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## Conducting an IC review: Decision writing checklist

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## Introduction

This checklist provides general guidance to review officers on matters to consider in progressing a matter to an Information Commissioner decision under s 55K.

## Procedural issues to be addressed prior to drafting a decision

- The s 54Z notice has been provided to the agency / minister as it is possible for an application for IC review to have progressed only on the basis of preliminary inquiries made under s 54V.
- The decision under review has been identified (original decision/internal review decision/revised decision).
- The scope of review is settled and that you have identified all of the relevant issues (that is the matters about which the parties are in disagreement) and that clarification has been sought by the applicant about the documents / outcome sought if necessary. The issues have been confirmed with the applicant in circumstances where an agency has made updated exemption contentions / a revised decision under s 55G.
- In access grant IC reviews, the FOI applicant has been notified of the IC review pursuant to s 54Z(b).
- It is clear who bears the onus in the IC review (see s 55D).
- Procedural fairness has been provided to parties – generally through exchange of submissions, use of case appraisal/preliminary views, or a description of the substance of (confidential) submissions. See s 55(4)(b): in conducting a review the Information Commissioner must ensure that each review party is given a reasonable opportunity to present his or her case (consider in particular whether each party has been given an opportunity to respond where the decision is likely to be adverse to them).
- All third parties have been identified (see s 55A for those who are automatically parties and those who can apply to join review) and invited to participate in review (see ss 54P and 54Z regarding notification of IC review).
- All parties (applicant, respondent and any participating third parties) have been advised that the matter is proceeding to a decision and that a preliminary view has been provided if required. Seek final submissions from the parties, in particular, relevant submissions in response to a case appraisal / preliminary view.
- An unredacted copy of the documents at issue has been obtained, where relevant (see s 55U, the Commissioner may potentially make a decision based on agency submissions). Any mark-up on the documents at issue clearly explain which exemptions have been applied to which material (see [3.3] of the [IC review procedure direction](#)) and consider whether updated marked-up copies are required if an agency has changed its exemption contentions / made a revised decision during the course of the IC review.
- If the reasons for decision are inadequate to demonstrate that the agency / minister has discharged its onus under s 55D, the agency / minister has had the opportunity to provide submissions in response to a case appraisal / preliminary view.



- If the agency / minister seeks to make confidential submissions: consider the requirements of the [IC review procedure direction](#) (paragraphs [5.1] – [5.7]; submissions are generally shared unless there are compelling reasons not to, provided ahead of time; if submissions are accepted in confidence, a version should be provided for the applicant). We should be able to explain why we have agreed to accept submissions as confidential in the circumstances.
- The applicant and any third parties have advised if they wish to be identified in the decision. Corporations may be invited to provide reasons as to whether they object to being identified but generally do not have the right to privacy of an individual. Discuss this with your supervisor. Consider whether identification of the third party in the IC review decision would disclose exempt material (under s 55K(5)(b) the Information Commissioner’s published decisions will not include any exempt material).
- If a decision is going to be set aside with respect to s 33, evidence has been sought from the Inspector-General of Intelligence and Security (see s 55ZB).

## Undertaking further case management

- If after considering the case plan and the information on the file, you consider further case management may be required, consult with the case officer in the Reviews and Investigations Team who prepared the case plan about whether the procedural steps were taken, and if not, the reasons why they were not taken.
- If after consulting with the case officer you still consider the case management step is necessary, consult with your supervisor about whether to take the step yourself, or whether to refer the matter back to the Reviews and Investigations Team for further case management.
- Given resourcing constraints and the need to finalise IC reviews in a timely manner, matters will only be sent back to the Reviews and investigations Team with the agreement of the Directors of both the Reviews and investigations Team and the Decisions Team.

## Commissioner input meeting

- Where a preliminary view has been provided during the course of an IC review, this will usually be the starting point for drafting a decision. Consider any submissions received in response to the preliminary view and whether this changes the proposed recommendation to the Information Commissioner.
- Where a draft decision finds documents/material exempt under one provision, it may not be necessary to consider whether the same document/material is exempt under other exemptions the agency/Minister has relied on in its decision. Form your view about whether it may not be necessary to discuss particular exemptions and discuss this with your supervisor.
- If you consider a Commissioner input meeting would be of assistance, arrange a meeting with your supervisor, the Assistant Commissioner, and Commissioner (or other decision-maker) to discuss the proposed draft decision and the proposed outcome.
- After the meeting, you should send an email to all attendees outlining the action items arising from the meeting, and place a copy of the email on the Resolve file.



## Drafting a decision

- The draft 'Reasons for Decision' template on Word should be used for drafting decisions.
- Start by setting out the background and the scope of the IC review, which can be key to determining if obvious case management steps have been missed and correctly identifying the issues in dispute which need to be addressed in the decision.
- Read the relevant provisions of the FOI Act and parts of the FOI Guidelines before starting to draft the decision and think about how you will address the requirements of each provision.
- Ensure references to the legislation and FOI Guidelines are correct. If paraphrasing legislation, 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. For example:
  - Exemptions affirm: *'OL' and Department of Home Affairs (Freedom of information)* [\[2018\] AICmr 36](#) (20 March 2018)
  - Exemptions vary: *'OC' and Australian Building and Construction Commission (Freedom of information)* [\[2018\] AICmr 26](#) (28 February 2018)
  - Exemptions set aside: *Australian Associated Press Pty Ltd and Department of Home Affairs (Freedom of information)* [\[2018\] AICmr 23](#) (14 February 2018)
  - Searches affirm: *David Kalman and Department of Veterans' Affairs (Freedom of information)* [\[2017\] AICmr 86](#) (13 September 2017)
  - Searches set aside: *The Australian and Minister for Foreign Affairs (Freedom of information)* [\[2018\] AICmr 6](#) (9 January 2018)
  - Practical refusal affirm: *'NX' and Australian Trade and Investment Commission (Freedom of information)* [\[2018\] AICmr 18](#) (2 February 2018)
  - Practical refusal set aside: *'NC' and Australian Building and Construction Commission (Freedom of information)* [\[2017\] AICmr 118](#) (17 November 2017)
  - Charges set aside: *Australian Associated Press Pty Ltd and Department of Foreign Affairs and Trade (Freedom of information)* [\[2018\] AICmr 13](#) (19 January 2018)
  - Access grant affirm: *Stryker Australia Pty Ltd and Department of Health (Freedom of information)* [\[2017\] AICmr 69](#) (25 July 2017)
  - Access grant set aside: *'HT' and the Australian Human Rights Commission* [\[2015\] AICmr 82](#) (15 December 2015)
- Consider and refer to OAIC resources, including:
  - overviews of IC review decisions that have addressed the same exemption / issue (check with your supervisor if these are available)
  - draw from a cross section of the most recent published decisions that have addressed the same exemption / issue (use keyword searches in Austlii), and
  - the relevant section of the FOI Guidelines.

