

# **PART 9 — INTERNAL AGENCY REVIEW OF DECISIONS**

Version 1.4, October 2014

<b>Availability and purpose of internal review .....</b>	<b>1</b>
<b>Choice between internal review or IC review .....</b>	<b>1</b>
<b>Decisions subject to internal review .....</b>	<b>1</b>
Access refusal decisions .....	2
Access grant decisions.....	2
When internal review is not available.....	2
<b>Who may apply for internal review? .....</b>	<b>4</b>
<b>Procedures in an internal review.....</b>	<b>5</b>
Making an application for internal review .....	5
Time for applying .....	5
Extension of time for applying .....	5
The internal review decision maker .....	6
Time for making and notifying an internal review decision .....	6
<b>Principles of internal review decision making.....</b>	<b>7</b>
<b>Notifying the applicant of an internal review decision.....</b>	<b>9</b>

## **PART 9 — INTERNAL AGENCY REVIEW OF DECISIONS**

### **Availability and purpose of internal review**

9.1 Part VI of the FOI Act provides for internal review of agency decisions in two circumstances:

- an FOI applicant who is refused access in accordance with a request under the FOI Act may request the agency to review its original decision and make a fresh decision; the internal review can extend to a decision to refuse access either wholly or in part, or to a decision on FOI charges
- a third party who is affected by a decision to grant access to a document in accordance with an applicant's request may request the agency to review its decision to grant access.

9.2 Internal review enables an agency to reconsider in full both the FOI request and the original agency decision on that request. The internal review officer can exercise all the powers of the original decision maker, including clarifying the scope of the request with the applicant, redoing any work undertaken at the primary decision-making stage and reaching a different view on any aspect of the original decision. The internal review officer should also consider any change in circumstances or new information or evidence that has come to light since the original decision. Internal review decisions should not merely restate or affirm the original decision without explanation.

### **Choice between internal review or IC review**

9.3 A person who is dissatisfied with an agency's access refusal or access grant decision can apply either for internal review or IC review of that decision. A person is not required to apply for internal review before applying for IC review. If dissatisfied with an internal review decision, the person can then apply for IC review of that decision. There is no fee or charge applying to either internal or IC review. For more information about IC review, see Part 10 of these Guidelines.

9.4 The Information Commissioner is of the view that it is usually better for a person to seek internal review of an agency decision before applying for IC review. Internal review can be quicker than external review and enables an agency to take a fresh look at its original decision.

9.5 Internal review is not available if the decision was made by a minister or personally by the principal officer of an agency (see [9.10] below). In both situations, a person can apply directly for IC review.

### **Decisions subject to internal review**

9.6 Two categories of decision are amenable to internal review under the FOI Act:

- an 'access refusal decision' (s 53A, discussed below at [9.8]) — the FOI applicant may apply for internal review of an access refusal decision (s 54)

- an ‘access grant decision’ (s 53B, discussed below at [9.9]) — an affected third party may apply for internal review of an access grant decision (s 54A).

9.7 These terms are also used in connection with IC review and AAT review, and are discussed in Part 10 of these Guidelines.<sup>1</sup>

### ***Access refusal decisions***

9.8 An access refusal decision is defined in s 53A to comprise all of the following:

- a decision refusing to give access to a document in accordance with a request
- a decision giving access to a document but not giving access to all documents to which the request relates
- a decision purporting to give, in accordance with a request, access to all documents to which the request relates, but not actually giving that access
- a decision to defer the provision of access to a document (except a document that a minister thinks should first be provided to the Parliament in accordance with s 21(1)(d))
- a decision under s 29 relating to imposition of a charge or the amount of a charge
- a decision to give access to a document to a qualified person under s 47F(5)
- a decision refusing to amend a record of personal information in accordance with an application made under s 48
- a decision refusing to annotate a record of personal information in accordance with an application made under s 48.

### ***Access grant decisions***

9.9 An access grant decision is a decision to grant access to a document where there is a requirement to consult with a State under s 26A, the Commonwealth or a State under s 26AA, a business entity under s 27, or an individual or legal personal representative of a deceased person under s 27A. This is spelt out in Table 1, taken from s 53B of the Act.

**Table 1: Access grant decisions**

<b>Item</b>	<b>If, in relation to a request for access to a document ...</b>	<b>the access grant decision is ...</b>
<b>1</b>	consultation with a State under s 26A (documents affecting Commonwealth State relations) is required	a decision of an agency or minister to give the applicant access to the document (or an edited copy of the document) because: <ol style="list-style-type: none"> <li>the document is not conditionally exempt under s 47B (Commonwealth State relations); or</li> <li>access to the document would not, on balance, be contrary to the public interest for the purposes of s 11A(5).</li> </ol>

<sup>1</sup> An overview of key internal review principles for agency decision makers is available in *FOI Agency Resource 10: Internal review*, available at [www.oaic.gov.au](http://www.oaic.gov.au).

