

CHAPTER 16

INTERNAL REVIEW

16.1 The Committee supported the concept of internal review in its 1979 Report.¹ Nothing in the submissions or evidence to the present inquiry has caused the Committee to resile from this view.

16.2 It has been suggested that internal review is ineffective in those agencies where authority to deny access has been restricted to a very senior level. The seniority of the original decision-maker may preclude the making of a fresh examination of the decision.² The available statistics make it difficult to verify this criticism.

16.3 The Freedom of Information (Charges) Regulations as amended by the Freedom of Information Laws Amendment Act 1986 require that a \$40 fee shall accompany applications for internal review (reg. 5). No fee is required, however, where the documents to which access is sought relate to the applicants' income support payments and the applicants have not had access to those documents in the previous three months (reg. 6(3)).

16.4 The \$40 fee for internal review will not represent anything near the recovery of the total costs to the Commonwealth of providing the review. However, the fee may provide some compensating revenue, and may act as a modest deterrent to applicants who seek internal review on the basis that they have

1. 1979 Report, paras. 28.2-28.8.

2. Submission from the Political Reference Service Ltd, p. 18 (Evidence, p. 968).

everything to gain and nothing to lose by so doing.³ The Committee does not regard the proposed fee as unreasonable.

16.5 Third parties are frequently unwilling participants in the FOI process, having become involved only as a result of a perceived need to prevent the disclosure of information relating to their personal or business affairs. It would be unfair to further penalise these third parties by requiring the payment of a \$40 fee.

16.6 The Committee recommends that, in addition to the present exemptions, the fee for internal review not be payable by third-parties seeking internal review to protect 'their' documents in the reverse-FOI context.⁴

16.7 Several matters of detail were brought to the Committee's attention. The Department of Territories pointed out that many applications for internal review are technically defective because they are not directed to 'the principal officer of the agency' as is required by sub-section 54(1).⁵ The Committee understands that agencies do not refuse applications on the basis of this deficiency.

16.8 The Committee recommends that the Act should be amended so as to require that requests for internal review be addressed with no greater specificity than is the case in respect of requests for access (on which see above paragraph 5.27).

16.9 The submission from the Attorney-General's Department identified a problem arising from the requirement that

3. The FOI Annual Report 1986-87 provides no data from which to assess the impact of the fee upon the volume of requests for internal review.

4. See above para. 8.47, where it was recommended that third-parties have a right to seek internal review.

5. Submission from the Department of Territories, p. 14.

applications for internal review must be lodged within 28 days of notification of the primary decision:

For obvious practical reasons it is common for agencies to notify any charge payable at the same time as the access decision is notified. Under s. 18, the granting of access may then be deferred until the charges have been paid and, once charges have been paid, more time may elapse before inspection can be arranged or copies provided.

The applicant may then encounter the difficulty that his time for seeking internal review has largely or completely passed before he has had access to the documents, yet it may only be access which enables him to decide whether he is satisfied with the initial decision or wants it reviewed. Such a situation can only encourage applicants to seek internal review at an early stage, without knowing whether it is really wanted, as a safeguard against running out of time. The result must be a proportion of unnecessary internal reviews.⁶

16.10 The Committee endorses the suggestion by the Attorney-General's Department.⁷

16.11 The Committee recognises that it is not practical to frame an appropriate recommendation in terms of specified numbers of days because the time taken by the agency to provide access or for any review or appeal cannot be specified. Nominating a specific number of days will unduly favour applicants where the access is provided, or review conducted, promptly. Conversely, nominating a specific number of days will disadvantage applicants where, through no fault of the applicant, access is delayed for, or review is conducted over, a lengthy period of time.

6. Submission from the Attorney-General's Department, p. 89 (Evidence, p. 94).

7. Submission from the Attorney-General's Department, p. 90 (Evidence, p. 95).

16.12 The Committee recommends that the time limit for requesting internal review take into account a 15 day period for the payment of charges, plus any period during which the decision to charge may be under review or appeal, and any delay by the agency in providing access.

16.13 This recommendation may go some way to overcoming one of the problems experienced by the Australian Taxation Office: applicants who have been granted partial access occasionally request the internal review of the decision without having inspected those parts of documents to which access has been granted.⁸

16.14 However, the Committee does not endorse the Australian Taxation Office's suggestion that, in such cases, the right to seek internal review should be conditional upon the exercise of a right of access. In some cases, applicants may be able to deduce from the section 26 statement of reasons that they require access to documents which have been withheld, without having inspected the released documents. The requirement that a \$40 fee shall accompany a request for internal review may deter some applicants who might otherwise have sought internal review frivolously.

16.15 The Act does not impose any express time limit upon internal review. However, a failure to notify the result of an internal review within 14 days of the receipt of application authorises applicants to seek the review of the primary decision by the Administrative Appeals Tribunal.⁹

16.16 Several agencies stated that the 14 day period is inadequate. In 1984-85, the Department of Territories, for example, took an average of 23.5 days to conduct its internal reviews.¹⁰ The Department of Veterans' Affairs submission stated:

8. Submission from the Australian Taxation Office, p. 14 (Evidence, p. 664).

9. FOI Act, s.55(3).

10. Submission from the Department of Territories, p. 9.

'Almost invariably DVA has so far been unable to deal with internal review cases within this 14 day deadline'.¹¹

16.17 The Department of Veterans' Affairs, as did other agencies, suggested that agencies should be allowed 30 days to respond.¹² The Department of Immigration and Ethnic Affairs suggested 28 days.¹³ The Inter-Agency Consultative Committee on FOI regarded 21 days as 'more realistic' than the present 14 days.¹⁴

16.18 Earlier, the Committee recommended that the period for reverse-FOI consultation should be extended to 30 days. The time for internal review should be extended similarly.

16.19 The Committee recommends that the time for internal review be extended to 30 days.

11. Submission from the Department of Veterans' Affairs, para. 75 (Evidence, p. 575). See also submission from the Department of Health, p. 33 (Evidence, p. 1253); first supplementary submission from the Department of Local Government and Administrative Services, pp. 2-3.

12. Submission from the Department of Veterans' Affairs, para. 78 (Evidence, p. 576). See also the submissions from the Department of Primary Industry, Attachment, p. 1; the Australian Taxation Office, p. 9 (Evidence, p. 659).

13. Submission from the Department of Immigration and Ethnic Affairs p. 10 (Evidence, p. 700). See also the submission from the Department of Arts, Heritage and Environment, p. 8.

14. Submission from Inter-Agency Consultative Committee on FOI, p. 7.

