

Processing FOI Internal Reviews

Guideline

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STATE RECORDS

of South Australia



Government of South Australia
State Records

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Processing FOI Internal Reviews

Introduction

Any person who is aggrieved by a determination made by your agency under the *Freedom of Information Act 1991* (FOI Act) is entitled to an internal review of that determination.

This process allows for a fresh decision to be made by someone other than the original decision maker. It provides a way for an applicant to test the merits of the original decision and allows your agency the opportunity to identify and correct any systematic problems within their own decision-making processes.

Purpose

This is a step-by-step guide to processing an internal review application submitted under the FOI Act.

It can be used by all agencies subject to the FOI Act, including state government agencies, ministerial offices, statutory authorities, local government councils and universities.

Internal Reviews and the FOI Act

There are two types of internal review applications under the FOI Act:

- » Section 29 provides review rights for determinations made under Part 3 – Access to documents. Part 3 provides applicants the right to apply for access to information held by agencies.
- » Section 38 provides review rights for determinations made under Part 4 – Amendment of records. Part 4 provides applicants the right to apply to have records relating to their personal affairs amended.

Timeframes

Upon receiving an internal review application, your agency has 14 (calendar) days to make a determination. Under sections 29(5) and 38(4), if an agency fails to do this within 14 days, the agency is taken to have confirmed the original determination.

Extensions

Usually, sections 14A(1)(a) and (b) provide the authority for your Principal Officer to approve an extension of time to search for documents or for consultation for a FOI request.

Unfortunately, this mechanism does not extend to processing an internal review under the FOI Act. If your agency is considering releasing information which requires consultation as a result of an internal review, you must do this within the 14 (calendar) day time limit.

Your agency does have the option to negotiate an informal extension with the applicant. However, informal extensions are not protected by the FOI Act, meaning the applicant can submit an external review after the 14th day.

It is important if you negotiate an informal extension to receive an agreement for a negotiated extension in writing and a record kept. This evidence will assist should the matter go to external review.

Deemed refusals

As soon as a FOI application passes the 30 (calendar) day time-limit for processing or any approved formal extensions, access is automatically deemed refused under section 19(2) of the FOI Act. Despite this, your agency can continue to process the application and make a determination to release the information in full or part beyond the 30th day. It does, however, give the applicant the right to submit an internal review.

If you receive an internal review under these circumstances, we recommend contacting the applicant and explaining your position with the intention of agreeing to a negotiated extension in writing. If the applicant does not agree, your agency can process the application as part of the internal review process instead.

Deferred access

Sections 25-28 require consultation with affected third parties where certain information is being considered for release. Should your agency release information contrary to the opinion of the consulted party, they too have a right to review your determination.

