



June 2020

Making and assessing FOI complaints

A person may complain to the Information Commissioner about an action taken by an agency in the performance of functions, or the exercise of powers under the *Freedom of Information Act 1982* (FOI Act). FOI complaints can only be made about an agency, Ministers are exempt.

An FOI complaint must be in writing and must identify the agency in respect of which the complaint is made. A person can lodge a complaint by using the FOI complaint form https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=ICCA_1

Complaints focus on how an agency has handled an FOI request or complied with other obligations under the FOI Act. Further information about the FOI complaints process can be accessed at: <https://www.oaic.gov.au/freedom-of-information/foi-guidelines/part-11-complaints-and-investigations/>

The OAIC must provide appropriate assistance to anyone who wishes to make a complaint and requires assistance to formulate their complaint (s 70(3)). This need may arise for example, if a person has language or literacy difficulties or otherwise needs assistance in ascertaining the scope of an agency’s FOI Act obligations and framing a complaint against the agency.

This worksheet provides guidance to assist with assessing complaints made to the Information Commissioner about the way agencies may have handled an application made under the FOI Act. This worksheet should be read in conjunction with the Part 11 of the FOI Guidelines and other guidance material including the [FOI Complaints – Investigation Overview worksheet](#).

FOI Complaints: Intake and Early Resolution process

Stages	Actions	Next steps
<ul style="list-style-type: none"> Intake 	<ul style="list-style-type: none"> Review correspondence and determine: <ul style="list-style-type: none"> Whether the complaint identifies the agency in respect of which the complaint is made. If it does 	If required request further information from the complainant if the jurisdiction or agency is unclear in FOI complaint form.

Stages	Actions	Next steps
	<ul style="list-style-type: none"> not, request further information from the complainant o the complaint relates to Ministers, State, Territory or local government agencies. If it does, advise the complainant that the OAIC can only investigate actions taken by an agency under the FOI Act (Cth). • If the complaint is within jurisdiction and identifies the agency satisfying s 70, raise the FOI complaint at weekly Investigations and Compliance Complaints, Vexatious Applicant Declaration and Extension of time meeting (Assessment meeting).¹ • If the Complainant provides further information advising that they withdraw the FOI complaint and are seeking IC review only, close the FOI complaint as ‘withdrawn’ and proceed to register an IC review. • If the Complainant refuses to withdraw the complaint once an IC review is registered, I&ER to provide verbal ITD over the telephone that the IC would likely decline to investigate the complaint on the basis that it is linked to an IC review. • If the Complainant provides further information indicating that the issues raised in the complaint are genuinely matters that can be included in an IC review, and refuses to proceed with IC review in lieu of complaint, I&ER to provide verbal ITD over the telephone that the IC would likely decline to investigate the complaint on this basis. 	<p>If no further information is required and the complaint is outside of jurisdiction or about a Minister finalise the complaint as invalid (out of jurisdiction) and notify the complainant.</p> <p>If Complainant does not agree to withdraw Complaint following verbal ITD:</p> <ul style="list-style-type: none"> • Assistant Review Adviser within I&ER to draft ITD on the basis that Complaint is linked to an ongoing IC review (one-page template to be developed) <p>If Complainant does not agree to withdraw Complaint following verbal ITD:</p> <ul style="list-style-type: none"> • Assistant Review Adviser within I&ER to draft ITD on the basis that issues raised in the complaint could be addressed in an IC review (one-page template to be developed) •
<ul style="list-style-type: none"> • Assessment meeting 	<ul style="list-style-type: none"> • Assessment of an FOI complaint will include the consideration of: 	<p>If assessed as a valid FOI complaint:</p>

¹ The Investigations and Compliance Complaints, Vexatious Applicant Declaration and Extension of time weekly meeting is attended by the Principal Director, the Investigations and Compliance team and the Assistant Director and Assistant Review Adviser of the Intake and Early Resolution team.

Stages	Actions	Next steps
	<ul style="list-style-type: none"> ○ Whether the FOI complaint is within jurisdiction ○ The outcome the complainant seeks ○ Whether the issues raised are more appropriately dealt with under the merit review process ○ Whether the issues raised are systemic in nature ○ Whether the complainant has previously complained to the respondent ○ At what stage of the processing did the action take place that the complaint relates to ○ Whether the complaint is about an agency's IPS or disclosure log 	<ul style="list-style-type: none"> ● Register complaint: Assistant Review and Investigation Adviser to enter complaint details in Resolve and send acknowledgement email to the complainant; matter allocated to 'FOI – Complaints' queue. <p>If assessed as a valid FOI Complaint and IC review:</p> <ul style="list-style-type: none"> ● Register complaint: Assistant Review and Investigation Adviser to enter complaint details in Resolve and send acknowledgement email to the complainant; matter allocated to 'FOI – Complaints' queue. ● Register related IC review. See XXXXXX for next steps in the IC review process. <p>If assessed as IC review only:</p> <ul style="list-style-type: none"> ● Register related IC review. See XXXXXX for next steps in the IC review process <p>If assessed as requiring further information from the complainant:</p> <ul style="list-style-type: none"> ● Send an email to the complainant see attachment A ● If the complainant does not wish to proceed with the complaint, but wishes to proceed with the IC review, finalise the complaint as withdrawn and register the IC review. See XXXXXX for next steps in the IC review process. ● If the complainant wishes to proceed with the complaint and provides further particulars list matter for reassessment at the next assessment meeting.

Stages	Actions	Next steps
<ul style="list-style-type: none"> Preliminary inquiries 	<ul style="list-style-type: none"> Review complaint and consider appropriate preliminary inquiries to be conducted with the agency 	<ul style="list-style-type: none"> Review and Investigation Adviser/Assistant Director to prepare preliminary inquiries and send to Director for clearance. Matter remains in the 'FOI – Complaint' queue until response received from agency Review and Investigation Adviser/Assistant Director to monitor response from agency and follow-up as necessary Review and Investigation Adviser/Assistant Director to acknowledge receipt of preliminary inquiries response.
<ul style="list-style-type: none"> Senior assessment 	<ul style="list-style-type: none"> Complaint and agency response to preliminary inquiries to be assessed to determine whether the complaint should proceed to investigation, be declined or that further preliminary inquiries are required. 	<ul style="list-style-type: none"> Director or Principal Director to undertake assessment; assessment to be recorded in the 'Summary' field for the matter in Resolve; matter to remain in 'FOI-Complaint' queue awaiting allocation to a Review and Investigation Adviser (or other officer as appropriate)

Attachment A: Letter to Complainant

Our reference: [Insert reference number]

Agency reference: [Insert reference number]

[First Name Last Name]

[Company Name]

[Address Line 1]

[Address Line 2]

Complaint about the handling of your FOI request by the [Agency] (Reference No)

Dear (applicant)

Thank you for your complaint about the [name of agency] (agency) in relation to your FOI request. If you have not done so already, we encourage you to lodge your complaint with the agency before lodging your complaint with us.

The [FOI Guidelines](#) at [11.4] state:

The Commissioner's view is that making a complaint is not an appropriate mechanism where IC review is available, unless there is a special reason to undertake an investigation and the matter can be dealt with more appropriately and effectively in that manner. IC review will ordinarily be the more appropriate avenue for a person to seek review of the merits of an FOI decision, particularly an access refusal or access grant decision.

You have sought [outcome].

I note that the Information Commissioner can only make non-binding recommendations as a result of a complaint.

During a complaint investigation about the actions of an agency, the Information Commissioner will not make a conclusion on whether the agency has made the correct and preferable decision in relation to your request for information. The Information Commissioner will only consider the merits of an agency's decision in an IC review. Further information about the difference between FOI complaints and IC reviews is available on our [website](#).

Consequently, at this stage it would appear that an IC review is the more appropriate and effective mechanism, rather than an FOI complaint, to address the issues you have raised.

If we do not hear from you, we will assess your complaint to determine whether it is more appropriately handled as an IC review. We will let you know if we decide to treat your complaint as an IC review.

Please note:

- If your circumstances change, or your request has been resolved directly with the (agency), please advise us by email as soon as practicable.
- Information about the way we handle your personal information is available in our [privacy policy](#).

Should you wish to follow up on this matter, please contact the OAIC by email foidr@oaic.gov.au and quote the reference number at the top of this email.

