

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/.



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 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.

[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 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 [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

4 September 2024

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



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 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.

[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 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 [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

4 September 2024

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



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	«ApplicantClientTitleFirstnameSurname»
Respondent	«RespondentClientTradingName»
Decision date	
OAIC reference number	«CaseNumber»
Agency reference number	«Agency_Reference_Number»

Decision

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» («RespondentClientAbbreviation») on «Agency_Decision_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, «InvestigativeOfficerFirstname» «InvestigativeOfficerSurname», wrote to the applicant and the «RespondentClientAbbreviation» 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. «InvestigativeOfficerFirstname» «InvestigativeOfficerSurname» 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.

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

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 OAIIC 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

4 September 2024

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/.



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

5 September 2024

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



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	«ApplicantClientTitleFirstnameSurname»
Respondent	«RespondentClientTradingName»
Decision date	
OAIC reference number	«CaseNumber»
Agency reference number	«Agency_Reference_Number»

Decision

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» («RespondentClientAbbreviation») on «Agency_Decision_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, «InvestigativeOfficerFirstname» «InvestigativeOfficerSurname», wrote to the applicant and the «RespondentClientAbbreviation» 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. «InvestigativeOfficerFirstname» «InvestigativeOfficerSurname» 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.

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

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 OAIIC 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

[redacted] 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

5 September 2024

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

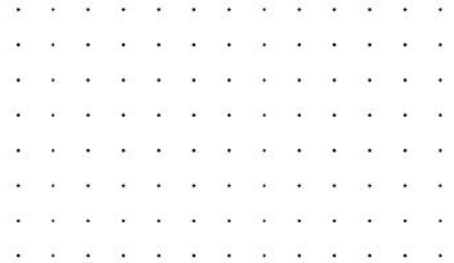
If you believe you have been treated unfairly by the OAIC, you can make a complaint to the Commonwealth Ombudsman (the Ombudsman). The Ombudsman's services are free. The Ombudsman can investigate complaints about the administrative actions of Australian Government agencies to see if you have been treated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



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

Information Commissioner review applicant	
Choose an item.	
Decision date	Click or tap to enter a date.
OAIC reference number	
Choose an item. reference number	

Decision

1. I refer to the application made by [applicant name] (the applicant) for Information Commissioner review (IC review) of a decision / internal review decision/ deemed access refusal decision / revised decision made by the [Respondent's full name](the Choose an item.) under the *Freedom of Information Act 1982* (Cth) (the FOI Act).
2. As a delegate of the Information Commissioner, I have decided to exercise my discretion not to undertake / continue to undertake an IC review under s 54W(b) of the FOI Act.
3. The background of this matter is provided at **Attachment A**.

Discretion not to continue to undertake an IC review

4. Under s 54W(b) of the FOI Act, the Information Commissioner may exercise the discretion 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 directly by the AAT, rather than initially by the Information Commissioner.
5. The effect of such a decision would allow the applicant to apply directly to the AAT. The applicant would then have 28 days to lodge an application with the AAT. AAT filing fees may apply.¹

¹ See [Administrative Appeals Tribunal - Fees](#)



6. This is also referred to in the Guidelines issued by the Australian Information Commissioner under s 93A (FOI Guidelines) at [10.104] and [10.105], which states:

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 IC review 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 Information Commissioner continuing with the IC review include:²

- 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 decision under review is of a level of complexity that it will be more appropriately handled through the procedures of the AAT
- where there may be a perceived or actual conflict of interest in the Information Commissioner undertaking the IC 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)).

7. However, 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.

8. Further, the Office of the Information Commissioner (OAIC) may take into account the views of the parties to an IC review before concluding an IC review pursuant to s 54W(b). While the Information Commissioner will consider the views of the review parties before finalising an IC review under s 54W(b), the decision whether it is more appropriate for the AAT to consider the IC reviewable decision ultimately rests with the Information Commissioner. Through the functions conferred on the Information Commissioner under the FOI Act, the Information Commissioner will be in the most informed position to

² See [McKinnon and Department of Immigration and Citizenship \[2012\] AICmr 34](#)

determine whether the interests of the administration of the FOI Act make it desirable for the AAT consider the IC reviewable decision.

