

Stage	Actions
Section 86 Notice	<p>31. Case Officer to prepare in consultation with Director Reviews and Investigations and Assistant Commissioner:</p> <ul style="list-style-type: none"> - s 86 Notice (including any recommendations) - letter accompanying s 86 Notice to respondent agency - updated evidence matrix, and - snapshot summary. <p>32. Case Officer when considering whether the findings of the investigation warrant making recommendations consider the appropriateness of recommendations that:</p> <ul style="list-style-type: none"> - Promote cultural change - Reinforce the requirement to promote the objects of the FOI Act - Implement training - Update FOI manuals - Develop policies and procedures, and - Conduct audits with a reporting timeframe of up to 6 months. <p>33. Once the s 86 Notice has been signed by the Information Commissioner:</p> <ul style="list-style-type: none"> - Information Commissioner or relevant delegate to call the respondent agency to advise that the matter has been finalised and advise: <ul style="list-style-type: none"> - whether any recommendations have been made - relevant next steps in the process - if relevant, Case Officer on the advice of the Director Reviews and Investigations or Assistant Commissioner to advise media of the outcome of the investigation prior to sending out the s 86 Notices to the parties - Case Officer to send out the s 86 Notice to the respondent agency inviting any comments within 2 weeks where recommendations have been made or 5 days where no recommendations have been made. - The s 86 Notice will also advise the respondent agency that the complainant will also receive a copy after the 2 week or five day period for the respondent agency to provide comments in response and a summary of the investigation will be published on the OAIC's website (see Outcomes of investigations summary table: D2021/020081). <p>34. Upon expiration of the 2 week or 5 day period (or once a response has been received from the respondent agency) the Director Reviews and Investigations in consultation with the Assistant Commissioner will review the respondent agency's comments.</p> <p>35. Where no issues are raised by the respondent agency in response to the investigation outcome, proceed to Step 40</p> <p>36. Where the respondent agency raises concerns regarding the outcome of the investigation, Case Officer is to draft an email to the Information Commissioner advising of the adverse comments which includes:</p> <ul style="list-style-type: none"> - brief background outlining the complaint, parties and whether recommendations were made - the comments from the respondent agency is provided as an attachment, and - Information which addresses the adverse comments. <p>37. Proceed to assign Resolve clearance action through the following levels:</p>

Stage	Actions
	<ul style="list-style-type: none"> - Director Reviews and Investigations - Assistant Commissioner <p>38. Once approved, Case Officer to send email to Information Commissioner.</p> <p>39. If needed, a follow up discussion between the Director Reviews and investigations, Assistant Commissioner and FOI Commissioner, to discuss next appropriate steps.</p> <p>40. Case officer to send an email to complainant providing a copy of the s 86 Notice (Attachment A) and may include any comments provided by the respondent.</p> <p>41. Case Officer to provide draft summary of the outcome of the investigation to Director Reviews and Investigations and Assistant Commissioner for clearance and approval to publish the outcome on the OAIC website (see Outcomes of investigations summary table: D2021/020081).</p> <p>42. Case Officer to liaise with OAIC Media team once approval has been provided for the publication of the outcome of the complaint.</p>
<p>Closure of investigation file</p>	<p>43. If no recommendations made Case Officer to close Resolve complaint file.</p> <p>44. If recommendations made:</p> <ul style="list-style-type: none"> - Case Officer closes the complaint file and raises a ‘Recommendation case’ on resolve x-ref the original complaint file. Refer to FOI Complaints recommendation case – Overview of process (see worksheet D2020/007324) - Case Officer to note when response to s 86 Notice is due and monitor response. - Case Officer to provide a case summary for distribution to FOI Branch.

Commissioner Initiated Investigation Process

Where the Information Commissioner has identified systemic or significant issues with an agency's processing of FOI requests, the Commissioner can commence investigation of the agency on their own initiative (Commissioner Initiated Investigation (CII)).

Systemic or significant issues may be identified through a number of methods:

- FOI complaints
- IC reviews
- Audits
- Information provided to the OAIC

Prior to commencing a CII, the Information Commissioner will consider the information before the office at that time. The Information Commissioner may decide to conduct preliminary inquiries with an agency prior to commencing investigation.

Stage	Actions
Preliminary inquiries	<ol style="list-style-type: none">1. Case Officer to draft a set of relevant preliminary inquiries in consultation with Director Reviews and Investigations.2. Case Officer to provide the preliminary inquiries to the agency and monitor response due from the respondent agency.
Assessment	<ol style="list-style-type: none">3. Complaint and respondent agency response to preliminary inquiries to be assessed to determine whether the complaint should proceed to a CII investigation. Relevant considerations to consider whether to commence a CII includes:<ul style="list-style-type: none">- whether the practice is systemic- whether significant issues are raised- whether there has been a breach of the FOI Act or non-compliance with the FOI Guidelines- whether it is in the public interest to investigate4. Director Reviews and Investigations or Assistant Director to undertake assessment and assign the matter to Case Officer for next steps.
Allocation	<ol style="list-style-type: none">5. If the recommendation is to proceed to commence a CII:6. Case Officer to prepare a brief to the Information Commissioner including the following information:<ul style="list-style-type: none">- recommendations- background- potential case studies- information before the office- relevant agency statistics- related IC review issues- considerations- outcomes/benefits- resourcing implications- project plan7. Proceed to assign Resolve clearance action through the following levels:<ul style="list-style-type: none">- Director Reviews and Investigations- Assistant Commissioner

Stage	Actions
Commencement of CII	<ul style="list-style-type: none"> - FOI Commissioner <p>8. Case Officer sends brief to Information Commissioner.</p> <p>9. If the Information Commissioner decides to commence a CII, the Case Officer drafts a s 75 Notice to the respondent agency for clearance.</p> <p>10. Proceed to assign Resolve clearance action through the following levels:</p> <ul style="list-style-type: none"> - Director Reviews and Investigations - Assistant Commissioner - FOI Commissioner <p>11. Case Officer to compile documents on Resolve file and send the draft s 75 Notice to the Information Commissioner.</p>
Investigation	<p>12. Once the Information Commissioner has settled the s 75 Notice, the Commissioner or relevant delegate to call the respondent agency to advise that this matter will proceed to a CII investigation providing the following information:</p> <ul style="list-style-type: none"> - Issues - Outline process, and - Case Officer details contact details. <p>13. Media statement prepared and finalised by the Information Commissioner</p> <p>14. Case Officer follows up on phone call to the agency by the Information Commissioner or relevant delegate by sending the s 75 Notice.</p> <p>15. Case Officer to notify affected third party that their matter will be used as a case study in the CII (if required).</p> <p>16. Case Officer to monitor respondent agency's response due date.</p> <p>17. Once a response has been received from the respondent agency to the s 75 Notice, Case Officer to assess the evidence and form preliminary view.</p> <p>18. After discussion with Director Reviews and Investigations and/or Assistant Commissioner, Case Officer to prepare relevant correspondence to either the respondent agency or the complainant.</p> <p>19. Case Officer to discuss next appropriate steps with Director Reviews and Investigations and/ or Assistant Commissioner.</p> <p>Next steps include:</p> <ul style="list-style-type: none"> - Request for further information from the agency - Request for further information from affected third parties - Providing a set of the agency's open submissions to affected third parties for their comment, and - Proceed to s 86 Notice. <p>20. If further information required, Case Officer to draft request and provide to Director Reviews and Investigations and Assistant Commissioner for clearance.</p> <p>21. Case Officer to monitor response.</p> <p>22. If response received, consider submissions and discuss with Director Reviews and Investigations for re-assessment.</p> <p>23. If Director Reviews and Investigations in consultation with Assistant Commissioner is satisfied that no further information is required proceed to finalisation.</p>
Section 86 Notice	<p>24. If proceeding to s 86 Notice, Case Officer to prepare in consultation with Director Reviews and Investigation and Assistant Commissioner:</p>

Stage	Actions
	<ul style="list-style-type: none"> - s 86 Notice - list of recommendations - letter accompanying s 86 Notice to respondent agency, and - Executive brief outlining next steps.
	25. Case Officer to compile documents on Resolve file.
	26. Case Officer to consider whether the findings of the CII warrant making recommendations and also consider the appropriateness of recommendations that: <ul style="list-style-type: none"> - related FOI complaint outcomes - promote cultural change - reinforce the requirement to promote the objects of the FOI Act - implement training - update FOI manuals - develop policies and procedures, and - conduct audits with a reporting timeframe of up to 6 months.
	27. Case Officer to arrange for the s 86 Notice to be signed by the Information Commissioner.
	28. Once the s 86 notice has been signed by the Information Commissioner: <ul style="list-style-type: none"> - Information Commissioner or relevant delegate to call the respondent agency to advise that the matter has been finalised and advise: <ul style="list-style-type: none"> - whether any recommendations have been made, and - relevant next steps in the process.
	29. Case Officer to advise OAIC media of the outcome of the investigation prior to sending out the s 86 notices to the agency.
	30. Case Officer to send out the s 86 Notice to the respondent agency inviting them to provide comments they wish to make within 2 weeks and advising them that the Information Commissioner will consider any comments and then provide a copy of the s 86 Notice and comments to any affected parties and publish a summary of the outcome of the investigation on the OAIC's website (see Outcomes of investigations summary table: D2021/020081). <ul style="list-style-type: none"> - Case Officer to update weekly 'FOI insights' to include the outcome of the investigation. - Case Officer to provide a case summary for distribution to FOI Regulatory Group, Legal and Enquiries teams.
	31. 2 weeks later: (if there are notified third parties) Case Officer to call the affected third parties and advise that the matter has been finalised by the Information Commissioner. Follow up with email providing s 86 Notice.

Stage	Actions
Finalisation	<p>32. Director Reviews and Investigations together with Assistant Commissioner in consultation with SCaC consider whether a media statement is required.</p> <p>33. Director Reviews and Investigations and Assistant Commissioner provide a copy of the s 86 Notice to SCaC for publication on the OAIC's website.</p> <p>34. Case Officer to provide draft summary of the outcome of the investigation to Director Reviews and Investigations and Assistant Commissioner for clearance and approval to publish the outcome on the OAIC website (see Outcomes of investigations summary table: D2021/020081)</p> <p>35. Case Officer to liaise with media once approval has been provided for the publication of the outcome of the complaint.</p> <p>36. If no recommendations made the Case Officer closes the CII Resolve file.</p> <p>37. If recommendations made the Case Officer closes the CII Resolve file and raises a 'Recommendation Case' on Resolve x-ref the original CII file. Follow process set out in FOI Complaints recommendation case – Overview of process (see worksheet D2020/007324).</p>



June 2023

FOI Complaints: transfer to Ombudsman

This resource applies to transfers of FOI complaints to the Commonwealth Ombudsman under s 74 of the *Freedom of Information Act 1982* (FOI Act) and should be read in conjunction with [Part 11 of the FOI Guidelines](#).

Key principles

- Under Part VIIB of the FOI Act the Information Commissioner can investigate agency actions relating to the handling of FOI matters. This involves investigating complaints received from complainants (s 70) as well as conducting own motion investigations (s 69(2)).
- The FOI Act sets out certain rules that apply to the conduct of the Information Commissioner's complaint investigations and Commissioner initiated investigations. The guiding principle is that an investigation shall be conducted in private and in the way the Information Commissioner considers fit (s 76(1)).
- Section 74 of the FOI Act provides the Information Commissioner with the discretion whether to transfer a complaint to the Commonwealth Ombudsman if satisfied that the complaint would be more effectively or appropriately dealt with by the Ombudsman.
- Part 11 of the *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* (FOI Guidelines) provides guidance on the operation of s 74.¹ In particular paragraph [11.14] explains that the Information Commissioner has the power to transfer a complaint (or part of a complaint) to the Ombudsman if the Information Commissioner is satisfied that the complaint could be dealt with more effectively or appropriately by the Ombudsman (s 74).
- The factors that the Information Commissioner considers when deciding to transfer a complaint to the Ombudsman include:
 - whether the complaint is about actions taken by the Office of the Information Commissioner (OAIC), including how the OAIC has dealt with an:
 - Information Commissioner review
 - FOI complaint
 - vexatious applicant declaration application
 - FOI request, or
 - extension of time application

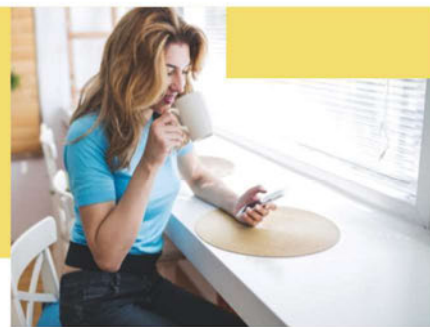
¹ See *FOI Guidelines* [11.14].

- whether there may be a perceived or actual conflict of interest in the Commissioner considering the complaint, including where:
 - the complainant has active complaints under the Privacy Act where the Information Commissioner is the respondent
 - the complaint relates to specific functions exercised by the Information Commissioner under the Privacy Act
 - the complainant has active matters in other forums, including the Administrative Appeals Tribunal and Federal Court and the Information Commissioner is the respondent
- whether the issues raised relate to other active complaints lodged with the Commonwealth Ombudsman
- When making a decision to transfer a complaint to the Ombudsman, the Information Commissioner must reach a level of satisfaction that the complaint could be more effectively or appropriately dealt with by the Ombudsman.
- In making a decision on whether to transfer the complaint to the Ombudsman, the Information Commissioner will notify the complainant that the complaint may be transferred to the Ombudsman under s 74 of the FOI Act and take into consideration any submissions the complainant makes in response prior to making a decision on whether to transfer the complaint.
- If the Information Commissioner decides to transfer the complaint to the Ombudsman, the Commissioner must:
 - consult the Ombudsman (s 74(2)(a))
 - make a decision not to investigate or not to continue to investigate the complaint (s 74(2)(b))
 - provide the Ombudsman with any information or documents that relate to the complaint (s 74(3)(b)), and
 - notify the complainant in writing that the complaint has been transferred (s 74(3)(c)). The notification to the complainant must contain the Commissioner’s reasons for transferring the complaint (s 74(4)).

Key steps and relevant templates

Step	Template
1. Consultation with the Ombudsman	Contact the Ombudsman by phone or issue a consultation letter to the Ombudsman: D2020/021432
2. If Ombudsman does not raise any further issues for consideration ² , notify the complainant of intent to transfer. Response to be provided within 2 weeks.	Intent to transfer under s 74 to complainant: D2020/021458
3. Decision to transfer	Letter to the Ombudsman transferring the FOI complaint: D2020/021428 Letter to the complainant advising that the FOI complaint has been transferred to the Ombudsman: D2020/021429

² Note: there is no requirement in s 74 for the Ombudsman to agree to transfer. In the event the Ombudsman does not agree to transfer, but the matter falls within the above parameters, the matter is to be escalated to the Assistant Commissioner.



June 2023

Conducting an IC review: Review Adviser preliminary steps checklist

This checklist provides general guidance to review officers to assist with assessing next steps when a review officer is allocated a new IC review matter.

Upon completing this checklist a review officer should have developed a case plan and formed a view about how the matter might be progressed to a resolution and transferred to the Significant Decisions team where appropriate.

Review officer introduction to review parties

- Review officers should write to the parties in an IC review within 2 working days of allocation to introduce themselves as the review officer handling the matter and to provide their contact details. Any request for case updates should also be provided where appropriate.
- Where an applicant has agreed to being contacted by telephone, the review officer should contact the applicant by telephone to introduce themselves before writing to the applicant.** During the telephone call, the review officer should take the opportunity to:
 - provide an overview of the IC review process and the review officer’s role
 - provide an explanation of what has been done so far to progress the IC review application
 - seek clarification of the outcome sought in the IC review (if necessary)
 - explain that the review officer will form a view about the merits of the case and may invite the applicant to provide further information/submissions in response to that view
 - discuss possible outcomes in the IC review process, and
 - advise on next steps.

