt under s 47 (trade secrets or commercially valuable information)
  - is not conditionally exempt under s 47B (Commonwealth-State relations), s 47G (business documents) or s 47F (personal privacy), or
  - is conditionally exempt under ss 47B, 47G or 47F, but access would not be contrary to the public interest (see Part 6 of these Guidelines).
- 10.8 A decision that an applicant’s FOI request falls outside the FOI Act (for example, a decision that a document is not an ‘official document of a minister’<sup>4</sup> or a decision that a document is open to public access as part of a public register where access is subject to a fee<sup>5</sup>) may be reviewed by the Information Commissioner (see [10.104]).

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<sup>4</sup> For example see *Philip Morris Ltd and Treasurer* [2013] AICmr 88.

<sup>5</sup> See for example *Mentink and Australian Federal Police* [2014] AICmr 64.

## Who can seek review?

10.9 Depending on the type of decision, the following table explains who can apply for an IC review.

- where the agency's or minister's decision was an access refusal decision (including a decision on charges and a refusal to amend or annotate a record of personal information) – the person who made the FOI request (that is, the FOI applicant) (s 54L(3))
- where the decision was to grant access – a third party who was consulted under s 26A(2) (s 54M(3)(a))
- where the decision was to grant access – a third party who was invited to make a submission in support of an exemption contention under ss 27 or 27A and did so (s54M(3)(a))
- where the decision was made after internal review of the original access refusal decision – the person who made the request for internal review (that is, the original FOI applicant) (s 54L(3))
- where the agency's decision on internal review was an access refusal decision – the person who made the FOI request (that is, the FOI applicant (s 54L(2)(b))
- where the agency's decision on internal review was an access grant decision – a third party who was invited to make a submission in support of an exemption contention and did so (s 54M(3)(b))
- where the decision was to refuse to extend the period for applying for internal review of an access refusal decision (under s 54B) – the person who was seeking internal review (that is, the original FOI applicant).

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

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

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

## Onus

10.13 In an IC review in relation to an FOI request (s 15) or an application to have personal records amended (s 48), 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 bear in mind their

obligation to use their best endeavours to assist the Commissioner to make the correct or preferable decision (see [10.21]).<sup>6</sup>

- 10.14 In an IC review of an access grant decision, the affected third party has the onus of establishing that a decision refusing the request is justified or that the Information Commissioner should give a decision adverse to the person who made the request (s 55D(2)).

## Principles of the Information Commissioner review process

- 10.15 Review by the Information Commissioner of decisions about access to government documents is designed around several key principles:
- it is a merit review process where the Information Commissioner makes the correct or preferable decision at the time of decision of the Information Commissioner
  - it is intended to be as informal as possible
  - it is intended to be non-adversarial, and
  - it is intended to be timely.

### Merit review

- 10.16 Review by the Information Commissioner is a merit review process. The Commissioner does not simply review the reasons given by the agency or minister, but determines the correct or preferable decision in the circumstances. The Commissioner can access all relevant material, including material that the agency or minister claims is exempt. The Commissioner can also consider additional material or submissions not considered by the original decision maker, including relevant new material that has arisen since the decision was made. For example, for the purpose of deciding whether a document requested by an applicant is conditionally exempt, the Commissioner can take account of contemporary developments that shed light on whether disclosure would be contrary to the public interest. However, the Commissioner cannot determine the exempt status of documents that have become documents of an agency or minister after the date of the applicant's FOI request.<sup>7</sup>
- 10.17 If the Information Commissioner finds that the original decision was not correct in law or not the preferable decision, the decision can be varied or set aside and a new decision substituted. For example, the Commissioner may decide that a document is not an exempt document under the FOI Act or that an access charge was not correctly applied.

### An informal process

- 10.18 IC reviews are intended to be a simple, practical and cost effective method of external merit review. This is consistent with the objects of the FOI Act, which provides that functions and powers are to be performed and exercised, as far as possible, to facilitate

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<sup>6</sup> This requirement is consistent with the general obligation of agencies to act as a model litigant. The nature of this obligation is explained in Appendix B to the *Legal Services Directions 2005*.

<sup>7</sup> *Lobo and Department of Immigration and Citizenship* [2010] AATA 583.

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

- 10.19 Consistent with the object of promoting public access to information, the Information Commissioner will provide appropriate assistance to IC review applicants to make their applications (s 54N(3)), which include explaining, for example, what particulars they must give in their application for review and seeking confirmation about which aspects of the decision they disagree with.
- 10.20 Consistent with the object of prompt and cost-effective access to information, most matters will be reviewed on the papers rather than through formal hearings. Although the Information Commissioner has more formal information gathering powers (see Division 8 of Part VII), documents are usually requested informally from agencies (see [10.100] below). The more formal powers may be used to compel agencies that do not respond to informal requests by the OIAC.

## Non-adversarial

- 10.21 Agencies and ministers must use their best endeavours to assist the Information Commissioner to make the correct or preferable decision in relation to access to information held by the Government (s 55DA). This duty is consistent with the obligation on the Commonwealth and its agencies to act as model litigants — that is, with complete propriety, fairly and in accordance with the highest professional standards as a party to proceedings, including tribunal proceedings. The Information Commissioner also encourages parties to reach agreement as to the terms of a decision on an IC review. The Information Commissioner may then make a decision in accordance with those terms without completing the IC review (s 55F).
- 10.22 All parties are also encouraged to minimise their use of legal representation in IC reviews, to reduce formality and costs. The Information Commissioner expects to receive responses from the relevant agency rather than a legal representative, even where the agency chooses to seek legal advice on particular issues.

## Timely

- 10.23 The IC review process is intended to be efficient and lead to resolution as quickly as possible. To maintain efficiency, the OIAC relies on:
- timely responses to requests for documents at issue and submissions from the parties
  - preliminary views, which may be provided by a case officer to the parties after review of the documents at issue and the submissions where appropriate, and
  - conferences between the parties where appropriate to facilitate early resolution.
- 10.24 The Information Commissioner may decide to expedite the conduct of an IC review application in response to a request from the IC review applicant or as a result of identifying individual applications that involve factors that are outlined below. When considering whether to expedite an IC review application, the Information Commissioner may have regard to any of the following factors:
- whether expedition would best facilitate and promote prompt public access to information. For example, this factor may be relevant where the application for IC review may delay the FOI applicant from accessing documents found not to be exempt. This may be relevant where an affected third party applies for IC review of an access



grant decision (under s 54M) and the FOI applicant's access to the documents in dispute is delayed because of the IC review application

- whether expedition would best facilitate public access to information at the lowest reasonable cost. For example it is relevant to consider whether:
  - an IC review decision in the matter would address a novel issue
  - an IC review decision would resolve issues raised in a number of other related IC review applications which may result in the resolution of other IC review applications at the lowest reasonable cost, and
  - whether it is administratively more efficient and timely to consider related IC review applications or applications that raise similar issues together
- the objects of the FOI Act
- any other factors the Information Commissioner considers relevant in the circumstances.

10.25 Where the conduct of an IC review is expedited, this may be reflected by changes in the process. For example, it may be appropriate for the Information Commissioner to provide the parties with shorter timeframes for responses and require the provision of submissions that can be shared with the other party to eliminate delays incurred when parties initially seek to only provide submissions on a confidential basis.<sup>8</sup>

## Procedures in an Information Commissioner review

### Parties to an IC review

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

- a) the IC review applicant (see [10.9] above)
- b) the principal officer of the agency, or the minister, to whom the FOI access request was made
- c) an affected third party required to be notified of an IC review application under s 54P (discussed below at [10.45]-[10.46])
- d) a person who is joined by the Information Commissioner to the review proceedings as a person whose interests are affected (discussed below at [10.48]-[10.51]).