Yours sincerely

Attachment B: Letter to IC Review applicant seeking to lodge a complaint as well

Our reference: [Insert reference number]

Agency reference: [Insert reference number]

[First Name Last Name]

[Company Name]

[Address Line 1]

[Address Line 2]

Your IC review application about an FOI decision by the [Agency] (Reference No)

Dear (applicant)

Thank you for your correspondence seeking to lodge an IC review application with the [Office of the Australian Information Commissioner](#) (the OAIC) about the [name of agency] (agency).

(delete)

Thank you for your complaint about the [name of agency] (agency) in relation to your FOI request.

(delete)

I note you have also made a complaint about the way the Department has handled your FOI request. Your concerns about the process will be considered during the IC review.

(Delete)

The [FOI Guidelines](#) at [11.4] state:

The Commissioner's view is that making a complaint is not an appropriate mechanism where IC review is available, unless there is a special reason to undertake an investigation and the matter can be dealt with more appropriately and effectively in that manner. IC review will ordinarily be the more appropriate avenue for a person to seek review of the merits of an FOI decision, particularly an access refusal or access grant decision.

You have sought [outcome]. I note that the Information Commissioner can only make non-binding recommendations as a result of a complaint.

During a complaint investigation about the actions of an agency, the Information Commissioner will not make a conclusion on whether the agency has made the correct and preferable decision in relation to your request for information. The Information Commissioner will only consider the merits of an agency's decision in an IC review.

Consequently, at this stage it would appear that an IC review is the more appropriate and effective mechanism, rather than an FOI complaint, to address the issues you have raised.

However, if wish to pursue a complaint about the Department as well as an IC review, can you please advise by return email.

To enable us to properly investigate your complaint, please give as much information as possible including:

- Why you are dissatisfied with the agency's handling of your FOI request
- Details of what has occurred and who you dealt with
- What action or result you want

Please note:

- The OAIC has initiated preliminary inquiries with the (agency) regarding your IC review, we will contact you once the (agency) responds to advise the next steps. **(remove if not deemed)**.
- If you have submitted a request to the (agency) for internal review of its decision and it has not yet provided you with an internal review decision, please advise by return email. **(remove if not relevant)**
- You will be advised about the next steps in the IC review process once your application has been assessed by a senior member of the FOI team. Depending on the issues you have raised, this may take up to 4 – 8 weeks **(delete if deemed/or seeking further info from A)**
- If your circumstances change, or your request has been resolved directly with the (agency), please advise us by email as soon as practicable.
- Information about the way we handle your personal information is available in our [privacy policy](#).

Should you wish to follow up on this matter, please contact the OAIC by email foidr@oaic.gov.au and quote the reference number at the top of this email.

Yours sincerely





Updated June 2023

Conducting an IC review: Deemed access refusal matters

This worksheet provides guidance to assist with managing IC reviews of deemed refusal decisions made under s ss 15AC(3), 51DA(2) or 54D(2) of the FOI Act.

This worksheet should be read in conjunction with:

- [Part 10 of the FOI Guidelines](#)
- [Direction as to certain procedures to be followed in IC reviews](#) (for respondents)
- [Direction as to certain procedures to be followed by applicants in Information Commissioner reviews](#) | OAIC, and
- the OAIC's [Regulatory Action Policy](#).

Deemed refusal decisions are currently dealt with by the Intake and Early Resolution Team, and primarily involved their 'Registrations sub team' [including registration, acknowledgment and issuing of preliminary inquiries], and the 'Intake sub team', who are responsible for both the triaging of invalid applications, and progression of valid applications through the IC review process. The 'Early Res sub team' is responsible for assessment of applications that later progress to review of a subsequent revised decision.

Deemed decisions- key principles

- The statutory processing period to process a FOI request is defined in s 15(5) of the FOI Act as being 30 days after the date of receipt of the FOI request.
- The statutory processing period may be extended prior to the expiration of that period under various sections of the FOI Act to allow for additional processing time (see ss 15AA and 15AB) or for third party consultation (see ss 26A, 27 and 27A). The statutory processing period may also be extended after the expiration of the processing period under s 15AC of the FOI Act by the Information Commissioner.
- Section 15AC(3) of the FOI Act provides that where an agency or Minister has not made a decision on a request within the statutory processing period, the principal officer of the agency or the Minister is taken to have made a decision personally refusing to give access to the document.
- Similarly, s 54D(2) of the FOI Act provides that where an agency or Minister has not made a decision on an internal review application within 30 days (as required by s 54C(3)), the principal officer of the agency is taken to have made a decision personally affirming the original decision. The period for making an internal review decision can only be extended after the 30 day period has expired (see s 54D(3)).

- Section 51DA of the FOI Act contains similar provisions in relation to deemed decisions with respect to applications for amendment and/or annotation (s 48) of personal records. The period for making a decision on an amendment or annotation application may only be extended after the 30 day period has expired (see s 51DA(3)).

Conducting IC review of deemed access refusal decisions

Stage	Actions
Registration and Triage	<ol style="list-style-type: none"> 1. The Registrations Officer is to register the IC review and the Intake sub-team is to consider whether there has been a deemed access refusal decision on the FOI request. Factors to consider include: <ul style="list-style-type: none"> ○ whether the statutory processing period has expired ○ whether there has been an application or a request by the agency to ‘passively agree’¹ to an extension of time ○ where a request consultation process under s 24AB has commenced, whether the process has commenced during the statutory processing period or once there has been a deemed access refusal. 2. If there has been a deemed access refusal, the Intake sub-team is to consider whether the application for IC review is valid (including whether it has been made within time); and, if the application for IC review is out of time, refer to ‘Conducting an IC review – Section 54T Extension of Time Application Checklist’, which can be found here: D2019/003336. 3. If the IC review application is valid (because it has been made within time, among other things), the Registrations Officer is to send acknowledgement letter to the applicant. 4. If the application is valid, the Registrations Officer is also to allocate the Resolve file to ‘FOI – IC reviews – Deemed’ queue or ‘FOI- IC reviews – DHA Deemed’ queue if the Department of Home Affairs [DHA] is the respondent. 5. If the application is invalid, for example because it has been made out of time or does not include evidence of the FOI request, no preliminary inquiries under s 54V to the respondent are yet required. Instead, the Registrations Officer is to allocate the Resolve file to ‘FOI – Triage’ queue for follow-up actions by the Intake sub-team. The Registrations Officer to mark the ‘Assessor Note’ field noting the reason for the application being invalid, using the following convention: ‘[NOW] 54T required’ or ‘[NOW] FOI request required, or ‘[NOW] out of jurisdiction’.
Valid applications only: Issue preliminary inquiries	<ol style="list-style-type: none"> 6. The Registrations Officer is to send s 54V preliminary inquiries email to the respondent. The respondent is given 1 week to respond. The template can be found here: D2020/007259. 7. The Registrations Officer is to mark the ‘Assessor Note’ field, noting when the preliminary inquiries response is due, using the following convention: ‘[DD/MM] PIs due’. 8. The Intake sub-team is to monitor the agency response’s due date. If a response has not been provided by the due date, the Intake sub-team is to call or email the respondent to follow up on the response. 9. If no response is received after a follow-up attempt, the Intake sub-team is to escalate to Director Intake and Early Resolution Team for consideration of issuing a s 54Z/55T notice.

¹ A ‘passive agreement’ refers to an agency requesting an extension of time under s 15AA and advising the applicant that where an applicant does not respond to the request, the agency takes that as a purported passive agreement by the applicant to extend the processing period.

