

KNOWLEDGE

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About Grata Fund

Grata Fund is a charity that supports marginalised people and communities to advocate for their legal rights. We do this by removing the financial barriers that prevent test cases in the public interest from getting to court, for people or organisations who do not have the resources to fund litigation themselves. Grata Fund adopts a movement lawyering approach: working with communities, legal experts and advocacy partners on integrated litigation and campaign strategies that tackle injustice while centralising the voices of affected people. Our areas of focus are democracy, human rights and climate change.

For further information about Grata Fund visit www.gratafund.org.au.



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Your right to review

Freedom of Information (**FOI**) requests are a powerful tool in our democracy. FOI requests shine a light into the darkest places of government, making it possible for journalists, advocates and communities to find out what is being done in our name and hold governments accountable to the people they serve.

Unfortunately, the Federal government often refuses FOI requests without adequate explanations or for reasons that are unjustifiable. It is important to be prepared for your FOI request to be fully or partially refused and to consider your right to review the decision.

This is Part II of Knowledge is Power: a guide to using the Freedom of Information Act. It explains how to seek a review of a decision not to release information to you, or to only partially release the requested information. For a guide to making an application under the Freedom of Information Act 1982 (Cth) (**FOI Act**), see Part I of this toolkit.



Review basics

Should I seek a review of my FOI decision?

So you've received a response to your request for documents under the Freedom of Information Act 1982 (Cth) (**FOI Act**), but the government body has refused to give you all the documents you asked for. What now?

If you weren't given access to all the information you wanted, and you aren't satisfied with the reasons given, **you can seek a review of the decision**.

This can sometimes lead to the government body giving you information that they had previously withheld.

Things to look out for

Many Federal government agencies have been accused of regularly rejecting requests for information under the FOI Act without adequate justification or without proper legal basis.

When considering whether to ask for a review, think about whether the grounds for rejecting some or all of your FOI request fall into any of the following categories. If it does then you may have grounds to seek a review.

Routine overuse of exemptions

Some exemptions are commonly used by government bodies, even where they do not apply. These include:

- Personal privacy;
- Certain operations of agencies;
- Enforcement of law and public safety;
- Deliberative processes;
- Confidential information; and
- Trade secrets and commercially valuable information.

For example, documents can be 'conditionally exempt' from disclosure if they would prejudice or have a substantial adverse effect on 'certain operations of agencies'.

But this conditional exemption is limited. Just because a document might impact a government body's operations, this doesn't mean it is automatically exempt from disclosure. The agency needs to set out specifically what it reasonably expects to happen if the material is disclosed. It can't just assert that disclosure of the material would have a prejudicial impact.



Similarly, documents that disclose ‘deliberative processes’ are also ‘conditionally exempt’. But just because a document talks about policies being proposed, doesn’t mean it is exempt. For example, technical or scientific reports, or purely factual information, would not be exempt from disclosure.

More information on the scope of these exemptions is available in the FOI Guidelines published by the Office of the Australian Information Commissioner.

Redacting more information than necessary

Sometimes government bodies **redact entire documents**, or **large parts of documents**, instead of just particular sections which are exempt.

You should think about whether the document looks overly redacted. For example, if you have requested access to emails between government officials, and all emails have been redacted on the basis of ‘personal privacy’, it might be worth challenging the decision on the basis that only names, email addresses and phone numbers should have been redacted.

Inadequately explaining exemptions

The government body **must give you reasons** for why they have refused your request (or part of your request). They must also explain why they have used particular exemptions. Sometimes the reasons given by the government body are inadequate, for example, they might just say that an exemption applies – and not tell you how or why. The FOI Guidelines provide useful information on the level of detail that reasons should provide.

Failure to explain the use of a conditional exemption

Some exemptions only apply if it would not be in the **public interest** to release the documents requested – this is called a **conditional exemption**. If the government body has relied on a conditional exemption to refuse your request, they must explain why it would be against the public interest to release the information. The FOI Guidelines say that the government body can’t just provide a list of factors either – it must explain the relevance of each factor and the weight given to those factors.

Do I need a lawyer?

Most of the time, **you don’t need a lawyer to help with an FOI review**.

The review process has been designed to be as informal as possible, so you shouldn’t need legal representation. In fact, the government body responsible for processing your FOI request is required to respond themselves and not through a lawyer. However, you can engage a lawyer if you want to.



Seeking a review

Option 1: Internal Review

There are two ways to ask for a review of your FOI decision. The first option is to ask the government body which processed your FOI request to look at the decision again – this is called an **internal review**.

How does internal review work?

