Part 9 —

Internal review

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## Availability and purpose of internal review

* 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 apply to the agency for review of its original 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 FOI request may apply to the agency for review of its decision to grant access
	1. As a merits review process, an internal review is a new decision-making process in which an independent internal review decision-maker reconsiders the original access refusal or access grant decision.
	2. The internal review decision maker has all the powers of the original decision maker, including clarifying the scope of the request with the applicant, searching for documents within the scope of the request, redoing work done at the original decision-making stage, creating documents, providing a different form of access, and consulting affected third parties.
	3. The internal review decision-maker is not limited to the evidence before the original decision-maker and must also have regard to any change in circumstances or new information or evidence that has come to light since the original decision.

## Choice between internal review or IC review

* 1. A person who is dissatisfied with an agency’s original decision can apply for either internal review or Information Commissioner (IC) review of that decision. The person is not required to apply for internal review before applying for IC review. The purpose of giving applicants and affected third parties the option of proceeding straight to IC review, without first applying for an internal review, is to encourage agencies to make the best decision in the first instance.[[1]](#footnote-1)
	2. 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.
	3. FOI applicants and affected third parties should not apply for internal review and IC review at the same time. The FOI Act anticipates that only one review will be conducted at a time, i.e., internal review and then IC review or directly to an IC review.
	4. Because internal review is not available if the original decision was made by a minister or personally by the principal officer of an agency, including where the agency or minister has made a deemed access refusal decision (see [[9.1](#_bookmark9)7] below), a person dissatisfied with the original decision in such cases will need to apply directly for IC review.

## Decisions subject to internal review

* 1. Internal review is available to both an FOI applicant dissatisfied with an access refusal decision (see [9.10]), and an affected third party dissatisfied with an access grant decision (see [9.11]).

### Access refusal decisions

* 1. An access refusal decision is defined in s 53A to include all of the following:
1. a decision refusing to give access to a document in accordance with a request
2. a decision giving access to a document but not giving, in accordance with the request, access to all documents to which the request relates
3. 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
4. a decision to defer the provision of access to a document (other than a document covered by paragraph 21(1)(d) (Parliament should be informed of contents)
5. a decision under s 29 relating to the imposition of a charge or the amount of a charge
6. a decision to give access to a document to a qualified person under ss 47F(5)
7. a decision refusing to amend a record of personal information in accordance with an application made under s 48
8. a decision refusing to annotate a record of personal information in accordance with an application made under s 48.
	1. An internal review of an access refusal decision can reconsider the entire decision and is not limited to the FOI applicant’s contentions regarding the access refusal decision.

### Access grant decisions

* 1. An access grant decision includes the following decisions:
1. a decision giving the FOI applicant access to a document that has been the subject of consultation with a State under s 26A
2. a decision giving the FOI applicant access to a document that has been the subject of consultation with a person, organisation or proprietor of an undertaking under s 27
3. a decision giving the FOI applicant access to a document that has been the subject of consultation with a person or their legal representative under s 27A.
	1. An internal review of an access grant decision is limited to considering the affected third party’s contentions in relation into specified exemptions. This is because affected third parties are only consulted on the application of s 47B (State-Commonwealth relations) (under s 26A), s 47F (personal information) (under s 27A) and ss 47 and 47G (trade secrets or business information) (under s 27).
	2. Because an access grant decision review is limited to the affected third party’s contentions in relation to the original decision, and because the grounds for review in the case of each affected third party are likely to be different, where there is more than one affected third party internal review application, the internal review decision-maker needs to deal with each application separately.

## Who can apply for internal review?

* 1. An FOI applicant may apply for internal review of an access refusal decision (s 54(2)).
	2. The following are affected third parties and may apply for internal review of an access grant decision (s 54A(2)):

the State consulted under s 26A of the FOI Act in relation to documents affecting Commonwealth-State relations

the person or organisation consulted under s 27 in relation to documents containing business information or trade secrets

the person consulted under s 27A in relation to documents containing personal information about a living person

the legal personal representative consulted under s 27A in relation to documents containing personal information about a deceased person.

* 1. Internal review is not available where:

a State, person or organisation was invited to make a submission in relation to documents affecting Commonwealth-State relations (s 26A), documents containing business information (s 27) or documents containing personal information (s 27A), but did not do so. (Nor is the State, person or organisation required to be notified of the access grant decision where they failed to make a submission.)

a State, person or organisation was not consulted under ss 26A, 27 or 27A. Such a State, person or organisation is not entitled to apply for internal or IC review of an access grant decision. (A third party who believes they should have been consulted can complain to the Information Commissioner. For further information about FOI complaints see [Part 11](https://www.oaic.gov.au/freedom-of-information/foi-guidelines/part-11-complaints-and-investigations/) of these Guidelines)

an access refusal decision or access grant decision was made by a minister (ss 54(1) and 54A(1)) or made personally by the principal officer of an agency (ss 54(1) and 54A(1))

a foreign government or international organisation was consulted under s 15(7)

a decision is not made within the statutory timeframe, and is consequently a deemed decision 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)) or

where the original decision has already been the subject of an internal review (s 54E(a)).