- Use the *IC review decisions – Standard wording samples* resource at [Attachment A](#) to consider what information should be included in the background, scope of IC review and issues sections of the draft decision.
- Check that style is consistent with recent decisions of the Australian Information Commissioner:
  - state whether the decision is being affirmed, set aside and substituted or varied (follow wording as used in previous decisions). Include whether decision varied by the agency / minister under s 55G of the FOI Act.
  - identify any third parties participating in the review, along with the applicant and respondent in the title block. Under the ‘Scope of review’ section, refer to any third party consultation and footnote the consultation requirements (ss 27, 27A).
  - review a recent decision relating to similar provisions to check what information has been included in the background and scope of review sections (for example, practical refusal cases will include different information in the background section than exemption cases)
  - follow recent cases when preparing the Catchwords.
- Consider and refer to recent Federal Court, AAT and IC review decisions on relevant issues considered/cited/distinguished if necessary.
- Refer to the [OAIC Style Guide](#) for citing cases and legislation, punctuation and grammar. See also the *IC review decisions proofreading checklist* at [Attachment B](#) for common issues.
- Consider the following key messages when drafting decisions:

### Formatting

- Use the OAIC’s formatting styles wherever possible. These are found in ‘Styles’ under the ‘Home’ tab in the FOI reasons for decision word template, or alternatively, under the ‘OAIC’ tab .
- It is important to make use of headings which help to guide the reader. However, too many levels of headings can be confusing. Try to limit this to three levels of headings if possible.
- Avoid one-word headings like ‘Consideration’, as this does not tell the reader anything about what is being discussed.
- Headings and formatting styles need to be consistent.
- When formulating headings, it is better to have a statement of what is coming in the section e.g. the heading could be a conclusion, which then leads to commentary as to how that conclusion was reached.
- If a statement is not appropriate, consider whether to pose the heading as a question that leads into the discussion.
- Consider whether to include the procedural background to the matter in a table/chronology format in an annexure. This may be most useful where the background is lengthy.



- Consider whether to include a table of documents setting out the decision in a table format in an annexure (see below). This may be useful where the decision involves several exemptions and multiple line by line redactions

Doc No.	Description	Decision under review	IC review decision

### Language

- Use the *IC review decisions – Standard wording samples* resource at [Attachment A](#).
- Avoid using passive voice.
- Ensure consistent uses of tense and language (for example, when referring to exempt documents or parts of documents use consistent language throughout the decision, such as ‘the material at issue’).
- Use plain English.
- Sentences should be less than 4 lines long.
- In the ‘Scope of IC review’ section, when noting the material the decision-maker has had regard to, do not refer to ‘case law’. Instead refer to IC review decisions and AAT decisions (as relevant).
- Avoid using phrases like ‘I am satisfied that ...’ – instead, when stating a conclusion, we can say ‘I find that...’, or ‘I consider that...’.
- We should refer back to the ‘correct and preferable decision’. In practice, this means we must make the legally correct decision or, where there can be more than one correct decision, the preferable decision.
- Avoid using emotive or overly descriptive language that could display bias.

### Referring to the parties submissions

- Make it clear when you are summarising the parties’ submissions by, for example, stating, ‘In summary, the applicant submits...’
- When summarising submissions, ensure that you accurately capture the narrative put forward by each party.
- Avoid lengthy quotes.

- There is no need to include or consider irrelevant submissions, although it may be appropriate to succinctly include or summarise the irrelevant submissions in the decision if you consider it will assist the party to feel they have been heard.
- Where submissions include overly emotive or inflammatory language, summarise and reframe the submissions.
- Avoid including adverse information about an individual that is not relevant to our consideration.

### Referring to the agency’s FOI decision/s

- Use the *IC review decisions – Standard wording samples* resource at **[Attachment A](#)** to consider what wording to use when discussing agency FOI decisions
- For instance, in relation to an access refusal decision, the standard wording includes:

On [date], the [agency] advised the applicant that it had identified [x] documents within the scope of the request. The [agency] decided to give the applicant access to [x] documents in full, [x] documents in part and refused access to the remaining [x] documents.<sup>1</sup> In making its decision, the [agency] relied on the [name of exemption] exemption (s [x]) and the [name of exemption] exemption (s [x]).

### References to IC review, AAT and court decisions

- Ensure that all references to IC review, AAT and court decisions are relevant to the particular issue and the context. For example, do not refer to a quote from an IC review decision about a conditional exemption when applying the public interest test.
  - Avoid repeating quotes from IC review decisions which restate the FOI Guidelines, where those parts of the FOI Guidelines have already been quoted in the draft decision.
- Do not disclose confidential submissions or content of exempt material, except as described in the agency / minister’s decision, provided to the applicant, or in non-confidential submissions (under s 55K(5)(b) the Information Commissioner’s published decisions will not include any exempt material). Consider including a general description of the confidential submissions and categorising exempt material.
- Review whether previous IC review decisions have considered similar documents / submissions and include a discussion of particularly relevant cases in the body of the decision.
- For example, you could use the NoteUp function and/or a keyword search in the [Austlii](#) Australian Information Commissioner database to search for particular topics (for example, investigation + 47E(c) or “practical refusal” + “reasonable steps”).
  - The OAIC’s [website](#) provides a summary of IC review decisions by year and lists the legislative provisions considered and catchwords.