Stage	Actions
Preliminary inquiries response received: respondent confirms deemed decision	<ol style="list-style-type: none"> 10. If the respondent responds to the preliminary inquiries confirming a deemed decision has been made, the Intake sub-team is to draft a s 54Z/55T notice requesting a revised decision or submissions and relevant processing documentation within 3 weeks. [The template s 54Z/55T notice in Resolve can be found under the 'All Actions' tab of the Resolve file by clicking 'Add Procedure', 'FOI Letter Templates', 'Early Resolution Letters (FOI)' and 'MR-070 54Z/55T Deemed- Notice of IC review']. 11. The Intake sub-team is to then allocate an 'Await Clearance - Director' action in Resolve to Director Intake and Early Resolution Team. 12. Director Intake and Early Resolution Team is to have regard to the Direction as to certain procedures to be followed in Information Commissioner reviews ('IC review procedure direction') and Part 10 of the FOI Guidelines, when considering whether to issue a s 54Z/55T notice. 13. Once the s 54Z/55T notice has been approved, the Intake sub-team is to send the notice to the respondent. The respondent is given 3 weeks to respond, in accordance with the IC review procedure direction. 14. The Intake sub-team is to update the 'Assessor Note' field with the following convention: '[DD/MM] 54Z/55T due'.
Preliminary inquiries response received: respondent denies deemed decision	<ol style="list-style-type: none"> 15. If the respondent responds to the preliminary inquiries advising that no deemed access refusal decision has been made, the Intake sub-team is to assess the circumstances and to conduct further preliminary inquiries with the respondent, if necessary, to determine the correct status of the decision and establish jurisdiction. 16. If no access refusal decision has been made [for example, where the applicant's FOI request was deemed to have been withdrawn by the applicant pursuant to s 24AB(7) following a request consultation process, and that notice was issued within the statutory processing timeframe], the Intake sub-team is to notify the applicant that the IC review application is invalid given no reviewable access refusal decision has been made, and invite the applicant's comments within 7 days. As part of this invitation to comment, the Intake sub-team is to include notice of intention to finalise the application as invalid in the absence of a response within 7 days. The Intake sub-team to consult Assistant Director Intake sub-team for guidance in the first instance where required, including where the applicant provides a response contesting their application is not invalid. 17. If the Intake sub-team is satisfied that a deemed access refusal decision has been made [for example, where the respondent has refused to deal with an invalid request when a request consultation process was required to have been undertaken], consult Assistant Director Intake sub-team in the first instance, prior to drafting a s 54Z/55T notice commencing a review [refer to steps 6-10 above]. The Assistant Director may wish to phone the respondent to discuss the OAIC's views prior to considering whether to draft a s 54Z/55T notice commencing a review. The Assistant Director is to inform the Intake sub-team as to when the s 54Z/55T notice should be drafted. The s 54Z/55T notice should include a summary of the OAIC's reasons as to why there has been a deemed access refusal decision – contrary to the respondent's views.
No response to s 54Z/55T notice received: issue follow-up	<ol style="list-style-type: none"> 18. If no response to s 54Z/55T notice has been received by the due date, the Intake sub-team is to call or email respondent and request a response within 7 days. If no response received by this date, Assistant Director Intake sub-team is to contact the respondent advising that the next step in the process is to issue a s 55R Notice. The Intake sub-team is to draft a s 55R notice for consideration by the Director Intake and Early Resolution Team. [The template s 55R notice can be found here: D2020/007254.] 19. Relevant considerations to be taken into account when deciding whether to issue a s 55R notice include: <ul style="list-style-type: none"> – the reasons given by the respondent for non-compliance with the s 55E notice

Stage	Actions
	<ul style="list-style-type: none"> - the length of time that the FOI request has been on foot - the subject matter of the FOI request - whether there are any significant or systemic issues to consider - Part 10 of the FOI Guidelines - the IC review procedure direction. <p>Further guidance on issuing s 55R Notices can be found here: D2019/014476</p> <p>20. Once the s 55R Notice has been cleared by Director Intake and Early Resolution Team, the Director is to raise a Resolve action to Assistant Commissioner FOI for clearance.</p> <p>21. Once the s 55R Notice has been approved by Assistant Commissioner FOI, the Intake sub-team is to send the notice to the respondent.</p> <p>22. The Intake sub-team is to update the 'Assessor Note' field with the following convention: '[DD/MM] 55R due'.</p>
<p>Response to s 54Z/55T notice received: respondent has provided a revised decision to the applicant</p>	<p>23. Once the OAIC has been advised by the respondent that a revised decision has been provided to the applicant and a copy of the decision provided to the OAIC, the Intake sub-team is to send a 'proceed' email to the applicant. The applicant is given 14 days to advise if they wish to proceed or withdraw their application for IC review. The proceed email requires that the applicant provide reasons in the event they wish to proceed with the review in accordance with the Direction as to certain procedures to be followed by applicants in Information Commissioner reviews ('IC review procedure direction for applicants'). This email is to contain notice that if a response is not received by the due date, the IC review will be finalised under s 54W(c) of the FOI Act based on a failure to comply with the Commissioner's procedure direction.</p> <p>The 'proceed' email template can be found here: D2023/013037.</p> <p>24. The Intake sub-team is to mark the 'Assessor Note' field with the following convention: '[DD/MM] ITD to A due'.</p> <p>25. Once a revised decision has been provided, the Registrations Officer is to update the Resolve file with the s 54Z/55T response including the new agency decision details under the 'Agency Decisions' tab of the file. The revised decision should be copied to the file as a stand-alone document and categorised as a '55G revised decision' through 'Document Properties' to ensure it can be captured for reporting purposes. The 55G decision drop down indicator on the Resolve home screen should also be completed to show that a revised decision has been received in response to a deemed access refusal decision.</p>
<p>If no response to proceed email is received</p>	<p>26. If no response to the 'proceed' email has been received, the Intake sub-team is to follow up with the applicant by phone where phone number has been provided. The Intake sub-team is to file note the phone contact attempt.</p>
<p>Closure of IC review under s 54W(c)</p>	<p>27. If no response to the follow-up action or to the 'proceed' email from the applicant has been received, the Intake sub-team is to draft a decision to finalise the matter under s 54W(c) of the FOI Act for consideration by Director Intake and Early Resolution Team. The s 54W(c) closure letter template can be found here: D2023/013035.</p> <p>Further guidance on consideration of whether to close an IC review under s 54W can be found here: D2018/016247.</p> <p>28. The Intake sub-team is to allocate a Resolve file action to Director Intake and Early Resolution Team for clearance. Assistant Commissioner FOI clearance of s 54W(c) closure letters is at the discretion of the Director for contentious or sensitive matters.</p> <p>29. Once the closure letter has been approved, the Intake sub-team is to convert the closure letter to a PDF and send a copy to the applicant and the respondent, in separate emails.</p>

Stage	Actions
	<p>30. The Intake sub-team is to immediately update the 'Agency Decisions' tab of the Resolve file, finalising any outstanding issues under s 54W(c), and finalise the IC review. The staff member may prefer to allocate the matter into their name prior to finalisation.</p> <p>31. The Intake sub-team is to close the IC review.</p>
<p>Response to proceed email received: applicant advises that they wish to proceed with IC review</p>	<p>32. If the applicant advises that they wish to proceed with the IC review, the Intake sub-team is to send an acknowledgement email to the applicant, confirming the scope of the review. If the scope of the review unclear, the Intake sub-team is to send an acknowledgement email to include request for reasons to be provided in support of IC review within 14 days. Acknowledgement email can be found here:</p> <p>33. The Intake sub-team is to send an update email to the respondent advising that the applicant wishes to proceed with the IC review. Template email can be found here:</p> <p>34. If reasons are required from the applicant, mark the Assessor field with the following convention: '[DD/MM] Subs from A due'.</p> <p>35. The Intake sub-team is to ensure a full response has been provided to the s 54Z/55T notice prior to moving matter to Assessments queue [for example, any processing documentation or submissions required in the notice should be on file].</p> <p>36. The Intake sub-team is to update the Resolve file [for example, to update the 'Agency Decisions' tab to include issues under review, and the summary field] and allocate the matter to the 'FOI – IC reviews – Assessment' queue. The Intake sub-team is to mark the 'Assessor Note' field noting there has been a deemed access refusal decision and the matter is ready for further assessment using the following convention: '[NOW] Deemed refusal'.</p>
<p>Response to proceed email received: applicant advises that they wish to withdraw their IC review application</p>	<p>37. If the applicant advises that they wish to withdraw their IC review, the Registrations Officer is to send a withdrawal acknowledgement email to the applicant. Email template can be found here: D2020/007272.</p> <p>38. The Registrations Officer is to notify the respondent by email that the applicant has withdrawn their request for IC review and confirm that the matter is now closed. Email template can be found here: D2020/007270.</p> <p>39. The Registrations Officer is to update the Resolve file and close the file without delay, finalising outstanding issues in the 'Agency Decisions' tab as withdrawn.</p>



June 2023

New IC review: Triage Process work sheet

Introduction

This checklist provides general guidance to review officers in the Intake and Early Resolution Team for the registration and triage process of IC review applications.