## Procedures in an internal review

### Making an application for internal review

* 1. An application for internal review must:

be in writing (electronic communications are considered to be in writing under the *Electronic Transactions Act 1999*), and

be made within the specified time limit (s 54B(1)).[[2]](#footnote-2)

### Time for applying

* 1. An applicant 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)).
	2. Access is not always provided to documents at the same time as an FOI decision is made under s 26, for example, where charges are outstanding at the time of notifying a decision. Therefore to avoid a person being prejudiced if an agency does not provide access to documents at the same time as notifying its decision on access, a longer period than 30 days may apply to 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 (s 53A(b))

a decision purporting to give access to documents in accordance with a request but not in fact doing so (s 53A(c))

a decision giving access to documents to a qualified person, rather than the FOI applicant, where disclosure of the applicant’s personal information could be detrimental to their physical or mental health or well-being (s 47F(5)).

* 1. In these cases, the time limit for applying for internal review is either 30 calendar days after notification of the original 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 was given or purported to be given more than 15 calendar days after notification of the original decision.

### Extension of time for applying

* 1. 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)).
	2. The FOI Act does not specify any criteria that an agency must consider but an agency is encouraged to adopt a liberal approach and grant an extension of time unless there is a special reason not to do so.
	3. Noting that when an applicant is seeking an extension of the time to apply for internal review, usually their application will already be out of time. The following factors should be considered in deciding whether to grant an extension of time:
* A long time has elapsed since the original decision was made and the agency would encounter administrative difficulties or prejudice in conducting an internal review.
* The applicant has not satisfactorily explained the reason for the delay.
* There would be no practical benefit in extending the time to apply for internal review of an access grant decision because the documents have already been released.
* There is urgency in providing the FOI applicant with access to the requested documents, for example the documents may be needed for imminent legal proceedings or to support an application that is subject to a timeframe that would be missed if the extension of time was granted.
	1. Where an extension of time is sought by an affected third party, it is important to communicate with the FOI applicant so they are aware of the process and that provision of access to the requested documents will be delayed until an internal review decision is made. In some cases, it may be appropriate to consult the FOI applicant when deciding whether to grant an affected third-party additional time to apply for internal review.
	2. In granting an extension of time to apply for internal review, 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.
	3. A decision to refuse an extension of time to apply for 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).
	4. An affected third party cannot apply for IC review of an agency’s refusal to extend the time to apply for internal review of an access grant decision. However the affected third party can apply to the Information Commissioner for an extension of the time to apply for IC review under s 54T of the FOI Act.

### The internal review decision maker

* 1. An agency must, as soon as practicable after receiving an application for internal review, 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, appointed as an authorised officer under arrangements approved by the minister or principal officer of the agency under s 23.
	2. The role of the internal review decision-maker is to bring a fresh, independent and impartial mind to the review.
	3. To the extent that it is possible, the internal review decision should be senior to the original decision maker and not involved in making the original decision. However an internal review decision maker at the same level may be appointed if they have had no prior involvement in the decision that is subject to 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.[[3]](#footnote-3)

