Australian Government
Office of the Australian Information Commissioner

Our reference: s 22
Agency reference:

s 22

By email to: s 22

Your application for Information Commissioner review of Administrative Appeals Tribunal's decision

Dear s 22

I refer to your application for Information Commissioner review (IC review) of a decision made by the Administrative Appeals Tribunal (the AAT) on 5 August 2019 under the *Freedom of Information Act 1982* (Cth) (the FOI Act).

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

The reasons for my recommendation follow.

Background

On 5 July 2019, you applied to the Department of Human Services for access to:

s 22

On the same day, the matter was informally referred to the AAT as the holder of the documents sought in your FOI request.

On 5 August 2021, the AAT advised you it had located one document within the scope of your request. The AAT found the document was exempt in full under s 46 of the FOI Act on the basis that providing you access to the document would be contrary to a direction given by a Tribunal.

On 19 October 2019, you sought IC review of the AAT's decision under s 54L of the FOI Act.

Scope of IC review

The issues in this IC review are whether the single document within the scope of your FOI request is exempt under s 46 of the FOI Act.

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

- the AAT's decision and reasons for decision
- the FOI Act, in particular s 46
- 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 [5.181] – [5.183], [5.187]
- the AAT's submissions.

Would disclosure of the document be contrary to an order of the Tribunal?

Section 46(b) of the FOI Act states:

> A document is an exempt document if public disclosure of the document would, apart from this Act and any immunity of the Crown:
>
> …
>
> (b) be contrary to an order made or direction given by a Royal Commission or by a tribunal or other person or body having power to take evidence on oath; or

Section 40 of the *Administrative Appeals Tribunal Act 1975* (the AAT Act) identifies the powers of the AAT. For the purpose of reviewing a decision, s 40(1)(a) of the AAT Act states the AAT has the power to:

> (a) take evidence on oath or affirmation;

Therefore, I am of the view that the AAT is a tribunal for the purpose of s 46(b) of the FOI Act.

s 47E(d) [redacted]

Discretion not to 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.

s 47E(d) [redacted]

For these reasons, I intend to recommend that the Information Commissioner exercises the discretion to decide not to continue to undertake this IC review under s 54W, because I am of the view that this IC review application is lacking in substance.

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

If you disagree with this proposed recommendation, please write to us by **15 July 2021** 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 s 22 [redacted] or on s 22 [redacted]. In all correspondence please quote s 22 [redacted]

Yours sincerely

s 22 [redacted]

s 22 [redacted]

s 22 [redacted]

1 July 2021

Australian Government
Office of the Australian Information Commissioner

Our reference: s 22
Agency reference: s 22

s 22

Sent by email: s 22

Your application for Information Commissioner review of the Federal Circuit Court and Family Circuit Court of Australia's decision

Dear s 22

I refer to your request for Information Commissioner review (IC review) of a decision made by the Federal Circuit Court and Family Court of Australia ('the Courts') on 15 June 2020 under the *Freedom of Information Act 1982* (Cth) (the FOI Act).

The purpose of this letter is to advise you of my intention to recommend that the delegate of the Information Commissioner exercises the discretion to decide not to continue to undertake a review of your IC review application under s 54W(a) of the FOI Act on the basis that your IC review application is lacking substance and to give you an opportunity to provide reasons for me to reconsider making this recommendation.

The reasons for my recommendation follow.

Background

On 15 May 2020, you applied to the Family Court of Australia for access to:

s 22

On 19 May 2020 you advised that you wish to include the Federal Circuit Court of Australia in your request.

On 5 June 202 you confirmed that you were seeking documents s22 s22 .

On 15 June 2020, the Courts made a decision to refuse your request under s 24A of the FOI Act on the basis that the documents do not exist.

On 16 June 2020, you sought IC review of the court's decision under s 54L of the FOI Act.

On 16 September 2020, the OAIC notified the Courts that the Information Commissioner would undertake an IC review of its decision dated 15 June 2020 and sought information to assist the Information Commissioner to conduct the review.

On 5 November 2020, the Courts responded to the OAIC providing the information sought, including evidence of the searches conducted for relevant documents.

On 7 April 2021 the OAIC contacted you by email providing a copy of these submissions and requesting any further comments you wished to provide. You provided a response to this correspondence on 19 April 2021.

On 18 May 2021 the OAIC forwarded your comments to the Courts and sought further submissions from them in response. The Courts provided further submissions on 11 June 2021.

Scope of IC review

The issue to be decided in this IC review is whether the Courts have taken all reasonable steps to find documents within scope of your request, as they are required to do under s 24A(1) of the FOI Act.

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

- The Courts' decision and reasons for decision of 15 June 2020
- the FOI Act, in particular ss 24A and 55D
- 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 [3.84] to [3.94]
- relevant case law, in particular *De Tarle and Australian Securities and Investments Commission (Freedom of information)* [2015] AATA 770
- the parties' submissions.

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

In their original reasons for decision, the Courts said:

s 22 [redacted]

s 22 [redacted]

Section 24A of the FOI Act requires the Courts 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 evidence of the searches conducted in processing the request, the Court's provided submissions addressing the searches undertaken and records of correspondence with individuals at relevant sections of the Courts evidencing the searches conducted.

In their submissions, the Courts said:

s 47E(d) [redacted]

s 47E(d)

The Courts submissions were shared with you by email on 9 April 2021. Correspondence containing your submissions in response was received on 19 April 2021. Your submissions were as follows:

s 22

On 18 May 2021 I shared your correspondence with the Courts. The Courts have provided further submissions addressing the points you have raised.

On the issue of the parameters of the searches that were undertaken, the courts again outlined the searches undertaken and said the following:

s 47E(d)

In relation to your point regarding searches of email correspondence in relation to your FOI Request, the Courts said the following:

s 47E(d) [redacted]

[redacted]

As discussed above, the FOI Guidelines requires that an agency 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. It appears from the evidence of searches conducted that all reasonable steps were undertaken to find the documents you requested. In particular, I have taken into account the following:

- the scope of your request as revised in correspondence dated 19 May 2020 and 5 June 2020
- submissions and evidence from the Courts showing that searches were undertaken of the following:

s 47E(d) [redacted]

- s 47E(d) [redacted]

s 47E(d) [redacted]

It appears that 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 the Courts has not released such documents to you.

Accordingly, it would appear that the Courts have discharged its onus to establish that the decision given in respect of your FOI request in justified (s 55D of the FOI Act).

Discretion not to undertake an IC review

Under s 54W(a) 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.

It appears that there is no evidence currently before the OAIC to support the view that the Courts hold further documents falling within the scope of your request and has not released these documents to you.

For these reasons, I intend to recommend to the delegate of the Information Commissioner that they exercise the discretion not to continue to undertake a review of your IC review application under s 54W(a)(i), on the grounds that it is lacking in substance.

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

Next steps

In consideration of the above, it its open to you to withdraw your IC review application by **27 July 2021**.

If you disagree with this proposed recommendation, please write to us by **27 July 2021** and advise us of your reasons. Your reasons will be taken into account before a decision is made on whether to finalise this matter under s 54W.

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

If you have any questions about this email, please contact me by telephone s 22 [redacted], or by email s 22 [redacted]. In all correspondence please include OAIC reference s 22 [redacted].

Yours sincerely

[redacted]

[redacted]

6 July 2021

s 47E(d)

Our reference: s 22
Agency reference: s 22

Dear s 22

I refer to your application for Information Commissioner review (IC review) of a decision the Department of Home Affairs (the Department) was deemed to have refused on 23 February 2021, and to my emails of 8 June and 9 June 2021 below.

On 7 June 2021, the Department provided a decision to you on your FOI request. In its decision, the Department refused access to the requested documents under s 24A of the FOI Act on the basis that a practical refusal reason applies to your request.

On 8 June 2021, I wrote to you seeking your advice on whether you wished to proceed or withdraw your IC review. In that correspondence I requested you respond by 22 June 2021.

In your response of 8 June 2021 you did not advise whether you wished to proceed with or withdraw your IC review.

On 9 June 2021, I responded to you advising that the OAIC is unable to place your IC review on hold, and again requested your advice on whether you wished to proceed or withdraw your IC review. In that correspondence I requested you respond by 22 June 2021. The OAIC has not received a further response from you. I have also attempted to phone you on two occasions but have been unable to reach you.

In light of the above and in order to progress your IC review, can you please advise if you would like to proceed or withdraw your request for IC review? Please provide a response **by 13 July 2021**.

Intention to finalise IC review

I note that s 54W(a)(ii) of the FOI Act provides that the Information Commissioner may decide not to undertake an IC review where an applicant fails to cooperate in progressing an IC review application without reasonable excuse. Should we not receive a response from you to this email by **13 July 2021**, your IC review application will be finalised by a delegate of the Information Commissioner under
s 54W(a)(ii).

If you have any questions regarding this email please contact me on s 22 or via email s 22 . Please quote OAIC reference number at the top of this email in all correspondence.

Yours sincerely

s 22

OAIC

s 22 [redacted]

[Subscribe to Information Matters]

Australian Government
Office of the Australian Information Commissioner

Our reference: s 22
Agency reference: s 22

s 22

By email to: s 22

Your application for Information Commissioner review of the Australian Federal Police's decision

Dear s 22

I refer to your request for Information Commissioner review (IC review) of a decision made by the Australian Federal Police (AFP) on 20 August 2020 under the *Freedom of Information Act 1982* (Cth) (the FOI Act).

The purpose of this letter is to advise you of my intention to recommend that the delegate of the Information Commissioner exercises the discretion to decide not to 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 lacking in substance, and to give you an opportunity to provide reasons for me to reconsider making this recommendation.

The reasons for my recommendation follow.

Background

On 16 July 2020, you applied to the AFP for access to:

s 22

1300 363 992
enquiries@oaic.gov.au
T +61 2 9284 9749
F +61 2 9284 9666
GPO Box 5218
Sydney NSW 2001
www.oaic.gov.au
ABN 85 249 230 937

OAIC

On 20 August 2020, the AFP 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 AFP was satisfied that documents falling within the scope of the request do not exist.

On 21 August 2020, you sought IC review of the AFP's decision under s 54L of the FOI Act.

Scope of IC review

The issue to be decided in this IC review is whether the AFP 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 AFP's decision and reasons for decision
- the FOI Act, in particular ss 24A and 54W(a)(i)
- 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 [3.85] – [3.94]
- relevant case law, in particular *De Tarle and Australian Securities and Investments Commission (Freedom of Information*) [2015] AATA 770, and
- the parties' submissions.[1]

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

In its reasons for decision, the AFP said:

s 22

[redacted]

[1] s22 [redacted].

- s 22 [redacted]
- [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

In your application for IC review, you say that:

> s 22 [redacted]

Section 24A of the FOI Act requires the AFP 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

[2] s47E(d) [redacted]

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 AFP has provided evidence of searches conducted, being email correspondence between the decision maker and relevant individuals who conducted searches. This evidence indicated that there were no documents within the scope of your FOI request.

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 AFP's evidence of searches and their submissions. I have also considered the scope of your FOI request.

The evidence provided by the AFP demonstrates that:

- s 47E(d) [redacted]

The evidence provided by the AFP further reveals that on 21 August 2020, following receipt of the AFP's reasons for decision, you responded to the AFP as follows:

> s 22 [redacted]

s 47E(d)

[redacted]

[redacted]

[redacted]

Accordingly, it would appear that AFP has discharged its onus to establish that the decision given in respect of your FOI request in justified (s 55D of the FOI Act).

Discretion not to continue to undertake an IC review

Under s 54W(a)(i) 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.

In light of the AFP's submissions and the specific nature of your FOI request, there is no evidence before the OAIC to support the view that there are documents that fall within the scope of your FOI request and that AFP has not released such documents to you.

For these reasons, I intend to recommend that the Information Commissioner exercises the discretion to decide not to continue to undertake this IC review under s 54W, because I am of the view that this IC review application is lacking in substance.

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

If you disagree with this proposed recommendation, please write to us by **26 July 2021** 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 s 22 or on s 22. In all correspondence please quote s 22.

Yours sincerely

s 22

s 22

12 July 2021

s 47E(d)

s 47E(d)

Australian Government
Office of the Australian Information Commissioner

Our references: s 22
Agency references: s 22

s 22

By email to: s 22

Your application for Information Commissioner review of the Attorney-General's Department's FOI decision

Dear s 22

I refer to your application for Information Commissioner review (IC review) of the decision made by the Attorney-General's Department (the Department) on 17 November 2020 under the *Freedom of Information Act 1982* (Cth) (the FOI Act).

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

I am writing to both parties in this IC review to offer you both an opportunity to comment or make submissions on this recommendation.

The reasons for my recommendation follow.

Background

On 4 October 2020, you applied to the Department for access to:

s 22

1300 363 992
enquiries@oaic.gov.au
T +61 2 9284 9749
F +61 2 9284 9666
GPO Box 5218
Sydney NSW 2001
www.oaic.gov.au
ABN 85 249 230 937

OAIC

s 22 [redacted]

On 21 October 2020, the Department wrote to you advising that the terms of your request in its current form would substantially and unreasonably divert the resources of the Department from its other operations. s 22 [redacted]

We understand that you responded on the same day, however you did not revise the terms of your request.

On 2 November 2020, the Department wrote to you to formally advise you that a practical refusal reason exists under s 24AA of the FOI Act in relation to your request, and requested that you consider revising the scope of your FOI request to remove the practical refusal reason.

We understand that you did not revise the scope of your request following this notice.

On 17 November 2020, the Department notified you of its decision to refuse your request under s 24(1)(b) of the FOI Act, on the basis that a practical refusal reason exists in relation to your request. The Department advised in its decision:

s 22 [redacted]

On 22 November 2020, you sought IC review of the Department's decision under s 54L of the FOI Act.

On 3 March 2021, you advised the OAIC that you consider it would be appropriate for this IC review to be finalised under s 54W(b) of the FOI Act, to enable you to seek review of the

Department's decision at the AAT, in line with the approach adopted by the OAIC in previous IC review applications you have made concerning s 22 .

Discretion not to undertake an IC review

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

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

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

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

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

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

> The Information Commissioner can decline to undertake a review if satisfied 'that the interests of the administration of the [FOI] Act make it desirable' that the AAT consider the review application (s 54W(b)). It is intended that the Commissioner will resolve most applications. Circumstances in which the Commissioner may decide that it is desirable for the AAT to consider a matter instead of the Commissioner continuing with the IC review include:
>
> - where the IC review is linked to ongoing proceedings before the AAT or a court
> - where there is an apparent inconsistency between earlier IC review decisions and AAT decisions
> - where, should the application progress to an IC review decision, the IC review decision is likely to be taken on appeal to the AAT on a disputed issue of fact

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

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

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

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

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

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

In this IC review, it is apparent that:

s 22 [redacted]

2. The FOI decision under review is also complex, and resolving this matter would require substantial allocation of OAIC resources. s 47E(d) [redacted]

3. Given the complexity of this IC review and the subject matter of the documents you seek, I consider that any IC review decision is likely to be taken on appeal to the AAT

on a disputed issue of fact. In my preliminary view, this IC review could more appropriately be handled through the procedures of the AAT.

I also note that the OAIC has previously decided not to undertake an IC review of FOI decisions made by the Department under s 54W(b) of the FOI Act (our references s 22 - Agency ref s 22 ; s 22 , and s 22 - Agency ref s 22), given the relevance of the documents requested to s 22 extradition proceedings. You have also advised the OAIC you consider this approach would be suitable in this matter also.

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

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

Next steps

If you disagree with this proposed recommendation, please write to us by s 22 and advise us of your reasons. Your reasons will be taken into account before a decision is made on whether to finalise this matter under s 54W(b).

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

If you would like to discuss this matter, please contact me on s 22 or on s 22 . In all correspondence please quote s 22 .

Yours sincerely

s 22

s 22

21 July 2021

Australian Government
Office of the Australian Information Commissioner

Our references: s 22 and s 22
AFP references: s 22 and s 22

s 22

By email to: s 22

Your applications for Information Commissioner review of the Australian Federal Police's FOI decisions

Dear s 22

I refer to your two applications for Information Commissioner review (IC review) of the decisions made by the Australian Federal Police (the AFP) on 15 January 2021 (OAIC reference s 22 , AFP reference s 22) and 22 March 2021 (our reference s 22 , AFP reference s 22) under the *Freedom of Information Act 1982* (Cth) (the FOI Act).

The purpose of this letter is to advise you of my intention to recommend that a delegate of the Information Commissioner exercise the discretion to decide not to undertake IC reviews of these decisions under s 54W(b) of the FOI Act, which would allow you to seek review at the Administrative Appeals Tribunal (AAT).

I am writing to both parties in these IC reviews to offer them an opportunity to comment or make submissions on this recommendation.

The reasons for my recommendation follow.

Background

s 22

On 1 October 2020, you applied to the Australian Federal Police (the AFP) for access to:

s 22

On 24 November 2020, you sought IC review of the AFP's 'deemed' access refusal decision under s 54L of the FOI Act, on the basis that you had not received a decision on your request by the statutory due date.

The Office of the Australian Information Commissioner (OAIC) commenced preliminary inquiries with the AFP on 24 November 2020 in relation to the progress and status of your FOI request.

On 15 January 2021, the AFP made a substantive decision on your request, s 22 [redacted]

On 14 February 2021, you advised the OAIC that you wished to proceed with IC review of the AFP's substantive decision, stating:

> …
>
> s 22 [redacted]
>
> - [redacted]
> - [redacted]
> - [redacted]
> - [redacted]

s 22 [redacted]

On 21 October 2020, you applied to the AFP for access to:

- s 22 [redacted]
- [redacted]
- [redacted]

On 22 November 2020, you sought IC review of the AFP's 'deemed' access refusal decision under s 54L of the FOI Act, on the basis that you had not received a decision on your request by the statutory due date.

The OAIC commenced preliminary inquiries with the AFP on 26 November 2020 in relation to the progress and status of your FOI request.

On 22 March 2021, the AFP made a substantive decision to refuse you access to the documents requested on the basis that the AFP does not hold the requested documents, pursuant to s 24A of the FOI Act. The AFP stated in its decision:

s 22 [redacted]

On 3 March 2021, I wrote to you seek your views on having these IC reviews discontinued under s 54W(b) of the FOI Act to enable you to seek review of these decisions at the AAT, s 22 [redacted]

s 22 [redacted]

On 3 March 2021, you responded that you agree that this approach would be appropriate in the circumstances, noting that:

> s 22 [redacted]

Discretion not to undertake an IC review

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

The effect of such a decision would be to finalise your IC review applications and allow you to apply directly to the AAT. You would then have 28 days to lodge an application/s with the AAT in accordance with ordinary AAT processes. AAT filing fees may apply.[1] Please note that you may not be required to pay an application fee or may be eligible for a reduced application fee of $100.

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

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

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

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

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

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

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

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

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

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

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

In this IC review, it is apparent that:

s 22 [redacted]

2. The FOI decisions under review are also complex, and resolving these matters would require a substantial allocation of OAIC resources. For example, the scope of these IC reviews extends to various exemptions including ss 33, 42, 47E and 47F of the FOI Act

(with respect to s 22), as well as searches undertaken to locate relevant documents (with respect to s 22).

3. s 22 [redacted]

4. Given the complexity of these IC reviews and their relevance to s 22 [redacted], I consider that any IC review decision is likely to be taken on appeal to the AAT on a disputed issue of fact. Given this, I consider that it is desirable for the efficient administration of the FOI Act that the IC reviewable decisions are reviewed by the AAT at first instance.

I also note that you have previously indicated to the OAIC that you consider this approach would be suitable in each of these matters.

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

The delegate of the Information Commissioner will review all material before the OAIC in deciding whether to exercise the discretion to decide not to undertake IC reviews in these cases.

Next steps

If you disagree with this proposed recommendation, please write to us by **4 August 2021** and advise us of your reasons. Your reasons will be taken into account before a decision is made on whether to finalise this matter under s 54W(b).

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

If you would like to discuss this matter, please contact me on s 22 or on s 22 . In all correspondence please quote s 22 and s 22 .

