

# What happens on internal and external review?

Alison McCubbin and Tony Pruyn, Office of the Information Commissioner



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# Introduction

- Review right basics– what the Act says and requires
- Describing review rights in a notice of decision
- Internal review – when, by whom, how and tips for the internal reviewer
- External review – what happens when the OIC receives an application for external review, tips for making the process go smoothly



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# Right to review basics

- Access applicants and third parties have review rights in relation to access decisions made by agencies.
- Agency notices of decision must include information about the person's review rights.
- Must seek internal review first unless the decision is made by the agency's principal officer.
- External review is available after a decision made by the principal officer or the internal review decision.



# Review timeframes

<b>Agency</b>	Must give notice of the internal review decision within <b>15 calendar days</b> after the review application is lodged or such longer period agreed between the agency and the applicant	Section 43(2)
<b>Applicant</b>	May lodge an application for internal review within <b>30 calendar days</b> after being given written notice of the initial agency decision  May lodge an application for external review within <b>60 days</b> after being given written notice of the agency's internal review decision	Section 40(2)  Section 66(2)
<b>Third Party</b>	May lodge an application for internal review within <b>30 days</b> after being given written notice of the agency initial decision  May lodge an application for external review within <b>30 days</b> after being given written notice of the agency's internal review decision	Section 40(2)  Section 66(3)
<b>Information Commissioner</b>	30 days to make a decision on a complaint unless Commissioner considers it is impracticable	Section 76(3)



# Timeframes (cont)

- Key concepts
  - give notice within...
  - calendar days
  - after being given written notice



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# Timeframes (cont)

- Increase time for an internal review decision only with the agreement of the access applicant (even if the internal review application is made by the third party)
- Failure to give notice of internal review decision in time – the agency’s initial decision is taken to have been confirmed – see our new publication - [What if the agency delays making a decision?](#)
- Agencies can extend the period in which an access applicant can seek internal review of an agency decision (section 40(3))
- The Information Commissioner can extend the period in which an access applicant or a third party can seek external review of an agency decision (section 66(4)).
- Review rights don’t expire at 4:00pm! - See also – [Calculating time and days](#)



# Describing review rights in a notice of decision

- [Its important to give accurate advice about review rights - Consider advising of next available review right only](#)
- Example *FOI Coordinators Manual* – [Appendix 1 – Sample notice of decision](#)



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# Internal review

## Section 39(1)

*A person who is aggrieved by a decision made by an agency in relation to an access application has a right to have the decision reviewed by the agency.*



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# Decisions reviewable on Internal Review

- **Access applicant** - the agency decision has the effect to:
  - Refuse access to a document
  - Give access to an edited copy of a document
  - Refuse to deal with the access application
  - Defer giving access to a document
  - Give access in a manner described in section 28 or withhold access
  - Impose a charge or require a deposit
- **Third party** –if the person is third party whose views were or should have been obtained under section 32 or section 33, and the decision conflicts with the person's views

(section 39(2))



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# Internal review application requirements

An application for review has to

- be in writing; and
- give particulars of the decision which the aggrieved person wishes to have reviewed; and
- give an address in Australia to which notices under this Act can be sent; and
- give any other information or details required under the regulations; and
- be lodged at an office of the agency within 30 days after being given written notice of decision

(section 40)



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# Internal review – Who?

- A person *not subordinate* to the original decision maker (section 41)
- The principal officer or an officer directed by the principal officer for that purpose, either generally or specifically (section 100)



# Internal review – how?

- Consider *as if it were an access application* (section 42)
  - What is the scope of the application?
  - Have all the documents within the scope of the application been identified.
  - What are the ‘sensitivities’ of the documents? Are those sensitivities covered by the exemptions?
- Provide a notice of decision to confirm, vary or reverse the decision under review (section 43)



# Internal review - tips

- Consider talking with the applicant
- Consider the application for review – what is in dispute?
- Consider each element of the concerns raised by the applicant and how that may be relevant to the FOI Act
- Read the documents in dispute
- Consult the relevant provisions of the FOI Act