Checklist to assist with Registration of IC review applications

Any time a new IC review application is received via email, post OR if more than one matters has been listed to be reviewed in a single webform matter, do the following:

- Conduct a search on resolve, select 'Find Client' to search for the correct applicant (exercising caution with companies/directors etc. – cross reference with decision and review form)
- Enter last name of the FOI applicant
- If there are no hits, select 'New Client' and enter in all possible fields (in particular phone and email contacts)
 - i. For Address, check validate and select from existing postcode, or 'Not registered' if there are no options
 - ii. Check save and check 'New Case'
- If there is a hit, open the client page for the correct person and click 'New Case' on top right-hand corner
- If there is a hit and the IC review application relates to an existing client but relates to a different FOI request made on the Right to Know website, select 'New Client' and enter in all possible fields (in particular phone and email contacts). This is because whenever an applicant makes an FOI request via the Right to Know website, a unique email address to the FOI request in the format of 'foi+request-...@righttoknow.org.au' is generated. [Please do NOT choose any existing client profile about the same entity, which likely contains an email address that relates to a different Right to Know matter].
 - i. Check save and check 'New Case'
- Select 'IC Review' or appropriate type and click 'Ok'
- Everything in orange must be completed
- Select Review Type – be careful! This cannot be changed post selection

- i. Two options: Access refusal (includes charges and amendment to personal information) and access grant (when someone opposes to the release of documents for either personal or business reasons)

Method: To be determined

Enter respondent/agency's details. Never create an agency – select from options existing profiles

- i. When selecting an agency or department, ensure that either 'FOI Contact Officer' is selected in the individual below or that the email on the agency profile is one which matches the agency's primary FOI email.

If a party is represented the review adviser add an additional party in 'Parties' tab

Received date: This is the date the application was received by the OAIC. The review adviser should include the method of receipt, whether it be via post, email or website.

Complete a google search of the FOI applicant to determine if the applicant has any media links. If so, flag with supervisor to determine if sensitivity needs to be changed.

Save the entries – This should create a case number.

The review adviser will notice a new action popup: 'Record case details and attach documents'.

Clear categories on email with application etc. and drag onto the file on Resolve.

- i. On outlook, put the category back on the email and move to 'Read case' folder
- ii. Check off 'Record case details' button

Applications received via smart form

Does the IC review request include a full copy of the decision?

Section 54N(1)(b) of the FOI Act provides that in order to make a valid application for IC review a person must include a copy of the notice given under s 26 of the IC reviewable decision for which an IC review is sought.

Check that:

- the decision has been provided
- the decision is complete and that there are no missing pages or attachments
- the applicant has not sought IC review of more than one decision. If this is the case, register separate decisions per the above instructions

If the decision is complete, fill in the 'Agency Decision' tab on resolve, include decision maker 'add issue' and allocate to FOI IC reviews Assessment. When completing this tab ensure that you enter all of the relevant issues and exemptions applied in the decision.

If there is no decision, but they provide a copy of the initial purported FOI request or an acknowledgment letter from the respondent agency, and claim no decision was made then issue preliminary inquiries to the respondent agency. The respondent is given 1 week to respond. Template can be found here: [D2020/007259](https://www.oaic.gov.au/foi/foi-ic-reviews/foi-ic-reviews-templates).

IC review request does not include a copy of the decision or the FOI request, issue a request for information to the applicant

- By email – Use template MR-152 under FOI Letter Templates → Early Resolution Letters (FOI) to send to the applicant via their preferred contact method
- Noting in the assessor notes field, a due date of 7 days noting [<One week>] ‘RFI due’
- If a decision is not provided in 7 days, draft a s 54N decision –using MR-155 under FOI Letter Templates → Early Resolution Letters (FOI)and refer the draft decision to your Director for clearance
- If the decision is cleared, notify the applicant and close the IC review.

If the decision is provided, then process the resolve case file as per the above instructions, filing out the summary field (per the below) and the ‘agency decisions’ tab.

Conduct the Triage process on resolve

- Enter in summary field
- Paste template. See sample Attachment C for assessor notes entered on resolve and allocate to FOI IC Reviews Assessments.

Does IC review relates to an access grant decision?

- If yes, immediately contact the Department for the details of the FOI applicant notifying the Department that a third party who was consulted has sought review. Invite the Department not to release the documents pending the outcome of the access grant IC review application. Refer to attachment D for a copy of the email that should be issued regarding access grant review requests. Once notice has been issued, move the matter FOI – IC Reviews Assessments queue.
- If no, allocate to FOI IC reviews Assessments.

Does IC review contains subject matter that is sensitive or high-profile in nature?

- If yes, complete ‘Sensitivity’ indicator on Main screen in Resolve under Review Details by selecting one of the following options:



Also notify Director by email of any sensitive requests, prior to moving to FOI IC reviews Assessments queue.

- If no, leave indicator at default setting of ‘Not sensitive’

IC review applicant is also seeking to lodge a complaint about the way an agency has handled their FOI request

- Check whether the applicant has sought review using the IC complaint smart form or indicated that they wish to lodge a complaint
- Check the outcome that the applicant is seeking
- Consider whether to contact the applicant to discuss whether to proceed with a complaint or an IC review application. In particular;
 - the outcome that the applicant is seeking
 - the time frames involved
 - ask the applicant to clarify the outcome they are seeking in writing
 - if the applicant is seeking to proceed with a complaint refer the applicant's correspondence to your Assistant Director for discussion.

Attachment A – Template for assessor summary field on Resolve main page

Summary

deemed refusal [or affirmed] on XX*. FOI request [or internal review request] made XX

Request:

Decision under review: original decision dated @.

[Exemptions use]: @ document/s found within scope of request, released/exempt in full/part under exemption/s @.

[Searches use]: No document/s found within scope of request. Access refused under s 24A (insert relevant subsection if known).

[Practical refusal use]: @ document/s found within scope of request. (Insert @ hours to process, decision making etc. any key points)

[Charges use]: \$@ (insert calculation)

Number of documents at issue: @ (delete if not applicable)

Scope of review: Applicant seeks review of [Practical refusal/Exemptions ss @/Searches]. Applicant states (insert any key statements that allude to applicant's scope of request. If not known request in acknowledgement).

Notes for assessor::

- a. Assessor Note
 - i. Enter the relevant exemptions or action status if preliminary enquiries undertaken:

Attachment B – Template for acknowledgement letter to applicant (where the matter is deemed)

Our reference: <CASE NO>

Agency Reference: <REF>

By email: <Email>

Receipt of your IC review application

Dear Mr/Ms A,

Thank you for your application for Information Commissioner Review (IC review).

The Office of the Australian Information Commissioner (OAIC) is considering your application.

If you wish to advise the OAIC of any changes to your circumstances, including your contact details or if your FOI request has been resolved, please write to FOIDR@oaic.gov.au and quote <CASE NO>.

Please note that the OAIC's preference is to receive IC review applications through our [online smartform](#), as this allows an application to be automatically registered and acknowledged, which in turn allows us to progress an application more quickly. Please note that future applications that are made by email will take longer to acknowledge and progress as they require manual registration.

Kind Regards,

Attachment C – Template for acknowledgement letter to applicant (where the decision is provided)

Our reference: XXXXX

Agency reference: XXXXX

Applicant name

By email: XXXXX

Receipt of your IC review application

Dear [Mr/Ms name]

Thank you for your application for Information Commissioner Review (IC review).

The Office of the Australian Information Commissioner (OAIC) is currently considering your application.

[If scope is clear] We understand that you are seeking a review of...[e.g. the exemptions applied to the documents under ss XX and XX of the FOI Act; the searches undertaken by the respondent to identify all documents relevant to your request etc.]

or

[If scope of review is unclear] To assist us in assessing your application, can you please respond by [2 weeks] with the following information:

1. identify the aspect(s) of the agency or Minister's decision about which the review is sought
2. state why you disagree with the agency or Minister's decision
3. identify which documents you consider have been wrongly refused, or which exemptions have been incorrectly applied
4. [only include if relevant- otherwise delete] if the request has been refused on the grounds that it would substantially or unreasonably divert an agency's resources or interfere with the performance of a minister's functions (ss 24 and 24AA) – specify the reasons why they believe the FOI request would not have this impact.

If you wish to advise the OAIC of any changes to your circumstances, including your contact details or if your FOI request has been resolved, please write to FOIDR@oaic.gov.au and quote <CASE NO>.

Otherwise we will write to you with an update on next steps once your application has been assessed.

Please note that the OAIC's preference is to receive IC review applications through our [online smartform](#), as this allows an application to be automatically registered and acknowledged, which in turn allows us to progress an application more quickly. Please note that future applications that are made by email will take longer to acknowledge and progress as they require manual registration.

Kind Regards,

Attachment D – Template for acknowledgement letter to applicant (where OAIC is respondent)

Our reference: XXXXX

Agency reference: XXXXX

Applicant name

By email: XXXXX

Copied to: Legal@oaic.gov.au

Receipt of your IC review application

Dear [Mr/Ms name]

Thank you for your application for Information Commissioner Review (IC review) of an FOI decision made by the Office of the Australian Information Commissioner (the OAIC).