Yours sincerely

[redacted]

[redacted]

21 July 2021

Our reference: s 22
Agency reference: s 22

Dear s 22

I refer to your application for Information Commissioner review (IC review) of a decision the Department of Home Affairs (the Department) was deemed to have refused on 9 May 2021, and to my email of 6 July 2021.

On 5 July 2021, the Department provided a decision to you on your FOI request.

On 6 July 2021, I wrote to you seeking your advice on whether you wished to proceed or withdraw your IC review. In that correspondence I requested you respond by 20 July 2021. The OAIC has not received a response from you.

In light of the above and in order to progress your IC review, can you please advise if you would like to proceed or withdraw your request for IC review? Please provide a response **by 3 August 2021**.

Intention to finalise IC review

Please note that s 54W(a)(ii) of the FOI Act provides that the Information Commissioner may decide not to undertake an IC review where an applicant fails to cooperate in progressing an IC review application without reasonable excuse. Should we not receive a response from you to this email by **3 August 2021,** your IC review application will be finalised by a delegate of the Information Commissioner under
s 54W(a)(ii).

If you have any questions regarding this email please contact me at s 22 or on s 22. Please quote OAIC reference number at the top of this email in all correspondence.

Kind regards

s 22

OAIC

s 22

| | | | *Subscribe to Information Matters*

s 47E(d)

s 47E(d)

Australian Government
Office of the Australian Information Commissioner

Our reference: s 22
Agency reference: s 22

s 22

By email to: s 22

Your application for Information Commissioner review of the Department of Home Affairs's FOI decision

Dear s 22

I refer to your application for Information Commissioner review (IC review) of a decision made by the Department of Home Affairs (the Department) on 14 July 2021 under the *Freedom of Information Act 1982* (Cth) (the FOI Act).

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

I am writing to both parties in this IC review to offer you both an opportunity to comment or make submissions on this recommendation.

The reasons for my recommendation follow.

Background

On 1 June 2021, you applied to the Department for access to:

s 22

On 2 July 2021, you sought IC review of the Department's deemed access refusal decision under s 54L of the FOI Act, on the basis the Department had not issued a substantive decision to you by the statutory due date of 1 July 2021.

On 6 July 2021, the Office of the Australian Information Commissioner (the OAIC) commenced preliminary inquiries with the Department.

On 15 July 2021, the Department notified the OAIC that it had made a substantive decision on your request. s 22

On 15 July 2021, you advised the OAIC that you wished to proceed with IC review of the Department's substantive decision, and that you sought review of:

s 22

Discretion not to undertake an IC review

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

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

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

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

> One of the reasons for retaining a right of review to the AAT is that, as an experienced review body, the AAT can properly deal with highly contested applications. This provision enables

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

> the Information Commissioner to decline to undertake a review if satisfied it would be more appropriate and efficient for the application to be made directly to the AAT.

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

> The Information Commissioner can decline to undertake a review if satisfied 'that the interests of the administration of the [FOI] Act make it desirable' that the AAT consider the review application (s 54W(b)). It is intended that the Commissioner will resolve most applications. Circumstances in which the Commissioner may decide that it is desirable for the AAT to consider a matter instead of the Commissioner continuing with the IC review include:
>
> - where the IC review is linked to ongoing proceedings before the AAT or a court
> - where there is an apparent inconsistency between earlier IC review decisions and AAT decisions
> - where, should the application progress to an IC review decision, the IC review decision is likely to be taken on appeal to the AAT on a disputed issue of fact
> - where the FOI request under review is of a level of complexity that would be more appropriately handled through the procedures of the AAT
> - where there may be a perceived or actual conflict of interest in the Commissioner undertaking review, including where:
>   - the FOI request under review was made to, or decided by, the Information Commissioner or their delegate
>   - the FOI request or material at issue relate to specific functions exercised by the Information Commissioner under the Privacy Act
>   - the applicant has active matters in other forums, including the AAT or Federal Court and the Information Commissioner is the respondent
> - where consideration by the AAT would further the objects of the FOI Act, particularly in relation to the performance and exercise of functions and powers given by the FOI Act to facilitate and promote public access to information, promptly and at the lowest reasonable cost (s 3(4)).
>
> The OAIC will consult the parties involved in a matter before making a decision under s 54W(b) to conclude an IC review.

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

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

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

In this IC review, it is apparent that:

- The FOI decision under review is complex and voluminous. Resolving the IC review would require a substantial allocation of OAIC resources, and in my view the matter could more appropriately be handled through the procedures of the AAT. This is because:
    - s 47E(d)
- s 47E(d)
- 47E(d)
- Further, in circumstances where there is a distinct possibility that, should the IC review continue, any IC review decision will be taken on appeal by either party to the AAT, I consider that it is desirable for the efficient administration of the FOI Act that the IC reviewable decisions are reviewed by the AAT at first instance. I also consider that such an approach is consistent with the objects of the FOI Act.

- Your submissions indicate a desire to be heard in relation to your IC review application and other issues. The AAT has well established procedures for informal dispute resolution.

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

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

Other matters

In your email correspondence to the OAIC of 23 July 2021, you queried whether the OAIC had obtained full unredacted copies of the documents at issue from the Department.

In the OAIC's response of the same day, we advised you that an IC review had not yet been commenced, and we provided you with a link to information about the IC review process in Chapter 10 of the FOI Guidelines.

In your response of 23 July 2021, you asked:

> s 22 [redacted]

Please note that, the OAIC has only undertaken preliminary inquiries into your IC review request under s 54V of the FOI Act.

Section 54V of the FOI Act provides the following:

> The Information Commissioner may make inquiries of the review parties for the purpose of determining whether or not to undertake an IC review.

This is further explained in the FOI Guidelines at [10.82], which provide:

> The Information Commissioner may make preliminary inquiries of the parties to help determine whether to undertake an IC review (s 54V). Such inquiries might be made to clarify whether the review decision falls within the Information Commissioner's jurisdiction, or to clarify whether an internal review is currently on foot. Where an application for IC review is made in relation to an FOI request that is deemed to have been refused under ss 15AC(3), 51DA(2) or 54D(2) of the FOI Act, the Commissioner will undertake preliminary inquiries.

At this stage, there has been no decision made as to whether an IC review of the Department's decision of 14 July 2021 should be commenced, following the preliminary inquiries we have undertaken with the Department.

As outlined in this letter, I intend to recommend that an IC review not be undertaken as I consider this matter could be more appropriately handled by the AAT.

You now have an opportunity to comment on my recommendation before a decision on this proposal is made by a delegate of the Information Commissioner.

Next steps

If you disagree with this proposed recommendation, please write to us by **6 August 2021** and advise us of your reasons. Your reasons will be taken into account before a decision is made on whether to finalise this matter under s 54W(b).

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

Please provide a response to FOIDR@oaic.gov.au. In all correspondence, please quote s 22 .

Yours sincerely

s 22

s 22

23 July 2021

s 47E(d)

s 47E(d)

Our reference: s 22
Agency reference: s 22

s 22

By email: s 22

Dear s 22

I refer to your application for IC review of a decision the Department of Veterans' Affairs (the Department) was deemed to have refused on 17 May 2021, and to my email below of 13 July 2021.

On 16 June 2021, the Department made a decision on your FOI request.

On 13 July 2021, I wrote to you seeking your advice on whether you wished to proceed or withdraw your IC review. In that correspondence I requested you respond by 27 July 2021. The OAIC has not received a response from you.

In light of the above and in order to progress your IC review, can you please advise if you would like to proceed or withdraw your request for IC review? Please provide a response **by 6 August 2021**.

Intention to finalise IC review

Please note that s 54W(a)(ii) of the FOI Act provides that the Information Commissioner may decide not to undertake an IC review where an applicant fails to cooperate in progressing an IC review application without reasonable excuse. Should we not receive a response from you to this email by **6 August 2021**, your IC review application will be finalised by a delegate of the Information Commissioner under
s 54W(a)(ii).

If you have any questions regarding this email please contact me at s 22 or on s 22. Please quote OAIC reference number at the top of this email in all correspondence.

Yours sincerely

s 22

OAIC

s 22

Subscribe to Information Matters

Our reference: s 22
Agency reference: s 22

s 22

By email: s 22

Dear s 22

I refer to your application for IC review of a decision the Department of Home Affairs (the Department) was deemed to have made on 14 June 2021, and to my emails of 30 June 2021 and 22 July 2021.

On 22 June 2021, the Department made a substantive decision to refuse you access to the documents requested on the basis they don't exist, pursuant to s 24A of the FOI Act.

On 30 June 2021 I wrote to you seeking your advice on whether you wished to proceed or withdraw your IC review. In that correspondence I requested you respond by 14 July 2021. The OAIC did not receive a response from you. On 22 July 2021 I wrote to you again seeking your advice, noting that a decision would be made to finalise your IC review under s 54W(a)(ii) of the FOI Act in the absence of a response from you by 29 July 2021. The OAIC did not receive a response from you.

In light of the above and in order to progress your IC review, can you please advise if you would like to proceed or withdraw your request for IC review? Please provide a response **by 5 August 2021**.

Intention to finalise IC review

Please note that s 54W(a)(ii) of the FOI Act provides that the Information Commissioner may decide not to undertake an IC review where an applicant fails to cooperate in progressing an IC review application without reasonable excuse. Should we not receive a response from you to this email by **5 August 2021**, your IC review application will be finalised by a delegate of the Information Commissioner under s 54W(a)(ii).

If you have any questions regarding this email please contact me on s 22 or via email s 22. Please quote OAIC reference number at the top of this email in all correspondence.

Yours sincerely

s 22

OAIC

s 22

Subscribe to Information Matters

Our reference: s 22

Agency reference: s 22

Dear s 22

I refer to your application for IC review of a decision the Department of Home Affairs (the Department) was deemed to have refused on 10 May 2021, and to my email of 13 July 2021.

On 5 July 2021, the Department provided a decision to you on your FOI request.

On 13 July 2021, I wrote to you seeking your advice on whether you wished to proceed or withdraw your IC review. In that correspondence I requested you respond by 27 July 2021. The OAIC has not received a response from you.

In light of the above and in order to progress your IC review, can you please advise if you would like to proceed or withdraw your request for IC review? Please provide a response **by 10 August 2021**.

Intention to finalise IC review

Please note that s 54W(a)(ii) of the FOI Act provides that the Information Commissioner may decide not to undertake an IC review where an applicant fails to cooperate in progressing an IC review application without reasonable excuse. Should we not receive a response from you to this email by **10 August 2021**, your IC review application will be finalised by a delegate of the Information Commissioner under
s 54W(a)(ii).

If If you have any questions regarding this email please contact me on s 22 or via email s 22 . Please quote OAIC reference number at the top of this email in all correspondence.

Yours sincerely

s 22

OAIC

s 22

Subscribe to Information Matters

Our reference: s 22
Agency reference: s 22

Dear s 22

I refer to your application for IC review of a decision the Department of Home Affairs (the Department) was deemed to have refused on 26 April 2021, and to my email of 13 July 2021.

On 23 June 2021, the Department provided a decision to you on your FOI request.

On 13 July 2021, I wrote to you seeking your advice on whether you wished to proceed or withdraw your IC review. In that correspondence I requested you respond by 27 July 2021. The OAIC has not received a response from you.

In light of the above and in order to progress your IC review, can you please advise if you would like to proceed or withdraw your request for IC review? Please provide a response **by 10 August 2021**.

Intention to finalise IC review

Please note that s 54W(a)(ii) of the FOI Act provides that the Information Commissioner may decide not to undertake an IC review where an applicant fails to cooperate in progressing an IC review application without reasonable excuse. Should we not receive a response from you to this email by **10 August 2021**, your IC review application will be finalised by a delegate of the Information Commissioner under
s 54W(a)(ii).

If If you have any questions regarding this email please contact me on s 22 or via email s 22. Please quote OAIC reference number at the top of this email in all correspondence.

Yours sincerely

s 22

OAIC

s 22

Subscribe to Information Matters

Our reference: s 22
Agency reference: s 22

Dear s 22

I refer to your application on behalf of s 22 for IC review of a decision the Department of Home Affairs (the Department) was deemed to have refused on 7 June 2021, and to my email of 13 July 2021.

On 8 July 2021, the Department made a decision to provide you with access to the requested documents under the *Privacy Act 1988*.

On 13 July 2021, I wrote to you seeking your advice on whether you wished to proceed or withdraw your IC review. In that correspondence I requested you respond by 27 July 2021. The OAIC has not received a response from you.

In light of the above and in order to progress your IC review, can you please advise if you would like to proceed or withdraw your request for IC review? Please provide a response **by 10 August 2021**.

Intention to finalise IC review

Please note that s 54W(a)(ii) of the FOI Act provides that the Information Commissioner may decide not to undertake an IC review where an applicant fails to cooperate in progressing an IC review application without reasonable excuse. Should we not receive a response from you to this email by **10 August 2021**, your IC review application will be finalised by a delegate of the Information Commissioner under
s 54W(a)(ii).

If you have any questions regarding this email please contact me on s 22 or via email s 22. Please quote OAIC reference number at the top of this email in all correspondence.

Yours sincerely

s 22

OAIC

s 22

Subscribe to Information Matters

Australian Government
Office of the Australian Information Commissioner

Our reference: s 22
Agency reference: s 22

s 22

By email to: s 22

Your application for Information Commissioner review of Attorney-General's Department's decision

Dear s 22

I refer to your application for Information Commissioner review (IC review) of a decision made by the Attorney-General's Department's (AGD) on 26 November 2020 under the *Freedom of Information Act 1982* (Cth) (the FOI Act).

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

I am writing to both parties in this IC review to offer you both an opportunity to comment or make submissions on this recommendation.

The reasons for my recommendation follow.

Background

On 21 August 2020, you applied to the AGD for access to:

s 22

s 22

s 22 [redacted]

On 19 October 2020, you sought internal review of the AGD's decision dated 6 October 2020.

On 26 November 2020, the AGD made an internal review decision of its original decision dated 6 October 2020. s 22 [redacted]

On 16 December 2020, you sought IC review of the AGD's internal review decision under s 54L of the FOI Act.

Discretion not to undertake an IC review

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

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

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

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

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

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

> The Information Commissioner can decline to undertake a review if satisfied 'that the interests of the administration of the [FOI] Act make it desirable' that the AAT consider the

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

review application (s 54W(b)). It is intended that the Commissioner will resolve most applications. Circumstances in which the Commissioner may decide that it is desirable for the AAT to consider a matter instead of the Commissioner continuing with the IC review include:

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

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

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

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

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

In this IC review, it is apparent that:

s 22 [redacted]

2. Given the complexity of these IC reviews and the subject matter of the documents you seek, I consider that any IC review decision is likely to be taken on appeal to the AAT on a disputed issue of fact. In my preliminary view, this IC review could more appropriately be handled through the procedures of the AAT.

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

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

Next steps

If you disagree with this proposed recommendation, please write to us by **23 August 2021** and advise us of your reasons. Your reasons will be taken into account before a decision is made on whether to finalise this matter under s 54W(b).

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

If you would like to discuss this matter, please contact me on s 22 or on s 22. In all correspondence please quote s 22.

Yours sincerely

s 22

s 22

9 August 2021

Australian Government
Office of the Australian Information Commissioner

Our reference: s 22
Agency reference: s 22

s22

s22
Freedom of Information & Privacy Law
Department of Foreign Affairs and Trade

By email to: s 22

Anthony Craig's application for Information Commissioner review of Department of Foreign Affairs and Trade's decision

Dear s 22

I refer to an application made by s 22 (the applicant) for Information Commissioner review (IC review) of a decision made by the Department of Foreign Affairs (DFAT) on 30 November 2020 under the *Freedom of Information Act 1982* (Cth) (the FOI Act).

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

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

The reasons for my recommendation follow.

Background

On 31 July 2020, the applicant applied to the DFAT for access to:

> s 22

On 18 September 2020, a revised scope for the request was agreed as follows:

> s 22

s 22

s 22 [redacted]

On 30 November 2020, the applicant sought IC review of DFAT's decision under s 54L of the FOI Act.

During the course of this IC review application, the applicant raised the following preliminary issues:

1. The applicant sought to refer the matter to the Federal Court of Australia (FCA) on a question of law under s 55H of the *Freedom of Information Act* 1982 (the FOI Act).
2. The applicant sought to expedite this matter and have asked the Information Commissioner to consider exercising her power under s 54W(b) of the FOI Act not to undertake an IC review and refer the matter to the Administrative Appeals Tribunal (the AAT).

On 12 April 2021, I was allocated this IC review application as the case officer.

On 13 April 2021, DFAT were given an opportunity to make submissions in response to the applicant's two preliminary requests.

On 19 April 2021, the applicant provided submissions in support of his preliminary requests.

On 21 May 2021, DFAT made submissions in response to the applicant's two preliminary requests

On 25 June 2021, the applicant made further submissions in support of the two preliminary requests.

I have addressed the two preliminary issues below.

Application to refer the matter to the FCA on a question of law under s 55H of the FOI Act

Under s 55H of the FOI Act, the Information Commissioner made decide to refer a question of law to the FCA at any time during the review (s 55H), and must act consistently with the FCA's decision (s 55H(5)).

In exercising the power to refer a question of law to the FCA, the Information Commissioner may consider the following factors:

- whether referring a question of law to the FCA would best facilitate and promote public access to information (for example if there is uncertainty with respect to the interpretation of the FOI Act)
- whether referring a question of law to the FCA would best increase the promptness of public access to information (for example if resolving a particular question of law would result in a positive impact on processing of FOI requests and IC reviews)

- whether referring a question of law to the FCA would best facilitate public access to information at the lowest reasonable cost (for example if the Federal Court's response to the question of law binds future decision makers and results in more efficient and therefore cost effective processing of FOI requests)
- whether referring a question of law to the FCA would promote the objects of the FOI Act to give the Australian community access to information held by the Government of the Commonwealth by requiring agencies to publish information and enforcing a right of access to documents, and
- any other factors which the Information Commissioner considers relevant in the circumstances.

I have taken from the applicant's submissions dated 19 April 2021 that the question of law he seeks to have referred to the FCA on a question of law under s 55H of the FOI Act is:

s 22 [redacted]

I have considered the submissions from both parties, and I am of the view that it would not be appropriate to refer the above question of law to the FCA.

As noted in the FOI Guidelines, the power to refer a question of law to the FCA is intended to ensure that the Information Commissioner makes decisions which are correct in law and that his or her decisions can finally resolve a matter.

I am not persuaded that referring the above question to the FCA would facilitate and promote public access to information, increase the promptness of public access to information, facilitate public access to information at the lowest reasonable cost or promote the objects of the FOI Act to give the Australian community access to information held by the Government of the Commonwealth by requiring agencies to publish information and enforcing a right of access to documents.

Finally, I am of the view that there are no other factors identified by the parties would warrant the Information Commissioner to exercise her discretion to refer the matter to the FCA on a question of law.

For these reasons, I intend to recommend the Information Commissioner not exercise her discretion to refer the matter to the FCA on a question of law.

Discretion not to continue to undertake an IC review

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

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

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

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

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

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

> The Information Commissioner can decline to undertake a review if satisfied 'that the interests of the administration of the [FOI] Act make it desirable' that the AAT consider the review application (s 54W(b)). It is intended that the Commissioner will resolve most applications. Circumstances in which the Commissioner may decide that it is desirable for the AAT to consider a matter instead of the Commissioner continuing with the IC review include:
>
> - the IC review is linked to ongoing proceedings before the AAT or a court
> - there is an apparent inconsistency between earlier IC review decisions and AAT decisions
> - the IC review decision is likely to be taken on appeal to the AAT on a disputed issue of fact, and
> - the FOI request under review is complex or voluminous, resolving the IC review matter would require substantial allocation of resources, and the matter could more appropriately be handled through procedures of the AAT.
>
> The OAIC will consult the parties involved in a matter before making a decision under s 54W(b) to conclude an IC review.

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

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

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

In this IC review, it is apparent that:

1. s 47E(d) [redacted]

2. This IC review application deals with similar subject matter to IC review application s 22 [redacted] and the AAT will be better equipped to deal with both matters concurrently.