Reasons for decision

9. 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 in the first instance because:

- [Insert reasoning]

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

- the Agency's **decision / internal review decision/ deemed access refusal decision OR submissions** dated **DD Month Year**.
- the **documents at issue / nature of the request**
- the FOI Act, in particular 54W **[example: s 11A(5), s 22, s33.]**
- the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act³ to which agencies must have regard in performing a function or exercising a power under the FOI Act, in particular [10.104] and [10.105]
- **the views of the parties**
- The Explanatory Memorandum to the Freedom of Information Amendment (Reform) Bill 2009

11. With consideration to the above, I am satisfied, as a delegate of the Information Commissioner, that it would be more appropriate and efficient for the application to be made directly to the AAT. As such, 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.

12. The applicant 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.

13. I confirm that this IC review is now closed. Your review rights are set out below.

Yours sincerely,

³ See Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the [Freedom of Information Act 1982](#)* (FOI Guidelines).

Hannah Holswilder

Director

Freedom of Information Branch

Office of the Australian Information Commissioner

DD Month 2024

ATTACHMENT A

Background

Date	Events
Click or tap to enter a date.	FOI request made to the Choose an item . <i>[Insert scope of FOI request]</i>
Click or tap to enter a date.	IC review application received by the Office of the Australian Information Commissioner. OR IC review application received by the Office of the Australian Information Commissioner. The applicant indicated within their IC review application that they wished for the Information Commissioner to exercise discretion to decide not to undertake an IC review under s 54W(b) of the FOI Act.
Click or tap to enter a date.	Choose an item . notified of receipt of IC review application and request for documents provided under [s 54Z or 54Z/55T] of the FOI Act.
Click or tap to enter a date.	The Choose an item . issued an initial decision in response to the applicant's FOI request. OR The Choose an item . provided access to documents outside of the allowable timeframe in the FOI Act. As this was not a valid decision, they are taken to be submissions. OR The Choose an item . issued a revised decision in accordance with s 55G of the FOI Act, in response to the Information Commissioner's notice and direction. OR [where a s55G decision could not be issued]

	<p>Choose an item. submission received to establish why the Information Commissioner should make a decision adverse to the applicant under s 55D(1) of the FOI Act.</p>
<p>Click or tap to enter a date.</p>	<p>An officer of the Information Commissioner requested the applicant/ Agency/Minister /parties provide submissions as to why the Information Commissioner should not exercise discretion to finalise IC review application s 54W(b) of the FOI Act</p> <p>Submissions were requested from the applicant/ Agency/Minister /parties for consideration by the Information Commissioner, or a delegated member of staff, by Click or tap to enter a date.</p>
<p>Click or tap to enter a date.</p>	<p>Applicant s 54W(b) submissions received, advising:</p> <p><i>'[insert applicant submissions (these may be included in the IC review application)]'</i></p>
<p>Click or tap to enter a date.</p>	<p>Choose an item. s 54W(b) submissions received, advising:</p> <p><i>'[insert Agency/Minister submissions (these will be in response to the IC's 54W(b) ITD)]'</i></p>
<p>Click or tap to enter a date.</p>	<p>An officer of the Information Commissioner provided the applicant with the Agency's/Minister's submission.</p> <p>Fulsome submissions were requested from the applicant for consideration by the Information Commissioner, or a delegated member of staff, by Click or tap to enter a date.</p>
<p>Click or tap to enter a date.</p>	<p>Further s 54W(b) submissions received from the applicant, advising:</p> <p><i>'[insert applicant's further submissions (these will be in response to the IC's 54W(b) ITD)]'</i></p>

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.⁴

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.⁵

Accessing your information

If you would like access to the information that we hold about you, please [contact us](#).

