FOI GUIDELINES – REVIEWS OF FOI DECISIONS

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FOI GUIDELINE - REVIEWS OF FOI DECISIONS

Purpose

This Guideline sets out an applicant's review rights under the *Freedom of Information Act 1982* Cth (the FOI Act).

OVERVIEW OF REVIEW RIGHTS

Where an FOI applicant is denied access, in accordance with their request, agencies are required to notify the applicant of their review rights. Given that there are statutory time limitations within which to apply for a review an initial decision, it is important that agencies provide timely notification of an applicant's review rights.

The review rights available to the applicant are:

1. an **internal review** of the agency's original decision;
2. a merits review by the **Administrative Appeals Tribunal** (AAT); or
3. an investigation by the **Commonwealth Ombudsman**.

An applicant also has the right to appeal against a decision made by an agency or by the AAT in the Federal Court or, where special leave is granted, in the High Court.

Third parties also have a right of review where they have an interest in the FOI request and an entitlement to object to the release of that information.

INTERNAL REVIEW

Applying for internal review

Applicants denied access, in accordance with their request under the FOI Act, may request that the agency review the original decision. In most cases, the AAT cannot review a decision until an internal review has been conducted.

An application to the agency for internal review must be made in writing and accompanied by an application fee of $40. The agency is not obliged to undertake an internal review until the application fee has been paid.

Agencies can remit the application fee on the application of the applicant. The FOI Act specifies two main grounds for remission. First, where an agency considers that it will, or has caused, financial hardship to the applicant. Second, where giving access is considered to be in the general public interest. However, agencies should note that the grounds for remitting the fee are not limited to the two specified, but may be allowed for any relevant reason. Where the fee is remitted no other charges are applicable as part of the review process.

Agencies are encouraged to develop their own procedures for reviewing FOI decisions. These procedures should detail who can review a decision, the appropriate level of the reviewing officer, authorisation to grant or refuse an extension of time, and any responsibilities of the reviewing officer under the FOI Act. Procedures such as these, in conjunction with good record keeping practices, will ensure that all documents within the scope of a request are identified and assessed within the given time frame.

Decisions subject to internal review and time limits

As illustrated in Table 1 below, an applicant generally has 30 days after they are notified of an FOI decision (the original decision) in which to apply for an internal review. Table 1 sets out the various FOI decisions which can be made by an agency and the corresponding time limits in which a person can apply for an internal review.

TABLE 1

DECISIONS SUBJECT TO INTERNAL REVIEW	**TIME LIMITS IN WHICH TO APPLY** (in calendar days)
Refusing access to a document in accordance with an FOI request	30 days after decision was notified
Granting access to a document but not granting access in accordance with the request to all documents	15 days after access was granted or 30 days after the decision was notified (whichever period was longer) or as agreed by the agency
Purporting to grant access in accordance with a request but not actually granting that access	15 days after access was granted or 30 days after the decision was notified (whichever period was longer) or as agreed by the agency
Deferring access to a document – section 21	30 days
The imposition of charges or the amount of those charges – section 29	30 days
The remission of charges – section 30A	30 days
Granting access to a document only to a qualified person under subsection 41(3) of the FOI Act	15 days after access was granted or 30 days after the decision was notified (whichever period was longer) or as agreed by the agency
Decision to refuse to amend a record of personal information in accordance with an application made under section 48 of the FOI Act	30 days
Decision refusing to annotate a record of personal information in accordance with an application made under section 48 of the FOI Act.	30 days
Decisions to release State documents not considered exempt after consultation under section 26A	30 days or as agreed by the agency
Decisions to release documents relating to business affairs after consultation under sub section 27(1)	30 days or as agreed by the agency

Decisions to release documents containing personal information after consultation under section 27A	30 days or as agreed by the agency

Note that where the 'responsible Minister' or 'Principal Officer', as defined in section 4 of the FOI Act, made the original decision **no internal review rights are available** and the applicant must appeal directly to the AAT.

Extension of time to apply for internal review

Agencies have an unfettered discretion to extend the timeframe in which an applicant can apply for a review, even after the review period has expired. Some factors which may be considered by an agency include:

- the particular facts and circumstances of the applicant's situation, for example why the applicant was late in submitting an application;
- the extent to which the internal review has been prejudiced by the length of time taken to consider the application or other events including the dispersal of the collection of documents made for the initial decision;
- the extent, if any, to which orderly consideration of other applications for internal review would be impeded by allowing extra time; and
- the length of time being sought.