Reviewing the IC review file

After sending introductory emails/letters to the parties, an assessment of next steps in the IC review should be completed within 2 weeks of allocation by taking the following steps:

- Review 'Summary' box on Resolve Main page for mail assessor's assessment.
- Review any 'Actions' on Resolve Main page.
- Review 'Documents' and 'All Actions' tabs on Resolve to familiarise yourself with the correspondence on the file. In particular, consider:
 - Whether the parties have made any submissions by telephone
 - Whether the OAIC has received hard copy documents from the parties, and
 - Whether the parties have requested expedition.
- Update the 'Documents' tab on Resolve using 'Document properties' to label correspondence and identify key documents including:
 - The IC review application
 - The decision under review
 - The parties' submissions, including the agency/minister's response to the [s 54Z](#) notice, and
 - Any correspondence clarifying the scope/issues in the IC review.
- Identify the decision under review:
 - Has the applicant provided a copy of the decision under review?
 - Has there been a deemed refusal (see [s 15AC\(3\)](#) and [s 54D](#) of the FOI Act)?
 - Is it an access grant decision or an access refusal decision (see [s 53A/s 54L](#) and [s 53B/s 54M](#) of the FOI Act)? Who bears the onus in the IC review (see [s 55D](#) of the FOI Act)?
 - Has there been an internal review ([s 54C](#)) or revised decision ([s 55G](#)) during the course of the IC review? Note that revised decisions will only be relevant in IC reviews of access refusal decisions (see [FOI Guidelines \[10.107\]](#)).
- Identify the parties to the IC review (see [s 55A](#)):
 - Are any of the parties represented and if so, do we have appropriate authority?
 - Has the applicant requested to be contacted in a particular manner? (see IC review application)
 - Are there any third parties? If so, do we have a copy of the [s 54P](#) notice issued by the agency/minister to advise the third party of the IC review? Is the identity of the third party known to the applicant or should their identity be kept confidential?
- Identify the scope of the IC review:
 - Has the applicant clearly explained in the IC review application the outcome they seek in the IC review? Is this outcome available in the IC review process?
 - In access grant decisions, does the IC review applicant rely on exemptions which it was invited to make submissions about during the consultation process (see [FOI Guidelines \[6.209\]](#))?
 - Does the [s 54Z](#) notice issued to the agency identify all of the issues in the IC review?
 - What steps have been taken already, if any, to seek to resolve the issues in the IC review? For example, consider whether:
 - any attempt has been made to reach an agreement under [s 55F](#)

- the agency/minister has been invited to consider making a decision under [s 55G](#)
 - the scope or issues have been limited/clarified with the applicant/agency
 - submissions been shared between the parties or whether the OAIC has agreed to accept submissions in confidence
 - a view as to the merits of the case has been provided to either of the parties (either by way of a preliminary view or intention to decline letter).
- Does the applicant have any other matters that are being considered/have been considered by the Freedom of Information team (check for open or closed cases)? If so, do any of the issues overlap?
- Has the agency/minister provided all of the documents requested in the [s 54Z](#) notice?
- If there is exempt material at issue, consider:
- Has the agency provided a marked up copy of the documents at issue? If not, consider whether it may be appropriate to issue a notice to produce under [ss 55R](#) and/or [55U](#).
 - If the agency has provided marked up copies of exempt material, do the marked-up documents enable you to understand the exemptions applied and are they consistent with the decision under review (see [3.3] of the [IC review procedure direction](#))? Is there an ‘Exempt material’ action on Resolve? If not, create one.
- Read the relevant provisions of the FOI Act and relevant parts of the FOI Guidelines and form a view about how the matter could be progressed to a resolution. Develop a case strategy to discuss with your supervisor: complete the ‘Reviews plan’ (see **Appendix A**).

Review Case Plan – Reviews and Investigations

The purpose of the review case plan – Reviews and Investigations is to:

- *ensure that all relevant procedural fairness steps are taken in a timely manner at the appropriate stage of the IC review process*
- *prevent unnecessary delays by ensuring procedural issues are addressed when they arise*
- *increase efficiency and prevent replication by giving staff the tools to build on the work done and knowledge gained by their colleagues at each stage of the case management process and*
- *provide confidence to staff and the Executive that matters allocated to the Significant Decisions Team are ready for a decision.*

Review advisers in the Reviews and Investigations Team should complete the review case plan prior to transferring the matter to the Significant Decisions Team.

Use of the attachments for planning and review

The review case plan – Reviews and Investigations includes 2 attachments:

- *Attachment A – Documents at issue – is a list of the documents at issue and the exemptions that apply to each*
- *Attachment B – Further information required – is a matrix setting out what further information is required in relation to each issue.*
- *The purpose of these tools is to identify information gaps and plan the strategy for finalising the review. While the review case plan requires that Review Advisers ensure the attachments are completed prior to transfer, Review Advisers in the Reviews and Investigations Team should ideally ensure the attachments are completed upon allocation and updated over the course of the IC review.*

Overview/Application details		
Scope of IC review	<ul style="list-style-type: none"> <i>If the matter was transferred from the Intake and Early Resolution Team without a Review Case Plan – Intake and Early Resolution, please outline the scope of the review in full</i> <i>Otherwise please explain any modifications to scope that have occurred since the matter was transferred from the Intake and Early Resolution Team</i> 	
Comments [review adviser to complete - optional]	<ul style="list-style-type: none"> <i>Briefly, include any comments about matters you want to flag to the drafter, such as, for example, difficult issues, any preliminary views sent to the parties, related or relevant cases or IC review decisions, the names of any third parties, or your view on particular issues</i> 	
Actions	Action (to be completed before transfer)	Notes (optional)
1. Third parties have been given an opportunity to provide submissions and have had the opportunity to respond to any adverse information <i>If there are no third parties, please mark the action not applicable</i> <i>If there is a third party but you consider a procedural fairness step is not required because it appears sufficiently clear that the decision will not be adverse to the them, please mark the action complete and note this in the 'Notes' field</i>	Choose an item.	
2. Requests for <u>confidential submissions</u> have been addressed, and where relevant, a non-confidential version of the submission has been provided by the agency <i>If there have been no requests for confidential submissions, please mark the action not applicable</i>	Choose an item.	
3. Parties have been given sufficient opportunities to provide submissions	Choose an item.	

Actions	Action (to be completed before transfer)	Notes (optional)
<i>For completeness, this includes ensuring the applicant has been given an opportunity to advise whether they wish to proceed and if so, on what grounds, after a revised decision</i>		
4. All documents under review (marked up and with the relevant exemptions flagged) are on the Resolve file	Choose an item.	
5. The agency has provided the OAIC with an updated schedule of documents flagging which exemption applies to each document. <i>A schedule will not be required in all cases, for example, where there are only a small number of documents. If you consider a schedule is not required please note this in the 'Notes' column, and mark the action complete</i>	Choose an item.	
6. Complete Attachment A: Documents at issue	Choose an item.	
7. Attachment B: Further information required is complete and confirms that no further information is required from the parties. <i>Usually, a matter should only be transferred to the Significant Decisions Team if no further information is required, however, if you and your director agree that you have made reasonable attempts to seek the information from the party, please outline the efforts made, including the use of compulsory powers, in the 'Notes' column, and mark the action complete</i>	Choose an item.	
8. The OAIC has sought IGIS evidence if required (s 33) <i>If s 33 is not an issue in the IC review, please mark the action not applicable</i>	Choose an item.	

Actions	Action (to be completed before transfer)	Notes (optional)
9. Director of Reviews and Investigations consulted regarding referral to the Significant Decisions Team	Choose an item.	
10. Parties advised that the matter is to be transferred to the Significant Decisions Team	Choose an item.	

Completed by	[insert name and position]
Date of completion	

Attachment A: Documents at issue

If an issue to be determined in this IC review is the application of exemptions to documents, this table should be completed to indicate which documents (or page numbers, if documents are not numbered) are in scope. Please only list the documents over which exemption issues need to be decided at IC review. The comment field can be used to record any observations on the strength of the exemption, issues to be considered, clarification of what parts of the document are exempt if necessary, etc. For example:

Doc #	Exemption	Comment
3, 7, 8	45	Query whether legal professional privilege waived. See applicant subs.
9	47G(1)(a) 45	Section 47G(1)(a) applies to part of covering document. Section 45 applies to attachment. Query whether privilege waived.
10-15	47G(1)(a)	

Attachment B: Further information required

The below table must be completed before allocating the matter to the Significant Decisions Team. Please complete the below table by including any relevant FOI Act requirements, any further information required to properly assess each requirement, and the source of the information. For example:

FOI Act requirement	Further information required and source
S 24AB – was the request consultation process followed?	Not under contention. No further information required
S 24AA – substantial diversion	<p>The agency has indicated processing the request would take more than 250 hours but has not provided any further details.</p> <p>Request the agency provide:</p> <ul style="list-style-type: none"> • a breakdown of the 250 hours processing time and information about how it calculated that figure. • whether sampling was undertaken and if so, copies of the sample documents • information about the relevance of the sample and how it relates to the calculation of processing time
S 24AA – unreasonable diversion	<p>The agency has not specifically addressed unreasonable diversion in its decision or submissions.</p> <p>Request the agency provide submissions as to why it considers the work involved in processing the request would unreasonably divert the resources from its other operations.</p>



June 2023

Conducting an IC review: Submissions

Contents

Submissions	1
Timeframes for responses	3
Requests for an extension of time to provide information/submissions	3

Submissions

General

Once the OAIC had decided to undertake an IC review, the OAIC will ordinarily give the agency/minister a copy of the application for IC review and will ask the agency/minister to provide information relevant to the IC review (see *FOI Guidelines* [10.100]).

The notices issued under [s 54Z](#) to the parties explain that the Information Commissioner will generally share the submissions provided during the IC review with the other party: see paragraph 10.103 of the *FOI Guidelines*.

In relation to submissions made during the course of an IC review in light of a review officer’s preliminary assessment of the matter, the *FOI Guidelines* at [10.113] explain that any submissions received during this process will generally be shared between the parties.

Request to provide confidential submissions: Respondents

Part 5 of the [IC review procedure direction](#) explains that if an agency/minister wishes to make a submission in confidence, a request for the submission to be treated in confidence must be made ahead of providing the submission.

Any request for confidentiality must be accompanied by reasons to support such a claim. Circumstances in which the OAIC may agree to accept submissions in confidence include:

- where the submissions would reveal the contents of the documents at issue
- where the OAIC is satisfied that the agency has made a prima facie case that the relevant submissions would likely be exempt under the FOI Act (for example where the

submissions include third party personal information and it seems that there is a prima facie case that the third party personal information would be exempt under s 47F).

Where the OAIC accepts a submission in confidence, agencies and ministers must provide a version of the submission that can be shared with the applicant (see [IC review procedure direction](#) [5.4]).

Provision of 'confidential' submissions by agencies without a request

If an agency/minister provides submissions marked as confidential without first requesting that the OAIC agrees to accept the submissions as confidential, the review officer should write to the agency/minister to explain:

Thank you for providing [agency/minister]'s submissions in this matter. I note that the submissions are marked as confidential. However, it does not appear that [agency/minister] made a request for the submission to be treated in confidence ahead of providing the submission in accordance with [5.3] of the [IC review procedure direction](#). In the absence of such a request, the OAIC does not agree to accept the submissions as confidential.

If the [agency/minister] wishes to make a request that the submissions are treated as confidential, please submit a request with reasons by **@ 3 working days** and provide a version of the submissions that can be shared with the applicant. The OAIC will then advise whether it agrees to treat the submissions as confidential.

If a response is not received within the timeframe provided or the agency/minister does not provide reasons for why it requests that the submissions are treated as confidential, discuss next steps with your supervisor.

Request to provide confidential submissions: Applicants

The provision of confidential submissions by an applicant is less common. If this situation arises, the review officer should discuss with their supervisor whether the applicant has provided sufficient reasons for the OAIC to agree to accept the submissions in confidence in the circumstances.

Examples of where the OAIC may agree to accept submissions from an applicant in confidence include:

- where a journalist's submissions refer to a confidential source of information, and
- where there has been a Public Interest Disclosure.

Submissions from third parties

If the OAIC has received or has been provided with copies of submissions from a third party during the course of the IC review and you intend to share the submissions or cite the submissions in an IC review decision, discuss this with your supervisor. Consideration should be given to whether disclosure of the third party's identity/submissions would disclose exempt material and/or result in a [breach of privacy](#).

If the OAIC invites a third party to provide submissions during the course of an IC review, the third party should be advised that their submissions may be cited or referred to in the IC review decision unless there are compelling reasons not to.

Timeframes for responses

Timeframes for responses from agencies

The timeframe that the Freedom of Information team generally allows agencies/ministers to provide a response to a request for information will vary depending on the circumstances. Generally, the following timeframes are set:

Action	Timeframe for response
Response to requests for information during the course of an IC review	Two weeks
Response to a simple request for clarification or for missing documents to be provided	Up to one week

Discuss with your supervisor if:

- you are considering allowing a timeframe different to those set out above
- you are considering granting an extension of time when an agency/applicant has provided no reasons for the extension (generally, this approach will not be appropriate)
- you are considering granting an extension of time of more than two weeks, or
- you have already granted an extension of time and the agency has requested a further extension of time.

Longer timeframes may be appropriate when:

- an agency has undertaken to make a revised decision and has provided reasons why an extension of time is required in the circumstances – generally, no more than two additional weeks will be given for the revised decision to be made.
- an agency has advised that it intends to undertake third party consultation during the course of the IC review.

Timeframes for responses from applicants and third parties

Generally, applicants and third parties are given two weeks to respond to a request for information or an invitation to provide submissions during the course of an IC review.

Discuss with your supervisor if you intend to allow the applicant/third party more than two weeks to provide a response.

Requests for an extension of time to provide information/submissions

If a party to the IC review (agency/minister/applicant/third party) is unable to respond within the specified timeframe, the OAIC expects the party to request an extension of time in advance of the deadline and provide reasons why additional time is required.

Generally, where a party requests an extension of two weeks or less and no extensions of time have been granted previously, the review officer can decide whether to grant the extension of time based on the reasons provided.

Circumstances where an extension of two weeks may be justified include:

- where an agency has been provided with a preliminary view and has advised that it will make a revised decision (consider contacting the agency to ask for details of the extent of the information it proposes to release under the revised decision to determine whether the revised decision is likely to resolve some/all of the issues in the IC review)
- where an agency has advised that it has commenced further third party consultation and is awaiting a response, and the review officer is satisfied that such consultation is appropriate to resolve the issues in the IC review
- where an applicant/third party has been invited to make submissions and has advised that due to illness or personal circumstances, they have been unable to prepare a response within the timeframe provided, or
- where an applicant/third party has expressed concerns about the complexity of the agency's decision/submissions/the OAIC's request for information/invitation to provide submissions and seeks further time to prepare a response (consider offering to call the applicant to talk through the decision/submissions/the OAIC's request for information/submissions).

Note: the OAIC cannot provide an extension of time in relation to an agency/minister's response to a notice to produce under [s 55R](#). If the OAIC receives a request for an extension of time to respond to a [s 55R](#) notice, discuss with your supervisor immediately.

Where a party requests an extension of more than two weeks, or is making a further request for an extension of time, the review officer should ask the party to provide reasons (if not already provided) and then discuss with your supervisor whether the extension of time should be granted in light of the following:

- the history of the matter
- whether any extensions of time have been granted previously
- whether the agency/minister/applicant/third party has previously had the opportunity to provide the documents/information requested
- whether the information sought is necessary to progress the IC review
- whether it might be appropriate to issue a notice to produce under [ss 55R](#) and/or [55U](#), and
- whether the other party is likely to object to the extension of time.

Requests for an extension of time from agencies

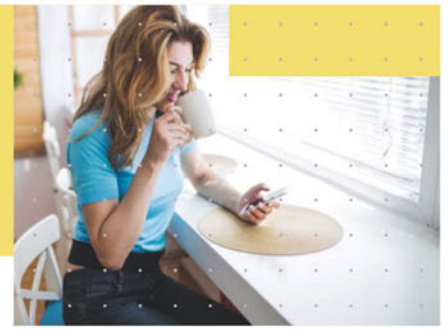
In an access refusal IC review, consider whether it is appropriate to remind the agency of its obligations in the IC review process:

- [Section 55D\(1\)](#) of the FOI Act provides that the agency or minister has the onus of establishing that a decision given in respect of the request or application is justified or the Information Commissioner should give a decision adverse to the IC review applicant.
- [Section 55DA](#) of the FOI Act requires agencies and ministers to assist the Information Commissioner in conducting an IC review.
- [Section 55Z](#) of the FOI Act authorises agencies and ministers to provide information for the purposes of an IC review and provides a protection from liability for doing so.