More information is available on our website.⁶

⁴ See [Federal Court of Australia](#)

⁵ See [Commonwealth Ombudsman](#)

⁶ See [About us: Access our information](#)



Australian Government

Office of the Australian Information Commissioner

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

Information Commissioner review applicant	
Choose an item.	
Recommendation date	Click or tap to enter a date.
OAIC reference number	
Choose an item. reference number	

Summary

1. I refer to the application made by [applicant name] (the applicant) for Information Commissioner review (IC review) of a **decision / internal review decision/ deemed access refusal decision** made by the [Respondent's full name] (the **Choose an item.**) 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 the Information Commissioner should exercise the discretion to decide not to **undertake /continue to undertake** an IC review under s 54W(b) of the FOI Act, as I am of the view that it may be in the interests of the efficient administration of the FOI Act that this review be closed and that the IC review applicant be provided the opportunity of applying directly to the Administrative Appeals Tribunal (AAT) for review, in the first instance.
3. I am writing to both parties in this IC review to offer an opportunity to comment or make submissions objecting this recommendation.

Discretion not to continue to undertake an IC review

4. Under s 54W(b) of the FOI Act, the Information Commissioner may exercise the discretion 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 directly by the AAT, rather than initially by the Information Commissioner.
5. The effect of such a decision would allow the applicant to apply directly to the AAT. The applicant would then have 28 days to lodge an application with the AAT. AAT filing fees may apply.¹

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



Australian Government

Office of the Australian Information Commissioner

6. This is also referred to in the Guidelines issued by the Australian Information Commissioner under s 93A (FOI Guidelines) at [10.104] and [10.105], which states:

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 IC review 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 Information Commissioner continuing with the IC review include:²

- 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 decision under review is of a level of complexity that it will be more appropriately handled through the procedures of the AAT
- where there may be a perceived or actual conflict of interest in the Information Commissioner undertaking the IC 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)).

7. However, 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.

Reasons for recommendation

8. In this IC review, it appears that it may be in the interests of the efficient administration of the FOI Act that that a delegate of the Information Commissioner exercises the discretion to decide not **to undertake / continue to undertake** an IC review under s 54W(b) of the FOI Act because:

² See [McKinnon and Department of Immigration and Citizenship \[2012\] AICmr 34](#)



Australian Government

Office of the Australian Information Commissioner

- [Insert reasons]

Next steps

9. The Office of the Information Commissioner (OAIC) may take into account the views of the parties to an IC review before concluding an IC review pursuant to s 54W(b). While the Information Commissioner will consider the views of the review parties before finalising an IC review under s 54W(b), the decision whether it is more appropriate for the AAT to consider the IC reviewable decision ultimately rests with the Information Commissioner. Through the functions conferred on the Information Commissioner under the FOI Act, the Information Commissioner will be in the most informed position to determine whether the interests of the administration of the FOI Act make it desirable for the AAT consider the IC reviewable decision.
10. If you disagree with this proposed recommendation, please write to us by [Click or tap to enter a date. \[1-2 weeks\]](#) and advise us of your reasons. If you agree with the proposed recommendation, you are not required to respond. However, should either party wish to provide additional information for consideration by the Information Commissioner, or a delegated member of staff, you may do so by the abovementioned date.
9. If more time is needed, a request for an extension of time must be made to the OAIC at the earliest opportunity within the period provided for response, and no later than 2 days before that period is due to expire. Requests for more time must explain the exceptional circumstances that necessitate additional time and propose a new date for response. Approval of an extension request is at the discretion of the OAIC.
11. The parties will be notified and provided review rights if the IC review is finalised under s 54W(b) of the FOI Act.