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# Internal review - tips

- If you are considering giving access to third party information that was previously found to be exempt – don't forget the requirements of sections 32 and 33
- Advise the parties of the right to seek external review (there is no extra internal review right arising from an internal review decision)
- Be clear when you are dealing with an internal review application rather than a request for clarity about the initial decision
- No internal review of an estimate of charges unless it is combined with a requirement to pay a deposit



# External Review

The main function of the Commissioner is to deal with *complaints* about **decisions** made by agencies in respect of access applications and applications for amendment of personal information (section 63(1))



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# Decisions reviewable on external review

## Section 65(1)

*A complaint may be made against an agency's decision to:*

- (a) to give access to a document; or*
- (b) to give access to an edited copy of a document; or*
- (c) to refuse to deal with an access application; or*
- (d) to refuse access to a document; or*
- (e) to defer the giving of access to a document; or*
- (f) to give access to a document in the manner referred to in section 28 or withhold access under that section; or*
- (g) to impose a charge or require the payment of a deposit.*





# External review application requirements

A complaint to the Information Commissioner must:

- be in writing and include an Australian address;
- give particulars of the decision to be reviewed;
- include a copy of the agency internal review notice of decision or the initial notice of decision if the decision was made by the principal officer; and
- be lodged in the appropriate timeframe  
(section 66)



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# Applying for review outside of timeframes

- applications for external review can be made out of time (sections 66(4))
- general principle not to allow an application for external review to be made out of time unless the applicant shows good cause
- *Di Virgilio v McCleary* [2012] WASC 437 identified four relevant considerations :
  - the length of the delay;
  - the reasons for the delay;
  - whether there is an arguable case; and
  - the extent of any prejudice to the respondent.



# Applying for review without internal review

- applications for external review can be made without internal review (section 66(6))
- general principle not to allow an application for external review without first having internal review completed, unless the applicant shows good cause
- Relevant considerations
  - whether there is any good reason why internal review was not be applied for;
  - any potential disadvantage to a party by allowing a complaint to be lodged without internal review having been applied for and completed; and
  - whether there would be wider prejudice to the public, in terms of disruption of established practices, if the application was granted to the applicant and to other persons in a like position.



# What to expect on external review

All parties are expected to engage in the external review process

- participate in negotiations constructively and flexibly
- be available to attend and participate in meetings and conciliation conferences
- provide information when requested

**Agencies will be also required to:**

- prepare and provide documents in a timely manner that enable ready review of the documents



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# External Review – three stages

- Assessment
- Investigation; and
- Finalisation



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# External review - assessment stage

- Formal written notification of the external review to the parties
- Agency required to produce key documents
- Requests include timeframes

## TIPS

- Comply with timeframes given by the OIC
- Contact the OIC if unsure
- If practicable, hand deliver copy documents by a person who has knowledge of the matter (if not practicable – make arrangements)



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# External review - investigation stage

- When this stage commences, things may move quickly
- OIC may explore whether resolution is possible through
  - early intervention
  - conciliation conference
  - providing a preliminary view

## TIPS

- timely response, engage meaningfully in good faith, seek resolution
- make yourself and others available at short notice
- be open to alternative dispute resolution proposals



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# External review - finalisation stage

## Outcome types

- Conciliated
- Formal decision of the Commissioner
  - Decision note
  - Full decision



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# Relevant OIC publications

- **For applicants**

- [Review of agency decisions](#)
- [Can others access information about me or my business?](#)
- [What if the agency delays making a decision?](#)
- [What happens in an external review?](#)
- [Third parties and their rights - guide for the public](#)



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# Relevant OIC publications

- **For agencies**

- [Calculating time and days guide](#)
- [External Review Procedure - guide for parties](#)
- [Producing documents to the Information Commissioner – guide for agencies](#)
- [Preparing for a conciliation conference - guide for parties](#)
- [Understanding the conciliation process - guide for parties](#)



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# Questions



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