Item	If, in relation to a request for access to a document ...	the access grant decision is ...
1A	consultation with the Commonwealth or a State under s 26AA (documents affecting Norfolk Island intergovernmental relations) is required	a decision of an agency or minister to give the applicant access to the document (or an edited copy of the document) because: (a) the document is not conditionally exempt under s 47B (Commonwealth-State relations); or (b) access to the document would not, on balance, be contrary to the public interest for the purposes of s 11A(5).
2	s 27 (business documents) applies in relation to business information in the document	a decision of an agency or minister to give access to the document (or an edited copy of the document) because: (a) the document is neither exempt under s 47 (trade secrets), nor conditionally exempt under s 47G (business documents); or (b) if the document is conditionally exempt under s 47G —access to the document would not, on balance, be contrary to the public interest for the purposes of s 11A(5).
3	s 27A (documents affecting personal privacy) applies in relation to personal information in the document about a living person	a decision of an agency or minister to give the applicant access to the document (or an edited copy of the document) because: (a) the document is not conditionally exempt under s 47F (personal privacy); or (b) access to the document would not, on balance, be contrary to the public interest for the purposes of s 11A(5).
4	s 27A (documents affecting personal privacy) applies in relation to personal information in the document about a deceased person	a decision of an agency or Minister to give the applicant access to the document (or an edited copy of the document) because: (a) the document is not conditionally exempt under s 47F (personal privacy); or (b) access to the document would not, on balance, be contrary to the public interest for the purposes of s 11A(5).

***When internal review is not available***

9.10 Internal review is not available if an access refusal decision or access grant decision was:

- made by a minister (ss 54(1) and 54A(1))
- made personally by the principal officer of an agency (ss 54(1) and 54A(1))
- not made within the statutory timeframe, and is consequently a deemed decision of an agency to refuse access to a document under s 15AC or to refuse to amend or annotate a personal record under s 51DA (s 54E(b)).

9.11 A person cannot seek internal review of an earlier internal review decision (s 54E(a)).

### Who may apply for internal review?

9.12 The FOI applicant may apply for internal review of an access refusal decision (s 54(2)). An affected third party may apply for internal review of an access grant decision (s 54A(2)). Section 53C contains a table that defines 'affected third party', as follows:

**Table 2: Who is an affected third party?**

Item	If, in relation to a request for access to a document ...	the access grant decision is ...
<b>1</b>	consultation with a State under s 26A (documents affecting Commonwealth State relations) is required	the State.
<b>1A</b>	consultation with the Commonwealth or a State under s 26AA (documents affecting Norfolk Island intergovernmental relations) is required	the Commonwealth or the State, as the case may be.
<b>2</b>	s 27 (business documents) applies in relation to business information in the document	the person or organisation concerned (within the meaning of s 27).
<b>3</b>	s 27A (documents affecting personal privacy) applies in relation to personal information in the document about a living person	the person.
<b>4</b>	s 27A (documents affecting personal privacy) applies in relation to personal information in the document about a deceased person	the legal personal representative of the deceased person.

9.13 The effect of that provision, coupled with the notification provisions in ss 27(8) and 27A(7), is that internal review of an access grant decision may be sought by:

- a State that was consulted by an agency under s 26A(2), the Commonwealth or a State that was consulted under s 26AA(2), and
- a business entity or person who was invited by an agency to make a submission under ss 27 or 27A and made such a submission in support of an exemption contention.

9.14 A business entity or person who was invited to make a submission under ss 27 or 27A but did not do so is neither required to be notified of an access grant decision nor entitled to apply for internal review of IC review of that decision.

9.15 A third party who was not consulted under ss 26A, 26AA, 27 or 27A is not entitled to apply for internal or IC review of an access grant decision. However, a third party who was not consulted but believes they should have been can complain to the Information Commissioner. For further information about FOI complaints see Part 11 of these Guidelines.

## Procedures in an internal review

### *Making an application for internal review*

9.16 Two requirements are specified in s 54B(1) for a person to apply for internal review:

- the application must be in writing (which includes an email or any other form of electronic communication permitted by the *Electronic Transactions Act 1999*), and
- the application must be made within the specified time limit (s 54B(1)).

### *Time for applying*

9.17 An applicant generally has 30 calendar days after being notified of an agency's access refusal or access grant decision to apply for internal review (s 54B(1)(a)). A longer period may apply for each of the following access refusal decisions:

- a decision giving access to documents in accordance with a request but not giving access to all the documents covered by the request
- a decision purporting to give access to documents in accordance with a request but not in fact doing so
- a decision under s 47F(5) giving access to a document to a qualified person, rather than the FOI applicant, where disclosure of personal information direct to the applicant may be detrimental to his or her physical or mental health or well-being.