10.27 Where a minister is party to an IC review and there is a change of minister in the course of the review, the new minister is the respondent. If the requested document is not in the possession of the new minister, the FOI Act will not apply and the IC review cannot continue as the document is no longer an 'official document of a minister'.<sup>9</sup>

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<sup>8</sup> See Australian Information Commissioner, *Direction as to the production of documents in IC reviews Section 55(2)(e)(i) Freedom of Information Act 1982* in relation to submissions made during an IC review.

<sup>9</sup> *Philip Morris Ltd and Treasurer* [2013] AICmr 88; *Thomas and Prime Minister* [2014] AICmr 18.

## Application for IC review

### Making an application

- 10.28 An application for IC review must be in writing (s 54N), which includes email. It must:
- give details of how notices may be sent to the applicant (for example, by providing an email address)
  - include a copy of the notice of the decision given by the agency or minister under s 26.
- 10.29 Including a copy of the s 26 notice enables the Information Commissioner to readily identify the agency or minister and the matters in dispute.
- 10.30 The application may also contain particulars of the basis on which the applicant disputes the reviewable decision (s 54N(2)). It will assist prompt handling of the matter if the applicant sets out the following matters in the application:
- any grounds on which the applicant disputes the reasons given for a claim that a document is exempt or conditionally exempt
  - any grounds on which the applicant considers that the public interest in giving access overrides the reasons given for not granting access
  - if an FOI request has been refused on the ground that it would unreasonably impact on an agency's resources or a minister's functions (ss 24 and 24AA) — any reasons why the applicant believes the FOI request would not have that impact.
- 10.31 The OAIC must provide 'appropriate assistance' where an applicant needs help to prepare the IC review application (s 54N(3)). This may arise, for example, where the applicant has language or literacy difficulties or other factors that affect their capacity to prepare an application.
- 10.32 The IC review application must be delivered to the OAIC or sent by prepaid postage or by electronic communication (fax or email) (s 54N(4)). 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). The contact details for the OAIC are:

Postal address	GPO Box 5218 Sydney NSW 2001
Email address	FOIDR@oaic.gov.au
Fax	+61 2 9284 9666

### Access grant decision

- 10.33 An IC review applicant who is a third party seeking review of an access grant decision may also not have received a copy of the s 26 statement of reasons given to the FOI applicant. The third party should, however, have been given a written notice of the access grant decision (see Part 3 of these Guidelines), and should provide a copy of that notice with their application.
- 10.34 The IC review application may also contain particulars of the basis on which the applicant disputes the reviewable decision (s 54N(2)). It will assist prompt handling of the matter if the affected third party applicant sets out the following matters:

- any grounds on which the applicant disputes the reasons given for a claim that a document is not exempt under s 47 or conditionally exempt under ss 47B, 47F or 47G, and
- any grounds on which the applicant considers that the public interest in giving access does not override the reasons given for not granting access.

## Deemed decisions

- 10.35 A person will not have received a copy of the decision when notice of a decision is deemed to have been given. In that case, the application should include details of the agency or minister to whom the FOI request was made and state whether the FOI request was an application for an initial decision or for internal review of an agency decision. If the decision under IC review is a deemed decision on internal review, it will be useful for the OAI if the agency provided the statement of reasons for the initial decision.
- 10.36 If, after an applicant applies for IC review of a deemed decision where the Information Commissioner allowed the agency or minister further time to make an actual decision and the agency or minister did so, the actual decision is substituted for the deemed decision for the purposes of the IC review (s 54Y(2)). At any time during an IC review, an agency or minister may substitute a deemed or an actual access refusal decision with a decision that is in the applicant's favour (see [10.67]–[10.74]).

## Withdrawing an application

- 10.37 An applicant may withdraw an application for IC review at any time before the Information Commissioner makes a decision (s 54R(1)). A withdrawn application is taken never to have been made (s 54R(2)). If an application is withdrawn, the Commissioner will notify the agency or minister.

## Time for applying

- 10.38 An application for IC review must be made within 60 days of notice being given of an access refusal decision (s 54S(1)) or 30 days of notice being given of an access grant decision (s 54S(2)). Further details are below.
- 10.39 An FOI applicant may apply for IC review of an access refusal decision within 60 days after the day notice of the decision was given under s 26 (s 54S(1)). This time limit also applies to deemed refusals, as notice is deemed to have been given under s 26 of the FOI Act on the last day of the initial decision period (s 15AC(3) — see Part 3 of these Guidelines). Where the FOI applicant sought internal review and the agency did not make a decision within 30 days and no extension was granted, the original decision to refuse access is taken to have been affirmed on the last day of the decision period which is 30 days after the date that the FOI request was made (s 54D — see Part 9 of these Guidelines).
- 10.40 An affected third party may apply for IC review of an access grant decision within 30 days after the day they were given notice under ss 26A(3), 27(6) or 27A(5). An affected third party may also apply for review of an agency decision under s 54C to grant access on internal review. If the affected third party does not apply for IC review within 30 days of the notification of the decision, the agency or minister can provide access to the document, unless the Information Commissioner has granted an extension to the affected third party (ss 26A(4), 27(7) and 27A(6)). The Information Commissioner will notify an agency or minister if an affected third party has applied for an extension of time. The Information

Commissioner will provide a further notice after making a decision on that application. To minimise the possibility of dispute about the propriety or timing of a decision to release information when a third party objects, agencies and ministers should contact the OAIC after the appeal period has expired to confirm whether any IC review proceedings are in progress.

## Extension of time for applying

- 10.41 An FOI applicant or an affected third party may ask the Information Commissioner for an extension of time to apply for IC review (s 54T(1)). The Information Commissioner may extend the time if satisfied that it is reasonable in all the circumstances to do so, even if the application period has expired (ss 54T(2) and (3)). The applicant should set out the reasons for the delay as part of their application. As a practical matter, an affected third party will not be able to apply for an extension of time if the agency or minister has already given the FOI applicant access to the documents after the time for applying for internal review or IC review has expired (see previous paragraph).
- 10.42 There may be a delay between when an FOI applicant receives notice of an access grant decision and when they receive access to documents. The Information Commissioner can consider granting an extension to apply for IC review if the applicant does not receive access to documents before the 30-day limit in s 54S(2) runs out. (The applicant can also apply for internal review within 15 days of receiving access — for more information, see Part 9 of these Guidelines.)
- 10.43 Before granting an extension, the Information Commissioner may require the applicant to give notice of the application to any person the Information Commissioner considers is affected (s 54T(4)). For example, the Information Commissioner may require the applicant to notify the agency or an affected third party. That person may in turn notify the Information Commissioner in writing that the agency or affected third party opposes the application, and must do so within the time the Commissioner specifies (s 54T(5)). Unless there are special reasons to the contrary, the Commissioner will allow 14 days for a response.
- 10.44 The Information Commissioner must give the applicant for the extension and any person opposing the extension a reasonable opportunity to present their cases before determining the extension application (s 54T(6)).