Requests for an extension of time from the applicant in an access grant
IC review

Consider whether it is appropriate to remind the applicant of its onus in the IC review
([s 55D\(2\)](#)).





August 2023

Conducting an IC review: Preliminary view checklist

Contents

Introduction 2

Before drafting a preliminary view/appraisal 2

Drafting a preliminary view/appraisal..... 3

Preliminary views to agencies 3

Preliminary views to applicants..... 3

Clearance of preliminary view/appraisal 4

Before sending the preliminary view/appraisal..... 4

Attachment A –Template preliminary views to agency 5

Attachment B – (i)Template preliminary views to applicant – access refusal decisions..... 11

(ii) Template intention to decline to applicant - searches.....24

Attachment C – Template preliminary view to applicant – access grant decisions 18

Introduction

This checklist provides general guidance to review officers to assist with drafting preliminary views (PVs) and should be read alongside [Part 10 of the FOI Guidelines](#), in particular [10.108] – [10.113].

The purpose of a PV is to provide the review officer's view as to the merits of the case and to quickly and efficiently afford the party to which the PV relates an opportunity to make further submissions or take action as may be appropriate in response to the PV. For example, an applicant may decide to withdraw the IC review application or an agency may make a revised decision under [s 55G](#) (see [FOI Guidelines \[10.53\]](#)).

The PV sets out the view of the review officer and is not a decision by the Information Commissioner under [s 55K](#). Even where a PV has been provided, there is an obligation for the Information Commissioner to make the correct and preferable decision, which is not restricted by an earlier PV.

It is important that PVs are accurate, evidence-based and cover the relevant issues as succinctly as possible. PVs are a case management tool and are also:

- a record of the work undertaken by the OAIC in progressing a review
- an opportunity to summarise the review officer's understanding of the parties' submissions
- an opportunity to share the submissions made by a party and provide a view on the merits of those submissions
- a record of the procedural fairness afforded to the parties ie the opportunity to respond to information on which a decision may be based.

A PV can bring to light the issues as you see them, for the management of a file and for the benefit of the parties. A PV can also address where a party has incorrectly interpreted the law or holds incorrect expectations of the IC review process.

The work undertaken in preparing a PV can also be beneficial in updating the case plan, which is also a case management tool and assists the review officer to track progress of the matter and issues that need to be resolved to finalise the matter.

Before drafting a preliminary view/appraisal

- Consider whether the steps identified in the *Conducting a review checklist* have been completed.
- Ensure that [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](#).
- Confirm affected third parties have been identified and have been consulted where appropriate, consistent with the guidance on the case management plan, prior to sending a PV.
- Consider whether the scope of the IC review is settled – further clarification from the applicant may be required and the scope narrowed where possible.
- Consider whether it is clear from the unredacted documents which material has been found exempt/irrelevant to the request and whether any mark-ups are consistent with the decision under review.

- Confirm the decision that is under review, e.g. check the validity of internal review decisions.

Drafting a preliminary view/appraisal

Preliminary views are provided in an email or .pdf letter format and should **concisely** set out the preliminary view and reasons for it.

Preliminary views generally also contain:

- Any submissions that have not been shared between parties, that are not confidential.
- A brief statement under each exemption, outlining whether and why the review officer is of the view that the exemption has or has not been made out.
- The next steps – what the applicant/agency should do based on whether they accept our preliminary view or not (tailor to the specific circumstances)

Preliminary views to agencies

- Refer to the templates at **Attachment A**.
- Tailor the language and level of detail you include in the preliminary view to be appropriate in light of your experience of the agency/minister's understanding of the FOI Act and FOI Guidelines.
- Identify the parts of the agency's decision that you believe have not been justified and discuss those parts only.
- Refer to the agency's onus and obligations in the IC review process.

Preliminary views to applicants

- For PVs to applicants in access refusal decisions, refer to the templates at **Attachment B**.
- For PVs to applicant in access grant decisions, refer to the template at **Attachment C**.
- Tailor the language and level of detail provided to suit your audience. The preliminary view should be easy to read and understand. Using short sentences and including headings can help break up the text into relevant discussions.
- Do not disclose confidential submissions or content of exempt material (except as described in the agency or minister's decision, provided to the applicant, or in non-confidential submissions). Consider characterising the exempt material (e.g. the names and contact details of third parties) or use the description provided by the respondent in the schedule and providing a general description of the context of the confidential submissions (e.g. *I cannot disclose the content of the confidential submissions, however I am able to disclose the submissions provide further particulars of why the Department submits that disclosure would damage the international relations of the Commonwealth*).

Important points to remember:

- References to the legislation and FOI Guidelines must be correct. Be very careful if paraphrasing legislation to ensure it is accurate: where possible, use the wording in the FOI Guidelines or previous IC review decisions if you want to simplify a concept or legal test.
- A PV should use plain language. Refer to the **OAIC quick reference style guide** for citing cases and legislation, punctuation and grammar.

- A PV should be easy to read and understand:
 - use appropriate headings to introduce topics
 - avoid long sentences/paragraphs
 - do not include irrelevant information
 - consider referring to an attachment to the FOI request/submissions if they are lengthy to quote.
- Focus on what is in dispute and provide only the relevant information to enable the recipient to understand the issues and legal discussion.
- Referring to previous IC review/AAT/Federal Court decisions (available on [AustLii](#)) dealing with similar issues when drafting a PV will ensure that the PV is consistent with previous IC review decisions in terms of language and discussion of the issues.
- 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 and the ‘NoteUp references’ function in [AustLii](#))
 - the relevant section of the FOI Guidelines, and
 - recent Federal Court, AAT and IC review decisions on relevant issues considered/cited/distinguished if necessary.

Clearance of preliminary view/appraisal

- The draft PV should be sent to your supervisor for clearance.
- The version you send up for clearance should be ready to send out to the parties subject to any comments about the content made by your supervisor. Carefully proofread the PV for accuracy, spelling mistakes, formatting and relevance before sending it up for clearance. The proofreading checklist at **Attachment B** to the Decision writing checklist may assist.
- Save draft PV on Resolve.
- Allocate a Resolve task to your supervisor for clearance, noting any particular issues for discussion.
- Your supervisor will review then advise if ACFOI or FOIC input is required before sending the preliminary view.

Before sending the preliminary view/appraisal

- Once the draft PV has been approved, consider calling the applicant/agency to discuss the steps you have taken to form your view on the IC review application, including review of the parties’ submissions the relevant law and previous IC review decisions. Explain the purpose of the PV and the timeframe for a response.
- Where appropriate, convert the PV to .pdf format.

Attachment A –Template preliminary views to agency

Preliminary view to agency – general/straightforward

[use styling in OAIC letter template for headings, etc]

Our reference: [insert]

Your reference: [insert]

[First Name Last Name]

[Company Name]

[Address Line 1]

[Address Line 2]

By email: [insert]

[OAIC reference number] – [applicant last name] and [agency] – Preliminary view

Dear [Salutation] [Last name]

I have reviewed material on file in relation to this matter and formed a preliminary view that [agency/minister] has not established that its decision is justified or that the Information Commissioner (IC) should give a decision adverse to the IC review applicant (s 55D). Therefore, if this matter were to proceed to a decision of the IC, I would recommend that [agency]’s decision be set aside.

The OAIC requests that [agency/minister] advise whether it is willing to make a revised decision under s 55G of the FOI Act and/or provide any submissions it wishes to make in response to this preliminary view by **close of business on @**.

Reasons

[Succinctly explain your reasons for reaching this view.]

My preliminary view is based on my experience as a review officer and my analysis of the issues and is not a decision by the IC.

[To assist the OAIC in this undertaking this IC review, please also provide:]

1. [set out any further information that we need to progress this matter for the Commissioner’s consideration – e.g. docs that were missing from the s 54Z notice response, updated marked up copies of documents, etc]

In preparing its submissions, the [agency/minister] should have regard to Part 5 of the *Direction as to certain procedures to be followed in IC reviews*, particularly the information at [5.2] – [5.4] about sharing submissions and requests to provide submissions in confidence.

If you have any questions, I can be contacted on [insert]@oaic.gov.au or (02) [insert].

Yours sincerely

[First Name Last Name]

[Position Title]

[date]



Preliminary view to agency – complex

[use styling in OAIC letter template for headings, etc]

Our reference: [insert]

Your reference: [insert]

[First Name Last Name]

[Company Name]

[Address Line 1]

[Address Line 2]

By email: [insert]

[OAIC reference number] – [applicant surname] and [agency] – Preliminary view

Dear [Salutation] [Last name]

I have reviewed material on file in relation to this matter and formed a preliminary view that [agency/minister] has not established that its decision is justified or that the Information Commissioner (IC) should give a decision adverse to the IC review applicant (s 55D). Therefore, if this matter were to proceed to a decision of the IC, I would recommend that [agency]'s decision be set aside.

The OAIC requests that [agency/minister] advise whether it is willing to make a revised decision under s 55G of the FOI Act and/or provide any submissions it wishes to make in response to this preliminary view by **close of business on @**.

My preliminary view is based on my experience as a review officer and my analysis of the issues and is not a decision by the IC.

Reasons

[Succinctly explain your reasons for reaching this view.]

- **[if relevant] Irrelevant material (s 22)**

In my preliminary view, [agency/minister] has not established that its decision to find this material irrelevant to the request is justified because [insert details – for example, there is nothing before the OAIC to suggest that the applicant agreed to exclude this material from the scope of the request] and therefore the material cannot reasonably be regarded as irrelevant to the request for access.

- **[insert exemption name] (s [insert section number])**

In my preliminary view, [agency/minister] has not established that its decision under s [insert exemption provision] is justified because [provide reasons for your preliminary view – look at the reasons provided in previous IC review decisions to help you explain your PV].

Next steps

[To assist the OAIC in this undertaking this IC review, please also provide:]

- 1. [set out any further information that we need to progress this matter for the Commissioner’s consideration – e.g. docs that were missing from the s 54Z notice response, updated marked up copies of documents, etc]

In preparing its submissions, the [agency/minister] should have regard to Part 5 of the *Direction as to certain procedures to be followed in IC reviews*, particularly the information at [5.2] – [5.4] about sharing submissions and requests to provide submissions in confidence.

If you have any questions, I can be contacted on [insert]@oaic.gov.au or (02) [insert].

Yours sincerely

[First Name Last Name]

[Position Title]

[date]



Preliminary view to agency – searches

[use styling in OAIC letter template for headings, etc]

Our reference: [insert]

Your reference: [insert]

[First Name Last Name]

[Company Name]

[Address Line 1]

[Address Line 2]

By email: [insert]

[OAIC reference number] – [applicant surname] and [agency] – Preliminary view

Dear [Salutation] [Last name]

I have reviewed the [material on file/response to RFI/ s 55V response] in relation to this matter and formed a preliminary view that the [agency] has not established that its decision is justified or that the Information Commissioner (IC) should give a decision adverse to the IC review applicant (s 55D). Therefore if this matter were to proceed to a decision by the Information Commissioner, I would recommend that the [agency]'s decision be set aside.

The OAIC requests that [agency/minister] advise whether it is willing to make a revised decision under s 55G of the FOI Act and/or provide any submissions it wishes to make in response to this preliminary view by **close of business on @**.

My preliminary view is based on my experience as a review officer and my analysis of the issues and is not a decision by the IC.

The issue to be decided in this IC review is whether the [agency/minister] has taken all reasonable steps to find documents within the scope of the applicant's request, in accordance with s 24A(1) of the FOI Act.

My preliminary view is that [agency/minister]'s reasons for decision and submissions do not give sufficient detail about the steps undertaken to search for the documents and why the documents requested cannot be found and (FOI Guidelines at [3.94]) to establish that its decision is justified.

In particular, the [agency/minister] has not explained:

- [if relevant] the range of documents searched and how that range was identified, including:
 - whether searches of [type of record-keeping system – for example, electronic messaging applications] were undertaken
 - whether consideration was given to s 17 of the FOI Act to produce a written document containing the information by using a 'computer or other equipment that is ordinarily available' to the agency for retrieving or collating stored information (see FOI Guidelines at [3.204] – [3.210])

- [if relevant] the methods used to search the documents and what technology was used (for example, by using keywords to search electronic documents)
- [if relevant] the limitations of any searches conducted
- [if relevant] whether the [agency/minister] consulted with any individuals in the [agency/Minister's office] who may have been able to assist in locating the documents, or
- [if relevant] reasons for why the documents cannot be found in light of the [agency/minister]'s record-keeping practices.
- [any other relevant issues].

I invite the [agency/minister] to consider whether a revised decision under s 55G of the FOI Act is appropriate. If the [agency/minister] disagrees with my preliminary view, please provide further submissions addressing the issues raised above and this matter will proceed to a decision by the Information Commissioner under s 55K of the FOI Act.

[To assist the OAIC in this undertaking this IC review, please also provide:]

1. [set out any further information that we need to progress this matter for the Commissioner's consideration – e.g. docs that were missing from the s 54Z notice response, etc]

In preparing its submissions, the [agency/minister] should have regard to Part 5 of the *Direction as to certain procedures to be followed in IC reviews*, particularly, the information at [5.2] – [5.4] about sharing submissions and requests to provide submissions in confidence.

If you have any questions, I can be contacted on [insert]@oaic.gov.au or (02) [insert].

Yours sincerely

[First Name Last Name]

[Position Title]

[date]

Attachment B – Template preliminary views to applicant – access refusal decisions

Preliminary view to applicant – general

Our reference: [insert]

[if applicable] Your reference: [insert]

Agency reference: [insert]

[First Name Last Name]

[Company Name]

[Address Line 1]

[Address Line 2]

[OAIC reference number] – Your application for IC review – Preliminary view

Dear [Salutation] [Last name]

I have reviewed material on file in relation to this matter and formed a preliminary view that the [agency/minister]'s decision has established that its decision is justified. Therefore, if this matter were to progress to a decision by the Information Commissioner (IC) under s 55K of the FOI Act, I would recommend that the decision of the [agency/minister] be [affirmed/varied].

My preliminary view is based on my experience as a review officer and my analysis of the issues and is not a decision by the IC.

[Agency/Minister]'s submissions

A copy of the [agency/minister]'s submissions is attached. [if relevant, note that 'The [agency/minister] has also provided submissions in confidence that provide further details of [insert]].

[consider quoting parts of the submissions that are particularly relevant to the preliminary view]

Reasons

[Succinctly explain your reasons for reaching this view. If the recipient appears to have misunderstood/misinterpreted the requirements of the relevant provision, provide clarification.]

Next steps

Please advise the OAIC whether you wish to proceed with this application for IC review by **[@ two weeks]**.

If you wish to proceed, please provide any further submissions or information you wish to be taken into account before this matter is progressed to a decision by the Information Commissioner by **[@ two weeks]**.

If you do not wish to proceed, please confirm this in writing by **[2 weeks]**.

Please note that any submissions provided in response to this preliminary view may be shared with the [agency/minister] and/or cited in the published IC review decision if this matter proceeds to a decision by the Information Commissioner under s 55K of the FOI Act.

If you have any questions, I can be contacted on (02) [insert] or [insert]@oaic.gov.au.

Yours sincerely

[First Name Last Name]

[Position Title]

[date]



Preliminary view to applicant – exemptions and irrelevant material

Our reference: [insert]

[if applicable] Your reference: [insert]

Agency reference: [insert]

[First Name Last Name]

[Company Name]

[Address Line 1]

[Address Line 2]

[OAIC reference number] – Your application for IC review – Preliminary view

Dear [Salutation] [Last name]

I have reviewed material on file in relation to this matter and formed a preliminary view that [agency/minister] has established that its decision is justified. Therefore, if this matter were to progress to a decision by the Information Commissioner under s 55K of the FOI Act, I would recommend that the decision of the [agency/minister] be [affirmed/varied].