3. Given the complexity of these IC reviews and the subject matter of the documents you seek, I consider that any IC review decision is likely to be taken on appeal to the AAT on a disputed issue of fact. In my preliminary view, this IC review could more appropriately be handled through the procedures of the AAT.

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

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

Next steps

If DFAT disagrees with this proposed recommendation, please write to us by **23 August 2021** and provide reasons. These reasons will be taken into account before a decision is made on whether to finalise this matter under s 54W(b).

If I do not hear from the DFAT by this date, this IC review application may be finalised under s 54W.

If you would like to discuss this matter, please contact me on s 22 [redacted] or on s 22 [redacted]. In all correspondence please quote s 22 [redacted].

Yours sincerely

s 22 [redacted]

s 22 [redacted]

9 August 2021

Our reference: s 22

s 22

By email to: s 22
Copied to: s 22

Dear s 22

I refer to your application on behalf of s 22 for IC review of a decision the Department of Home Affairs (the Department) was deemed to have refused on 7 June 2021, and to my email of 3 August 2021.

On 23 July 2021, the Department made a decision to give you access to the documents you requested under the *Privacy Act 1988*.

On 3 August 2021, I wrote to you seeking your advice on whether you wished to proceed or withdraw your IC review. In that correspondence I requested you respond by 17 August 2021. The OAIC has not received a response from you.

In light of the above and in order to progress your IC review, can you please advise if you would like to proceed or withdraw your request for IC review? Please provide a response **by 26 August 2021.**

Intention to finalise IC review

I note that s 54W(a)(ii) of the FOI Act provides that the Information Commissioner may decide not to undertake an IC review where an applicant fails to cooperate in progressing an IC review application without reasonable excuse. Should we not receive a response from you to this email by **26 August 2021**, your IC review application will be finalised by a delegate of the Information Commissioner under s 54W(a)(ii).

If you have any questions regarding this email please contact me on s 22 or via email s 22. Please quote OAIC reference number at the top of this email in all correspondence.

Yours sincerely

s 22

OAIC

s 22

Subscribe to Information Matters

Our reference: s 22
Agency reference: s 22

s 22

By email: s 22
Copied to: s 22

Your IC review application about the Department of Home Affairs

Dear s 22

I refer to your application on behalf of s 22 for IC review of a decision the Department of Home Affairs (the Department) was deemed to have refused on 7 June 2021, and to my email of 27 July 2021.

On 9 July 2021, the Department made a decision to give you access to the documents you requested under the *Privacy Act 1988*.

On 27 July 2021, I wrote to you seeking your advice on whether you wished to proceed or withdraw your IC review. In that correspondence I requested you respond by 10 August 2021. The OAIC has not received a response from you.

In light of the above and in order to progress your IC review, can you please advise if you would like to proceed or withdraw your request for IC review? Please provide a response **by 26 August 2021.**

Intention to finalise IC review

I note that s 54W(a)(ii) of the FOI Act provides that the Information Commissioner may decide not to undertake an IC review where an applicant fails to cooperate in progressing an IC review application without reasonable excuse. Should we not receive a response from you to this email by **26 August 2021**, your IC review application will be finalised by a delegate of the Information Commissioner under s 54W(a)(ii).

If you have any questions regarding this email please contact me on s 22 or via email s 22. Please quote OAIC reference number at the top of this email in all correspondence.

Yours sincerely

s 22

OAIC

s 22

Subscribe to Information Matters

Our reference: s 22
Agency reference: s 22

s 22

By email: s 22

Dear s 22

I refer to your application on behalf of s 22 for IC review of a decision the Department of Home Affairs (the Department) was deemed to have refused on 7 May 2021, and to my email of 3 August 2021.

On 27 July 2021, the Department provided a decision to you on your FOI request.

On 3 August 2021, I wrote to you seeking your advice on whether you wished to proceed or withdraw your IC review. In that correspondence I requested you respond by 17 August 2021. The OAIC has not received a response from you.

In light of the above and in order to progress your IC review, can you please advise if you would like to proceed or withdraw your request for IC review? Please provide a response **by 26 August 2021.**

Intention to finalise IC review

I note that s 54W(a)(ii) of the FOI Act provides that the Information Commissioner may decide not to undertake an IC review where an applicant fails to cooperate in progressing an IC review application without reasonable excuse. Should we not receive a response from you to this email by **26 August 2021**, your IC review application will be finalised by a delegate of the Information Commissioner under s 54W(a)(ii).

If you have any questions regarding this email please contact me on s 22 or via email s 22. Please quote OAIC reference number at the top of this email in all correspondence.

Yours sincerely

s 22

OAIC

s 22

Subscribe to Information Matters

Our reference: s 22
Agency reference: s 22

s 22
By email to: s 22

Dear s 22

I refer to your application for IC review of a decision the Department of Home Affairs (the Department) was deemed to have refused on 9 February 2021, and to my email of 27 July 2021.

On 26 July 2021, the Department provided a decision to you on your FOI request.

On 27 July 2021, I wrote to you seeking your advice on whether you wished to proceed or withdraw your IC review. In that correspondence I requested you respond by 10 August 2021. The OAIC has not received a response from you.

In light of the above and in order to progress your IC review, can you please advise if you would like to proceed or withdraw your request for IC review? Please provide a response **by 26 August 2021.**

Intention to finalise IC review

I note that s 54W(a)(ii) of the FOI Act provides that the Information Commissioner may decide not to undertake an IC review where an applicant fails to cooperate in progressing an IC review application without reasonable excuse. Should we not receive a response from you to this email by **26 August 2021**, your IC review application will be finalised by a delegate of the Information Commissioner under s 54W(a)(ii).

If you have any questions regarding this email please contact me on s 22 or via email s 22. Please quote OAIC reference number at the top of this email in all correspondence.

Yours sincerely

s 22

OAIC

s 22

Subscribe to Information Matters

Our reference: s 22
Agency reference: s 22

s 22
By email to: s 22

Dear s 22

I refer to your application on behalf of s 22 for IC review of a decision the Department of Home Affairs (the agency) was deemed to have refused on 9 November 2020, and to my email of 27 July 2021.

On 14 May 2021, the Department provided a decision to you on your FOI request.

On 27 July 2021, I wrote to you seeking your advice on whether you wished to proceed or withdraw your IC review. In that correspondence I requested you respond by 10 August 2021. The OAIC has not received a response from you.

In light of the above and in order to progress your IC review, can you please advise if you would like to proceed or withdraw your request for IC review? Please provide a response **by 26 August 2021.**

Intention to finalise IC review

I note that s 54W(a)(ii) of the FOI Act provides that the Information Commissioner may decide not to undertake an IC review where an applicant fails to cooperate in progressing an IC review application without reasonable excuse. Should we not receive a response from you to this email by **26 August 2021**, your IC review application will be finalised by a delegate of the Information Commissioner under s 54W(a)(ii).

If you have any questions regarding this email please contact me on s 22 or via email s 22. Please quote OAIC reference number at the top of this email in all correspondence.

Yours sincerely

s 22

OAIC

s 22

Subscribe to Information Matters

Our reference: s 22
Agency reference: s 22

s 22
By email to: s 22

Dear s 22

I refer to your application on behalf of s 22 for IC review of a decision the Department of Home Affairs (the Department) was deemed to have refused on 17 December 2020, and to my email of 22 July 2021.

On 20 July 2021, the Department provided a decision to you on your FOI request.

On 22 July 2021, I wrote to you seeking your advice on whether you wished to proceed or withdraw your IC review. In that correspondence I requested you respond by 5 August 2021. The OAIC has not received a response from you.

In light of the above and in order to progress your IC review, can you please advise if you would like to proceed or withdraw your request for IC review? Please provide a response **by 26 August 2021.**

Intention to finalise IC review

I note that s 54W(a)(ii) of the FOI Act provides that the Information Commissioner may decide not to undertake an IC review where an applicant fails to cooperate in progressing an IC review application without reasonable excuse. Should we not receive a response from you to this email by **26 August 2021**, your IC review application will be finalised by a delegate of the Information Commissioner under s 54W(a)(ii).

If you have any questions regarding this email please contact me on s 22 or via email s 22. Please quote OAIC reference number at the top of this email in all correspondence.

Yours sincerely

s 22

OAIC

s 22

Subscribe to Information Matters

Our reference: s 22
Agency reference: s 22

s 22

By email to: s 22

Dear s 22

I refer to your application on behalf of s 22 for IC review of a decision the Department of Home Affairs (the Department) was deemed to have refused on 25 May 2021, and to my email of 22 July 2021.

On 15 July 2021, the Department provided a decision to you on your FOI request.

On 22 July 2021, I wrote to you seeking your advice on whether you wished to proceed or withdraw your IC review. In that correspondence I requested you respond by 5 August 2021. The OAIC has not received a response from you.

In light of the above and in order to progress your IC review, can you please advise if you would like to proceed or withdraw your request for IC review? Please provide a response **by 26 August 2021.**

Intention to finalise IC review

I note that s 54W(a)(ii) of the FOI Act provides that the Information Commissioner may decide not to undertake an IC review where an applicant fails to cooperate in progressing an IC review application without reasonable excuse. Should we not receive a response from you to this email by **26 August 2021**, your IC review application will be finalised by a delegate of the Information Commissioner under s 54W(a)(ii).

If you have any questions regarding this email please contact me on s 22 or via email s 22. Please quote OAIC reference number at the top of this email in all correspondence.

Yours sincerely

s 22

OAIC

s 22

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Australian Government
Office of the Australian Information Commissioner

Our reference: s 22
Agency reference: s 22

s 22

By email to: s 22

Your application for Information Commissioner review of the Minister for Home Affairs' decision

Dear s 22

I refer to your request for Information Commissioner review (IC review) of a decision made by the Minister for Home Affairs (the Minister) under the *Freedom of Information Act 1982* (Cth) (FOI Act).

The purpose of this letter is to:

- advise you of my intention to recommend that the delegate of the Information Commissioner exercises the discretion to decide not to continue to undertake a review of your IC review application under s 54W of the FOI Act, on the basis that your IC review application is lacking in substance, and
- to give you an opportunity to provide reasons for me to reconsider making this recommendation.

The reasons for my recommendation follow.

Background

On 12 February 2021, you applied to the Minister for access to:

s 22

On 15 March 2021, you sought IC review of the Minister's deemed decision under s 54L of the FOI Act.

On 30 March 2021, the Hon Karen Andrews MP was sworn in as Minister for Home Affairs, however, the request was made to the previous Minister, the Hon Peter Dutton MP. Under the FOI Act the request is taken to have been made to the new Minister.

On 14 May 2021, the person authorised by the then Minister made a substantive decision refusing the request under s 24A(1)(a)(ii) of the FOI Act on the basis that all reasonable steps had been taken to find documents and the Minister was satisfied that documents falling within the scope of the request do not exist.

Scope of IC review

The issue to be decided in this IC review is whether the Minister has taken all reasonable steps to find documents within the scope of your request, in accordance with s 24A(1) of the FOI Act.

The definition of 'official document of a Minister' or 'official document of the Minister' in s 4 of the FOI Act appears relevant to the issue of searches.

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

- the Minister's decision and reasons for decision
- the FOI Act, in particular ss 4(1), 15, 24A and 54W(a)
- 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 [2.52], [3.89]
- relevant case law, in particular *De Tarle and Australian Securities and Investments Commission (Freedom of Information)* [2015] AATA 770, and
- the Office of the Minister for Home Affairs' submissions.

Official document of a minister (s 4(1))

Section 15 of the FOI Act sets out the procedure which applies where a person wishes to obtain access to an 'official document of a Minister'.

For a document to be an 'official document of a Minister' or 'official document of the Minister' it must be in the possession or deemed to be in the possession of the minister pursuant to s 4(1) of the FOI Act. The first element of this definition is that a document is 'in the possession of a Minister … in his or her capacity as a Minister'.

Section 4(1) of the FOI Act explains that the term 'official document of a Minister' means:

> ... a document that is in the possession of a Minister, or that is in the **possession of the Minister concerned**, as the case requires, in his or her capacity as a Minister, being a document that relates to the affairs of an agency or of a Department of State and, for the purposes of this definition, a Minister shall be deemed to be in possession of a document that has passed from his or her possession if he or she is entitled to access to the document and the document is not a document of an agency. (emphasis added)

Where an FOI request is made naming a Minister as a respondent and there is a change of Minister, generally the request continues with the new Minister as the respondent. However, if the request relates to a document that was in the possession of the former Minister but is not in the possession of the new Minister, that document would no longer be an official document of a Minister and will therefore not be subject to the FOI Act.

What is an 'official document of a minister'?

An 'official document of a minister' is a document in a minister's possession that relates to the affairs of an agency. 'Possession' can include a document held in the minister's office or a document a minister is entitled to hold.

s22 [redacted]

s22 [redacted]

[redacted]

[redacted]

…

s22 [redacted]

s22 [redacted]

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

s22 [redacted]

[redacted]

Section 24A of the FOI Act requires the 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 Office of the Minister for Home Affairs has provided submissions, which are enclosed.

s47E(d) [redacted]

Discretion not to 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.

s47E(d) [redacted]

s47E(d) [redacted]

[redacted]

For these reasons, I intend to recommend that a delegate of the Information Commissioner exercises the discretion to decide not to continue to undertake this IC review under s 54W, because I am of the view that this IC review application is lacking in substance.

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

If you disagree with this proposed recommendation, please write to us by **23 September 2021** 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 s 22 [redacted] or s 22 [redacted]. In all correspondence please quote s 22 [redacted].

Yours sincerely

s 22 [redacted]

s 22 [redacted]

1 September 2021

Our reference: s 22
Agency reference: s 22

s 22
By email: s 22

Dear s 22

I refer to your application for Information Commissioner review (IC review) of a decision made by the Department of Home Affairs (the Department) was deemed to have refused on 9 May 2021, and to my email of 18 August 2021.

On 5 July 2021, the Department made a substantive decision to provide you with partial access to documents.

Further to this, on 13 August 2021 the Department made a revised decision to provide you with further access to documents.

On 18 August 2021, I wrote to you seeking your advice on whether you wished to proceed or withdraw your IC review. In that correspondence I requested you respond by 1 September 2021. The OAIC has not received a response from you.

In light of the above and in order to progress your IC review, can you please advise if you would like to proceed or withdraw your request for IC review? Please provide a response **by 9 September 2021**.

Intention to finalise IC review

Please note that s 54W(a)(ii) of the FOI Act provides that the Information Commissioner may decide not to undertake an IC review where an applicant fails to cooperate in progressing an IC review application without reasonable excuse. Should we not receive a response from you to this email by **9 September 2021**, your IC review application will be finalised by a delegate of the Information Commissioner under s 54W(a)(ii).

If you have any questions regarding this email please contact me on s 22 or by return email. Please quote OAIC reference number at the top of this email in all correspondence.

Kind regards

s 22

OAIC

s 22

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28 SEPTEMBER 2021
International Access to Information Day
oaic.gov.au/iaid

Our reference: s 22
Agency reference: s 22

s 22
By email: s 22

Dear s 22

I refer to your application for Information Commissioner review (IC review) of a decision made by the Department of Foreign Affairs and Trade (the Department) was deemed to have refused on 12 July 2021, and to my email of 18 August 2021.

On 5 August2021, the Department provided a decision to you on your FOI request.

On 18 August 2021, I wrote to you seeking your advice on whether you wished to proceed or withdraw your IC review. In that correspondence I requested you respond by 1 September 2021. The OAIC has not received a response from you.

In light of the above and in order to progress your IC review, can you please advise if you would like to proceed or withdraw your request for IC review? Please provide a response **by 9 September 2021**.

Intention to finalise IC review

Please note that s 54W(a)(ii) of the FOI Act provides that the Information Commissioner may decide not to undertake an IC review where an applicant fails to cooperate in progressing an IC review application without reasonable excuse. Should we not receive a response from you to this email by **9 September 2021**, your IC review application will be finalised by a delegate of the Information Commissioner under s 54W(a)(ii).

If you have any questions regarding this email please contact me on s 22 or by return email. Please quote OAIC reference number at the top of this email in all correspondence.

Kind regards

s 22

OAIC

s 22

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28 SEPTEMBER 2021
International Access to Information Day
oaic.gov.au/iaid

Our reference: s 22
Agency reference: s 22

s 22
By email to: s 22

Dear s 22

I refer to your application for Information Commissioner review (IC review) of a decision the Department of Defence (the Department) was deemed to have refused on 28 May 2021, and to my email of 17 August 2021.

On 6 August 2021, the Department provided a decision to you on your FOI request.

On 17 August 2021, I wrote to you seeking your advice on whether you wished to proceed or withdraw your IC review. In that correspondence I requested you respond by 31 August 2021. The OAIC has not received a response from you.

In light of the above and in order to progress your IC review, can you please advise if you would like to proceed or withdraw your request for IC review? Please provide a response **by 9 September 2021**.

Intention to finalise IC review

Please note that s 54W(a)(ii) of the FOI Act provides that the Information Commissioner may decide not to undertake an IC review where an applicant fails to cooperate in progressing an IC review application without reasonable excuse. Should we not receive a response from you to this email by **9 September 2021**, your IC review application will be finalised by a delegate of the Information Commissioner under s 54W(a)(ii).

If you have any questions regarding this email please contact me on s 22 or by return email. Please quote OAIC reference number at the top of this email in all correspondence.

Kind regards

s 22

OAIC

s 22

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28 SEPTEMBER 2021
International Access to Information Day
oaic.gov.au/iaid

Our reference: s 22
Agency reference: s 22

s 22
By email to: s 22

Dear s 22

I refer to your application for IC review of a decision the Minister for Defence (the Minister) was deemed to have refused on 27 June 2021, and to my email of 17 August 2021.

On 9 August 2021, the Minister's Office provided a decision to you on your FOI request.

On 17 August 2021, I wrote to you seeking your advice on whether you wished to proceed or withdraw your IC review. In that correspondence I requested you respond by 31 August 2021. The OAIC has not received a response from you.

In light of the above and in order to progress your IC review, can you please advise if you would like to proceed or withdraw your request for IC review? Please provide a response **by 9 September 2021**.

Intention to finalise IC review

Please note that s 54W(a)(ii) of the FOI Act provides that the Information Commissioner may decide not to undertake an IC review where an applicant fails to cooperate in progressing an IC review application without reasonable excuse. Should we not receive a response from you to this email by **9 September 2021**, your IC review application will be finalised by a delegate of the Information Commissioner under s 54W(a)(ii).

If you have any questions regarding this email please contact me on s 22 or by return email. Please quote OAIC reference number at the top of this email in all correspondence.

Kind regards

s 22

OAIC

s 22

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28 SEPTEMBER 2021
International Access to Information Day
oaic.gov.au/iaid

Our reference: s 22
Agency reference: s 22

s 22

By email to: s 22

Your application for Information Commissioner review of the Minister for Home Affairs' decision

Dear s 22

I refer to your request for Information Commissioner review (IC review) of a decision made by the Minister for Home Affairs (the Minister) under the *Freedom of Information Act 1982* (Cth) (FOI Act).

The purpose of this letter is to:

- advise you of my intention to recommend that the delegate of the Information Commissioner exercises the discretion to decide not to continue to undertake a review of your IC review application under s 54W of the FOI Act, on the basis that your IC review application is lacking in substance, and
- to give you an opportunity to provide reasons for me to reconsider making this recommendation.

The reasons for my recommendation follow.

Background

On 12 February 2021, you applied to the Minister for access to:

s 22

On 15 March 2021, you sought IC review of the Minister's deemed decision under s 54L of the FOI Act.

On 30 March 2021, the Hon Karen Andrews MP was sworn in as Minister for Home Affairs, however, the request was made to the previous Minister, the Hon Peter Dutton MP. Under the FOI Act the request is taken to have been made to the new Minister.

On 14 May 2021, the person authorised by the then Minister made a substantive decision refusing the request under s 24A(1)(a)(ii) of the FOI Act on the basis that all reasonable steps had been taken to find documents and the Minister was satisfied that documents falling within the scope of the request do not exist.