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<sup>1</sup> Identified in the schedule to the [agency]’s [original/internal review/ revised] reasons for decision



## Preparing the decision for clearance

- Review the reasoning in the draft decision and check that:
  - The background and scope sections only include information that is relevant to the issues in the IC review. If you think that information is not relevant but you are unsure, please include the information and note the relevance of the information in a comment for the decision reviewer's consideration.
  - The draft decision sets out the relevant legislative provisions and refers to relevant paragraphs of the FOI Guidelines.
  - There is appropriate analysis of the submissions put forward by the parties and that this accurately reflects their submissions.
  - That the relevant provisions of the FOI Act and the FOI Guidelines have been properly applied.
  - There is reasoning between the facts and conclusion that set out why (with reference to the particular circumstances of the case) the relevant legislative requirements are / are not satisfied in this case.
  - The interpretation of the legislation is consistent with the wording of the FOI Act, the FOI Guidelines and precedent IC review / AAT / Federal Court decisions. If not, discuss with your supervisor.
  - Each paragraph is clear, concise, accurate and includes only information that is relevant to the reasons for decision.
  - The draft decision includes the review rights and adequately explains what documents or parts of documents are to be exempt and not exempt in a clear and understandable way.
- Closely proof-read the decision**: read out aloud, read for accuracy then reasoning, then read again. Refer to the *IC review decisions proofreading checklist* at **Attachment B**. In summary, check:
  - References to document numbers and FOI Guidelines paragraph numbers are correct.
  - All quotes are accurate.
  - The formatting with respect to font, font size, paragraph indents, spacing and footnotes are all consistent with the style guide.
- Prepare the file using the template at **Attachment C** for electronic clearance using documents on Resolve.
- Draft snapshot and cover email using the template at **Attachment D**. When preparing the email snapshot, use the snipping tool to copy and paste the list of key documents from Resolve into the email.

## Clearance of decision

- The draft you send to the reviewer should be decision ready, subject to any feedback from the reviewer. If you have not done so already, **closely proof-read the decision**. Refer to the *IC review decisions proofreading checklist* at **Attachment B**.

- Label the draft document 'Draft decision [surname of applicant] and [agency][IC review ref no.] [your initials][date of draft: DDMMYYYY]' eg '[Draft decision] - 22 [redacted]'
- Snapshot and cover email should be emailed to your supervisor for clearance. The clearance process for decisions is outlined below.

## Finalisation of decision

- Commissioner approval sent via email. Save a copy of the Commissioner's email approving the decision to the 'Documents' tab on Resolve.
- Format and save the files by following the instructions in [Attachment E](#).
- The publications officer will then prepare the files for distribution/publication (as set out in [Attachment E](#)).
- Circulate the summary to FOI team with the links in TRIM.
- Provide decision to parties (including affected third parties participating in the review and any joined parties). This should happen on the same day that the decision is approved by the Commissioner unless the decision is finalised late in the day or after hours.

## Closing the Resolve file

- Ensure copies of all correspondence to and from the parties is saved to the 'Documents' tab.
- Delete/destroy all exempt material (electronic and hard copies).
  - If documents received electronically, destroy.
  - If documents received in hardcopy, ask agency/minister whether it requires the documents to be returned. Note that we do not currently have a secure method of destroying USBs and therefore USBs should be returned.
  - Destroy electronic copies by deleting the files from all locations (for example, Resolve, Outlook, 47E(d) [redacted]).
  - Destroy hardcopy documents by shredding.
  - Return hardcopy documents as arranged with the agency.
- Update 'Exempt material' action on Resolve to record whether exempt material has been destroyed or returned and the date that the action was completed.
- Create 'Ad hoc' action to close file and complete necessary steps to update Resolve (see *IC reviews – Resolve user guide*).
- Close Resolve file.



# Attachment A – IC review decisions – Standard wording examples

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Practical refusal decisions – set aside .....	13
Searches decision – set aside .....	13
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Irrelevant material .....	19
Charges decisions .....	19
Practical refusal decisions .....	20
Searches decisions .....	20
<b>Reasoning – general statements</b> .....	20

Onus .....	20	. . .
Purpose		. . .
The purpose of this document is to provide examples of wording that is commonly used in IC review decisions. This resource should be read alongside recently published IC review decisions and in light of any recent feedback provided during the decision drafting process.		. . .
General		. . .
<b>Referring to sections of the FOI Act</b>		. . .
Section [x] of the FOI Act provides:		. . .
[insert]		. . .
<b>Referring to the FOI Guidelines</b>		. . .
The FOI Guidelines explain:		. . .
[insert]		. . .
<b>Referring to the reasons for decision</b>		. . .
In its [original/internal review/revised] reasons for decision, the [agency] said:		. . .
[insert]		. . .
<b>Referring to the parties' submissions</b>		. . .
In the IC review application, the applicant said:		. . .
[insert]		. . .
The applicant submits:		. . .
[insert]		. . .
The [agency] submits:		. . .
[insert]		. . .
<b>Referring to the information before the Commissioner</b>		. . .
Based on the information before me, ... [rather than 'Based on the information before the OAIC']		. . .



## Decision section

### **Affirm decisions**

I affirm the decision of [agency] of [date], [if relevant] as varied on [date].

### **Charges decision – set aside**

I set aside the decision of the [agency] of [date]. I substitute my decision that the charge of \$ [x] be [reduced to \$ [x] / waived in full].

### **Practical refusal decisions – set aside**

I set aside the decision of [agency] of [date]. I substitute my decision that a practical refusal reason does not exist.

The [agency] must now process the applicant’s request and notify the applicant of its decision no later than 30 days after it receives this decision.<sup>2</sup>

### **Searches decision – set aside**

I set aside the decision of [agency] of [date].

The [agency] must conduct further searches for documents falling within the scope of the applicant’s FOI request and provide a response to the applicant in accordance with s 26 of the FOI Act within 30 days of receipt of this decision.<sup>3</sup>

### **Exemptions decision – vary**

I vary the decision of the [agency]. I consider that the document that the [agency] decided is exempt under s [x] is exempt under [x].

