

Extract from Part 10 of the FOI Guidelines

When the Information Commissioner will not review a matter

- 10.85 The Information Commissioner has the discretion not to undertake a review, or not to continue a review, if:
- a. the applicant fails to comply with a direction by the Information Commissioner (s 54W(c))^[27], or
 - b. if the Information Commissioner is satisfied:
 - i. the review application is frivolous, vexatious, misconceived, lacking in substance or not made in good faith
 - ii. the review applicant has failed to cooperate in progressing the IC review application or the IC review without reasonable excuse
 - iii. the Information Commissioner cannot contact the applicant after making reasonable attempts (s 54W(a))
 - c. if the Information Commissioner is satisfied the IC reviewable decision should be considered by the AAT (s 54W(b) — see [\[10.88\]](#) below).
- 10.86 An IC review application for review of an agency or minister’s preliminary costs assessment will be considered to lack substance if the agency or minister waives the charges.^[28] The circumstances in which an IC review application can be described as ‘frivolous or vexatious’ have been examined in various cases.^[29] The circumstances include where it is open to conclude that a series of FOI requests were made to annoy or harass agency staff and none of the requests is capable of conferring a practical benefit on the applicant.^[30] See Part 12 of these Guidelines for information about vexatious applicant declarations. Where an applicant expresses their wish for a decision not to be published because they are concerned about privacy, this does not constitute failure to cooperate (but if the review proceeds the decision is nevertheless required to be published (s 555K(8)).^[31]

...

AAT review as an alternative to IC review

- 10.88 The Information Commissioner may decline to undertake a review if satisfied ‘that the interests of the administration of the [FOI] Act make it desirable’ that the AAT consider the IC reviewable decision (s 54W(b)). It is

intended that the Information Commissioner will resolve most applications. Circumstances in which the Information Commissioner may decide that it is desirable for the AAT to consider the IC reviewable decision instead of the Commissioner continuing with the IC review include:^[32]

- where the IC review is linked to ongoing proceedings before the AAT or a court
- where there is an apparent inconsistency between earlier IC review decisions and AAT decisions
- where, should the application progress to an IC review decision, the IC review decision is likely to be taken on appeal to the AAT on a disputed issue of fact
- where the FOI request under review is of a level of complexity that would be more appropriately handled through the procedures of the AAT
- where there may be a perceived or actual conflict of interest in the Commissioner undertaking review, including where:
 - the FOI request under review was made to, or decided by, the Information Commissioner or their delegate
 - the FOI request or material at issue relate to specific functions exercised by the Information Commissioner under the Privacy Act
 - the applicant has active matters in other forums, including the AAT or Federal Court and the Information Commissioner is the respondent
- where consideration by the AAT would further the objects of the FOI Act, particularly in relation to the performance and exercise of functions and powers given by the FOI Act to facilitate and promote public access to information, promptly and at the lowest reasonable cost (s 3(4)).

10.89 The OAIC will consult the parties to an IC review before concluding an IC review pursuant to s 54W(b).

^[27] See Australian Information Commissioner, Direction as to certain procedures to be followed by applicants in Information Commissioner reviews at 1.40-1.41

^[28] Knowles v Australian Information Commissioner [2018] FCA 1212.

^[29] For an example of abuse of process generally see Bringolf and Secretary, Department of Human Services (Freedom of information) [2018] AATA 2004.

^[30] Ford v Child Support Registrar [2009] FCA 328, applying Attorney-General (Vic) v Wentworth (1998) 14 NSWLR 481.

^[31] Giddings v Australian Information Commissioner [2017] FCA 677.

^[32] See also McKinnon and Department of Immigration and Citizenship [2012] AICmr 34.

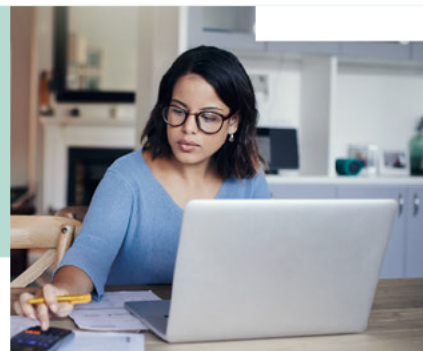


Information Commissioner (IC) review process

Stage	Process	Guidelines	Sample letters / guidance	Notes
Stage 1: Intake and Early Resolution / Production of documents	1. Triage: a) Review and acknowledge application (received via email, fax or smartform) for validity a. Invalid applications to be finalised under s 54N b. Valid applications – deemed – proceed to ‘Deemed process’ below and invite s 54T application (extension of time to make IC review application) c. Valid applications within time proceed to ‘Assessment’- see below	10.28 – 10.32 (Application for IC review) 10.41 – 10.44 (extension of time for applying) 10.81 – 10.82 (Preliminary inquiries)	<ul style="list-style-type: none"> Acknowledgement letter D2022/011173 Acknowledgement letter where OAIC is respondent D2022/026515 	
	2. Deemed access refusals a) Conduct preliminary inquiries with Respondent and invite the applicant to lodge an application to make an IC review application under s 54T if required. b) If Respondent advises that the FOI request is not deemed to have been refused as the statutory processing time has not expired, the application is invalid and the application will be finalised under s 54N. c) If Respondent advises that the FOI request is deemed to have been refused as the statutory processing time has expired: a. Grant the applicant’s s 54T application if required b. Commence review, issue s 54Z/54T letter to the respondent and request relevant documentation d) If the Respondent makes a revised decision, confirm with the applicant whether they wish to proceed e) If the Respondent provides the processing documentation, proceed to ‘Review s 54Z response’ below	10.4 – 10.5 (Deemed decisions) 10.82 (Preliminary inquiries) 10.67 – 10.74 (Revising the decision in the course of an IC review) 10.100 (Steps in the Information Commissioner review process) 10.105 – 10.107 (Deemed refusal or deemed affirmation of original decision)	<ul style="list-style-type: none"> Notice to commence review (DHA): D2022/019558 Deemed email templates (proceeds, withdrawals, ITDs) D2022/002690 	<i>Proposed amendments to the procedure directions if implemented will impact on these matters.</i>
	3. Assessment a) Review IC review application and statement of reasons and decide whether to: a. Commence review - see below b. Decline under s 54W - see below c. Conduct further enquiries	10.81 – 10.82 (Preliminary inquiries)	<ul style="list-style-type: none"> Conducting IC reviews - assessments D2019/002542 Conducting IC reviews – case categorisation D2020/000377 Conducting IC reviews: Identification of systemic and significant issues worksheet D2019/001898 	
	4. Notice of commencement of IC review / Request for information (s 54Z) a) Issue notice of commencement of review and request for information, including notifying relevant parties	10.55 (Obtaining information) 10.91 – 10.93 (The Information Commissioner’s powers to gather information) 10.100 (Steps in the Information Commissioner review process) 10.114 – 10.115 (Methods of providing documents to the Information Commissioner)	<ul style="list-style-type: none"> 54Z notice of IC review D2022/002669 Opening letter to applicant and 54Z cover email to respondent D2022/026520 55A notice of added party to proceeding D2019/009911 	<i>We have previously considered adopting a similar approach to the AAT in relation to the production of submissions – for a copy to be provided to the applicant as well, and then the applicant to have x weeks to provide submissions in response. I</i>
	5. Decline a) Issue intent to decline the applicant if under s 54W(a)(i) and to both applicant and respondent if under s 54W(b)	10.85 – 10.90 (When the Information Commissioner will not review a matter)	<ul style="list-style-type: none"> Intention to decline (s 54W checklist) D2018/016246 Closure letter (s 54W checklist) D2018/016247 Conducting an IC review: Review of preliminary views/s 54W letters D2018/016248 54W (b) Intent to decline notice - D2022/011204 	

Stage	Process	Guidelines	Sample letters / guidance	Notes
	<p>a. s 54W(a)(i): if the applicant responds, consider the response and determine whether to proceed to close under s 54W or whether further information is required. If the applicant does not respond, proceed to close under s 54W.</p> <p>b. s 54W(b): If the parties do not respond, proceed to close. If the parties respond, consider the response and determine whether to proceed to close under s 54W or whether to re-assess.</p>		<ul style="list-style-type: none"> 54W(b) Decision notice D2022/026476 54W (a) Decline advice letter to applicant (i) (ii) (iii) D2022/011179 D2022/011181 D2022/011189 54W (a) Close letter to Applicant (i) (ii) (iii) D2022/011182 D2022/011183 D2022/011184 	
2: Case Management	<p>8. Review of s 54Z response</p> <p>a) If scope of IC review involves ss 33/34 exemptions and the OAIC does not hold the material at issue</p> <p>a. Consider whether to issue s 55U notice</p> <p>b. If a s 55U notice has been issued and the Respondent has provided the material at issue, consider whether on further review, more information is required from the applicant or respondent</p> <p>b) For all other reviews, consider:</p> <p>a. requests to provide confidential submissions</p> <p>b. whether more information is required from the applicant or respondent, including where a notice to compel the document at issue is required</p> <p>c. whether the request for information should be in the form of an intent to decline to the applicant or a preliminary view to the applicant or respondent</p>	<p>10.13 – 10.14 (Onus)</p> <p>10.67 – 10.74 (Revising the decision in the course of an IC review)</p> <p>10.77 – 10.80 Evidence by the Inspector-General of Intelligence and Security</p> <p>10.91 – 10.99 (The Information Commissioner’s powers to gather information)</p> <p>10.108 – 10.113 (Preliminary assessment and view)</p>	<ul style="list-style-type: none"> Reviews and Investigations case plan: D2023/002296 Preliminary steps checklist D2018/016244 Conducting an IC review – general information about case management D2018/016249 Submissions D2018/016243 Conducting an IC review: Preliminary view checklist D2018/016245 IC review case plan D2021/017910 55T notice to produce exempt documents - D2019/003535 55R notice to produce to agency - D2016/006882 	<i>Review advisers are encouraged to complete the case plan to assist with planning review, identifying and addressing procedural fairness issues and providing a brief document that sets out the history of the case</i>
	<p>7. Informal resolution and procedural fairness steps</p> <p>a) Ensure procedural fairness steps have been undertaken and where possible, facilitate resolution through the use of preliminary views/inviting s 55G decisions</p> <p>b) If the application proceeds to a decline under s 54W – see ‘Decline’ process above</p> <p>c) If the application proceeds to a decision under s 55K – see ‘Decision and finalisation’ stage below</p>	<p>10.52 – 10.62 (General procedure)</p> <p>10.67 – 10.74 (Revising the decision in the course of an IC review)</p> <p>10.85 – 10.90 (When the Information Commissioner will not review a matter)</p>		
3: Decision and finalisation	<p>8. Draft decision for clearance</p> <p>a) Decision drafted for Director and Assistant Commissioner clearance</p> <p>b) IC review applications involving searches, charges, practical refusals will proceed to the Assistant Commissioner for decision</p> <p>c) All other decisions will proceed to the FOI Commissioner or Information Commissioner for clearance</p> <p>d) At any time during the clearance stage, the matter may need to return to the case management stage.</p>	<p>10.118 (Written reasons to be given)</p> <p>10.125 – 10.26 (Compliance with the Information Commissioner’s decision)</p>	<ul style="list-style-type: none"> Decision writing checklist D2018/016241 Conducting an IC review- clearance using documents on Resolve check list D2020/005955 Snapshot for clearance of IC review decisions D2022/001851 Section 55K decision – s47C D2021/003889 Section 55K decision – s 47 F D2021/003888 	
	<p>9. Finalisation of Decision</p> <p>a) Once the decision has been approved, the decision is assigned a citation and is then sent to the relevant parties.</p> <p>b) For matters that are set aside or varied, a letter seeking confirmation of compliance/appeal is also sent to the Respondent.</p>	<p>10.125 – 10.126 (Compliance with the Information Commissioner’s decision)</p>	<ul style="list-style-type: none"> Attachment E of Decision writing checklist D2018/016241 Section: 55K compliance letter template D2020/012832 	
	<p>10. Return/destruction of exempt material</p>	<p>10.94 (Producing documents claimed to be exempt: general)</p>	<ul style="list-style-type: none"> Conducting an IC review – general information about case management D2018/016249 	
	<p>11. Publication of decision</p> <p>a) The decision is sent to AUSTLII for overnight publication.</p>	<p>10.118 (Written reasons to be given)</p>		
	<p>12. Summary</p>			

Stage	Process	Guidelines	Sample letters / guidance	Notes
	a) A summary of the decision, noting key points and whether any changes are required to the FOI Guidelines or IC review process, is circulated to the Commissioners, media, legal and FOI Branch.			



Applying to the Administrative Appeals Tribunal after receiving a section 54W(b) decision

You can apply to the Administrative Appeals Tribunal (AAT) for review of:

- an agency or minister's FOI decision, if the Information Commissioner has decided not to undertake a review under s 54W(b) of the *Freedom of Information Act 1982* (FOI Act), or
- the Information Commissioner's decision to affirm, vary or set aside an FOI decision under s 55K of the FOI Act.

This Fact Sheet explains the effect of an Information Commissioner decision under s 54W(b) of the FOI Act and how to ask the AAT to review the FOI decision or internal review decision (the 'IC reviewable decision').

What is a s 54W(b) decision?

A person who disagrees with an agency or minister's FOI decision on their request for access to a document under the FOI Act can apply to the Information Commissioner for review of the original decision or the internal review decision.

The Information Commissioner does not just review the reasons given by the agency or minister but will determine the correct or preferable decision in all the circumstances. In some cases, the Information Commissioner may exercise a discretion not to review an FOI decision if it is desirable that it is considered by the AAT, in the interests of the administration of the FOI Act. The Information

Commissioner can do this under s 54W(b) of the FOI Act.

Circumstances in which the Information Commissioner may decide it is better for the AAT to undertake the review instead of the Information Commissioner include when:

- the IC review is linked to ongoing proceedings before the AAT or a court
- there is an apparent inconsistency between earlier IC review decisions and AAT decisions
- the IC review decision is likely to be taken on appeal to the AAT on a disputed issue of fact
- the FOI request under review is complex and would be more appropriately handled by the AAT
- there may be a perceived or actual conflict of interest in the Information Commissioner undertaking the review, because the FOI request under review was made to or decided by the Information Commissioner or their delegate, or the request relates to specific functions exercised by the Information Commissioner under the Privacy Act
- the applicant has active matters in other forums, such as the AAT or Federal Court, and the Information Commissioner is the respondent
- whether consideration by the AAT would further the objects of the FOI Act.

How to apply for review by the AAT

If the Information Commissioner makes a decision under s 54W(b), you can apply to the AAT for review of the original FOI decision or the internal review decision (that is, the IC reviewable decision). The AAT will then consider the issues raised in the review.

If you want to apply for review by the AAT, you must do so within 28 days after receiving notice of the s 54W(b) decision. You must apply in writing.

You can apply on the AAT website: online.aat.gov.au. You can also complete the AAT [application form](#) and send it to the AAT by email, fax or post, or deliver it to an AAT Registry.¹

You can find the AAT's contact details at aat.gov.au/contact-us. The AAT can be contacted by telephone on 1800 228 333 for more information about how to apply.

You should provide the AAT with a copy of two decisions with your application (both are attached):

- The IC reviewable decision – this is the agency or the minister's decision that you were seeking to be reviewed by the Information Commissioner. This will be the latest decision made by the agency or the minister in response to an FOI request, if you have more than one decision. For example, if an internal review was undertaken, the IC reviewable decision will be the internal review decision. If a revised decision has been made under s 55G of the FOI Act, the IC reviewable decision will be the s 55G decision.
- The 54W(b) decision – this is the letter from the delegate of the Information Commissioner explaining the decision not to undertake a review under s 54W(b) of the FOI Act.