Yours sincerely,

[OAIC Officer]

Review Advisor

Freedom of Information Branch

Office of the Australian Information Commissioner

DD Month 2024



Australian Government

Office of the Australian Information Commissioner

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

Information Commissioner review affected party	
Agency	
Recommendation date	Click or tap to enter a date.
OAIC reference number	
Agency reference number	

Summary

1. I refer to the application for Information Commissioner review (IC review) of a decision made by the [Respondent] (the Agency/Minister) under the *Freedom of Information Act 1982* (Cth) (the FOI Act).
2. The purpose of this letter is to advise you, as an affected third party or person whose interests are affected by the IC reviewable decision, of my intention to recommend that the Information Commissioner, or a delegated member of staff, exercises the discretion to decide not to **undertake / continue to undertake** an IC review under s 54W(b) of the FOI Act.
3. I am of the view that it may be in the interests of the efficient administration of the FOI Act that this review be closed, to allow the opportunity of applying directly to the Administrative Appeals Tribunal (AAT) for review, in the first instance.
4. I am writing to offer you an opportunity to comment or make submissions objecting this recommendation.

Discretion not to continue to undertake an IC review

5. Under s 54W(b) of the FOI Act, the Information Commissioner may exercise the discretion 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 directly by the AAT, rather than initially by the Information Commissioner.



Australian Government

Office of the Australian Information Commissioner

6. The effect of such a decision would allow the applicant to apply directly to the AAT. The applicant would then have 28 days to lodge an application with the AAT. AAT filing fees may apply.¹
7. This is also referred to in the Guidelines issued by the Australian Information Commissioner under s 93A (FOI Guidelines) at [10.104] and [10.105], which states:

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 IC review 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 Information Commissioner continuing with the IC review include:²

- 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 decision under review is of a level of complexity that it will be more appropriately handled through the procedures of the AAT
 - where there may be a perceived or actual conflict of interest in the Information Commissioner undertaking the IC 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)).
8. However, 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.

¹ See [Administrative Appeals Tribunal - Fees](#)

² See [McKinnon and Department of Immigration and Citizenship \[2012\] AICmr 34](#)



Australian Government

Office of the Australian Information Commissioner

Reasons for recommendation

9. In this IC review, it appears that it may be in the interests of the efficient administration of the FOI Act that that the Information Commissioner, or a delegated member of staff, exercises the discretion to decide not to **undertake / continue to undertake** an IC review under s 54W(b) of the FOI Act because:

- [insert reasons – example below]
- The documents at issue appear complex, requiring technical knowledge of the subject matter, including, procedural knowledge related to the assessment of the information only known by the third parties, and the ability to determine the detriment that could occur arising from disclosure.
- Notably, the documents at issue contain information belonging to or relating to a **third party / multiple third parties** who were consulted during the processing of the FOI request, whose interests were identified as being affected by the decision. I believe it is reasonable to contend that to reach resolution of the matter it may require a formal hearing to enable oral submissions, and cross examination of the affidavit evidence so as to allow the parties sufficient opportunity to present how the decision affects their interests. This approach is more suited to the processes of the AAT than the IC review process, which is intended to be an informal process with matters review on the papers rather than through formal hearings.
- With consideration to the above, I further believe that the decision may be better suited to the flexible dispute resolution processes of the AAT, which are not available to the Information Commissioner. For example, under s 35 of the *Administrative Appeals Tribunal Act 1975* (AAT Act) the Tribunal may, by order, direct that a hearing (or part of a hearing) takes place in private where the Tribunal can also give directions prohibiting or restricting the publication of information lodged or otherwise given.³ In addition to this, s 34E of the AAT Act provides that evidence of anything said, or any act done, at an alternative dispute resolution process is inadmissible in any court or in any proceeding before a person authorised by a law of the Commonwealth or of a State or Territory to hear evidence.⁴
- I am further minded to conclude that reaching a resolution may exhaust a substantial amount of Information Commissioner resources over a significant period where, ultimately, any IC review decision made by the Information Commissioner may be taken on appeal to the AAT by either the affected third party, the FOI applicant or the Agency.