### Extension of time for making a decision

* 1. The agency must notify the internal review applicant of a decision on internal review within 30 calendar days of receiving the internal review application (ss 54C(3) and 54D).
	2. If an agency does not make an internal review decision within 30 days of the internal review application being received, the principal officer of the agency is deemed to have made and notified a decision affirming the original FOI decision (ss 54D(2)). The applicant may then apply for IC review of the agency’s deemed decision (see [Part 10](https://www.oaic.gov.au/freedom-of-information/foi-guidelines/part-10-review-by-the-information-commissioner/) of these Guidelines).
	3. Unlike the original FOI decision making process, the FOI Act does not provide for an extension of time to decide the internal review with the agreement of the applicant. The agency may however ask that an applicant not apply for IC review of a deemed internal review decision pending the agency’s decision. 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.
	4. An agency may apply to the Information Commissioner for an extension of time to finalise an internal review (s 54D(3)).The Information Commissioner has a discretion to extend the internal review decision-making-period as considered appropriate (s 54D(4)), and may also impose conditions(s 54D(5)), for example that the agency must give notice of the extended time to the applicant.
	5. The FOI Act does not specify any criteria the Information Commissioner must consider when deciding whether to grant an extension of time. Generally, the Information 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. Relevant factors will include:
* the scope of the FOI request and the number of documents within scope
* the work already undertaken by the original decision maker and the amount of additional work needed to complete the internal review
* whether any other agencies or parties have an interest in the request
* the measures to be taken by the agency or minister to ensure a decision will be made within the extended time period and to keep the applicant information about progress of the internal review.[[4]](#footnote-4)
	1. If the Information Commissioner grants an extension of time, the agency will not be deemed to have affirmed the original FOI decision (s 54D(6)) as long as the agency makes a decision within the extended time and complies with any conditions imposed (s 54D(5)). The purpose of this provision is to avoid the need for an applicant to lodge an application for IC review.[[5]](#footnote-5)
	2. If an agency does not make an internal review decision within the extended period or does not comply with any conditions the agency is deemed to have affirmed the original decision (s 54D(7)). In this case, the Information Commissioner has no power to allow a further extension of time to make an internal review decision and the applicant or affected third party may apply for IC review(s 54D(8)).
	3. If an agency is deemed to have affirmed the original decision because the statutory time to make a decision has passed, the agency can make an internal review decision if the internal review applicant has not yet applied for IC review of the deemed decision. It is 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](https://www.oaic.gov.au/freedom-of-information/foi-guidelines/part-10-review-by-the-information-commissioner/) of these Guidelines for guidance on how agencies can resolve a deemed FOI decision subject to IC review).

### Internal review decision-making process

* 1. The FOI Act does not prescribe any procedure or criteria for the internal review decision-making process[[6]](#footnote-6)but the usual administrative decision-making principles apply to making internal review decisions:
* because internal review is a merit review process, the internal review decision-maker makes a new decision
* the internal review decision-maker exercises all the powers available to the original decision-maker
* the internal review decision-maker should have access to all the material that was available to the original decision maker and may also consider any additional relevant material or submissions not considered by the original FOI decision maker
* the internal review decision-maker must consider all issues raised by the internal review applicant and may contact that person to seek further information or to discuss the issues raised by the application
* the internal review decision-maker must bring an independent mind to the review and must not act at the direction or behest of any other officer.
	1. Internal review of an access refusal decision may consider all of the original decision to refuse access and is not limited to the refusal of access to specific documents or the applicant’s contentions in this regard.
	2. Internal review of an access grant decision is limited to a review of the original decision to grant access to specific documents, and the affected third party’s contentions regarding the decision to grant access.
	3. An internal review decision-maker has all the powers of the original decision-maker and can do any of the following:
* undertake further searches for documents
* reconsider all the material available to the original decision-maker and may also consider any additional relevant material or submissions not considered by the original FOI decision-maker
* consider all issues raised by the internal review applicant, including contacting that person to seek further information or to discuss the issues raised by the application, including the option of redefining or narrowing the scope of the application
* if the decision-maker decides to release documents that contain the personal or business information of an affected third party or information affecting Commonwealth-State relations, access to the documents must not be given until an affected third party’s review or appeal opportunities have been exhausted (ss 26A(4), 27(4) and 27A(6)) (see [Part 3](https://www.oaic.gov.au/freedom-of-information/foi-guidelines/part-3-processing-and-deciding-on-requests-for-access/) of the FOI Guidelines)
* undertake third party consultation where documents contain information about a person or business who was not consulted earlier, or the consultation did not address issues that have subsequently arisen during the internal review and the affected third party might reasonably wish to make an exemption contention (ss 26A, 27 and 27A).
	1. It is possible that the internal review decision-maker identifies that the original decision-maker misunderstood the scope of the FOI request and that had the scope been properly understood in the first instance, it would have attracted a practical refusal reason. In this circumstance, the internal review decision-maker may decide to commence a request consultation process (s 24AB). The following two points are important to consider:
* because s 24AB(8) only provides for the consultation period to be disregarded for the purpose of working out the 30 day period in 15(5)(b), the 30-day processing period in s 54C(3) cannot be extended as a result of consultation under s 24AB (this means consultation needs to be undertaken within the 30-day internal review timeframe)
* the estimate of the time to process the FOI request can only include the time needed to process the request at the internal review stage. However, the time taken to process the original request may inform the calculation of how long it will take to process the remaining part of the request). (See [Part 3](https://www.oaic.gov.au/freedom-of-information/foi-guidelines/part-3-processing-and-deciding-on-requests-for-access/) of the FOI Guidelines for more information about practical refusal decisions).
	1. If an internal review of an access grant decision overturns the original decision and decides that the information the affected third party has made submissions about is exempt from disclosure, the FOI applicant may apply for IC review of the internal review decision.