## Agency or minister must notify third parties

- 10.45 The agency or minister must notify an affected third party where an FOI applicant has applied for IC review of a decision to refuse access to a document to which a consultation requirement applies (s 54P). This obligation applies whether the affected third party made a submission or was invited to make a submission but did not under s 26A (documents affecting Commonwealth-State relations), s 27 (business documents) or s 27A (personal privacy) (s 54P(1) — see Part 6 of these Guidelines). The third party has a right to be a party in the IC review. The third party would be seeking to support the agency's or minister's contention that access should be refused to a document that affects them.
- 10.46 The agency or minister is required as soon as practicable to take all reasonable steps to provide this notice (s 54P(2)). They must also give a copy of the notice to the Information Commissioner as soon as practicable (s 54P(3)). The s 54P notice is generally requested by the IC review officer (see table at [10.100]).

- 10.47 Section 54Q provides that the Information Commissioner may, on the agency's or minister's application, order that this notice requirement does not apply to business documents (s 27) or documents affecting personal privacy (s 27A). This may be done if the Commissioner is satisfied that notification of the IC review would not be appropriate as it could reasonably be expected to:
- a) prejudice the conduct of an investigation of a breach of the law or a failure to comply with a law relating to taxation (for example, if the person who would otherwise be notified is under investigation)
  - b) prejudice the enforcement or proper administration of the law in a particular instance
  - c) disclose or allow someone to ascertain the existence, identity or non-existence of a confidential source of information, in relation to the enforcement or administration of the law
  - d) endanger anyone's life or physical safety
  - e) damage the security, defence or international relations of the Commonwealth (s 54Q(3)).

## Joining other parties to the review

- 10.48 The Information Commissioner may join a person whose interests are affected as a party to an IC review application (s 55A(3)) if that person applies in writing (s 55A(2)).
- 10.49 This could arise, for example, in a case where the IC review applicant is an affected third party who disagrees with an agency's or minister's decision to grant access to a document. In that case, the Information Commissioner may join the original FOI applicant to the review.
- 10.50 Another example is where an affected third party is not given notice of an IC review application because one of the reasons in s 54Q applies (see [10.47]). If the Information Commissioner, on considering the review application, is not satisfied that the information concerning that person is exempt, the Commissioner may decide to join the person to the review under s 55A(1)(d).
- 10.51 In some cases, the FOI decision may have included documents that involve more than one agency. An agency has the option of transferring an FOI request to another agency under s 16 where appropriate if the other agency agrees. If the agency decides not to transfer the FOI request, the agency is responsible for consulting relevant agencies, both before making a decision and throughout the IC review process. In exceptional circumstances where an agency other than the decision maker applies to be joined as a party to an IC review, the Information Commissioner may decide to grant the application.

## General procedure

- 10.52 IC reviews are intended to provide a simple, practical and cost effective system for external merit review. To achieve this aim, the Information Commissioner may conduct an IC review in whatever way the Information Commissioner considers appropriate (s 55(2)(a)), and must use as little formality and technicality as possible (s 55(4)(a)). It is intended that most applications will be determined on the basis of the documents and submissions (see [10.63]).

## Using alternative dispute resolution methods

10.53 To help resolve applications promptly, the Information Commissioner may use alternative dispute resolution methods or any other appropriate technique (s 55(2)(b)). Alternative dispute resolution methods and early appraisal can clarify at an early stage the issues to be resolved or the information to be provided by either party in support of their claims or submissions. For instance, the OAIC's IC review officer with carriage of the matter may review the material submitted by both parties and provide a preliminary view as to the merits of the case to the relevant party. The party then has the opportunity to make further submissions or take other action as may be appropriate (withdrawal of the IC review application or issuance of a s 55G revised decision). The IC review officer can also facilitate a teleconference between the parties if this would aid in resolving the matter.

## Participation by various means

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

## Obtaining information

10.55 The Information Commissioner may obtain any information from any person and make any inquiries that the Information Commissioner considers appropriate (s 55(2)(d)). For example, the Commissioner may request information about the agency's decision early in the IC review process. Those inquiries may help the Commissioner to form a preliminary view about the issues to be addressed or the merit of a decision. The Information Commissioner also has a specific power to make preliminary inquiries to determine whether to undertake an IC review (discussed below at [10.82]) and the power to compel agencies to participate in a number of information gathering processes (discussed at [10.91]–[10.99]). The Information Commissioner can also seek expert assistance from agency staff or another party where documents involve complex or technical issues.

## Written directions

10.56 The Information Commissioner may give written directions about the conduct of the IC review, both generally and in particular IC reviews (s 55(2)(e)).

10.57 The Information Commissioner has issued the following general procedure directions:

- a direction setting out the general procedure to be followed by agencies and ministers for the production of documents and submissions in IC reviews<sup>10</sup>
- a direction as to certain procedures to be followed by applicants in IC reviews.<sup>11</sup>

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

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<sup>10</sup> See Australian Information Commissioner, *Direction as to certain procedures to be followed in IC reviews*.

<sup>11</sup> See Australian Information Commissioner, *Direction as to certain procedures to be followed by applicants in Information Commissioner reviews*.

- 10.59 Where an agency or minister fails to comply with a direction of the Information Commissioner, the Information Commissioner may proceed to make a decision (s 55K) on the basis that the agency or minister has failed to discharge their onus (s 55D(1)).<sup>12</sup>
- 10.60 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)).

## When the reasons for a decision are inadequate

- 10.61 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). This includes where a decision is deemed to be made and no s 26 statement was prepared.<sup>13</sup>
- 10.62 The Information Commissioner can specify when an agency or minister must provide reasons. If no time period is specified, the agency or minister must provide reasons within 28 days (s 55E(3)). For guidance on preparing good reasons for decisions, see Part 3 of these Guidelines.

## Hearings

- 10.63 Hearings are not intended to be a common part of Information Commissioner reviews, because they can increase contestability, introduce more formality to the process and prolong the matter. In general, IC reviews will be conducted on the papers. (see [10.52] above and s 55(1)).<sup>14</sup>
- 10.64 However, a party may apply to the Information Commissioner for a hearing at any time before a decision is made (s 55B(1)). The Information Commissioner notify the other review parties of the application and give all review parties a reasonable opportunity to make submissions on the application.<sup>15</sup>
- 10.65 The Information Commissioner must conduct hearings in public unless satisfied there are reasons to hold a hearing (in whole or part) in private (s 55(5)(a)). This means that part of a hearing may be held in the absence of one or more of the review parties and their representatives if the Commissioner considers it necessary to prevent the disclosure of confidential matters.
- 10.66 A party may be represented by another person at a hearing (s 55C), including a legal representative. For example, a party may wish to be represented by an advocate, friend or family member.

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<sup>12</sup> See Australian Information Commissioner, *Direction as to certain procedures to be followed in IC reviews*, at [6.1].

<sup>13</sup> See Australian Information Commissioner, *Direction as to certain procedures to be followed in IC reviews*, at [4.1]-[4.4].

<sup>14</sup> Section 55(1) provides that review can be carried out on the documents or other available material if: the Information Commissioner considers the matter can be adequately determined in the absence of the review parties, the Information Commissioner is satisfied that there are no unusual circumstances that warrant a hearing, or none of the parties has applied for a hearing.

<sup>15</sup> See *McKinnon and Department of Immigration and Citizenship* [2012] AICmr 34.