The AAT application form asks for the date you received the decision you want reviewed.

You should provide the date you received the letter from the delegate of the Information Commissioner that contains the decision not to undertake a review under s 54W(b).

The AAT application form also asks you to describe the 'decision'. If you have attached the decision of the Information Commissioner's delegate and the last decision of the government agency or minister (IC reviewable decision), you can write 'See attached decision'. Otherwise, you should describe these decisions.

The AAT application form asks that you write the reason(s) why you want the decision reviewed. This can be a short summary. The AAT will give you an opportunity to say more later in the process.

An application fee of \$962 must usually be paid when you apply to the AAT. However, in some cases, no fee is payable. You may also be eligible to pay a reduced fee of \$100. More information about [application fees](#) is on the AAT website.²

More information

- Apply for a review: aat.gov.au/apply-for-a-review/freedom-of-information-foi
- Steps in a review: aat.gov.au/steps-in-a-review/freedom-of-information-foi

¹ aat.gov.au/landing-pages/application-forms/application-for-review-of-decision-individual

² aat.gov.au/apply-for-a-review/freedom-of-information-foi/fees



Australian Government

Office of the Australian Information Commissioner

Intention to recommend that an IC review **not be undertaken/ continue to be undertaken under s 54W(b) of the *Freedom of Information Act 1982***

IC review applicant	«ApplicantClientTitleFirstnameSurname»
Respondent	«RespondentClientTradingName»
OAIC reference number	«CaseNumber»
Agency reference number	«Agency_Reference_Number»

Summary

1. I refer to the application made by «ApplicantClientTitle» «ApplicantClientSurname» (the applicant) for Information Commissioner review (IC review) of a decision made by the «RespondentClientTradingName» (respondent) on «Agency_Decision_Date» under the *Freedom of Information Act 1982* (Cth) (the FOI Act).
2. The purpose of this letter is to advise the parties of my intention to recommend that a delegate of the Information Commissioner exercise the discretion to decide not to [undertake/continue to undertake] an IC review under s 54W(b) of the FOI Act, which would allow the applicant to seek review at the Administrative Appeals Tribunal (AAT).
3. I am writing to both parties in this IC review to offer you both an opportunity to comment or make submissions on this recommendation.
4. The reasons for my recommendation follow.

Background

5. The reasons for my recommendation follow.

Discretion not to [undertake/continue to undertake] an IC review

6. The reasons for my recommendation follow.
7. The effect of such a decision would be to finalise this IC review application and allow the applicant to apply directly to the AAT. The applicant would then have 28 days to lodge an application with the AAT in accordance with ordinary AAT processes. AAT filing fees may apply.¹
8. The discretion in s 54W(b) of the FOI Act may be exercised where the Information Commissioner is satisfied that the interests of the administration of the FOI Act make it desirable that the IC reviewable decision be considered directly by the AAT, rather than initially by the Information Commissioner.
9. The Explanatory Memorandum to the Freedom of Information Amendment (Reform) Bill 2009 which created s 54W(b) states:

One of the reasons for retaining a right of review to the AAT is that, as an experienced review body, the AAT can properly deal with highly contested applications. This provision enables the Information Commissioner to decline to undertake a review if satisfied it would be more appropriate and efficient for the application to be made directly to the AAT.

10. This is also referred to in the Guidelines issued by the Australian Information Commissioner under s 93A (FOI Guidelines) at [10.88] – [10.89], which state:

The Information Commissioner can decline to undertake a review if satisfied ‘that the interests of the administration of the [FOI] Act make it desirable’ that the AAT consider the review application (s 54W(b)). It is intended that the Commissioner will resolve most applications. Circumstances in which the Commissioner may decide that it is desirable for the AAT to consider a matter instead of the Commissioner continuing with the IC review include:

- where the IC review is linked to ongoing proceedings before the AAT or a court
- where there is an apparent inconsistency between earlier IC review decisions and AAT decisions
- where, should the application progress to an IC review decision, the IC review decision is likely to be taken on appeal to the AAT on a disputed issue of fact
- where the FOI request under review is of a level of complexity that would be more appropriately handled through the procedures of the AAT
- where there may be a perceived or actual conflict of interest in the Commissioner undertaking review, including where:

¹ See, <https://www.aat.gov.au/apply-for-a-review/freedom-of-information-foi/fees>

- the FOI request under review was made to, or decided by, the Information Commissioner or their delegate
- the FOI request or material at issue relate to specific functions exercised by the Information Commissioner under the Privacy Act
- the applicant has active matters in other forums, including the AAT or Federal Court and the Information Commissioner is the respondent
- where consideration by the AAT would further the objects of the FOI Act, particularly in relation to the performance and exercise of functions and powers given by the FOI Act to facilitate and promote public access to information, promptly and at the lowest reasonable cost (s 3(4)).

The OAIIC will consult the parties involved in a matter before making a decision under s 54W(b) to conclude an IC review.

11. The circumstances in which the Information Commissioner may consider it desirable that the AAT consider the IC review application, as outlined in the FOI Guidelines above, are not exhaustive. There will be circumstances that are not listed where the Information Commissioner may deem it desirable to refer the matter to the AAT.
12. The objects of the FOI Act provide that functions and powers under the FOI Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost.
13. Further, in accordance with these objects, paragraph [10.18] of the FOI Guidelines provides that IC reviews are intended to be a simple, practical and cost-efficient method of external merits review.

[insert reasons for recommendation]

[Sample reasons for recommendation]

14. In this IC review, it is apparent that:

- The FOI decision under review is linked to ongoing proceedings currently before the Administrative Appeals Tribunal. It is clear from the applicant's submissions in this IC review that the applicant is seeking access to information about [provide details of proceedings].
- The FOI decision under review is complex and voluminous and resolving this matter would require substantial allocation of OAIIC resources. For example, the scope of this IC review extends to various exemptions including [ss 22, 24A, 33, 42 and 47F] of the FOI Act and requires consideration of [number] documents at issue.

- The exemption of s 33 of the FOI Act adds complexity to this matter because before the Information Commissioner can determine that a document is not an exempt document under s 33 of the FOI Act, she must first request the Inspector-General of Intelligence to appear and give evidence on the damage that would, or could reasonably be expected to be caused to the security or the Commonwealth, the defence of the Commonwealth or the international relations of the Commonwealth if access to the document were given in accordance with the request (s 55ZB of the FOI Act), and
 - Given the complexity of the IC review and the subject matter of the documents requested, I consider that any IC review decision is likely to be taken on appeal to the AAT on a disputed issue of fact. In my preliminary view, this IC review could more appropriately be handled through the procedures of the AAT.
15. For these reasons, I intend to recommend to a delegate of the Information Commissioner that they exercise the discretion not to [undertake/continue to undertake] an IC review under s 54W(b), as I am of the view that it is in the interests of the administration of the FOI Act that this review be closed and that the applicant be provided the opportunity of applying directly to the AAT for review.
16. The delegate of the Information Commissioner will review all material before the OAIC in deciding whether to exercise the discretion to decide not to [undertake/continue to undertake] a review in this case.

Next steps

17. If you disagree with this proposed recommendation, please write to us by [**@ 2 weeks**] and advise us of your reasons. Your reasons will be taken into account before a decision is made on whether to finalise this matter under s 54W(b).
18. In the absence of a response by this date this IC review application may be finalised under s 54W(b), and the parties will be notified of their review rights.

Yours sincerely

«InvestigativeOfficerFirstnameSurname»
 «InvestigativeOfficerPosition»
 Freedom of information Regulatory Branch
 13 December 2023

ATTACHMENT A

Key procedural steps

Date	Events
[date]	IC review application received
	Respondent agency notified under s 54Z
	Request for information issued under @
	Request for information due
	Information received
	Submissions provided to parties
	Revised decision



Template: closure under s 54W(b) to the applicant

Our reference: [Insert reference number]

Agency reference: [Insert reference number]

[First Name Last Name]

[Company Name]

[Address Line 1]

[Address Line 2]

By email to: [insert]

Decision not to [undertake/continue to undertake] a review under s 54W of the FOI Act

Dear [Mr/Ms Name]

I refer to your request for Information Commissioner review (IC review) of a decision made by the [agency/minister] ([agency/minister shorthand]) on [date] under the *Freedom of Information Act 1982* (Cth) (the FOI Act). This decision is referred to as the IC reviewable decision.

I am a delegate of the Information Commissioner. Under s 54W of the FOI Act, I have decided not to [undertake/continue to undertake] a review of this IC review on the basis that the interests of the administration of the FOI Act make it desirable that the IC reviewable decision be considered by the Administrative Appeals Tribunal (**IC reviewable decision attached**). The effect of my decision is to allow you to apply directly to the Tribunal.

My reasons follow.

Background

[Include the same information in the intention to decline and update to refer to the review officer in the third person]

On [date], the OAIC review officer responsible for this matter, [name], wrote to you to advise you of their intention to recommend to the delegate of the Information Commissioner that your application for IC review be finalised under s 54W(b) of the FOI Act on the basis that it is in the interests of the administration of the FOI Act that the IC reviewable decision be considered by the AAT.

[Name] invited you to provide reasons if you disagreed with the proposed finalisation of your IC review by [date].

[if relevant] Based on the information before me, the OAIC has not received a response.

OR [insert details of response or that no response was received]

Decision not to [undertake/continue to undertake] a review

I am a delegate of the Information Commissioner.

I have had regard to:

- the [agency/minister]'s decision and reasons for decision
- [if relevant insert details of internal review decision / revised decision]
- [if relevant] an unedited copy of the documents identified as falling within the scope of the request
- the FOI Act, in particular [insert section(s)]
- the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act to which agencies must have regard in performing a function or exercising a power under the FOI Act (FOI Guidelines), in particular paragraphs [insert] and [10.88] – [10.89]
- [if relevant] relevant case law, in particular [insert], and
- the parties' submissions.

Under s 54W of the FOI Act, the Information Commissioner may decide not to undertake a review, or not to continue to undertake a review, if the Information Commissioner is satisfied that the interests of the administration of the FOI Act make it desirable that the IC reviewable decision be considered by the Administrative Appeals Tribunal (AAT).

The effect of such a decision would be to finalise the IC review application and allow the applicant to apply directly to the AAT. The applicant would then have 28 days to lodge an application with the AAT in accordance with ordinary AAT processes.

The discretion of s 54W of the FOI Act may be exercised where the Information Commissioner is satisfied that the interests of the administration of the FOI Act make it desirable that the IC reviewable decision be considered directly by the AAT, rather than by the Information Commissioner first.

The Explanatory Memorandum to the Freedom of Information Amendment (Reform) Bill 2009 which created s 54W(b) states:

One of the reasons for retaining a right of review to the AAT is that, as an experienced review body, the AAT can properly deal with highly contested applications. This provision enables the Information Commissioner to decline to undertake a review if satisfied it would be more appropriate and efficient for the application to be made directly to the AAT.

This is also referred to in the Guidelines issued by the Australian Information Commissioner under s 93A (FOI Guidelines) at [10.88] – [10.89], which states:

The Information Commissioner can decline to undertake a review if satisfied 'that the interests of the administration of the [FOI] Act make it desirable' that the AAT consider the review application (s 54W(b)). It is intended that the Commissioner will resolve most applications. Circumstances in which the Commissioner may decide that it is desirable for the AAT to consider a matter instead of the Commissioner continuing with the IC review include:

- the IC review is linked to ongoing proceedings before the AAT or a court

- there is an apparent inconsistency between earlier IC review decisions and AAT decisions
- the IC review decision is likely to be taken on appeal to the AAT on a disputed issue of fact, and
- the FOI request under review is complex or voluminous, resolving the IC review matter would require substantial allocation of resources, and the matter could more appropriately be handled through procedures of the AAT.

The OAIC will consult the parties involved in a matter before making a decision under s 54W(b) to conclude an IC review.

The circumstances under which the Information Commissioner may consider it desirable that the AAT consider the review application, as outlined in the FOI Guidelines above, are not exhaustive. There will be circumstances that are not listed where the Information Commissioner may deem it desirable to refer the matter to the AAT.

The objects of the FOI Act provide that functions and powers under the FOI Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost.

Further, in accordance with these objects, paragraph [10.18] of the FOI Guidelines provides that IC reviews are intended to be a simple, practical and cost-efficient method of external merits review.

[If relevant, set out parties' submissions here and include consideration of these submissions]

I have considered the issues in this matter and I am satisfied that it is in the interests of the administration of the FOI Act that the IC reviewable decision be considered by the AAT because:

- [review and update as appropriate]
- the IC review is linked to ongoing proceedings in the AAT or a court
- there is an apparent inconsistency between earlier IC review decisions and AAT decisions
- the exemptions applied to the documents under s [x] of the FOI Act in this IC review are highly contested and there are a number of affected third parties who must be given a reasonable opportunity to present their case before a final decision is made (s 55(4)(b))
- the IC review decision is likely to be taken on appeal to the AAT on a disputed issue of fact
- the FOI request under review is complex or voluminous, resolving the IC review matter would require a substantial allocation of OAIC resources, and the matter could more appropriately be handled through the procedures of the AAT
- the OAIC is the primary decision-maker of the decision under review.

[Sample reasons]

- *It is linked to ongoing proceedings currently before the Administrative Appeals Tribunal. It is clear from your submissions in this IC review that you are seeking access to information about [provide details of proceedings].*
- *The FOI request under review is complex and voluminous and resolving this matter would require substantial allocation of OAIC resources. For example, the scope of this IC review extends to various exemptions including ss 22, 24A, 33, 42 and 47F of the FOI Act and requires consideration of 200 documents at issue.*

- *The exemption of s 33 of the FOI Act adds complexity to this matter because before the Information Commissioner can determine that a document is not an exempt document under s 33 of the FOI Act, she must first request the Inspector-General of Intelligence to appear and give evidence on the damage that would, or could reasonably be expected to be caused to the security or the Commonwealth, the defence of the Commonwealth or the international relations of the Commonwealth if access to the document were given in accordance with the request (s 55ZB of the FOI Act), and*
- *Further, in circumstances where there is a distinct possibility that, should the IC reviews continue, any IC review decision will be taken on appeal by either party to the AAT, I consider that it is desirable for the efficient administration of the FOI Act that the IC reviewable decisions are reviewed by the AAT at first instance. I also consider that such an approach is consistent with the objects of the FOI Act.*

In deciding whether to exercise the discretion not to [undertake / continue to undertake] a review, I have considered:

- [review and update as appropriate]
- The Explanatory Memorandum to the Freedom of Information Amendment (Reform) Bill 2009 which created s 54W states: One of the reasons for retaining a right of review to the AAT is that, as an experienced review body, the AAT can properly deal with highly contested applications. This provision enables the Information Commissioner to decline to undertake a review if satisfied it would be more appropriate and efficient for the application to be made directly to the AAT.
- The objects of the FOI Act provide that functions and powers under the FOI Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost.
- In accordance with the objects of the FOI Act, paragraph [10.18] of the FOI Guidelines provides that IC reviews are intended to be a simple, practical and cost efficient method of external merit review.
- [Where the OAIC is the primary decision maker] The perceived conflict of interest in the Information Commissioner reviewing a decision made by their own agency.

For these reasons, as a delegate of the Information Commissioner, I have decided to exercise my discretion to decide not to [undertake / continue to undertake] a review of your application under s 54W of the FOI Act. I confirm that this IC review is now closed.