An internal review must be conducted by someone other than the person who made the initial decision. The FOI Guidelines also recommend that a more senior officer be appointed to conduct the review. The officer has the same powers as the person who made the original decision. They will reconsider your application and make a new decision, either affirming the original decision or changing it.

Why should I apply for internal review?

Internal review can be **quicker** than asking for a review by the independent body – the Office of the Australian Information Commissioner (**OAIC**). If you apply for internal review and you aren't happy with the new decision, you can still apply for review by the OAIC. There is also **no fee** for applying for internal review.

How do I apply?

The government body which processed your original FOI request should provide you with information about how to apply for internal review. Your application must be in writing (including by post or via email).

Your application for internal review should be as specific as possible about what you are seeking to have reviewed. For example, you might be seeking internal review of the whole decision, or only parts of the decision.

You should also include as much detail as you can about why you think the original decision was wrong. For example, you might think that the exemptions have been incorrectly applied, the public interest factors were not properly weighed, the redactions were excessive, or the reasons given for refusing access were inadequate or wrong.



How long do I have to apply?

If you want to ask for an internal review, you have either 30 days from when you're told about the original FOI decision, or 15 days from when you're given access to any documents – depending on which gives you the most time.

NB: This process will not be available where your application was considered by a minister or personally by the principal officer of the government body.

How long will the review take?

Internal review decisions must be made within 30 days from when your application is received. However, the government body can apply to the OAIc for an extension of time, and it is very common for them to do so.

The OAIc has a broad discretion to grant an extension and will generally consider whether it is reasonable in all the circumstances, including the reasons the government body has given for the request and any views you have expressed about an extension.

If that further time expires and a review decision has still not been made, the OAIc cannot grant any further extensions of time.

What if I don't get a response?

If the government body doesn't respond to your request for internal review within 30 days, and they have not asked for an extension of time, then the government body is considered to have upheld the original decision.

Option 2: OAIc Review

The second way of asking for a review of your FOI decision is to apply to the OAIc. The OAIc is an independent statutory body whose functions include review of FOI decisions. The OAIc will independently assess the merits of the decision. You do not have to ask for an internal review before you apply to the OAIc. If you have already requested an internal review and are unhappy with the outcome, you can still ask for a review by the OAIc.

One benefit of review by the OAIc over internal review is that it involves an entirely separate body. Reviews by the OAIc are also free. However, it is important to be aware that the process can be very slow. Applications can take months, if not years, to be finalised.



NB: If you have applied for internal review and a review by the OAI, the OAI will likely not consider your case until the internal review has been decided.

How long do I have to apply?

You must apply to the OAI for review **within 60 days** from when you are told that the government body has refused, or partially refused, your FOI request. If you have applied for internal review, then you have 60 days from when you are told about the internal review decision.

How do I apply?

Your request should be made to the OAI and must:

- be in writing (by post, email or fax);
- include your contact details; and
- include a copy of the decision you want reviewed.

The easiest way to lodge an application is to use the OAI's [online review form](#). Alternatively, you can [download their form](#) and send it by post, email or fax.

When you are applying for a review of your FOI decision, it is important to **be as specific as possible**. This will help to reduce the time it takes for you to receive a decision from the OAI.

To give your application the best chance of being decided quickly, you should include:

- the specific part or parts of the decision you disagree with; and
- why you disagree with the decision (eg, you think that the public interest outweighs the exemption grounds listed and the exemption relied upon is a conditional exemption).

Will the OAI always accept an application for review?

The OAI may not consider or continue with your FOI review application if:

- you have not made a valid application (if this happens, you will need to lodge a new application in the correct form);
- the OAI thinks your application is frivolous or has no substance;
- you fail to cooperate with the OAI in progressing your review or fail to comply with a direction;
- the OAI is unable to contact you; or
- the OAI believes your review application should be sent straight to the Administrative Appeals Tribunal (**AAT**) (see **Appendix B**).



How long will the review take?

There is no legal time limit on how long the OAIIC can take to make a review decision. As a result, complicated applications can take months or years to be determined.

The OAIIC review time will depend on factors such as the number of issues you wish to have reviewed, the number of documents they need to consider, whether there are other interested parties involved and the extent to which you engage in informal resolution processes.

You can help speed up the process by providing as much information in your application as possible and being very specific about the part of the decision you wish to have reviewed.

What if the government body makes a new decision during the review?

Sometimes the government body decides to provide you with more information in response to your FOI request during the OAIIC review process. If this happens, then it must notify the OAIIC. This doesn't end the review process and you can continue to seek review of the new decision if you are still unsatisfied with what has been released.

For an overview of the OAIIC review process, see **Appendix A**.