## Revising the decision in the course of an IC review

- 10.67 After an application is made to the Information Commissioner for IC review, an agency or minister may (at any time during the IC review) revoke or vary an access refusal decision<sup>16</sup> to favour the applicant by:
- giving access to a document in accordance with the request (s 55G(1)(a))
  - relieving the IC review applicant from liability to pay a charge (s 55G(1)(b)), or
  - requiring record of personal information to be amended or annotated in accordance with the application (s 55G(1)(c)).
- 10.68 During an IC review, where an agency or minister no longer contends that material is exempt or has identified further material within the scope of the FOI request, a revised decision under s 55G facilitates the prompt release of further material to the applicant.
- 10.69 The agency or minister must notify the Information Commissioner in writing of the new decision (s 55G(2)(a)).
- 10.70 A revised decision does not automatically conclude the IC review. The revised decision will be the decision under review (s 55G(2)(b)). The OAIC will generally consult the applicant as to whether they wish to continue the IC review on the basis of the revised decision.
- 10.71 If the decision under review is a decision refusing to give access to a document in accordance with a request under s 53A(a), the revised decision must have the effect of releasing more material to the applicant.<sup>17</sup> That will include releasing part of a document because ‘document’ under s 4(1) of the FOI Act is defined to also include any part of a document.<sup>18</sup> A revised decision may still be an access refusal decision in relation to other material within the scope of a request, provided that the variation is made ‘in a manner that favours the applicant’.<sup>19</sup>
- 10.72 The power under s 55G to make a revised decision during the IC review should be understood bearing in mind the purpose and context of the section. The provision only applies to decisions ‘that essentially benefit the applicant’,<sup>20</sup> does not require agreement between the parties<sup>21</sup> and is a prescribed procedure within the IC review process (see Division 6 of Part VII of the FOI Act).
- 10.73 Accordingly, it is not in the spirit of a revised decision to include further exemption claims in relation to the remaining material to which access is refused which would have the effect of disadvantaging an applicant.
- 10.74 Any new contentions by an agency or minister that further or different exemptions apply to documents at issue should be put forward as part of the IC review, not as a revised decision under s 55G. Any new contentions that are put forward as part of the IC review must be justified by new circumstances or information that was not available at the time of the

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<sup>16</sup> A minister or agency cannot vary an access grant decision once the matter is under IC review (that is, there is no equivalent to s 55G, which applies only to access refusal decisions).

<sup>17</sup> *Thomson and Australian Federal Police* [2013] AICmr 83 [12].

<sup>18</sup> See [2.26] – [2.28].

<sup>19</sup> *Australian Associated Press Pty Ltd and Department of Immigration and Border Protection* [2016] AICmr 25 [18], [22] and [24].

<sup>20</sup> See Explanatory Memorandum to the Freedom of Information Amendment (Reform) Bill 2009 33.

<sup>21</sup> As distinct from s 55F of the FOI Act.



earlier decision and supported by detailed submissions.<sup>22</sup> Agencies should bear in mind the lowest reasonable cost objective of the FOI Act under s 3(4) in ensuring that any such contentions are justified at a later stage of an IC review and should provide detailed reasons to the Information Commissioner.

## Protections when information is supplied

- 10.75 A claim for legal professional privilege can still apply to a document or information produced for the purpose of an IC review. The act of producing the document does not of itself constitute a waiver of the privilege (s 55Y).
- 10.76 A person is immune from civil proceedings and any criminal or civil penalty if the person gives information, produces a document or answers a question in good faith for an IC review (s 55Z). The immunity applies whether the information was supplied voluntarily or supplied because the Information Commissioner had compelled production of the information (for example, under s 55(2)(d) — see [10.91]-[10.99]).

## Evidence by the Inspector-General of Intelligence and Security

- 10.77 Before deciding that a document an agency or minister claims falls under the national security exemption (s 33) is not exempt, the Information Commissioner must ask the Inspector-General of Intelligence and Security (Inspector-General) to give evidence on the likely damage if access was granted (ss 55ZA–55ZD — for guidance about s 33, see Part 5 of these Guidelines).<sup>23</sup> There are similar provisions in relation to AAT proceedings (s 60A). The Inspector-General must comply with the Information Commissioner’s request unless the Inspector-General believes they are not appropriately qualified to give evidence on those matters (s 55ZC).
- 10.78 This requirement is to assist the Information Commissioner make a decision through the provision of expert advice. Because the Inspector-General is an independent statutory office holder, the evidence given is not evidence by the agency or minister who made the FOI decision. The Information Commissioner and the Inspector-General have entered into a memorandum of understanding establishing agreed procedures for the exercise of this discretion.<sup>24</sup>
- 10.79 Before receiving evidence from the Inspector-General personally, the Information Commissioner must receive any evidence or submissions from the agency or minister (s 55ZB(3)). The Commissioner is not bound by the Inspector-General’s opinion (s 55ZB(4)).
- 10.80 The requirement does not apply if the Information Commissioner considers there is sufficient material to affirm the agency’s or minister’s decision to exempt the document.

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<sup>22</sup> See Australian Information Commissioner, *Direction as to certain procedures to be followed in IC reviews*, at [5.6]-[5.7].

<sup>23</sup> See *Penny Wong and Department of the Prime Minister and Cabinet* [2016] AICmr 6 [16] and *Wake and Australian Broadcasting Corporation* [2013] AICmr 45 [9].

<sup>24</sup> The memorandum of understanding is available at [www.oaic.gov.au](http://www.oaic.gov.au).

## The Information Commissioner’s options

- 10.81 After receiving an application for IC review, the Information Commissioner has two options:
- to review the decision if satisfied it is a decision that is reviewable, or
  - not to review the decision if satisfied on certain grounds (discussed at [10.85] below).

### Preliminary inquiries

- 10.82 The Information Commissioner may make preliminary inquiries of the parties to help determine whether to undertake an IC review (s 54V). Such inquiries might be made to clarify whether the review decision falls within the Information Commissioner’s jurisdiction, or to clarify whether an internal review is currently on foot. Where an application for IC review is made in relation to an FOI request that is deemed to have been refused under ss 15AC(3), 51DA(2) or 54D(2) of the FOI Act, the Commissioner will undertake preliminary inquiries.<sup>25</sup>

### Who conducts the review?

- 10.83 An IC review officer from the OAIC will manage the IC application for review, including undertaking the preliminary assessment (see [10.108]–[10.113]). However, only the Information Commissioner, FOI Commissioner or Privacy Commissioner can make the final decision on a review (AIC Act ss 10, 11, 12 and 25(e)).

### Timeframe for a review

- 10.84 The Act does not specify a time for completion of an IC review.<sup>26</sup> The time taken will depend on a number of factors, including:
- the type and range of issues involved in the IC review
  - the number and type of documents involved
  - whether there is a need to refine the scope of the issues the applicant has raised
  - whether the agency or minister needs to undertake further searches for documents
  - whether parties other than the agency and the applicant need to be consulted or joined to the IC review
  - any new issues the parties have introduced during the IC review
  - the time parties take to respond to requests for information or other issues raised by the IC review officer, and
  - the extent to which the parties are willing to engage in informal resolution processes (where appropriate).

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<sup>25</sup> See Australian Information Commissioner, *Direction as to certain procedures to be followed in IC reviews* at [4.1]–[4.4].

<sup>26</sup> The OAIC seeks to ensure that 80% of IC review matters are finalised within 12 months of receipt. See OAIC, *Corporate Plan 2017-18*, 31 August 2017, at [www.oaic.gov.au](http://www.oaic.gov.au).

