

Right to Information Act 2009, s 49

***GUIDELINE IN RELATION TO REVIEW OF DECISIONS
BY THE OMBUDSMAN***

This Guideline is issued by the Ombudsman under s 49 of the *Right to Information Act 2009*. It replaces Guideline No. 1/2010, which is revoked.

The Guideline relates to reviews conducted by the Ombudsman under Part 4 of the Act. Its purpose is to provide guidance to users of the Act about how such reviews are conducted.

1. General

Section 47 of the Act gives the Ombudsman wide powers in relation to the conduct of reviews. These powers include the power to give directions to the parties, and to promote settlement of a review application.

The Ombudsman is obliged by s 47(6) to use the powers given by s 47 to resolve an application for review as soon as practicable after its receipt. Where the application cannot be resolved, the Ombudsman is obliged by the same provision to ensure that his or her decision on the review is made as soon as practicable.

Participants in the review process should expect -

- that the review process will be expedited through the active use of the powers provided by s 47
- that the prospect for settlement of the review application will be explored in a timely way, through case management conferences and other means
- that the powers provided by s 47 will be used to seek to limit the matters which need to be the subject of a formal decision by the Ombudsman under s 48.

2. The application for review

2.1 Application by applicant for assessed disclosure

An application for review by the original applicant for assessed disclosure under s 13 of the Act must be in writing. It should be accompanied by -

- a statement of the ground or grounds upon which it is made

[NOTE - the grounds upon which an application for review may be made to the Ombudsman are indicated in ss 44(1)(b)(ii), 45(1) and 46(1) of the Act.]
- a copy of the application for assessed disclosure which was made under s 13
- a copy of all decisions made by the public authority or Minister in response to the application for assessed disclosure, including a copy of any internal review decision under s 43
- a copy of all correspondence between the public authority or Minister and the applicant, in relation to the application for assessed disclosure.

2.2 Application by external party or other third party

There are certain circumstances in which a person other than the applicant for assessed disclosure may apply for a review.

Briefly, these are where -

- a person seeks review of a decision to release their personal information to the applicant for assessed disclosure - see ss 36(2), 43(2) and 44(1)
- a person or organisation seeks review of a decision to release information to the applicant for assessed disclosure, being information which the person or organisation considers is likely to expose them to competitive disadvantage - see ss 37(2), 43(3) and 44(1)
- a person believes that they should have been consulted under s 36(2) or s 37(2), but were not - see ss 36(2), 37(2) and 45(2)(a)
- a decision has been made on internal review under s 43, and a person, other than the person who applied for the review, claims that they have been adversely affected by the decision - ss 43 and 45(2)(b)

An application for review on any of these grounds must be in writing. It will assist in expediting the review process if the application is accompanied by -

- a statement of the ground upon which it is made

- a copy of all correspondence between the public authority or Minister and the applicant for review, in relation to the matter which is the subject of the review.

3. Procedure to be followed on review

3.1 General

The Ombudsman is given the power by s 47(1)(b) to decide on the process for dealing with an application for review. The process to be followed will depend on the nature of the case.

The powers open to the Ombudsman include the power to –

- direct that a decision be made, if one has not previously been made within the time required by s 15 : s 47(1)(e).
- direct an internal review, if one has not already been completed: s 47(1)(f)
- promote settlement of the review application : s 47(1)(h)
- require the provision of better reasons for decision within a period of 10 working days, if any reasons for decision that have been issued previously do not comply with s 22 of the Act or are otherwise inadequate : s 47(1)(n).

Except where the review is clearly out of jurisdiction, the Ombudsman first needs to obtain the materials needed to carry out the review. In many cases, it will then be possible to address the review by correspondence alone. In some cases, it will be necessary to hold one or more case management conferences to progress the case.

3.2 Materials required for review

In the ordinary course of events, the respondent public authority or Minister will be informed in writing by the Ombudsman of the application for review, and, subject to the nature of the particular review, and the extent of compliance by the applicant with section 2.1 above, will be asked to produce the following to the Ombudsman within 10 to 15 working days (with the time given depending on the amount of information involved) –

- a copy of the application for assessed disclosure
- a copy of all correspondence with the applicant

- a copy of all decisions taken on the application for assessed disclosure, including any internal review decision
- a copy of the information at issue
- a Schedule which lists all of the records in which the information at issue is contained, giving –
 - the date of the record
 - a brief but informative description of the record
 - a note as to whether the disclosure of the information in the record is being resisted, and if so under what section of the Act
- any submissions which the public authority or Minister may wish to make in relation to the application for review
- any evidence upon which the public authority or Minister relies in support of an argument that the applicant is not entitled to the information sought

This material will then be evaluated to determine the best way of handling the review.

3.3 Case management conferences

If considered necessary by the Ombudsman, a case management conference will be held, conducted by the Ombudsman or the Ombudsman's delegate, with a view to addressing such matters as –

- refinement of the issues to be dealt with in the review
- the potential for settlement
- the process to be followed if the review is to proceed.

Whoever represents the public authority or Minister at such a conference should be of sufficient seniority to be able to make decisions on the future of the matter without further consultation.

4. Onus

Attention is drawn to the provisions of s 47(4), under which, if an application for review is not resolved by consent of the parties and the Ombudsman is required to decide the outcome of the application, the public authority or Minister has the onus of persuading the Ombudsman that the information should not be disclosed. The subsection states that the Ombudsman may determine a review on the basis that this onus has not been discharged.

It will usually be the case that evidence is required to prove that an applicant for assessed disclosure is not entitled to the information being sought. For instance, the right to rely upon s 19 of the Act, under which an application for assessed disclosure may be refused on the ground of the unreasonable diversion of resources etc, cannot be made out without evidence which shows that the requirements of the section are satisfied, including evidence which enables due regard to be had to the matters specified in Schedule 3.

The existence of this onus is why the Ombudsman is likely to require the public authority or Minister, at the outset of the review, to produce the evidence upon which the authority or Minister relies in support of the claim that the applicant is not entitled to the information sought - see section 3 of this Guideline, above.

5. Review decision

The Ombudsman will normally only proceed to make a formal decision on an application for review where it is apparent that there is no other means of resolving the issues which are outstanding between the parties.

Review decisions will usually be prepared in the order of receipt of the applications for review to which they relate. A decision will not be given priority unless the Ombudsman is persuaded that this is required by the special circumstances of the case.

In simpler cases, the Ombudsman may convey the review decision to the parties by letter.

In more complex cases, formal Reasons for Decision will be prepared.

As required by s 48(1)(a) of the Act, the Ombudsman will provide a draft of the decision to the public authority or Minister, seeking input, if the Ombudsman intends to make a decision which is adverse to the public authority or Minister.

The Ombudsman has the power to provide a draft of the decision to any interested party before it is finalised : s 48(1)(b).

The Ombudsman has the power to publish the Reasons for Decision : s 49(5). This will be done where the decision may be of value to users of the Act, or is otherwise considered deserving of publication. On occasions, only a summary of the decision will be published.

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