It should only be in exceptional circumstances that an agency refuse a request for further time, particularly given that an internal review may be a necessary step before the applicant can appeal to the AAT. It also accords with the fundamental principle of the FOI Act that agencies have a duty to assist the applicant in seeking access under the Act.

A decision not to grant extra time is reviewable by the AAT. The onus is then on the agency to establish that the refusal to grant extra time was justified. Unless the agency has solid grounds for refusal, it is likely that the AAT will grant an applicant further time in which to request an internal review. A person making a late application for an internal review may, therefore, lodge a request for an extension of time with their application and expect to have that request duly considered. Having said this, the power to grant extra time is not conditional on a request being made by the applicant.

Where an applicant has not been notified of a decision on an internal review application within 30 days, he or she can apply directly to the AAT for a review (section 55(3) of the FOI Act). If it appears that consideration of an application will exceed the 30 day time limit, the agency should contact the applicant and inform him or her of the progress of the application. Often applicants will accept a few days delay so long as they are assured that the agency is working towards a decision.

It is important to view this practice in light of the corresponding principle in section 56 of the FOI Act which provides that where an applicant has not received notice of a primary decision on an FOI application after 30 days, the agency is deemed to have made a decision refusing to grant access to the document.

Who should review an FOI decision?

An internal review must be undertaken by an authorised officer who was not involved in making the original decision. Under no circumstances should a person who made the initial decision review his or her own decision. An internal review is generally undertaken at a more senior level to that of the initial decision maker. The level of the reviewer should not be below that of the original decision maker.

It is critical that the reviewer be in a position to make an independent assessment of the application. He or she must not have had anything to do with the original decision, and should not consult with the original decision-maker while undertaking the review.

For further information on authorised decision-makers see FOI Guidelines: *Fundamental Principles and Procedures* at <www.ag.gov.au/foi>.

Processing a review decision

The internal review decision should not be influenced by the original decision making process. It should not merely be a 'rubber stamp' of the original decision. All documents subject to internal review will need to be examined and a new decision (although not necessarily a *different* decision) should be made for each document.

While the reviewing officer will be reconsidering the scope of the original FOI application, this does not mean that every step in the original decision making process needs to be undertaken again. For example, where there is clear evidence to support a conclusion that a particular step in the original decision process was correct.

Decision-makers conducting internal reviews should consider:

- the applicant's submissions for review;
- the need for consultation where none has been undertaken (the need to consult with third parties in conducting an internal review does *not* extend the 30 day period for the decision);
- the need for further consultation where the reason for documents being exempt is not absolutely clear;
- the desirability of further searches for documents, particularly where the scope of the request or the existence of the documents is at issue (an application for internal review cannot extend the scope of the original request if its scope is not under contention);
- each exemption claimed, to ensure the claim is sustainable; and
- whether documents previously exempted may be released.

If the request for internal review involves complex issues or a relatively large workload, it is often helpful to discuss the case with the applicant with a view to narrowing the request to essential documents. However, it should be made clear to the applicant that he or she is under no obligation *at any time* to disclose the purpose of the request, and that confining

the request in these circumstances will not prejudice the right to seek a review at a later stage.

Based on this information the reviewing officer may:

- affirm the decision;
- vary the decision (for example by releasing further documents); or
- set the decision aside and substitute a new decision.

Reviewing decisions on fees and charges

An internal review of fees and charges decisions requires a reviewing officer to check:

- the time spent on each aspect of the primary decision to ensure the time recorded in the decision fairly represents the workload;
- the accuracy of calculations of charges made on the primary decision; and
- after considering the applicant's submissions if any, whether grounds exist for the fee or charge to remitted or waived.

Reviewing decisions on amendments or annotations

An internal review of decisions relating to the refusal to amend or annotate a record requires a reviewing officer to check:

- the submissions made by the applicant for review;
- any additional evidence submitted; and
- all material considered in primary decision weighed against new evidence submitted with the review request.

It may be helpful for reviewing officers to draw up a table in which evidence for the amendment or annotation can be placed on one side of the table and evidence against the amendment placed on the other. This will assist the reviewer in reaching a new decision and will assist when providing the applicant with reasons for the decision.

Notifying the applicant of an internal review decision

Applicants must be provided with written notice of the decision. The notice must:

- state the findings on any material question of fact, referring to the material on which those findings were based, and state the reasons for the decision;
- state the name and designation of the person giving the decision; and
- advise applicant(s) about their rights to a review of the decision and the procedure for the exercise of those rights.