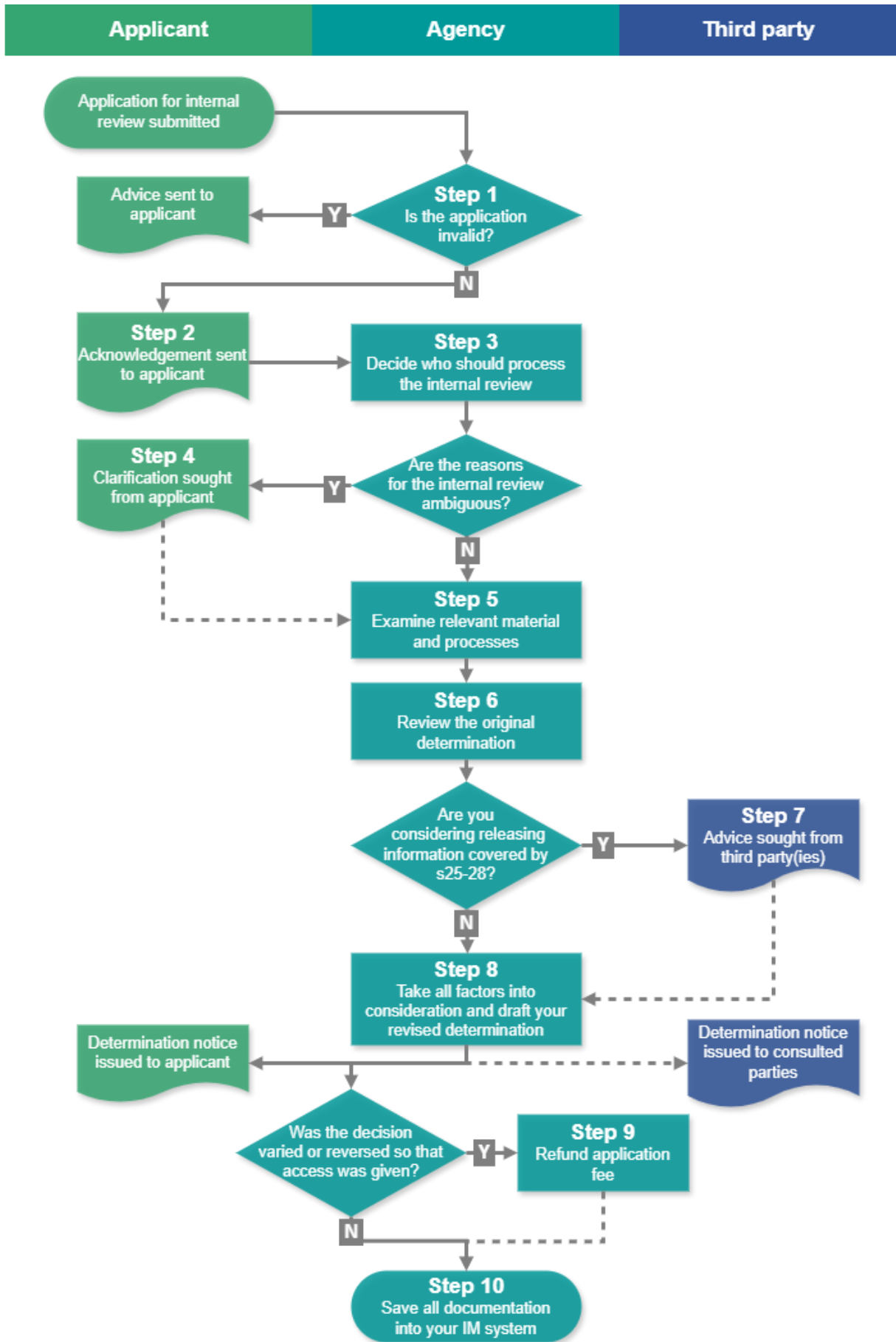
When an internal review has been submitted by a consulted third party, access cannot be provided to the original applicant while the internal review is being processed.

This is defined as deferring access under subsections (3)(d) of sections 25-28. Access can only be provided either:

- » upon completion of any third party internal reviews or
- » once the 30 day timeframe for third parties to submit an internal review expires.

Essentially, the applicant is temporarily refused access to documents until the deferral is finalised, impairing their ability to assess whether they disagree with the determination. The FOI Act takes this into consideration via section 29(2)(e), which provides your agency's Principal Officer with the authority to accept an internal review from the applicant beyond the 30 day time limit.

FOI Internal Review Workflow Diagram



Step1

Is the internal review application valid?

Section 29(2) states:

29—Internal review

- (2) An application for review of a determination—
- (a) must be in writing; and
 - (b) must be accompanied by such application fee as may be prescribed; and
 - (c) must be addressed to the principal officer of the agency; and
 - (d) must specify an address in Australia to which notices under this Act should be sent; and
 - (e) must be lodged at an office of the agency within 30 days after the day on which notice of the determination was given to the applicant or within such further time as the principal officer of the agency may allow.

Internal reviews under section 38 have the same criteria as section 29 except an application fee is not required.

38—Internal review

- (2) An application for review of a determination—
- (a) must be in writing; and
 - (b) must be addressed to the principal officer of the agency; and
 - (c) must specify an address in Australia to which notices under this Act should be sent; and
 - (d) must be lodged at an office of the agency within 30 days after the day on which notice of the determination was given to the applicant or within such further time as the principal officer of the agency may allow.

Under sections 29(6) and 38(5), a determination is not subject to internal review where the determination:

- » was made by the Principal Officer, or
- » was made at the direction of the Principal Officer, or
- » was made at the direction of a person or body to which the Principal Officer is responsible.

Who can submit an internal review application?

Section 29(1) states:

29—Internal review

- (1) Subject to subsection (5), a person who is aggrieved by a determination made by an agency under any other provision of this Part is entitled to a review of the determination.

Although worded slightly differently, section 38 (internal reviews for amendment applications) has the same subsection (1).

38—Internal review

- (1) Subject to subsection (5), a person who is aggrieved by a determination made by an agency under Division 1 is entitled to a review of the determination.

The use of the term 'person aggrieved' in these sections includes someone who has a genuine grievance with the determination in question because it prejudices their interests. This may include someone not directly involved with the original determination.