Next steps

You now have 28 calendar days from the date of this notice to make an application for review of the relevant IC reviewable decision to the AAT in accordance with s 57A of the FOI Act.

If you disagree with my decision under s 54W of the FOI Act, information about your review rights is set out below.

If you would like to discuss this matter, please contact [name] on (02) [xxxx] [xxxx] or on [name]@oaic.gov.au. In all correspondence please quote [OAIC reference number].

Yours sincerely

[First Name Last Name]

[Position Title]

[date]

Review rights

Judicial review

You can apply to the Federal Court of Australia or the Federal Circuit Court for a review of a decision of the Information Commissioner if you think that a decision by the Information Commissioner not to review or not to continue to undertake review of your IC review application under the *Freedom of Information Act 1982* (the FOI Act) is not legally correct. You can make this application under the *Administrative Decisions (Judicial Review) Act 1977*.

The Court will not review the merits of your case but it may refer the matter back to the Information Commissioner for further consideration if it finds the decision was wrong in law or the Information Commissioner's powers were not exercised properly.

An application for review must be made to the Court within 28 days of the OAIC sending the decision or determination to you. You may wish to seek legal advice as the process can involve fees and costs. Please contact the Federal Court registry in your state or territory for more information, or visit the Federal Court website at <http://www.fedcourt.gov.au/>.

Making a complaint to the Commonwealth Ombudsman

If you believe you have been treated unfairly by the OAIC, you can make a complaint to the Commonwealth Ombudsman (the Ombudsman). The Ombudsman's services are free. The Ombudsman can investigate complaints about the administrative actions of Australian Government agencies to see if you have been treated unfairly.

If the Ombudsman finds your complaint is justified, the Ombudsman can recommend that the OAIC reconsider or change its action or decision or take any other action that the Ombudsman considers is appropriate. You can contact the Ombudsman's office for more information on 1300 362 072 or visit the Commonwealth Ombudsman's website at <http://www.ombudsman.gov.au>.

Accessing your information

If you would like access to the information that we hold about you, please contact FOIDR@oaic.gov.au. More information is available on the **Access our information**¹ page on our website.

¹ www.oaic.gov.au/about-us/access-our-information/.





Template: closure under s 54W(b) to the respondent

Our reference: [Insert reference number]

Agency reference: [Insert reference number]

[First Name Last Name]

[Company Name]

[Address Line 1]

[Address Line 2]

By email to: [insert]

Decision not to [undertake/continue to undertake] a review under s 54W of the FOI Act

Dear [Mr/Ms Name]

I refer to [name]'s request for Information Commissioner review (IC review) of a decision made by the [agency/minister] ([agency/minister shorthand]) on [date] under the *Freedom of Information Act 1982* (Cth) (the FOI Act).

I am a delegate of the Information Commissioner. Under s 54W of the FOI Act, I have decided not to [undertake/continue to undertake] a review of this IC review. My reasons follow.

Background

[Include the same information in the intention to decline and update to refer to the review officer in the third person]

On [date], the OAIC review officer responsible for this matter, [name], wrote to [agency/minister] to advise of their intention to recommend to the delegate of the Information Commissioner that your application for IC review be finalised under s 54W(b) of the FOI Act on the basis that it is in the interests of the administration of the FOI Act that the IC reviewable decision be considered by the AAT.

[Name] invited [agency/minister] to provide reasons if you disagreed with the proposed finalisation of your IC review by [date].

[if relevant] Based on the information before me, the OAIC has not received a response.

OR [insert details of response or that no response was received]

Decision not to [undertake/continue to undertake] a review

I am a delegate of the Information Commissioner.

I have had regard to:

- the [agency/minister]'s decision and reasons for decision
- [if relevant insert details of internal review decision / revised decision]
- [if relevant] an unedited copy of the documents identified as falling within the scope of the request
- the FOI Act, in particular [insert section(s)]
- the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act to which agencies must have regard in performing a function or exercising a power under the FOI Act (FOI Guidelines), in particular paragraphs [insert] and [10.88] – [10.89]
- [if relevant] relevant case law, in particular [insert], and
- the parties' submissions.

Under s 54W of the FOI Act, the Information Commissioner may decide not to undertake a review, or not to continue to undertake a review, if the Information Commissioner is satisfied that the interests of the administration of the FOI Act make it desirable that the IC reviewable decision be considered by the Administrative Appeals Tribunal (AAT).

The effect of such a decision would be to finalise the IC review application and allow the applicant to apply directly to the AAT. The applicant would then have 28 days to lodge an application with the AAT in accordance with ordinary AAT processes.

The discretion of s 54W of the FOI Act may be exercised where the Information Commissioner is satisfied that the interests of the administration of the FOI Act make it desirable that the IC reviewable decision be considered directly by the AAT, rather than by the Information Commissioner first.

The Explanatory Memorandum to the Freedom of Information Amendment (Reform) Bill 2009 which created s 54W(b) states:

One of the reasons for retaining a right of review to the AAT is that, as an experienced review body, the AAT can properly deal with highly contested applications. This provision enables the Information Commissioner to decline to undertake a review if satisfied it would be more appropriate and efficient for the application to be made directly to the AAT.

This is also referred to in the Guidelines issued by the Australian Information Commissioner under s 93A (FOI Guidelines) at [10.88] – [10.89], which states:

The Information Commissioner can decline to undertake a review if satisfied 'that the interests of the administration of the [FOI] Act make it desirable' that the AAT consider the review application (s 54W(b)). It is intended that the Commissioner will resolve most applications. Circumstances in which the Commissioner may decide that it is desirable for the AAT to consider a matter instead of the Commissioner continuing with the IC review include:

- the IC review is linked to ongoing proceedings before the AAT or a court
- there is an apparent inconsistency between earlier IC review decisions and AAT decisions
- the IC review decision is likely to be taken on appeal to the AAT on a disputed issue of fact, and
- the FOI request under review is complex or voluminous, resolving the IC review matter would require substantial allocation of resources, and the matter could more appropriately be handled through procedures of the AAT.

The OAIC will consult the parties involved in a matter before making a decision under s 54W(b) to conclude an IC review.

The circumstances under which the Information Commissioner may consider it desirable that the AAT consider the review application, as outlined in the FOI Guidelines above, are not exhaustive. There will be circumstances that are not listed where the Information Commissioner may deem it desirable to refer the matter to the AAT.

The objects of the FOI Act provide that functions and powers under the FOI Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost.

Further, in accordance with these objects, paragraph [10.18] of the FOI Guidelines provides that IC reviews are intended to be a simple, practical and cost-efficient method of external merits review.

[If relevant, set out parties' submissions here and include consideration of these submissions]

I have considered the issues in this matter and I am satisfied that it is in the interests of the administration of the FOI Act that the IC reviewable decision be considered by the AAT because:

- [review and update as appropriate]
- the IC review is linked to ongoing proceedings in the AAT or a court
- there is an apparent inconsistency between earlier IC review decisions and AAT decisions
- the exemptions applied to the documents under s [x] of the FOI Act in this IC review are highly contested and there are a number of affected third parties who must be given a reasonable opportunity to present their case before a final decision is made (s 55(4)(b))
- the IC review decision is likely to be taken on appeal to the AAT on a disputed issue of fact
- the FOI request under review is complex or voluminous, resolving the IC review matter would require a substantial allocation of OAIC resources, and the matter could more appropriately be handled through the procedures of the AAT
- the OAIC is the primary decision-maker of the decision under review.

[Sample reasons]

- *It is linked to ongoing proceedings currently before the Administrative Appeals Tribunal. It is clear from the applicant's submissions in this IC review that they are seeking access to information about [provide details of proceedings].*
- *The FOI request under review is complex and voluminous and resolving this matter would require substantial allocation of OAIC resources. For example, the scope of this IC review extends to various exemptions including ss 22, 24A, 33, 42 and 47F of the FOI Act and requires consideration of 200 documents at issue.*
- *The exemption of s 33 of the FOI Act adds complexity to this matter because before the Information Commissioner can determine that a document is not an exempt document under s 33 of the FOI Act, she must first request the Inspector-General of Intelligence to appear and give evidence on the damage that would, or could reasonably be expected to be caused to the security or the Commonwealth, the defence of the Commonwealth*

or the international relations of the Commonwealth if access to the document were given in accordance with the request (s 55ZB of the FOI Act), and

- Further, in circumstances where there is a distinct possibility that, should the IC reviews continue, any IC review decision will be taken on appeal by either party to the AAT, I consider that it is desirable for the efficient administration of the FOI Act that the IC reviewable decisions are reviewed by the AAT at first instance. I also consider that such an approach is consistent with the objects of the FOI Act.

In deciding whether to exercise the discretion not to [undertake / continue to undertake] a review, I have considered:

- [review and update as appropriate]
- The Explanatory Memorandum to the Freedom of Information Amendment (Reform) Bill 2009 which created s 54W states: One of the reasons for retaining a right of review to the AAT is that, as an experienced review body, the AAT can properly deal with highly contested applications. This provision enables the Information Commissioner to decline to undertake a review if satisfied it would be more appropriate and efficient for the application to be made directly to the AAT.
- The objects of the FOI Act provide that functions and powers under the FOI Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost.
- In accordance with the objects of the FOI Act, paragraph [10.18] of the FOI Guidelines provides that IC reviews are intended to be a simple, practical and cost efficient method of external merit review.
- [Where the OAIC is the primary decision maker] The perceived conflict of interest in the Information Commissioner reviewing a decision made by their own agency.

For these reasons, as a delegate of the Information Commissioner, I have decided to exercise my discretion to decide not to [undertake / continue to undertake] a review of this IC review application under s 54W of the FOI Act. I confirm that this IC review is now closed.

Next steps

You now have 28 calendar days from the date of this notice to make an application for review of the relevant IC reviewable decision to the AAT in accordance with s 57A of the FOI Act.

If you would like to discuss this matter, please contact [name] on (02) [xxxx] [xxxx] or on [name]@oaic.gov.au. In all correspondence please quote [OAIC reference number].

Yours sincerely

[First Name Last Name]

[Position Title]

[date]

Review rights

Judicial review

You can apply to the Federal Court of Australia or the Federal Circuit Court for a review of a decision of the Information Commissioner if you think that a decision by the Information Commissioner not to review or not to continue to undertake review of your IC review application under the *Freedom of Information Act 1982* (the FOI Act) is not legally correct. You can make this application under the *Administrative Decisions (Judicial Review) Act 1977*.

The Court will not review the merits of your case but it may refer the matter back to the Information Commissioner for further consideration if it finds the decision was wrong in law or the Information Commissioner's powers were not exercised properly.

An application for review must be made to the Court within 28 days of the OAIC sending the decision or determination to you. You may wish to seek legal advice as the process can involve fees and costs. Please contact the Federal Court registry in your state or territory for more information, or visit the Federal Court website at <http://www.fedcourt.gov.au/>.

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If you believe you have been treated unfairly by the OAIC, you can make a complaint to the Commonwealth Ombudsman (the Ombudsman). The Ombudsman's services are free. The Ombudsman can investigate complaints about the administrative actions of Australian Government agencies to see if you have been treated unfairly.

If the Ombudsman finds your complaint is justified, the Ombudsman can recommend that the OAIC reconsider or change its action or decision or take any other action that the Ombudsman considers is appropriate. You can contact the Ombudsman's office for more information on 1300 362 072 or visit the Commonwealth Ombudsman's website at <http://www.ombudsman.gov.au>.

Accessing your information

If you would like access to the information that we hold about you, please contact FOIDR@oaic.gov.au. More information is available on the **Access our information**¹ page on our website.

¹ www.oaic.gov.au/about-us/access-our-information/.



Australian Government
Office of the Australian Information Commissioner

Our reference: [Insert reference number]
Agency reference: [Insert reference number]

[First Name Last Name]

[Company Name]

[Address Line 1]

[Address Line 2]

By email to: [insert]

[Insert name]’s application for Information Commissioner review of [agency/minister]’s decision

Dear [Mr/Ms Name]

I refer to an application made by [name] (the applicant) for Information Commissioner review (IC review) of a decision made by the [agency/minister] ([agency/minister shorthand]) on [date] under the *Freedom of Information Act 1982* (Cth) (the FOI Act).

The purpose of this letter is to advise you of my intention to recommend that the delegate of the Information Commissioner exercises the discretion to decide not to [undertake/continue to undertake] a review in this IC review under s 54W of the FOI Act, which would allow the applicant to seek review at the Administrative Appeals Tribunal (AAT).

I am writing to both parties in this review to offer them an opportunity to comment on this recommendation.

The reasons for my recommendation follow.

Background

On [date], the applicant applied to the [agency/minister] for access to:

[insert quote or for long requests, attach the FOI request].

[insert any details about revision to scope]

On [date], the [agency/minister] advised the applicant [insert details of decision in similar format to how it is set out in an IC review decision].

[if relevant, insert details of internal review application and decision]

On [date], the applicant sought IC review of the [agency/minister]’s decision under s 54L of the FOI Act.

[insert any other relevant background information]

Discretion not to [undertake/continue to undertake] an IC review

Under s 54W of the FOI Act, the Information Commissioner may decide not to undertake a review, or not to continue to undertake a review, if the Information Commissioner is satisfied



that the interests of the administration of the FOI Act make it desirable that the IC reviewable decision be considered by the Administrative Appeals Tribunal (AAT).

The effect of such a decision would be to finalise the IC review application and allow the applicant to apply directly to the AAT. The applicant would then have 28 days to lodge an application with the AAT in accordance with ordinary AAT processes.

The discretion of s 54W of the FOI Act may be exercised where the Information Commissioner is satisfied that the interests of the administration of the FOI Act make it desirable that the IC reviewable decision be considered directly by the AAT, rather than by the Information Commissioner first.

The Explanatory Memorandum to the Freedom of Information Amendment (Reform) Bill 2009 which created s 54W(b) states:

One of the reasons for retaining a right of review to the AAT is that, as an experienced review body, the AAT can properly deal with highly contested applications. This provision enables the Information Commissioner to decline to undertake a review if satisfied it would be more appropriate and efficient for the application to be made directly to the AAT.

This is also referred to in the Guidelines issued by the Australian Information Commissioner under s 93A (FOI Guidelines) at [10.88] – [10.89], which states:

The Information Commissioner can decline to undertake a review if satisfied 'that the interests of the administration of the [FOI] Act make it desirable' that the AAT consider the review application (s 54W(b)). It is intended that the Commissioner will resolve most applications. Circumstances in which the Commissioner may decide that it is desirable for the AAT to consider a matter instead of the Commissioner continuing with the IC review include:

- the IC review is linked to ongoing proceedings before the AAT or a court
- there is an apparent inconsistency between earlier IC review decisions and AAT decisions
- the IC review decision is likely to be taken on appeal to the AAT on a disputed issue of fact, and
- the FOI request under review is complex or voluminous, resolving the IC review matter would require substantial allocation of resources, and the matter could more appropriately be handled through procedures of the AAT.

The OAIC will consult the parties involved in a matter before making a decision under s 54W(b) to conclude an IC review.

The circumstances under which the Information Commissioner may consider it desirable that the AAT consider the review application, as outlined in the FOI Guidelines above, are not exhaustive. There will be circumstances that are not listed where the Information Commissioner may deem it desirable to refer the matter to the AAT.

The objects of the FOI Act provide that functions and powers under the FOI Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost.

Further, in accordance with these objects, paragraph [10.18] of the FOI Guidelines provides that IC reviews are intended to be a simple, practical and cost-efficient method of external merits review.