Even if the decision made on internal review is to allow access to all documents as requested, the notice should still include details of the applicant's right of review in the

AAT. The applicant may wish to contend that the search for documents has been inadequate and that he or she has not, in fact, been goven access to all documents sought.

Further assistance on writing statements of reason can be obtained from FOI Guidelines – *Statement of Reasons*.

Notification must include reasons for decision

The reviewing officer must give the applicant written notice of the decision that includes both an explanation of the original decision and set out the reasons for the review decision. While there is no statutory requirement under the FOI Act to provide a statement of reasons in respect of a decision on internal review to refuse to remit a fee or charge, the AAT Act requires such a statement to be given. In those circumstances, best practice would dictate that a statement of reasons should be given on any internal review decision on charges which is unfavourable to the applicant.

***Remember*: The failure to make a decision on an internal review within the statutory time period means an applicant can go straight to the AAT. At any time, the applicant may complain to the Ombudsman.**

What happens when the agency makes a decision after the applicant has appealed to the AAT?

If an applicant has made an application to the AAT for review on the basis of a deemed refusal, an agency can still make a decision before the AAT has finalised its review. Unless the decision made is a decision to grant, without deferment, access to a document or documents as requested or to amend or annotate the record of personal information, then the AAT may decide to treat that decision as part of the deemed refusal review. The AAT has an additional discretion to allow an agency or minister extra time to make an actual decision rather than proceed on the basis of a deemed refusal.

REVIEW BY THE ADMINISTRATIVE APPEALS TRIBUNAL

Decisions subject to review by the AAT

The AAT undertakes an independent merits review of administrative decisions. The AAT stands in the shoes of the decision maker and reconsiders the decision. The AAT Act and Regulations set out the AAT's core powers and functions. However, the AAT's powers to review particular types of administrative decisions depends on specific jurisdiction being conferred on it by another Act. For the AAT to reconsider an FOI decision, it must be 'reviewable' as set out in Table 2.

TABLE 2

DECISIONS WHICH THE AAT CAN REVIEW	SECTION OF THE FOI ACT
Decisions refusing to grant access to a document in accordance with a request. For example: • Refusal may have been made because the document is exempt under part IV of the FOI Act • Access may have only been granted to some of the documents • Access may have been given in a form other than that requested • A decision to make deletions under section 22 to a document to grant partial access	Section 55(1)(a); section 55(1)(aa) or section 55(1)(ab)
Decision to defer access to a document. For example the decision to provide access to a report after it has been tabled in Parliament or after it has been considered and released by the Minister.	Section 55(1)(b)
Decision refusing to allow further time to make an application for review of decision	Section 55(1)(c)
Decisions under section 29 to apply a charge or the amount of that charge or under section 30A relating to the application fee	Section 55(1)(d); section 55(1)(e)
Decision to grant access only to a qualified person. For example a document containing psychiatric information whose disclosure directly to an applicant may cause harm to the applicant may be released to the psychiatrist nominated by the applicant [section 41(1)].	Section 55(1)(f)
Decision refusing to amend or annotate a record containing personal information made under section 48 of the FOI Act.	Section 55(1)(g) and section 55(1)(h)

Applicants can go directly to the AAT without first making a request for an internal review in the following circumstances.

- Where the request was made to the Minister and no decision has been made within the applicable time limits.
- Where the initial decision was made by the Minister or the principal officer.
- Where no decision has been made within the applicable time limit (30 days) in relation to a request for an internal review.
- Where the application for review is out of time and an extension of time is refused.
- If, before 60 days has elapsed after a complaint has been made to the Ombudsman, and the Ombudsman has granted a certificate certifying there has been

unreasonable delay in connection of the request. The Ombudsman must have notified the applicant of his decision before the applicant can take the matter to the AAT. Note however that the Ombudsman cannot grant a certificate in respect of a request to the Minister or where the Minister is making the decision.

- Where an applicant seeks a review of a decision to refuse to amend a record containing personal information and no decision has been notified to the applicant within 30 days of the request being made.

Lodgement fees

There is an application fee for lodgement of appeals to the AAT. The AAT may, where the applicant applies, remit that fee. Certain applicants will be exempted from this fee in accordance with the AAT Regulations. Assistance on the matter of AAT fees and applications for remission may be obtained from the AAT Registry in each State and Territory. For further information, go to <www.aat.gov.au>.

