

ASSISTING OUR OFFICE

How to participate in the review or complaint process

Agencies that are the subject of a review or complaint are obliged to assist or co-operate with the FOI Commissioner when dealing with those matters.

Section 49I of the FOI Act provides that the agency that made a decision subject to review must assist the FOI Commissioner to undertake the review.

Similarly, section 61E provides that an agency or Minister to which or whom a complaint relates must co-operate with the

FOI Commissioner in dealing with the complaint.

Agencies can do several things to assist and co-operate with this office in the interests of furthering the objects of the FOI Act and helping individuals gain access to Victorian government information.

Assisting and co-operating

What is meant by 'assisting' during the course of a review?

Our office relies on the assistance provided by agencies in order to conduct reviews in a timely, efficient and fair manner, with as little formality and technicality as possible.

Things that your agency can do to assist in this process include –

- > Participating in our informal resolution processes, and negotiating in good faith in order to attempt to resolve the review informally, before moving to the more formal review process. You should bear in mind that the FOI Act allows for a negotiated agreement to be reached (section 49N) and the terms of such an agreement can cover a broad variety of options.

- > Avoiding being overly formal or adversarial in your dealings with our office. We take an informal approach to dealing with review matters. Formal or adversarial conduct by agencies does not assist our office to conduct reviews with as little formality and technicality as possible, as required by the FOI Act.
- > Providing copies of the documents that are subject to review quickly after they are requested, and in the preferred format as described by our office.
- > Ensuring that any submissions you provide are clear, succinct, relevant, address the pertinent issues, and are provided as early as possible during the review process.
- > If our office has made queries of your agency, to provide clear and direct responses that address the issues raised

and are provided as quickly as possible or by the date nominated by our office.

- > Avoiding introducing new issues or exemptions during the review that were not considered or claimed when your agency made its original decision, unless there is a clear and significant reason to do so.

What is meant by 'co-operating' during the course of a complaint?

The co-operation of agencies and Ministers during the course of a complaint is crucial to negotiating a fair outcome and resolving complaints in an efficient manner.

Ways that your agency can co-operate with our office during the course of a complaint include –

- > Participating in our complaint resolution processes in good faith, approaching the resolution process with an open mind and being prepared to consider a variety of options that have the potential to resolve the complaint in the interests of both parties.
- > Avoiding bias or a change in approach because of an applicant's conduct, and seeking to resolve the complaint at hand in the best and fairest way possible.
- > If a complaint proceeds to conciliation, participating in the conciliation process in good faith and being prepared to canvass and negotiate on all relevant issues to allow the matter to be conciliated successfully.
- > If conciliation has failed and submissions have been requested, ensuring that any submissions you provide are clear, succinct, relevant, address the pertinent issues, and are provided as quickly as possible.
- > If you are compelled by our office to produce documents, complying with the production notice fully and providing the

requested documents at the earliest possible time.

- > If you are provided with the opportunity to comment on a proposed recommendation, ensuring that the comments you provide are relevant, address the pertinent issues, and are provided at the earliest possible time.

Providing review documents

In order to deal with review matters in a timely, efficient and fair manner, we often seek the assistance of agencies in providing copies of the documents that are subject to review at the earliest possible opportunity.

We will attempt to resolve all review matters informally, before proceeding to the more formal review process. Having access to the documents subject to review assists us in identifying any relevant issues that may form the basis of an informal resolution or negotiated agreement.

Format of the documents being provided

If you are requested to provide copies of the documents that are subject to review in order to assist our office, we prefer that they are provided in the following way –

- > Copies of the documents are provided to us, rather than original documents. You can provide your agreement for us to securely destroy the copies you have provided (which will occur once the review matter is complete.)
- > The documents are provided in marked up form, that is, the copies clearly indicate where material has been deleted or is considered to be exempt, and which exemptions are being claimed in each instance. This may be done by highlighting or drawing boxes around the exempt material.
- > The documents are accompanied by a clear schedule that lists or describes each document, identifies the exemptions being claimed in each instance, and identifies



whether the document is exempt in part or in full.

- > The documents are accompanied by a completed Document Transfer Form.

You may provide copies of the documents subject to review in either electronic form or hard copy.

Jurisdiction and our ability to deal with matters

All review and complaint matters undergo thorough assessment prior to being accepted or not accepted, to ensure that our office only deals with matters that fall within our jurisdiction.

From time to time, an agency or Minister may raise issues of a jurisdictional nature with respect to specific matters. If you wish to raise such issues, we would prefer that you inform our office as early as possible, and provide any supporting information or evidence to demonstrate a lack of jurisdiction, in particular any information that may have been previously unknown to our office.

It does not assist applicants or the review or complaint process if your agency raises jurisdictional issues without providing any supporting evidence.

The FOI Commissioner will consider any jurisdictional concerns and if she determines that this office is within jurisdiction, we would expect that you continue to assist with the review or co-operate with the complaint.

Following the resolution of the matter, you may wish to pursue any appeal rights that are available to you and raise any issues regarding the FOI Commissioner's jurisdiction in that forum. The Tribunal is not impeded in proceeding to conducting its review of the matter, as long as the FOI Commissioner's decision was made, or was purported to have been made, within jurisdiction.

Natural justice

Section 49H(3) of the FOI Act provides that the FOI Commissioner is bound by the rules of natural justice in conducting a review.

What is 'natural justice'?

Natural justice, or procedural fairness, refers to the principle that decision-making should be the result of fair procedure. Natural justice requires two elements – firstly, that before a person's legal rights are adversely affected, they are given the opportunity to show why adverse action should not be taken against them, and secondly, that a decision maker's mind is open to persuasion and free from bias.

Natural justice is not required in cases where there are no adverse effects arising. Elements of the review process that are purely administrative in nature, and do not relate to the process of considering and reaching a decision – for example, whether or not an applicant has agreed to an extension of time – do not fall within the ambit of natural justice.

Fair procedure is not the same as equal procedure. Natural justice does not require that all communications between our office and one party are then repeated or duplicated with the other party to the review.

Why is natural justice important?

Natural justice ensures that decisions are made by our office in a fair and impartial manner. Natural justice also acts to level the playing field between agencies and applicants. For this reason our office will, from time to time, pay particular attention to the needs of an applicant to ensure that natural justice is provided to them. This does not constitute a denial of natural justice to an agency.

What happens when natural justice issues are raised?

Our office may seek further information from your agency if it becomes apparent that a natural justice issue has been encountered. We would expect that your agency provides responses to our queries and any further information as quickly as possible, to assist in resolving any natural justice concerns.

If you have any natural justice concerns, you should raise them with our office at the earliest possible opportunity, to facilitate an efficient resolution of the issues.

Once any natural justice concerns are dealt with by our office, it is our expectation that you will continue to assist our office in dealing with the matter through to its completion.

Further Information

Visit our website, call or email us:

- > www.foicommisioner.vic.gov.au
- > 1300 842 364 (1300 VIC FOI)
- > enquiries@foicommisioner.vic.gov.au

Other related fact sheets include:

- > Top tips for senior managers
- > Writing FOI access decisions

Disclaimer: This fact sheet does not constitute legal advice and should not be used as a substitute for applying the provisions of the Freedom of Information Act 1982, or any other legal requirement, to individual cases.