## When the Information Commissioner will not review a matter

- 10.85 The Information Commissioner has the discretion not to undertake a review, or not to continue a review, if:
- a) the applicant fails to comply with a direction by the Information Commissioner (s 54W(c))<sup>27</sup>, or
  - b) if the Information Commissioner is satisfied:
    - i) the review application is frivolous, vexatious, misconceived, lacking in substance or not made in good faith
    - ii) the review applicant has failed to cooperate in progressing the IC review application or the IC review without reasonable excuse
    - iii) the Information Commissioner cannot contact the applicant after making reasonable attempts (s 54W(a))
  - c) if the Information Commissioner is satisfied the IC reviewable decision should be considered by the AAT (s 54W(b) — see [10.88] below).
- 10.86 An IC review application for review of an agency or minister’s preliminary costs assessment will be considered to lack substance if the agency or minister waives the charges.<sup>28</sup> The circumstances in which an IC review application can be described as ‘frivolous or vexatious’ have been examined in various cases.<sup>29</sup> The circumstances include where it is open to conclude that a series of FOI requests were made to annoy or harass agency staff and none of the requests is capable of conferring a practical benefit on the applicant.<sup>30</sup> See Part 12 of these Guidelines for information about vexatious applicant declarations. Where an applicant expresses their wish for a decision not to be published because they are concerned about privacy, this does not constitute failure to cooperate (but if the review proceeds the decision is nevertheless required to be published (s 555K(8)).<sup>31</sup>

## Reviewing part of a matter

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

## AAT review as an alternative to IC review

- 10.88 The Information Commissioner may decline to undertake a review if satisfied ‘that the interests of the administration of the [FOI] Act make it desirable’ that the AAT consider the IC reviewable decision (s 54W(b)). It is intended that the Information Commissioner will resolve most applications. Circumstances in which the Information Commissioner may

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<sup>27</sup> See Australian Information Commissioner, *Direction as to certain procedures to be followed by applicants in Information Commissioner reviews* at 1.40-1.41

<sup>28</sup> *Knowles v Australian Information Commissioner* [2018] FCA 1212.

<sup>29</sup> For an example of abuse of process generally see *Bringolf and Secretary, Department of Human Services (Freedom of information)* [2018] AATA 2004.

<sup>30</sup> *Ford v Child Support Registrar* [2009] FCA 328, applying *Attorney-General (Vic) v Wentworth* (1998) 14 NSWLR 481.

<sup>31</sup> *Giddings v Australian Information Commissioner* [2017] FCA 677.

decide that it is desirable for the AAT to consider the IC reviewable decision instead of the Commissioner continuing with the IC review include:<sup>32</sup>

- where the IC review is linked to ongoing proceedings before the AAT or a court
- where there is an apparent inconsistency between earlier IC review decisions and AAT decisions
- where, should the application progress to an IC review decision, the IC review decision is likely to be taken on appeal to the AAT on a disputed issue of fact
- where the FOI request under review is of a level of complexity that would be more appropriately handled through the procedures of the AAT
- where there may be a perceived or actual conflict of interest in the Commissioner undertaking review, including where:
  - the FOI request under review was made to, or decided by, the Information Commissioner or their delegate
  - the FOI request or material at issue relate to specific functions exercised by the Information Commissioner under the Privacy Act
  - the applicant has active matters in other forums, including the AAT or Federal Court and the Information Commissioner is the respondent
- where consideration by the AAT would further the objects of the FOI Act, particularly in relation to the performance and exercise of functions and powers given by the FOI Act to facilitate and promote public access to information, promptly and at the lowest reasonable cost (s 3(4)).

10.89 The OAIC will consult the parties to an IC review before concluding an IC review pursuant to s 54W(b).

## Parties to be notified of decision not to undertake a review

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

## The Information Commissioner's powers to gather information

10.91 The Information Commissioner has a range of powers to compel agencies to participate in procedures to gather information needed to properly review the merits of a decision. In addition to the power to require an agency or minister to give adequate reasons for a decision (discussed at [10.61]), the Commissioner has the power to:

- require a person to produce information and documents

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<sup>32</sup> See also *McKinnon and Department of Immigration and Citizenship* [2012] AICmr 34.

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

10.92 Each of these is discussed below. The Information Commissioner’s information gathering powers are similar to those of the AAT, as discussed below. Further information is also available in the Annexure to the Information Commissioner’s direction as to the production of documents and submissions.<sup>33</sup>

## Producing information and documents

10.93 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 (s 55R(3)). Failure to comply with a notice to produce is an offence punishable by six months imprisonment (s 55R(5)). There is a similar offence for failing to comply with a summons to produce issued by the AAT (*Administrative Appeals Tribunal Act 1975* (AAT Act) ss 40 and 61). The Commissioner may take, copy and take extracts from those documents and hold them as long as necessary for the purposes of the IC review (s 55S(1)).

## Producing documents claimed to be exempt: general

10.94 The Information Commissioner may require the principal officer of an agency or a minister to produce a document claimed to be exempt, other than a document claimed to be exempt under the national security, Cabinet or Parliamentary Budget Office documents exemptions (s 55T(1)). As a general rule, the Commissioner will require an agency to provide a copy of all documents that are claimed to be exempt to enable the Commissioner to undertake merit review of the decision to refuse access (see [10.94]). If satisfied the document is exempt, the Commissioner must return the document to the agency or minister (s 55T(3)).

10.95 No person other than the Information Commissioner, the FOI Commissioner, the Privacy Commissioner or a member of the Information Commissioner’s staff may have access to a document that is claimed to be exempt (s 55T(5)). (The Information Commissioner must take all reasonable steps to ensure relevant OAIC staff are given appropriate security clearances (s 89P)). The AAT has a similar production power for its proceedings (s 64).

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

10.96 The Information Commissioner may only require the principal officer of an agency or a minister to produce a document they claim is exempt under the national security exemption (s 33), Cabinet documents exemption (s 34) or Parliamentary Budget Office documents exemption (s 45A) if the Commissioner is not satisfied by evidence on affidavit

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<sup>33</sup> See Australian Information Commissioner, *Direction as to certain procedures to be followed in IC reviews*.

or other evidence that the document is exempt (s 55U(3)). There is a similar provision in s 58E(2) relating to AAT review proceedings.

## Further searches for documents

10.97 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)). This replicates the powers given to the AAT under s 58A(2).

## Attending to answer questions

10.98 The Information Commissioner may require a person to attend to answer questions for the purposes of an IC review (s 55W(1)). The Information Commissioner must give the person a written notice that specifies the time and place when the person must attend, with the time to be not less than 14 days after the person is given the notice (s 55W(2)). Failure to comply with the notice is an offence punishable by six months imprisonment (s 55W(3)). There is a similar offence for failing to comply with a summons to appear to give evidence in AAT proceedings (AAT Act ss 40 and 61).

10.99 The Information Commissioner may also require a person who appears before the Commissioner pursuant to a notice to take an oath or affirmation that the answers the person will give will be true (s 55X). Breaching that requirement (for example, if the person refuses to take the oath or affirmation, or knowingly gives false answers) is an offence punishable by six months imprisonment (s 55X(3)).

# Steps in the Information Commissioner review process

## On receiving a review application

10.100 When an IC review application is received, the IC review officer will check that it is a valid application (see [10.28] – [10.32]). Before undertaking an IC review, the IC review officer will inform the person, the agency or minister who made the decision, or if the IC review application is by an affected third party in relation to an access grant decision, the FOI applicant (s 54Z). The IC review officer will contact the relevant agency or minister advising them of the review and seeking relevant information (as set out in the table below). The IC review officer will give the agency a copy of the application for IC review. The IC review officer may also enquire whether the agency is currently undertaking an internal review under Part VI of the Act. Where the agency advises that an internal review is under way, the IC review officer will ordinarily await the outcome before taking further steps in the IC review. The agency must make a fresh decision within 30 days after the day on which the application was received by the agency (s 54C(3)).<sup>34</sup>

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<sup>34</sup> For internal review processes and timeframes, see Part 9 of these Guidelines.