I intend to recommend that a delegate of the Information Commissioner exercise the discretion to decide not to undertake this IC review under s 54W(b) of the FOI Act, which would allow you to seek review at the Administrative Appeals Tribunal (AAT).

The effect of such a decision would be to finalise this IC review application and allow you to apply directly to the AAT. You would then have 28 days to lodge an application with the AAT in accordance with ordinary AAT processes.

The reasons for this recommendation follow.

Discretion under s 54W(b) of the FOI Act

Under s 54W(b), the Information Commissioner may decide not to undertake a review, or not to continue to undertake a review, if the Information Commissioner is satisfied that the interests of the administration of the FOI Act make it desirable that the IC reviewable decision be considered by the AAT.

This is also referred to in the Guidelines issued by the Australian Information Commissioner under s 93A (FOI Guidelines) at [10.88] – [10.89], which states:

The Information Commissioner can 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 review application (s 54W(b)). It is intended that the Commissioner will resolve most applications. Circumstances in which the Commissioner may decide that it is desirable for the AAT to consider a matter instead of the Commissioner continuing with the IC review include:

- 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
- 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)).

The OAIC will consult the parties involved in a matter before making a decision under s 54W(b) to conclude an IC review.

In this IC review, it is my view that it is in the interests of the administration of the FOI Act that this review be closed and that you be provided the opportunity of applying directly to the AAT for review, because it is apparent that:

- The FOI request under review was processed and decided by the OAIC.
- There may therefore be a perceived conflict of interest in the Commissioner undertaking a review of a decision made by their own agency.

[Only if relevant: In this case, I also note the OAIC has already had an opportunity to reconsider the decision under internal review].

The delegate of the Information Commissioner will review all material before the OAIC in deciding whether to exercise the discretion to decide not to undertake a review in this case.

Next steps

If you disagree with this proposed recommendation, please write to us by [2 weeks] and advise us of your reasons. Your reasons will be taken into account before a decision is made on whether to finalise this matter under s 54W(b).

In the absence of a response by this date this IC review application may be finalised under s 54W(b), and the parties will be notified of their review rights.

Yours sincerely

[Name]

Intake and Early Resolution Team

[Date]

Attachment E – Access Grant notification to affected agency

Our reference: <OAIC Ref>

Your reference: <Agency Ref>

FOI Contact Officer

By email: <Agency FOI Contact Email>

New Third Party IC Review Application

Dear FOI Contact Officer

On <IC Review Application Date>, a third party applied to the OAIC for IC review of an access grant decision made by the <Department/Agency Name> (Department/Agency) on <Access Grant Decision Date>.

A copy of the IC review application and the <Agency's> decision are attached.

To assist us in assessing this application, can you please respond to confirm that the <Agency> has not already released the relevant documents to the FOI applicant?

If the <Agency> has not already released the documents, please do not release the documents as these will be subject to review by the Commissioner.

I would appreciate your earliest response, or by COB <1 Week> please.

Was the IC review application made within 60 days (in the case of access grant decisions 30 days) after the day notice of the IC reviewable decision was given under s 26?

If the application for IC review was not made within 60 days in the case of an access refusal IC review application and 30 days in the case of an access grant decision, follow the process under *conducting an IC review: Applications for extension of time to apply for IC review – s 54T worksheet* at TRIM LINK: [D2019/003336](https://www.oaic.gov.au/foi/foi-requests/foi-requests-2019-2020/foi-requests-2019-2020-003336)



Updated June 2023

PROCESSING EXTENSION OF TIME REQUESTS

The *Freedom of Information Act 1982 (Cth)* requires agencies and ministers to comply with statutory timeframes for processing FOI requests. In some limited circumstances, the timeframe may be extended, for example, with the agreement of the applicant or with the approval of the Information Commissioner.

Further information on processing FOI requests can be found in [Part 3 of the FOI Guidelines](#).

Where an agency is unable to process a request within the statutory processing period, the FOI Act provides that the Information Commissioner is able to grant an extension of time to finalise the FOI request.¹

If an agency or a minister is unable to process a FOI request and the statutory processing clock is still running – an agency or minister can request an extension of time under s 15AB of the FOI Act.

If an agency or a minister has not been able to process an FOI request within the statutory processing period – that is the processing clock has expired, an agency or a minister is able to request an extension under s 15AC of the FOI Act.

When requesting an extension of time, agencies and ministers are required to provide submissions in support of the request. The information that the OAIC requires includes:

- Contact details of the applicant
- Date of receipt of the FOI request
- Scope of the FOI request
- Whether the statutory processing period has been extended under any other provision in the FOI Act (e.g. imposition of charges, consultation process, consultation with third parties or consultation with international governments)
- Whether the agency or minister has requested an agreement from the applicant to extend the processing period under s 15AA
- A plan on how the agency or minister intends to utilise the extra time if granted
- Submissions in support of its request

¹ Australian Information Commissioner and Privacy Commissioner, *Delegation of freedom of information powers and functions*, 20 June 2019.

Where an agency or minister does not provide sufficient reasons to support its extension of time request, it is open to the decision maker to request further information from the agency or minister, but there is no obligation to do so.

The OAIC has developed a [Smartform](#) which sets out the required information for an extension of time application. Agencies and ministers are encouraged to use the Smartform when requesting extensions of time.

Extension with the applicant's agreement (s 15AA)

An agency may extend the processing period by up to 30 days if the applicant agrees in writing. The agency can also ask applicants for further extensions under s 15AA as long as the combined length of all agreed extensions does not exceed 30 days. The agency must give written notice of an extension to the OAIC as soon as practicable after the agreement is made. If the agency does not tell the OAIC, the extension is invalid.

A s 15AA agreement cannot be made once an FOI request has become a deemed refusal under s 15AC.

15AB – Voluminous and/or complex

Section 15AB of the FOI Act allows an agency or Minister to apply to the Information Commissioner (IC) for an EOT, where they consider the initial period insufficient to deal with an FOI request because the request is complex or voluminous (these are the only two issues we are able to take into consideration when deciding whether to grant an 15AB EOT).

An extension of time can be granted for a period of 30 days or other period as the Information Commissioner considers appropriate.

The following considerations should be taken into account when making an extension of time decision:

- Delegation: Delegation for making administrative decisions on extension of time applications is APS 5 and above.
- The due date of the request, having regard to other statutory provisions which have been applied? (Note: these are generally checked at the triage/registration stage)
Example:
 - Agreement by applicant (s 15AA)
 - Consultation with third parties (s 15(6))
 - Consultation for the purposes of a practical refusal reason (s 24AB)
 - Application of any charges (s 29)
- Whether the processing period has ended: If the due date for the decision has passed, then an application under s 15AB cannot be made. See Assistant Director or Director of the Intake and Early Resolution team.
- Whether the request is voluminous: In determining whether a request is voluminous, regard must be had to the number of documents within the scope of the request. The agency's size should also be taken into consideration: A small agency may consider a request of 300 pages voluminous, whereas larger agencies may routinely process requests involving >1000 pages.

- Whether the request is complex: In determining whether a request is complex, regard must be had to:
 - The scope and nature of the documents requested, including any sensitivities that exist, and the range of documents captured by the request
 - Whether multiple third party consultations are required (for example, where it may involve cabinet material or national security material)
 - Any challenges involved in the search and retrieval of relevant documents, including whether the documents need to be retrieved from an offshore location or external storage facility, or where documents do not exist in a discrete form and the agency is attempting to collate the requested information from multiple databases or platforms
 - Whether specialised subject matter expertise is required to assess release of the documents. This is a consideration in relation to the types of requests that certain agencies process, for example, requests for sensitive business information such as formulas for generic medicines and approvals for medicines which require expertise outside of the FOI team, or specialised tax information.
- Whether the FOI applicant objects or may object to an extension and whether consultation with the FOI applicant is required:
 - Agencies may include in their application if they have attempted to seek an extension of time agreement under s 15AA
 - If a previous s 15AB application has been made, review the relevant Resolve record for any apparent objections from the applicant. In such circumstances, please consult with the FOI applicant prior to making a decision. For further information, see ‘Consulting on EOT applications’.
- The time requested by the agency: Whether the time requested is reasonable, having regard to the work undertaken to date and the plan for additional time (see below). The timeframe granted can be varied (for example, an extension of two additional weeks rather than the four additional weeks sought).
- Steps undertaken by the agency to progress the request: Consider the submissions provided by the agency, including the breakdown of how the statutory processing timeframe has been used:

EXAMPLE: Work done to date: *The ATO started the search and retrieval process, but paused its searches when the size of the initial request became apparent.*

- *The FOI decision maker then issued a practical refusal notice. The applicant responded by reducing the scope of the request, and the practical refusal reason was removed. The size was reduced to a little more than 300 pages of documents, by the time searching was complete.*
- *As outlined above, the content of the documents were such that the ATO needed to consult with the Department of Industry. At the time of making this application, the FOI decision maker has not yet received the Department of Industry’s submissions.*

- The agency's plan for additional time: Agencies should provide their plan for the additional time to be granted:

Example: Work to be done in the additional time

Days 1 -7 – review and the Department of Industry's submissions (when they arrive), and consult internally if required

Days 8-15 – review and edit the documents, further consultation with internal stakeholders if required

Days 15 - 21 – schedule the documents, prepare the draft decision letter, and have the decision letter peer reviewed.