[insert reasons for recommendation]

[Sample reasons for recommendation]

In this IC review, it is apparent that:

1. It is linked to ongoing proceedings currently before the Administrative Appeals Tribunal. It is clear from the applicant's submissions in this IC review that they are seeking access to information about [provide details of proceedings].
2. The FOI request under review is complex and voluminous and resolving this matter would require substantial allocation of OAIC resources. For example, the scope of this IC review extends to various exemptions including ss 22, 24A, 33, 42 and 47F of the FOI Act and requires consideration of 200 documents at issue.
3. The exemption of s 33 of the FOI Act adds complexity to this matter because before the Information Commissioner can determine that a document is not an exempt document under s 33 of the FOI Act, she must first request the Inspector-General of Intelligence to appear and give evidence on the damage that would, or could reasonably be expected to be caused to the security or the Commonwealth, the defence of the Commonwealth or the international relations of the Commonwealth if access to the document were given in accordance with the request (s 55ZB of the FOI Act), and
4. Given the complexity of these IC reviews and the subject matter of the documents you seek, I consider that any IC review decision is likely to be taken on appeal to the AAT. In my preliminary view, this IC review could more appropriately be handled through the procedures of the AAT.

For these reasons, I intend to recommend to the delegate of the Information Commissioner that that they exercise the discretion not to [undertake/continue to undertake] a review of this IC review application under s 54W of the FOI Act, as I am of the view that it is in the interests of the administration of the FOI Act that this review be closed and the applicant be provided the opportunity of applying directly to the AAT for review.

The delegate of the Information Commissioner will review all material before the OAIC in deciding whether to exercise the discretion to decide not to [undertake/ continue to undertake] a review in this case.

Next steps

If the [agency/minister] disagrees with this proposed recommendation, please write to us by **[@ 2 weeks]** and provide reasons. These reasons will be taken into account before a decision is made on whether to finalise this matter under s 54W.

If I do not hear from the [agency/minister] by this date, this IC review application may be finalised under s 54W.

If you would like to discuss this matter, please contact me on (02) [xxxx] [xxxx] or on [name]@oaic.gov.au. In all correspondence please quote [OAIC reference number].

Yours sincerely

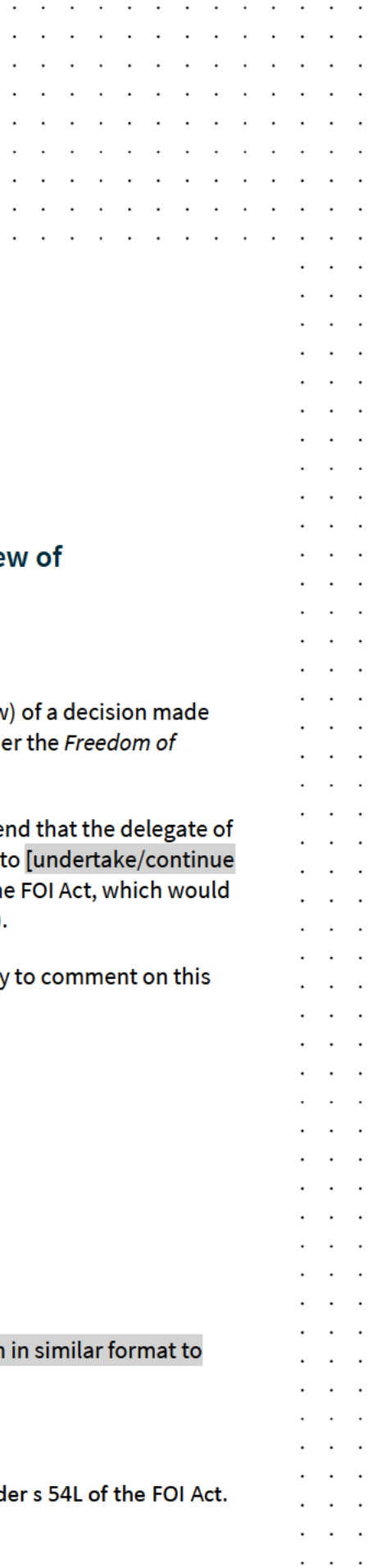
[First Name Last Name]

[Position Title]

[date]



Australian Government
Office of the Australian Information Commissioner



Our reference: [Insert reference number]
Agency reference: [Insert reference number]

[First Name Last Name]

[Company Name]
[Address Line 1]
[Address Line 2]

By email to: [insert]

Your application for Information Commissioner review of [agency/minister]'s decision

Dear [Mr/Ms Name]

I refer to your request for Information Commissioner review (IC review) of a decision made by the [agency/minister] ([agency/minister shorthand]) on [date] under the *Freedom of Information Act 1982* (Cth) (the FOI Act).

The purpose of this letter is to advise you of my intention to recommend that the delegate of the Information Commissioner exercises the discretion to decide not to [undertake/continue to undertake] a review of your IC review application under s 54W of the FOI Act, which would allow you to seek review at the Administrative Appeals Tribunal (AAT).

I am writing to both parties in this review to offer them an opportunity to comment on this recommendation.

The reasons for my recommendation follow.

Background

On [date], you applied to the [agency/minister] for access to:

[insert quote or for long requests, attach the FOI request].

[insert any details about revision to scope]

On [date], the [agency/minister] advised you [insert details of decision in similar format to how it is set out in an IC review decision].

[if relevant, insert details of internal review application and decision]

On [date], you sought IC review of the [agency/minister]'s decision under s 54L of the FOI Act.



[insert any other relevant background information]

Discretion not to [undertake/continue to undertake] an IC review

Under s 54W of the FOI Act, the Information Commissioner may decide not to undertake a review, or not to continue to undertake a review, if the Information Commissioner is satisfied that the interests of the administration of the FOI Act make it desirable that the IC reviewable decision be considered by the AAT.

The effect of such a decision would be to finalise your IC review application and allow you to apply directly to the AAT. You would then have 28 days to lodge an application with the AAT in accordance with ordinary AAT processes. AAT filing fees may apply.¹ I have attached further information regarding the application process and applicable fees for your reference. Please note that you may not be required to pay an application fee or may be eligible for a reduced application fee of \$100.

The discretion of s 54W of the FOI Act may be exercised where the Information Commissioner is satisfied that the interests of the administration of the FOI Act make it desirable that the IC reviewable decision be considered directly by the AAT, rather than by the Information Commissioner first.

The Explanatory Memorandum to the Freedom of Information Amendment (Reform) Bill 2009 which created s 54W(b) states:

One of the reasons for retaining a right of review to the AAT is that, as an experienced review body, the AAT can properly deal with highly contested applications. This provision enables the Information Commissioner to decline to undertake a review if satisfied it would be more appropriate and efficient for the application to be made directly to the AAT.

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The Information Commissioner can decline to undertake a review if satisfied ‘that the interests of the administration of the [FOI] Act make it desirable’ that the AAT consider the review application (s 54W(b)). It is intended that the Commissioner will resolve most applications. Circumstances in which the Commissioner may decide that it is desirable for the AAT to consider a matter instead of the Commissioner continuing with the IC review include:

- the IC review is linked to ongoing proceedings before the AAT or a court
- there is an apparent inconsistency between earlier IC review decisions and AAT decisions
- the IC review decision is likely to be taken on appeal to the AAT on a disputed issue of fact, and

¹ See, <https://www.aat.gov.au/apply-for-a-review/freedom-of-information-foi/fees>

- the FOI request under review is complex or voluminous, resolving the IC review matter would require substantial allocation of resources, and the matter could more appropriately be handled through procedures of the AAT.

The OAIC will consult the parties involved in a matter before making a decision under s 54W(b) to conclude an IC review.

The circumstances under which the Information Commissioner may consider it desirable that the AAT consider the review application, as outlined in the FOI Guidelines above, are not exhaustive. There will be circumstances that are not listed where the Information Commissioner may deem it desirable to refer the matter to the AAT.

The objects of the FOI Act provide that functions and powers under the FOI Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost.

Further, in accordance with these objects, paragraph [10.18] of the FOI Guidelines provides that IC reviews are intended to be a simple, practical and cost-efficient method of external merits review.

[insert reasons for recommendation]

[Sample reasons for recommendation]

In this IC review, it is apparent that:

1. It is linked to ongoing proceedings currently before the Administrative Appeals Tribunal. It is clear from your submissions in this IC review that you are seeking access to information about [provide details of proceedings].
2. The FOI request under review is complex and voluminous and resolving this matter would require substantial allocation of OAIC resources. For example, the scope of this IC review extends to various exemptions including ss 22, 24A, 33, 42 and 47F of the FOI Act and requires consideration of 200 documents at issue.
3. The exemption of s 33 of the FOI Act adds complexity to this matter because before the Information Commissioner can determine that a document is not an exempt document under s 33 of the FOI Act, she must first request the Inspector-General of Intelligence to appear and give evidence on the damage that would, or could reasonably be expected to be caused to the security or the Commonwealth, the defence of the Commonwealth or the international relations of the Commonwealth if access to the document were given in accordance with the request (s 55ZB of the FOI Act), and
4. Given the complexity of these IC reviews and the subject matter of the documents you seek, I consider that any IC review decision is likely to be taken on appeal to the

AAT. In my preliminary view, this IC review could more appropriately be handled through the procedures of the AAT.

For these reasons, I intend to recommend to the delegate of the Information Commissioner that they exercise the discretion not to [undertake/continue to undertake] a review of your IC review application under s 54W, as I am of the view that it is in the interests of the administration of the FOI Act that this review be closed and you be provided the opportunity of applying directly to the AAT for review.

The delegate of the Information Commissioner will review all material before the OAIC in deciding whether to exercise the discretion to decide not to [undertake/continue to undertake] a review in this case.

Next steps

If you disagree with this proposed recommendation, please write to us by [**@ 2 weeks**] and advise us of your reasons. Your reasons will be taken into account before a decision is made on whether to finalise this matter under s 54W.

If I do not hear from you by this date your IC review application may be finalised under s 54W and you will be notified of your review rights.

If you would like to discuss this matter, please contact me on (02) [xxxx] [xxxx] or on [name]@oaic.gov.au. In all correspondence please quote [OAIC reference number].

Yours sincerely

[First Name Last Name]

[Position Title]

[date]

Fee information on the AAT's website

22/05/2020

Fees | Administrative Appeals Tribunal

Fees

Do I need to pay an application fee?

An application fee must usually be paid when you apply for a review of a decision under the *Freedom of Information Act 1982*.

However, **no** fee is payable if the decision is about a document relating to a decision that does not attract a fee when a person applies to the AAT for a review of that type of decision. Decisions which do not attract a fee when applying to the AAT include:

- first review of Centrelink and child support decisions
- second review of Centrelink decisions (excluding Paid Parental Leave)
- Commonwealth workers compensation decisions under the *Safety Rehabilitation and Compensation Act 1988* or *Seafarers Rehabilitation and Compensation Act 1992*
- military compensation decisions under the *Military Rehabilitation and Compensation Act 2004*
- NDIS decisions under the *National Disability Insurance Scheme Act 2013*
- veterans' entitlement decisions under the *Veterans' Entitlements Act 1986*.

How much do I have to pay?

If you have to pay a fee, the standard application fee is **\$932**.

Can I pay a reduced fee?

Yes, a reduced fee of \$100 can be paid if:

- legal aid has been granted for the review
- you hold a health care card, pensioner concession card, Commonwealth seniors health card or other card that certifies entitlement to Commonwealth health concessions
- you are in prison, immigration detention or otherwise detained in a public institution
- you are under 18 years of age
- you receive Youth Allowance, Austudy or ABSTUDY Centrelink payments
- we decide payment of the application fee would cause you financial hardship.

You must give us evidence that you are eligible to pay a reduced fee.

To ask for a fee reduction under financial hardship you must fill in the [Request for fee reduction form](#). You should send us this form when you lodge the application.

What if I have more than one application for review?

If you make more than one application and we decide that they can be dealt with together, we can order that you only have to pay one fee.

You can ask us about paying a single fee when you lodge the applications.

When do I pay the fee?

You should pay the fee when you lodge the application. We will not start the review until you pay the fee.

22/05/2020

Fees | Administrative Appeals Tribunal

The application might be dismissed if you do not pay the fee within 6 weeks after lodging the application.

How do I pay the fee?

- EFTPOS
- credit card (MasterCard and Visa only)
- cheque
- money order
- cash.

Credit card payments can also be made by phone.

Can I receive a refund?

We will refund:

- the entire application fee if you were not required to pay it
- the difference between the fee you paid and \$100, if we decide you can pay the reduced fee
- the difference between the fee you paid and \$100, if the review is decided in your favour.

There is **no** refund if you paid the reduced fee of \$100.

ABN: 90 680 970 626

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Australian Government

Office of the Australian Information Commissioner

Decision not to [undertake/continue to undertake] an IC review under s 54W(b) of the *Freedom of Information Act 1982*

IC review applicant	
Respondent	
Decision date	
OAIC reference number	
Agency reference number	

Decision

1. I refer to the application made by (the applicant) for Information Commissioner review (IC review) of a decision made by the [agency] (Department) on [date] under the *Freedom of Information Act 1982* (Cth) (the FOI Act).
2. As a delegate of the Information Commissioner, I am authorised to make decisions under s 54W(b) of the FOI Act.
3. Under s 54W(b) of the FOI Act, I have decided not to [undertake/continue to undertake] an IC review on the basis that the interests of the administration of the FOI Act make it desirable that the IC reviewable decision be considered by the Administrative Appeals Tribunal (AAT). A copy of the IC reviewable decision is attached). The effect of my decision is to allow the applicant to apply directly to the AAT.

Background

4. The key procedural steps in this IC review are set out at **Attachment A**.
5. On [date], the OAIC review officer responsible for this matter, FOI - IC Reviews - Declines FOI - IC Reviews - Declines, wrote to the applicant and the Department to advise of their intention to recommend to the delegate of the Information Commissioner that this application for IC review be finalised under s 54W(b) of the FOI Act on the basis that it is in the interests of the administration of the FOI Act that the IC reviewable decision be considered by the AAT.

6. FOI - IC Reviews - Declines FOI - IC Reviews - Declines invited the parties to provide reasons if they disagreed with the proposed finalisation of this IC review by [date].
7. [if relevant] Based on the information before me, the OAIC has not received a response.
8. OR [insert details of response or that no response was received]

Discretion not to [undertake/continue to undertake] an IC review

9. Under s 54W(b) of the FOI Act, the Information Commissioner may decide not to undertake a review, or not to continue to undertake a review, if the Information Commissioner is satisfied that the interests of the administration of the FOI Act make it desirable that the IC reviewable decision be considered by the AAT.
10. The effect of such a decision would be to finalise this IC review application and allow the applicant to apply directly to the AAT. The applicant would then have 28 days to lodge an application with the AAT in accordance with ordinary AAT processes. AAT filing fees may apply.¹
11. The discretion in s 54W(b) of the FOI Act may be exercised where the Information Commissioner is satisfied that the interests of the administration of the FOI Act make it desirable that the IC reviewable decision be considered directly by the AAT, rather than initially by the Information Commissioner.
12. The Explanatory Memorandum to the Freedom of Information Amendment (Reform) Bill 2009 which created s 54W(b) states:

One of the reasons for retaining a right of review to the AAT is that, as an experienced review body, the AAT can properly deal with highly contested applications. This provision enables the Information Commissioner to decline to undertake a review if satisfied it would be more appropriate and efficient for the application to be made directly to the AAT.