Scope of IC review

The issue to be decided in this IC review is whether the Minister has taken all reasonable steps to find documents within the scope of your request, in accordance with s 24A(1) of the FOI Act.

The definition of 'official document of a Minister' or 'official document of the Minister' in s 4 of the FOI Act appears relevant to the issue of searches.

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

- the Minister's decision and reasons for decision
- the FOI Act, in particular ss 4(1), 15, 24A and 54W(a)
- 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 [2.52], [3.89]
- relevant case law, in particular *De Tarle and Australian Securities and Investments Commission (Freedom of Information)* [2015] AATA 770, and
- the Office of the Minister for Home Affairs' submissions.

Official document of a minister (s 4(1))

Section 15 of the FOI Act sets out the procedure which applies where a person wishes to obtain access to an 'official document of a Minister'.

For a document to be an 'official document of a Minister' or 'official document of the Minister' it must be in the possession or deemed to be in the possession of the minister pursuant to s 4(1) of the FOI Act. The first element of this definition is that a document is 'in the possession of a Minister … in his or her capacity as a Minister'.

Section 4(1) of the FOI Act explains that the term 'official document of a Minister' means:

> ... a document that is in the possession of a Minister, or that is in the **possession of the Minister concerned**, as the case requires, in his or her capacity as a Minister, being a document that relates to the affairs of an agency or of a Department of State and, for the purposes of this definition, a Minister shall be deemed to be in possession of a document that has passed from his or her possession if he or she is entitled to access to the document and the document is not a document of an agency. (emphasis added)

Where an FOI request is made naming a Minister as a respondent and there is a change of Minister, generally the request continues with the new Minister as the respondent. However, if the request relates to a document that was in the possession of the former Minister but is not in the possession of the new Minister, that document would no longer be an official document of a Minister and will therefore not be subject to the FOI Act.

What is an 'official document of a minister'?

An 'official document of a minister' is a document in a minister's possession that relates to the affairs of an agency. 'Possession' can include a document held in the minister's office or a document a minister is entitled to hold.

s22 [redacted]

s22 [redacted]

[redacted]

[redacted]

…

s22 [redacted]

[redacted]

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

s22 [redacted]

s22 [redacted]

Section 24A of the FOI Act requires the 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 Office of the Minister for Home Affairs has provided submissions, which the OAIC provided to you on 1 September 2021.

s47E(d) [redacted]

Discretion not to 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.

s47E(d) [redacted]

s47E(d) [redacted]

[redacted]

For these reasons, I intend to recommend that a delegate of the Information Commissioner exercises the discretion to decide not to continue to undertake this IC review under s 54W, because I am of the view that this IC review application is lacking in substance.

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

If you disagree with this proposed recommendation, please write to us by **23 September 2021** 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 s 22 [redacted] or s 22 [redacted]. In all correspondence please quote s 22 [redacted].

Yours sincerely

s 22 [redacted]

s 22 [redacted]

2 September 2021

Australian Government
Office of the Australian Information Commissioner

Our reference: s 22
Agency reference: s 22

s 22

By email to: s 22

Your application for Information Commissioner review of the Minister for Home Affairs' decision

Dear s 22

I refer to your request for Information Commissioner review (IC review) of a decision made by the Minister for Home Affairs (the Minister) under the *Freedom of Information Act 1982* (Cth) (FOI Act).

The purpose of this letter is to:

- advise you of my intention to recommend that the delegate of the Information Commissioner exercises the discretion to decide not to continue to undertake a review of your IC review application under s 54W of the FOI Act, on the basis that your IC review application is lacking in substance, and
- to give you an opportunity to provide reasons for me to reconsider making this recommendation.

The reasons for my recommendation follow.

Background

On 23 February 2021, you applied to the Minister for access to:

s 22

On 15 March 2021, you sought IC review of the Minister's deemed decision under s 54L of the FOI Act.

On 30 March 2021, the Hon Karen Andrews MP was sworn in as Minister for Home Affairs, however, the request was made to the previous Minister, the Hon Peter Dutton MP. Under the FOI Act the request is taken to have been made to the new Minister.

On 14 May 2021, the person authorised by the then Minister made a substantive decision refusing the request under s 24A(1)(a)(ii) of the FOI Act on the basis that all reasonable steps had been taken to find documents and the Minister was satisfied that documents falling within the scope of the request do not exist.

Scope of IC review

The issue to be decided in this IC review is whether the Minister has taken all reasonable steps to find documents within the scope of your request, in accordance with s 24A(1) of the FOI Act.

The definition of 'official document of a Minister' or 'official document of the Minister' in s 4 of the FOI Act appears relevant to the issue of searches.

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

- the Minister's decision and reasons for decision
- the FOI Act, in particular ss 4(1), 15, 24A and 54W(a)
- 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 [2.52], [3.89]
- relevant case law, in particular *De Tarle and Australian Securities and Investments Commission (Freedom of Information)* [2015] AATA 770, and
- the Office of the Minister for Home Affairs' submissions.

Official document of a minister (s 4(1))

Section 15 of the FOI Act sets out the procedure which applies where a person wishes to obtain access to an 'official document of a Minister'.

For a document to be an 'official document of a Minister' or 'official document of the Minister' it must be in the possession or deemed to be in the possession of the minister pursuant to s 4(1) of the FOI Act. The first element of this definition is that a document is 'in the possession of a Minister … in his or her capacity as a Minister'.

Section 4(1) of the FOI Act explains that the term 'official document of a Minister' means:

> ... a document that is in the possession of a Minister, or that is in the **possession of the Minister concerned**, as the case requires, in his or her capacity as a Minister, being a document that relates to the affairs of an agency or of a Department of State and, for the purposes of this definition, a Minister shall be deemed to be in possession of a document that

has passed from his or her possession if he or she is entitled to access to the document and the document is not a document of an agency. (emphasis added)

Where an FOI request is made naming a Minister as a respondent and there is a change of Minister, generally the request continues with the new Minister as the respondent. However, if the request relates to a document that was in the possession of the former Minister but is not in the possession of the new Minister, that document would no longer be an official document of a Minister and will therefore not be subject to the FOI Act.

What is an 'official document of a minister'?

An 'official document of a minister' is a document in a minister's possession that relates to the affairs of an agency. 'Possession' can include a document held in the minister's office or a document a minister is entitled to hold.

s22 [redacted]:

s 22 [redacted]

[redacted]

[redacted]

…

s22 [redacted]

[redacted]

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

In their reasons for decision the Minister said:

s22 [redacted]

Section 24A of the FOI Act requires the 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 Office of the Minister for Home Affairs has provided submissions, which the OAIC provided to you on 1 September 2021.

s47E(d) [redacted]

Discretion not to 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.

s47E(d) [redacted]

s47E(d) [redacted]

[redacted]

For these reasons, I intend to recommend that a delegate of the Information Commissioner exercises the discretion to decide not to continue to undertake this IC review under s 54W, because I am of the view that this IC review application is lacking in substance.

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

If you disagree with this proposed recommendation, please write to us by **23 September 2021** 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 s 22 [redacted] or s 22 [redacted]. In all correspondence please quote s 22 [redacted].

Yours sincerely

s 22 [redacted]

s 22 [redacted]

2 September 2021

Our reference: s 22
Agency reference: s 22

s 22

By email to: s 22

Your application for Information Commissioner review of the Minister for Home Affairs' decision

Dear s 22

I refer to your request for Information Commissioner review (IC review) of a decision made by the Minister for Home Affairs (the Minister) under the *Freedom of Information Act 1982* (Cth) (FOI Act).

The purpose of this letter is to:

- advise you of my intention to recommend that the delegate of the Information Commissioner exercises the discretion to decide not to continue to undertake a review of your IC review application under s 54W of the FOI Act, on the basis that your IC review application is lacking in substance, and
- to give you an opportunity to provide reasons for me to reconsider making this recommendation.

The reasons for my recommendation follow.

Background

On 23 February 2021, you applied to the Minister for access to:

s 22

On 15 March 2021, you sought IC review of the Minister's deemed decision under s 54L of the FOI Act.

On 30 March 2021, the Hon Karen Andrews MP was sworn in as Minister for Home Affairs, however, the request was made to the previous Minister, the Hon Peter Dutton MP. Under the FOI Act the request is taken to have been made to the new Minister.

On 14 May 2021, the person authorised by the then Minister made a substantive decision refusing the request under s 24A(1)(a)(ii) of the FOI Act on the basis that all reasonable steps

had been taken to find documents and the Minister was satisfied that documents falling within the scope of the request do not exist.

Scope of IC review

The issue to be decided in this IC review is whether the Minister has taken all reasonable steps to find documents within the scope of your request, in accordance with s 24A(1) of the FOI Act.

The definition of 'official document of a Minister' or 'official document of the Minister' in s 4 of the FOI Act appears relevant to the issue of searches.

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

- the Minister's decision and reasons for decision
- the FOI Act, in particular ss 4(1), 15, 24A and 54W(a)
- 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 [2.52], [3.89]
- relevant case law, in particular *De Tarle and Australian Securities and Investments Commission (Freedom of Information)* [2015] AATA 770, and
- the Office of the Minister for Home Affairs' submissions.

Official document of a minister (s 4(1))

Section 15 of the FOI Act sets out the procedure which applies where a person wishes to obtain access to an 'official document of a Minister'.

For a document to be an 'official document of a Minister' or 'official document of the Minister' it must be in the possession or deemed to be in the possession of the minister pursuant to s 4(1) of the FOI Act. The first element of this definition is that a document is 'in the possession of a Minister … in his or her capacity as a Minister'.

Section 4(1) of the FOI Act explains that the term 'official document of a Minister' means:

> ... a document that is in the possession of a Minister, or that is in the **possession of the Minister concerned**, as the case requires, in his or her capacity as a Minister, being a document that relates to the affairs of an agency or of a Department of State and, for the purposes of this definition, a Minister shall be deemed to be in possession of a document that has passed from his or her possession if he or she is entitled to access to the document and the document is not a document of an agency. (emphasis added)

Where an FOI request is made naming a Minister as a respondent and there is a change of Minister, generally the request continues with the new Minister as the respondent. However, if the request relates to a document that was in the possession of the former Minister but is

not in the possession of the new Minister, that document would no longer be an official document of a Minister and will therefore not be subject to the FOI Act.

What is an 'official document of a minister'?

An 'official document of a minister' is a document in a minister's possession that relates to the affairs of an agency. 'Possession' can include a document held in the minister's office or a document a minister is entitled to hold.

s22 [redacted]

s22 [redacted]

[redacted]

[redacted]

…

s22 [redacted]

[redacted]

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

s22 [redacted]

s22 [redacted]

Section 24A of the FOI Act requires the 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 Office of the Minister for Home Affairs has provided submissions, which the OAIC provided to you on 1 September 2021.

s47E(d) [redacted]

Discretion not to 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.

s47E(d) [redacted]

s47E(d) [redacted]

For these reasons, I intend to recommend that a delegate of the Information Commissioner exercises the discretion to decide not to continue to undertake this IC review under s 54W, because I am of the view that this IC review application is lacking in substance.

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

If you disagree with this proposed recommendation, please write to us by **23 September 2021** 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 s 22 [redacted] or s 22 [redacted]. In all correspondence please quote s 22 [redacted].

Yours sincerely

s 22 [redacted]

s 22 [redacted]

2 September 2021

Our reference: s 22
Agency reference: s 22

s 22

Email to: s 22

Your IC review application about the Department of Home Affairs

Dear s 22

I refer to your application on behalf of s 22 for IC review of a decision the Department of Home Affairs (the Department) was deemed to have refused on 17 May 2021, and to my email of 19 August 2021.

On 13 August 2021, the Department provided a decision to you on your FOI request.

On 19 August 2021, I wrote to you seeking your advice on whether you wished to proceed or withdraw your IC review. In that correspondence I requested you respond by 2 September 2021. The OAIC has not received a response from you.

In light of the above and in order to progress your IC review, can you please advise if you would like to proceed or withdraw your request for IC review? Please provide a response **by 10 September 2021**.

Intention to finalise IC review

Please note that s 54W(a)(ii) of the FOI Act provides that the Information Commissioner may decide not to undertake an IC review where an applicant fails to cooperate in progressing an IC review application without reasonable excuse. Should we not receive a response from you to this email by **10 September 2021**, your IC review application may be finalised by a delegate of the Information Commissioner under s 54W(a)(ii).

If you have any questions regarding this email please contact me at foidr@oaic.gov.au or on s 22 or by return email. Please quote OAIC reference number at the top of this email in all correspondence.

Kind regards

s 22

OAIC

s 22

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Our reference: s 22
Agency reference: s 22

s 22
By email to: s 22

Dear s 22

I refer to your application on behalf of s 22 for IC review of a decision the Department of Home Affairs (the Department) was deemed to have refused on 27 May 2021, and to my email of 18 August 2021.

On 17 August 2021, the Department provided a revised decision to you.

On 18 August 2021, I wrote to you seeking your advice on whether you wished to proceed or withdraw your IC review. In that correspondence I requested you respond by 1 September 2021. The OAIC received a response from you on 1 September 2021 advising that you would respond within the next few days but we have not received your response to date.

In light of the above and in order to progress your IC review, can you please advise if you would like to proceed or withdraw your request for IC review? Please provide a response **by 15 September 2021**.

Intention to finalise IC review

I note that s 54W(a)(ii) of the FOI Act provides that the Information Commissioner may decide not to undertake an IC review where an applicant fails to cooperate in progressing an IC review application without reasonable excuse. Should we not receive a response from you to this email by **15 September 2021**, your IC review application will be finalised by a delegate of the Information Commissioner under s 54W(a)(ii).

If you have any questions regarding this email please contact me on s 22 or via email s 22. Please quote OAIC reference number at the top of this email in all correspondence.

Yours sincerely

s 22

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s 22

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Our reference: s 22
Agency reference: s 22

s 22
By email: s 22

Dear s 22

I refer to your application on behalf of s 22 for IC review of a decision the Department of Home Affairs (the Department) was deemed to have refused on 9 November 2020, and to my email of 20 August 2021.

On 29 April 2021, the Department provided a decision to you on your FOI request.

On 20 August 2021, I wrote to you seeking your advice on whether you wished to proceed or withdraw your IC review. In that correspondence I requested you respond by 3 September 2021. The OAIC has not received a response from you.

In light of the above and in order to progress your IC review, can you please advise if you would like to proceed or withdraw your request for IC review? Please provide a response **by 15 September 2021**.

Intention to finalise IC review

I note that s 54W(a)(ii) of the FOI Act provides that the Information Commissioner may decide not to undertake an IC review where an applicant fails to cooperate in progressing an IC review application without reasonable excuse. Should we not receive a response from you to this email by **15 September 2021**, your IC review application will be finalised by a delegate of the Information Commissioner under s 54W(a)(ii).

If you have any questions regarding this email please contact me on s 22 or via email s 22. Please quote OAIC reference number at the top of this email in all correspondence.

Yours sincerely

s 22

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s 22

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Our reference: s 22
Agency reference: s 22

s 22
By email to: s 22

Dear s 22

I refer to your application on behalf of s 22 for IC review of a decision the Department of Home Affairs (the Department) was deemed to have refused on 9 November 2020, and to my email of 20 August 2021.

On 7 July 2021, the Department provided a decision to you on your FOI request.

On 20 August 2021, I wrote to you seeking your advice on whether you wished to proceed or withdraw your IC review. In that correspondence I requested you respond by 3 September 2021. The OAIC has not received a response from you.

In light of the above and in order to progress your IC review, can you please advise if you would like to proceed or withdraw your request for IC review? Please provide a response **by 15 September 2021.**

Intention to finalise IC review

I note that s 54W(a)(ii) of the FOI Act provides that the Information Commissioner may decide not to undertake an IC review where an applicant fails to cooperate in progressing an IC review application without reasonable excuse. Should we not receive a response from you to this email by **15 September 2021**, your IC review application may be finalised by a delegate of the Information Commissioner under s 54W(a)(ii).

If you have any questions regarding this email please contact me on s 22 or by return email. Please quote OAIC reference number at the top of this email in all correspondence.

Yours sincerely

s 22

OAIC

s 22

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s 47E(d)

s 47E(d)

Our reference: s 22
Agency reference: s 22

s 22
By email to: s 22

Your IC review application about the Department of Home Affairs

Dear s 22

I refer to your application on behalf of s 22 for IC review of a decision the Department of Home Affairs (the Department) was deemed to have made on 29 March 2021, and to my email of 17 August 2021.

On 6 August 2021, the Department provided a decision to you on your FOI request.

On 17 August 2021, I wrote to you seeking your advice on whether you wished to proceed or withdraw your IC review. In that correspondence I requested you respond by 31 August 2021. The OAIC has not received a response from you.

In light of the above and in order to progress your IC review, can you please advise if you would like to proceed or withdraw your request for IC review? Please provide a response **by 15 September 2021.**

Intention to finalise IC review

I note that s 54W(a)(ii) of the FOI Act provides that the Information Commissioner may decide not to undertake an IC review where an applicant fails to cooperate in progressing an IC review application without reasonable excuse. Should we not receive a response from you to this email by **15 September 2021**, your IC review application will be finalised by a delegate of the Information Commissioner under s 54W(a)(ii).

If you have any questions regarding this email please contact me on s 22 or by return email. Please quote OAIC reference number at the top of this email in all correspondence.

Yours sincerely

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s 22

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Our reference: s 22
Agency reference: s 22

s 22

By email: s 22

Your IC review application about the Department of Home Affairs

Dear s 22

I refer to your application for IC review of a decision the Department of Home Affairs (the Department) was deemed to have made on 10 June 2021, and to my email of 17 August 2021

On 6 August 2021, the Department provided a decision to you on your FOI request.

On 17 August 2021, I wrote to you seeking your advice on whether you wished to proceed or withdraw your IC review. In that correspondence I requested you respond by 31 August 2021. The OAIC has not received a response from you.

In light of the above and in order to progress your IC review, can you please advise if you would like to proceed or withdraw your request for IC review? Please provide a response **by 15 September 2021.**

Intention to finalise IC review

I note that s 54W(a)(ii) of the FOI Act provides that the Information Commissioner may decide not to undertake an IC review where an applicant fails to cooperate in progressing an IC review application without reasonable excuse. Should we not receive a response from you to this email by **15 September 2021**, your IC review application will be finalised by a delegate of the Information Commissioner under s 54W(a)(ii).

If you have any questions regarding this email please contact me on s 22 or by return email. Please quote OAIC reference number at the top of this email in all correspondence.

Yours sincerely

OAIC

s 22

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Our reference s 22
Agency reference: s 22

s 22

By email: s 22

Your IC review application about the Department of Foreign Affairs and Trade

Dear s 22

I refer to your application for IC review of a decision the Department of Foreign Affairs and Trade (the Department) was deemed to have refused on 12 July 2021, and to my email of 21 July 2021.

On 16 July 2021 the Department provided you with full administrative access to the documents you requested.

On 21 July 2021, I wrote to you seeking your advice on whether you wished to proceed or withdraw your IC review. In that correspondence I requested you respond by 4 August 2021. The OAIC has not received a response from you.

In light of the above and in order to progress your IC review, can you please advise if you would like to proceed or withdraw your request for IC review? Please provide a response **by 15 September 2021.**

Intention to finalise IC review

I note that s 54W(a)(ii) of the FOI Act provides that the Information Commissioner may decide not to undertake an IC review where an applicant fails to cooperate in progressing an IC review application without reasonable excuse. Should we not receive a response from you to this email by **15 September 2021**, your IC review application will be finalised by a delegate of the Information Commissioner under s 54W(a)(ii).

If you have any questions regarding this email please contact me on s 22 or by return email. Please quote OAIC reference number at the top of this email in all correspondence.

Yours sincerely

OAIC

s 22

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Our reference: s 22
Agency reference: s 22

s 22

By email: s 22

IC review application about the Australian Federal Police

Dear s 22

I refer to s 22 application for IC review of a decision the Australian Federal Police (the AFP) was deemed to have refused on 5 July 2021, and to my email of 26 August 2021.

