What happens on internal and external review?

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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
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

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

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

- **It's 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*
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.
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))
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)
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
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))
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.
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)
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
External Review – three stages

• Assessment
• Investigation; and
• Finalisation
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)
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
External review - finalisation stage

Outcome types

• Conciliated

• Formal decision of the Commissioner
  – Decision note
  – Full decision
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
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
Questions