Office of the Information Commissioner
Western Australia

External Review Procedure

Guide for parties

The independent regulator fostering trust and accountability in WA through privacy and freedom of information.

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External Review Procedure Guide for Parties

This is a general guide to the procedures used by the Information Commissioner (**the Commissioner**) when conducting an external review of an agency's decision under section 65 of the *Freedom of Information Act 1992* (WA) (**the FOI Act**).[1] In this guide the term 'Commissioner' may include the Commissioner's officers. The term 'complainant' refers to the person who has applied for external review.

What is expected of you as a party?

The Commissioner expects all parties to an external review to be actively engaged in the external review process.

This includes:

- participating in negotiations constructively and flexibly in a genuine effort to resolve the matter;
- being available to attend and participate in meetings and Conciliation Conferences; and
- promptly providing additional information to the Commissioner when requested.

For agencies this will also include:

- preparing and providing documents to the Commissioner in a timely manner and in a form that enables ready review of the documents.

The Commissioner usually deals with applications for external review in three stages, as outlined below.

Stage 1 – Assessment

1.1 When a valid application for external review has been made, the Commissioner will notify the parties in writing. If an agency has claimed an exemption under clause 3 or clause 4 of Schedule 1 to the FOI Act, *it is the agency's responsibility* to notify any third parties that an application for external review has been made to the Commissioner.

1.2 If the agency's notice of decision does not comply with the requirements of section 30 of the FOI Act and does not contain sufficient reasons for its decision, the Commissioner will require the agency to provide further information to justify its decision. This may include preparing a schedule of disputed documents.

1.3 The Commissioner will usually require the agency to provide a complete copy of the disputed documents and a complete copy of the agency's FOI file, together with a Statement of Certification completed by an officer of the agency that states that the disputed documents produced are true and complete copies of the original documents.

Stage 2 – Investigation

2.1 The Commissioner will usually make preliminary inquiries to determine whether it is possible to resolve the matter by conciliation. It is essential for both parties to keep an open mind at this point. Matters open to negotiation may include:

- the form of access that could be provided;

[1] The FOI Act refers to an application for external review as a 'complaint'.

- charges that may be payable;
- the type of document required;
- whether information can be provided in another form; and
- whether the agency is prepared to exercise its discretion to disclose a document that may be technically exempt, if no harm is likely to follow.

2.2 The Commissioner may hold meetings with representatives of the agency and with the complainant, separately or together, to:

- identify disputed documents;
- resolve inconsistencies; and
- clarify issues and reduce misunderstandings.

2.3 The parties to an external review may also be required to attend a compulsory Conciliation Conference.

2.4 Where it is practicable and appropriate, the Commissioner will communicate with the parties by email. Therefore, all parties should ensure that the Commissioner's officer assigned to their matter has been provided with a current email address that is regularly monitored.

2.5 Agencies are expected to provide contact details of alternate officers where the primary officer is not available.

2.6 Complainants are also expected to notify the Commissioner of changes to any contact details previously provided, in particular the postal address.

2.7 The Commissioner has the power to require any person to attend before the Commissioner or to produce information or documents to the Commissioner that the Commissioner considers relevant to the matter. Failure to comply with such a requirement is an offence.

2.8 Parties are expected to comply with time frames set by the Commissioner, but may seek extensions in exceptional cases. A request for an extension of time must be in writing and include persuasive reasons as to why the time frame cannot be met.

2.9 If a complainant does not respond to communications from the Commissioner in the time frame set, the Commissioner may proceed on the basis that the complainant no longer wishes to proceed with the external review and close the file.

2.10 If a complainant is unable to participate in the external review process because of other commitments, they need to ensure that someone else is authorised to act on their behalf. Alternatively, they can inform the Commissioner in writing of the reasons for their unavailability so that consideration can be given to suspending proceedings.

2.11 Where it is considered appropriate, the Commissioner may provide details of any submissions received to the other parties to the external review. It is not the Commissioner's usual practice to provide each party with a complete copy of each other's submissions.

2.12 If the matter has not been resolved by this stage, after considering all of the material and the disputed documents, the Commissioner may inform the parties of her preliminary view of the matter, including reasons. Each party then has the option of reconsidering their position and may withdraw or provide additional material in support of its view.

Stage 3 – Finalisation

3.1 If any matters remain in dispute, after considering any further information and submissions, the Commissioner will formally determine the issues in dispute between the parties.

3.2 The Commissioner informs the parties in writing of her final decision and the reasons for it. The agency is then responsible for giving effect to the decision.

3.3 The Commissioner is required to have her decisions published in full or in an abbreviated, summary or note form. The decisions are published our website and on the Australasian Legal Information Institute website.

3.4 Published decisions will generally not include any information that directly identifies an individual. There are some exceptions. For example, an individual may be named in a decision if they are a member of Parliament or apply on behalf of a media organisation or entity of public significance. If the application is made on behalf of a corporation or other entity, the corporation's or entity's name may be published.

3.5 The Commissioner may also decide to stop dealing with any external review, which does not relate to a matter the Commissioner has power to deal with, or is frivolous, vexatious, misconceived or lacking in substance.

3.6 An appeal lies to the Supreme Court on any *question of law* arising out of a decision of the Commissioner. That is, an appeal to the Supreme Court is not a further full merits review. There is no appeal to the Supreme Court in relation to decisions on a deferral of access, imposition of charges, or the payment of a deposit. The Rules of the Supreme Court stipulate the time within which an appeal can be lodged.

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