The powers of the AAT

Once proceedings have commenced in the AAT, the Tribunal has the power to review any decision that has been made by the agency. For example, if the AAT reviews a decision by an agency that a document was fully exempt, it may decide that the document is not an exempt document and that it could be released in part or in full. However, where the AAT confirms that a document is exempt, it cannot then make the exempt document available to the applicant, a discretion that is always open to an agency.

The AAT has the power to order an agency to conduct further searches for documents if it is not satisfied that all documents relevant to the request have been identified or that they do not in fact exist. For this reason it is important that agencies conduct extensive searches for documents and place evidence of those searches on file.

The AAT may affirm a decision made by the agency decision maker (the original decision is not changed); vary the decision (part of the decision is changed); or it may set aside the decision (that the AAT agrees with the applicant that the decision was wrong and makes a new decision). The AAT may refer the decision back to the agency with instructions about the outcome and ask that the decision be changed in accordance with any particular points it wants considered.

Onus of proof: section 61 AAT Act

Given that the agency or Minister is a party to any AAT proceedings, the onus of proof in establishing that the agency was justified in making a decision is placed on the agency or Minister. This is fair to applicants who have not had access to documents (and cannot, therefore, argue that the original decision was wrong).

Broadly speaking, State Governments, commercial organisations and private individuals must be consulted where their interests may be affected by the release of documents. In third party applications where consultation has taken place with a third party prior to a decision to release and that third party objects to the disclosure, the onus of proof is on the applicant who is attempting to prevent the disclosure of material by the agency**.**

Time limits: section 54 AAT Act

The time limit in which to lodge an appeal to the AAT is generally 60 days from the date of the decision. However, where there is a deemed refusal of an original access request or where a person has applied for a review of a decision under section 54 of the FOI Act and the agency has not made the decision within 30 days, an application can be made to the AAT immediately after those 30 days have elapsed. The AAT can extend the time in which to lodge an appeal in certain circumstances. Agencies or the responsible Minister may also seek an extension of time from the AAT to deal with an application.
Where the Ombudsman is investigating a complaint about delay, the 60 day appeal period to the AAT commences after the Ombudsman has notified the applicant about his decision.

Both applicants and agencies have 28 days to appeal from an AAT decision to the Federal Court if either party believes the decision is based on an error of law. The court will only address questions of law. No appeal lies on the basis of error of fact.

Disclosure of the existence of documents to the AAT

Agencies are obliged to assist the AAT in every possible way to identify documents falling within the scope of the FOI request. The AAT has no personal knowledge of relevant facts and is not in a position to make its own searches for document. Reviews cannot proceed fairly unless agencies freely disclose to the AAT all the information they have concerning the documents to which access has been sought. If there are facts known to the agency but no other party, then the AAT can only become aware of those facts where they are disclosed by the agency.

Agencies should make it clear if there are other related documents which may be within the scope of the request. For example, where an applicant requests 'X's' personnel files but the agency holds similar documents on an 'X/A' file which were not considered, the agency should seek the views of the AAT as to whether those documents are encompassed by the request.

AAT application process

After an application for review has been lodged with the AAT, the AAT will notify the agency concerned (the Respondent). A preliminary hearing may be held if there are issues which need to be resolved such as jurisdiction (whether the AAT can review the matter), and questions relating to extension of time (whether the AAT will consider an application lodged outside the time limit). The Respondent may seek to have the request dismissed if the decision is not reviewable because the AAT has no jurisdiction or where it opposes an application for an extension of time.

Once the AAT has notified the Respondent that an application has been received, the Respondent must, under section 37 of the AAT Act, lodge 2 copies of the following documents with the AAT:

- a statement of reasons for the decision;
- a schedule of documents considered relevant; and
- all documents considered relevant to the review of the decision.

These are referred to as the 'T' documents.

'T' documents should be numbered, for example T1, T2 etc. The Respondent must send a copy of the 'T' documents to all other parties to the application and must lodge these with the AAT **at least** 7 days before the matter is to be heard.

The AAT may call a directions hearing at any time to deal with procedural matters (such as an exchange of affidavits or documents or to clarify matters). It may also call a hearing where one party fails to comply with any legislative or AAT requirements.

At the hearing (at a date set by the AAT), the parties and witnesses will appear before a Tribunal member or members to present their case. Parties can elect to have legal representation, although this is not mandatory. Hearings are normally open to the public but may be held in private if the evidence is confidential in nature or if so ordered by the Tribunal. It is possible for a decision to be made 'on the papers' without a hearing if all the parties agree.