### **Exemptions decision – set aside**

I set aside the decision of the [agency] of [date], [if relevant] as varied on [date(s)]. I substitute my decision that the material that the [agency] decided is exempt under s [x] is not exempt. [use bullet points if there are multiple exemptions].

The [agency] must now provide the applicant with a copy of the document[s], [if relevant] edited under s 22 of the FOI Act only to the extent necessary to delete [exempt and/or irrelevant] material, within 28 days of this decision.

### **Irrelevant material – set aside**

I set aside the decision of the [agency] of [date], [if relevant] as varied on [date(s)]. The [material / documents] that the [agency] found to be irrelevant to the request is not irrelevant to the request.

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<sup>2</sup> On the question of the processing deadlines that now apply, see *Fletcher and Prime Minister of Australia* [2013] AlCmr 11 [33] – [38].

<sup>3</sup> On the question of the processing deadlines that now apply, see *Fletcher and Prime Minister of Australia* [2013] AlCmr 11 [33] – [38].

## Background section

### Extension of time under s 54T

On [date], the applicant sought IC review of the [agency]'s decision under s 54L of the FOI Act.<sup>4</sup>

### Charges decisions

On [date], the applicant applied to the [agency] for access to \_\_\_\_\_.

On [date], the [agency] gave notice to the applicant of its intention to impose a charge and provided a preliminary estimate of the amount of the charge of \$[insert], pursuant to s 29(1) of the FOI Act.

On [date], the applicant wrote to the [agency] and requested that the charge be waived or reduced on [insert grounds under [s 29(5)(a) and/or s 29(5)(b)] of the FOI Act.

On [date], the [agency] advised the applicant of its decision to impose a charge of \$[x] to process the request. [if relevant] The [agency] reduced the charge on the basis that [insert].

[if relevant] On [date], the applicant sought internal review of the [agency]'s decision to impose the charge.

On [date], the [agency] advised the applicant of its decision [to reduce the charge to \$[x] on the basis that [insert] / not to further reduce or waive the charge].

On [date], the applicant sought IC review of the [agency]'s decision to impose a charge under s 54L of the FOI Act.

### Practical refusal decisions

On [date], the [agency] issued the applicant with a request consultation notice under s 24AB of the FOI Act. In that notice, the [agency] informed the applicant that the request [insert details of practical refusal reason].<sup>5</sup>

On [date], the applicant responded to the request consultation notice to [insert details of response]. [if relevant] This ended the request consultation period.<sup>6</sup>

### Searches decisions

On [date], the applicant applied to the [agency] for access to \_\_\_\_\_.

On [date], the [agency] made a decision to refuse the request under s 24A of the FOI Act on the basis that the document[s] could not be located or do[es] no exist.

<sup>4</sup> The applicant sought and was granted an extension of time under s 54T of the FOI Act.

<sup>5</sup> This started a request consultation period. Under s 24AB(3), if the applicant contacts the contact person specified in the notice during the consultation period in accordance with the notice, the agency must take reasonable steps to assist the applicant to revise the request so that a practical refusal reason no longer exists.

<sup>6</sup> Under s 24AB(8), the consultation period starts on the day an applicant is given notice under s 24AB(2) and continues until the applicant either, makes a revised request, or indicates that they do not wish to revise the request.



## Deemed decisions

Pursuant to s 54Y of the FOI Act, where a substantive decision is made by an agency after the commencement of an IC review of a deemed refusal decision, the substantive decision becomes the decision under review.

## Section 55F agreements

During the course of this IC review, the possibility of finalising this IC review by way of an agreement under s 55F was considered.<sup>7</sup> However, as the parties have been unable to reach an agreement under s 55F, I will proceed to make a decision under s 55K.

## Third party consultation

### *Section 26A – Commonwealth-State relations*

On [date], [agency] undertook consultation with [insert] under s 26A of the FOI Act.<sup>8</sup>

On [date], [insert] responded to [agency] submitting that it objected to the disclosure of [certain material / the documents].

OR On [date], [insert] responded to [agency] submitting that it has no objection to disclosure.

OR, Based on the information before the OAIC, [insert] did not respond to the [agency]'s consultation.

### *Section 27 – business affairs*

On [date], [agency] undertook third party consultation with [name of third party business [unless we have decided to de-identify the business] under s 27 of the FOI Act.<sup>9</sup>

On [date], [name of third party business] responded to [agency] submitting that it objected to the disclosure of [certain material / the documents].

OR On [date], [name of third party business] responded to [agency] submitting that it has no objection to disclosure.

OR, Based on the information before the OAIC, the third party did not respond to the [agency]'s consultation.

### *Section 27A – personal privacy*

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<sup>7</sup> Section s 55F provides that I may, if satisfied that the terms of an agreement are appropriate, make a decision in accordance with the terms without completing an IC review (s 55F(2)).

<sup>8</sup> If arrangements have been entered into between the Commonwealth and a State under s 26A, agencies and ministers are required to consult the State in accordance with the arrangements, before deciding to release a document where the State or the Commonwealth may reasonably contend that the document is conditionally exempt and that disclosure of the document would be contrary to the public interest.

<sup>9</sup> Under s 27 of the FOI Act, where it appears to the agency that the organisation concerned might wish to make an exemption contention that the document is exempt under s 47; or the document is conditionally exempt under s 47G and access to the document would, on balance, be contrary to the public interest, the agency must not decide to give access to the document without giving the organisation a reasonable opportunity to make submissions in support of the exemption contention, and without having regard to any submissions so made.

On [date], [agency] undertook third party consultation with [number] individual(s) under s 27A of the FOI Act (documents affecting personal privacy) in relation to documents it had identified within the scope of the request.<sup>10</sup>

On [date], the third party responded to [agency] submitting that it objected to the disclosure of [certain material / the documents].

OR On [date], the third party responded to [agency] submitting that it has no objection to disclosure.