Scope of IC review	Information to be provided by Respondent
Access refusal - Exemptions (Part IV Divisions 2 and 3, except ss 33, 34, 45A)	<ul style="list-style-type: none"> <li>• The original FOI request and any correspondence with the FOI applicant that modifies the scope of the FOI request</li> <li>• Copies of correspondence including file notes of relevant telephone conversations between the agency or minister and anyone consulted</li> <li>• A marked up and unredacted copy of the documents at issue where material claimed to be exempt is highlighted with reference made to the exemptions applied</li> <li>• Any submissions in support of the agency or minister’s decision, including the application of s 11B of the FOI Act in relation to conditional exemption claims</li> <li>• If any third parties are notified of the IC review, a copy of the written notifications under s 54P</li> </ul>
Access refusal – Exemptions (Part IV Division 2, ss 33, 34, 45A)	<ul style="list-style-type: none"> <li>• The original FOI request and any correspondence with the FOI applicant that modifies the scope of the FOI request</li> <li>• Copies of correspondence including file notes of relevant telephone conversations between the agency or minister and anyone consulted</li> <li>• Evidence, on affidavit or otherwise, including by way of submissions, that documents are exempt under ss 33, 34, or 45A</li> <li>• If any third parties are notified of the IC review, a copy of the written notifications under s 54P</li> </ul>
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"> <li>• The original FOI request and any correspondence with the FOI applicant that modifies the scope of the FOI request</li> <li>• Information about the nature of the document in question</li> <li>• The agency or minister’s response to the applicant</li> <li>• Any submissions in support of the agency or minister’s decision</li> </ul>
Access grant (Part IV Divisions 2 and 3 ss 47, 47F and 47G)	<ul style="list-style-type: none"> <li>• The original FOI request and any correspondence with the FOI applicant that modifies the scope of the FOI request</li> <li>• Copies of correspondence with the third party</li> <li>• The documents in dispute</li> <li>• The reasons for the decision to release the documents despite the third party’s objections</li> <li>• Any submissions in support of the agency or minister’s decision</li> </ul>
Access refusal – Charges (Part III, s 29)	<ul style="list-style-type: none"> <li>• The original FOI request and any correspondence with the FOI applicant that modifies the scope of the FOI request</li> <li>• A copy of the charges notice sent to the FOI applicant</li> <li>• A copy of the preliminary estimates notice sent to the FOI applicant and the applicant’s response</li> <li>• Any further explanation the agency or minister wishes to provide as to why the charge was imposed or how it was calculated, including any documentary evidence which supports the agency or minister’s calculation of charges</li> <li>• Any submissions in support of the agency or minister’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</li> <li>•</li> </ul>

Scope of IC review	Information to be provided by Respondent
Access refusal – Refusal to amend or annotate a record of personal information (Part IV)	<ul style="list-style-type: none"> <li>• A copy of the documents that were given to the FOI applicant</li> <li>• The reasons why the agency or minister 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</li> <li>• Any submissions in support of the agency or minister’s decision</li> </ul>
Access refusal – Failure to provide all documents / Adequacy of searches (Part III, s 24A)	<ul style="list-style-type: none"> <li>• The FOI request, and any correspondence that modifies its scope</li> <li>• A copy of any document that records searches conducted, including if applicable: <ul style="list-style-type: none"> <li>○ Notes kept by individuals conducting searches</li> <li>○ Correspondence between the FOI decision maker and individuals who conducted searches</li> <li>○ Any other records of searches or recorded consideration of where to search</li> </ul> </li> <li>• Any other relevant information that the agency or minister wishes to provide in support of its decision</li> </ul>
Access refusal – Practical refusal (Part III, s 24A)	<ul style="list-style-type: none"> <li>• The original FOI request and any correspondence with the FOI applicant that modifies the scope of the FOI request</li> <li>• Copies of any correspondence including file notes of telephone conversations relating to the agency of minister’s request consultation process, including a copy of the letter sent to the applicant, and the applicant’s response (if any).</li> <li>• Records that demonstrate the number of documents and/or pages encompassed by the request, including but not limited to notes of any searches conducted, and consultations with relevant staff members</li> <li>• An estimation of the number of hours processing time involved, and a breakdown of this time to demonstrate what this is based on</li> <li>• Evidence of document sampling, if undertaken</li> <li>• The names and contact details of anyone who was consulted by agency or minister, formally under ss 15(7), 26A 27A, or informally (including consultations with other government agencies)</li> <li>• Any submissions in support of the agency or minister’s decision</li> </ul>
Access refusal – Deemed refusal or deemed affirmation of original decision	<ul style="list-style-type: none"> <li>• The written reasons for the decision (see [10.106])</li> <li>• The original decision</li> <li>• Other documents as listed above depending on the nature of the decision</li> </ul>

10.101 The request for documents may initially be informal. However, if an agency does not comply with this informal request, the documents may be requested under a provision of the FOI Act that compels production by the relevant agency or minister within a specified timeframe. If necessary, the Information Commissioner may rely on the powers to:

- require the agency or minister to provide documents for which an exemption claim has been made, if these have not been provided to the IC review officer earlier (ss 55T and 55U – see [10.94]–[10.100])
- issue a notice requiring any person to provide information or documents that are relevant to an IC review (s 55R – see [10.93])



- require the agency or minister to conduct a further search for documents (s 55V – see [10.97])
- by written notice requiring a person to appear to answer questions (s 55W – see [10.98]), and to provide answers on oath or affirmation (s 55X – see [10.99])
- hold a hearing at which the parties will have an opportunity to present further evidence or submissions (see [10.63]–[10.66]).

## Submissions and material received by the OAIC

- 10.102 In the case of documents from which information has been redacted, the agency should supply to the IC review officer copies of both the original document with the redacted material and the relevant exemption marked and the edited copy that was released. The OAIC will not release documents to the FOI applicant or any other party.
- 10.103 As a general rule, submissions made by the agency will be made available to the IC review applicant, and to other parties as considered appropriate. If submissions are made on a confidential basis, the agency or minister should indicate this to the OAIC before providing the submission and provide adequate reasons to support such a claim. The OAIC will consider those reasons and decide whether to accept the submission on a confidential basis. Where the Information Commissioner accepts a submission in confidence, the agency must provide a version of the submission that can be shared with the applicant.<sup>35</sup>
- 10.104 A modified review process will be followed if the threshold question to be resolved is whether the applicant’s FOI request falls within the scope of the FOI Act. In a straightforward case, the Information Commissioner may be able to decide, without contacting an agency or minister, that the FOI request was made to an agency or for a document to which the FOI Act does not apply. On the other hand, it may be necessary for an IC review officer to contact an agency or minister to seek information about the nature of a document or the agency’s or minister’s response to the applicant. This may be necessary, for example, if the FOI applicant disagrees with a minister’s decision that the document requested is not an official document of the minister, or is a ‘defence intelligence document’.