Making an appeal

A decision of the Information Commissioner can be appealed to the Administrative Appeals Tribunal. In some limited circumstances, an appeal can also be made directly to the Federal Court (**see page 12**).

Appealing to the AAT

When can I appeal to the AAT?

If you are unhappy with the OAI's decision, you can appeal to the AAT within 28 days of receiving it. If necessary you can request an extension of time to lodge your appeal, but you must provide reasons.

How do I lodge an appeal?

The first step in appealing an FOI decision to the AAT is to **lodge an application** and **pay the application fee**. This can be done online through the AAT website, by filling out an application form, by email, or by post.

The application must include:

- your name;
- your contact details;
- the date of the decision you're appealing
- a copy of the decision; and
- an explanation of why the decision is wrong (be as specific as possible).

What will the AAT do?

The AAT's job is to undertake a *merits review* of the FOI decision. That means the AAT will take a fresh look at the FOI application and reach what they believe is the correct and preferable decision. This is different to the role of a court in an appeal, which is limited to determining whether the law has been interpreted and applied correctly.

For more information about the appeal process in the AAT, see **Appendix C**.

Do I need a lawyer?

The AAT is designed to be more informal than a court and you **do not need a lawyer**. However, you may want to get a lawyer if you have the money or you can find a pro bono team. This is because an AAT review can involve complex legal arguments, and the government body will often have a legal team of their own.



How much will it cost?

In the AAT, you will only have to pay the filing fee and your own legal costs (eg, if you choose to hire a lawyer).

NB: This is different to the Federal Court, where you can sometimes be forced to pay the other side's legal costs.

The AAT can also recommend the government body pay your costs where you have applied to the AAT for review of the OAIC's decision and you win the case. For an overview of what the AAT will consider when making this kind of recommendation, see **Appendix D**.

How long will the appeal take?

Like any legal process, appealing an FOI decision to the AAT can take a long time. The median time to finalise FOI applications in the AAT between 1 July 2021 to 31 January 2022 was **63 weeks** from lodgement to finalisation. Only 40% of applications were finalised within 12 months of lodgement.

Appealing to the Federal Court

When can I appeal to the Federal Court?

You can only appeal an AAT decision to the Federal Court if you think the AAT has made a **legal mistake** when deciding your case.

You can also appeal to the Federal Court directly from a decision of the OAIC (without first going to the AAT) if you think there is a '**question of law**' that needs to be decided. For example, if you think the OAIC has interpreted and applied the law incorrectly.

You should lodge your appeal in the Federal Court **within 28 days** of receiving a decision from the OAIC or AAT.

NB: You can also apply to the Federal Court if the government body is ignoring the decision of the OAIC. The Court can make an order forcing them to comply.



How do I lodge an appeal?

To lodge an appeal in the Federal Court you must complete a form known as a **Notice of Appeal** and lodge it with the Federal Court registry. This form is available on the Federal Court website – but you should speak to a lawyer before filling it out. You will also need to pay the filing fee.

What will the Federal Court do?

In an FOI appeal, the Federal Court can only decide **questions of law**. That is, whether the law has been interpreted and applied correctly. The Court will not normally look at any new facts or information.

Do I need a lawyer?

While you technically don't need a lawyer to go to the Federal Court, the process is more difficult to navigate than the AAT. It is a very good idea to **get legal advice** when deciding whether to lodge an appeal in the Federal Court. You should also try and get a lawyer to help represent you in court. This is because Federal Court appeals involve formal legal processes, technical documents, and complex legal questions.

How much will it cost?

Unlike at the AAT, appeals to the Federal Court carry the risk of an **adverse costs order**. This means that the Federal Court could make you pay for the government body's legal fees. This means that appealing FOI decisions to the Federal Court can be expensive. Grata Fund can provide support to help you bring legal challenges that are in the public interest. Some of our areas of interest are set out in our [FOI Hit List report](#). If you have an FOI appeal and you would like our support, you can find out more and [make an application on our website](#).



Appendices

Appendix A - The OAIC review process

Step 1: Apply for OAIC review

Submit an application to the OAIC in writing via email, fax or post – or using the OAIC’s online form.

Step 2: The OAIC receives your application

Once the OAIC receives your application, they will let you know in writing and also contact the relevant government body. They may also contact any other party to the review.

The OAIC will then make an initial assessment of whether or not to review your application. This includes considering whether the application is valid and was submitted in time.

Step 3: Preliminary assessment

The OAIC will then conduct a preliminary assessment, considering the complexity of the application, whether the application can be resolved through alternative dispute resolution, and whether a review should not be undertaken (eg, because the application is vexatious or frivolous).



Appendix A - The OAIIC review process, contd.