Where an applicant has been given a notice (statement of reasons) in accordance with section 26 of the FOI Act the agency or Minister is ***not*** required to comply with section 28 of the AAT Act (which requires reasons for decisions to be given to an applicant in writing).

However, the Tribunal may require the agency to provide an adequate statement of reasons to the applicant if it finds that that decision did not contain adequate reference to the evidence or other findings on which the decision was based or failed to contain an adequate explanation as to the reasons for decision,. If that happens, the person who made the decision has 28 days to provide adequate notice to the applicant setting out the evidence and findings in accordance with the Tribunal direction.

Agencies ***must comply*** with AAT practice directions in cases where the AAT is reviewing exemption claims. Different requirements may be appropriate where the AAT is reviewing charges, reviewing requests for amendment of records or third party applications.

Schedule of documents for AAT proceedings

Each agency must lodge with the AAT a schedule of the documents for which an exemption has been claimed. A copy of the schedule is also to be provided to the applicant. Where there are other parties to the proceedings (e.g. a party joined under section 30 of the AAT Act), further advice should be sought about providing copies to those parties.

Agencies should not lodge copies of documents claimed to be exempt, either in whole or in part, when material is lodged in compliance with section 37 of the AAT Act. The FOI Act provides that the AAT may require the production of a document for examination where the AAT is not satisfied by evidence on affidavit or otherwise that the document is an exempt document or may require its production to determine whether the document may be released with deletions. Agencies may volunteer to provide exempt documents to the AAT before the hearing as this may expedite the matter. In any event, the AAT will, after due consideration, return the document to the Respondent, ensuring that the contents of the document are not disclosed to non-Tribunal staff.

The following material must be included in the schedule.

- A full description of the document described in such a way so that the AAT is aware of the general nature of the contents, without disclosing exempt material.
- Where a ground of public interest which has been relied on is repeated frequently, there is no objection to the ground being set out in full on the first occasion it is relied on and then subsequently referred to in brief for other similar documents. Alternatively, the ground of public interest being relied on may be set out as a preliminary matter in the schedule and then cross-referenced to the body of the schedule.
- Where only part of a document is claimed to be exempt, then that relevant part should be clearly identified.
- Often multiple copies of the same document will be found in agency files. Where copies are involved they should be clearly identified. Where a copy is annotated in a way in which it varies from the other copies of the document, this fact should be clearly identified in the schedule.
- Where, after consultation with another agency, the agency is aware that a document is identical to a document claimed to be exempt by the other agency, this should be brought to the attention of the AAT.
- While notification that the same documents are subject to separate AAT applications concerning different agencies would not normally be included in the schedule of documents, the AAT should be advised so that the appropriate arrangement can be made in relation to the constitution of the Tribunal and in consolidation of hearings if this is appropriate.

Exempt matter ***should not be*** included in a schedule. Where a section 37 statement contains exempt material, a confidentiality order under section 35 of the AAT Act should be sought. Where it is not possible to describe the document without disclosing exempt material the omission of the material should be noted in the schedule.

Affidavits

The AAT requires agencies to lodge affidavits with the Tribunal and to provide copies of those affidavits to the applicant. The affidavits must set out the evidence to be relied upon in support of the claims for exemption. The affidavits are statements of facts and opinions on which the agency is relying in AAT proceedings. Affidavits must be sworn or affirmed by the person who will be available to give evidence, if necessary. The affidavits must be lodged at least 7 days before the hearing.

Where appropriate, an order can be sought under section 35 of the AAT Act if the affidavit or parts of it contain information which could be exempt matter in a document of the agency. Affidavits should set out the evidence that supports the claim for exemption. This will be particularly important in cases where the claim for exemption is based on the agency's opinions or beliefs as to the consequences of disclosure.

Confidentiality orders: section 35 AAT Act

It may be necessary to seek a confidentiality order from the Tribunal to protect some of the material contained in a section 37 statement or in other documents being provided to the Tribunal. The Tribunal can, where it sees fit, issue orders restricting the publication of the

material or the disclosure of the material. Agencies should specify the material for which an order is sought and provide adequate reasons for seeking such an order.

Any such request for an order should be sought at least 7 days before the hearing to allow the AAT adequate time to consider the material.