## Deemed refusal or deemed affirmation of original decision

- 10.105 A person may apply for IC review when there is a deemed refusal of an FOI access request. This will occur when the agency or minister has not made a decision within 30 days of receiving the FOI request or within the relevant period if it has been extended (s 15AC). After a deemed access refusal, the agency or minister should consider applying in writing to the Information Commissioner for further time to consider the matter (s 15AC(4)). This avenue is only available once. The Commissioner may then grant an appropriate extension, subject to any conditions considered appropriate (ss 15AC(5)–(6)).
- 10.106 The agency or minister retains an obligation to provide the applicant with written reasons in relation to the decision (s 26). If these reasons are not forthcoming the Information Commissioner may also issue a notice requiring the agency or minister to provide reasons (s 55E).<sup>36</sup> This decision made by the agency or minister after the IC review application has been made becomes the reviewable decision for the IC review (s 54Y). The provision of the

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<sup>35</sup> See Australian Information Commissioner, *Direction as to certain procedures to be followed in IC reviews*, at [5.4].

<sup>36</sup> See Australian Information Commissioner, *Direction as to certain procedures to be followed in IC reviews*, at [4.3]–[4.4].

decision does not finalise the IC review process. The applicant has to withdraw the application for IC review (s 54R).

- 10.107 When there has been a deemed affirmation of an agency's decision following the expiration of time to complete an internal review, the agency should consider whether to seek an extension of time from the Information Commissioner to complete the internal review (s 54D(3)). Where the agency does not do so, or the Information Commissioner declines to grant an extension, the processes outlined in [10.101]–[10.104] above will apply.

## Preliminary assessment and view

- 10.108 The IC review officer will consider the IC review application and the material supplied by the agency or minister. The IC review officer may ask the agency or minister or the FOI applicant to provide additional information or submissions at this stage.
- 10.109 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 matter and advise the agency or minister or the FOI applicant as relevant.
- 10.110 If the preliminary view is against the agency or minister the preliminary view will be provided to the agency or minister. The Information Commissioner or the IC review officer will then invite the agency or minister to issue a revised decision in line with the preliminary view or make submissions in response to the preliminary view.
- 10.111 If the preliminary view is against the applicant the preliminary view will be provided to the FOI applicant. The IC review officer will then invite the applicant to withdraw the IC review application or make submissions in response to the preliminary view.
- 10.112 It should also be noted that in exceptional cases where the Information Commissioner has personally inspected the documents and formed the view that the documents should be released in part or in full, the Information Commissioner may provide the agency or minister with their preliminary view. The agency or minister will be given the opportunity to make a revised decision or make further submissions prior to proceeding to a decision. Any submissions provided by the agency or minister in response to this preliminary view will be provided to the applicant for comment unless the agency or minister requests 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, agencies and ministers must provide a version of the submissions that can be shared with the applicant.<sup>37</sup>
- 10.113 In relation to preliminary assessments, any submissions received during this process will generally be shared between the parties.

## Methods of providing documents to the Information Commissioner

- 10.114 Ordinarily, the Information Commissioner will require agencies to provide copies of documents in hard copy or in scanned form as PDF documents. Where the Information Commissioner requests a copy of the documents at issue, the agency or minister is asked to provide a marked up and unredacted copy of the documents where material claimed to

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<sup>37</sup> See Australian Information Commissioner, *Direction as to certain procedures to be followed in IC reviews*, at [5.4].

be exempt is highlighted with reference made to the exemptions applied. Information may be provided to the Information Commissioner's office by, for example email, USB or safe hand delivery.

10.115 The inspection of documents by the Information Commissioner will only be permitted where the agency or minister satisfies the Information Commissioner that there are extenuating circumstances to warrant production by this method. The onus is on the requesting agency or minister to justify that extenuating circumstances exist to warrant inspection.<sup>38</sup> If the Information Commissioner agrees to an agency 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. Inspection of documents at the premises of the agency are organised only in exceptional circumstances.<sup>39</sup>

## The Information Commissioner's decision

### Where the review parties reach agreement

10.116 At any stage during an IC review, the Information Commissioner may resolve an application in whole or in part by giving effect to an agreement between the parties (s 55F). Before making the decision, the Commissioner must be satisfied that the terms of the written agreement would be within the powers of the Commissioner and that all parties have agreed to the terms.

### Where the review parties do not reach agreement

10.117 If the parties do not reach an agreement, and unless the IC review applicant withdraws their application under s 54R, the Information Commissioner must make a decision after a merit review of the application. The Commissioner has three options:

- to affirm the decision of the agency or minister (s 55K(1)(a))
- to vary the decision of the agency or minister (s 55K(1)(b))
- to set aside the decision of the agency or minister and make a fresh decision (s 55K(1)(c)).

### Written reasons to be given

10.118 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)). The statements of reasons for Information Commissioner decisions are published on AustLII in the Australian Information Commissioner database.<sup>40</sup> The Information Commissioner's published decisions will not include any exempt material or information about the existence or non-existence of a document that would be exempt under ss 33, 37 or 45A (ss 55K(5)(a) and 25(1)) or any other matter that would cause the

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<sup>38</sup> See Australian Information Commissioner, *Direction as to certain procedures to be followed in IC reviews*, at [3.9]-[3.13].

<sup>39</sup> See for instance *T' and Australian Securities and Investments Commission* [2013] AICmr 33 where two OAIC officers attended ASIC premises and inspected 3 files that fell within the applicant's FOI request.

<sup>40</sup> See [www.austlii.edu.au/au/cases/cth/AICmr/](http://www.austlii.edu.au/au/cases/cth/AICmr/)

reasons to be an exempt document (s 55K(5)(b)). In addition, where appropriate to protect against the unreasonable disclosure of personal information about an applicant or third party, including details of their identity, the Commissioner will not include such personal information in the decision published on the website.

## Exempt documents

10.119 If the Information Commissioner finds a document to be exempt, the Information Commissioner cannot order that access be given to the exempt material (s 55L). This includes a document which:

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

10.120 A similar restriction is placed on the AAT under s 58(2).

## Requiring records to be amended

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

10.122 The Information Commissioner's decision can require amendment to be made to a record of personal information (subject to two limitations):

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

10.123 The AAT is similarly limited in its power to recommend or require amendments of personal records (s 58AA).

## Practical refusal, searches and charges

10.124 Other decisions that the Information Commissioner can set aside or affirm include:

- access refusal decisions based on the existence of a practical refusal reason with respect to an FOI request following a request consultation process (s 24)
- access refusal decisions based on the contention that all reasonable steps have been taken to find the document and the document cannot be found or does not exist (s 24A). The FOI Act provides individuals with a right of access to documents that exist. There is no right of access to documents that do not exist or cannot be found. The Commissioner cannot consider whether records have been destroyed or removed<sup>41</sup> or matters where the applicant disputes the nature of the documents produced,<sup>42</sup> and
- the Commissioner cannot consider matters on the basis that the applicant suspects records have been destroyed or removed and cannot be located by the agency,<sup>43</sup> or where the applicant disputes the nature of the document produced,<sup>44</sup> and
- decisions with respect to charges (s 29).

## Compliance with the Information Commissioner's decision

10.125 Parties to an IC review are notified of the Information Commissioner's written reasons for decision at the conclusion of the IC review and are provided with a copy of these reasons.

10.126 At the time of notifying the parties of the written reasons for decision, the Information Commissioner will request information from the respondent about compliance with the decision. This information is to be provided to the Information Commissioner within four weeks of notification of the decision.