13. This is also referred to in the Guidelines issued by the Australian Information Commissioner under s 93A (FOI Guidelines) at [10.88] – [10.89], which state:

The Information Commissioner can decline to undertake a review if satisfied ‘that the interests of the administration of the [FOI] Act make it desirable’ that the AAT consider the review application (s 54W(b)). It is intended that the Commissioner will resolve most applications. Circumstances in which the Commissioner may decide that it is desirable for the AAT to consider a matter instead of the Commissioner continuing with the IC review include:

- where the IC review is linked to ongoing proceedings before the AAT or a court

¹ <https://www.aat.gov.au/apply-for-a-review/freedom-of-information-foi/fees>

- where there is an apparent inconsistency between earlier IC review decisions and AAT decisions
- where, should the application progress to an IC review decision, the IC review decision is likely to be taken on appeal to the AAT on a disputed issue of fact
- where the FOI request under review is of a level of complexity that would be more appropriately handled through the procedures of the AAT
- where there may be a perceived or actual conflict of interest in the Commissioner undertaking review, including where:
 - the FOI request under review was made to, or decided by, the Information Commissioner or their delegate
 - the FOI request or material at issue relate to specific functions exercised by the Information Commissioner under the Privacy Act
 - the applicant has active matters in other forums, including the AAT or Federal Court and the Information Commissioner is the respondent
- where consideration by the AAT would further the objects of the FOI Act, particularly in relation to the performance and exercise of functions and powers given by the FOI Act to facilitate and promote public access to information, promptly and at the lowest reasonable cost (s 3(4)).

The OAIC will consult the parties involved in a matter before making a decision under s 54W(b) to conclude an IC review.

14. The circumstances in which the Information Commissioner may consider it desirable that the AAT consider the IC review application, as outlined in the FOI Guidelines above, are not exhaustive. There will be circumstances that are not listed where the Information Commissioner may deem it desirable to refer the matter to the AAT.
15. The objects of the FOI Act provide that functions and powers under the FOI Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost.
16. Further, in accordance with these objects, paragraph [10.18] of the FOI Guidelines provides that IC reviews are intended to be a simple, practical and cost-efficient method of external merits review.

Reasons for decision

17. [If relevant, set out parties' submissions here and include consideration of these submissions]
18. I have considered the issues in this matter and I am satisfied that it is in the interests of the administration of the FOI Act that the IC reviewable decision be considered by the AAT because:
 - [review and update as appropriate]

- the IC review is linked to ongoing proceedings in the AAT or a court
- there is an apparent inconsistency between earlier IC review decisions and AAT decisions
- the exemptions applied to the documents under s [x] of the FOI Act in this IC review are highly contested and there are a number of affected third parties who must be given a reasonable opportunity to present their case before a final decision is made (s 55(4)(b))
- the IC review decision is likely to be taken on appeal to the AAT on a disputed issue of fact
- the FOI request under review is complex or voluminous, resolving the IC review matter would require a substantial allocation of OAIC resources, and the matter could more appropriately be handled through the procedures of the AAT
- the OAIC is the primary decision-maker of the decision under review
- the material at issue relates to specific functions exercised by the Commissioner under the Privacy Act.

[Sample reasons]

- *It is linked to ongoing proceedings currently before the Administrative Appeals Tribunal. It is clear from the applicant's submissions in this IC review that the applicant is seeking access to information about [provide details of proceedings].*
- *The FOI request under review is complex and voluminous and resolving this matter would require substantial allocation of OAIC resources. For example, the scope of this IC review extends to various exemptions including ss 22, 24A, 33, 42 and 47F of the FOI Act and requires consideration of 200 documents at issue.*
- *The exemption of s 33 of the FOI Act adds complexity to this matter because before the Information Commissioner can determine that a document is not an exempt document under s 33 of the FOI Act, she must first request the Inspector-General of Intelligence to appear and give evidence on the damage that would, or could reasonably be expected to be caused to the security or the Commonwealth, the defence of the Commonwealth or the international relations of the Commonwealth if access to the document were given in accordance with the request (s 55ZB of the FOI Act), and*
- *Further, in circumstances where there is a distinct possibility that, should the IC review continue, any IC review decision will be taken on appeal by either party to the AAT, I consider that it is desirable for the efficient administration of the FOI Act that the IC reviewable decision is reviewed by the AAT at first instance. I also consider that such an approach is consistent with the objects of the FOI Act.*

19. In deciding whether to exercise the discretion not to [undertake / continue to undertake] a review, I have considered:

- [review and update as appropriate]

- The Explanatory Memorandum to the Freedom of Information Amendment (Reform) Bill 2009 which created s 54W(b) states: One of the reasons for retaining a right of review to the AAT is that, as an experienced review body, the AAT can properly deal with highly contested applications. This provision enables the Information Commissioner to decline to undertake a review if satisfied it would be more appropriate and efficient for the application to be made directly to the AAT.
 - The objects of the FOI Act provide that functions and powers under the FOI Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost.
 - In accordance with the objects of the FOI Act, paragraph [10.18] of the FOI Guidelines provides that IC reviews are intended to be a simple, practical and cost efficient method of external merit review.
 - [Where the OAIC is the primary decision maker] The perceived conflict of interest in the Information Commissioner reviewing a decision made by their own agency.
20. For these reasons, as a delegate of the Information Commissioner, I have decided to exercise my discretion to decide not to [undertake / continue to undertake] an IC review under s 54W(b) of the FOI Act. I confirm that this IC review is now closed.

Next steps

21. The applicant now has 28 calendar days from the date of this notice to make an application for review of the IC reviewable decision to the AAT in accordance with s 57A of the FOI Act.
22. If either party disagrees with my decision under s 54W(b) of the FOI Act, information about your review rights is set out below.

Yours sincerely

[Director Name]

[Director]

Freedom of information Branch

18 December 2023

ATTACHMENT A

Key procedural steps

Date	Events
[Date]	IC review application received
	Respondent agency notified under s 54Z
	Request for information issued under @
	Request for information due
	Information received
	Submissions provided to parties
	Revised decision

Review rights

Judicial review

You can apply to the Federal Court of Australia or the Federal Circuit Court for a review of a decision of the Information Commissioner if you think that a decision by the Information Commissioner not to review or not to continue to undertake review of this IC review application under the *Freedom of Information Act 1982* (the FOI Act) is not legally correct. You can make this application under the *Administrative Decisions (Judicial Review) Act 1977*.

The Court will not review the merits of your case but it may refer the matter back to the Information Commissioner for further consideration if it finds the decision was wrong in law or the Information Commissioner's powers were not exercised properly.

An application for review must be made to the Court within 28 days of the OAIC sending the decision or determination to you. You may wish to seek legal advice as the process can involve fees and costs. Please contact the Federal Court registry in your state or territory for more information, or visit the Federal Court website at <http://www.fedcourt.gov.au/>.

Making a complaint to the Commonwealth Ombudsman

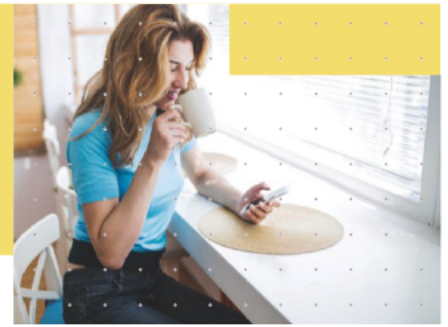
If you believe you have been treated unfairly by the OAIC, you can make a complaint to the Commonwealth Ombudsman (the Ombudsman). The Ombudsman's services are free. The Ombudsman can investigate complaints about the administrative actions of Australian Government agencies to see if you have been treated unfairly.

If the Ombudsman finds your complaint is justified, the Ombudsman can recommend that the OAIC reconsider or change its action or decision or take any other action that the Ombudsman considers is appropriate. You can contact the Ombudsman's office for more information on 1300 362 072 or visit the Commonwealth Ombudsman's website at <http://www.ombudsman.gov.au>.

Accessing your information

If you would like access to the information that we hold about you, please contact FOIDR@oaic.gov.au. More information is available on the **Access our information**² page on our website.

² www.oaic.gov.au/about-us/access-our-information/.



June 2023

Conducting an IC review: Intention to decline (s 54W) checklist

Introduction

This checklist provides general guidance to review officers to assist with drafting intention to decline (ITD) letters where consideration is being given to finalising a matter under [s 54W](#) of the FOI Act and should be read alongside [Part 10 of the FOI Guidelines](#), in particular [10.85] – [10.90].

Under [s 54W](#) of the FOI Act, the Information Commissioner has the power to decide not to undertake an IC review, or not to continue to undertake an IC review, if:

- the IC review application is frivolous, vexatious, misconceived, lacking in substance or not made in good faith ([s 54W\(a\)\(i\)](#));
- the IC review applicant has failed to cooperate in progressing the IC review application, or the IC review, without reasonable excuse ([s 54W\(a\)\(ii\)](#));
- the Information Commissioner cannot contact the IC review applicant after making reasonable attempts ([s 54W\(a\)\(iii\)](#));
- the Information Commissioner is satisfied that the interests of the administration of the FOI Act make it desirable that the IC reviewable decision be considered by the AAT ([s 54W\(b\)](#)); or
- the IC review applicant fails to comply with a direction of the Information Commissioner ([s 54W\(c\)](#)).

Under the Information Commissioner's [instrument of delegation](#) and the Freedom of Information team's clearance process, the powers under [s 54W](#) of the FOI Act are delegated to the Director level. The Commissioner therefore does not have to personally decide whether a matter should be finalised under [s 54W](#).

Before drafting an ITD

- Before drafting an ITD, discuss with your supervisor why you think an ITD is appropriate in the circumstances and seek their approval that this course of action is appropriate. Bear in mind that where a matter is finalised under [ss 54W\(a\) or \(c\)](#), the applicant will have no further right to merit review of the agency/minister's decision.
- After an ITD has been provided, the delegate of the Information Commissioner will consider whether the applicant (and agency in the case of [s 54W\(b\)](#) ITDs) have been

given a reasonable opportunity to comment on the issues in the IC review before making a decision on whether to finalise the matter under [s 54W](#). It is therefore important that the ITD is accurate, evidence-based and covers all of the issues in the IC review. If you do not have enough information to provide an ITD on the merits of the IC review application under [s 54W\(a\)\(i\)](#), you should seek further submissions from the parties.

Drafting an ITD

General templates for intention to decline letters (ITD) are available on Resolve.

Important points to remember:

- References to the legislation and FOI Guidelines must be correct. Be very careful if paraphrasing legislation to ensure it is accurate: where possible, use the wording in the FOI Guidelines or previous IC review decisions if you want to simplify a concept or legal test.
- An ITD should use plain language. Refer to the [OAIC quick reference style guide](#) for citing cases and legislation, punctuation and grammar.
- An ITD should be easy to read and understand:
 - use appropriate headings to introduce topics
 - avoid long sentences/paragraphs
 - do not include irrelevant information
 - consider referring to an attachment of the FOI request/submissions if they are lengthy to quote.
- It is important to tailor the ITD to the level of FOI knowledge of the applicant (and agency in the case of a [s 54W\(b\)](#) ITD).
- Consider and refer to OAIC resources, including:
 - the relevant paragraphs of the FOI Guidelines, and
 - recent Federal Court, AAT and IC review decisions on relevant issues considered/cited/distinguished if necessary.
- Do not disclose confidential submissions or content of exempt material (except as described in the agency/minister's decision or in non-confidential submissions).

Clearance of ITD

- The draft ITD must be sent to your supervisor for clearance.
- The version you send up for clearance should be ready to send out subject to any comments about the content made by your supervisor. Carefully proofread the ITD for accuracy, spelling mistakes, formatting and relevance before sending it up for clearance.
- Save draft ITD on Resolve.
- Allocate a Resolve task to your supervisor for clearance, noting any particular issues for discussion.

Before sending the ITD

- Once the draft ITD has been approved, consider calling the applicant (and agency in the case of a [s 54W\(b\)](#) ITD) to discuss the steps you have taken to form your view on the IC review application, including review of the parties' submissions the relevant law and previous IC review decisions. Explain the purpose of the ITD letter and the timeframe for a response.



Updated June 2023

Conducting IC review: Assessments

This worksheet provides guidance to assist with assessing IC review applications. This worksheet should be read in conjunction with the FOI Guidelines and other guidance material, including the IC review case categories ([D2020/000377](#)) and Identification of Systemic and Significant Issues worksheets: [D2019/001898](#).

Preliminary assessments

Once an IC review application has been registered and assessed for validity, it proceeds to preliminary assessment ('FOI – Assessment' queue).

Preliminary assessment involves a review of:

- the FOI request
- the decision under review
- the applicant's reasons for review
- any responses to preliminary requests for information, including submissions
- assigning a case category.

The preliminary assessment will need to be included within the Summary field and the 'Decide Path' Action and summarised in the 'Assessor's note field'.

The preliminary assessment will typically address the following issues and/or include the following information:

- Assigning a case category
- Whether the application was out of time and a decision has been made to allow the applicant to make an application
- Whether internal review request was lodged following IC review application
- Whether there has been a request for expedition and/or a hearing
- Whether the application relates to an ongoing complaint or recommendation case
- Whether it relates to an existing vexatious applicant declaration or to an ongoing vexatious applicant declaration request
- Whether further information is required
- Whether agreement should be explored under s 55F
- Whether the application should be declined under s 54W(a)
- Whether the application should be declined under s 54W(b) in line with part [10.88] of the FOI Guidelines, in particular:
 - Where the application is linked to ongoing proceedings in the AAT or Federal Court and should be declined under s 54W(b)

- the FOI request or material at issue relate to specific functions exercised by the Information Commissioner under the Privacy Act
- Where the application is associated with cohorts which have previously been identified as desirable for the AAT to consider instead of the Commissioner continuing with the IC review
- Where the application is assessed as a category [cat 4] and [cat 5.4] under the IC review case categories worksheet at TRIM Link [D2020/000377](#).
- In an access refusal matter, whether the agency or minister has discharged onus of establishing that its decision is justified or that the Commissioner should give a decision adverse to the FOI applicant
- In access grant matter, whether the IC review applicant has discharged onus of establishing that a decision refusing the request is justified or that the Commissioner should give a decision adverse to the FOI applicant
- Whether to commence review as set out in paragraph [10.188] of the FOI Guidelines and if so,
 - what the letters to the parties should include:
 - The letter to the applicant ordinarily confirms the scope of the review and may also seek further information.
 - The letter to the respondent ordinarily requests the processing documentation, material at issue and submissions, and in some circumstances, a preliminary view on the issues/exemptions raised
 - relevant precedents for the Intake/Early Resolution team or the Review Adviser to consider
- Whether the matter raises significant or systemic issues
- Whether the matter relates to an existing or previous application for IC review
- The status of any related matter and a comment on how the IC review should be progressed in light of the related matter
- Whether guidance for review advisers can only be provided following receipt of documents at issue and whether scope of review can be narrowed
- The Assessor's initials and date the assessment was undertaken.

Attachment A sets out particular guidance on specific issues under review.

Attachment B sets out sample summaries.

Attachment C sets out sample assessor notes for common issues.

Attachment A: Issues and considerations

The table below sets out specific issues in IC review applications and the considerations which should be undertaken in assessing how the case should be managed.