My preliminary view is based on my experience as a review officer and my analysis of the issues and is not a decision by the IC.

Reasons

[if relevant] *Irrelevant material (s 22)*

In my preliminary view as review officer, the [agency/minister]'s decision to find this material irrelevant to the request is justified because [insert details – for example, you agreed to exclude third party personal information from the scope of the request] and therefore the material can reasonably be regarded as irrelevant to the request for access.

[insert exemption name] (s [insert section number])

In my preliminary view as review officer, the [agency/minister]'s decision under s [insert exemption provision] is justified because [provide reasons for your preliminary view – look at the reasons provided in previous IC review decisions to help you explain your PV].

Next steps

Please advise the OAIC whether you wish to proceed with this application for IC review by **[@ two weeks]**.

If you wish to proceed, please provide any further submissions or information you wish to be taken into account before this matter is progressed to a decision by the Information Commissioner by **[@ two weeks]**.

If you do not wish to proceed, please confirm this in writing by **[2 weeks]**.

Please note that any submissions provided in response to this preliminary view may be shared with the [agency/minister] and/or cited in the published IC review decision if this matter proceeds to a decision by the Information Commissioner under s 55K of the FOI Act.

If you have any questions, I can be contacted on (02) [insert] or [insert]@oaic.gov.au.

Yours sincerely

[First Name Last Name]

[Position Title]

[date]



Intention to Decline to applicant – searches

Our reference: [Insert reference number]

Agency reference: [Insert reference number]

[First Name Last Name]

[Company Name]

[Address Line 1]

[Address Line 2]

By email to: [insert]

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

Dear [Mr/Ms Name]

I refer to your request for Information Commissioner review (IC review) of a decision made by the [agency/minister] ([agency/minister shorthand]) on [date] under the *Freedom of Information Act 1982* (Cth) (the FOI Act). [if the applicant has more than one ongoing IC review, include the date of the decision under review]

The purpose of this letter is to advise you of my intention to recommend that the delegate of the Information Commissioner exercises the discretion to decide not to [undertake/continue to undertake] a review of your IC review application s 54W of the FOI Act on the basis that your IC review application is [is frivolous, vexatious, misconceived, lacking in substance or not made in good faith], and to give you an opportunity to provide reasons for me to reconsider making this recommendation.

The reasons for my recommendation follow.

Background

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

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

[insert any details about revision to scope]

On [date], the [agency/minister] refused the request under s 24A(1)(a)(ii) of the FOI Act on the basis that all reasonable steps have been taken to find documents and the [agency/minister] was satisfied that documents falling within the scope of the request do not exist.

[if relevant] On [date], you applied for internal review. [insert any relevant details about clarification/reduction of scope during internal review process]

On [date], the [agency/minister] made its internal review decision. [insert details]

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

[insert any other relevant background information, such as a revised decision under s 55G of clarification of the issues in the IC review]

Scope of IC review

The issues in this IC review are [insert].

The issue to be decided in this IC review is whether the [agency/minister] has taken all reasonable steps to find documents within the scope of the applicant's request, in accordance with s 24A(1) of the FOI Act.

In forming my view as review officer, I have had regard to the following:

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

Whether reasonable steps taken to find documents (s 24A)

In its reasons for decision, the [agency/minister] said:

[insert details of decision]

In your application for IC review, you say that [insert details].

Section 24A of the FOI Act requires [the agency/minister] 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 (FOI Guidelines at [3.89]):

- the subject matter of the documents
- the current and past file management systems and the practice of destruction or removal of documents
- the record management systems in place
- the individuals within an agency or minister's office who may be able to assist with the location of documents, and
- the age of the documents.

In this context 'reasonable' has been understood as taking steps that are 'not going beyond the limit assigned by reason; not extravagant or excessive; moderate...Of such an amount, size, number, etc., as is judged to be appropriate or suitable to the circumstances or purpose' (see *De Tarle and Australian Securities and Investments Commission (Freedom of Information)* [2015] AATA 770 at [19]).

In response to the OAIC's request for information relating to the searches conducted in processing the request, the [agency/minister] has provided [insert details of evidence provided – for example, a certificate dated 1 January 2018 stating that searches of hard copy/paper files, electronic documents (including emails and files) and working documents were completed].

It appears from the evidence of searches undertaken that all reasonable steps were undertaken to find the documents you requested. In particular, I have taken into account the following:

- [insert]

There is no evidence before the OAIC to support the view that there are other documents that fall within the scope of your FOI request and that [agency/minister] has not released such documents to you.

Accordingly it would appear that [agency/minister] has discharged its onus to establish that the decision given in respect of your FOI request is justified (s 55D of the FOI Act).

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

Under s 54W of the FOI Act, the Information Commissioner may decide not to undertake a review, or not to continue to undertake a review, if the Information Commissioner is satisfied that the IC review application is frivolous, vexatious, misconceived, lacking in substance or not made in good faith.

[Insert reasons for your view about why the application is frivolous, vexatious, misconceived, lacking in substance or not made in good faith].

For these reasons, I intend to recommend that the Information Commissioner exercises the discretion to decide not to [undertake/continue to undertake] this IC review under s 54W, because I am of the view that this IC review application is [frivolous, vexatious, misconceived, lacking in substance or not made in good faith].

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 a review/not to continue to undertake a review] in this case.

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

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

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

Yours sincerely

[First Name Last Name]

[Position Title]

[date]

Attachment C – Template preliminary view to applicant – access grant decisions

Preliminary view to applicant – general

Our reference: [insert]

[if applicable] Your reference: [insert]

Agency reference: [insert]

[First Name Last Name]

[Company Name]

[Address Line 1]

[Address Line 2]

[OAIC reference number] – Your application for IC review – Preliminary view

Dear [Salutation] [Last name]

I have reviewed material on file in relation to this matter and formed a preliminary view that [agency/minister] has established that its decision is justified. Therefore, if this matter were to progress to a decision by the Information Commissioner (IC) under s 55K of the FOI Act, I would recommend that the decision of the [agency/minister] be [affirmed/varied].

My preliminary view is based on my experience as a review officer and my analysis of the issues and is not a decision of the IC.

[Agency/Minister]’s submissions

A copy of the [agency/minister]’s submissions is attached. [if relevant, note that ‘The [agency/minister] has also provided submissions in confidence that provide further details of [insert]].

[consider quoting parts of the submissions that are particularly relevant to the preliminary view]

Reasons

[Succinctly explain your reasons for reaching this view. If the recipient appears to have misunderstood/misinterpreted the requirements of the relevant provision, provide clarification].

Next steps

I would be grateful if you could please advise the OAIC whether you wish to proceed with this application for IC review on or before **[@ two weeks]**.

If you do not wish to proceed, I would be grateful if you could confirm this in writing.

If you wish to proceed, please provide any further submissions or information you wish to be taken into account before this matter is progressed to a decision by the Information Commissioner by **[@ two weeks]**.

Please note that any submissions provided in response to this preliminary view may be shared with the other parties to the IC review and/or cited in the published IC review

decision if this matter proceeds to a decision by the Information Commissioner under s 55K of the FOI Act.

If you have any questions, I can be contacted on (02) [insert] or [insert]@oaic.gov.au.

Yours sincerely

[First Name Last Name]

[Position Title]

[date]





June 2023

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

Introduction

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

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

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

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

Before drafting an ITD

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

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

Drafting an ITD

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

Important points to remember:

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

Clearance of ITD

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

Before sending the ITD

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





June 2023

Conducting an IC review: Closure letter (s 54W) checklist

Introduction

This checklist provides general guidance to review officers to assist with drafting a closure letter where an intention to decline letter has been sent under s 54W of the FOI Act.

This checklist follows on from the [Intention to decline \(s 54W\) checklist](#) and is relevant where a review officer wishes to recommend to the delegate of the Information Commissioner that a matter be declined under s 54W in light of any response received to the intention to decline letter.

Before drafting a closure letter

- Check whether a response has been received to the intention to decline letter.
- Consider whether the response to the intention to decline letter (if relevant) has changed your view about whether the matter should be declined under s 54W. Does the response raise issues that you need to clarify with the applicant/agency?
- Discuss with your supervisor whether you should proceed to draft a closure letter for the delegate's consideration.

Drafting a closure letter

General templates for closure letters are available on Resolve.

Important points to remember:

- References to the legislation and FOI Guidelines must be accurate. Be very careful if paraphrasing legislation to ensure it is accurate: where possible, use the wording in the FOI Guidelines or previous IC review decisions if you want to simplify a concept or legal test.
- If you have copied parts of the ITD into the closure letter, proofread to ensure that it is appropriately updated to reflect that the delegate is the author of the closure letter.
- If possible, cite the submissions made in response to the ITD rather than summarising. If it is necessary to summarise, consider attaching a copy of the relevant submissions.
- The delegate's reasons should be drafted using plain language to address any submissions made in response to the ITD.

Clearance of closure letter

- The draft closure letter must be sent to your supervisor for clearance.
- The version you send up for clearance should be ready to send out subject to any comments about the content made by your supervisor. Carefully proofread the closure letter for accuracy, spelling mistakes, formatting and relevance before sending it up for clearance.
- Check that the closure letter includes the reasons for decision.
- Check that the closure letter includes information on review rights.
- Save draft closure letter on Resolve.
- Allocate a Resolve task to your supervisor for clearance, noting any particular issues for discussion.
- Once the closure letter has been cleared by your supervisor, allocate a Resolve task to the delegate for clearance, noting any particular issues for discussion.

Sending the closure letter, notifying the Respondent and third parties and closing the Resolve file

- Once the closure letter has been approved by the delegate, add the delegate's signature and check that:
 - the letter is dated correctly
 - the letter is being sent to the correct email/postal address, and
 - the closure letter includes information on review rights.
- For closures under s 54W(a):
 - Send s 54X notification to the Respondent of a s 54W(a) closure - [D2020/011910](#). This notification can be signed by a case officer and not the delegate signing the closure.
 - Send s 54X notification to Third parties of a s 54W(a) closure - [D2020/011963](#). This notification can be signed by a case officer and not the delegate signing the closure.
- For closures under s 54W(b):
 - Save the closure letters to each of the parties to the IC review in .pdf format and send each letter to the relevant party to advise that the IC review has been finalised under s 54W(b).
 - Save copies of all correspondence to the parties advising of closure on Resolve.
- Close Resolve file.



June 2023

Conducting an IC review: Review of preliminary views/s 54W letters

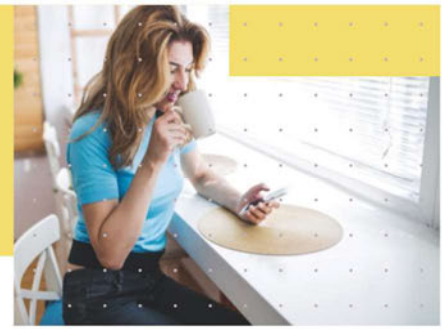
The purpose of this checklist is to assist in the review of

- draft preliminary views/case appraisals, and
- draft intention to decline/closure letters.

It is assumed that the review officer has already had a discussion with their supervisor in relation to the case management of the particular matter. This review checklist should be read alongside the preliminary view checklist, intention to decline (s 54W) checklist and closure letter (s 54W) checklist.

- Review accuracy of facts/background, including whether the all of the issues in the IC review have been appropriately identified and described.
- Review application of the law, that the submissions provided by the parties have been appropriately taken into account, and that onus under [s 55D](#) has been appropriately discussed.
- Review formatting, including font size, headings used, paragraph spacing, quotes, indenting in footnotes, etc.
- Review for typographical errors, including footnotes, quotes, document numbers and paragraph numbers of the FOI Guidelines.
- Check that the parties have been afforded procedural fairness, including any third parties if relevant.
- Check that all of the issues in the IC review have been appropriately discussed and addressed (generally, a preliminary view/ITD should be drafted on the basis that this will be the parties' final opportunity to provide submissions before the matter is finalised).
- Review whether the OAIC has agreed to receive submissions in confidence and if so, check that the draft letter does not reveal confidential material.
- Where the draft letter is to an applicant/third party, check that exempt material is not disclosed. Characterisation of the exempt material may be acceptable. For example, 'documents comprising emails and attachments exchanged between an internal lawyer of [agency] and officers of [agency]', or 'names of third party individuals'.

- Where unusual issues are identified, ensure that the matter is appropriately escalated to the Director and/or Assistant Commissioner.
- For preliminary review/intent to decline letters: ensure that there is a reference to the view being provided as a review officer/recommendation to the delegate.
- For closures under s 54W(a):
 - Save the closure letter in .pdf format and send the closure letter to the applicant.
 - Write to the agency to advise that the IC review has been finalised under s 54W(a) and that the matter will be closed.
 - Save copies of the correspondence to the applicant and agency/minister advising of closure on Resolve.
 - Send section 54X notification to the Respondent of a s 54W(a) closure - [D2020/011910](#). This notification can be signed by a case officer and not the delegate signing the closure.
 - Send section 54X notification to Third parties of a s 54W(a) closure - [D2020/011963](#). This notification can be signed by a case officer and not the delegate signing the closure.
- For closures under s 54W(b):
 - Save the closure letters to each of the parties to the IC review in .pdf format and send each letter to the relevant party to advise that the IC review has been finalised under s 54W(b).
 - Save copies of all correspondence to the parties advising of closure on Resolve.



June 2023

Conducting an IC review: Decision writing checklist

Contents

Introduction	2
Procedural issues to be addressed prior to drafting a decision.....	2
Pre-drafting meeting	3
Drafting a decision.....	3
Preparing the decision for clearance.....	5
Clearance of decision	6
Finalisation of decision	6
Closing the Resolve file.....	6
Attachment A – IC review decisions – Standard wording examples.....	8
Attachment B – IC review decisions proofreading checklist	18
Attachment C – Cover sheet template	22
Attachment C.1 – Instructions for assisting with electronic clearance using documents on Resolve	24
Attachment D – Template Snapshot	26
Attachment E – Finalisation/publication process	28
Attachment F – Template summaries of IC review decision	33

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).

Pre-drafting 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. If further submissions are required before the matter can be progressed to a decision, discuss with your supervisor.
- 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.
- Arrange a meeting with your supervisor, the decision reviewer, the Principal Director and Commissioner to discuss the proposed draft decision and get approval to proceed to drafting a decision.

Drafting a decision

- The draft ‘Reasons for Decision’ template on Word should be used for drafting decisions.
- 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.
- 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.

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.
 - 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.
- **Closely proof-read the decision:** print and read, 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 coversheet for the Commissioner using the template at [Attachment C](#). Prepare the hard copy folder with key documents for the Commissioner **or** follow the instruction at [Attachment C.1](#) for electronic clearance using documents on Resolve.
 - Adapt coversheet to type of matter and include only relevant detail and the documents at issue in the relevant case. In consultation with your supervisor, describe any contentious or unusual issues under ‘issues for the Commissioner’.
 - Identify the documents at issue with a different coloured tab in the hard copy folder and ensure that the documents are clearly marked up for Commissioner’s consideration.
- Draft snapshot and cover email using the template at [Attachment D](#).

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] - Parker and DHA – MR18/00123 - CM02022019’.
- Draft decision and coversheet emailed to your supervisor for clearance. In the covering email please indicate the age of the matter.
- Check the ‘Decision to Executive’ field on Resolve (and add the date) when the decision has progressed to Principal Director. (If the decision is later returned to you for additional work, ‘uncheck’ this field in Resolve).
- Add the decision to the [FOI Regulatory Group Workbook](#) and continue to update as it progresses to the Director, Principal Director and the Commissioner.