On 20 August 2021, the AFP provided a decision to you on your FOI request.

On 26 August 2021, I wrote to you seeking your advice on whether you wished to proceed or withdraw your IC review. In that correspondence I requested you respond by 9 September 2021. The OAIC has not received a response from you.

In light of the above and in order to progress your IC review, can you please advise if you would like to proceed or withdraw your request for IC review? Please provide a response **by 28 September 2021**.

Intention to finalise IC review

Please note that s 54W(a)(ii) of the FOI Act provides that the Information Commissioner may decide not to undertake an IC review where an applicant fails to cooperate in progressing an IC review application without reasonable excuse. Should we not receive a response from you to this email by **28 September 2021**, your IC review application will be finalised by a delegate of the Information Commissioner under s 54W(a)(ii).

If you have any questions regarding this email please contact me on s 22 or by return email. Please quote OAIC reference number at the top of this email in all correspondence.

Yours sincerely

s 22

OAIC

s 22

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Our reference: s 22
Agency reference: s 22

s 22
By email: s 22
Copied to: s 22

Dear s 22

I refer to your application on behalf of s 22 for IC review of a decision the Department of Home Affairs (the Department) was deemed to have refused on 3 March 2021, and to my email of 2 September 2021.

On 25 August 2021, the Department provided a decision to you on your FOI request.

On 2 September 2021, I wrote to you seeking your advice on whether you wished to proceed or withdraw your IC review. In that correspondence I requested you respond by 16 September 2021. The OAIC does not appear to have received a response from you.

In light of the above and in order to progress your IC review, can you please advise if you would like to proceed or withdraw your request for IC review? Please provide a response **by 28 September 2021**.

Intention to finalise IC review

I note that s 54W(a)(ii) of the FOI Act provides that the Information Commissioner may decide not to undertake an IC review where an applicant fails to cooperate in progressing an IC review application without reasonable excuse. Should we not receive a response from you to this email by **28 September 2021,** your IC review application will be finalised by a delegate of the Information Commissioner under s 54W(a)(ii).

If you have any questions regarding this email please contact me on s 22 or by return email. Please quote OAIC reference number at the top of this email in all correspondence.

Kind regards

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Our reference: s 22
Agency reference: s 22

s 22
s 22
By email to: s 22

Dear s 22

I refer to your application on behalf of s 22 for IC review of a decision the Department of Home Affairs (the Department) was deemed to have made on 19 October 2020, and to my email of 26 August 2021.

On 21 April 2021, the Department provided a decision to you on your FOI request.

On 26 August 2021, I wrote to you seeking your advice on whether you wished to proceed or withdraw your IC review. In that correspondence I requested you respond by 9 September 2021. The OAIC does not appear to have received a response from you.

In light of the above and in order to progress your IC review, can you please advise if you would like to proceed or withdraw your request for IC review? Please provide a response **by 28 September 2021**.

Intention to finalise IC review

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Our reference: s 22
Agency reference: s 22

s 22
By email to: s 22

Dear s 22

I refer to your application for IC review of a decision the Department of Home Affairs (the Department) was deemed to have refused on 22 March 2021, and to my email of 2 September 2021.

On 31 August 2021, the Department provided a decision to you on your FOI request.

On 2 September 2021, I wrote to you seeking your advice on whether you wished to proceed or withdraw your IC review. In that correspondence I requested you respond by 16 September 2021. The OAIC does not appear to have received a response from you.

In light of the above and in order to progress your IC review, can you please advise if you would like to proceed or withdraw your request for IC review? Please provide a response **by 28 September 2021**.

Intention to finalise IC review

I note that s 54W(a)(ii) of the FOI Act provides that the Information Commissioner may decide not to undertake an IC review where an applicant fails to cooperate in progressing an IC review application without reasonable excuse. Should we not receive a response from you to this email by **28 September 2021**, your IC review application will be finalised by a delegate of the Information Commissioner under s 54W(a)(ii).

If you have any questions regarding this email please contact me at foidr@oaic.gov.au or on s 22 . Please quote OAIC reference number at the top of this email in all correspondence.

Kind regards

s 22

OAIC

s 22

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Our reference: s 22
Agency reference: s 22

s 22
By email to: s 22

Dear s 22

I refer to your application for IC review of a decision the Department of Home Affairs (the Department) was deemed to have refused on 12 August 2021, and to my email of 27 August 2021.

On 10 August 2021, the Department provided a decision to you on your FOI request.

On 27 August 2021, I wrote to you seeking your advice on whether you wished to proceed or withdraw your IC review. In that correspondence I requested you respond by 10 September 2021. The OAIC does not appear to have received a response from you.

In light of the above and in order to progress your IC review, can you please advise if you would like to proceed or withdraw your request for IC review? Please provide a response **by 28 September 2021**.

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Kind regards

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Our reference: s 22
Agency reference: s 22

s 22
Email to: s 22

Dear s 22

I refer to your application on behalf of s 22 for IC review of a decision the Department of Home Affairs (the Department) was deemed to have refused on 29 March 2021, and to my email of 26 August 2021.

On 25 August 2021, the Department provided a decision to you on your FOI request.

On 26 August 2021, I wrote to you seeking your advice on whether you wished to proceed or withdraw your IC review. In that correspondence I requested you respond by 9 September 2021. The OAIC does not appear to have received a response from you.

In light of the above and in order to progress your IC review, can you please advise if you would like to proceed or withdraw your request for IC review? Please provide a response **by 28 September 2021**.

Intention to finalise IC review

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Our reference: s 22
Agency reference: s 22

s 22
By email to: s 22

Dear s 22

I refer to your application for IC review of a decision the Department of Home Affairs (the Department) was deemed to have refused on 30 July 2021, and to my email of 26 August 2021.

On 6 July 2021, the Department provided a decision to you on your FOI request.

On 26 August 2021, I wrote to you seeking your advice on whether you wished to proceed or withdraw your IC review. In that correspondence I requested you respond by 9 September 2021. The OAIC does not appear to have received a response from you.

In light of the above and in order to progress your IC review, can you please advise if you would like to proceed or withdraw your request for IC review? Please provide a response **by 28 September 2021**.

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Our reference: s 22
Agency reference: s 22

s 22
By email to: s 22

Dear s 22

I refer to your application for IC review of a decision the Department of Home Affairs (the Department) was deemed to have refused on 28 June 2021, and to my email of 26 August 2021.

On 23 August 2021, the Department provided a decision to you on your FOI request.

On 26 August 2021, I wrote to you seeking your advice on whether you wished to proceed or withdraw your IC review. In that correspondence I requested you respond by 9 September 2021. The OAIC does not appear to have received a response from you.

In light of the above and in order to progress your IC review, can you please advise if you would like to proceed or withdraw your request for IC review? Please provide a response **by 28 September 2021**.

Intention to finalise IC review

I note that s 54W(a)(ii) of the FOI Act provides that the Information Commissioner may decide not to undertake an IC review where an applicant fails to cooperate in progressing an IC review application without reasonable excuse. Should we not receive a response from you to this email by **28 September 2021**, your IC review application will be finalised by a delegate of the Information Commissioner under s 54W(a)(ii).

If you have any questions regarding this email please contact me by return email or on s 22 . Please quote OAIC reference number at the top of this email in all correspondence.

Kind regards

s 22

OAIC

s 22

Subscribe to Information Matters

From: s 22 [redacted]

Our reference: s 22 and s 22
Agency reference: s 22 and s 22

s 22
By email to: s 22

Dear s 22

I refer to your applications for IC review of the deemed access refusal decisions made by the Department of the Prime Minister and Cabinet (the Department) on 11 May 2021, and the Office of the Prime Minister (Prime Minister's Office) on 12 May 2021, and to my email of 1 September 2021.

On 12 and 13 August 2021 respectively, the Department, and the Prime Minister's Office, provided you with a decision in response to your FOI request.

On 17 August 2021, I wrote to you seeking your advice on whether you wished to proceed or withdraw your IC reviews.

On 31 August 2021 you responded advising that you wished to proceed with the IC reviews based on a failure by the respondents to comply with their obligations under the FOI Act, in particular, the statutory processing timeframes.

On 1 September 2021 I wrote to advise you that these concerns would be more appropriately dealt with as an FOI complaint, as IC review is a merits review processes which, in this case, would be limited to reviewing the respective decisions to refuse partial access to documents. Further information about FOI complaints and IC reviews is available on our website.

At this time I invited you to respond advising how you would like to proceed. The OAIC does not yet appear to have received a response from you.

Request for response

In light of the above and in order to progress your IC reviews, can you please advise if you would like to proceed or withdraw your requests for IC review? If you wish to proceed, please outline the grounds on which you seek review (i.e. which aspects of the decision/s you disagree with).

Please provide a response **by 28 September 2021**.

If you do not wish to proceed with IC reviews, please confirm whether you seek to pursue FOI complaints about the Department and/or the Prime Minister's Office, in which case I will refer your complaint/s to our Compliance and Investigation team for consideration.

Intention to finalise IC reviews

Please note that s 54W(a)(ii) of the FOI Act provides that the Information Commissioner may decide not to undertake an IC review where an applicant fails to cooperate in progressing an IC review application without reasonable excuse. Should we not receive a response from you to this

email by **28 September 2021**, your IC review applications will be finalised by a delegate of the Information Commissioner under s 54W(a)(ii).

If you have any questions regarding this email please contact me by return email or on s 22 . Please quote OAIC reference number at the top of this email in all correspondence.

Kind regards

s 22

OAIC

s 22

Subscribe to Information Matters

Our reference: s 22
Agency reference: s 22

s 22
By email: s 22

Dear s 22

I refer to your application for IC review of a decision the Department of Defence (the Department) was deemed to have refused on 22 April 2021, and to my email of 21 September 2021.

On 20 September 2021, the Department provided a decision to you on your FOI request.

On 21 September 2021, I wrote to you seeking your advice on whether you wished to proceed or withdraw your IC review. In that correspondence I requested you respond by 5 October 2021. The OAIC does not appear to have received a response from you.

In light of the above and in order to progress your IC review, can you please advise if you would like to proceed or withdraw your request for IC review? Please provide a response **by 13 October 2021**.

Intention to finalise IC review

Please note that s 54W(a)(ii) of the FOI Act provides that the Information Commissioner may decide not to undertake an IC review where an applicant fails to cooperate in progressing an IC review application without reasonable excuse. Should we not receive a response from you to this email by **13 October 2021**, your IC review application will be finalised by a delegate of the Information Commissioner under s 54W(a)(ii).

If you have any questions regarding this email please contact me on s 22 or via email foidr@oaic.gov.au. Please quote OAIC reference number at the top of this email in all correspondence.

Yours sincerely

s 22

OAIC

s 22

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Our reference: s 22
Agency reference: s 22

s 22
By email to: s 22
Copied to: s 22

Your IC review application about the Department of Home Affairs

Dear s 22

I refer to your application on behalf of s 22 for IC review of a decision the Department of Home Affairs (the Department) was deemed to have refused on 24 June 2021, and to my email of 8 September 2021.

On 6 September 2021, the Department provided a decision to you on your FOI request.

On 8 September 2021, I wrote to you seeking your advice on whether you wished to proceed or withdraw your IC review. In that correspondence I requested you respond by 22 September 2021. The OAIC does not appear to have received a response from you.

In light of the above and in order to progress your IC review, can you please advise if you would like to proceed or withdraw your request for IC review? Please provide a response **by 13 October 2021**.

Intention to finalise IC review

Please note that s 54W(a)(ii) of the FOI Act provides that the Information Commissioner may decide not to undertake an IC review where an applicant fails to cooperate in progressing an IC review application without reasonable excuse. Should we not receive a response from you to this email by **13 October 2021**, your IC review application will be finalised by a delegate of the Information Commissioner under s 54W(a)(ii).

If you have any questions regarding this email please contact me on s 22 or via email foidr@oaic.gov.au. Please quote OAIC reference number at the top of this email in all correspondence.

Yours sincerely

s 22

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s 22

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Our reference: s 22
Agency reference: s 22

s 22
By email to: s 22

Your IC review application about the Department of Home Affairs

Dear s 22

I refer to your application for IC review of a decision the Department of Home Affairs (the Department) was deemed to have refused on 30 July 2021, and to my email of 8 September 2021.

On 3 September 2021, the Department provided a decision to you on your FOI request.

On 8 September 2021, I wrote to you seeking your advice on whether you wished to proceed or withdraw your IC review. In that correspondence I requested you respond by 22 September 2021. The OAIC does not appear to have received a response from you.

In light of the above and in order to progress your IC review, can you please advise if you would like to proceed or withdraw your request for IC review? Please provide a response **by 13 October 2021**.

Intention to finalise IC review

Please note that s 54W(a)(ii) of the FOI Act provides that the Information Commissioner may decide not to undertake an IC review where an applicant fails to cooperate in progressing an IC review application without reasonable excuse. Should we not receive a response from you to this email by **13 October 2021**, your IC review application will be finalised by a delegate of the Information Commissioner under s 54W(a)(ii).

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Yours sincerely

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OAIC

s 22

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Our reference: s 22

s 22
[redacted]
By email to: s 22

Your IC review application about the Department of Home Affairs

Dear s 22

I refer to your application on behalf of s 22 for IC review of a decision the Department of Home Affairs (the Department) was deemed to have refused on 28 August 2021, and to my email of 8 September 2021.

On 7 September 2021, the Department provided a decision to you on your FOI request.

On 8 September 2021, I wrote to you seeking your advice on whether you wished to proceed or withdraw your IC review. In that correspondence I requested you respond by 22 September 2021. The OAIC does not appear to have received a response from you.

In light of the above and in order to progress your IC review, can you please advise if you would like to proceed or withdraw your request for IC review? Please provide a response **by 13 October 2021**.

Intention to finalise IC review

Please note that s 54W(a)(ii) of the FOI Act provides that the Information Commissioner may decide not to undertake an IC review where an applicant fails to cooperate in progressing an IC review application without reasonable excuse. Should we not receive a response from you to this email by **13 October 2021**, your IC review application will be finalised by a delegate of the Information Commissioner under s 54W(a)(ii).

If you have any questions regarding this email please contact me on s 22 or via email foidr@oaic.gov.au. Please quote OAIC reference number at the top of this email in all correspondence.

Yours sincerely

s 22

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s 22
[redacted]

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Our reference: s 22
Agency reference: s 22

s 22
By email to: s 22

Your IC review application about the Department of Home Affairs

Dear s 22

I refer to your application for IC review of a decision the Department of Home Affairs (the Department) was deemed to have refused on 23 August 2021, and to my email of 8 September 2021.

This matter relates your request dated 23 July for access to:

s 22

On 3 September 2021, the Department provided a decision to you on your FOI request.

On 8 September 2021, I wrote to you seeking your advice on whether you wished to proceed or withdraw your IC review. In that correspondence I requested you respond by 22 September 2021. The OAIC does not appear to have received a response from you.

In light of the above and in order to progress your IC review, can you please advise if you would like to proceed or withdraw your request for IC review? Please provide a response **by 13 October 2021**.

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Yours sincerely

s 22

OAIC

s 22 [redacted]

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Our reference: s 22
Agency reference: s 22

s 22

By email: s 22

Dear s 22

I refer to your application on behalf of s 22 for IC review of a decision the Department of Home Affairs (the Department) was deemed to have made on 28 June 2021, and to my email of 21 September 2021.

On 13 September 2021, the Department provided a decision to you on your FOI request.

On 21 September 2021, I wrote to you seeking your advice on whether you wished to proceed or withdraw your IC review. In that correspondence I requested you respond by 5 October 2021. The OAIC does not appear to have received a response from you.

In light of the above and in order to progress your IC review, can you please advise if you would like to proceed or withdraw your request for IC review? Please provide a response **by 13 October 2021**. Should you wish to proceed with the IC review, please include a representative authority from Mr Ahmadi.

Intention to finalise IC review

Please note that s 54W(a)(ii) of the FOI Act provides that the Information Commissioner may decide not to undertake an IC review where an applicant fails to cooperate in progressing an IC review application without reasonable excuse. Should we not receive a response from you to this email by **13 October 2021**, your IC review application will be finalised by a delegate of the Information Commissioner under s 54W(a)(ii).

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By email: s 22

Your IC review application about the Department of Home Affairs

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International Access to Information Day
oaic.gov.au/iaid

Our reference: s 22
Agency reference: s 22

s 22
By email to: s 22

Dear s 22

I refer to your application on behalf of s 22 for IC review of a decision the Department of Home Affairs (the Department) was deemed to have refused on 25 August 2021, and to my email of 10 September 2021.

On 9 September 2021, the Department provided a decision to you on your FOI request.

On 10 September 2021, I wrote to you seeking your advice on whether you wished to proceed or withdraw your IC review. In that correspondence I requested you respond by 24 September 2021. The OAIC does not appear to have received a response from you.

In light of the above and in order to progress your IC review, can you please advise if you would like to proceed or withdraw your request for IC review? Please provide a response **by 13 October 2021**.

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Our reference: s 22
Agency reference: s 22

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By email to: s 22

Your IC review application about the Department of Home Affairs

Dear s 22

I refer to your application for IC review of a decision the Department of Home Affairs (the Department) was deemed to have refused on 23 August 2021, and to my email of 10 September 2021.

For reference, this matter relates to your request dated 23 July 2021 for access to the following:

s 22

On 6 September 2021, the Department provided a decision to you on your FOI request.

On 10 September 2021, I wrote to you seeking your advice on whether you wished to proceed or withdraw your IC review. In that correspondence I requested you respond by 24 September 2021. The OAIC does not appear to have received a response from you.

In light of the above and in order to progress your IC review, can you please advise if you would like to proceed or withdraw your request for IC review? Please provide a response **by 13 October 2021**.

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Yours sincerely

s 22

OAIC

s 22

s 22 [redacted]

| | | | *Subscribe to Information Matters*

Our reference: s 22
Agency reference: s 22

s 22
By email to: s 22

Your IC review application about the Department of Home Affairs

Dear s 22

I refer to your application on behalf of s 22 for IC review of a decision the Department of Home Affairs (the Department) was deemed to have made 31 July 2021, and to my email of 10 September 2021.

On 6 September 2021, the Department provided a decision to you on your FOI request.

On 10 September 2021, I wrote to you seeking your advice on whether you wished to proceed or withdraw your IC review. In that correspondence I requested you respond by 24 September 2021. The OAIC does not appear to have received a response from you.

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Yours sincerely

s 22

OAIC

s 22

Subscribe to Information Matters

Our reference: s 22
Agency reference: s 22

s 22

By email: s 22

Your application for Information Commissioner review of the Administrative Appeals Tribunal's decision

Dear s 22 ,

I refer to your application for Information Commissioner review (IC review) of a decision made by the Administrative Appeals Tribunal (AAT) on 23 June 2021 under the *Freedom of Information Act 1982* (Cth) (the FOI Act).

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

The reasons for my recommendation follow.

Background

The key procedural steps in this IC review are set out at **Attachment A**.

Scope of IC review

The issue to be decided in this IC review is whether the AAT has taken all reasonable steps to find documents within the scope of the request (s 24A of the FOI Act).

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

i. the AAT's decision and reasons for decision of 1 July 2020
ii. the AAT's revised decision and reasons for decision of 23 June 2021
iii. evidence of searches undertaken by the AAT
iv. the FOI Act, in particular s 24A

v. 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, in particular paragraphs [3.85] – [3.94]

vi. relevant case law, in particular *De Tarle and Australian Securities and Investments Commission (Freedom of information)* [2015] AATA 770, and

vii. the parties' submissions.

Consideration of whether reasonable steps undertaken

Section 24A requires that an agency or minister 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.