Where the original decision provided a full and complete statement of reasons, including schedules, in accordance with section 26 of the FOI Act, this should be sufficient to include in the 'T' documents provided to the AAT. Properly prepared statements of reasons significantly reduce the time taken to prepare affidavits and schedules. Only where material was excluded by virtue of section 26(2) of the FOI Act (where its inclusion in a document of an agency would cause that document to become an exempt document) should there be a need to vary the material provided to the Tribunal.

Transferred requests

Where one agency has transferred a request to another agency under the FOI Act the transferring agency is required to identify, the following information in its 'T' documents:

- the documents in respect of which the request for access has been transferred;
- the name of the transferring agency or agencies; and
- the date or dates of transfer.

This allows the AAT to determine whether there are likely to be other appeals involving the same or related documents and can then ensure that consolidated hearings take place. In many cases, the evidence supporting the claim in the documents, which have given rise to the transfer, will be similar and consolidation of hearings will reduce costs.

Notification to the Australian Government Solicitor

Agencies intending to use the Australian Government Solicitor to represent them in FOI matters are reminded that they should do so as soon as a notification of review has been received.

Agencies should also ensure that the Australian Government Solicitor is advised when documents have been filed with the AAT, conferences attended or any undertakings given to the Tribunal. This will ensure proper handling of the matter in the AAT.

Variation in Orders

There may be times when an agency cannot comply with an AAT Direction. If this happens the AAT must be advised of the problem and a request for a variation, supported by adequate reasons, should be submitted to the AAT Member who made the order.

As a general rule, however, orders must be complied with and a variation sought only where it is not possible to comply.

Costs

Where an applicant has been successful, or substantially successful, in his or her application for review, the AAT may recommend that the Commonwealth pay the costs of the application.

Some of the factors which the AAT may consider are:

- whether payment of the costs would cause financial hardship to the applicant;
- whether the decision of the Tribunal would be of benefit to the general public;
- whether the decision of the Tribunal would be of commercial benefit to the person making the application to the Tribunal; and
- the reasonableness of the decision reviewed.

Consistency of argument

There is a need for consistency of argument in both proceedings under the FOI Act and other proceedings involving the interpretation of the Act.

While decisions in respect of an FOI request are made by the agency or the Minister, they should be made in light of relevant court or tribunal decisions, as well as advice given by the Attorney-General's Department or the Australian Government Solicitor. Any decision made by a court or tribunal on the meaning of the Act may be a precedent in future cases and would affect all agencies, not simply the agency concerned in a particular case.

The Attorney-General has the general responsibility for the administration of the FOI Act. The Department is responsible for developing legal argument by, or on behalf of, the Commonwealth on the interpretation of the Act.

Given that the Australian Government Solicitor consults with the Attorney-General's Department on policy aspects of litigation, it would be unusual for the Attorney-General to intervene in proceedings before the AAT. Therefore, if the question of intervention were to be raised, it would be appropriate for the AAT to be advised that the legal argument had the Attorney's agreement. Generally, the argument would be made by the agency (a party to the proceedings) although the position may be different where a particular matter raises matters of general principle affecting other departments and authorities.

Therefore, where an agency is subject to an appeal under the FOI Act or other proceedings involving the interpretation of the FOI Act, the Attorney General's Department should be informed in writing, attaching a copy of the statement of reasons given under section 26 of that Act.

Where an appeal or other proceedings raises issues of general principle affecting agencies other than the particular agency concerned in the appeal or the proceedings, the Attorney-General's Department would wish to consider the arguments to be put on the interpretation of the FOI Act. If the agency is being represented by the Australian Government Solicitor, then comments on the arguments will be provided by the Australian Government Solicitor. Where the agency is not being represented by the Australian Government Solicitor, then the liaison will be direct with the agency concerned or its legal representative.

Agencies requiring assistance in developing arguments on the construction of the FOI Act for the purpose of a tribunal or court proceeding are encouraged to seek the assistance of the Attorney-General's Department.

Agencies obtaining advice, in circumstances outside litigation, from the Australian Government Solicitor or any other legal advisor involving the interpretation of the FOI are normally required to provide a copy of that advice to the Attorney-General's Department in accordance with the Legal Service Directions.

COMPLAINTS TO THE COMMONWEALTH OMBUDSMAN: section 57 FOI Act

A person is entitled to complain to the Commonwealth Ombudsman about actions of agencies in relation to FOI requests. This includes complaints about delays in making decisions, imposition of fees and charges, failure to find documents and failure to amend or annotate documents. The complaint process is free.