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](#).
- Provide links to files in TRIM to your supervisor and the decision reviewer (sample at [Attachment F](#)). The decision reviewer will then prepare the files for distribution/publication (as set out in [Attachment E](#)).
- Circulate both summaries to FOI team with link to PDF 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 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, H: Drive).
 - 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

Purpose	9
General	9
Referring to sections of the FOI Act	9
Referring to the FOI Guidelines	9
Referring to the reasons for decision	9
Referring to the parties’ submissions	9
Referring to the information before the Commissioner	9
Decision section	10
Affirm decisions	10
Charges decision – set aside	10
Practical refusal decisions – set aside	10
Searches decision – set aside	10
Exemptions decision – vary	10
Exemptions decision – set aside	10
Irrelevant material – set aside	10
Background section	11
Extension of time under s 54T	11
Charges decisions	11
Practical refusal decisions	11
Searches decisions	11
Deemed decisions	12
Section 55F agreements	12
Third party consultation	12
Exemptions decisions	13
Irrelevant material	13
Revised decisions	13
Updated exemption contentions	13
Scope of IC review section	14
Issues section	15
Exemptions	15
Irrelevant material	16
Charges decisions	16
Practical refusal decisions	17
Searches decisions	17
Reasoning – general statements	17

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

Referring to sections of the FOI Act

Section [x] of the FOI Act provides:

[insert]

Referring to the FOI Guidelines

The FOI Guidelines explain:

[insert]

Referring to the reasons for decision

In its [original/internal review/revised] reasons for decision, the [agency] said:

[insert]

Referring to the parties' submissions

In the IC review application, the applicant said:

[insert]

The applicant submits:

[insert]

The [agency] submits:

[insert]

Referring to the information before the Commissioner

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.¹

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.²

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.

¹ On the question of the processing deadlines that now apply, see *Fletcher and Prime Minister of Australia* [2013] AlCmr 11 [33] – [38].

² 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.³

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].⁴

On [date], the applicant responded to the request consultation notice to [insert details of response]. [if relevant] This ended the request consultation period.⁵

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.

³ The applicant sought and was granted an extension of time under s 54T of the FOI Act.

⁴ 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.

⁵ 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.⁶ 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.⁷

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.⁸

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

⁶ 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)).

⁷ 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.

⁸ 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.⁹

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.¹⁰ 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.¹¹ 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].

⁹ 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.

¹⁰ Identified in the schedule to the [agency]'s [original/internal review/revised] reasons for decision

¹¹ 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.

Scope of IC review section

The issues to be decided in this IC review are:

- whether the documents/material that the [agency] found to be exempt under s [non-conditional exemption] are exempt under this provision
- whether the documents/material that the [agency] found to be exempt under s [conditional exemption] are exempt under this provision, and if so, whether giving the applicant access to conditionally exempt documents at this time would, on balance, be contrary to the public interest.
- [where new exemption contention] whether material the [agency] contends is exempt under s x is exempt under this provision.
- [where agency has conceded certain material not exempt] whether material the [agency] maintains is exempt under s x is exempt under this provision.
- whether the material the [agency] found to be irrelevant to the terms of the applicant's request is irrelevant to the request (s 22)
- whether a practical refusal reason exists (s 24 of the FOI Act)
- whether the [agency] has taken all reasonable steps to find documents within the scope of the request (s 24A of the FOI Act)
- the Department's decision to impose a charge and not to waive the charge under s 29 of the FOI Act.

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 request¹² and five documents exempt under s [x] of the FOI Act.¹³ 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.

¹² [refer to document numbers in schedule of documents]

¹³ [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.¹⁴

The [agency] decided that [x] documents contain material that is irrelevant to the request.¹⁵

[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.¹⁶

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 ...¹⁷

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

¹⁴ Section 22(1)(b)(ii) of the FOI Act.

¹⁵ [refer to document numbers in schedule of documents]

¹⁶ FOI Guidelines [4.5] and [4.54].

¹⁷ 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.¹⁸

[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.¹⁹

[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)).

¹⁸ ‘Practical refusal reason’ is defined in s 24AA of the FOI Act; ‘request consultation process’ is defined in s 24AB.

¹⁹ *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 must take reasonable steps 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

Tip	Example	Check
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. ¹	
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

Tip	Example	Check
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"> • issue x • issue y, and • issue z. 	
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"> • ‘s 47’ not ‘s.47’ or ‘s. 47’ • ‘ss 47 and 47F’ not ‘ss.47 and 47F’ • ‘p 7’ not ‘p. 7’ • ‘APPA’ not ‘A.P.P.A.’ • ‘Mr Smith’ not ‘Mr. Smith’ 	

Attachment C – Cover sheet template

Header: Review officer – [review officer name]

[OAIC reference number] [Parties' names]

- Parties**
- The parties are [name] (the applicant) and [agency/minister].
 - The applicant has requested to be [named / de-identified] in the decision.
- Scope**
- The decision under review is the decision of [date].
 - [insert any particularly relevant information about scope or the issues – for example, the number of documents at issue or whether the applicant has limited the scope to particular issues]
- Exemptions**
- [For example: Personal privacy exemption (s 47F) – documents 3 and 5]
- Third parties**
- [insert details of consultation and summary of third party's views]
- Background**
- On [date], the applicant made an FOI request.
 - [insert details of procedural background if relevant – for example, if there was a s 24AB notice or if a third party was consulted]
 - On [date], the [agency/minister] refused the request relying on [insert].
 - [insert details of internal review if relevant]
 - On [date], the applicant sought IC review.
 - [insert details of revised decision or any updates to exemption contentions / scope of review if relevant]
- Key documents between parties**
1. * Tab 0. Cover sheet
 2. ***Tab 1. Draft decision**
 3. *Tab 2. FOI request
 4. *Tab 3. FOI decision
 5. *Tab 4. Internal review decision
 6. *Tab 5. IC review application
 7. *Tab 6. Revised decision
 8. *Tab 7
 - a. *Tab 7(a). A's submissions (delivered to Reception 5.02.2018)
 - b. *Tab 7(b). A's submissions
 - c. *Tab 7(c). A's submissions
 - d. *Tab 7(d). A's submissions (evidence only - 30 January 2014 email and attachments)
 9. *Tab 8
 - a. *Tab 8(a). R's submissions
 - b. *Tab 8(b). R's submissions (evidence only)
 - c. *Tab 8(c). R's submissions
 10. *Tab 9. IGIS

11. *Tab 10. Document in issue – [short form name of document]

Draft decision

- [summarise whether the decision is to affirm / vary / set aside and include particulars if relevant (for example: Document @ is not exempt under @)]

Issues for Commissioner

- [This should be consistent with the issues set out in the draft reasons for decision]

Other considerations

- [For example: if there are linked IC reviews; if draft decision considers novel issues or departs from precedent decisions]

Attachment C.1 – 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

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

The Director/Principal Director will use the following Snapshot template provided by Executive at the top of the email.

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

[copy case officer and relevant officers who have cleared the decision]

Snapshot	
Due date	[1 week]
Fixed or flexible	Flexible
If fixed, why?	N/A
Topic for clearance	[insert parties' names] (OAIC ref no [insert])
Product	Draft IC Review decision
Length / no. of pages*	<p>Draft decision – [insert] pages.</p> <p>Relevant documents in hardcopy folder [insert] pages (approx.).</p> <p>Key documents on Resolve record [reference no]</p> <ul style="list-style-type: none"> • *Tab 0. Cover sheet • *Tab 1. Draft decision • *Tab 2. FOI request • *Tab 3. FOI decision(s) <ul style="list-style-type: none"> ○ *Tab 3(a). Primary decision ○ *Tab 3(b). Internal review decision • *Tab 4. IC review application • *Tab 5. Revised decision • *Tab 6 <ul style="list-style-type: none"> ○ *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 <ul style="list-style-type: none"> ○ *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]

External party?	Yes – see above
Review officer	[insert]
Consultation	[insert e.g. Legal]
Clearance	[insert e.g. Director, Principal Director, Commissioner]
Final clearance	FOI Commissioner / Information Commissioner

** it may be appropriate to include an additional row below called 'For noting / For consideration', for example if we have discussed a particular AAT decision in the draft IC review decision, or the matter relates to a novel issue, or there are linked cases.*

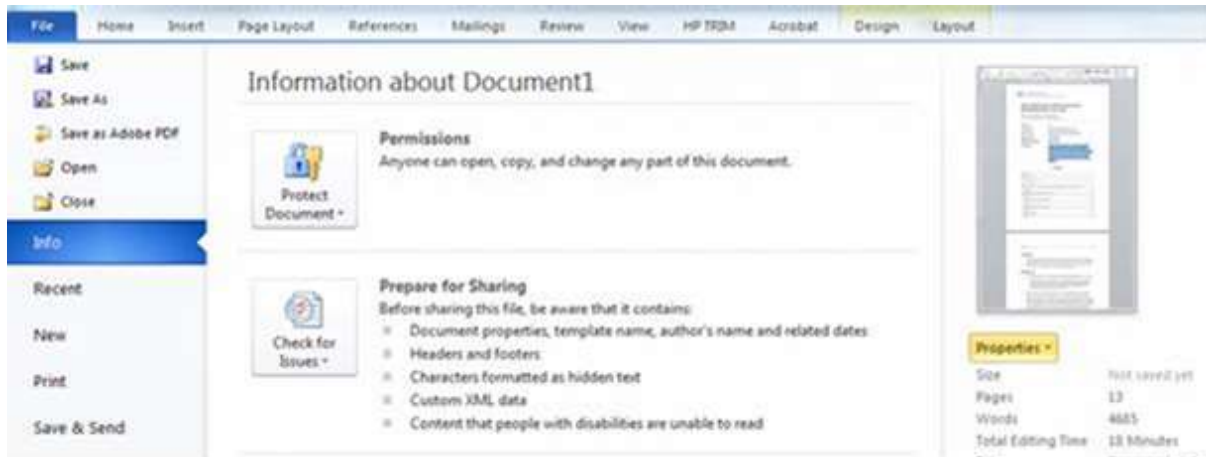
Attachment E – Finalisation/publication process

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.

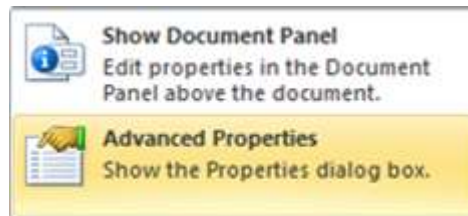
- Check that the Director and Publications Officer are copied into the approval from the Commissioner ('I approve this decision' etc), if not, forward them the approval.
 - The Publications Officer will then register the decision in the master list ([D2018/003448](#)) and send the citation to the case 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](#).
- Send TRIM links to the three files to the Director/Publications Officer together with a case summary and short summary.
 - The Director/Publications Officer will acknowledge receipt of the files and identify any relevant issues/changes to be made.
 - The Director/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.
- Prepare the s 55K compliance letter to be sent with the decision ([D2020/012832](#)). This letter is to be signed by offices EL2 level and above.
- Send the case summary and short summary to the FOI team with a [link](#) to the PDF (file is not attached) and CC to the following teams around the office:
 - Legal: Legal@oaic.gov.au
 - Enquiries: jake.barry@oaic.gov.au
 - SCAC: 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:

Category:

Keywords:

Comments:

Hyperlink base:

Template:

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:

Subject:

Author:

Manager:

Company:

Category:

Keywords:

Comments:

Hyperlink base:

Template:

Save Thumbnails for All Word Documents

OK Cancel

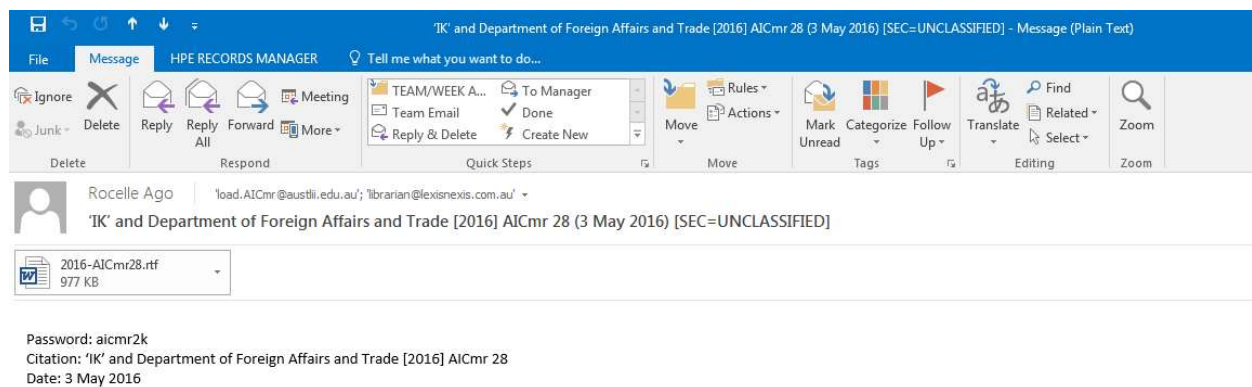
Publication of decision on AustLII

The decision will be sent to AustLII for publication.

To send a decision:

- New email – set the email to plain text. AustLII does not recognise any other email formats.
- Attach rtf file.
- Subject: Decision name/citation [Sec = UNCLASSIFIED]
- To: 'load.AICmr@austlii.edu.au' and 'librarian@lexisnexis.com.au'
- Email content:
 - o Password: aicmr2k
 - o Citation: [citation]
 - o Date: [insert]

Example



* Each decision must be sent separately. AustLII cannot process bulk decisions in a single email.

* Where a decision needs to be re-issued (e.g due to errors in the decision):

1. Create a new email and follow the steps above
2. Attach the updated rtf decision file
3. Keep the same details (such as citation in the subject and body of the email) as the original email. AustLII will automatically recognise the entry and overwrite the original entry with the updated decision.

Publication of decision on OAIC website

The OAIC also publishes a table of IC review decisions that also link to AustLII. To update the table:

Send an email to Website@oaic.gov.au that contains the following content:

- Decision*
- Legislative provision
- Catchword summary (from the decision)
- Decision under review
- IC review decision

Example

RE: 2016 IC review decisions 23-26 [DLM=For-Official-Use-Only]

Hi Amanda

Could you please publish the following entries? The decisions will be available on AUSTLII tomorrow.

Decision	Legislative provision/s	Catchword summary	Decision under review	IC review decision
David Worris and Department of Veterans' Affairs [2016] AICmr 26 [22 April 2016]	§§ 11A(5), 47G, 55D	Freedom of Information — Whether disclosure would unreasonably affect an organisation's business affairs — Whether disclosure would unreasonably affect a person's professional affairs — Whether contrary to the public interest to release conditionally exempt documents — Whether the agency has discharged its onus of establishing that its decision is justified	Access refusal	Set aside and substituted
Australian Associated Press Pty Ltd and Department of Immigration and Border Protection [2016] AICmr 25 [22 April 2016]	§§ 11A, 42, 47E(d), 47F, 55G	Freedom of Information — Whether document subject to legal professional privilege — Whether disclosure would have a substantial adverse effect on the proper and efficient conduct of the operations of an agency — Whether disclosure of personal information is unreasonable — Whether contrary to public interest to release conditionally exempt documents	Access refusal	Varied
TJ and Department of Immigration and Border Protection [2016] AICmr 24 [21 April 2016]	s 24A	Freedom of Information — Whether reasonable steps were taken to locate documents	Access refusal	Affirmed
Patrick Healy and Australia Post [2016] AICmr 23 [20 April 2016]	§§ 11A, 22, 47F	Freedom of Information — Whether disclosure of personal information is unreasonable — Whether contrary to public interest to release conditionally exempt documents — Whether reasonably practicable to prepare edited copy of video	Access refusal	Set aside and substituted

Many thanks
Rocelle Ago | Director | FOI Dispute Resolution
 Office of the Australian Information Commissioner
 Level 3, 175 Pitt Street, SYDNEY NSW 2000
 GPO Box 5128 SYDNEY NSW 2001 | www.oaic.gov.au
 Phone: +61 2 9284 9621 | E-mail: rocelle.ago@oaic.gov.au

* The decision will need to be hyperlinked to AustLII – You can copy and paste the link to the most recent decision on AustLII and manually update the citation number to the corresponding citation number in the decision to be published (ie. <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AICmr/2019/19.html>)



Attachment F – Template summaries of IC review decision

Review officers need to prepare two summaries when a decision has been finalised by the Information Commissioner:

Sample 1

Nick Xenophon and Department of Defence [2016] AICmr 14 (16 March 2016)

The Acting Australian Information Commissioner affirmed the decision of the Department of Defence, deciding that the document in issue was exempt in full under s 34(1)(a) of the FOI Act. The document in issue was an attachment to a Cabinet submission and the Commissioner was satisfied based on the submissions of the Department that it was actually submitted to Cabinet. On the question of whether the document was brought into existence for the dominant purpose of submission for consideration by Cabinet, the Commissioner examined the document, considered two public announcements and took into account the submissions received from both parties. The Commissioner considered the terms of reference of the document were consistent with the dominant purpose being submission of the document for consideration by Cabinet.