Fees and charges

Internal review applications under section 29 are subject to an application fee, however internal reviews to amend personal records under section 38 are not. Agencies can opt to waive the internal review fee.

While your agency can charge an applicant for production costs such as photocopying and providing a written transcript, you cannot charge for the time it takes to process an internal review application (see current [fees notice](#)). This is because you have, in effect, already dealt with the application when the original determination was issued.

Under section 29(4), the internal review application fee must be refunded if your agency varies or overturns their original determination. This includes where an agency provides access to a document because of the internal review.

Reviewing a notice of nil documents

Section 23(1) states:

23—Notices of determination

- (1) An agency must notify an applicant in writing—
 - (a) of its determination of his or her application; or
 - (b) if the application relates to a document that is not held by the agency—of the fact that the agency does not hold such a document.

A notice under section 23(1)(b) is also known as a 'nil documents notice'.

The use of 'or' between subsections (a) and (b) draws the distinction between a notice of determination and a nil documents notice. Accordingly, a nil documents notice is not a determination under the FOI Act.

Sections 29 and 38 only provide review rights to a person where a determination has been made. Therefore, a nil documents notice is not reviewable.

If an applicant believes that the agency has failed to find all documents, they may make a [complaint to the Ombudsman](#) under the *Ombudsman Act 1972*. However, Ombudsman SA expects that an applicant will have raised the issue with the agency before making a complaint to the Ombudsman through the agency's internal complaint handling processes.

Reviewing a determination to extend time limits

Extensions approved under section 14A(1) are determined by your agency's Principal Officer.

An internal review cannot be submitted to your agency if the Principal Officer made (or directed) the determination.

Under these circumstances, the internal review applicant can only submit an external review to the Ombudsman.

Step 2

Acknowledge the internal review application

Your agency should acknowledge the application of an internal review in the same way as an application for access or amendment. If the internal review application is not valid, the applicant should be notified as soon as possible and provided reasons why.

For valid internal review applications, your acknowledgement notice should confirm:

- » the date the application was received
- » the number of days the agency has to review the determination, and
- » the applicant's external review rights, including who they can submit an external review application to.

State Records has numerous [templates on our website](#), including acknowledging internal review applications.

Step 3

Decide who should process the internal review

The FOI Act is silent on who is responsible for making an internal review determination.

One view is the Principal Officer of your agency should make the determination. This is because the FOI Act requires the internal review be addressed to the Principal Officer and therefore, it was the intention of Parliament the Principal Officer make the determination.

At the very least, the internal review should be processed by a more senior officer than the original decision maker.

While agency staff can process and draft an internal review determination, your agency's Principal Officer should finalise the decision (sign off).

Step 4

Consider the reason(s) the internal review application was submitted

Sometimes, an applicant will request an internal review for a specific reason (or reasons). For example, the applicant doesn't agree with the redactions applied to a document. If provided, this should guide the reviewer on what to focus their time on.

If the applicant is only requesting the review of one document's determination out of many, the reviewer does not need to spend time reviewing anything that may be out-of-scope of the applicant's request.

Alternatively, if the applicant's reasons for review are ambiguous (or no reason was provided at all), it is recommended you attempt to clarify their position. A short, prompted conversation can help the applicant express their reasons for requesting a review and help you identify issues to focus on.

Step 5

Examine relevant material and processes

If the applicant has provided you with specific reasons for the internal review request or clarified their position, you can focus on the relevant documents in question. If not, all documents will need to be reviewed.

When reviewing the documents within scope of the review request, you should compare and review all redacted and unredacted documents as well as any correspondence or evidence relied on when the original determination was made.

Performing additional searches for documents

Sections 29 and 38 do not require the agency to conduct any further searches for documents while reviewing a determination. Your agency is only obliged to review the determinations made and how any exemption clauses have been assessed.

However, if the applicant expresses concerns about the search, it is recommended your agency attempt to address those concerns while processing the internal review. Dealing with concerns about searches should be handled as an agency complaint as it is not subject to the FOI Act and the 14 day internal review timeframe does not apply.

If additional searches are conducted but the applicant is not satisfied, the Ombudsman can take an official complaint. If additional searches are not conducted, it is likely the Ombudsman would refer the agency's internal complaint handling process before taking on an official complaint under the *Ombudsman Act 1972*.

Step 6

Review the original determination

Once the relevant material and processes have been examined, you should have all the information needed to review the original determination. Each issue or document within scope should be reviewed with respect to whether the original determination is confirmed, varied or reversed.