- If in doubt, ask the agency to provide further details.
- Are there charges involved? Section 29 of the FOI Act provides that an agency or minister may impose a charge to process a FOI request. If an agency is requesting an extension of time within the statutory processing period – the imposition of any charges remain. If an agency does not provide a response within the processing period – the agency or minister is unable to impose the charge and as a result must refund any payment made by the FOI applicant.
- We can't take reasons such as people being on holiday into account. We do at Christmas/New Year, but not generally during the year.

Preparing and finalising an extension of time decision

- Once you have made a decision to either grant or decline an extension of time, complete the Resolve fields below:

Details

Request Type: Extension of time Case Number: RQ20/I File Security: [v]
 Request from: Agency Case Officer: Nicolaou, Irene Destruction Status: [v]
 Sub Type: s15AC - deemed refu Target Date: [v] Retention Class: [v]
 Title: DHS - Department of Human Services

Info: This is a Spread sheet case

Main | All Actions | Documents | Parties | XRefs | File Movements | Person Matching

Requestor Details
 DHS - Department of Human Services Find Open Unknown
 Contact: [v] Find Open Select
 Preferred method of contact: Email
 BH: (02) 6223 4400 FX: (02) 6223 4499
 privacy@humanservices.gov.au

Request Relating to
 @optusnet.com.au Find Open Unknown

IC Request Details

Received Date: 12-Mar-2020
 How Received: Spread sheet
 Registered By: Spreadsheet Queue
 Agency Reference Number: [v]

Agency Request Received: 3-Feb-2020
 Original Decision Date: 4-Mar-2020
 Extension Date: 18-Apr-2020
 Days Extended: 45
 Request Decision: [v]

Open Actions

Action Name	Due Date
Granted	
Granted with conditions	
Granted varied	
Not granted	
Withdrawn	
Invalid	

Summary (Press F2 for Full Screen)
 Imported from Spreadsheet
 Date spreadsheet submitted: 16/03/2020
 Date FOI request received: 3/02/2020
 Agreed length of extension: 45
 Current date decision is due: 4/03/2020
 New decision date with agreed extension: 18/04/2020

- Complete the relevant template on TRIM listed in the tables below.
- Whilst completing the decision you should have regard to the sample letters on decision making located here: [TRIM LINK](#)
- Once a decision for the agency or minister and the applicant has been drafted place these on the Resolve file marking the property field accordingly:
 - 'Draft decision to FOI applicant'
 - 'Draft decision to Requestor'
- Raise an action for clearance assigned to the Assistant Director or Director of the Intake and Early Resolution team
- Once the decisions have been cleared, insert your signature (APS employees) and convert the document to a PDF.
- Proofread the decisions to ensure:
 - FOI applicant details are correct
 - Decision date is correctly recorded
 - Reasons have been particularised
 - Delegated decision maker has signed the decision
- Send the individual decisions to the parties from the FOIDR@oaic.gov.au mailbox
- Place the sent emails onto the Resolve file
- Close the resolve file.

Key Resources: s 15AB

15AB - Sample request for further information to agency or minister	D2020/005199
15AB - Sample consultation email to FOI applicant	D2020/005196
15AB - Sample acknowledgement email to agency or minister	D2020/005200
15AB - Template decision to grant letter to both parties	D2022/026838
15AB - Template decision to decline letter to both parties	D2022/026774

15AC – Deemed decisions

Section 15AC applies where a request for access to documents under the FOI Act:

- has been made to an agency or Minister
- the initial period for making a decision on the application must have lapsed (usually 30 days unless an EOT applies), and
- notice of the decision has NOT been received by the applicant.

In this situation, the application is *deemed* to have been refused by the agency or Minister on the last day of the decision period (30 days or last day of any EOT).

In this situation, the agency or Minister may apply to the OAIC for an extension of time under s 15AC of the FOI Act. An application under s 15AC can only be granted once and cannot be varied or extended.

Considerations

The following considerations should be taken into account when making an extension of time decision:

- Delegation: Delegation for making administrative decisions on extension of time applications is APS 5 and above.
- The due date of the request, having regard to other statutory provisions which have been applied? (Note: these are generally checked at the triage/registration stage)
Example:
 - Agreement by applicant (s 15AA)
 - Consultation with third parties (s 15(6))
 - Consultation for the purposes of a practical refusal reason (s 24AB)
 - Application of any charges (s 29)
- Whether the processing period has ended: If the due date for the decision has passed, then an application under s 15AB cannot be made. See Assistant Director or Director of the Investigations and Compliance team
- The factors which have affected the agency's ability to meet the processing timeframe
 - Whether the request is complex or voluminous (see 15AB – Voluminous and/or complex for further information)

- Has the agency taken steps to provide timely access to information within the scope of the request, for example, has the agency provided information to a staged release and will continue to do so?
- Whether there have been operational issues that have impacted on the FOI team or the agency, for example:
 - Availability of decision maker
 - Availability of area to process FOI request, including absence of key decision making personnel
 - Enlivenment of Business Continuity Plan, which redeployed FOI staff to high priority functions
- Whether the FOI applicant objects or may object to an extension and whether consultation with the FOI applicant is required:
 - Agencies may include in their application if they have attempted to seek an extension of time agreement under s 15AA
 - If a previous s 15AB application has been made, review the relevant Resolve record for any apparent objections from the applicant. In such circumstances, please consult with the FOI applicant prior to making a decision. For further information, see ‘Consulting on EOT applications’.
- The time requested by the agency: Whether the time requested is reasonable, having regard to the work undertaken to date and the plan for additional time (see below).
- Steps undertaken by the agency to progress the request: Consider the submissions provided by the agency, including the breakdown of how the statutory processing timeframe has been used:

EXAMPLE: Work done to date: *The ATO started the search and retrieval process, but paused its searches when the size of the initial request became apparent.*

- *The FOI decision maker then issued a practical refusal notice. The applicant responded by reducing the scope of the request, and the practical refusal reason was removed. The size was reduced to a little more than 300 pages of documents, by the time searching was complete.*
 - *As outlined above, the content of the documents were such that the ATO needed to consult with the Department of Industry. At the time of making this application, the FOI decision maker has not yet received the Department of Industry’s submissions.*
- The agency’s plan for additional time: Agencies should provide their plan for the additional time to be granted:

Example: Work to be done in the additional time

Days 1 -7 – review and the Department of Industry’s submissions (when they arrive), and consult internally if required

Days 8-15 – review and edit the documents, further consultation with internal stakeholders if required

Days 15 - 21 – schedule the documents, prepare the draft decision letter, and have the decision letter peer reviewed.

- Has the agency made a decision since the statutory processing period has expired and it is requesting an extension of time for administrative purposes?
- Whether the FOI Applicant has sought IC review of the deemed access refusal decision.

Preparing and finalising an extension of time decision

- Once you have made a decision to either grant or decline an extension of time, complete the Resolve fields below:

The screenshot shows the 'IC Request Entry' software interface. The 'Details' section at the top includes fields for Request Type (Extension of time), Case Number (RQ2), File Security, Request from (Agency), Case Officer (Nicolaou, Irene), Destruction Status, Sub Type (s15AC - deemed refu), Target Date, and Retention Class. The Title is 'DHS - Department of Human Services'. Below this is a navigation bar with tabs like 'Main', 'All Actions', 'Documents', etc. The 'Requestor Details' section shows 'DHS - Department of Human Services' as the requestor, with contact information and a 'Request Relating to' field containing '@optusnet.com.au'. The 'IC Request Details' section shows dates for 'Received Date' (12-Mar-2020), 'Agency Request Received' (3-Feb-2020), 'Original Decision Date' (4-Mar-2020), 'Extension Date' (18-Apr-2020), 'Days Extended' (45), and 'Request Decision'. A dropdown menu for 'Request Decision' is open, showing options: 'Granted', 'Granted with conditions', 'Granted varied', 'Not granted', 'Withdrawn', and 'Invalid'. A 'Summary' section at the bottom left provides a timeline: 'Imported from Spreadsheet', 'Date spreadsheet submitted: 16/03/2020', 'Date FOI request received: 3/02/2020', 'Agreed length of extension: 45', 'Current date decision is due: 4/03/2020', and 'New decision date with agreed extension: 18/04/2020'. A large grey arrow points from the 'Request Decision' dropdown towards the 'Summary' section.