### Notifying the applicant of an internal review decision

* 1. The agency must notify the internal review applicant of a decision within 30 calendar days of receiving the internal review application (ss 54C(3) and 54D). 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).
	2. A decision affirming the refusal of access to a document, or deferring access to a document, must include the following particulars specified in s 26:

the findings on any material questions of fact, referring to the material on which those findings were based and state the reasons for the decision

the reasons for any public interest factors taken into account

the name and designation of the person making the decision

the applicant’s review rights, right to complain to the Information Commissioner and the procedures for exercising those rights (this should be included because even if the internal review decision is to provide access to all documents requested, the applicant may 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 identified by the agency).

## Charges and internal reviews

* 1. Charges for processing an FOI request cannot be imposed on internal review. The *Note* to regulation 6 of the [*Freedom of Information (Charges) Regulations 2019*](https://www.legislation.gov.au/Details/F2019L00348) (Regulations) (which sets what charges can be imposed) states that because the FOI Act defines ‘request’ as an application made under s 15(1) of the FOI Act, regulation 6(a) (which refers to the charges set out in Part 1 of Schedule 1 to the Regulations) does not apply to an application under ss 54 or 54A of the FOI Act internal review).
	2. Part 1 of Schedule 1 to the Regulations lists the following processing activities which agencies cannot impose a charge for when conducting an internal review:
* the time spent by the agency or Minister in searching for or retrieving, the document
* a charge in respect of the production of a document containing information in a discrete form by the use of a computer or other equipment that is ordinarily available to the agency for retrieving or collating stored information
* producing a written transcript
* a charge in respect of the time that is spent by an agency or Minister in deciding whether to grant, refuse or defer access to the document or to grant access to a copy of the document with deletions, including time spent to examines documents, consult with an person or body, redacting a document, notifying an interim or final decision on the request. :
	1. However, the charges identified in Part 2 of Schedule 1 may be imposed on internal review (providing access to documents).

## Reporting internal reviews

* 1. Statistical data about internal reviews needs to be included at items 8B-8D on page 2 of the FOI quarterly statistical return form on the OAIC FOI statistics portal (at <https://foistats.oaic.gov.au/>).[[7]](#footnote-7)
	2. Agencies need to keep accurate records of internal review applications and how the internal reviews were decision. The following information must be reported on the FOIstats portal at the end of each quarter:

the number of applications for internal review received by the agency during the quarter

the number of internal review decisions made in the following categories:

* the number of applications where the original decision was affirmed
* where the agency decision was varied on review whether more access was given (access granted in full); greater access was given (access granted not in full); access granted after deferment; access granted in another form; charges reduced or not imposed; or lesser access given.
* the number of applications withdrawn by the applicant without any concession by the agency.
	1. The number of applications and every outcome must be reported on the basis of whether the FOI request sought ‘predominantly personal’ or ‘other’ information.
1. See the [Explanatory Memorandum to the Freedom of Information Amendment (Reform) Bill 2009](https://www.legislation.gov.au/Details/C2009B00257/Explanatory%20Memorandum/Text) [↑](#footnote-ref-1)
2. Although the FOI Act does not specify where an internal review application must be sent, s 15(2A) provides that the original FOI request must be sent to an officer of an agency, or a member of staff of the Minister, at the address of any central or regional office of the agency or Minister specified in a current telephone directory. [↑](#footnote-ref-2)
3. For more information about IC review, see [Part 10](https://www.oaic.gov.au/freedom-of-information/foi-guidelines/part-10-review-by-the-information-commissioner/) of the FOI Guidelines. [↑](#footnote-ref-3)
4. For guidance about applying for an extension of time, see: ‘Extension of time for processing requests’ at <https://www.oaic.gov.au/freedom-of-information/guidance-and-advice/extension-of-time-for-processing-requests/>. [↑](#footnote-ref-4)
5. See the [Explanatory Memorandum to the Freedom of Information Amendment (Reform) Bill 2009](https://www.legislation.gov.au/Details/C2009B00257/Explanatory%20Memorandum/Text) [↑](#footnote-ref-5)
6. For further information on internal review decision-making principles, see the Administrative Review Council, Internal Review of Agency Decision Making, Report No 44 (2000). [↑](#footnote-ref-6)
7. See the FOIstats guide - <https://www.oaic.gov.au/freedom-of-information/guidance-and-advice/foistats-guide/> [↑](#footnote-ref-7)