The Guidelines issued under s 93A of the Act explain:

> The Act is silent on what constitutes 'all reasonable steps'. The meaning of 'reasonable' in the context of s 24A(1)(a) has been construed as not going beyond the limit assigned by reason, not extravagant or excessive, moderate and of such an amount, size or number as is judged to be appropriate or suitable to the circumstances or purpose.
>
> Agencies and ministers should undertake a reasonable search on a flexible and common-sense interpretation of the terms of the request. What constitutes a reasonable search will depend on the circumstances of each request and will be influenced by the normal business practices in the agency's operating environment or the minister's office. At a minimum, an agency or minister should take comprehensive steps to locate documents, having regard to:
>
> - the subject matter of the documents
> - the current and past file management systems and the practice of destruction or removal of documents, and
> - 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.[1]

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]).

[1] Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the* Freedom of Information Act (FOI Guidelines) [3.88] — [3.89].

The AAT's decision

The AAT found that documents falling within the scope of your request cannot be found or do not exist. In its reasons for decision, the AAT said:

s 22

[redacted]

s 22

Parties' submissions

You submitted:

s 22

The AAT submitted:

s 47E(d)

s 47E(d)

[redacted]

A copy of the AAT's submissions dated 18 August 2021 is **enclosed**.

Evidence of searches undertaken

The AAT provided the OAIC with details of the searches undertaken in relation to the FOI request and the outcome of those searches. I have considered these records, which indicate that AAT undertook searches through:

- Case Management System
- Records Management System
- Hardcopy files archived with s 47E(d) [redacted]
- s 47E(d) [redacted]

I have also considered the records of the above searches undertaken by the AAT, which the AAT also provided to the OAIC during the course of this IC review and the AAT detailed in its reasons for decision, which identified:

- The date searches were undertaken
- The person/s who undertook the searches
- The locations searched
- The search terms used
- The outcomes of the searches undertaken
- Reasons as to why some documents have not been found, for example, they have been destroyed
- The AAT's Record Destruction Authority
- The details of the AAT's offsite archive contractor in possession of documents within the scope of the request
- Limitations of the search

Discretion not to 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.

Having regard to the scope of your request, the parties' submissions and the AAT's evidence of searches, it appears that the AAT has taken all reasonable steps to find documents within the scope of the request as it was required to do by s 24A and that relevant documents, if they existed, would have been found.

For these reasons, I intend to recommend that the Information Commissioner exercises the discretion to decide not to continue to undertake this IC review under s 54W, because I am of the view that this IC review application is lacking in substance.

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

If you disagree with this proposed recommendation, please write to us by 27 October 2021 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 s 22 or on s 22. In all correspondence please quote s 22.

Yours sincerely

s 22

s 22

15 October 2021

ATTACHMENT A
Key procedural steps

Date	Events
2 May 2020	FOI request for: s 22 [redacted]
1 June 2020	The AAT sought an extension of time under s15AB of the FOI Act
1 July 2020	The AAT made a decision granting access to documents
13 July 2020	IC review application received
11May 2021	Respondent agency notified under s 54Z
2 July 2021	Request for information issued under s 55(2)(a)
23 July 2021	Request for information due
18 August 2021	Information received
14 October 2021	Submissions provided to parties
23 June 2021	Revised decision

Our reference: s 22
Agency reference: s 22

s 22

By email to: s 22

Your IC review application about the Department of Home Affairs

Dear s 22

I refer to s 22 application for IC review of a decision the Department of Home Affairs (the Department) was deemed to have refused on 5 June 2021, and to our previous email correspondence below.

On 12 August 2021, the Department provided a decision to s 22 in response to his FOI request.

On 6 September 2021, I wrote to you seeking your advice on whether you wished to proceed or withdraw your IC review, after the Department arranged to re-send a new copy of the released documents to you directly, at s 22 request.

In that correspondence I requested you respond by 5 October 2021. The OAIC does not appear to have received a response from you.

In light of the above and in order to progress your IC review, can you please advise if you would like to proceed or withdraw your request for IC review? Please provide a response **by 14 October 2021**.

Intention to finalise IC review

Please note that s 54W(a)(ii) of the FOI Act provides that the Information Commissioner may decide not to undertake an IC review where an applicant fails to cooperate in progressing an IC review application without reasonable excuse. Should we not receive a response from you to this email by **14 October 2021**, your IC review application will be finalised by a delegate of the Information Commissioner under s 54W(a)(ii).

If you have any questions regarding this email please contact me on s 22 or via email foidr@oaic.gov.au. Please quote OAIC reference number at the top of this email in all correspondence.

Yours sincerely

s 22

OAIC

s 22

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Our reference: s 22
Agency reference: s 22

s 22
By email to: s 22

Your IC review application about the Department of Home Affairs

Dear s 22

I refer to your application on behalf of s 22 for IC review of a decision the Department of Home Affairs (the Department) was deemed to have refused on 24 August 2021.

On 28 September 2021, the Department notified the Office of the Australian Information Commissioner (the OAIC) it had made a substantive decision to provide you with partial access to the documents requested.

Can you please notify us by **21 October 2021**, if you now wish to:

- Withdraw the IC review application, or
- Proceed with the IC review application, and make a submission about the grounds on which you wish to proceed.

I note that s 54W(a)(ii) of the FOI Act provides that the Information Commissioner may decide not to undertake an IC review where an applicant fails to cooperate in progressing an IC review application without reasonable excuse. Should we not receive a response from you to this email by **21 October 2021**, your IC review application may be finalised by a delegate of the Information Commissioner under s 54W(a)(ii).

If you have any questions regarding this email please contact me on s 22 or by return email. Please quote OAIC reference number at the top of this email in all correspondence.

Yours sincerely

s 22

OAIC

s 22

Subscribe to Information Matters

s 47E(d)

s 47E(d)

s 47E(d)

s 47E(d)

s 47E(d)

Our reference: s 22

s 22

s 22

Your application for Information Commissioner review of Australian Taxation Office's decision

Dear s 22

I refer to your application for Information Commissioner review (IC review) of a decision made by the Australian Taxation Office (the ATO) on 29 January 2021, under the *Freedom of Information Act 1982* (Cth) (the FOI Act).

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

The reasons for my recommendation follow.

Background

The key procedural steps in this IC review are set out at **Attachment A**.

Scope of IC review

The issue to be decided in this IC review is whether the ATO has taken all reasonable steps to find documents within the scope of the request (s 24A of the FOI Act).

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

i. the ATO's decision and reasons for decision of 30 November 2020
ii. the ATO's internal review decision and reasons for decision of 12 February 2021
iii. evidence of searches undertaken by the ATO

iv. the FOI Act, in particular s 24A

v. 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, in particular paragraphs [3.85] – [3.94]

vi. relevant case law, in particular *De Tarle and Australian Securities and Investments Commission (Freedom of information)* [2015] AATA 770, and

vii. the parties' submissions.

Consideration of whether reasonable steps undertaken

Section 24A requires that an agency or minister 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.

The Guidelines issued under s 93A of the Act explain:

> The Act is silent on what constitutes 'all reasonable steps'. The meaning of 'reasonable' in the context of s 24A(1)(a) has been construed as not going beyond the limit assigned by reason, not extravagant or excessive, moderate and of such an amount, size or number as is judged to be appropriate or suitable to the circumstances or purpose.
>
> Agencies and ministers should undertake a reasonable search on a flexible and common-sense interpretation of the terms of the request. What constitutes a reasonable search will depend on the circumstances of each request and will be influenced by the normal business practices in the agency's operating environment or the minister's office. At a minimum, an agency or minister should take comprehensive steps to locate documents, having regard to:
>
> - the subject matter of the documents
> - the current and past file management systems and the practice of destruction or removal of documents, and
> - 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.[1]

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]).

---

[1] Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the* Freedom of Information Act (FOI Guidelines) [3.88] — [3.89].

Agency's decision

The ATO found that further documents falling within the scope of the applicant's request cannot be found or do not exist. In its reasons for its internal review decision, the ATO said:

> s 22 [redacted]

Applicant's submissions

You submitted:

> s 22 [redacted]

The ATO submitted:

> s 47E(d) [redacted]

Evidence of searches undertaken

The ATO provided the OAIC with details of the searches undertaken in relation to the FOI request and the outcome of those searches. I have considered these records, which indicate that the ATO undertook searches through:

- the ATO's case management system

- the ATO's records management systems
- hardcopy records

I have also considered the records of the above searches undertaken by the ATO, which the ATO also provided to the OAIC during the course of this IC review or the ATO detailed in its reasons for decision, which identified:

- The date searches were undertaken
- The person/s who undertook the searches
- The locations searched
- The search terms used
- The outcomes of the searches undertaken

I have also taken into consideration that, on 18 January 2021, the ATO wrote to you seeking your advice to assist it to conduct further searches for the documents you were seeking and that the ATO did not receive a response from you that responded to its inquiries.

Discretion not to 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.

Having regard to the scope of your request, the parties' submissions and the ATO's evidence of searches, it appears that the ATO has taken all reasonable steps to find documents within the scope of the request as it was required to do by s 24A and that relevant documents, if they existed, would have been found.

For these reasons, I intend to recommend that the Information Commissioner exercises the discretion to decide not to continue to undertake this IC review under s 54W, because I am of the view that this IC review application is lacking in substance.

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

If you disagree with this proposed recommendation, please write to us by **4 November 2021** 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 s 22 or on s 22 . In all correspondence please quote s 22 .

Yours sincerely

s 22

14 October 2021

ATTACHMENT A
Key procedural steps

Date	Events
29 January 2021	IC review application received
19 February 2021	Respondent agency notified under s 54Z
22 April 2021	Agency responded to s 54Z notice providing information and documents requested in the notice.

Australian Government
Office of the Australian Information Commissioner

Our reference: s 22
Agency reference: s 22

s 22
By email: s 22

Your application for Information Commissioner review of the Department of Defence's decision

Dear s 22

I refer to your application for Information Commissioner review (IC review) of a decision made by the Department of Defence (the Department) on 15 May 2020 under the *Freedom of Information Act 1982* (Cth) (the FOI Act).

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

The reasons for my recommendation follow.

Background

The key procedural steps in this IC review are set out at **Attachment A**.

Scope of IC review

The issue to be decided in this IC review is whether the Department has taken all reasonable steps to find documents within the scope of the request (s 24A of the FOI Act).

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

i. the Department's initial decision of 15 May 2020 and reasons for decision
ii. evidence of searches undertaken by the Department
iii. the FOI Act, in particular s 24A

iv. 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, in particular paragraphs [3.85] – [3.94]

v. relevant case law, in particular *De Tarle and Australian Securities and Investments Commission (Freedom of information)* [2015] AATA 770, and

vi. the parties' submissions.

Consideration of whether reasonable steps undertaken

Section 24A requires that an agency or minister 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.

The Guidelines issued under s 93A of the Act explain:

> The Act is silent on what constitutes 'all reasonable steps'. The meaning of 'reasonable' in the context of s 24A(1)(a) has been construed as not going beyond the limit assigned by reason, not extravagant or excessive, moderate and of such an amount, size or number as is judged to be appropriate or suitable to the circumstances or purpose.
>
> Agencies and ministers should undertake a reasonable search on a flexible and common-sense interpretation of the terms of the request. What constitutes a reasonable search will depend on the circumstances of each request and will be influenced by the normal business practices in the agency's operating environment or the minister's office. At a minimum, an agency or minister should take comprehensive steps to locate documents, having regard to:
>
> - the subject matter of the documents
> - the current and past file management systems and the practice of destruction or removal of documents, and
> - 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.[1]

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]).

[1] Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the* Freedom of Information Act (FOI Guidelines) [3.88] — [3.89].

The Department's decision

The Department found that documents falling within the scope of your FOI request cannot be found or do not exist. In its reasons for decision, the Department said:

s 22

[redacted]

Your submissions

In your IC review application, you submitted:

s 22

[redacted]

The Department's submissions

In the Department's submissions to the OAIC it has stated:

s 47E(d)

[redacted]

s 47E(d)

[redacted]

The Department has also advised:

s 47E(d)

[redacted]

A copy of the Department's submission is attached.

Evidence of searches undertaken

The Department provided the OAIC with details of the searches undertaken in relation to the FOI request and the outcome of those searches. I have considered these records, which indicate that Defence Archives, Navy, and the Department's Payroll Services Branch undertook searches for the documents requested in the following locations:

s 47E(d)

[redacted]

s 47E(d)

I have also considered the records of the above searches undertaken by the Department which the Department provided to the OAIC during the course of this IC review, which identified:

- The date searches were undertaken
- The persons who undertook the searches
- The locations searched
- The search terms used, and
- The outcomes of the searches undertaken.

Discretion not to 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.

Having regard to the scope of your request, the parties' submissions and the Department's evidence of searches, it appears that the Department has taken all reasonable steps to find documents within the scope of the request as it was required to do by s 24A and that relevant documents, if they existed, or were held by the Department, they would have been found.

In particular, I have considered the Department's advice that:

s 47E(d)

s 47E(d) [redacted]

For these reasons, I intend to recommend that the Information Commissioner exercises the discretion to decide not to continue to undertake this IC review under s 54W(a)(i), because I am of the view that this IC review application is lacking in substance.

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

If you disagree with this proposed recommendation, please write to us by **27 October 2021** 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(a)(i).

s 22 [redacted]

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

If you would like to discuss this matter, please contact me on s 22 [redacted] or on s 22 [redacted]. In all correspondence please quote s 22 [redacted].

Yours sincerely

s 22 [redacted]

s 22 [redacted]

14 October 2021

ATTACHMENT A
Key procedural steps

Date	Events
20 April 2020	FOI request for: s 22 [redacted]
15 May 2020	Initial decision refusing access on the basis that documents do not exist.
15 May 2020	IC review application received.
4 August 2020	IC review commenced and respondent agency notified under s 54Z, including request for submissions and evidence.
13 August 2020	Section 54Z response received from agency attaching evidence. No submissions provided.
19 March 2021	Request for submissions and further evidence issued to agency.
17 June 2021	Submissions and further evidence of searches received from the respondent agency.

Our reference: s 22

s 22

By email: s 22

Your application for Information Commissioner review of the Department of Health's decision

Dear s 22

I refer to your application for Information Commissioner review (IC review) of a decision made by the DOH - Department of Health (the Department) on 10 March 2020 under the *Freedom of Information Act 1982* (Cth) (the FOI Act).

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

The reasons for my recommendation follow.

Background

The key procedural steps in this IC review are set out at **Attachment A**.

Scope of IC review

The issue to be decided in this IC review is whether the Department has taken all reasonable steps to find documents within the scope of the request (s 24A of the FOI Act).

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

i. the Department's decision and reasons for decision of 12 December 2019.
ii. the Department's internal review decision and reasons for decision of 10 March 2020.
iii. evidence of searches undertaken by the Department

iv. the FOI Act, in particular s 24A

v. 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, in particular paragraphs [3.85] – [3.94]

vi. relevant case law, in particular *De Tarle and Australian Securities and Investments Commission (Freedom of information)* [2015] AATA 770, and

vii. the parties' submissions.

Consideration of whether reasonable steps undertaken

Section 24A requires that an agency or minister 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.

The Guidelines issued under s 93A of the Act explain:

> The Act is silent on what constitutes 'all reasonable steps'. The meaning of 'reasonable' in the context of s 24A(1)(a) has been construed as not going beyond the limit assigned by reason, not extravagant or excessive, moderate and of such an amount, size or number as is judged to be appropriate or suitable to the circumstances or purpose.
>
> Agencies and ministers should undertake a reasonable search on a flexible and common-sense interpretation of the terms of the request. What constitutes a reasonable search will depend on the circumstances of each request and will be influenced by the normal business practices in the agency's operating environment or the minister's office. At a minimum, an agency or minister should take comprehensive steps to locate documents, having regard to:
>
> - the subject matter of the documents
> - the current and past file management systems and the practice of destruction or removal of documents, and
> - 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.[1]

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]).

[1] Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the* Freedom of Information Act (FOI Guidelines) [3.88] — [3.89].

Agency's decision

The Department found that all documents falling within the scope of the applicant's request had been located and released to s 22 and that no further relevant documents exist.

In its reasons for internal review decision, the Department said:

s 22

Parties' submissions

You submitted:

s 22

s 22 [redacted]

The Department submitted:

s 47E(d) [redacted]

Evidence of searches undertaken

The Department provided the OAIC with details of the searches undertaken in relation to the FOI request and the outcome of those searches. I have considered these records, which indicate that the Department undertook searches through:

- E-mails including individual and group email accounts
- TRIM filed and paper files held by the relevant Division/Branch
- Paper files relating to the relevant Division/Branch held in the Records Management System
- Electronic documents on shared and personal drives including USB drives
- Department databases
- Personal folders, notebooks, calendars, and diaries of relevant officers
- Floppy Disks, CDS and other devices
- Office 365
- s22 [redacted] and Parliamentary Document Management System (PDMS)

I have also considered the records of the above searches undertaken by the Department, which the Department also provided to the OAIC during the course of this IC review or the Department detailed in its reasons for decision, which identified:

- The date searches were undertaken
- The person who undertook the searches
- The locations searched
- The outcomes of the searches undertaken

Discretion not to 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.

Having regard to the scope of your request, the parties' submissions and the Department's evidence of searches, it appears that the Department has taken all reasonable steps to find documents within the scope of the request as it was required to do by s 24A and that relevant documents, if they existed, would have been found.

For these reasons, I intend to recommend that the Information Commissioner exercises the discretion to decide not to continue to undertake this IC review under s 54W, because I am of the view that this IC review application is lacking in substance.

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

If you disagree with this proposed recommendation, please write to us by **27 October 2021** 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 s 22 or by email to FOIDR@oaic.gov.au. In all correspondence please quote s 22 .

Yours sincerely

s 22

FOI - IC Reviews

14 October 2021

ATTACHMENT A
Key procedural steps

Date	Events
14/04/2020	IC review application received
3/08/2020	Respondent agency notified under s 54Z
3/08/2020	Request for information issued under s 55DA
24/08/2020	Request for information due
24/08/2020	Information received

Our reference: s 22
Agency reference: s 22

s 22

By email: s 22

Your application for Information Commissioner review of Services Australia's decision

Dear s 22

I refer to your application for Information Commissioner review (IC review) of a decision made by the Services Australia (Services Australia) on 30 November 2020 under the *Freedom of Information Act 1982* (Cth) (the FOI Act).

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

The reasons for my recommendation follow.

Background

The key procedural steps in this IC review are set out at **Attachment A**.

Scope of IC review

The issue to be decided in this IC review is whether the Services Australia has taken all reasonable steps to find documents within the scope of the request (s 24A of the FOI Act).

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

i. Services Australia's decision and reasons for decision of 30 November 2020
ii. evidence of searches undertaken by Services Australia
iii. the FOI Act, in particular s 24A

iv. 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, in particular paragraphs [3.85] – [3.94]

v. relevant case law, in particular *De Tarle and Australian Securities and Investments Commission (Freedom of information)* [2015] AATA 770, and

vi. parties' submissions.

Consideration of whether reasonable steps undertaken

Section 24A requires that an agency or minister 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.

The Guidelines issued under s 93A of the Act explain:

> The Act is silent on what constitutes 'all reasonable steps'. The meaning of 'reasonable' in the context of s 24A(1)(a) has been construed as not going beyond the limit assigned by reason, not extravagant or excessive, moderate and of such an amount, size or number as is judged to be appropriate or suitable to the circumstances or purpose.
>
> Agencies and ministers should undertake a reasonable search on a flexible and common-sense interpretation of the terms of the request. What constitutes a reasonable search will depend on the circumstances of each request and will be influenced by the normal business practices in the agency's operating environment or the minister's office. At a minimum, an agency or minister should take comprehensive steps to locate documents, having regard to:
>
> - the subject matter of the documents
> - the current and past file management systems and the practice of destruction or removal of documents, and
> - 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.[1]

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]).

[1] Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the* Freedom of Information Act (FOI Guidelines) [3.88] — [3.89].