- Complete the relevant template on TRIM listed in the tables below.
- Whilst completing the decision you should have regard to the sample letters on decision making located here: [15AC grant] [D2023/006079](#) [15AC decline]
- Once a decision for the agency or minister and the applicant has been drafted place these on the Resolve file marking the property field accordingly:
 - 'Draft decision to FOI applicant'
 - 'Draft decision to Requestor'
- Raise an action for clearance assigned to the Assistant Director or Director of the Investigations and Compliance team
- Once the decisions have been cleared, insert your signature (APS employees) and convert the document to a PDF.
- Proofread the decisions to ensure:
 - FOI applicant details are correct

- Decision date is correctly recorded
- Reasons have been particularised
- Delegated decision maker has signed the decision
- Send the individual decisions to the parties from the FOIDR@oaic.gov.au mailbox
- Place the sent emails onto the Resolve file
- Close the resolve file.

Key Resources: 15AC

15AC - Sample request for further information to agency or minister	D2020/005199
15AC - Sample consultation email to FOI applicant	D2020/005197
15AC - Sample acknowledgement email to agency or minister	D2020/005200
15AC - Template decision to grant EOT letter to both parties	D2023/006078
15AC - Template decision to refuse EOT letter to both parties	D2023/006079

Consulting on EOT applications

The FOI Guidelines provide that when considering extension of time applications, the Information Commissioner will take into consideration the application and whether discussions with the applicant about the delay and extension application have occurred.²

The FOI Guidelines also provide:

There is no obligation upon the Information Commissioner to seek the views of an applicant about a request for an extension of time under s 15AC following a deemed decision. However, the Information Commissioner is not precluded from seeking the views of an applicant where it is a relevant consideration in deciding whether to grant the request for an extension of time.³

Circumstances where FOI applicants must be consulted

- If a previous extension of time has been granted
- If the request is for 30 days or more

² FOI Guidelines [3.157].

³ FOI Guidelines [3.158].

- Where the agency or minister has advised that the applicant has raised concerns regarding the delay in processing or has refused an extension of time under s 15AA
- Where the FOI applicant may reasonably object to the extension being granted and it is reasonably practicable to conduct consultation which includes the consideration of the likelihood of receiving a response from the applicant within the three day consultation timeframe.
- If the request relates to an FOI applicant who is a journalist, or a current or former parliamentarian

Circumstances where FOI applicants should be consulted

- If the extension sought is significant in length [30 days or more] and the FOI applicant’s views on the request have not otherwise made known to us
- If the scope of the request is significant or sensitive in nature, for example, if the FOI request relates to a subject of high public or media interest, or the FOI request has been made by a journalist, social influencer, minister or member of parliament, or
- If the agency or minister has imposed charges to process the request.

Consultation process

- The FOI applicant is ordinarily provided 3 working days to provide a response.
- Consultation may be conducted by phone [for less complex requests] or by email.
- A copy of the agency’s reasons [excluding staff contact officer details] should be provided to the FOI applicant for consideration.

Key Resources: Consultation

Sample consultation email to FOI applicant	D2020/005196
Sample acknowledgement email to agency or minister	D2020/005200

For further information

GPO Box 5218 Sydney NSW 2001 | P 1300 363 992 | E enquiries@oaic.gov.au

Or visit our website www.oaic.gov.au

The information provided in this resource is of a general nature. It is not a substitute for legal advice.



Australian Government

Office of the Australian Information Commissioner

Direction as to certain procedures to be followed in IC reviews

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

Contents

Direction as to certain procedures to be followed in IC reviews

1.	About this Direction.....	1
2.	General principles.....	1
3.	General procedure in relation to IC review of deemed refusal decisions.....	2
	<i>Preliminary inquiries</i>	2
	<i>Commencement of review</i>	2
4.	General procedure in relation to review of other access refusal and access grant decisions	3
	<i>Commencement of review</i>	3
	<i>Requirement to engage with the applicant</i>	3
	<i>Response to s 54Z notice</i>	3
5.	General procedure for production and inspection of documents	4
	<i>Production of documents</i>	4
	<i>Inspection of documents</i>	5
6.	General procedure in relation to submissions made during an IC review	6
	<i>General principles</i>	6
	<i>Request to make submissions in confidence</i>	7
	<i>Consideration of submissions</i>	7
7.	Non-compliance with this Direction	8
	Annexure 1: Information gathering and document production powers.....	9
	Annexure 2: Evidence checklist – IC review compulsory conference.....	10

Direction as to certain procedures to be followed in IC reviews

1. About this Direction

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

2. General principles

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

¹ Section 55(3) of the FOI Act.

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

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

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

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

Preliminary inquiries

- 3.1 Where an application for IC review is made in relation to an FOI request that is deemed to have been refused under ss 15AC(3), 51DA(2) or 54D(2) of the FOI Act, the Information Commissioner will undertake preliminary inquiries under s 54V of the FOI Act. In undertaking preliminary inquiries, the Information Commissioner will require the agency or minister to confirm that the relevant FOI request is deemed to have been refused.
- 3.2 Agencies and ministers will have one week to respond to the Information Commissioner's preliminary inquiries.

Commencement of review

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

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

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

- b. make a revised decision under s 55G if the decision the agency or minister intends to make will result in the giving of access to some of the requested documents, and to provide the relevant decision and non-exempt documents to the applicant, and to provide all relevant processing documents and the documents remaining at issue to the Information Commissioner or
- c. make submissions in support of the access refusal if the agency or minister intends refusing access to the requested documents and to send those submissions to both the Information Commissioner and the applicant. The agency or minister must also provide all relevant processing documents and exempt documents to the Information Commissioner under s 55T of the FOI Act.

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

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

Commencement of review

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

Requirement to engage with the applicant

4.2 The s 54Z notice will also require the agency or minister to engage, or make reasonable attempts to engage with, the IC review applicant during the IC review, for the purpose of genuinely attempting to resolve or narrow the issues in dispute in the IC review.

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

Response to s 54Z notice

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

Direction as to certain procedures to be followed in IC reviews

- 4.5 Respondent agencies and ministers must provide the Information Commissioner with evidence of the action they have taken to address the issues identified in the IC review application, or actions taken to contact the applicant.⁴
- 4.6 The evidence to be provided to the Information Commissioner will include:
- evidence that the agency or minister has taken genuine and reasonable steps to contact the IC review applicant, including any written correspondence issued to the applicant and any file notes of telephone calls made to the applicant
 - evidence of communications and any correspondence with the IC review applicant that demonstrates the attempts made by the parties to resolve the issues in dispute, including any proposals made by the agency or minister to resolve the IC review informally, and any response from the applicant
 - evidence of the outcome of the engagement between the agency or minister and the IC review applicant, including any evidence the applicant has notified the agency or minister in writing that their IC review application is withdrawn as a result of the agency or minister's contact with the applicant.⁵
- 4.7 In the event that not all issues in dispute in the IC review are resolved through the engagement process with the IC review applicant, respondent agencies and ministers should consider whether to make a revised decision under s 55G of the FOI Act.
- 4.8 If the respondent agency or minister decides not to make a revised decision under s 55G giving full access in accordance with the applicant's FOI request, agencies and ministers are required to provide the Information Commissioner with the FOI request processing documents and marked up copies of the exempt documents at issue in the IC review (if applicable) (see [5.2] below).

5. General procedure for production and inspection of documents

Production of documents

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

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

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

Direction as to certain procedures to be followed in IC reviews

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

Inspection of documents

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

⁶ See *FOI Guidelines* at [10.98].

⁷ See *FOI Guidelines* at [10.100].

⁸ See *FOI Guidelines* at [10.98].

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

Direction as to certain procedures to be followed in IC reviews

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

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

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

General principles

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

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

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

Request to make submissions in confidence

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

Consideration of submissions

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

¹¹ See *FOI Guidelines* at [10.103].