OR, Based on the information before the OAIC, the third party did not respond to the [agency]'s consultation.

### Exemptions decisions

On [date], the [agency] advised the applicant that it had identified [x] documents within the scope of the request. The [agency] decided to give the applicant access to [x] documents in full, [x] documents in part and refused access to the remaining [x] documents.<sup>11</sup> In making its decision, the [agency] relied on the [name of exemption] exemption (s [x]) and the [name of exemption] exemption (s [x]).

### Irrelevant material

The [agency] also deleted some material from the documents that it considers irrelevant to the request.

### Revised decisions

On [date], [agency] made a revised decision under s 55G of the FOI Act.<sup>12</sup> The [agency] decided [insert].

### Updated exemption contentions

During the course of this IC review, the [agency] advised that it no longer relies on s [x] in relation to [insert]. However, the [agency] introduced new contentions under the [name of exemption] exemption (s [x]) in relation to [insert].

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<sup>10</sup> Under s 27A of the FOI Act, where it appears to the agency that a person might wish to make a contention that a document is conditionally exempt under s 47F, and access to the document would, on balance, be contrary to the public interest, the agency must not decide to give access to the document without giving the person a reasonable opportunity to make submissions in support of the exemption contention, and without having regard to any submissions so made.

<sup>11</sup> Identified in the schedule to the [agency]'s [original/internal review/revised] reasons for decision

<sup>12</sup> Section 55G(1)(a) of the FOI Act provides that at any time during an IC review, an agency or Minister may vary (or set aside and substitute) an access refusal decision in relation to a request, if the variation would have an effect of giving access to a document in accordance with the request.





Issues section

**Exemptions**

The [agency] decided that [x] documents are exempt in full and [x] documents are exempt in part under s [x] of the FOI Act.

[if relevant] As I discussed above at [x – use cross-referencing tool **Error! Reference source not found.**], I have found [x] documents to be irrelevant to the request<sup>13</sup> and five documents exempt under s [x] of the FOI Act.<sup>14</sup> Accordingly, I need only consider the application of s [x] to the remaining [x] documents.

The material/documents that the [agency] found exempt under this provision comprise [insert] OR

The material/documents that the [agency] found exempt under this provision can be characterised as:

- [insert]

As discussed in the FOI Guidelines and previous IC review cases, [insert with reference to most recent IC review decision that discusses this exemption].

The FOI Guidelines explain:

[insert]

For these reasons, I am satisfied that the disclosure of the material/documents that the [agency] decided is exempt under s [x] would [insert wording of relevant provision – for example ‘would be an unreasonable disclosure of personal information’]. The documents are exempt under s [x].

[if the agency has not discharged its onus] For these reasons, I am not satisfied that the [agency] has discharged its onus of establishing that its decision under s [x] is justified.

The documents that the [agency] decided are exempt under s [x] of the FOI Act are not exempt under this provision.

*Where the Information Commissioner decides that a different exemption applies*

Under s 55K(2) of the FOI Act, for the purposes of implementing a decision on an IC review, I may perform the functions, and exercise the powers, of the person who made the IC reviewable decision. It is therefore open to me to consider any exemption that was available to the person who made the IC reviewable decision.

In this case, the [agency] has found material in [x] documents exempt under s [x] of the FOI Act. In my view, it is more appropriate to consider whether this material/document is exempt under s [x].

*Where public interest considerations are irrelevant because the documents are not conditionally exempt*

As I have found that the document is not conditionally exempt under s [x], I do not need to consider whether giving access to a conditionally exempt document is contrary to the public interest for the purposes of s 11A(5) of the FOI Act.

<sup>13</sup> [refer to document numbers in schedule of documents]

<sup>14</sup> [refer to document numbers in schedule of documents]





*Where public interest considerations must be considered after finding a document conditionally exempt*

As I have found that the documents are conditionally exempt, I must consider whether, on balance, it would be contrary to the public interest to give access to conditionally exempt documents at this time.

*Where public interest considerations are irrelevant because it is a non-conditional exemption*

The applicant submits that disclosure of the material/documents is in the public interest. However, as s [x] of the FOI Act is not a conditional exemption, submissions relating to the public interest are not relevant when considering whether s [x] applies.

**Irrelevant material**

Section 22 of the FOI Act provides that an agency may prepare an edited copy of a document by deleting information that is exempt or that could reasonably be regarded as irrelevant to the request.<sup>15</sup>

The [agency] decided that [x] documents contain material that is irrelevant to the request.<sup>16</sup>

[insert reasoning]

Accordingly, I am [satisfied / not satisfied] that the [description of material] that the [agency] decided is irrelevant to the request is irrelevant to the request.

**Charges decisions**

*Assessment of the amount of the charge*

The FOI Guidelines explain that the decision to impose a charge is discretionary. A charge must be as fair and accurate as possible to reflect the work involved in providing access to the documents requested and must not be used to unnecessarily delay access or discourage an applicant from exercising the right of access conferred by the FOI Act.<sup>17</sup>

The FOI Guidelines further explain that in exercising the discretion to impose a charge, an agency should take into account the ‘lowest reasonable cost objective’ in s 3(4) of the FOI Act, which provides that ‘functions and powers given by this 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’. The FOI Guidelines relevantly explain:

Agencies and ministers should interpret the ‘lowest reasonable cost’ objective broadly in imposing any charges under the FOI Act. That is, an agency or minister should have regard to the lowest reasonable cost to the applicant, to the agency or minister, and the Commonwealth as a whole. Where the cost of calculating and collecting a charge might exceed the cost to the agency to process the request, it would generally be more appropriate not to impose a charge ...<sup>18</sup>

[refer to recently published practical refusal decisions for guidance on the structure and content of the draft decision]

<sup>15</sup> Section 22(1)(b)(ii) of the FOI Act.

<sup>16</sup> [refer to document numbers in schedule of documents]

<sup>17</sup> FOI Guidelines [4.5] and [4.54].

<sup>18</sup> FOI Guidelines [4.4].