Agency's decision

Services Australia found that documents falling within the scope of your request cannot be found or do not exist. In its reasons for decision, Services Australia said:

s 22

Your submissions

In your IC review application, you advised:

s 22

In their response to the s 54Z Notice, Services Australia advised:

s 47E(d)

Evidence of searches undertaken

Services Australia provided the OAIC with details of the searches undertaken in relation to the FOI request and the outcome of those searches. I have considered these records, which indicate that Services Australia undertook searches through:

- its electronic records including but not limited to, electronic customer records, emails, shared computer drivers, CDs/DVDs and information on stored databases and,
- s 22 [redacted]

I have also considered the records of the above searches undertaken by Services Australia, which Services Australia also provided to the OAIC during the course of this IC review, which identified:

- The date searches were undertaken
- The team that undertook the searches
- The locations searched, as mentioned above all electronic records as paper files were not used in the period identified.
- The search terms used
- The outcomes of the searches undertaken
- Reasons as to why no documents have been found

Services Australia has also provided the OAIC with a copy of the correspondence between the decision maker and the individuals who conducted the searches. I have given weight to the correspondence as it demonstrates that additional queries were raised before making the decision to ensure that s22 [redacted] could not be found in any other location or form.

Discretion not to 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.

Having regard to the scope of your request, the parties' submissions, and Services Australia's evidence of searches, it appears that Services Australia has taken all reasonable steps to find documents within the scope of the request as it was required to do by s 24A and that relevant documents, if they existed, would have been found.

For these reasons, I intend to recommend that the Information Commissioner exercises the discretion to decide not to continue to undertake this IC review under s 54W, because I am of the view that this IC review application is lacking in substance.

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

If you disagree with this proposed recommendation, please write to us by **27 October 2021** 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 at foidr@oaic.gov.au . In all correspondence, please quote s 22 .

Yours sincerely

s 22

s 22

14 October 2021

ATTACHMENT A
Key procedural steps

Date	Events
2 November 2020	FOI request for: s 22 [redacted]
30 November 2020	Decision refusing access in part to under s 24A of the FOI Act
8 December 2020	IC review application received
14 July 2021	Respondent agency notified under s 54Z
14 July 2021	Request for information issued under s 54Z
4 August 2021	Request for information originally due
24 September 2021	Information received

Our reference: s 22

s 22

By email: s 22

Your application for Information Commissioner review of Services Australia's decision

Dear s 22

I refer to your application for Information Commissioner review (IC review) of a decision made by Services Australia (Services Australia) on 17 July 2020 under the *Freedom of Information Act 1982* (Cth) (the FOI Act).

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

The reasons for my recommendation follow.

Background

The key procedural steps in this IC review are set out at **Attachment A**.

Scope of IC review

The issue to be decided in this IC review is whether Services Australia has taken all reasonable steps to find documents within the scope of the request (s 24A of the FOI Act).

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

i. Services Australia's decision and reasons for decision of 16 June 2020
ii. Services Australia's internal review decision and reasons for decision of 17 July 2020
iii. evidence of searches undertaken by Services Australia
iv. the FOI Act, in particular s 24A

v. 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, in particular paragraphs [3.85] – [3.94]

vi. relevant case law, in particular *De Tarle and Australian Securities and Investments Commission (Freedom of information)* [2015] AATA 770, and

vii. the parties' submissions.

Consideration of whether reasonable steps undertaken

Section 24A requires that an agency or minister 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.

The Guidelines issued under s 93A of the Act explain:

> The Act is silent on what constitutes 'all reasonable steps'. The meaning of 'reasonable' in the context of s 24A(1)(a) has been construed as not going beyond the limit assigned by reason, not extravagant or excessive, moderate and of such an amount, size or number as is judged to be appropriate or suitable to the circumstances or purpose.
>
> Agencies and ministers should undertake a reasonable search on a flexible and common-sense interpretation of the terms of the request. What constitutes a reasonable search will depend on the circumstances of each request and will be influenced by the normal business practices in the agency's operating environment or the minister's office. At a minimum, an agency or minister should take comprehensive steps to locate documents, having regard to:
>
> - the subject matter of the documents
> - the current and past file management systems and the practice of destruction or removal of documents, and
> - 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.[1]

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]).

[1] Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the* Freedom of Information Act (FOI Guidelines) [3.88] — [3.89].

Agency/minister's decision

Services Australia found that documents falling within the scope of the applicant's request cannot be found or do not exist. In its reasons for decision, Services Australia said:

s 22 [redacted]

Parties' submissions

On 17 September 2020, you submitted:

s 22 [redacted]

s 22 [redacted]

On 1 October 2020, you further submitted:

s 22 [redacted]

On 28 January 2021, Services Australia submitted:

s 47E(d) [redacted]

s 47E(d)

[redacted]

Evidence of searches undertaken

Services Australia provided the OAIC with details of the searches undertaken in relation to the FOI request and the outcome of those searches. I have considered these records, which indicate that Services Australia undertook searches through:

- [redacted]
- [redacted]
- [redacted]

I have also considered the records of the above searches undertaken by Services Australia, which Services Australia also provided to the OAIC during the course of this IC review or Services Australia detailed in its reasons for decision, which identified:

- The date searches were undertaken
- The person/s who undertook the searches
- The locations searched
- The search terms used
- The outcomes of the searches undertaken

Discretion not to 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.

Having regard to the scope of your request, the parties' submissions and Services Australia's evidence of searches, it appears that Services Australia has taken all reasonable steps to find documents within the scope of the request as it was required to do by s 24A and that relevant documents, if they existed, would have been found.

Services Australia have also undertaken further searches for s 22 [redacted] to avoid any confusion and have not found any documents within the scope of the request.

For these reasons, I intend to recommend that the Information Commissioner exercises the discretion to decide not to continue to undertake this IC review under s 54W, because I am of the view that this IC review application is lacking in substance.

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

If you disagree with this proposed recommendation, please write to us by **27 October 2021** 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 s 22 [redacted] or via email s 22 [redacted]. In all correspondence please quote s 22 [redacted].

Yours sincerely

[redacted]

s 22 [redacted]

14 October 2021

ATTACHMENT A
Key procedural steps

Date	Events
17-09-2020	IC review application received
07-01-2021	Respondent agency notified under s 54Z
28-01-2021	Information received

Australian Government
Office of the Australian Information Commissioner

Our reference: s 22

s 22

By email: s 22

Your application for Information Commissioner review of Bureau of Meteorology's decision

Dear s 22

I refer to your application for Information Commissioner review (IC review) of a decision made by the Bureau of Meteorology (BoM) on 3 Jul, 2020 under the *Freedom of Information Act 1982* (Cth) (the FOI Act).

The purpose of this letter is to advise you of my intention to exercise the discretion to decide not to continue to undertake a review of your IC review application under s 54W of the FOI Act on the basis that your IC review application is lacking in substance, and to give you an opportunity to provide reasons for me to reconsider my view.

The reasons for my view follow.

Background

The key procedural steps in this IC review are set out at **Attachment A**.

Scope of IC review

The issue to be decided in this IC review is whether the BoM has taken all reasonable steps to find documents within the scope of the request (s 24A of the FOI Act).

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

i. the BoM's decision and reasons for decision of 3/02/2020
ii. evidence of searches undertaken by the BoM
iii. the FOI Act, in particular s 24A
iv. 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, in particular paragraphs [3.85] – [3.94]

v. relevant case law, in particular *De Tarle and Australian Securities and Investments Commission (Freedom of information)* [2015] AATA 770, and

vi. the parties' submissions.

Consideration of whether reasonable steps undertaken

Section 24A requires that an agency or minister 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.

The Guidelines issued under s 93A of the Act explain:

> The Act is silent on what constitutes 'all reasonable steps'. The meaning of 'reasonable' in the context of s 24A(1)(a) has been construed as not going beyond the limit assigned by reason, not extravagant or excessive, moderate and of such an amount, size or number as is judged to be appropriate or suitable to the circumstances or purpose.
>
> Agencies and ministers should undertake a reasonable search on a flexible and common-sense interpretation of the terms of the request. What constitutes a reasonable search will depend on the circumstances of each request and will be influenced by the normal business practices in the agency's operating environment or the minister's office. At a minimum, an agency or minister should take comprehensive steps to locate documents, having regard to:
>
> - the subject matter of the documents
> - the current and past file management systems and the practice of destruction or removal of documents, and
> - 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.[1]

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]).

Agency/minister's decision

The BoM found that documents falling within the scope of the applicant's request cannot be found or do not exist. In its reasons for decision, the BoM said:

[1] Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the* Freedom of Information Act (FOI Guidelines) [3.88] — [3.89].

s 22 [redacted]

Parties' submissions

You submitted:

s 22 [redacted]

The BoM submitted:

s 47E(d) [redacted]

s 47E(d) [redacted]

Evidence of searches undertaken

The BoM provided the OAIC with details of the searches undertaken in relation to the FOI request and the outcome of those searches.

These records indicate that BoM undertook searches through consulting with the following individuals in order to identify documents within the scope of the request:

s 22 [redacted]

BoM submits these staff are variously responsible for, and the Bureau's experts on

s 22 [redacted]

I have considered the records of the searches undertaken by the BoM, which the BoM also provided to the OAIC during the course of this IC review or BoM detailed in its reasons for decision, which identified:

- The date searches were undertaken

- The person/s who undertook the searches
- The locations searched
- The outcomes of the searches undertaken
- Reasons as to why no documents have been found.

Discretion not to 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.

Having regard to the scope of your request, the parties' submissions and the BoM's evidence of searches, it appears that the BoM has taken all reasonable steps to find documents within the scope of the request as it was required to do by s 24A and that relevant documents, if they existed, would have been found.

For these reasons, I intend to exercise the discretion to decide not to continue to undertake this IC review under s 54W, because I am of the view that this IC review application is lacking in substance.

I will review all material before the OAIC in deciding whether to exercise the discretion to decide not to continue to undertake a review in this case.

If you disagree with this proposed decision, please write to us by **27 October 2021** 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 s 22 or on s 22. In all correspondence please quote s 22.

Yours sincerely

s 22

s 22

14 October 2021

ATTACHMENT A
Key procedural steps

Date	Events
3 July 2020	IC review application received
4 January 2020	Respondent agency notified under s 54Z Agency requested to provide information
15 January 2021	Information received

Our reference: s 22
Agency reference: s 22

s 22

By email: s 22

Your application for Information Commissioner review of National Disability Insurance Agency's decision

Dear s 22

I refer to your application for Information Commissioner review (IC review) of a decision made by the National Disability Insurance Agency (NDIA) on 10 November 2020 under the *Freedom of Information Act 1982* (Cth) (the FOI Act).

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

The reasons for my recommendation follow.

Background

The key procedural steps in this IC review are set out at **Attachment A**.

Scope of IC review

The issue to be decided in this IC review is whether the NDIA has taken all reasonable steps to find documents within the scope of the request (s 24A of the FOI Act).

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

i. the NDIA's decision and reasons for decision of 30 September 2020
ii. evidence of searches undertaken by the NDIA
iii. the FOI Act, in particular s 24A

iv. 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, in particular paragraphs [3.85] – [3.94]

v. relevant case law, in particular *De Tarle and Australian Securities and Investments Commission (Freedom of information)* [2015] AATA 770, and

vi. the parties' submissions.

Consideration of whether reasonable steps undertaken

Section 24A requires that an agency or minister 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.

The Guidelines issued under s 93A of the Act explain:

> The Act is silent on what constitutes 'all reasonable steps'. The meaning of 'reasonable' in the context of s 24A(1)(a) has been construed as not going beyond the limit assigned by reason, not extravagant or excessive, moderate and of such an amount, size or number as is judged to be appropriate or suitable to the circumstances or purpose.
>
> Agencies and ministers should undertake a reasonable search on a flexible and common-sense interpretation of the terms of the request. What constitutes a reasonable search will depend on the circumstances of each request and will be influenced by the normal business practices in the agency's operating environment or the minister's office. At a minimum, an agency or minister should take comprehensive steps to locate documents, having regard to:
>
> - the subject matter of the documents
> - the current and past file management systems and the practice of destruction or removal of documents, and
> - 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.[1]

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]).

[1] Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the* Freedom of Information Act (FOI Guidelines) [3.88] — [3.89].

Agency decision

The NDIA found that documents falling within the scope of the applicant's request cannot be found or do not exist. In its reasons for decision, the NDIA said:

> s 22 [redacted]

You submitted:

> s 22 [redacted]

The NDIA submitted:

> s 47E(d) [redacted]

Evidence of searches undertaken

The NDIA provided the OAIC with details of the searches undertaken in relation to the FOI request and the outcome of those searches. I have considered these records, which indicate that NDIA undertook searches through its:

- case management system, and
- records management systems

I have also considered the records of the above searches undertaken by the NDIA, which the NDIA also provided to the OAIC during the course of this IC review or NDIA detailed in its reasons for decision, which identified:

- The date searches were undertaken
- The person/s who undertook the searches
- The locations searched
- The search terms used

- The outcomes of the searches undertaken

Discretion not to 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.

Having regard to the scope of your request, the parties' submissions and the NDIA's evidence of searches, it appears that the NDIA has taken all reasonable steps to find documents within the scope of the request as it was required to do by s 24A and that relevant documents, if they existed, would have been found.

For these reasons, I intend to recommend that the Information Commissioner exercises the discretion to decide not to continue to undertake this IC review under s 54W, because I am of the view that this IC review application is lacking in substance.

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

If you disagree with this proposed recommendation, please write to us by **27 October 2021** 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 s 22 or on s 22. In all correspondence please quote s 22.

Yours sincerely

s 22

14 October 2021

ATTACHMENT A
Key procedural steps

Date	Events
10 November 2020	IC review application received
16 December 2020	Respondent agency notified under s 54Z
15 February 2021	Respondent responded to s 54Z providing information and documents sought in the notice

Australian Government
Office of the Australian Information Commissioner

Our reference: s 22

s 22

By email: s 22

Your application for Information Commissioner review of Australian Prudential Regulation Authority's decision

Dear s 22

I refer to your application for Information Commissioner review (IC review) of a decision made by the Australian Prudential Regulation Authority (APRA) on 31 May 2020 under the *Freedom of Information Act 1982* (Cth) (the FOI Act).

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

The reasons for my recommendation follow.

Background

The key procedural steps in this IC review are set out at **Attachment A**.

Scope of IC review

The issue to be decided in this IC review is whether the APRA has taken all reasonable steps to find documents within the scope of the request (s 24A of the FOI Act).

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

i. the APRA's decision and reasons for decision of 25 May 2020
ii. evidence of searches undertaken by the APRA
iii. the FOI Act, in particular s 24A

iv. 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, in particular paragraphs [3.85] – [3.94]

v. relevant case law, in particular *De Tarle and Australian Securities and Investments Commission (Freedom of information)* [2015] AATA 770, and

vi. the parties' submissions.

Consideration of whether reasonable steps undertaken

Section 24A requires that an agency or minister 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.

The Guidelines issued under s 93A of the Act explain:

> The Act is silent on what constitutes 'all reasonable steps'. The meaning of 'reasonable' in the context of s 24A(1)(a) has been construed as not going beyond the limit assigned by reason, not extravagant or excessive, moderate and of such an amount, size or number as is judged to be appropriate or suitable to the circumstances or purpose.
>
> Agencies and ministers should undertake a reasonable search on a flexible and common-sense interpretation of the terms of the request. What constitutes a reasonable search will depend on the circumstances of each request and will be influenced by the normal business practices in the agency's operating environment or the minister's office. At a minimum, an agency or minister should take comprehensive steps to locate documents, having regard to:
>
> - the subject matter of the documents
> - the current and past file management systems and the practice of destruction or removal of documents, and
> - 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.[1]

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]).

[1] Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the* Freedom of Information Act (FOI Guidelines) [3.88] — [3.89].

Agency's decision

The APRA found that documents falling within the scope of the applicant's request cannot be found or do not exist. In its reasons for decision, the APRA said:

s 22 [redacted]

Parties' submissions

You submitted:

s 22 [redacted]

The APRA submitted:

s 47E(d) [redacted]

s 47E(d)

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Evidence of searches undertaken

The APRA provided the OAIC with details of the searches undertaken in relation to the FOI request and the outcome of those searches. s 47E(d)

[redacted]

I have also considered the records of the above searches undertaken by the APRA, which the APRA also provided to the OAIC during the course of this IC review, which identified:

- The date searches were undertaken
- The persons who undertook the searches
- The locations searched
- The outcomes of the searches undertaken
- Reasons as to why no documents could be found
- Limitations of the search

Discretion not to 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.

Having regard to the scope of your request, the parties' submissions and the APRA's evidence of searches, it appears that the APRA has taken all reasonable steps to find documents within the scope of the request as it was required to do by s 24A and that relevant documents, if they existed, would have been found.

For these reasons, I intend to recommend that the Information Commissioner exercises the discretion to decide not to continue to undertake this IC review under s 54W, because I am of the view that this IC review application is lacking in substance.

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

If you disagree with this proposed recommendation, please write to us by **27 October 2021** 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 s 22 or to FOIDR@oaic.gov.au. In all correspondence please quote s 22 .

Yours sincerely

s 22

FOI - IC Reviews

14 October 2021

ATTACHMENT A
Key procedural steps

Date	Events
31/05/2020	IC review application received
3/08/ 2020	Respondent agency notified under s 54Z
3/08/ 2020	Request for information issued under 55DA
24/08/ 2021	Request for information due
24/08/2021	Information received
15/04/2021	Submissions provided to applicant

Australian Government
Office of the Australian Information Commissioner

Our reference: s 22
Agency reference: s 22

s 22

By email: s 22

Your application for Information Commissioner review of Services Australia's decision

Dear s 22

I refer to your application for Information Commissioner review (IC review) of a decision made by Services Australia (Services Australia) on 4 September 2019 under the *Freedom of Information Act 1982* (Cth) (the FOI Act).

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

The reasons for my recommendation follow.

Background

On 5 August 2019, s 22 applied to Services Australia on your behalf for access to:

> s 22

On 4 September 2019, Services Australia advised the applicant it had identified two documents within the scope of the request. Services Australia released one document in accordance with its administrative access arrangements and refused access to one document. s 22

The key procedural steps in this IC review are set out at **Attachment A**.

Scope of IC review

The issue to be decided in this IC review is whether Services Australia has taken all reasonable steps to find documents within the scope of the request (s 24A of the FOI Act).

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

i. Services Australia's decision and reasons for decision of 4 September 2019

ii. evidence of searches undertaken by Services Australia

iii. the FOI Act, in particular s 24A

iv. 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, in particular paragraphs [3.85] – [3.94]

v. relevant case law, in particular *De Tarle and Australian Securities and Investments Commission (Freedom of information)* [2015] AATA 770, and

vi. the parties' submissions.

Consideration of whether reasonable steps undertaken

Section 24A requires that an agency or minister 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.

The Guidelines issued under s 93A of the FOI Act explain:

> The Act is silent on what constitutes 'all reasonable steps'. The meaning of 'reasonable' in the context of s 24A(1)(a) has been construed as not going beyond the limit assigned by reason, not extravagant or excessive, moderate and of such an amount, size or number as is judged to be appropriate or suitable to the circumstances or purpose.
>
> Agencies and ministers should undertake a reasonable search on a flexible and common-sense interpretation of the terms of the request. What constitutes a reasonable search will depend on the circumstances of each request and will be influenced by the normal business practices in the agency's operating environment or the minister's office. At a minimum, an agency or minister should take comprehensive steps to locate documents, having regard to:
>
> - the subject matter of the documents
> - the current and past file management systems and the practice of destruction or removal of documents, and
> - 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.[1]

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]).

Services Australia's decision

Services Australia found 2 documents falling within the scope of the request. Services Australia released document 1 through its administrative access arrangements and released document 2 s22 22 [redacted]

In your application for IC review you said:

> s 22 [redacted]
>
> [redacted]
>
> [redacted]

Parties' submissions

You submit that:

> s 22 [redacted]

Services Australia provided submissions to the OAIC in response to a request for information pursuant to s 54Z of the FOI Act. A copy of these submissions is enclosed.[2]

Relevantly, Services Australia submits:

> s 47E(d) [redacted]
>
> [redacted]

[1] 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) [3.88] — [3.89].