Sample 2

‘OE’ and Australian Taxation Office (Freedom of information) [2018] AICmr 29 (8 March 2018)

Access refusal — Request for unedited version of specified email chain — Question of form of access or document format raised by applicant during IC review — Whether all reasonable steps taken to locate documents — Whether disclosure of personal information is unreasonable — Whether contrary to public interest to release conditionally exempt documents — ss 11A(5), 20, 24A and 47F — Decision under review affirmed

Jon Patty and Attorney-General's Department (Freedom of information) [2018] AICmr 28 (2 March 2018)

Charges — Request for waiver of \$1013.75 charge — Calculation of charge for processing 60 documents or 204 pages — Lowest reasonable cost not demonstrated — Whether giving of access to documents is in the general public interest or in the interest of a substantial section of the public — Access to documents concerning how a decision is made under the *Customs (Prohibited Imports) Regulations 1956* — Significant public interest to licensed firearms owners — Documents would contribute to the public record on an issue that is at the forefront of public debate and is regularly in the media — ss 29, 55D — Decision under review set aside and substituted — Charge waived in full

Paul Farrell and Department of Home Affairs (Freedom of information) [2018] AICmr 27 (28 February 2018)

Access refusal — Request for access to disclosures made under s 19 of the *Australian Border Force Act 2015* (Cth) — Information as to the existence of certain documents — Whether the Department is authorised to neither confirm nor deny the existence of the documents —

Documents affecting enforcement of law — Whether documents would be exempt under s 37(1) — ss 25 and 37 — Decision under review set aside and substituted

'OC' and Australian Building and Construction Commission (Freedom of information) [2018] AICmr 26 (28 February 2018)

Access refusal — Request for access to emails sent by or to a particular Australian Building and Construction Commission (ABCC) officer referring to the applicant — Documents relating to the investigation of a workplace incident — Whether documents subject to legal professional privilege — Whether disclosure would have a substantial adverse effect on the management or assessment of personnel — Whether disclosure of personal information unreasonable — Whether disclosure of conditionally exempt documents contrary to the public interest — ss 11A(5), 42 and 47E(c) — Decision under review varied — Three documents that the ABCC had found exempt under ss 47C or 47F are exempt under s 47E(c)



June 2023

Decisions review checklists

The purpose of the decisions review checklists is to assist in the first and second review of draft decisions, prior to the draft decision being progressed to the Director and/or Assistant Commissioner, Freedom of Information for further clearance.

It is assumed that the review officer has already had a pre-decision drafting meeting with their supervisor, the decision reviewer and/or the Assistant Commissioner, Freedom of Information in relation to the direction of the draft decision.

First review

This checklist provides a list of considerations to consider in undertaking the first review of a decision:

- Check that all matters in the *Decision writing checklist* have been addressed.
- Check that all parties (including any third parties that have been joined) have been appropriately advised that the matter is progressing to a decision by the Information Commissioner.
- Ensure that the draft decision identifies and discusses all of the relevant issues (that is the matters about which the parties are in disagreement) and does not include irrelevant information.
- Ensure that all parties in the IC review have been appropriately identified (or de-identified) in the IC review decision, including any third parties.
- Ensure that the review officer has thoroughly proofread the draft before undertaking first review. If it appears that the draft decision has not been proofread, ask the review officer to do this before you undertake any further review.
- Ensure that the parties have been afforded procedural fairness, including any third parties if relevant: This could be in the form of a preliminary view, or where submissions provided by a party are relevant and we are seeking to rely on them in the decision, that they have been appropriately shared with the other party.
- Submissions received in confidence: confirm that the OAIC has agreed to accept the submissions as confidential. If so, ensure that the decision does not reveal the confidential material.
- Exempt material: Ensure that the material the agency / minister claims is exempt is not revealed. Characterisation of the exempt material may be acceptable. For example, 'documents comprising emails and attachments exchanged between an internal lawyer of [agency] and officers of [agency]', or 'names of third party individuals'.

- Review application of the law, that the submissions provided by the parties have been appropriately taken into account, and whether the agency has discharged its onus under s 55D in establishing that the relevant legislative requirements have been satisfied (or in the case of access grant decisions, whether the IC review applicant has discharged its onus).
- Review accuracy of facts / background and that the reasoning is clearly and concisely set out.
- Where unusual or novel issues are identified, or the decision seeks to depart from the interpretation of the FOI Act set out in the FOI Guidelines or precedent decisions, ensure that the matter is appropriately escalated to the Director and/or Assistant Commissioner, Freedom of Information.
- Review for typographical errors, including footnotes, quotes, document numbers, reference to provisions of the FOI Act and paragraph numbers of the FOI Guidelines.
- Review formatting, including font size, headings used, paragraph spacing, quotes, indenting in footnotes, etc. Review officers should have had regard to the Proofreading Checklist at **Attachment B** to the *Decision writing checklist D2018/016241*.
- Proofread the folder cover sheet to ensure that it reflects the decision.
- Proofread snapshot to ensure that details are correct. Ensure it is consistent with the sample snapshot in **Attachment C** to the *Decision writing checklist D2018/016241*.
- Review folder of documents to ensure that it is complete with all relevant information and that the documents are properly marked-up and tagged.

Second review

Once first review of the draft decision has been completed and the review officer has properly addressed the comments and suggestions, the draft decision should be progressed to second review.

The second review should focus on:

- Undertaking a thorough environmental and jurisdictional scan of the issues raised. In particular, ensuring that the draft decision follows precedents (IC review, AAT, Federal Court decisions).
- Assessing the draft decision for precedential value with respect to similar matters on hand or in the future.
- Ensuring that the draft decision has been proofread for legal and factual accuracy and readability.
- Ensuring that procedural fairness issues have been addressed.



February 2020

Information Commissioner reviews: Key cases

The purpose of this resource is to provide Review Officers with a selection of IC review and AAT decisions in relation to a number of issues and exemptions that may be encountered in IC review matters.

Issues relating to processing of FOI requests	Cases
1. Requirement for Commonwealth contracts (s 6C)	‘LI’ and Department of Education and Training (Freedom of information) [2017] AICmr 41 (10 May 2017) Australian Society for Kangaroos and Rural Industries Research and Development Corporation trading as AgriFutures Australia (Freedom of information) [2019] AICmr 31 (6 June 2019)
2. Requests involving use of computers etc (s 17)	Collection Point Pty Ltd v Commissioner of Taxation [2013] FCAFC 67 (3 July 2013) ‘QL’ and Department of Human Services (Freedom of information) [2019] AICmr 36 (12 June 2019)
3. Deferment of access (s 21)	Wellard Rural Exports Pty Ltd and Department of Agriculture [2014] AICmr 131 (24 November 2014)
4. Whether attachments to documents fall within the scope of request (s 22)	Timmins and Attorney-General’s Department [2015] AICmr 32 (28 April 2015)
5. Names of public servants being treated as irrelevant (s 22)	‘FM’ and Department of Foreign Affairs and Trade [2015] AICmr 31 (24 April 2015) TBA – pending out come of discussion paper – further cases to be added.
6. Practical refusal (s 24)	Dreyfus and Attorney-General (Commonwealth of Australia) (Freedom of information) [2015] AATA 995 (22 December 2015) Paul Farrell and Prime Minister of Australia (Freedom of information) [2017] AICmr 44 (15 May 2017) Jack Waterford and Department of Human Services (Freedom of information) [2019] AICmr 21 (5 June 2019)

Justin Warren and Department of Human Services (Freedom of information) [\[2019\] AICmr 22 \(5 June 2019\)](#)
'QG' and Department of Human Services (Freedom of information) [\[2019\] AICmr 23 \(5 June 2019\)](#)
Chris Drake and Australian Electoral Commission (Freedom of information) [\[2019\] AICmr 24 \(5 June 2019\)](#)
Paul Farrell and Department of Human Services (Freedom of information)(No 2) [\[2019\] AICmr 25 \(5 June 2019\)](#)
'QH' and Department of Human Services (Freedom of information) [\[2019\] AICmr 26 \(5 June 2019\)](#)
'QI' and Department of Human Services (Freedom of information) [\[2019\] AICmr 27 \(5 June 2019\)](#)
'QJ' and Department of Human Services (Freedom of information) [\[2019\] AICmr 28 \(5 June 2019\)](#)

Daniel Shore and Department of Human Services (Freedom of information) [\[2019\] AICmr 52 \(2 July 2019\)](#)

United Firefighters Union of Australia Aviation Branch and Airservices Australia (Freedom of information) [\[2020\] AICmr 4 \(20 January 2020\)](#)

7. [Searches \(s 24A\)](#)

The Australian and Minister for Foreign Affairs (Freedom of information) [\[2018\] AICmr 6 \(9 January 2018\)](#)

Dezfouli and Australian Federal Police (Freedom of information) [\[2019\] AATA 4079 \(4 October 2019\)](#)

De Tarle and Australian Securities and Investments Commission (Freedom of Information) [\[2015\] AATA 770](#)

8. [Searches – Wickr and Whatsapp](#)

Josh Taylor and Prime Minister of Australia (Freedom of information) [\[2018\] AICmr 42 \(21 March 2018\)](#)

Ben Fairless and Minister for Immigration and Border Protection (Freedom of information) [\[2017\] AICmr 115 \(14 November 2017\)](#)

9. [Neither confirming or denying the existence of documents \(s 25\)](#)

Paul Farrell and Department of Home Affairs (Freedom of information) [\[2018\] AICmr 27 \(28 February 2018\)](#)

Mark Diamond and Australian Federal Police (Freedom of information) [\[2018\] AICmr 33 \(19 March 2018\)](#)

'PN' and Australian Taxation Office (Freedom of information) [\[2018\] AICmr 71 \(12 December 2018\)](#)

10. Notice is not required to contain any matter that may cause the document to be an exempt document (s 26(2))

TFS Manufacturing Pty Limited and Department of Health [\[2016\] AICmr 73 \(31 October 2016\)](#)

Graham Mahony and Australian Charities and Not-for-profits Commission (Freedom of information) [\[2019\] AICmr 64 \(31 August 2019\)](#)

11. Charges (s 29)	MacTiernan and Secretary, Department of Infrastructure and Regional Development (Freedom of information) [2015] AATA 584 (11 August 2015)
	Ben Butler and Australian Securities and Investments Commission (Freedom of information) [2017] AICmr 18 (21 February 2017)
	Emmanuel Freudenthal and Department of Foreign Affairs and Trade (Freedom of information) [2019] AICmr 15 (29 April 2019)
12. Amendment and annotation of personal records (ss 48 and 50)	‘NA’ and Department of Immigration and Border Protection (Freedom of information) [2017] AICmr 112 (10 November 2017)
	Grass and Secretary, Department of Home Affairs (Freedom of information) [2019] AATA 1415 (25 June 2019)
13. Revised decisions by agencies (s 55G)	Australian Associated Press Pty Ltd and Department of Immigration and Border Protection [2016] AICmr 25 (22 April 2016)
14. Referral of questions of law to the Federal Court (s 55H)	Elstone Pty Limited and Civil Aviation Safety Authority (Freedom of information) [2018] AICmr 52 (28 May 2018)

Non-conditional exemptions	Cases
1. National security, defence or international relations (s 33)	Secretary, Department of Prime Minister and Cabinet and Summers (Freedom of information) [2019] AATA 5537 (20 December 2019)
	Xenophon and Secretary, Department of Defence (Freedom of information) [2019] AATA 3667 (20 September 2019)
2. Cabinet documents (s 34)	Secretary, Department of Prime Minister and Cabinet and Secretary, Department of Infrastructure and Regional Development and Sanderson (Party Joined) [2015] AATA 361 (27 May 2015)
	Dan Conifer and Department of the Prime Minister and Cabinet (No. 3) (Freedom of information) [2017] AICmr 132 (7 December 2017)
	TBA – Justin Warren and Services Australia (Freedom of information) [2019] AICmr 70 (11 November 2019) – currently being appealed at the AAT.
3. Law enforcement and public safety (s 37)	37(1)(a) - ‘PN’ and Australian Taxation Office (Freedom of information) [2018] AICmr 71 (12 December 2018)
	37(1)(b) – ‘QQ’ and Department of Home Affairs (Freedom of information) [2019] AICmr 49 (28 June 2019)
	37(1)(c) - Chris Vedelago and Airservices Australia (Freedom of information) [2018] AICmr 45 (21 March 2018)
	37(2)(a) – ‘HU’ and Australian Federal Police [2015] AICmr 83 (15 December 2015)

37(2)(b) – Paul Farrell and Australian Federal Police (Freedom of information) [\[2019\] AICmr 68](#)

37(2)(c) – Oliver Banovec and Australian Federal Police [\[2014\] AICmr 110 \(10 October 2014\)](#)

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4. [Secrecy provisions apply \(s 38\)](#)

‘NK’ and Australian Taxation Office (Freedom of information) [\[2017\] AICmr 129](#) (5 December 2017)

Mullen and Aged Care Quality and Safety Commissioner [\[2019\] FCA 1726 \(24 October 2019\)](#)

‘RL’ and Aged Care Quality and Safety Commission (Freedom of Information) [\[2019\] AICmr 74 \(18 December 2019\)](#)

5. [Legal professional privilege \(s 42\)](#)

Taggart and Civil Aviation and Safety Authority (Freedom of Information) [\[2016\] AATA 327](#) (20 May 2016)

John Hilvert and Australian Bureau of Statistics (Freedom of information) [\[2017\] AICmr 43](#) (12 May 2017)

‘KV’ and Indigenous Land Corporation (Freedom of information) [\[2017\] AICmr 17](#) (20 February 2017)

‘OC’ and Australian Building and Construction Commission (Freedom of information) [\[2018\] AICmr 26 \(28 February 2018\)](#)

‘QA’ and Australian Securities and Investments Commission (Freedom of information) [\[2019\] AICmr 12 \(11 March 2019\)](#) – communication between solicitor or client and a third party

Quinn and Australian Tax Office (Freedom of information) [\[2019\] AATA 5550 \(23 December 2019\)](#)

Osland v Secretary to the Department of Justice [\[2008\] HCA 37 \(7 August 2008\)](#) - Waiver

6. [Material obtained in confidence \(s 45\)](#)

Dan Conifer and Department of the Prime Minister and Cabinet (Freedom of information) [\[2017\] AICmr 103](#) (9 October 2017)

Francis and Australian Sports Anti-Doping Authority (Freedom of information) [\[2019\] AATA 12 \(4 January 2019\)](#)

7. [Parliamentary Budget Office documents \(s 45A\)](#)

8. [Contempt of the Parliament or in contempt of court \(s 46\)](#)

46(b) - ‘KZ’ and Australian Federal Police (Freedom of information) [\[2017\] AICmr 24](#) (17 March 2017)

46(c) - Seven Network (Operations) Limited and Australian Federal Police (Freedom of information) [\[2019\] AICmr 32 \(6 June 2019\)](#)

9. [Trade secrets or commercially valuable information \(s 47\)](#) 'OS' and Department of Health (Freedom of Information) [\[2018\] AICmr 46](#) (22 March 2018)
- Paul Farrell and Department of Home Affairs (No 5) (Freedom of information) [\[2019\] AICmr 65](#) (27 September 2019)

10. [Electoral rolls and related documents \(s 47A\)](#)