## Practical refusal decisions

Section 24 of the FOI Act allows an agency or minister to refuse access to a document if satisfied that a ‘practical refusal reason’ exists in relation to the request, following a ‘request consultation process’ in accordance with s 24AB.<sup>19</sup>

[refer to recently published practical refusal decisions for guidance on the structure and content of the draft decision]

## Searches decisions

Section 24A requires an agency to take ‘all reasonable steps’ to find a requested document before refusing access to it on the basis that it cannot be found or does not exist. Whether ‘all reasonable steps’ have been taken is a question of fact in the individual case to be decided having regard to matters such as the terms of an applicant’s request, the document creation and retention practices in an agency, and the steps taken by the agency to identify and locate documents requested by the applicant.<sup>20</sup>

[refer to recently published searches decisions for guidance on the structure and content of the draft decision]

## Reasoning – general statements

### Onus

In an IC review of an access refusal decision, the agency bears the onus of establishing that its decision is justified, or that I should give a decision adverse to the IC review applicant (s 55D(1)).

In an IC review of an access grant decision, it is the IC review applicant that bears the onus of establishing that a decision refusing the request is justified, or that I should give a decision adverse to the FOI applicant (s 55D(2)).

---

<sup>19</sup> ‘Practical refusal reason’ is defined in s 24AA of the FOI Act; ‘request consultation process’ is defined in s 24AB.

<sup>20</sup> *FOI Guidelines* [3.85] – [3.94].



## Attachment B – IC review decisions proofreading checklist

### Quotes

Tip	Example	Check
Quotes should be verbatim (exactly the same words used originally): cut and paste and then proofread (if text in PDF can't be copied, open in Adobe Pro – Go to Tools – Click on Text Recognition – Select In This File – Click OK to recognise text).		
If names or details that require de-identification appear in quote text, you can replace with square brackets and a formal description.	The applicant sought access to 'all document relating to a complaint made by [a named individual] about him'	
Use single quotation marks '...' unless it's a quote within a quote, then use double "..."	The applicant submits 'the respondent's contention that "the documents would cause significant harm" is misconceived.'	
Place quotation mark after full stop or comma (unless the punctuation is not within the quote).	See above.	
Use ellipses to indicate the omission of words; the format is as space on each side of the '...'	Section 3(2) of the FOI Act provides '[t]he Parliament intends ... to promote Australia's representative democracy by ... increasing scrutiny, discussion, comment and review of the Government's activities'	
Block quotes shouldn't run across multiple documents; ellipses indicates text missing from same document. Sentences should be in the order they appear in the document.		
Use square brackets at the end of a quote to indicate where emphasis added.	Section 24AB states:  If the applicant contacts the contact person during the consultation period in accordance with the notice, the agency or Minister <b>must take reasonable steps</b> to assist the applicant to revise the request so that the practical refusal reason no longer exists [emphasis added].	
Keep quotes and the introductory sentence on the same page by selecting 'Paragraph', 'Line and page breaks' and 'Keep with next' (e.g. to keep 'The applicant submits:' and the quote on the same page).		

**Footnotes**

<b>Tip</b>	<b>Example</b>	<b>Check</b>
Footnotes generally go after punctuation mark.	The FOI Guidelines explain that an agency should have regard to the lowest reasonable cost objective in imposing charges under the FOI Act. <sup>1</sup>	
Follow previous decisions for citing FOI Guidelines and decisions in the body of decisions and footnotes.	The first reference to the FOI Guidelines should always include the full name of the FOI Guidelines. See a recently published decision as an example.	
Check that case citations and references to the FOI Guidelines are correct, particularly where you have referred to a previous published decision in preparing your draft.		
Check that footnotes are accurate where you have referred to document numbers with reference to the schedule of documents attached to an agency's decision.  Check that the number of documents listed is consistent with the number in the body of the decision.		

**Formatting**

<b>Tip</b>	<b>Example</b>	<b>Check</b>
Follow the formatting on the Word template reasons for decision. Use the 'OAIC' tab at the top left hand corner for headings and bullet points.		
When listing items, use only a comma and 'and' after the second last bullet point (not a series of semi-colons) (this list is an example).  Spacing before bullets should be 6pt, and 10pt after the last bullet.	The issues I have considered are: <ul style="list-style-type: none"> <li>• issue x</li> <li>• issue y, and</li> <li>• issue z.</li> </ul>	
Check the numbering of your paragraphs once decision is drafted.		
Spell out numbers in words from zero to nine (except for references to sections in	The Department identified 12 documents as falling within the scope of the request and gave the applicant access to four documents in full, four documents in part	



Tip	Example	Check
legislation); use numerals for all numbers from 10 on.	and refused access to the remaining two documents.	
Use one space after a full stop (not two). Use the 'Show/Hide' function by clicking ¶ on the Home toolbar to assist you to check whether spacing throughout the document is correct.		
Use a non-breaking space (Ctrl+Shift+space bar) to prevent breaking titles or section references across lines (eg this should be used when writing s 47F to prevent the 's' from appearing on one line and the '47F' on the next line).		
Department (capital D)	The Department submits ...	
departmental (lower case D)	The Department submits that the names of departmental officers are exempt under s 47F.	
First mention of our office, say 'Office of the Australian Information Commissioner (OAIC)' then use OAIC throughout.	The Office of the Australian Information Commissioner (OAIC) requested that the Department provide documents. The Department provided the OAIC with the documents on 3 March 2018.	
In setting out catchwords make sure they are evenly spaced and use the same length em dash — ; use capital letter after each '—'	Freedom of Information — Whether disclosure would cause damage to the security of the Commonwealth — (CTH) Freedom of Information Act 1982 s 33(a)(i)	
Check references to documents/document/material throughout decision.	The issue in this IC review is whether the document that the Department found exempt under s 47F is conditionally exempt, and if so, whether giving the applicant access to a conditionally exempt document [not conditionally exempt documents] at this time would be contrary to the public interest.	