³ See Administrative Appeals Tribunal Act 1975 – Section 35

⁴ Administrative Appeals Tribunal Act 1975 - Section 34E



Australian Government

Office of the Australian Information Commissioner

Next steps

10. The Office of the Information Commissioner (OAIC) may take into account the views of the parties to an IC review before concluding an IC review pursuant to s 54W(b). While the Information Commissioner will consider the views of the review parties before finalising an IC review under s 54W(b), the decision whether it is more appropriate for the AAT to consider the IC reviewable decision ultimately rests with the Information Commissioner. Through the functions conferred on the Information Commissioner under the FOI Act, the Information Commissioner will be in the most informed position to determine whether the interests of the administration of the FOI Act make it desirable for the AAT consider the IC reviewable decision.
11. If you disagree with this proposed recommendation, please write to us by [Click or tap to enter a date. \[1-2 weeks\]](#) and advise us of your reasons. If you agree with the proposed recommendation, you are not required to respond. However, should you wish to provide additional information for consideration by the Information Commissioner, or a delegated member of staff, you may do so by the abovementioned date.
12. If more time is needed, a request for an extension of time must be made to the OAIC at the earliest opportunity within the period provided for response, and no later than 2 days before that period is due to expire. Requests for more time must explain the exceptional circumstances that necessitate additional time and propose a new date for response. Approval of an extension request is at the discretion of the OAIC.
13. You will be notified and provided review rights if the IC review is finalised under s 54W(b) of the FOI Act.

Yours sincerely,

[OAIC Officer]

Review Advisor

Freedom of Information Branch

Office of the Australian Information Commissioner

DD Month 2024

Subject line: OAIC – MR – s 54W(b) - Recommendation not to **undertake / continue to undertake** an Information Commissioner review

Our reference:

Agency/Minister reference:

Affected Party
Agency/Minister

By email: [Email address of Affected Party]

Recommendation not to **undertake / continue to undertake** an Information Commissioner review under s 54W(b) of the FOI Act

Good **morning/afternoon** [Contact person of Affected Party]

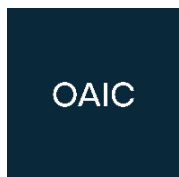
Please find **attached** correspondence in relation to this Information Commissioner review.

If you disagree with the proposed recommendation, please write to us by **DD Month 2024** and advise us of your reasons.

If you require assistance regarding this email, please contact us at foidr@oaic.gov.au.

Please quote the reference **MR** in all correspondence.

Kind regards,



Georgia Furlong (she/her)
Review Advisor
Freedom of Information Branch
Office of the Australian Information Commissioner
Sydney
P 1300 363 992 E foidr@oaic.gov.au

The OAIC acknowledges Traditional Custodians of Country across Australia and their continuing connection to land, waters and communities. We pay our respect to First Nations people, cultures and Elders past and present.

[Subscribe to Information Matters](#)

Draft s54X Correspondence

Subject line: OAIC – MR– s 54X – Notification of a decision not to **undertake/ continue to undertake** an Information Commissioner review

Our reference:

Agency/Minister reference:

Affected Party
Agency

By email: **[Affected Party Email Address]**

Notification of a decision not to **undertake/ continue to undertake an Information Commissioner review**

Dear **[Affected Party]**,

In accordance with s 54X of the *Freedom of Information Act 1982* (the FOI Act), you are being notified that the Information Commissioner has today concluded the Information Commissioner review under s 54W(b) of the FOI Act.

An excerpt of the reasons for decision is provided below:

[insert screenshot of the ‘reasons for decision’ paragraph/s from pdf 54W(b) decision]

The applicant 28 calendar days from today to lodge an application for review with the Administrative Appeals Tribunal (the AAT), in accordance with s 57A of the *Administrative Appeals Tribunal Act 1975* (the AAT Act).

Under s 60AA of the FOI Act, the **Agency/Minister** has an obligation to notify any person whose interests are affected by the decision that an application has been made to the AAT.

Section 30(1A) of the AAT Act provides that, if an application has been made by a person for a review of a decision, any other person whose interests are affected by the decision may apply to be made a party to the proceeding.

Please direct all future correspondence relating to the decision to the **Agency/Minister**.

I confirm our file is now closed.

Kind regards,