Issues	Considerations
OAIC is the Respondent	<ul style="list-style-type: none"> Whether the application should be declined under s 54W(b) Sample assessment: <i>It is the Information Commissioner's view that it will usually not be in the interests of the administration of the FOI Act to conduct an IC review of a decision, or an internal review decision, made by the agency that the Information Commissioner heads: the OAIC.</i> <i>Please proceed to draft an intent to decline to the applicant under s 54W(b) and send a copy of the decline separately to the FOI decision maker at the OAIC copied to the Legal Services at legal@oaic.gov.au. Please invite a response from the Legal Services team to the s 54W(b) proposal within 2 weeks, noting that in the absence of a response we will assume it has no objections to the proposal.</i>
Applicant requests expedition of IC review application	<ul style="list-style-type: none"> Sample assessment: <i>Applicant requests to have the application expedited. Contact Respondent to seek their comments, including whether the Respondent is able to make a revised decision under s 55G of the FOI Act and request a response by [insert 2 weeks],</i>
Applicant requests matter to be finalised under s 54W(b)	<ul style="list-style-type: none"> Sample assessment: <i>Applicant seeks to have the matter finalised under s 54W(b). Contact Respondent to seek their comments and request a response by [insert 2 weeks].</i>

Attachment B

Case Summary field

**Current template

Summary

deemed refusal [or affirmed] on XX*. FOI request [or internal review request] made XX

Request:

Decision under review: original decision dated @.

[Exemptions use]: @ document/s found within scope of request, released/exempt in full/part under exemption/s @.

[Searches use]: No document/s found within scope of request. Access refused under s 24A (insert relevant subsection if known).

[Practical refusal use]: @ document/s found within scope of request. (Insert @ hours to process, decision making etc. any key points)

[Charges use]: \$@ (insert calculation)

Number of documents at issue: @ (delete if not applicable)

Scope of review: Applicant seeks review of [Practical refusal/Exemptions ss @/Searches]. Applicant states (insert any key statements that allude to applicant's scope of request. If not known request in acknowledgement).

Notes for assessor:

Attachment C

New Assessor notes:

All matters generally:

Post triage notes: Commence review & send opening letters:

Opening letter to A: Standard opening email.

Opening letter to R: Request information outlined in paragraph 10.100 of the Guidelines that relate to this review- [include issue, e.g. exemptions under xxx / searches etc].

Practical refusal matters:

Post triage notes: Commence review & send opening letters:

Opening letter to A: Standard opening email.

Opening letter to R: Request information outlined in paragraph 10.100 of the Guidelines that relate to this review: Access refusal – Practical refusal (Part III, 24A). Please also include the following advice:

At any stage during an IC review, the Information Commissioner may resolve an application in whole or in part by giving effect to an agreement between the parties (s 55F). Therefore in your response, please notify the OAIC whether you wish to propose a revised scope for the applicant's consideration, for the purpose of attempting resolution under s 55F agreement.



Australian Government

Office of the Australian Information Commissioner

Decision not to undertake an IC review under s 54W(b) of the *Freedom of Information Act 1982*

IC review applicant	s 22
Respondent	IP Australia
Decision date	23 November 2023
OAIC reference number	s 22
Agency reference number	n/a

Decision

1. I refer to the application made by s 22 (the applicant) for Information Commissioner review (IC review) of an internal review decision made by IP Australia (the respondent) on 7 August 2023 under the *Freedom of Information Act 1982* (Cth) (the FOI Act).
2. As a delegate of the Information Commissioner, I am authorised to make decisions under s 54W(b) of the FOI Act.
3. Under s 54W(b) of the FOI Act, I have decided not to undertake an IC review on the basis that the interests of the administration of the FOI Act make it desirable that the IC reviewable decision be considered by the Administrative Appeals Tribunal (AAT). The effect of my decision is to allow the applicant to apply directly to the AAT.

Background

4. The key procedural steps in this IC review are set out at **Attachment A**.
5. On 16 October 2023, Ms Dianne Abdo of the OAIC wrote to the respondent to advise of her intention to recommend to the delegate of the Information Commissioner that this application for IC review be finalised under s 54W(b) of the FOI Act on the basis that it is in the interests of the administration of the FOI Act that the IC reviewable decision be considered by the AAT.
6. On 16 October 2023, Ms Dianne Abdo of the OAIC wrote to the applicant to advise of her intention to recommend to the delegate of the Information Commissioner that this application for IC review be finalised under s 54W(b) of the FOI Act on the

basis that it is in the interests of the administration of the FOI Act that the IC reviewable decision be considered by the AAT.

7. On 27 October 2023, the applicant provided submissions to the OAIC as to why the application for IC review should not be finalised under s 54W(b) which I have taken into consideration, particularly their objection to the referral on the basis that AAT filing will cost ‘approximately \$1,000’.
8. No response has been received from the respondent regarding this proposed IC review finalisation.

Discretion not to undertake an IC review

9. Under s 54W(b) of the FOI Act, the Information Commissioner may decide not to undertake a review, or not to continue to undertake a review, if the Information Commissioner is satisfied that the interests of the administration of the FOI Act make it desirable that the IC reviewable decision be considered by the AAT.
10. The effect of such a decision would be to finalise this IC review application and allow the applicant to apply directly to the AAT. The applicant would then have 28 days to lodge an application with the AAT in accordance with ordinary AAT processes. AAT filing fees may apply.¹
11. The discretion in s 54W(b) of the FOI Act may be exercised where the Information Commissioner is satisfied that the interests of the administration of the FOI Act make it desirable that the IC reviewable decision be considered directly by the AAT, rather than initially by the Information Commissioner.
12. The Explanatory Memorandum to the Freedom of Information Amendment (Reform) Bill 2009 which created s 54W(b) states:

One of the reasons for retaining a right of review to the AAT is that, as an experienced review body, the AAT can properly deal with highly contested applications. This provision enables the Information Commissioner to decline to undertake a review if satisfied it would be more appropriate and efficient for the application to be made directly to the AAT.

13. This is also referred to in the Guidelines issued by the Australian Information Commissioner under s 93A (FOI Guidelines) at [10.88] – [10.89], which state:

The Information Commissioner can decline to undertake a review if satisfied ‘that the interests of the administration of the [FOI] Act make it desirable’ that the AAT consider the review application (s 54W(b)). It is intended that the Commissioner will resolve most

¹ <https://www.aat.gov.au/apply-for-a-review/freedom-of-information-foi/fees>

applications. Circumstances in which the Commissioner may decide that it is desirable for the AAT to consider a matter instead of the Commissioner continuing with the IC review include:

- where the IC review is linked to ongoing proceedings before the AAT or a court
- where there is an apparent inconsistency between earlier IC review decisions and AAT decisions
- where, should the application progress to an IC review decision, the IC review decision is likely to be taken on appeal to the AAT on a disputed issue of fact
- where the FOI request under review is of a level of complexity that would be more appropriately handled through the procedures of the AAT
- where there may be a perceived or actual conflict of interest in the Commissioner undertaking review, including where:
 - a) the FOI request under review was made to, or decided by, the Information Commissioner or their delegate
 - b) the FOI request or material at issue relate to specific functions exercised by the Information Commissioner under the Privacy Act
 - c) the applicant has active matters in other forums, including the AAT or Federal Court and the Information Commissioner is the respondent
- where consideration by the AAT would further the objects of the FOI Act, particularly in relation to the performance and exercise of functions and powers given by the FOI Act to facilitate and promote public access to information, promptly and at the lowest reasonable cost (s 3(4)).

The OAIC will consult the parties involved in a matter before making a decision under s 54W(b) to conclude an IC review.

14. The circumstances in which the Information Commissioner may consider it desirable that the AAT consider the IC review application, as outlined in the FOI Guidelines above, are not exhaustive. There will be circumstances that are not listed where the Information Commissioner may deem it desirable to refer the matter to the AAT.
15. The objects of the FOI Act provide that functions and powers under the FOI Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost.
16. Further, in accordance with these objects, paragraph [10.18] of the FOI Guidelines provides that IC reviews are intended to be a simple, practical and cost-efficient method of external merits review.

Reasons for decision

17. I have considered the issues in this matter and I am satisfied that it is in the interests of the administration of the FOI Act that the IC reviewable decision be considered by the AAT because:

- The FOI decision under review relates to business information and is of a level of complexity and sensitivity that would be more appropriately handled through the procedures of the AAT.
- The IC review decision is likely to be taken on appeal to the AAT on a disputed issue of fact.

18. In deciding whether to exercise the discretion not to undertake a review, I have considered:

- Guidelines issued by the Australian Information Commissioner under s 93A (FOI Guidelines) at [10.88] – [10.89], which state the Commissioner may decide that it is desirable for the AAT to consider a matter instead of the Commissioner continuing with the IC review where the IC review is linked to ongoing proceedings before the AAT or a court
- The Explanatory Memorandum to the Freedom of Information Amendment (Reform) Bill 2009 which created s 54W(b) states: One of the reasons for retaining a right of review to the AAT is that, as an experienced review body, the AAT can properly deal with highly contested applications. This provision enables the Information Commissioner to decline to undertake a review if satisfied it would be more appropriate and efficient for the application to be made directly to the AAT.
- The objects of the FOI Act provide that functions and powers under the FOI Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost.
- In accordance with the objects of the FOI Act, paragraph [10.18] of the FOI Guidelines provides that IC reviews are intended to be a simple, practical and cost-efficient method of external merit review.
- The applicant's objections to this proposed finalisation.

19. For these reasons, as a delegate of the Information Commissioner, I have decided to exercise my discretion to decide not to undertake an IC review under s 54W(b) of the FOI Act. I confirm that this IC review is now closed.

Next steps

20. The applicant now has 28 calendar days from the date of this notice to make an application for review of the IC reviewable decision to the AAT in accordance with s 57A of the FOI Act.
21. If either party disagrees with my decision under s 54W(b) of the FOI Act, information about your review rights is set out below.

Yours sincerely



Heath Baker

Director
Freedom of information Branch

23 November 2023

ATTACHMENT A

Key procedural steps

Date	Events
28 April 2023	The FOI requester made an FOI request to the respondent for documents in relation to trademark number s 22 .
2 May 2023	The applicant was consulted about the possible release of these documents.
16 May 2023	Submissions were received by the respondent from the applicant in support of exemption provisions under the Act.
6 June 2023	The respondent indicated to the applicant the intention to grant access in part to the FOI requester.
6 July 2023	The applicant requested an internal review.
7 August 2023	The respondent made an internal review decision varying the initial decision.
6 September 2023	Applicant requested IC review of the internal review decision.
8 September 2023	OIAC commenced an IC review
16 October 2023	Ms Dianne Abdo of the OAIC wrote to the respondent and to the applicant to advise of her intention to recommend to the delegate of the Information Commissioner that this application for IC review be finalised under s 54W(b) of the FOI Act on the basis that it is in the interests of the administration of the FOI Act that the IC reviewable decision be considered by the AAT. A response was requested by 30 October 2023.
27 October 2023	The applicant provided a response to the intention to recommend to the delegate of the Information Commissioner to finalise this matter under s 54W(b) of the FOI act.

Review rights

Judicial review

You can apply to the Federal Court of Australia or the Federal Circuit Court for a review of a decision of the Information Commissioner if you think that a decision by the Information Commissioner not to review or not to continue to undertake review of this IC review application under the *Freedom of Information Act 1982* (the FOI Act) is not legally correct. You can make this application under the *Administrative Decisions (Judicial Review) Act 1977*.

The Court will not review the merits of your case but it may refer the matter back to the Information Commissioner for further consideration if it finds the decision was wrong in law or the Information Commissioner's powers were not exercised properly.

An application for review must be made to the Court within 28 days of the OAIC sending the decision or determination to you. You may wish to seek legal advice as the process can involve fees and costs. Please contact the Federal Court registry in your state or territory for more information, or visit the Federal Court website at <http://www.fedcourt.gov.au/>.

Making a complaint to the Commonwealth Ombudsman

If you believe you have been treated unfairly by the OAIC, you can make a complaint to the Commonwealth Ombudsman (the Ombudsman). The Ombudsman's services are free. The Ombudsman can investigate complaints about the administrative actions of Australian Government agencies to see if you have been treated unfairly.

If the Ombudsman finds your complaint is justified, the Ombudsman can recommend that the OAIC reconsider or change its action or decision or take any other action that the Ombudsman considers is appropriate. You can contact the Ombudsman's office for more information on 1300 362 072 or visit the Commonwealth Ombudsman's website at <http://www.ombudsman.gov.au>.

Accessing your information

If you would like access to the information that we hold about you, please contact FOIDR@oaic.gov.au. More information is available on the **Access our information**² page on our website.

² www.oaic.gov.au/about-us/access-our-information/.



Decision not to undertake an IC review under s 54W(b) of the *Freedom of Information Act 1982*

IC review applicant	s 22
Respondent	Department of Health and Aged Care
Decision date	23 November 2023
OAIC reference number	s 22
Agency reference number	s 22

Decision

1. I refer to the application made by s 22 (the applicant) for Information Commissioner review (IC review) of a decision made by the Department of Health and Aged Care (the Department) on 31 March 2022 under the *Freedom of Information Act 1982* (Cth) (the FOI Act).
2. As a delegate of the Information Commissioner, I am authorised to make decisions under s 54W(b) of the FOI Act.
3. Under s 54W(b) of the FOI Act, I have decided not to undertake an IC review on the basis that the interests of the administration of the FOI Act make it desirable that the IC reviewable decision be considered by the Administrative Appeals Tribunal (AAT). A copy of the IC reviewable decision is attached). The effect of my decision is to allow the applicant to apply directly to the AAT.

Background

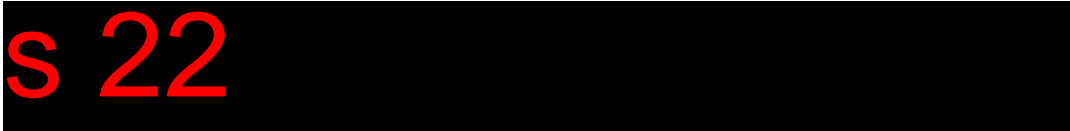
4. The key procedural steps in this IC review are set out at **Attachment A**.
5. On 14 July 2023, the OAIC review officer responsible for this matter, Alistair Boyd, wrote to the applicant and the the Department to advise of their intention to recommend to the delegate of the Information Commissioner that this application for IC review be finalised under s 54W(b) of the FOI Act on the basis that it is in the interests of the administration of the FOI Act that the IC reviewable decision be considered by the AAT.



6. Alistair Boyd invited the parties to provide reasons if they disagreed with the proposed finalisation of this IC review by 4 August 2023.
7. The OAIC received submissions from the Department on 3 August 2023 advising:



8. On 30 October 2023 the Applicant responded to the OAIC's request for submissions with:



Discretion not to undertake an IC review

9. Under s 54W(b) of the FOI Act, the Information Commissioner may decide not to undertake a review, or not to continue to undertake a review, if the Information Commissioner is satisfied that the interests of the administration of the FOI Act make it desirable that the IC reviewable decision be considered by the AAT.
10. The effect of such a decision would be to finalise this IC review application and allow the applicant to apply directly to the AAT. The applicant would then have 28 days to lodge an application with the AAT in accordance with ordinary AAT processes. AAT filing fees may apply.¹

¹ <https://www.aat.gov.au/apply-for-a-review/freedom-of-information-foi/fees>

11. The discretion in s 54W(b) of the FOI Act may be exercised where the Information Commissioner is satisfied that the interests of the administration of the FOI Act make it desirable that the IC reviewable decision be considered directly by the AAT, rather than initially by the Information Commissioner.
12. The Explanatory Memorandum to the Freedom of Information Amendment (Reform) Bill 2009 which created s 54W(b) states:

One of the reasons for retaining a right of review to the AAT is that, as an experienced review body, the AAT can properly deal with highly contested applications. This provision enables the Information Commissioner to decline to undertake a review if satisfied it would be more appropriate and efficient for the application to be made directly to the AAT.