The Commonwealth Ombudsman is entitled (subject to certain provisions of the Ombudsman Act) to obtain access to all documents relevant to any investigation being undertaken, including documents which are claimed to be exempt.

The Ombudsman cannot investigate the complaint if the actions were those of a 'responsible Minister'.

The Ombudsman's preference is for applicants to try and resolve a matter with the agency or seek internal review of a decision before lodging a complaint. However, the Ombudsman can accept the complaint without the applicant first having to go to the agency. It should be noted that an applicant can complain at any time during the FOI process to the Ombudsman.

The applicant's right of review to the AAT does not mean that the Ombudsman's investigative powers are limited in any way. However, if a person complains to the Commonwealth Ombudsman about delays in processing an FOI application or failure to make a decision, that person cannot take the matter to the AAT until the Ombudsman has concluded the matter and provided a written decision relating to the investigation of the complaint. The time limit for an appeal to the AAT ends 60 days after the day that the Ombudsman delivers his decision.

The Ombudsman cannot, if he disagrees with a decision, substitute his own decision for the decision of the agency. He can, however, recommend that the decision be changed and may make a report to the responsible Minister if the agency concerned does not act on his recommendations.

Where the Ombudsman makes a report to the complainant, it cannot contain information as to the existence or non-existence of a document if that information would be exempt under sections 33 (international relations, national security and defence documents); 33A (Commonwealth /State relations); or 37(1)(law enforcement) of the FOI Act.

Where the Ombudsman has investigated a complaint about the amendment of a record containing personal information, he cannot recommend that the record be amended if he is satisfied that:

- the record is a record of a decision made under an enactment by a court, tribunal, authority or person;
- the decision whether to amend the document involves the determination of a question that the applicant is, or has been, entitled to have determined by a court or tribunal other than the AAT itself; or
- the request for amendment relates to a record of opinion to which neither of the following criteria applies;
  - the opinion was based on a mistake of fact; or

- the author of the document was biased, unqualified to form the opinion or acted improperly in conducting the factual inquiries which led to the formation of the opinion.

REVIEW BY THE PRIVACY COMMISSIONER

The FOI Act provides that a person may apply in writing seeking the amendment or annotation of their personal records. The rights of review under this Act are in the AAT.

The *Privacy Act 1988* (Cth) also obliges agencies that keep records of personal information to allow individuals access to their own personal information and to have that information amended where it is incorrect, irrelevant, incomplete, not up-to-date or misleading. Where a request for an amendment of a record has been denied, a person may complain to the federal Privacy Commissioner. The Commissioner has the powers under the Privacy Act to recommend that the agency amend a particular document, or, where this is not done, to direct the department to add an annotation to the relevant record setting out the amendments that were sought by the applicant.

APPEALS TO THE FEDERAL COURT

A party to an AAT proceeding may appeal from an AAT decision to the Federal Court, but only on questions of law. The Federal Court cannot review the merits of a case but only the lawfulness of the process leading to the decision. Where special leave is granted, an applicant may also appeal to the High Court of Australia on questions of law.

The AAT may, of its motion, or on the request of a party, refer a question of law arising from any proceeding in the AAT to the Federal Court for a decision. All such referrals are handled for the Commonwealth by the Australian Government Solicitor.

An applicant may also seek review of an FOI decision in the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* (AD (JR) Act). Judicial review under the AD(JR) Act applies to administrative decisions made under an enactment. It goes only to the lawfulness of the process leading to the decision and does not consider the merits of the actual decision. An applicant may go to the Federal Court at any time and is not required to have a matter heard by the AAT first.

HIGH COURT APPEALS

Appeals from Federal Court decisions relating to FOI may be made to the High Court by any party. However, appeals may only be made where special leave to make the appeal has been granted by the Court. Such appeals are rare in FOI matters. All such appeals are handled for the Commonwealth by the Australian Government Solicitor.

CHECKLIST FOR OFFICERS UNDERTAKING AN INTERNAL REVIEW

Officers should first check whether they are properly authorised to make review decisions. If they are not authorised they should not make a review decision.

The steps in conducting a review are the same regardless of the type of review request being received. All documents relevant to the review should be examined along with any submissions or contentions made by the applicant.