Tip	Example	Check
Check for consistency in terminology used throughout the decision (e.g. consistently use staff / officers / employees / personnel in a decision relating to s 47E(c)).		
For a specific minister use capital M but references to obligations of a minister under the FOI Act is lower case m (even if capitalised in the legislation)	The issue in this IC review is whether the document was brought into existence for the dominant purpose of briefing a minister on a document to which s 34(1)(a) applies. In this case, the relevant minister is the Minister for Foreign Affairs (the Minister).	
Title of 'the Honourable' or 'the Hon' applies to ministers and some ex ministers, not to senators/members generally.		
Do not use a full stop after short forms, for example 'p 7' not 'p. 7' and 'APPA', not 'A.P.P.A.'	<ul style="list-style-type: none"> <li>• 's 47' not 's.47' or 's. 47'</li> <li>• 'ss 47 and 47F' not 'ss.47 and 47F'</li> <li>• 'p 7' not 'p. 7'</li> <li>• 'APPA' not 'A.P.P.A.'</li> <li>• 'Mr Smith' not 'Mr. Smith'</li> </ul>	



## Attachment C – Instructions for assisting with electronic clearance using documents on Resolve

Once the cover sheet is prepared, the case officer tabs the key documents in the Resolve file and saves the draft decision for Executive clearance onto Resolve.

- The draft decision that the Information Commissioner will review is the draft decision on Resolve.
- Ensure that each document in the coversheet is in the 'Documents' tab on the Resolve case file and can be easily identified. For example:
  1. verbal submissions from a party recorded in a file note of a telephone conversation in the 'Actions' tab can be printed to pdf and saved onto the 'Documents' tab
  2. if a large number of *different* key documents are attached to one email, one or more attachment(s) can be separately saved onto the 'Documents' tab.
  3. if a single email and multiple attachments comprise the *same* key document, the attachments do not have to be separately saved but can be identified in the name on the 'Documents' tab. For instance: \*Tab 6(d). A's submissions (30 January 2014 email and attachments B and C)
  4. where the key document is located in the middle of an attachment, note the page numbers. For instance: \*Tab 4. Internal review decision (pp 61-73)
  5. where the key document is embedded in a Word document, these individual embedded document(s) can be separately saved onto the Documents tab.
- On the 'Documents' tab in Resolve, categorise each document in the coversheet as a 'Key Document' or 'Exempt Material' if the document includes exempt matter. Number the documents between 1 and 9. If there are more than 9 key documents, use alphabets to identify documents that can be grouped together.
- Use the following naming convention as a guide to name each key document in the 'Documents' tab:
  - \*Tab 0. Cover sheet
  - \*Tab 1. Draft decision
  - \*Tab 2. FOI request
  - \*Tab 3. FOI decision(s)
    - \*Tab 3(a). Primary decision
    - \*Tab 3(b). Internal review decision
  - \*Tab 4. IC review application
  - \*Tab 5. Revised decision
  - \*Tab 6
    - \*Tab 6(a). A's submissions (delivered to Reception 5.02.2018)
    - \*Tab 6(b). A's submissions
    - \*Tab 6(c). A's submissions
    - \*Tab 6(d). A's submissions (evidence only - 30 January 2014 email and attachments)
  - \*Tab 7
    - \*Tab 7(a). R's submissions
    - \*Tab 7(b). R's submissions (evidence only)
    - \*Tab 7(c). R's submissions
  - \*Tab 8. IGIS

- \*Tab 9. Document in issue – [short form name of document] . . . .
  - Only documents that are key documents in the IC review will be: . . . .
    - 1. listed or numbered in the coversheet, and . . . .
    - 2. categorised as a **'Key Document'** or **'Exempt Material'** on the Resolve case file. . . .
- For instance, if there is no internal review decision, '\*Tab @. Internal review decision' will not be listed on the cover sheet. . . .
- Check that the relevant files are categorised and organised appropriately by sorting the 'Comments' column then sorting the 'Categories' Column. The documents relevant to the draft decision should appear at the top of the page in numerical order. . . .





## Attachment D – Template Snapshot

The drafter will use the following Snapshot template at the top of the email to seek clearance from the Director.

**Subject:** [IC review decision] [insert parties' names] (OAIC ref no [insert])

Snapshot	
Due date	[1 week] [standard]
Fixed or flexible	Flexible
If fixed, why?	N/A
Topic for clearance	[insert parties' names] (OAIC ref no [insert])
Product	Draft IC Review decision
Scope / exemptions	[insert provisions at issue]
Length / no. of pages*	<p>Draft decision – [insert] pages.</p> <p>Key documents on Resolve record [reference no]</p> <ul style="list-style-type: none"> <li>• *Tab 0. Cover sheet</li> <li>• <b>*Tab 1. Draft decision</b></li> <li>• *Tab 2. FOI request</li> <li>• *Tab 3. FOI decision(s) <ul style="list-style-type: none"> <li>○ *Tab 3(a). Primary decision</li> <li>○ *Tab 3(b). Internal review decision</li> </ul> </li> <li>• *Tab 4. IC review application</li> <li>• *Tab 5. Revised decision</li> <li>• *Tab 6 <ul style="list-style-type: none"> <li>○ *Tab 6(a). A's submissions (delivered to Reception 5.02.2018)</li> <li>○ *Tab 6(b). A's submissions</li> <li>○ *Tab 6(c). A's submissions</li> <li>○ *Tab 6(d). A's submissions (evidence only - 30 January 2014 email and attachments)</li> </ul> </li> <li>• *Tab 7 <ul style="list-style-type: none"> <li>○ *Tab 7(a). R's submissions</li> <li>○ *Tab 7(b). R's submissions (evidence only)</li> <li>○ *Tab 7(c). R's submissions</li> </ul> </li> <li>• *Tab 8. IGIS</li> <li>• *Tab 9. Document in issue – [short form name of document]</li> </ul>
Third parties	Yes – see above
Issues for Commissioner	[flag any particular issues for the Commissioner]
Review officer	[insert]
Clearance	[insert e.g. Director, Assistant Commissioner]
Final clearance	FOI Commissioner / Information Commissioner