9.18 In each of those instances, the time limit for applying for internal review is either 30 calendar days after notification of the agency decision or 15 calendar days after access to documents is given or purported to be given, whichever period is longer (s 54B(1)(b)). A longer time limit than 30 days will apply if access is given or purported to be given more than 15 calendar days after notification of the agency decision. In effect, a person will not be prejudiced if an agency delays in giving access after notifying its decision.

9.19 There is no equivalent provision in the FOI Act for a longer time limit to apply for IC review if an agency delays in granting access after notifying an access refusal or access grant decision. An applicant must apply for IC review within 60 days of receiving notice of an access refusal decision (s 54S(1)) or within 30 days of receiving notice of an access grant decision (s 54S(2)). If the time limit for applying for IC review has run out because a person has waited for an agency to provide access after notifying its decision, the person may nevertheless have two other options. One is to apply for internal review within 15 days of receiving access (s 54(1)(b)(ii)). The other is to seek an extension of time from the Information Commissioner to apply for IC review. For further information about IC review see Part 10 of these Guidelines.

### *Extension of time for applying*

9.20 An agency may extend the period for an applicant to apply for internal review, even if the statutory period has already expired (s 54B(2)).

9.21 The FOI Act does not specify any criteria that an agency must consider. Agencies are encouraged to adopt a liberal approach and grant an extension unless there is a special

reason not to do so. It may, for example, be appropriate to refuse an extension if a long time has elapsed since the agency decision was made, the agency would encounter administrative difficulty or prejudice in undertaking a review after that delay, and the applicant has not satisfactorily explained the reason for the delay. There may be no benefit in extending the time for applying for review of an access grant decision, for example, if the documents in question have already been released.

9.22 In granting an extension, it is reasonable for an agency to require an applicant to apply for internal review within a short and specified time limit, for example, 20 days.

9.23 An agency decision to refuse an extension of time to seek internal review of an access refusal decision is an IC reviewable decision (s 54L(2)(c)). The agency bears the onus of establishing that the refusal to grant extra time was justified (s 55D). The FOI Act does not provide for IC review of an agency's refusal to extend the time to seek internal review of an access grant decision.

9.24 An applicant who is refused an extension of time by an agency or the Information Commissioner may make a fresh request under s 15 for access to the documents that were the subject of the earlier FOI request and agency decision.

#### ***The internal review decision maker***

9.25 An agency, upon receiving an application for internal review, must as soon as practicable arrange for a person other than the original FOI decision maker to make the review decision (s 54C(2)). The person must be an officer of the agency who is appointed as an authorised officer under arrangements approved by the minister or the principal officer of the agency under s 23.

9.26 If possible, it is preferable that a more senior officer who was not involved in the earlier decision be appointed to conduct the internal review. If no suitable person can be appointed, the agency should consider discussing with the applicant the option of applying for IC review instead.

#### ***Time for making and notifying an internal review decision***

9.27 The agency must notify a decision to the internal review applicant within 30 calendar days of receiving the internal review application (ss 54C(3), 54D). The notice of decision must contain the particulars specified in s 26 (s 54C(4) — see [9.37] below).

#### ***Third party consultation***

9.28 The FOI Act does not allow an extension of time to undertake third party consultation during internal review. Consultation may nevertheless be required if the document being considered in internal review contains personal or business information about a person or business who was not earlier consulted, and the person 'might reasonably wish to make [an] exemption contention' (ss 27(1)(b) and 27A(1)(b)). The person may not earlier have been consulted because, for example, the agency based an access refusal decision on another exemption ground, or did not feel the need to undertake consultation before making an access refusal decision based on the business affairs or personal affairs exemption.

### Extension of time for deciding

9.29 If the internal review applicant does not receive notice of the internal review decision within 30 days, the principal officer of the agency is deemed to have made and notified a decision on the 30th day affirming the original FOI decision (s 54D(2)). The applicant may then apply for IC review of the agency's deemed decision (see Part 10 of these Guidelines). The agency may also apply to the Commissioner for an extension of time to finalise the review (s 54D(3)).

9.30 The FOI Act does not specify any criteria the Information Commissioner must consider when deciding whether to grant an extension. Generally, the Commissioner will consider whether it is reasonable in all the circumstances to grant an extension, having regard to the agency's reasons for making the request and any views expressed by the internal review applicant.

9.31 In granting an extension, the Information Commissioner can allow further time considered appropriate for the agency to make an internal review decision (s 54D(4)) and impose any condition on the agency (s 54D(5)). During the period of any extension, the agency will not be deemed to have affirmed the original FOI decision (s 54D(6)). However, if the agency fails to make an internal review decision during the period of extension or fails to comply with a condition imposed by the Commissioner, the principal officer of the agency is deemed to have affirmed the original FOI decision on the last day of the period of extension (s 54D(7)). The Commissioner cannot thereafter grant any further extension to the agency (s 54D(8)).