13. This is also referred to in the Guidelines issued by the Australian Information Commissioner under s 93A (FOI Guidelines) at [10.88] – [10.89], which state:

The Information Commissioner can decline to undertake a review if satisfied ‘that the interests of the administration of the [FOI] Act make it desirable’ that the AAT consider the review application (s 54W(b)). It is intended that the Commissioner will resolve most applications. Circumstances in which the Commissioner may decide that it is desirable for the AAT to consider a matter instead of the Commissioner continuing with the IC review include:

- where the IC review is linked to ongoing proceedings before the AAT or a court
- where there is an apparent inconsistency between earlier IC review decisions and AAT decisions
- where, should the application progress to an IC review decision, the IC review decision is likely to be taken on appeal to the AAT on a disputed issue of fact
- where the FOI request under review is of a level of complexity that would be more appropriately handled through the procedures of the AAT
- where there may be a perceived or actual conflict of interest in the Commissioner undertaking review, including where:
 - the FOI request under review was made to, or decided by, the Information Commissioner or their delegate
 - the FOI request or material at issue relate to specific functions exercised by the Information Commissioner under the Privacy Act
 - the applicant has active matters in other forums, including the AAT or Federal Court and the Information Commissioner is the respondent
- where consideration by the AAT would further the objects of the FOI Act, particularly in relation to the performance and exercise of functions and powers given by the FOI Act to facilitate and promote public access to information, promptly and at the lowest reasonable cost (s 3(4)).

The OAIC will consult the parties involved in a matter before making a decision under s 54W(b) to conclude an IC review.

14. The circumstances in which the Information Commissioner may consider it desirable that the AAT consider the IC review application, as outlined in the FOI

Guidelines above, are not exhaustive. There will be circumstances that are not listed where the Information Commissioner may deem it desirable to refer the matter to the AAT.

15. The objects of the FOI Act provide that functions and powers under the FOI Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost.
16. Further, in accordance with these objects, paragraph [10.18] of the FOI Guidelines provides that IC reviews are intended to be a simple, practical and cost-efficient method of external merits review.

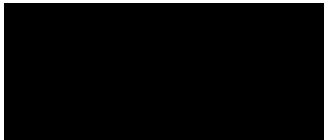
Reasons for decision

17. I have considered the issues in this matter and I am satisfied that it is in the interests of the administration of the FOI Act that the IC reviewable decision be considered by the AAT because:
 - the FOI request under review is complex or voluminous, and the matter could more appropriately be handled through the procedures of the AAT
 - there is a distinct possibility that, should the IC review continue, any IC review decision will be taken on appeal by either party to the AAT. I consider that it is desirable for the efficient administration of the FOI Act that the IC reviewable decision is reviewed by the AAT at first instance
 - given this, it is likely the matter will be resolved more quickly by referring the matter to the AAT now.
18. In deciding whether to exercise the discretion not to undertake a review, I have considered:
 - the parties' submissions, summarised in paragraphs 7 and 8
 - the Explanatory Memorandum to the Freedom of Information Amendment (Reform) Bill 2009 which created s 54W(b) states: One of the reasons for retaining a right of review to the AAT is that, as an experienced review body, the AAT can properly deal with highly contested applications. This provision enables the Information Commissioner to decline to undertake a review if satisfied it would be more appropriate and efficient for the application to be made directly to the AAT
 - the objects of the FOI Act provide that functions and powers under the FOI Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost.
19. For these reasons, as a delegate of the Information Commissioner, I have decided to exercise my discretion to decide not to undertake an IC review under s 54W(b) of the FOI Act. I confirm that this IC review is now closed.

Next steps

20. The applicant now has 28 calendar days from the date of this notice to make an application for review of the IC reviewable decision to the AAT in accordance with s 57A of the FOI Act.
21. If either party disagrees with my decision under s 54W(b) of the FOI Act, information about your review rights is set out below.

Yours sincerely



Heath Baker
Director
Freedom of information Branch

23 November 2023

ATTACHMENT A

Key procedural steps

Date	Events
9/11/2020	IC review application received
26/3/2020	Department notified under s 54Z
28/3/2022	Revised scope of request agreed by parties
31/3/2022	Department made s 55G revised decision
8/05/2022	Submissions received from the applicant
9/1/2023	Information requested from the Department
21/2/2023	Information received from the Department
3/03/2023	Submissions received from the Department
14/07/2023	s 54W(b) Intention to Decline (ITD) issued to applicant and respondent
03/08/2023	Response to s 54W(b) ITD received from respondent
30/10/2023	Response to 54W(b) ITD received from applicant

Review rights

Judicial review

You can apply to the Federal Court of Australia or the Federal Circuit Court for a review of a decision of the Information Commissioner if you think that a decision by the Information Commissioner not to review or not to continue to undertake review of this IC review application under the *Freedom of Information Act 1982* (the FOI Act) is not legally correct. You can make this application under the *Administrative Decisions (Judicial Review) Act 1977*.

The Court will not review the merits of your case but it may refer the matter back to the Information Commissioner for further consideration if it finds the decision was wrong in law or the Information Commissioner's powers were not exercised properly.

An application for review must be made to the Court within 28 days of the OAIC sending the decision or determination to you. You may wish to seek legal advice as the process can involve fees and costs. Please contact the Federal Court registry in your state or territory for more information, or visit the Federal Court website at <http://www.fedcourt.gov.au/>.

Making a complaint to the Commonwealth Ombudsman

If you believe you have been treated unfairly by the OAIC, you can make a complaint to the Commonwealth Ombudsman (the Ombudsman). The Ombudsman's services are free. The Ombudsman can investigate complaints about the administrative actions of Australian Government agencies to see if you have been treated unfairly.

If the Ombudsman finds your complaint is justified, the Ombudsman can recommend that the OAIC reconsider or change its action or decision or take any other action that the Ombudsman considers is appropriate. You can contact the Ombudsman's office for more information on 1300 362 072 or visit the Commonwealth Ombudsman's website at <http://www.ombudsman.gov.au>.

Accessing your information

If you would like access to the information that we hold about you, please contact FOIDR@oaic.gov.au. More information is available on the **Access our information**² page on our website.

² www.oaic.gov.au/about-us/access-our-information/.



Decision not to undertake an IC review under s 54W(b) of the *Freedom of Information Act 1982*

IC review applicant	s 22
Respondent	Office of the Australian Information Commissioner
Decision date	23 November 2023
OAIC reference number	s 22
Agency reference number	s 22

Decision

1. I refer to the application made by s 22 (the applicant) for Information Commissioner review (IC review) of a decision made by the Office of the Australian Information Commissioner (the OAIC) on 6 September 2023 under the *Freedom of Information Act 1982* (Cth) (the FOI Act).
2. As a delegate of the Information Commissioner, I am authorised to make decisions under s 54W(b) of the FOI Act.
3. Under s 54W(b) of the FOI Act, I have decided not to undertake an IC review on the basis that the interests of the administration of the FOI Act make it desirable that the IC reviewable decision be considered by the Administrative Appeals Tribunal (AAT). A copy of the IC reviewable decision is attached). The effect of my decision is to allow the applicant to apply directly to the AAT.

Background

4. The key procedural steps in this IC review are set out at **Attachment A**.
5. On 6 September 2023, the applicant requested this application for IC review be finalised under s 54W(b) of the FOI Act.

Discretion not to undertake an IC review

6. Under s 54W(b) of the FOI Act, the Information Commissioner may decide not to undertake a review, or not to continue to undertake a review, if the Information



Commissioner is satisfied that the interests of the administration of the FOI Act make it desirable that the IC reviewable decision be considered by the AAT.

7. The effect of such a decision would be to finalise this IC review application and allow the applicant to apply directly to the AAT. The applicant would then have 28 days to lodge an application with the AAT in accordance with ordinary AAT processes. AAT filing fees may apply.¹
8. The discretion in s 54W(b) of the FOI Act may be exercised where the Information Commissioner is satisfied that the interests of the administration of the FOI Act make it desirable that the IC reviewable decision be considered directly by the AAT, rather than initially by the Information Commissioner.
9. The Explanatory Memorandum to the Freedom of Information Amendment (Reform) Bill 2009 which created s 54W(b) states:

One of the reasons for retaining a right of review to the AAT is that, as an experienced review body, the AAT can properly deal with highly contested applications. This provision enables the Information Commissioner to decline to undertake a review if satisfied it would be more appropriate and efficient for the application to be made directly to the AAT.

10. This is also referred to in the Guidelines issued by the Australian Information Commissioner under s 93A (FOI Guidelines) at [10.88] – [10.89], which state:

The Information Commissioner can decline to undertake a review if satisfied ‘that the interests of the administration of the [FOI] Act make it desirable’ that the AAT consider the review application (s 54W(b)). It is intended that the Commissioner will resolve most applications. Circumstances in which the Commissioner may decide that it is desirable for the AAT to consider a matter instead of the Commissioner continuing with the IC review include:

- where the IC review is linked to ongoing proceedings before the AAT or a court
- where there is an apparent inconsistency between earlier IC review decisions and AAT decisions
- where, should the application progress to an IC review decision, the IC review decision is likely to be taken on appeal to the AAT on a disputed issue of fact
- where the FOI request under review is of a level of complexity that would be more appropriately handled through the procedures of the AAT
- where there may be a perceived or actual conflict of interest in the Commissioner undertaking review, including where:
 - the FOI request under review was made to, or decided by, the Information Commissioner or their delegate

¹ <https://www.aat.gov.au/apply-for-a-review/freedom-of-information-foi/fees>

- the FOI request or material at issue relate to specific functions exercised by the Information Commissioner under the Privacy Act
- the applicant has active matters in other forums, including the AAT or Federal Court and the Information Commissioner is the respondent
- where consideration by the AAT would further the objects of the FOI Act, particularly in relation to the performance and exercise of functions and powers given by the FOI Act to facilitate and promote public access to information, promptly and at the lowest reasonable cost (s 3(4)).

The OAIC will consult the parties involved in a matter before making a decision under s 54W(b) to conclude an IC review.

11. The circumstances in which the Information Commissioner may consider it desirable that the AAT consider the IC review application, as outlined in the FOI Guidelines above, are not exhaustive. There will be circumstances that are not listed where the Information Commissioner may deem it desirable to refer the matter to the AAT.
12. The objects of the FOI Act provide that functions and powers under the FOI Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost.
13. Further, in accordance with these objects, paragraph [10.18] of the FOI Guidelines provides that IC reviews are intended to be a simple, practical and cost-efficient method of external merits review.

Reasons for decision

14. I have considered the issues in this matter and I am satisfied that it is in the interests of the administration of the FOI Act that the IC reviewable decision be considered by the AAT because the OAIC is the primary decision-maker of the decision under review.
15. In deciding whether to exercise the discretion not to undertake a review, I have considered the perceived conflict of interest in the Information Commissioner reviewing a decision made by their own agency.
16. For these reasons, as a delegate of the Information Commissioner, I have decided to exercise my discretion to decide not to undertake an IC review under s 54W(b) of the FOI Act. I confirm that this IC review is now closed.

Next steps

17. The applicant now has 28 calendar days from the date of this notice to make an application for review of the IC reviewable decision to the AAT in accordance with s 57A of the FOI Act.

18. If either party disagrees with my decision under s 54W(b) of the FOI Act, information about your review rights is set out below.

Yours sincerely



Heath Baker
Director
Freedom of information Branch

23 November 2023

ATTACHMENT A

Key procedural steps

Date	Events
6 Sept 2023	IC review application received

Review rights

Judicial review

You can apply to the Federal Court of Australia or the Federal Circuit Court for a review of a decision of the Information Commissioner if you think that a decision by the Information Commissioner not to review or not to continue to undertake review of this IC review application under the *Freedom of Information Act 1982* (the FOI Act) is not legally correct. You can make this application under the *Administrative Decisions (Judicial Review) Act 1977*.

The Court will not review the merits of your case but it may refer the matter back to the Information Commissioner for further consideration if it finds the decision was wrong in law or the Information Commissioner's powers were not exercised properly.

An application for review must be made to the Court within 28 days of the OAIC sending the decision or determination to you. You may wish to seek legal advice as the process can involve fees and costs. Please contact the Federal Court registry in your state or territory for more information, or visit the Federal Court website at <http://www.fedcourt.gov.au/>.

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If the Ombudsman finds your complaint is justified, the Ombudsman can recommend that the OAIC reconsider or change its action or decision or take any other action that the Ombudsman considers is appropriate. You can contact the Ombudsman's office for more information on 1300 362 072 or visit the Commonwealth Ombudsman's website at <http://www.ombudsman.gov.au>.

Accessing your information

If you would like access to the information that we hold about you, please contact FOIDR@oaic.gov.au. More information is available on the **Access our information**² page on our website.

² www.oaic.gov.au/about-us/access-our-information/.



Decision not to undertake an IC review under s 54W(b) of the *Freedom of Information Act 1982*

IC review applicant	s 22
Respondent	Fair Work Ombudsman
Decision date	20 November 2023
OAIC reference number	s 22
Agency reference number	s 22

Decision

1. I refer to the application made by s 22 (the applicant) for Information Commissioner review (IC review) of a decision made by the Fair Work Ombudsman (FWO) on 30 August 2023 under the *Freedom of Information Act 1982* (Cth) (the FOI Act).
2. As a delegate of the Information Commissioner, I am authorised to make decisions under s 54W(b) of the FOI Act.
3. Under s 54W(b) of the FOI Act, I have decided not to undertake an IC review on the basis that the interests of the administration of the FOI Act make it desirable that the IC reviewable decision be considered by the Administrative Appeals Tribunal (AAT). A copy of the IC reviewable decision is attached). The effect of my decision is to allow the applicant to apply directly to the AAT.

Background

4. The key procedural steps in this IC review are set out at **Attachment A**.
5. On 4 October 2023, Dianne Abdo of the OAIC to the applicant and the FWO to advise of their intention to recommend to the delegate of the Information Commissioner that this application for IC review be finalised under s 54W(b) of the FOI Act on the basis that it is in the interests of the administration of the FOI Act that the IC reviewable decision be considered by the AAT.

6. Ms Abdo invited the parties to provide reasons if they disagreed with the proposed finalisation of this IC review by 18 October 2023.
7. On 13 and 17 October 2023, the applicant sought an extension of time to provide its response. On 18 October 2023, the OAIIC granted the applicant an extension of time to provide a more detailed response.
8. On 17 October 2023 the applicant provided submissions objecting to finalisation of the IC review under s54W(b), for reasons including:



9. On 25 October 2023, the applicant provided further detailed submissions objecting to the finalisation of the IC review under s4W(b) r to the AAT:



10. Based on the information before me, the OAI has not received a response from the Respondent.

Discretion not to undertake an IC review

11. Under s 54W(b) of the FOI Act, the Information Commissioner may decide not to undertake a review, or not to continue to undertake a review, if the Information Commissioner is satisfied that the interests of the administration of the FOI Act make it desirable that the IC reviewable decision be considered by the AAT.
12. The effect of such a decision would be to finalise this IC review application and allow the applicant to apply directly to the AAT. The applicant would then have 28 days to lodge an application with the AAT in accordance with ordinary AAT processes. AAT filing fees may apply.¹
13. The discretion in s 54W(b) of the FOI Act may be exercised where the Information Commissioner is satisfied that the interests of the administration of the FOI Act make it desirable that the IC reviewable decision be considered directly by the AAT, rather than initially by the Information Commissioner.
14. The Explanatory Memorandum to the Freedom of Information Amendment (Reform) Bill 2009 which created s 54W(b) states:

One of the reasons for retaining a right of review to the AAT is that, as an experienced review body, the AAT can properly deal with highly contested applications. This provision enables the Information Commissioner to decline to undertake a review if satisfied it would be more appropriate and efficient for the application to be made directly to the AAT.