Step 4: The OAIIC reviews your application

If the OAIIC decides to review your application they will assign a review adviser. The review adviser will tell you and the government body in writing that they are reviewing your application and give you their contact details.

The review adviser will then request the documents from the government body and ask them to make submissions. They review all of the information given to them and consider any developments since the original decision was made. They may also decide not to review your decision.

If the review adviser cannot get all parties to agree to a new decision, they will make a recommendation to the Information Commissioner.

Step 5: The Information Commissioner makes a decision

The Information Commissioner will make one of three decisions:

- Affirm the original decision.
- Make a new decision to replace the original decision.
- Change some parts of the original decision.

The Information Commissioner will give you their reasons and tell all parties in writing. The decision will also be published.



Appendix B - OAIC referral to the AAT

The OAIC can decide not to consider a review application because they believe it should be considered by the AAT instead. To do this, the OAIC must determine that 'the interests of the administration of the [FOI] Act make it desirable'.

Reasons this may happen:

The review application is linked to ongoing AAT or court proceedings.

The OAIC's decision is likely to be appealed to the AAT because of a dispute about the facts.

There is an inconsistency between previous decisions of the Information Commissioner and the AAT.

The review application is legally complex and it should be decided by the AAT.

There is a conflict of interests that makes it inappropriate for the OAIC to make a decision.

You then have 28 days to apply to the AAT.



Appendix C - The AAT process

Step 1: Conciliation

The first step in the appeal process is to hold a conference or conciliation with the parties to the FOI decision, usually that is you and a representative of the government body that made the decision. This is an informal meeting where an AAT Member or Registrar will try to help you resolve the matter by making an agreement with the other side.

Step 2: Directions hearing

The AAT may also hold what is known as a 'directions hearing' before the formal hearing. A directions hearing is a meeting to discuss the progress of the application and what will happen before and during the formal hearing.

Step 3: Hearing

If an agreement isn't reached in conciliation, then the AAT will hold a hearing. You will need to submit a written summary of your arguments to the AAT seven days before the hearing. At the hearing both you (or your lawyer) and a representative of the government department will present information and arguments about the decision to the Tribunal Member or Members. It is a relatively informal process.

Step 4: Decision

Following the hearing the AAT can decide to uphold the decision, vary the decision, set the decision aside and replace it with a new decision, or set the decision aside and send it back to the government body to make a new decision. The AAT might tell you its decision at the end of the hearing, or you may receive the decision in writing at a later date. Written decisions are usually received within two months of the hearing.



Appendix D - AAT recommendation on costs

Questions considered by the AAT when deciding whether to recommend the government body pay your costs after a successful appeal:

Will paying your legal costs cause you financial hardship?

Will the decision benefit the general public?

Will the decision benefit you commercially?

How reasonable was the original decision?



Endnotes

1. FOI Act, s 47F.
2. FOI Act, s 47E.
3. FOI Act, s 37.
4. FOI Act, s 47C.
5. FOI Act, s 45.
6. FOI Act, s 47.
7. Office of the Australian Information Commissioner, *FOI Guidelines*, (Version 1.3, 19 December 2016), [6.53] <<https://www.oaic.gov.au/freedom-of-information/foi-guidelines>> ('FOI Guidelines').
8. See FOI Guidelines, Part 6.
9. FOI Guidelines, [6.26].
10. FOI Act, s 54C(2).
11. FOI Guidelines, [9.26].
12. FOI Guidelines, [9.2].
13. *Ibid*, [9.3]-[9.4].
14. FOI Act, s 54B(1).
15. FOI Act, s 54B(1)(a).
16. FOI Act, s 54C(3).
17. FOI Act, s 54D(3).
18. FOI Guidelines, [9.30].
19. FOI Act, s 54D(8).
20. FOI Act, s 54D.
21. FOI Act, s 54S.
22. *Administrative Appeals Tribunal Act 1975* (Cth), s 29(2) ('AAT Act').
23. FOI Act, s 66(1).
24. Administrative Appeals Tribunal, *AAT Caseload Report 1 July 2021 to 31 January 2022* (2022) <<https://www.aat.gov.au/AAT/media/AAT/Files/Statistics/AAT-Whole-of-Tribunal-Statistics-2021-22.pdf>>.
25. AAT Act, s 44.
26. FOI Act, s 56.
27. FOI Act, s 56(2); AAT Act, s 44(2A). You can also request an extension from the Federal Court.
28. FOI Act, s 55P.
29. The relevant form for an appeal from the AAT is Federal Court Form 75.
30. *Federal Court of Australia Act 1976* (Cth), s 43.
31. FOI Act, s 54W(b).
32. FOI Act, s 57A(2).
33. FOI Act, s 66(2).



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