9.32 Even if an agency does not apply for an extension of time, or does not make a decision during an extended timeframe, the agency can proceed to make an internal review decision if the review applicant has not applied for IC review of the deemed decision. It is nevertheless advisable for the agency to notify the applicant that it is proceeding to make an internal review decision and to do so as soon as practicable. See Part 10 of these Guidelines for guidance about how agencies can resolve a matter once an IC review has commenced.

9.33 There is no mechanism in the FOI Act for an agency and an applicant to agree to extend the time for deciding an internal review application (by contrast, s 15AA enables an agency and an applicant to agree to extend the time for processing an FOI request). It is nevertheless open to an agency to request an applicant not to apply for IC review of a deemed internal review decision pending the agency's decision. However, this should not be done lightly and the applicant should be fully advised of the reason for the delay, the expected date of decision and the applicant's right to seek IC review.

### Principles of internal review decision making

9.34 The FOI Act does not prescribe any procedure or criteria for the internal review decision. An agency should be guided by the principles put forward by the Administrative Review Council in a Best Practice Guide on internal review, *Internal Review of Agency Decision Making*, Report No 44 (2000), Chapter 8. Those principles can be adapted to the FOI context as follows:



- The role of the internal review officer is to bring a fresh, independent and impartial mind to the review. To the extent possible, the officer should not have been involved in or consulted in the making of the decision under review. (As noted at [9.26] above, it is preferable that the review officer is senior to the officer who made the decision under review.)
- Internal review is a merit review process (see Part 10 of these Guidelines). The internal review officer can decide all issues raised by an applicant's FOI request, and exercise all the powers available to the original decision maker. For example, the review officer can decide (contrary to the decision reached by the original decision maker) that a document is not an exempt document under the FOI Act, that an exempt document should be provided to the applicant in accordance with s 3A, that a practical refusal reason under ss 24 and 24AA does not exist, or that an FOI charge should be reduced or waived.
- The internal review officer may rely on record searches or third party consultation undertaken by the original decision maker, or may cause the same work to be undertaken again. For example, the review officer may rely upon an earlier agency search that located all requested documents the agency held, and may accept the record of consultation the agency undertook with a State, a foreign organisation, a business entity or a person. On the other hand, if there is a doubt as to the adequacy of those earlier record searches or consultation, the review officer may repeat those tasks, partially or in full, to reach a correct and preferable decision on the FOI request.
- All the material available to the original decision maker should be available to the internal review officer. In reviewing an exemption claim, the internal review officer should examine each document claimed to be exempt.
- The internal review officer must consider all issues raised by the person applying for internal review. The review officer may contact that person to seek further information or to discuss the issues raised by the request, including the option of redefining or narrowing the scope of the request.
- The internal review officer may consult other agency staff when undertaking the review, including the original FOI decision maker. However, it is important that the review officer brings an independent mind to the task and does not act at the direction or behest of any other officer.
- The internal review officer may consider additional material or submissions not considered by the original FOI decision maker. In particular, the review officer may decide that a change in circumstances occurring since the earlier decision has the result, for example, that disclosure would not be contrary to the public interest, or that a charge should be waived on public interest grounds.

9.35 As explained above, there is no obligation to undertake further consultation with an affected third party at the internal review stage. Nor does the FOI Act authorise an agency to extend the time for deciding an internal review in order to undertake consultation. An internal review officer should nevertheless consider the need for consultation if none has been undertaken or if an earlier consultation did not address issues that arise in the internal review.

9.36 If the internal review officer decides to release documents that contain the personal or business information of an affected third party or information affecting Commonwealth-State relations, ss 26A(4), 26AA(4), 27(7) and 27A(6) require that access not be given until an affected third party's review or appeal opportunities have run out (see Parts 8 and 10 of these Guidelines).<sup>2</sup>

### **Notifying the applicant of an internal review decision**

9.37 An agency must provide written notice of an internal review decision to the internal review applicant (s 54C(4)). The notice of decision must comply with s 26, which also applies to original decisions (see Part 3 of these Guidelines). The notice should state the findings and reasons underlying the internal review decision, and not merely refer to or restate the decision of the original FOI decision maker.

9.38 The notice should also advise the applicant of the right to complain to the Information Commissioner and to seek IC review of the internal review decision, and the procedure for exercising those rights. This should be done even if the internal review decision is to provide access to all documents requested. The internal review applicant may, for example, wish to complain about how the internal review was handled, or seek IC review on the basis that not all documents covered by an FOI request were located by the agency.

---

<sup>2</sup> Only a business entity or person who made a submission in support of an exemption contention under ss 27 or 27A can seek internal review of an access grant decision.