15. This is also referred to in the Guidelines issued by the Australian Information Commissioner under s 93A (FOI Guidelines) at [10.88] – [10.89], which state:

The Information Commissioner can decline to undertake a review if satisfied ‘that the interests of the administration of the [FOI] Act make it desirable’ that the AAT consider the review application (s 54W(b)). It is intended that the Commissioner will resolve most applications. Circumstances in which the Commissioner may decide that it is desirable for the AAT to consider a matter instead of the Commissioner continuing with the IC review include:

- where the IC review is linked to ongoing proceedings before the AAT or a court
- where there is an apparent inconsistency between earlier IC review decisions and AAT decisions
- where, should the application progress to an IC review decision, the IC review decision is likely to be taken on appeal to the AAT on a disputed issue of fact

¹ <https://www.aat.gov.au/apply-for-a-review/freedom-of-information-foi/fees>

- where the FOI request under review is of a level of complexity that would be more appropriately handled through the procedures of the AAT
- where there may be a perceived or actual conflict of interest in the Commissioner undertaking review, including where:
 - the FOI request under review was made to, or decided by, the Information Commissioner or their delegate
 - the FOI request or material at issue relate to specific functions exercised by the Information Commissioner under the Privacy Act
 - the applicant has active matters in other forums, including the AAT or Federal Court and the Information Commissioner is the respondent
- where consideration by the AAT would further the objects of the FOI Act, particularly in relation to the performance and exercise of functions and powers given by the FOI Act to facilitate and promote public access to information, promptly and at the lowest reasonable cost (s 3(4)).

The OAIC will consult the parties involved in a matter before making a decision under s 54W(b) to conclude an IC review.

16. The circumstances in which the Information Commissioner may consider it desirable that the AAT consider the IC review application, as outlined in the FOI Guidelines above, are not exhaustive. There will be circumstances that are not listed where the Information Commissioner may deem it desirable to refer the matter to the AAT.
17. The objects of the FOI Act provide that functions and powers under the FOI Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost.
18. Further, in accordance with these objects, paragraph [10.18] of the FOI Guidelines provides that IC reviews are intended to be a simple, practical and cost-efficient method of external merits review.

Reasons for decision

19. I have considered the applicant's submissions as set out in paragraph 8 and 9.
20. I have considered the issues in this matter and I am satisfied that it is in the interests of the administration of the FOI Act that the IC reviewable decision be considered by the AAT because:
 - the issues under review in this matter are highly contested and of a complex nature that would be more appropriately handled through the formal procedures of the AAT. In particular, the nature of this matter, with three parties and competing interests creates a degree of complexity that the AAT is well placed to manage

- the commercially sensitive nature of the information in question suggests there is material chance the outcome of an IC review will be appealed to the AAT
- given this, allowing the applicant to appeal to the AAT at this point will likely facilitate a more timely resolution and consider that such an approach is consistent with the objects of the FOI Act.

21. In deciding whether to exercise the discretion not to undertake a review, I have considered:

- the Explanatory Memorandum to the Freedom of Information Amendment (Reform) Bill 2009 which created s 54W(b) states: One of the reasons for retaining a right of review to the AAT is that, as an experienced review body, the AAT can properly deal with highly contested applications. This provision enables the Information Commissioner to decline to undertake a review if satisfied it would be more appropriate and efficient for the application to be made directly to the AAT
- the objects of the FOI Act provide that functions and powers under the FOI Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost
- in accordance with the objects of the FOI Act, paragraph [10.18] of the FOI Guidelines provides that IC reviews are intended to be a simple, practical and cost efficient method of external merit review.

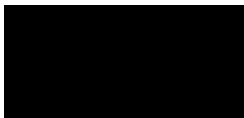
22. For these reasons, as a delegate of the Information Commissioner, I have decided to exercise my discretion to decide not to undertake an IC review under s 54W(b) of the FOI Act. I confirm that this IC review is now closed.

Next steps

23. The applicant now has 28 calendar days from the date of this notice to make an application for review of the IC reviewable decision to the AAT in accordance with s 57A of the FOI Act.

24. If either party disagrees with my decision under s 54W(b) of the FOI Act, information about your review rights is set out below.

Yours sincerely



Heath Baker
Director
Freedom of information Branch

20 November 2023

ATTACHMENT A

Key procedural steps

Date	Events
Unknown date	The respondent received an FOI request for access to information relating to s 22 [REDACTED] [REDACTED] [REDACTED] [REDACTED]
19 June 2023	The respondent consulted the applicant as affected third party under s 27 of the FOI Act because an FOI request had captured documents relevant to the applicant.
20 June 2023	The applicant made submissions objecting to the release of the documents.
17 July 2023	The respondent notified the applicant as affected third party under s 27 of the FOI Act that documents would be released in part to the FOI requestor.
8 August 2023	The applicant sought internal review of the Respondent's decision.
30 August 2023	The respondent made an internal review decision to release the documents in part
25 September 2023	IC review application received by OAIC
4 October 2023	The applicant is notified of intention to finalise the review under s54W(b) and provided an opportunity to provide submissions by 18 October 2023
4 October 2023	The FWO is notified of intention to finalise the review under s54W(b) and provided an opportunity to provide submissions by 18 October 2023

13 October 2023	The applicant sought an extension of time to provides its response to the s54W(b) notice of intention to finalise the review
17 October 2023	The applicant provides it submissions objecting to the intention to finalise the review under s54W(b) of the FOI Act
18 October 2023	The applicant was granted an extension of time to provide is submissions to the s54W(b) notice of intention to finalise the review by 25 October 2023
25 October 2023	The applicant further detailed submissions objecting to the intention to finalise the review under s54W(b) of the FOI Act.

Review rights

Judicial review

You can apply to the Federal Court of Australia or the Federal Circuit Court for a review of a decision of the Information Commissioner if you think that a decision by the Information Commissioner not to review or not to continue to undertake review of this IC review application under the *Freedom of Information Act 1982* (the FOI Act) is not legally correct. You can make this application under the *Administrative Decisions (Judicial Review) Act 1977*.

The Court will not review the merits of your case but it may refer the matter back to the Information Commissioner for further consideration if it finds the decision was wrong in law or the Information Commissioner's powers were not exercised properly.

An application for review must be made to the Court within 28 days of the OAIC sending the decision or determination to you. You may wish to seek legal advice as the process can involve fees and costs. Please contact the Federal Court registry in your state or territory for more information, or visit the Federal Court website at <http://www.fedcourt.gov.au/>.

Making a complaint to the Commonwealth Ombudsman

If you believe you have been treated unfairly by the OAIC, you can make a complaint to the Commonwealth Ombudsman (the Ombudsman). The Ombudsman's services are free. The Ombudsman can investigate complaints about the administrative actions of Australian Government agencies to see if you have been treated unfairly.

If the Ombudsman finds your complaint is justified, the Ombudsman can recommend that the OAIC reconsider or change its action or decision or take any other action that the Ombudsman considers is appropriate. You can contact the Ombudsman's office for more

information on 1300 362 072 or visit the Commonwealth Ombudsman's website at <http://www.ombudsman.gov.au>.

Accessing your information

If you would like access to the information that we hold about you, please contact FOIDR@oaic.gov.au. More information is available on the **Access our information**² page on our website.

² www.oaic.gov.au/about-us/access-our-information/.



Decision not to undertake an IC review under s 54W(b) of the *Freedom of Information Act 1982*

IC review applicant	s 22
Respondent	Department of Employment and Workplace Relations
Decision date	10 November 2023
OAIC reference number	s 22
Agency reference number	s 22

Decision

1. I refer to the application made by s 22 (the applicant) for Information Commissioner review (IC review) of an internal review decision made by the Department of Employment and Workplace Relations (the respondent) on 31 July 2023 under the *Freedom of Information Act 1982* (Cth) (the FOI Act).
2. As a delegate of the Information Commissioner, I am authorised to make decisions under s 54W(b) of the FOI Act.
3. Under s 54W(b) of the FOI Act, I have decided not to undertake an IC review on the basis that the interests of the administration of the FOI Act make it desirable that the IC reviewable decision be considered by the Administrative Appeals Tribunal (AAT). The effect of my decision is to allow the applicant to apply directly to the AAT.

Background

4. The key procedural steps in this IC review are set out at **Attachment A**.
5. On 16 October 2023, Ms Dianne Abdo of the OAIC wrote to the parties to advise of her intention to recommend to the delegate of the Information Commissioner that this application for IC review be finalised under s 54W(b) of the FOI Act. This was on the basis that it is in the interests of the administration of the FOI Act that the IC reviewable decision be considered by the AAT. Ms Abdo requested a response by 30 October 2023.
6. The respondent did not provide submissions to the OAIC as to why the application for IC review should not be finalised under s 54W(b).
7. On 1 November 2023, the applicant provided submissions to the OAIC as to why the application for IC review should not be finalised under s 54W(b). I have taken this submission into consideration.

Discretion not to undertake an IC review

8. Under s 54W(b) of the FOI Act, the Information Commissioner may decide not to undertake a review, or not to continue to undertake a review, if the Information Commissioner is satisfied that the interests of the administration of the FOI Act make it desirable that the IC reviewable decision be considered by the AAT.
9. The effect of such a decision would be to finalise this IC review application and allow the applicant to apply directly to the AAT. The applicant would then have 28 days to lodge an application with the AAT in accordance with ordinary AAT processes. AAT filing fees may apply.¹
10. The discretion in s 54W(b) of the FOI Act may be exercised where the Information Commissioner is satisfied that the interests of the administration of the FOI Act make it desirable that the IC reviewable decision be considered directly by the AAT, rather than initially by the Information Commissioner.
11. The Explanatory Memorandum to the Freedom of Information Amendment (Reform) Bill 2009 which created s 54W(b) states:

One of the reasons for retaining a right of review to the AAT is that, as an experienced review body, the AAT can properly deal with highly contested applications. This provision enables the Information Commissioner to decline to undertake a review if satisfied it would be more appropriate and efficient for the application to be made directly to the AAT.

12. This is also referred to in the Guidelines issued by the Australian Information Commissioner under s 93A (FOI Guidelines) at [10.88] – [10.89], which state:

The Information Commissioner can decline to undertake a review if satisfied ‘that the interests of the administration of the [FOI] Act make it desirable’ that the AAT consider the review application (s 54W(b)). It is intended that the Commissioner will resolve most applications. Circumstances in which the Commissioner may decide that it is desirable for the AAT to consider a matter instead of the Commissioner continuing with the IC review include:

- where the IC review is linked to ongoing proceedings before the AAT or a court
- where there is an apparent inconsistency between earlier IC review decisions and AAT decisions
- where, should the application progress to an IC review decision, the IC review decision is likely to be taken on appeal to the AAT on a disputed issue of fact
- where the FOI request under review is of a level of complexity that would be more appropriately handled through the procedures of the AAT

¹ <https://www.aat.gov.au/apply-for-a-review/freedom-of-information-foi/fees>

- where there may be a perceived or actual conflict of interest in the Commissioner undertaking review, including where:
 - a) the FOI request under review was made to, or decided by, the Information Commissioner or their delegate
 - b) the FOI request or material at issue relate to specific functions exercised by the Information Commissioner under the Privacy Act
 - c) the applicant has active matters in other forums, including the AAT or Federal Court and the Information Commissioner is the respondent
- where consideration by the AAT would further the objects of the FOI Act, particularly in relation to the performance and exercise of functions and powers given by the FOI Act to facilitate and promote public access to information, promptly and at the lowest reasonable cost (s 3(4)).

The OAIC will consult the parties involved in a matter before making a decision under s 54W(b) to conclude an IC review.

13. The circumstances in which the Information Commissioner may consider it desirable that the AAT consider the IC review application, as outlined in the FOI Guidelines above, are not exhaustive. There will be circumstances that are not listed where the Information Commissioner may deem it desirable to refer the matter to the AAT.
14. The objects of the FOI Act provide that functions and powers under the FOI Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost.
15. Further, in accordance with these objects, paragraph [10.18] of the FOI Guidelines provides that IC reviews are intended to be a simple, practical, and cost-efficient method of external merits review.

Reasons for decision

16. I have considered the issues in this matter and I am satisfied that it is in the interests of the administration of the FOI Act that the IC reviewable decision be considered by the AAT because:
 - the FOI decision under review relates to business information of a level of complexity and sensitivity more appropriately handled through the procedures of the AAT
 - there is a reasonable likelihood of the IC review decision being taken on appeal to the AAT on a disputed issue of fact
 - given the above reasons, it is likely referring this decision to the AAT now will result in this matter being resolved more quickly.

17. While I have considered the applicant's submissions in response to the OAI's intention to recommend that an IC review not be undertaken under s 54W(b), I am satisfied that it is in the interests of the administration of the FOI Act that the IC reviewable decision be considered by the AAT.
18. In deciding whether to exercise the discretion not to undertake a review, I have considered:
- guidelines issued by the Australian Information Commissioner under s 93A (FOI Guidelines) at [10.88] – [10.89], which state the Commissioner may decide that it is desirable for the AAT to consider a matter instead of the Commissioner continuing with the IC review where the IC review is linked to ongoing proceedings before the AAT or a court
 - the Explanatory Memorandum to the Freedom of Information Amendment (Reform) Bill 2009 which created s 54W(b) states: One of the reasons for retaining a right of review to the AAT is that, as an experienced review body, the AAT can properly deal with highly contested applications. This provision enables the Information Commissioner to decline to undertake a review if satisfied it would be more appropriate and efficient for the application to be made directly to the AAT
 - the objects of the FOI Act provide that functions and powers under the FOI Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost
 - in accordance with the objects of the FOI Act, paragraph [10.18] of the FOI Guidelines provides that IC reviews are intended to be a simple, practical and cost-efficient method of external merit review.
19. For these reasons, as a delegate of the Information Commissioner, I have decided to exercise my discretion to decide not to undertake an IC review under s 54W(b) of the FOI Act. I confirm that this IC review is now closed.

Next steps

20. The applicant now has 28 calendar days from the date of this notice to make an application for review of the IC reviewable decision to the AAT in accordance with s 57A of the FOI Act.
21. If either party disagrees with my decision under s 54W(b) of the FOI Act, information about your review rights is set out below.

Yours sincerely



Heath Baker
Director
Freedom of information Branch

10 November 2023

ATTACHMENT A

Key procedural steps

Date	Events
7 June 2023	The respondent notified the applicant of an FOI request received seeking access to documents that contain information concerning the applicant.
13 June 2023	The applicant made submissions contending that the documents should be exempt.
14 July 2023	The respondent received a request for an internal review of the initial decision from the FOI requester.
31 July 2023	The respondent made an internal review decision to give the FOI requester partial access to the documents.
29 August 2023	IC review application received by the OAIC.
31 August 2023	IC review commenced.
16 October 2023	The respondent is notified of intention to finalise under s 54W(b) and provided an opportunity to provide submissions by 30 October 2023.
16 October 2023	The applicant is notified of intention to finalise under s 54W(b) and provided an opportunity to provide submissions by 30 October 2023.
1 November 2023	The applicant provided submissions as to why they disagree with the intention to finalise the IC review under s 54W(b).

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