You will need to consider:

- » all elements of the relevant sections and clauses (including public interest or reasonableness factors) in the initial determination
- » any additional findings and
- » the relevant fact(s) those findings are based on.

Your agency will need to process documents identified through additional searches (if you've chosen to undertake them) in the same way they would be processed as part of an access application.

Step 7

Consult with newly affected parties (if necessary)

On occasion, the reviewer may consider information previously refused under clauses 5-8 of Schedule 1, should be released because of revised public interest or reasonableness factors. Should information covered by sections 25-28 be considered for release as part of a revised determination, consultation with the affected third parties must occur.

This process provides an opportunity to gather valuable information and knowledge that may assist in confirming, varying or reversing the original determination. As is the case with access application consultation, third parties consulted cannot veto a decision.

As previously mentioned, your agency cannot have an extension approved under section 14A(1)(b) for the purpose of consultation while conducting an internal review. Any consultation will need to be concluded within the 14 calendar day time-limit unless you can agree to an informal negotiated extension with the applicant.

See our [Consultation and the FOI Act Guideline](#) for more information.

Step 8

Issue your internal review determination

Once you have reviewed the original determination and, if needed, consulted with third parties, you can finalise your internal review determination and issue it to the applicant (and those consulted with).

An internal review determination notice should include:

- » a reference number connecting it back to the original application
- » the date the:
 - internal review determination was issued
 - internal review application was received by the agency
 - the original application's determination was issued
- » the scope of/reasons for the internal review application including each issue or document subject to the review
- » whether your agency is confirming, varying or reversing the initial determination for each issue or document including reasons for each decision
 - If you are confirming a decision to refuse access, you will need to address all elements in the relevant sections and clauses as you did in the initial determination, as well as include any additional findings along with the material questions of fact those findings are based on.
 - If the initial determination is varied or reversed, explain the application fee will be refunded.
- » advice regarding the applicant's (or consulted parties') external review rights and
- » advice detailing publication of FOI applications in your agency's disclosure log in accordance with PC045 (if applicable).

Lastly (and as mentioned earlier), because an internal review must be addressed to your agency's Principal Officer, it should also be officially decided (signed off) by them. If your Principal Officer is not available to sign the document but has verbally approved the contents as their own decision, another person can sign on their behalf.

This is particularly important if consulted parties object to your determination – as mentioned in Step 1, the determination is officially made by the Principal Officer and therefore not afforded internal review rights.

State Records has numerous [templates on our website](#), including internal review notices of determinations.

Step 9

Refund internal review application fee (if necessary)

If the determination is varied or reversed so access to a document is given, the agency must refund any application fee paid in respect of the review (section 29(4)).

Step 10

Ensure all information is saved in your agency's information management system

All documentation and file notes pertinent to the internal review must be captured and stored in your agency's information management system. It should also be clearly linked to the original FOI application file.

Should the matter be escalated to external review, with the Ombudsman or the South Australian Civil and Administrative Tribunal (SACAT), you may need to provide evidence of your decision-making process.

Information management obligations

As 'official records' under the *State Records Act 1997*, each FOI application (including internal reviews) and its associated record trail must be appropriately captured and managed within the agency's information management system. A new file should be created for every application received. This is in part because some applications may be required to be retained for a longer period of time than others in accordance with an approved disposal schedule.

Documents relating to the application must be stored in the FOI file. This may mean copies of the documents are held in two places – the FOI file (copies and redacted copies) and the source files (the original documents).

Any source files retrieved from State Records for the purposes of locating documents must be returned to the archives in their original state. That is, no records or documents can be added or removed from these files. Copies can be taken of the original documents to provide to the applicant where it is determined access can be provided under the FOI Act. Redactions must only be made to copies not on original documents.

Annual reporting obligations

Section 54AA requires all agencies subject to the FOI Act to 'furnish to the Minister' information to allow the annual report to be completed. The FOI activity information required to be reported is prescribed by the current [Gazette notice](#).

Internal review activities are among the many elements required to be reported each year. The data related to internal reviews include:

- » a tally of applications for internal review received during the relevant financial year and
- » a tally of the outcomes of internal review applications, determined during the financial year – split by:
 - decisions confirmed
 - decisions varied
 - decisions reversed and

- applications withdrawn and/or closed.

See our [FOI Annual Reporting Guideline and FOI Applications Data Collations Spreadsheet](#) for more information.

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Need further assistance?

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