¹² See *FOI Guidelines* at [10.74].

Direction as to certain procedures to be followed in IC reviews

6.13 Agencies and ministers should be aware that if they do not make submissions when an opportunity to do so has been provided, the review may proceed to a decision under s 55K of the FOI Act without any further opportunity to make submissions.

7. Non-compliance with this Direction

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

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

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

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

Angelene Falk
Australian Information Commissioner

DATE

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

Annexure 1: Information gathering and document production powers

1. Notice to Produce

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

2. Production of exempt documents generally

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

3. Production of particular exempt documents

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

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

Annexure 2: Evidence checklist – IC review compulsory conference

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

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

1. Contact with IC review applicant

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

2. Attempts to resolve issues in dispute

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

3. Outcome of engagement

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

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



Australian Government

Office of the Australian Information Commissioner

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



Angelene Falk

Australian Information Commissioner

1 July 2023

OAIC

Contents

Part 1: About this direction	2
Part 2: The IC review process	2
Making an application for IC review	2
During the IC review	5
Changes to contact details	5
Participation in the IC review	5
Submissions	5
Information Commissioner decisions	6
Part 3: Procedure for IC review of specific types of decisions	7
Deemed access refusal decisions	7
Access refusal decisions	7
Access grant decisions	8
Part 4: Non-compliance with this direction	8

Part 1: About this direction

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

Part 2: The IC review process

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

Making an application for IC review

- 1.10 An application for IC review must be made in writing and should be made online using the Information Commissioner Review Application form available on the [OAIC website](#).
- 1.11 Where it is not possible for an application to be made online, applications may be sent to the OAIC by:
 - email to foidr@oaic.gov.au

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

1.12 An IC review application must, at a minimum, include the following contact details:

- a. the applicant's name or, where the applicant is an organisation or company, the name of contact person for the IC review and the name of the organisation or company
- b. a contact telephone number
- c. an email address that will be used to receive correspondence in connection with the IC review (a postal address may be provided if no email address is available).

1.13 The OAIC will contact applicants using their preferred contact method nominated in the application for IC review. Where an applicant has listed a preferred contact method as well as other contact information, the OAIC will consider any notices as received when sent to an applicant's preferred contact.

1.14 An application for IC review must also include the following information (if relevant):

- a. The name and contact details of any person the applicant would like to represent them, as well as evidence that the person has authority to act on the applicant's behalf, where appropriate
- b. If the applicant requires an interpreter, the language or dialect required
- c. If the applicant requires any other assistance, the type of assistance required
- d. If the applicant has contacted the OAIC previously about the current application or another matter, the reference number previously provided by the OAIC to the applicant.

1.15 An application for IC review may be made by, or on behalf of, the person who made the FOI request to which decision relates (s 54L(3)). The OAIC may require information about the applicant's identity to establish that they are the person who made the original FOI request or evidence that a third party is authorised to seek review of the decision by that person.

1.16 An application for IC review must be accompanied by a copy of the agency's or Minister's decision (called a s 26 notice) for which review is sought or, if no decision has been made (for example, when the agency or Minister is taken to have refused the FOI request because they have not made a decision within the statutory time period), a copy of the FOI request.

1.17 The applicant must provide the OAIC with information about the FOI decision, in particular:

- a. Whether the decision about which IC review is sought is an original decision or an internal review decision.
 - If an applicant has the choice between applying for internal review or IC review, the Information Commissioner is of the view that it is usually better to seek internal review first as this is generally quicker and allows the agency to take a fresh look at its original decision. However, in circumstances where the original decision was made by the Minister or personally by the principal officer of an agency, or in the case of a deemed access refusal, applicants must apply directly for IC review.

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

1.18 An application for IC review should also:

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

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

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

During the IC review

Changes to contact details

- 1.21 An applicant or nominated representative must advise the OAIC if there are any changes to their contact details as soon as it is possible to do so. The Information Commissioner may decide not to undertake an IC review, or not continue to undertake an IC review, if the applicant or their nominated representative cannot be contacted after making reasonable attempts (s 54W(a)(iii)).

Participation in the IC review

- 1.22 Applicants must respond to inquiries from the OAIC within the time provided unless there are circumstances warranting a longer period to respond. If more time is needed, a request for an extension of time must be made to the OAIC at the earliest opportunity within the period provided for response, and no later than 2 days before that period is due to expire. Requests for more time must explain why additional time is needed and propose a new date for response. Approval of an extension request is at the discretion of the OAIC.
- 1.23 The OAIC requires agencies and Ministers to engage with the IC review applicant at the commencement of an IC review. The purpose of this engagement is to attempt to resolve the issues identified in the IC review application in an informal and timely way. Agencies are required to contact applicants for IC review shortly after the IC review application is lodged to arrange a suitable time for the engagement process. Failure by an applicant to participate in the engagement process without reasonable excuse may in some cases result in the Information Commissioner not continuing to undertake the IC review on the ground that the IC review applicant has failed to cooperate in progressing the IC review application or IC review without reasonable excuse (see s 54W(a)(ii)).
- 1.24 The Information Commissioner may use any technique the Information Commissioner considers appropriate to facilitate an agreed resolution of the matters at issue in the IC review (such as alternative dispute resolution processes - s 55(2)(b)). Where appropriate, and following the compulsory engagement process described above, the OAIC may invite applicants to attend a teleconference to discuss the issues in dispute in the IC review with the agency's or Minister's office and to explore options for resolution, with a view to reaching agreement on some or all of the matters at issue in the IC review.
- 1.25 The Information Commissioner may decide not to undertake an IC review, or not continue to undertake an IC review, if an IC review applicant has failed to cooperate in progressing the IC review application or the IC review without reasonable excuse (s 54W(a)(ii)).

Submissions

- 1.26 During an IC review, applicants will be given a reasonable opportunity to present their case. This generally includes having the opportunity to comment on relevant, adverse information provided to the OAIC by other parties.
- 1.27 Applicants will be invited to make written submissions after the initial triage and early resolution process is complete, and once the application has been assigned to a review adviser

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

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

Information Commissioner decisions

- 1.35 The Information Commissioner must give written reasons for the decision to all the parties to the IC review (ss 55K(1) and (6)) and must publish the decision in a manner that makes it publicly available (s 55K(8)). This means that when the Information Commissioner makes a decision under s 55K of the FOI Act, the outcome of the IC review will be published online.
- 1.36 When the Information Commissioner makes a decision on IC review under s 55K of the FOI Act, the Information Commissioner will quote or summarise the submissions in the published decision. If a confidential submission is relied on by the Information Commissioner in making a decision on the IC review, this will be noted in the decision without revealing the confidential material.

- 1.37 To protect against the unreasonable disclosure of personal information, the Information Commissioner will consider whether identifying information should be included in published decisions. Natural persons may opt not to be named by providing notice in writing during the IC review. Other applicants, such as organisations or companies, must provide reasons for wishing not to be named, which will be considered on a case-by-case basis.

Part 3: Procedure for IC review of specific types of decisions

Deemed access refusal decisions

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

Access refusal decisions

- 1.40 An 'access refusal decision' means (s 53A):
- a. a decision refusing to give access to a document in accordance with a request
 - b. a decision giving access to a document, but not all the documents, to which the request relates
 - c. a decision purporting to give access to all documents to which a request relates, but not actually giving that access
 - d. a decision to defer access to a document for a specified period (s 21) (see Part 3 of the Guidelines)
 - e. a decision relating to the imposition or amount of a charge (s 29)
 - f. a decision to give access to a document to a 'qualified person' (where disclosing the information to the applicant might be detrimental to the applicant's physical or mental health or well-being) (s 47F(5))

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

- 1.41 In an IC review of an access refusal decision, the agency or Minister bears the onus of establishing that the decision is justified or that the Information Commissioner should give a decision adverse to the IC review applicant (s 55D(1)).
- 1.42 Given that the agency or Minister bears this onus, it will generally be necessary to undertake inquiries or seek information from the agency or Minister before inviting comment from applicants.

Access grant decisions

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

Part 4: Non-compliance with this direction

- 1.46 If an applicant fails to comply with this direction, the Information Commissioner may in some cases decide not to undertake an IC review or make a decision at their discretion, not to review as outlined in s 54W(c). This means that, in these cases, the review will be finalised.
- 1.47 Applicants will be provided with the opportunity to explain why the Information Commissioner should not finalise the IC review under s 54W(c) of the FOI Act before a decision is made.