Conditional exemptions

Cases

- | | |
|--|---|
| 1. Applying conditional exemptions and the public interest | |
| 2. Documents affecting Commonwealth-State relations (s 47B) | The Australian and Prime Minister of Australia [2016] AICmr 84 (7 December 2016) |
| | Community and Public Sector Union and Attorney-General's Department (Freedom of Information) [2019] AICmr 75 (18 December 2019) |
| 3. Documents subject to deliberative processes (s 47C) | 'GI' and Department of the Prime Minister and Cabinet [2015] AICmr 51 (17 July 2015) |
| | Wood; Secretary, Department of Prime Minister and Cabinet and (Freedom of information) [2015] AATA 945 (8 December 2015) |
| | Rovere and Secretary, Department of Education and Training [2015] AATA 462 (30 June 2015) |
| 4. Documents affecting financial or property interests of the Commonwealth (s 47D) | 'DB' and Australian Federal Police [2014] AICmr 105 (30 September 2014) |
| | Linton Besser and Department of Employment [2015] AICmr 67 (15 October 2015) |
| | Community and Public Sector Union and Attorney-General's Department (Freedom of Information) [2019] AICmr 75 (18 December 2019) |
| 5. Documents affecting certain operations of agencies (s 47E) | 47E(a) – 'JA' and Office of the Gene Technology Regulator [2016] AICmr 45 (1 July 2016) |
| | 47E(b) – Fortitude East Pty Limited and Australia Trade Commission [2016] AICmr 71 (24 October 2016) |
| | 47E(c) – various.
Richard Rudd and Civil Aviation Safety Authority (Freedom of information) [2018] AICmr 56 (19 June 2018) |
| | 'PC and Australia Taxation Office (Freedom of information) [2018] AICmr 53 (30 May 2018) |
| | 47E(d) – various. |

Gold Coast Lifestyle Association and Department of Infrastructure and Regional Development and Cities (Freedom of Information) [[2019\] AICmr 59 \(9 August 2019\)](#)

Australian Broadcasting Corporation and Civil Aviation Safety Authority [[2015\] AICmr 21 \(10 April 2015\)](#)

6. [Documents affecting personal privacy \(s 47F\)](#)

'FG' and National Archives of Australia [[2015\] AICmr 26 \(13 April 2015\)](#)

'BA' and Merit Protection Commissioner [[2014\] AICmr 9 \(30 January 2014\)](#)

Construction, Forestry, Mining and Energy Union and Australian Building and Construction Commission (Freedom of information) [[2017\] AICmr 125 \(1 December 2017\)](#)

Margaret Simons and Department of Communications and the Arts (Freedom of information) [[2019\] AICmr 55 \(5 July 2019\)](#)

7. [Documents disclosing business information \(s 47G\)](#)

Besser; Secretary, Department of Employment and (Freedom of information) [[2017\] AATA 835 \(9 June 2017\)](#)

47G(1)(a) – Self Care Corporation Pty Limited and Department of Health (Freedom of information) [[2019\] AICmr 56 \(28 July 2019\)](#)

47G(1)(b) - Construction, Forestry, Mining and Energy Union and Australian Building and Construction Commission (Freedom of information) [[2017\] AICmr 125 \(1 December 2017\)](#)

8. [Research documents \(s 47H\)](#)

9. [Documents affecting the Australian economy \(s 47J\)](#)

Washington and Australian Prudential Regulation Authority [[2011\] AICmr 11 \(22 December 2011\)](#)

Rovere and Secretary, Department of Education and Training [[2015\] AATA 462 \(30 June 2015\)](#)

For further information

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Or visit our website www.oaic.gov.au

The information provided in this resource is of a general nature. It is not a substitute for legal advice.



Updated June 2023

Conducting IC review: Assessments

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

Preliminary assessments

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

Preliminary assessment involves a review of:

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

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

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

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

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

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

Attachment B sets out sample summaries.

Attachment C sets out sample assessor notes for common issues.

Attachment A: Issues and considerations

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

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

Attachment B

Case Summary field

**Current template

Summary

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

Request:

Decision under review: original decision dated @.

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

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

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

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

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

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

Notes for assessor:

New Assessor notes:

All matters generally:

Post triage notes: Commence review & send opening letters:

Opening letter to A: Standard opening email.

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

Practical refusal matters:

Post triage notes: Commence review & send opening letters:

Opening letter to A: Standard opening email.

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

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



June 2023

Conducting an IC review: General information about case management

This section includes general information and principles about case management, including in relation to using precedents and resources, record keeping, handling exempt material and managing a caseload.

Precedents and resources

The toolkit includes references to templates that have been developed to assist review officers and ensure consistency across the FOI Branch.

Every IC review application must be considered on a case by case basis and templates should only be used as a starting point to provide guidance on the type of information that should be included in a letter/document. If using a template, review officers must make sure it is appropriately updated or adapted to be accurate and relevant to the case at hand.

If there is no reference to a template in the toolkit, ask your supervisor if they are able to provide you with a precedent for the type of document you are drafting if you think this will assist you during the drafting process.

Templates will be updated from time to time. If you believe that a template needs to be updated or amended, or that new templates should be developed, please discuss this with your supervisor.

Handling exempt/sensitive material

Handling exempt material and confidential submissions

- Exempt material/confidential submissions received electronically should be saved on Resolve.
- Exempt material/confidential submissions received in hard copy should be stored in the safe.
 - Do **not** save an electronic copy of exempt material received in hard copy.
 - A copy of the confidential submissions should be saved in Resolve and labelled as 'Confidential'.

- If the exempt material/confidential submissions have a classification or caveat marking, review officers should discuss with their supervisor how to handle the material in accordance with the [Protective Security Policy Framework](#). Talk to the OAIC's Records Officer if you have any questions.
- Where exempt material/confidential submissions are received in hard copy, create a 'Correspondence from agency' action on Resolve and note where the exempt material/confidential submissions are stored.
- Upon receipt of exempt material, an 'Exempt material' action must be created on Resolve on the same day the exempt material is received. This item will remain on Resolve until the exempt material is destroyed/deleted.
- All hard copies of exempt material/confidential submissions must be stored in the safe and should only be taken out when the material is being reviewed.
- The content of exempt material/confidential submissions must not be disclosed. If this happens, you must immediately report it to your supervisor.

Deleting/destroying exempt material

- All exempt material (electronic and hard copies) must be destroyed/deleted once an IC review application has been finalised:
 - If exempt material received electronically, destroy by deleting the files from all locations (for example, Resolve, Outlook, H: Drive). There is no need to first check with the agency/minister whether the documents can be destroyed.
 - If exempt material received in hardcopy, ask the agency/minister whether it requires the documents to be returned. Note that the OAIC do not currently have a secure method of destroying USBs and therefore USBs should be returned.
 - If the agency/minister does not want the hard copy documents to be returned, destroy documents by shredding.
 - If the agency/minister wants the hard copy documents to be returned, arrange delivery either by safe hand or collection by the agency/minister.
- Update 'Exempt material' action on Resolve to record whether the exempt material has been destroyed or returned and the date that the action was completed.
 - Use the 'awaiting advice' option if you have contacted the agency/minister to confirm whether the documents should be returned/destroyed and are awaiting a response. It is the review officer's responsibility to diarise to follow up with the agency/minister if a response is not received.

Managing a caseload: efficient and timely action

General

- Complete the 'Review Plan' on Resolve to ensure that relevant case management actions are completed and to set up a plan for completing the IC review.
- Use the actions in Resolve to manage your workload by creating actions to manage deadlines and progress drafts through clearance.
- Review Resolve actions daily to check whether responses are overdue and whether any tasks have been allocated to you.

- Block out time to regularly update parties and to undertake close work.
- Where a party to an IC review requests an update, a response should generally be provided within 2-3 working days.
- Consider calling the parties to discuss a particular issue/action if you think this will more efficiently progress the IC review. If key issues/deadlines/particular actions have been discussed or agreed, confirm the conversation in writing on the same day.

Progressing matters efficiently

- Plan what you hope to achieve during a particular day/week, taking into account any non-casework related tasks that you are required to undertake that day/week (eg attending team meetings) and utilising 'FOI Branch' Focus times.
- Plan your time noting when responses are due in particular cases. Use Resolve and to monitor deadlines.
- Identify the scope and issues in the IC review early and confirm this in writing with the parties early in the case management process. Explore whether the applicant may wish to limit the scope of the IC review to particular issues/documents.
- Be comprehensive in your requests for information from the parties to avoid having to make multiple requests for information.
- Before sending a request for information/inviting submissions (other than a [s 54Z](#) notice), consider calling the applicant/agency to explain what information you are requesting and why. This will help the applicant/agency understand what is needed and how it will help progress the IC review. It will also provide an opportunity to discuss any immediate issues there may be in the applicant/agency providing a response within the requested timeframe.
- Consider whether you have multiple cases that deal with similar issues and try to work efficiently to progress these cases. For example, if you have multiple cases where searches ([s 24A](#)) are an issue, consider setting aside a day when you will aim to progress each of those cases.
- Be forward-thinking when deciding whether it is appropriate to request further information from the applicant/agency. Consider whether the information requested will mean the OAIC has all of the required information to progress the matter to a resolution.
- Progress matters bearing in mind that they may ultimately progress to a decision by the Information Commissioner and think about how the issues would be discussed in an IC review decision. Are the steps you are taking necessary to resolve those issues?
- If it appears that a matter will proceed to a decision by the FOI or Information Commissioner, raise the issue at an FOI Commissioner input meeting.
- Block out time to focus on matters with a complex history or issues so that you can fully familiarise yourself with the issues and material to form a strategy for how the matter should be progressed. Set up a meeting to discuss with your supervisor once you have formed a strategy.
- Where a case strategy has been agreed with your supervisor, note this strategy in the 'Review Plan' and set yourself a target for when you will have progressed the matter in line with this strategy.

- Every case is different. Analyse the issues and use your judgment to assess what steps you can take to progress the matter to a resolution as efficiently as possible. For example, if it appears that the parties are unlikely to come to an agreement under [s 55E](#), form your preliminary view so that the matter can be progressed to a decision/closure.
- Prioritise older matters. Often older matters involve complexities or sensitivities. If you are unsure how to progress a particular matter, block out time to focus on assessing next steps and set up a meeting with your supervisor to discuss. Consider the complexities and sensitivities and whether a meeting with the Commissioner would assist.
- When reviewing exempt material, think about the most efficient way to form your view about whether the document/material is exempt.
 - Familiarise yourself with the decision under review and the applicant’s submissions before looking at the documents at issue.
 - Consider whether the marked up documents are consistent with the decision under review and whether it is easy to understand which material has been found exempt/irrelevant to the request. If not, discuss with your supervisor whether an updated version of the documents at issue should be requested.
 - Where the agency has decided that the documents are exempt in full under a particular provisions and exempt in part under other provisions, form your view on whether you think that the documents are exempt in full as claimed. If so, it may be appropriate to provide a preliminary view/intention to decline letter on this basis without needing to consider whether it is also your view that the documents are exempt in part.
 - Where an agency has decided that the same material exempt under multiple exemptions, consider the non-conditional exemptions first (as there will be no need to consider the public interest if the exemption applies).
 - Where an agency has relied on a variety of exemptions in relation to a variety of material, consider which material has been found exempt under which provision and try to characterise the relevant material (for example, the names of third parties were found exempt under s 47F, material comprising the opinions of public servants was found exempt under s 47C, etc).

Clearance process

Pursuant to [s 25](#) of the *Australian Information Commissioner Act 2010*, the Information Commissioner has issued an instrument relating to the delegation of FOI powers by the Australian Information Commissioner which is available on the [OAIC's website](#).

Regard must be had to this instrument to determine whether a particular power or function under the FOI Act has been delegated and if so, to what level. For example, IC review decisions made under [s 55K](#) of the FOI Act are non-delegable and can only be made by the Information Commissioner, and the power to issue a notice to produce under [s 55U\(3\)](#) is delegated to Director level.

There is also a clearance process in the Freedom of Information Branch that sets out the level of clearance required for particular documents. The clearance process is updated periodically. The following table sets out the clearance process as at August 2023:

Document	Clearance is required		
	Assistant Director/Supervisor	Director	Assistant Commissioner
Notice to Produce (ss 55R and 55U) (Delegation: EL2)	Yes	Yes	Noting
Requests for extension of time to respond to s 54Z notice	Yes	-	-
Preliminary view/requests for further information (Delegation: Officer level)	Yes	-	-
Intent to decline (Delegation: Officer level)	Yes	-	-
Closure letters (Final clearance: Director level)	Yes	Yes	
Section 55F agreement: Draft (Delegation: Officer level)	Yes	-	-
Section 55F agreement: Closure (Delegation: Director level)	Yes	Yes	-
Section 55K decisions (Commissioner/Assistant Commissioner issued)	Yes	Yes	Yes
Intent to decline (s 54W)/Preliminary views (Delegation: Officer level)	Yes	Yes	-
Intent to decline (s 54W)/Preliminary views – Complex or significant or novel (Delegation: Officer level)	Yes	Yes	Noting

Generally, draft documents should be saved into Resolve for clearance. The draft document should be clearly labelled, and a clearance action should be allocated to the appropriate person for clearance with a brief description of the document to be cleared.

Please note the specific guidance regarding clearance in the *Intention to decline (s 54W) checklist*, *Closure letter (s 54W) checklist*, *Preliminary view checklist* and *Decision-writing checklist*.

Matters to escalate to supervisor

As a general guide, escalate the following matters to your supervisor:

- Material change from initial assessment noted on Resolve.
- Requests for extension of time (EOTs) to provide a response over two weeks or repeated requests for EOTs.
- Requests for expedition.
- Where parties are seeking to have matter finalised under [s 54W\(b\)](#) or request a hearing under [s 55B](#).
- High profile cases/media coverage.
- FOI requests made during the IC review process.
- Complaints about how an IC review application has been handled.
- Matters likely to proceed to a decision or decline under [s 54W\(a\)](#).
- Matters that may require a teleconference.
- Preliminary views and requests for further submissions to applicants/agencies.



Australian Government

Office of the Australian Information Commissioner

Delegation of FOI powers and functions by the Australian Information Commissioner

Freedom of Information Act 1982

I, Angelene Falk, Australian Information Commissioner and Australian Privacy Commissioner, pursuant to section 25 of the Australian Information Commissioner Act 2010, revoke all previous instruments, and delegate to all members of staff of the Office of the Australian Information Commissioner holding, occupying or performing the duties of a position in column 1, the powers and functions conferred upon me by the Freedom of Information Act 1982, as set out in column 2.