## Attachment D1 – Clearance process

Steps	Action	Lead
1	Draft the decision	drafter
2	Email sent to Director requesting comments/feedback including the snapshot, copying in the Executive officer to the relevant Commissioner or Assistant Commissioner.	drafter
3	Once Director has reviewed and included comments, the Director will forward the snapshot by email to the decision maker, copying in the drafter (and <a href="mailto:ACFOI@oaic.gov.au">ACFOI@oaic.gov.au</a> where the Assistant Commissioner is not the decision maker)	Director
5	Once the decision maker has reviewed, they will either approve the decision, or request that the drafter action comments in the draft in Resolve, by replying to all in the email thread.	FOIC or delegate
6	<p>In circumstances where the FOIC has requested the drafter to action comments, the drafter will action the comments by:</p> <ul style="list-style-type: none"> <li>• adding their track changes in the document on Resolve, and</li> <li>• responding to the comments by providing additional information (as necessary) and/or confirming each of the comments has been actioned.</li> </ul> <p>Once all comments have been actioned, the drafter will reply all to the FOIC's email (see step 5 above) to confirm that the comments have been actioned and the matter is ready for the FOIC to final review.</p>	FOIC/delegate and drafter



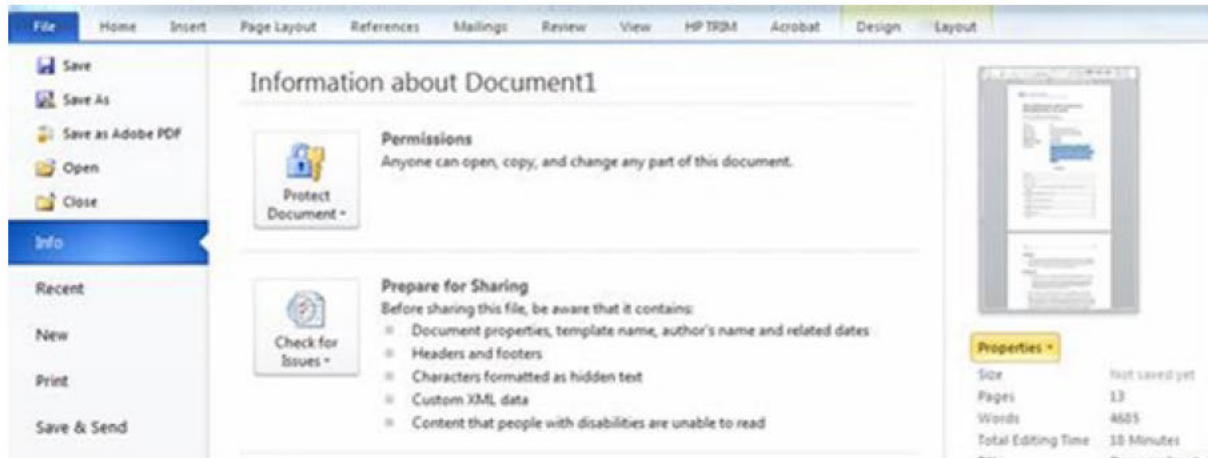
## Attachment E – Finalisation/publication process

Once Commissioner approval is received, the case officer saves the approval to the Resolve file and prepares the decision for delivery to the parties/publication.

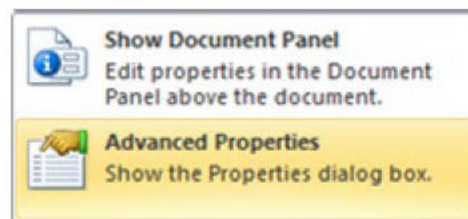
- Check that the Director and Publications Officer are copied into the approval from the Commissioner ('I approve this decision' etc), if not, forward them the approval.
  - The Publications Officer will then register the decision in the master list ([D2018/003448](#)) and send the citation to the case officer.
- Update the decision with the date and citation (the date is the date of the approval).
- Fix up the metadata. See below instructions on saving files.
- Create three files: docx, rtf and pdf. The file name should be '2016-AICmr59' for example). See below for instructions on saving files.
- Save the three versions to TRIM [14/000082-13](#).
- The Publications Officer will send the rtf version to AustLII 1-2 days after the decision has been sent to the parties (instructions set out below).
- Send the pdf version to the parties on the same day as the decision. The covering email should note that the decision will be published on AustLII shortly.
- Send the case summary and short summary to the FOI team with a [link](#) to the PDF and CC to the following teams and individuals around the office:
  - [FOICommissioner@oaic.gov.au](mailto:FOICommissioner@oaic.gov.au)
  - [Toni.Pirani@oaic.gov.au](mailto:Toni.Pirani@oaic.gov.au)
  - [elizabeth.tydd@oaic.gov.au](mailto:elizabeth.tydd@oaic.gov.au)
  - Legal: [Legal@oaic.gov.au](mailto:Legal@oaic.gov.au)
  - Media: [media@oaic.gov.au](mailto:media@oaic.gov.au)

## Saving files

When saving the decision as different files, please make sure the properties are as per the steps below.



When you click on 'Properties' a drop down box like this will appear. Click on 'Advanced Properties'.



Once you do this, the following will appear:



The only tab you need to be concerned with is the summary tab. Click on that tab and when you do, it should now look like this:



Document5 Properties

General Summary Statistics Contents Custom

Title:

Subject:

Author:

Manager:

Company: OAIC

Category: Reasons for Decision

Keywords:

Comments:

Hyperlink base:

Template: Reasons for Decision.dotm

Save Thumbnails for All Word Documents

OK Cancel

You need to fill in each of the following sections, which is duplicating information from the body of the decision. The end result should look like this:

Document5 Properties

General Summary Statistics Contents Custom

Title: 22

Subject: Decision and reasons for decision of Australian Informi

Author: Angelene Falk, Australian Information Commissioner

Manager:

Company: OAIC

Category: Reasons for Decision

Keywords:

Comments: Freedom of Information — Whether disclosure would have a substantial adverse effect on the proper and efficient conduct of the operations of

Hyperlink base:

Template: Reasons for Decision.dotm

Save Thumbnails for All Word Documents

OK Cancel