The starting point for any FOI request is that unless significant and quantifiable harm will occur to the Commonwealth, agencies should release as much material held in documents, subject only to justifiable exemptions. The objects of the FOI Act in relation to openness and accountability should be kept in mind and access provided where it is possible to do so. Fees and charges should not be used to deter applicants from seeking access to documents under the FOI Act.

Under no circumstances should reviewers simply accept the primary decision without fully understanding the request for review and the documents or issues for which a review has been requested.

A list of the most common review requests are presented below:

STEP 1	Examine request for review and any submissions made with the request. Review may be for: • Documents cannot be found - if YES go to Step 2 • Fees and charges - if YES go to Step 3 • Refusal of Access - if YES go to Step 4 • Amendment or annotation - if YES go to Step 5 Locate all files/documents relevant to the request.
STEP 2	Primary decision refused access to documents under section 24A as documents cannot be found or do not exist. • Consider any submissions about possible existence of documents. This may assist in locating documents at issue. • Consider what document searches were done at time of primary decision. o What is the evidence of searches on file o Who conducted searches, where and when searches were done o Where primary request included request for electronic documents what searches were done for these documents, who by and when o If searches indicated documents were destroyed is there a record disposal schedule which proves records were destroyed • Consider whether new searches should be done to find documents where the search initially was inadequate or non – existent (remember you only have to find documents relevant

	to the primary request. A review does not extend the scope of the primary request) • **Conduct new searches** where required. Place evidence of new searches on file If new documents found – make decision on access to each new document located - go to Step 6 If no new documents make a decision to refuse access - go to Step 6
STEP 3	Primary decision charged application fee or imposed additional charges Consider submissions made to remit or waive application fee: • If there is a claim for financial hardship – is there evidence to support the claim. If no evidence, contact applicant to seek supporting evidence for claim. If no evidence of hardship and no other reason for remission exists (such as public interest) refuse remission – go to step 6 If evidence exists remit fee and notify applicant. • If public interest claim made consider merits of claim both for and against remission. If public interest claims for disclosure outweigh claims for non disclosure then remit fee. If claims for non-disclosure outweigh public interests for release refuse remission • Fees can be remitted for any other reasons the decision maker considers appropriate Consider submission for remission of additional charges. • Similar grounds exist for remission of charges as for application fees. Make decision and go to Step 6 Consider submissions that charges should be reduced or waived because they were wrongly calculated (use AGS pro forma to calculate charges) • Recalculate charges o Check time spent on each aspect being charged for eg search and retrieval. Agencies should not penalise applicants for their poor record keeping practices o Check accuracy of calculations (eg number of documents or duplicates being charged for; whether a similar request has been made and decisions on access made so less time needed to make decision o Have additional documents been located which need to be factored into charges Once satisfied charges have been accurately calculated then can consider whether they should be reduced (hardship or public interest grounds). Make decision and go to Step 6. If charges not calculated correctly then decision should be made to reduce or waive charges or increase estimate. Make decision and go to Step 6
STEP 4	Primary decision refused access to documents Consider the request for review and grounds for review • Consult with applicant if additional information required or

	request not clear • Examine each document for which an exemption claim was made or for which a part exemption claim was made • Consider whether the document may now be released either in full or in part • Consider whether there is evidence to support the exemption claim, whether additional exemptions can be claimed • Consider public interest arguments where claimed and determine whether these still apply or whether the grounds for public interest (where relevant) now support disclosure • Consider whether adequate consultation done with affected third parties. If the consultation not adequate or third party wishes not clear then consult with third parties (no extension of time is permitted for these consultations) • Consider whether you need to seek input from within or outside the department in relation to document sensitivities Make decision in respect of each document and go to Step 6
STEP 5	Primary decision refused to make amendment or annotation For amendments, consider the request and any supporting evidence or submissions • If not sufficient evidence, seek evidence from applicant • Get all relevant files and consider all evidence supplied by applicant at primary decision stage. • Draw up a table with evidence for the amendment in one column and evidence against the amendment in another • Decide what weightings you want to assign to each piece of evidence Make a decision in relation to the amendment application and go to Step 6 For annotation, consider the request and any supporting evidence or submissions. Generally annotations will be refused if they are voluminous (ask applicant to provide a short statement of the annotation required), irrelevant or defamatory Make a decision and go to Step 6.
STEP 6	Prepare notice of decision letter to applicant. Provide reasons for decision including material considered in reaching conclusions and evidence to support those conclusions (where decision is adverse to applicant). Include AAT review and complaint rights to Commonwealth Ombudsman. Notify applicant and attach any documents to be released.