Angelene Falk
Australian Information Commissioner
Australian Privacy Commissioner
3 February 2023

OAIC Staff	<i>Powers and Functions</i>
SES Band 2	<p><i>All powers and functions with the exception of:</i></p> <ul style="list-style-type: none"> • <i>Section 55H</i> • <i>Section 55K</i> • <i>Section 55Q</i> • <i>Section 73</i> • <i>Section 86</i> • <i>Section 89</i> • <i>Section 89A</i> • <i>Section 89K</i> • <i>Section 93A(1)</i>
SES Band 1 – Freedom of Information Branch	<p><i>All powers and functions with the exception of:</i></p> <ul style="list-style-type: none"> • <i>Section 55H</i> • <i>Section 55Q</i> • <i>Section 89</i> • <i>Section 89A</i> • <i>Section 89K</i> • <i>Section 93A(1)</i>
Executive Level 2 — Freedom of information Branch	<p><i>All powers and functions under Part III, V, VI, VII, and VIIB, with the exception of:</i></p> <ul style="list-style-type: none"> • <i>Section 55H</i> • <i>Section 55K</i> • <i>Section 55Q</i> • <i>Section 55W</i> • <i>Section 55X</i> • <i>Section 73</i> • <i>Section 77</i>

OAIC Staff	Powers and Functions
	<ul style="list-style-type: none"> • Section 79 • Section 82 • Section 83 • Section 86 • Section 89 • Section 89A
Executive Level 1 — Freedom of information Branch	<p><i>All powers and functions under Part 111, V, VI, VII, and VIIB, with the exception of:</i></p> <ul style="list-style-type: none"> • Section 11C(2) • Section 54W • Paragraph 55(2)(e) • Paragraph 55(5)(a) • Paragraph 55(5)(c) • Subsection 55A(3) • Section 55B • Section 55F • Section 55H • Section 55K • Section 55P • Section 55Q • Section 55R • Section 55T • Section 55U • Section 55W • Subsection 69(2) • Section 73 • Section 74 • Section 77

OAIC Staff	<i>Powers and Functions</i>
	<ul style="list-style-type: none"> • <i>Section 79</i> • <i>Section 82</i> • <i>Section 83</i> • <i>Section 86</i> • <i>Section 89</i> • <i>Section 89A</i> • <i>Section 89D</i>
<p>Australian Public Service Level 6 — Freedom of information Branch Australian Public Service Level 5 — Freedom of information Branch</p>	<p><i>All powers and functions under Part 111, V, VI, VII, and VIIB, with the exception of:</i></p> <ul style="list-style-type: none"> • <i>Section 11C(2)</i> • <i>Section 54W</i> • <i>Paragraph 55(2)(e)</i> • <i>Paragraph 55(5)(a)</i> • <i>Paragraph 55(5)(c)</i> • <i>Subsection 55A(3)</i> • <i>Section 55B</i> • <i>Section 55E</i> • <i>Section 55F</i> • <i>Section 55H</i> • <i>Section 55K</i> • <i>Section 55P</i> • <i>Section 55Q</i> • <i>Section 55R</i> • <i>Section 55T</i> • <i>Section 55U</i> • <i>Section 55V</i> • <i>Section 55W</i> • <i>Subsection 69(2)</i>

OAIC Staff	<i>Powers and Functions</i>
	<ul style="list-style-type: none">• <i>Section 73</i>• <i>Section 74</i>• <i>Section 77</i>• <i>Section 79</i>• <i>Section 82</i>• <i>Section 83</i>• <i>Section 86</i>• <i>Section 89</i>• <i>Section 89A</i>• <i>Section 89D</i>



Angelene Falk
Australian Information Commissioner
Australian Privacy Commissioner
3 February 2023



Australian Government
**Office of the Australian
Information Commissioner**

Guidance for staff

Referring conduct to the AFP

oaic.gov.au

OAIC

June 2019

Contents

Background	3
When this guidance applies	3
Offence provisions	3
Identifying circumstances that may amount to an offence	8

Background

When this guidance applies

The *Privacy Act 1988* (Cth) (Privacy Act) and the *Freedom of Information Act 1982* (Cth) (FOI Act) contain a number of provisions where a breach will amount to a criminal offence (offence provisions). Some of these offences apply to conduct of third parties that may occur during the course of the OAIC conducting its role as a regulator.

You need to be aware of the offence provisions if you are working on the following types of cases:

- Complaints and investigations under Part V of the Privacy Act
- Credit reporting under Part IIIA of the Privacy Act
- Privacy cases involving the collection, use and disclosure of personal information in emergencies and disasters in which the special provisions under Part VIA of the Privacy Act apply
- Information Commissioner reviews under Part VII of the FOI Act
- Investigations under Part VIIB of the FOI Act.

You will also need to be aware of how to identify conduct that may amount to an offence under these provisions and what to do if you suspect that an offence may have occurred. In the event that conduct amounting to an offence under the Privacy Act is suspected, an officer will need to raise the issue with their manager, who will then raise with their SES and Legal Services for consideration.

Apart from an offence under s 49 of the Privacy Act which imposes a mandatory obligation to refer to the Australian Federal Police (AFP), the offence provisions leave it to the discretion of the Commissioner to decide whether to refer conduct to the AFP.

Purpose

This guidance material outlines:

- what the offence provisions are, with a focus on s 65(3) of the Privacy Act
- identifying whether there exist circumstances giving rise to an offence under s 65(3) of the Privacy Act on the face of the case (prima facie case)
- processes for considering whether there is a prima facie case
- relevant considerations in exercising the referral discretion.

Offence provisions

Privacy Act

The following table sets out the offence provisions relevant to the Privacy Act.

Types of cases	Offence provision (Privacy Act)	Conduct	Penalty	Discretionary or compulsory referral to AFP
Investigations under s 40, where a person has been directed by a s 46 written notice to attend a compulsory conference	S 46(2)	A person must not, without reasonable excuse, fail to attend a compulsory conference, or fail to attend from day to day unless excused or released from further attendance by the Commissioner.	Imprisonment for 6 months or 10 penalty units or both for individuals. 50 penalty units for a body corporate	Discretionary
Investigations under s 40	s 49	The person committed a tax file number offence, a healthcare identifier offence and AML/CTF verification offence or a credit reporting offence	Various	Compulsory referral where the Commissioner forms the opinion that the offence may have occurred.
Investigations under s 40, where a person has been issued with a s 44 notice to attend before the Commissioner	S 65(1)	A person must not, without reasonable excuse, refuse or fail to attend before the Commissioner or refuse or fail to swear an oath or make an affirmation when required to do so under the act.	Imprisonment for 12 months or 20 penalty units or both	Discretionary
Conciliations, preliminary enquiries, investigations of privacy complaints under Part V	S 65(3)	A person must not give information or make a statement to the Commissioner knowing that it is misleading in a material particular.	Imprisonment for 12 months or 20 penalty units or both	Discretionary
Investigations under s 40, where a person has been issued with a s 44 notice to attend before the Commissioner	S 66(1)	A person must not refuse or fail to give information, or to answer a question or produce a document or record when so required under the act.	Imprisonment for 12 months or 20 penalty units or both for individuals	Discretionary

Types of cases	Offence provision (Privacy Act)	Conduct	Penalty	Discretionary or compulsory referral to AFP
			100 penalty units for a body corporate	
Where a person has been authorised by the Commissioner the power to enter premises under s 68	S 68A(3)	A person must not fail to return their identity card to the Commissioner as soon as practicable after the person ceases to be authorised.	1 penalty unit	Discretionary
Dealing with personal information in emergencies and disasters under Part VIA	S 80Q(1)	A person who obtains personal information relating to an individual because of the operation of this part, and the person is not a responsible person for the individual, must not disclose that information unless the disclosure is authorised under s 80Q(2).	Imprisonment for 1 year or 60 penalty units or both	Discretionary
Credit reporting under Part IIIA	S 20P(1)	A credit reporting body must not use or disclose credit reporting information which is false or misleading in a material particular.	200 penalty units	Discretionary
Credit reporting under Part IIIA, where a credit provider has disclosed information under s 21D.	S 21R(1)	A credit provider must not disclose information about an individual to a credit reporting body which is false or misleading in a material particular.	200 penalty units	Discretionary
Credit reporting under Part IIIA	S 21R(2)	A credit provider must not use or disclose credit eligibility information which is false or misleading in a material particular.	200 penalty units	Discretionary

Types of cases	Offence provision (Privacy Act)	Conduct	Penalty	Discretionary or compulsory referral to AFP
Credit reporting under Part IIIA, where an entity obtains credit reporting information	S 24(1)	An entity must not obtain credit reporting information from a credit reporting body unless it is an entity to which the body is permitted to disclose information to or the entity is an access seeker for the information.	200 penalty units	Discretionary
Credit reporting under Part IIIA, where an entity obtains credit reporting information	S 24(2)	An entity must not obtain credit reporting information from a credit reporting body under false pretence.	200 penalty units	Discretionary
Credit reporting under Part IIIA, where an entity obtains credit eligibility information	S 24A(1)	An entity must not obtain credit eligibility information from a credit provider unless it is an entity to which the provider is permitted to disclose the information to or the entity is an access seeker for the information.	200 penalty units	Discretionary
Credit reporting under Part IIIA, where an entity obtains credit eligibility information	S 24A(2)	An entity must not obtain credit eligibility information from a credit provider under false pretence.	200 penalty units	Discretionary

FOI Act

The following table sets out the FOI Act offence provisions.

Types of Cases	Offence provision (FOI Act)	Conduct	Penalty	Discretionary or compulsory referral to AFP
IC review under Part VII, where a person has been issued with a notice to appear before the Commissioner under s 55W	S 55W(3)	A person breaches a requirement set out in the notice under s 55W.	6 months imprisonment	Discretionary
IC review under Part VII where a person has been issued with a notice under s 55R to produce information/documents	S 55R(5)	A person breaches a requirement set out in the notice under s 55R.	6 months imprisonment	Discretionary
IC review under Part VII where a person has been issued with a notice under s 55W and is required to appear before the Commissioner and take an oath or affirmation	S 55X(3)	A person breaches the requirement to be examined on oath or affirmation.	6 months imprisonment	Discretionary
IC investigations under Part VIIIB, where a person has been required to produce information/documents under s 79(3)	S 79(5)	A person breaches a requirement set out in the notice under s 79.	6 months imprisonment	Discretionary
IC investigations under Part VIIIB, where a person has been required to appear before the Commissioner to answer questions under s 82(1)	S 82(3)	A person breaches a requirement set out in the notice under s 82.	6 months imprisonment	Discretionary
IC investigations under Part VIIIB, where a person has been issued with a notice under s 82(1) and is required to appear before the Commissioner and take an oath or affirmation	S 83(3)	A person breaches the requirement to be examined on oath or affirmation.	6 months imprisonment	Discretionary

Identifying circumstances that may amount to an offence

In any case in which it appears that there is conduct that may amount to an offence under one or more of the offence provisions, the primary question is whether a prima facie case is made out on the facts as known. For all instances where conduct is suspected to amount to an offence under one or more of the offence provisions, you should contact Legal Services to assist in determining whether a prima facie case is made out.

In circumstances involving s 65(3) of the Privacy Act in particular (the furnishing of information or the making of a statement that is false or misleading in a material particular), please see the guidance below.

Misleading the Commissioner – s 65(3) of the Privacy Act

In order to make out a prima facie offence having been committed under s 65(3), the following elements must be established:

1. A person furnishes information or makes a statement to the Commissioner. For example, a person sends an email to the Commissioner containing statements.
2. The person intended to furnish the information or make the statement to the Commissioner. In the example, this means that they intend to send the email.
3. The information or statement is false or misleading. False or misleading information can include omissions where such omissions create a false impression. For example, the email contains information that the individual did something that they did not do, or the email omits information without which gives an impression of something that is false.
4. The information or statement is false or misleading in a material particular. A material particular is something that is not trivial and has relevance to the case. For example, the email contains false information in response to a question about whether the respondent to a privacy complaint disclosed personal information where an individual claims that the respondent breached their privacy by disclosing the personal information. This would likely be false in a material particular.

If it appears that the elements exist on the facts of the case as they are known, you should refer the information to your manager, who will then raise the issue with their SES and Legal Services. Legal Services will consider whether advice is required to determine whether a prima facie case is made out.

Consideration of referral

Once it has been determined that a prima facie offence has been made out, and there is no obligation to refer, the Commissioner will need to turn their mind to the question of whether to refer the conduct to the AFP.

Relevant factors

The overriding requirement in deciding whether to refer to the AFP is to exercise good faith, including by ensuring that the decision to refer is made having regard to the objects of the Privacy Act and that each decision to refer is consistent with other decisions to refer.

The following is a non-exhaustive list of factors that should be considered:

- the need to maintain the dignity of the Commissioner's statutory office, and to preserve public confidence and integrity of the investigation process
- the extent to which the alleged offending has the capacity to compromise the outcome of the Commissioner's investigations
- how the alleged offending was discovered, including whether it was brought to the attention of the OAIC by the alleged offender
- the steps taken by the alleged offender to remedy the conduct giving rise to the alleged offence
- whether the alleged offender has engaged in similar conduct in the past
- whether the alleged offender has demonstrated contrition, for example, by apologising
- frequency with which the relevant offence occurs more generally and whether this results in any adverse effect such as increased costs, delays and inconvenience
- need for deterrence
- whether the alleged breach lengthened the investigation and/or unnecessarily complicated the matter
- capacity of the alleged breach to undermine public confidence in the investigation process
- relative seriousness of the alleged offence, from the Commissioner's perspective, on the spectrum of matters involving alleged breaches of the particular offence provision.

Irrelevant factors

Demonstrating that a decision is exercised in good faith would, at a minimum, involve ensuring that the decision is not made in bad faith, insofar as the following irrelevant considerations are not part of the decision-making process:

- race, religion, sex, national origin or political associations, activities or beliefs of the alleged offender or anyone else who is involved
- any personal feelings about the alleged offender or a person aggrieved by the conduct
- any possible political advantage, disadvantage or embarrassment to the government or any political group or party
- possible effect of the decision on the personal professional circumstances of those responsible for making it.

Other factors

Factors that could raise concerns, and which the Commissioner should be mindful of, but do not necessarily demonstrate bad faith in making a decision to refer include:

- referral after a lengthy period of delay without reasonable explanation for the delay
- referral on the basis of external pressure in circumstances where the matter would otherwise not be referred
- assumptions as to the likely response by the AFP and or the Commonwealth Director of Public Prosecutions (CDPP) and the likely severity of any sentence that might be imposed.

AFP requirements

- In addition to the factors outlined above, the Commissioner should have regard to any current policies of the AFP requiring certain matters to be considered before referral to the AFP, including any guidelines for deciding whether to investigate and prosecute matters, and any risk management framework or matrix for determining the matter is likely to be accepted for further action on referral.

Commissioner briefing

Once a preliminary assessment has been made as to the above matters, Legal Services will prepare a brief to the Commissioner outlining the background and seeking a decision, together with the following:

- legal advice setting out the prima facie case of an offence being committed
- preliminary assessment as to the relevant factors applied to the specific case
- proposed AFP brief.



Australian Government

Office of the Australian Information Commissioner

Direction as to certain procedures to be followed in IC reviews

This direction is given under s 55(2)(e)(i) of the *Freedom of Information Act 1982*.

Contents

Direction as to certain procedures to be followed in IC reviews

1.	About this Direction.....	1
2.	General principles.....	1
3.	General procedure in relation to IC review of deemed refusal decisions.....	2
	<i>Preliminary inquiries</i>	2
	<i>Commencement of review</i>	2
4.	General procedure in relation to review of other access refusal and access grant decisions.....	3
	<i>Commencement of review</i>	3
	<i>Requirement to engage with the applicant</i>	3
	<i>Response to s 54Z notice</i>	3
5.	General procedure for production and inspection of documents.....	4
	<i>Production of documents</i>	4
	<i>Inspection of documents</i>	5
6.	General procedure in relation to submissions made during an IC review.....	6
	<i>General principles</i>	6
	<i>Request to make submissions in confidence</i>	7
	<i>Consideration of submissions</i>	7
7.	Non-compliance with this Direction.....	8
	Annexure 1: Information gathering and document production powers.....	9
	Annexure 2: Evidence checklist – IC review compulsory conference.....	10

Direction as to certain procedures to be followed in IC reviews

1. About this Direction

- 1.1 This Direction is given by the Australian Information Commissioner under s 55(2)(e)(i) of the *Freedom of Information Act 1982* (the FOI Act) in relation to Information Commissioner (IC) reviews generally.
- 1.2 The purpose of this Direction is to set out the particular procedures that agencies and ministers are required to follow during IC reviews, including procedures relating to:
 - deemed access refusal decisions
 - a requirement to engage, or make reasonable attempts to engage, with IC review applicants during the IC review for the purpose of genuinely attempting to resolve or narrow the matters at issue in the IC review
 - the production of documents and submissions.
- 1.3 This Direction does not apply to the extent it is inconsistent with a provision of the FOI Act, another enactment or a specific direction made in a particular IC review.
- 1.4 This Direction is not a legislative instrument.¹
- 1.5 This Direction has effect from 1 July 2023.

2. General principles

- 2.1 IC review procedures are found in Part VII of the FOI Act. The IC review process is intended to be an informal, non-adversarial and timely means of external merits review of decisions by agencies and ministers in relation to FOI requests. Part 10 of the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act, to which ministers and agencies must have regard in performing a function or exercising a power under the FOI Act, sets out in detail the process and underlying principles of IC review.
- 2.2 Before commencing an IC review, the Information Commissioner will notify the relevant agency or minister that an applicant has applied for IC review of the agency or minister's decision (s 54Z notice of IC review).²
- 2.3 Section 55(2)(a) of the FOI Act authorises the Information Commissioner to conduct an IC review in whatever way the Information Commissioner considers appropriate. Section 55(2)(d) of the FOI Act allows the Information Commissioner to obtain any

¹ Section 55(3) of the FOI Act.

² Not every application for IC review will proceed to an IC review. The 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) set out the circumstances in which the Information Commissioner may not conduct a review at [10.81] and [10.85] – [10.86].