

# 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*.

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### About this Direction

* 1. This Direction is given by the Australian Information Commissioner under s 55(2)(e)(i) of the *Freedom of Information Act 1982* (the FOI Act) in relation to Information Commissioner (IC) reviews generally.
	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. 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.
	2. This Direction is not a legislative instrument.[[1]](#footnote-1)
	3. This Direction has effect from 1 July 2023.

### General principles

* 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. 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]](#footnote-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 information from any person and to make any inquiries that the Information Commissioner considers appropriate.
	4. In general, IC reviews will be conducted on the papers unless there are unusual circumstances to warrant a hearing.[[3]](#footnote-3) Therefore, complete and timely production of documents at issue, submissions and any other information that has been requested is important.
	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.
	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.

### General procedure in relation to IC review of deemed refusal decisions

## *Preliminary inquiries*

* 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.
	2. Agencies and ministers will have one week to respond to the Information Commissioner’s preliminary inquiries.

## *Commencement of review*

* 1. 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 commencment 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:
1. 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 provide the relevant decision to the applicant and to the Information Commissioner or
2. 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
3. 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.
	1. Agencies and ministers will have 3 weeks to respond to the Information Commissioner’s written direction.

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

## *Commencement of review*

* 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*

* 1. 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.
	2. 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*

* 1. 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.
	2. 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]](#footnote-4)
	3. 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]](#footnote-5)
	1. 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.
	2. 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).

### General procedure for production and inspection of documents

## *Production of documents*

* 1. The Information Commissioner has various powers to require the production of information and documents under the FOI Act. These powers are 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.
	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]](#footnote-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]](#footnote-7)
	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.
	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]](#footnote-8)
	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]](#footnote-9)
	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]](#_Response_to_s), 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.
	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*

* 1. 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 agency or minister can demonstrate that the circumstances warrant inspection rather than the direct production of copies of the marked up documents.
	2. 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.
	3. 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.
	4. 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]](#footnote-10)
	5. 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.

### General procedure in relation to submissions made during an IC review

## *General principles*

* 1. All parties to an IC review will be given a reasonable opportunity to present their case through written submissions.
	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.
	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.
	4. Subject to [6.6], the Information Commissioner will not accept any further submissions from either party to the IC review.
	5. The Information Commissioner will generally provide each of the parties with 4 weeks to make their submissions.
	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*

* 1. 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.
	2. 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]](#footnote-11)
	3. 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*

* 1. 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.
	2. 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.
	3. 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]](#footnote-12)
	4. 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.

### Non-compliance with this Direction

* 1. Because the model litgant 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]](#footnote-13)
	2. The Information Commissioner may report non-compliance with this Direction in the Office of the Australian Information Commissioner’s Annual Report.
	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.
	4. The Information Commissioner may also consider investigating the non-compliance under Part VIIB of the FOI Act.

Angelene Falk

Australian Information Commissioner

DATE

## Annexure 1: Information gathering and document production powers

1. **Notice to Produce**
	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).
	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**
	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. 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**
	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).
	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. 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]](#footnote-14)

## Annexure 2: Evidence checklist – IC review compulsory conference

The ‘*Direction as to certain procedures to be followed in IC reivew*’ issued under s 55(2)(e)(i) of the *Freedom of Information Act 1982* by the Australian Information Commissioner requries 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\* | [ ]  Attached[ ]  Not applicable |
| Copy of letter sent to IC review applicant to arrange contact | [ ]  Attached[ ]  Not applicable |
| Date of Letter | [insert date] |
| File note of telephone call to IC review applicant | [ ]  Attached[ ]  Not applicable |
| Copies of written correspondence from IC review applicant | [ ]  Attached[ ]  Not applicable |

1. Attempts to resolve issues in dispute

|  |  |
| --- | --- |
| File note of engagement with applicant | [ ]  Attached[ ]  Not applicable |
| Suggestions made by agency/minister to resolve IC review | [ ]  Attached[ ]  Not applicable |
| Response provided by applicant, and any suggestions made by applicant to resolve IC review | [ ]  Attached[ ]  Not applicable |

1. Outcome of engagement

|  |  |
| --- | --- |
| Outcome of engagement | [ ]  Attached[ ]  Not applicable |
| Written notification that IC review applicant wishes to withdraw their application for IC review | [ ]  Attached[ ]  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.

1. Section 55(3) of the FOI Act. [↑](#footnote-ref-1)
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]. [↑](#footnote-ref-2)
3. See *FOI Guidelines* at [10.20] and [10.63]. [↑](#footnote-ref-3)
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. [↑](#footnote-ref-4)
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. [↑](#footnote-ref-5)
6. See *FOI Guidelines* at [10.98]. [↑](#footnote-ref-6)
7. See *FOI Guidelines* at [10.100]. [↑](#footnote-ref-7)
8. See *FOI Guidelines* at [10.98]. [↑](#footnote-ref-8)
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. [↑](#footnote-ref-9)
10. The OAIC is able to receive secure electronic transmission of documents. For more information contact the OAIC. [↑](#footnote-ref-10)
11. See *FOI Guidelines* at [10.103]. [↑](#footnote-ref-11)
12. See *FOI Guidelines* at [10.74]. [↑](#footnote-ref-12)
13. See paragraph 3 of Appendix B to the *Legal Services Directions 2017*. [↑](#footnote-ref-13)
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. [↑](#footnote-ref-14)