## Enforcement of the Information Commissioner's decision

10.127 An agency or minister must comply with an IC review decision (s 55N). If an agency or minister fails to comply, the Information Commissioner or the review applicant may apply to the Federal Court for an order directing them to comply (s 55P(1)). The application can only be made after the period an agency or minister has to apply to the AAT for review of the Information Commissioner's decision has expired, that is, 28 days (AAT Act s 29(2)). There is a similar scheme for enforcing determinations of the Privacy Commissioner (Privacy Act ss 55A and 62).

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

- whether exercising the power to enforce an IC review decision would best facilitate and promote public access to information (for example, it is relevant to consider whether enforcement of an IC review decision would result in the agency releasing documents to the IC review applicant and, more generally, increase compliance of that agency with IC review decisions)

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<sup>41</sup> *Josh Taylor and Prime Minister of Australia (Freedom of information)* [2018] AICmr 42.

<sup>42</sup> See for example *'WV' and Department of Veterans' Affairs (Freedom of information)* [2021] AICmr 10.

<sup>43</sup> *Josh Taylor and Prime Minister of Australia (Freedom of information)* [2018] AICmr 42.

<sup>44</sup> See for example *'WV' and Department of Veterans' Affairs (Freedom of information)* [2021] AICmr 10.

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

## Correcting errors in the Information Commissioner’s decision

10.129 The Information Commissioner has a discretionary power to correct obvious errors in his or her decision, either on his or her own initiative or on application by a review party (s 55Q).

## Federal Court proceedings

10.130 The Federal Court may determine matters in two situations:

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

10.131 The Federal Court may also direct an agency or minister to comply with the Information Commissioner’s decision.

## Referring questions of law

10.132 The Information Commissioner may refer a question of law to the Federal Court at any time during the review (s 55H), and must act consistently with the Federal Court’s decision (s 55H(5)). This power is intended to ensure that the Information Commissioner makes decisions that are correct in law and that his or her decisions can finally resolve a matter. The AAT has a similar power under s 45 of the AAT Act.

10.133 If a reference is made to the Federal Court, the Information Commissioner must send all relevant documents and information in his or her possession to the Court (s 55J).

10.134 In exercising the power to refer a question of law to the Federal Court of Australia, the Information Commissioner may consider the following factors:

- whether referring a question of law to the Federal Court would best facilitate and promote public access to information (for example if there is uncertainty with respect to the interpretation of the FOI Act)

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

## Appeal to the Federal Court

- 10.135 A review party has the right to appeal to the Federal Court on a question of law from a decision of the Information Commissioner (s 56). A party to an AAT proceeding has a similar right (AAT Act s 44).
- 10.136 A party may choose to apply to the Federal Court rather than seek merit review in the AAT if, for example, the party believes the Information Commissioner wrongly interpreted and applied the FOI Act. If the Federal Court remits a decision to the Information Commissioner for reconsideration, a party could later apply to the AAT for review of the Commissioner's subsequent decision.
- 10.137 Section 56A(1)(b) provides that in determining the matter, the Federal Court may make findings of fact if its findings of fact are not inconsistent with findings of fact made by the Information Commissioner (other than findings resulting from an error of law), and it appears to the Court to be convenient. In determining whether it is convenient, the Court must have regard to all the following factors:
- i) the extent to which it is necessary for facts to be found
  - ii) the means of establishing those facts
  - iii) the expeditious and efficient resolution of the whole of the matter to which the IC review relates
  - iv) the relative expense to the parties if the Court, rather than the Information Commissioner, makes the findings of fact
  - v) the relative delay to the parties if the Court, rather than the Information Commissioner, makes the findings of fact
  - vi) whether any of the parties considers that it is appropriate for the Court, rather than the Information Commissioner, to make the findings of fact
  - vii) such other matters (if any) as the Court considers relevant.
- 10.138 There are similar provisions where Federal Court proceedings arise from an appeal from an AAT decision (AAT Act s 44(7)).

# Review by the AAT

## When can a person apply to the AAT?

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

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

10.140 A person cannot apply to the AAT directly for review of an agency or a minister’s decision – the person must apply for Information Commissioner review first.<sup>45</sup> However, when applying for IC review an applicant may make submissions as to why the Information Commissioner should decline the review under s 54W(b), thus enabling the person to apply to the AAT.

10.141 A person cannot apply to the AAT for review of the Information Commissioner’s decision not to undertake or continue a review. A person can however seek judicial review by the Federal Court of Australia or the Federal Circuit Court of Australia of the decision not to undertake or continue a review under the *Administrative Decisions (Judicial Review) Act 1977*.

## Time limit

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

## Parties to the AAT proceedings

10.143 The parties to an AAT review application are:

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

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

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<sup>45</sup> *Scholes and Decision Maker (Freedom of information)* [2018] AATA 4091.



- 10.145 The Information Commissioner is not a party to the proceedings in the AAT, except in relation to review under s 89N of a declaration that a person is a vexatious applicant. Consequently, the Commissioner does not play any role in the proceedings in defending his or her decision. In deciding the correct or preferable decision, the AAT will be guided by the submissions of the parties, who will ordinarily be the FOI applicant and the agency or minister who made the IC reviewable decision. As noted below in [10.153], s 61A of the FOI Act modifies relevant provisions of the AAT Act to spell out the role in the proceedings of the agency or minister who made the IC reviewable decision. Further, s 58(1) of the FOI Act provides that the AAT may decide any matter in relation to the FOI request that could be decided by the agency or minister.
- 10.146 In relation to review of a declaration that a person is a vexatious applicant (see Part 12 of these Guidelines), note 3 to s 89N expressly refers to s 30 of the AAT Act, which sets out the parties to AAT proceedings. Section 30 states that the decision maker (in this case, the Information Commissioner) will be a party to the proceedings. The Commissioner's role would be to assist the AAT and not to be a protagonist in the proceedings.<sup>46</sup> An agency or minister could also apply to the AAT to be made a party to those proceedings (AAT Act s 30(1A)).

## Notifying third parties

- 10.147 An agency or minister must notify affected third parties if an FOI applicant seeks AAT review of a decision to refuse access to third party information (s 60AA). This is the same as the notice requirement where an application is made for an IC review. An affected third party may apply to become a party to the AAT proceedings under s 30(1A) of the AAT Act (s 30(3)(d)).
- 10.148 The AAT may order that an agency or minister does not need to give notice to an affected third party of an AAT review application if it would not be appropriate to do so in the circumstances (s 60AB). An agency or minister must apply to the AAT for an order to be excused from the requirement to give notice (s 60AB(2)).
- 10.149 Section 60AB(3) provides the circumstances to which the AAT must have regard when determining if the requirement to give notice is not appropriate. Those circumstances are whether notifying the affected third party would or could reasonably be expected to:
- a) prejudice the conduct of an investigation of a breach of the law, or a failure to comply with a law relating to taxation (for example, if a document includes information about a person under criminal investigation)
  - b) prejudice the enforcement or proper administration of the law in a particular instance
  - c) disclose, or enable a person to ascertain, the existence or identity of a confidential source of information, or the non-existence of a confidential source of information, in relation to the enforcement or administration of the law
  - d) endanger the life or physical safety of any person
  - e) cause damage to the security, defence or international relations of the Commonwealth.

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<sup>46</sup> In line with the view expressed in *R v Australian Broadcasting Tribunal; ex parte Hardiman* [1980] HCA 13; (1980) 144 CLR 13 at [54]. See also AAT Act s 33(1AA).

## Onus

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

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

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

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

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

## Modifications to references in the AAT Act

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