[2] s22 [redacted]

s 47E(d)

[redacted]

[redacted]

[redacted]

[redacted]

Evidence of searches undertaken

Services Australia provided the OAIC with details of the searches undertaken in relation to the FOI request and the outcome of those searches. I have considered these records, which indicate that Services Australia undertook searches through:

- Case Management and Record Management Systems, specifically Customer First and Customer Record
- Electronic documents saved on computers, electronic devices such as iPads, smartphones and apps (for example emails on Outlook, text messages etc)
- s 22 [redacted] and the Archiving and Culling Engine for archived file notes and letters.

I have considered the records of the above searches undertaken by Services Australia, which identified:

- The date searches were undertaken
- The persons who undertook the searches
- The locations searched

- The search terms used
- The outcomes of the searches undertaken
- and where applicable, I have also considered the reasons as to why no further documents have been found
- Limitations of the search.

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 Services Australia's evidence of searches and their submissions. I have also considered your submissions and the scope of your FOI request.

The submissions and evidence provided by Services Australia demonstrate that:

- s 47E(d) [redacted]
- [redacted]
- [redacted]

Based on Services Australia's submissions and the evidence of searches discussed above and having regard to the specific scope of the request, it appears that there are no further documents falling within the scope of the request that Services Australia has not already released.

Accordingly, it would appear that Services Australia 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 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.

Having regard to the scope of your request, the parties' submissions and Services Australia's evidence of searches, it appears that the Services Australia has taken all reasonable steps to find documents within the scope of the request as it was required to do by s 24A and that further relevant documents, if they existed, would have been found.

For these reasons, I intend to recommend that the Information Commissioner exercises the discretion to decide not to continue to undertake this IC review under s 54W, because I am of the view that this IC review application is lacking in substance.

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

If you disagree with this proposed recommendation, please write to us by **27 October 2021** 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 s 22 or s 22. In all correspondence please quote s 22.

Yours sincerely

s 22

s 22

14 October 2021

ATTACHMENT A
Key procedural steps

Date	Events
24/12/2019	IC review application received
07/01/2020	EOT to apply for IC review granted under s 54T
19/01/2020	The applicant confirmed the scope of the review
27/05/2020	Respondent agency notified under s 54Z
30/06/2020	Information received in response to s 54Z notice

Our reference: s 22

s 22

By email: s 22

Your application for Information Commissioner review of Department of Veterans' Affairs's decision

Dear s 22

I refer to your application for Information Commissioner review (IC review) of a decision made by the Department of Veterans' Affairs (the Department) on 21 September 2020 under the *Freedom of Information Act 1982* (Cth) (the FOI Act).

The purpose of this letter is to advise you of my intention to recommend that the delegate of the Information Commissioner exercises the discretion to decide not to continue to undertake a review of your IC review application under s 54W of the FOI Act on the basis that your IC review application 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

The key procedural steps in this IC review are set out at **Attachment A**.

Scope of IC review

The issue to be decided in this IC review is whether the Department has taken all reasonable steps to find documents within the scope of the request (s 24A of the FOI Act).

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

i. the Department's decision and reasons for decision of 18 September 2020
ii. evidence of searches undertaken by the Department
iii. the FOI Act, in particular s 24A

iv. 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, in particular paragraphs [3.85] – [3.94]

v. relevant case law, in particular *De Tarle and Australian Securities and Investments Commission (Freedom of information)* [2015] AATA 770, and

vi. the parties' submissions.

Consideration of whether reasonable steps undertaken

Section 24A requires that an agency or minister 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.

The Guidelines issued under s 93A of the Act explain:

> The Act is silent on what constitutes 'all reasonable steps'. The meaning of 'reasonable' in the context of s 24A(1)(a) has been construed as not going beyond the limit assigned by reason, not extravagant or excessive, moderate and of such an amount, size or number as is judged to be appropriate or suitable to the circumstances or purpose.
>
> Agencies and ministers should undertake a reasonable search on a flexible and common-sense interpretation of the terms of the request. What constitutes a reasonable search will depend on the circumstances of each request and will be influenced by the normal business practices in the agency's operating environment or the minister's office. At a minimum, an agency or minister should take comprehensive steps to locate documents, having regard to:
>
> - the subject matter of the documents
> - the current and past file management systems and the practice of destruction or removal of documents, and
> - 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.[1]

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]).

[1] Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the* Freedom of Information Act (FOI Guidelines) [3.88] — [3.89].

Agency/minister's decision

The Department found that s22 [redacted] fell within the scope of the applicant's request and were released to the applicant in full with some exemptions under s 22. The Department said:

> s 22 [redacted]

Parties' submissions

On 24 September 2020, you submitted:

> s 22 [redacted]

On 18 February 2021, the Department submitted:

> s 47E(d) [redacted]

s 47E(d)

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

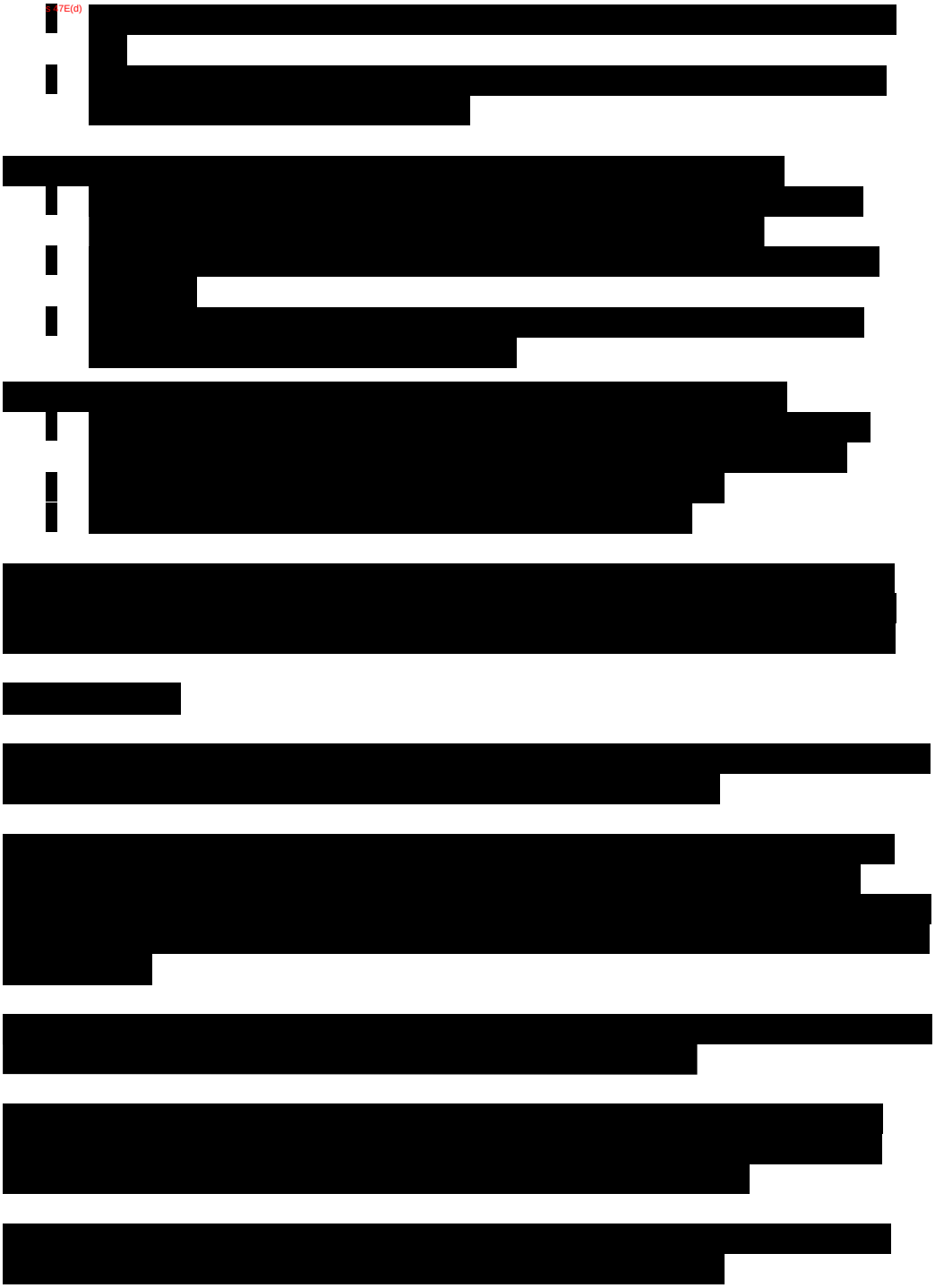
[redacted]

[redacted]

[redacted]

[redacted]

[redacted]



Evidence of searches undertaken

The Department provided the OAIC with details of the searches undertaken in relation to the FOI request and the outcome of those searches. I have considered these records, which indicate that the Department undertook searches through:

- The Client Benefits Division (CBD)
- The Client Engagement and Support Services Division (CESS)
- Records Management System (TRIM)

The Department also undertook further searches upon notification of the IC review and have advised that no new documents were found in the scope of the request. The Department advised that an attachment to one document originally identified was not included in the document bundle. The Department has advised this has now been provided to the applicant.

I have also considered the records of the above searches undertaken by the Department, which the Department also provided to the OAIC during the course of this IC review, which identified:

- The date searches were undertaken
- The person/s who undertook the searches
- The locations searched
- The search terms used
- The outcomes of the searches undertaken

Discretion not to 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.

Having regard to the scope of your request, the parties' submissions and the Department's evidence of searches, it appears that the Department has taken all reasonable steps to find documents within the scope of the request as it was required to do by s 24A and that relevant documents, if they existed, would have been found.

For these reasons, I intend to recommend that the Information Commissioner exercises the discretion to decide not to continue to undertake this IC review under s 54W, because I am of the view that this IC review application is lacking in substance.

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

If you disagree with this proposed recommendation, please write to us by **27 October 2021** 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 s 22 or via email s 22 . In all correspondence please quote s 22 .

Yours sincerely

s 22

s 22

14 October 2021

ATTACHMENT A
Key procedural steps

Date	Events
21-09-2020	IC review application received
05-01-2021	Respondent agency notified under s 54Z
18-02-2021	Information received

Our reference: s 22

Agency reference: s 22

s 22

By email: s 22

Your application for Information Commissioner review of Australian Taxation Office's decision

Dear s 22

I refer to your application for Information Commissioner review (IC review) of an Internal review decision made by the Australian Taxation Office (the ATO) on 13 October 2020 under the *Freedom of Information Act 1982* (Cth) (the FOI Act).

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

The reasons for my recommendation follow.

Background

The key procedural steps in this IC review are set out at **Attachment A**.

Scope of IC review

The issue to be decided in this IC review is whether the ATO has taken all reasonable steps to find documents within the scope of the request (s 24A of the FOI Act).

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

i. the ATO's decision and reasons for decision of 20 August 2020
ii. the ATO's internal review decision and reasons for decision of 13 October 2020
iii. evidence of searches undertaken by the ATO

iv. the FOI Act, in particular s 24A

v. 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, in particular paragraphs [3.85] – [3.94]

vi. relevant case law, in particular *De Tarle and Australian Securities and Investments Commission (Freedom of information)* [2015] AATA 770, and

vii. the parties' submissions.

Consideration of whether reasonable steps undertaken

Section 24A requires that an agency or minister 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.

The Guidelines issued under s 93A of the Act explain:

> The Act is silent on what constitutes 'all reasonable steps'. The meaning of 'reasonable' in the context of s 24A(1)(a) has been construed as not going beyond the limit assigned by reason, not extravagant or excessive, moderate and of such an amount, size or number as is judged to be appropriate or suitable to the circumstances or purpose.
>
> Agencies and ministers should undertake a reasonable search on a flexible and common-sense interpretation of the terms of the request. What constitutes a reasonable search will depend on the circumstances of each request and will be influenced by the normal business practices in the agency's operating environment or the minister's office. At a minimum, an agency or minister should take comprehensive steps to locate documents, having regard to:
>
> - the subject matter of the documents
> - the current and past file management systems and the practice of destruction or removal of documents, and
> - 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.[1]

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]).

---

[1] Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the* Freedom of Information Act (FOI Guidelines) [3.88] — [3.89].

Agency's decision

The ATO found that documents falling within the scope of your request cannot be found or do not exist. In the original decision dated 20 August 2020, the ATO said:

s 22 [redacted]

In the ATO's internal review decision, dated 13 October 2020, it affirmed the original decision and said:

s 22 [redacted]

s 22 [redacted]

[redacted]

Your submissions

In your IC review application, you advised:

s 22 [redacted]

Your IC review application was accompanied by screenshots of the following:

- s 22 [redacted]
- [redacted]
- [redacted]

We note this additional information was provided to the ATO with the 54Z Notification, the ATO submitted:

s 47E(d) [redacted]

[redacted]

Evidence of searches undertaken

The ATO provided the OAIC with details of the searches undertaken in relation to the FOI request and the outcome of those searches. I have considered these records, which indicate that the ATO undertook searches through:

- Individual staff members at the ATO
- The ATO Records Centre (the paper record database)
- Electronic searches by the Service Delivery Centre and RDR Secretariat

I have also considered the records of the above searches undertaken by the ATO, which the ATO also provided to the OAIC during the course of this IC review, which identified:

- The date searches were undertaken
- The persons who undertook the searches
- The locations searched
- The search terms used, s 22 [redacted]
- The outcomes of the searches undertaken
- Limitations of the search

s 47E(d) [redacted]

Discretion not to 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.

Having regard to the scope of your request, the parties' submissions and the ATO's evidence of searches, it appears that the ATO has taken all reasonable steps to find documents within the scope of the request as it was required to do by s 24A and that relevant documents, if they existed, would have been found.

For these reasons, I intend to recommend that the Information Commissioner exercises the discretion to decide not to continue to undertake this IC review under s 54W, because I am of the view that this IC review application is lacking in substance.

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

If you disagree with this proposed recommendation, please write to us by **27 October 2021** 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 at foidr@oaic.gov.au and quote s 22 in all your correspondence.

Yours sincerely

s 22

14 October 2021

ATTACHMENT A
Key procedural steps

Date	Events
26 July 2021	FOI request for: s 22 [redacted]
20 August 2020	Decision refusing access under s 24A of the FOI Act
15 September 2020	Internal review sought on the following grounds: s 22 [redacted]
13 October 2021	Internal Review affirming the original decision to refuse access under s 24A of the FOI Act

6 December 2021	IC review application received
1 May 2021	Respondent agency notified under s 54Z
1 May 2021	Request for information issued under s 54Z
22 May 2021	Request for information due
24 May 2021	Information received

Australian Government
Office of the Australian Information Commissioner

Our reference: s 22

s 22
Sent by email: s 22

Application for Information Commissioner review of Services Australia's decision

Dear s 22

I refer to your request on behalf on s 22 for Information Commissioner review (IC review) of a decision made by Services Australia on 22 May 2020 under the *Freedom of Information Act 1982* (Cth) (the FOI Act).

The purpose of this letter is to advise you of my intention to exercise the discretion to decide not to continue to undertake a review of your IC review application under s 54W of the FOI Act on the basis that your IC review application is lacking in substance, and to give you an opportunity to provide reasons for me to reconsider my view.

The reasons for my view follow.

Background

The key procedural steps in this IC review are set out at **Attachment A**.

Scope of IC review

The issue to be decided in this IC review is whether Services Australia has taken all reasonable steps to find documents within the scope of the request (s 24A of the FOI Act).

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

i. Services Australia's decision and reasons for decision of 22/05/2020
ii. evidence of searches undertaken by Services Australia
iii. the FOI Act, in particular s 24A
iv. 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, in particular paragraphs [3.85] – [3.94]

v. relevant case law, in particular *De Tarle and Australian Securities and Investments Commission (Freedom of information)* [2015] AATA 770, and

vi. the parties' submissions.

Consideration of whether reasonable steps undertaken

Section 24A requires that an agency or minister 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.

The Guidelines issued under s 93A of the Act explain:

> The Act is silent on what constitutes 'all reasonable steps'. The meaning of 'reasonable' in the context of s 24A(1)(a) has been construed as not going beyond the limit assigned by reason, not extravagant or excessive, moderate and of such an amount, size or number as is judged to be appropriate or suitable to the circumstances or purpose.
>
> Agencies and ministers should undertake a reasonable search on a flexible and common-sense interpretation of the terms of the request. What constitutes a reasonable search will depend on the circumstances of each request and will be influenced by the normal business practices in the agency's operating environment or the minister's office. At a minimum, an agency or minister should take comprehensive steps to locate documents, having regard to:
>
> - the subject matter of the documents
> - the current and past file management systems and the practice of destruction or removal of documents, and
> - 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.[1]

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]).

Agency's decision

Services Australia found that documents falling within the scope of the applicant's request cannot be found or do not exist. In its reasons for decision, Services Australia said:

[1] Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the* Freedom of Information Act (FOI Guidelines) [3.88] — [3.89].

s 22 [redacted]

Parties' submissions

You submitted that more documents are available that fall within the scope of your request.

Services Australia submits:

s 47E(d) [redacted]

Evidence of searches undertaken

Services Australia provided the OAIC with details of the searches undertaken in relation to the FOI request and the outcome of those searches.

s 47E(d)

[redacted]

[redacted]

[redacted]

I have also considered the records of the above searches undertaken by Services Australia, which Services Australia also provided to the OAIC during the course of this IC review or Services Australia detailed in its reasons for decision, which identified:

- The date searches were undertaken
- The person/s who undertook the searches
- The locations searched
- The outcomes of the searches undertaken
- Reasons as to why no documents have been found.

Discretion not to 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.

Having regard to the scope of your request, the parties' submissions and Services Australia's evidence of searches, it appears that Services Australia has taken all reasonable steps to find documents within the scope of the request as it was required to do by s 24A and that relevant documents, if they existed, would have been found.

For these reasons, I intend to exercise the discretion to decide not to continue to undertake this IC review under s 54W, because I am of the view that this IC review application is lacking in substance.

I will review all material before the OAIC in deciding whether to exercise the discretion to decide not to continue to undertake a review in this case.

If you disagree with this proposed recommendation, please write to us by **27 October 2021** 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 s 22 or on s 22. In all correspondence please quote s 22.

Yours sincerely

s 22

s 22

14 October 2021

ATTACHMENT A
Key procedural steps

Date	Events
25 May 2020	IC review application received
3 August 2020	Respondent agency notified under s 54Z
24 August 2020	Information received

Australian Government
Office of the Australian Information Commissioner

Our reference: s 22
Agency reference: s 22

s22

By email: s 22

Your application for Information Commissioner review of Attorney-General's Department's decision

Dear s22

I refer to your application for Information Commissioner review (IC review) of a decision made by the Attorney-General's Department (the Department) on 24 March 2021 under the *Freedom of Information Act 1982* (Cth) (the FOI Act).

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

The reasons for my recommendation follow.

Background

On 20 February 2021, you applied to the Department for access to documents.

On 25 February 2021, the Department asked you to confirm its understanding of the FOI request.

On the same day you responded with a series of correspondence stating:

s 22

1300 363 992
enquiries@oaic.gov.au
T +61 2 9284 9749
F +61 2 9284 9666
GPO Box 5218
Sydney NSW 2001
www.oaic.gov.au
ABN 85 249 230 937

OAIC

s 22 [redacted]

[redacted]

Between 3 March 2021 and 23 March 2021, there was a series of correspondence exchanged between you and the Department to clarify the request.

On 24 March 2021, the Department made a decision to refuse the request under s24A of the FOI Act on the basis that the documents do not exist.

On 25 March 2021, you sought IC review of the Department's decision.

The key procedural steps in this IC review are set out at **Attachment A**.

Scope of IC review

The issue to be decided in this IC review is whether the AGD has taken all reasonable steps to find documents within the scope of the request (s 24A of the FOI Act).

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

i. the Department's decision and reasons for decision of 24 March 2021
ii. evidence of searches undertaken by the AGD
iii. the FOI Act, in particular s 24A
iv. 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, in particular paragraphs [3.85] – [3.94]
v. relevant case law, in particular *De Tarle and Australian Securities and Investments Commission (Freedom of information)* [2015] AATA 770, and
vi. the parties' submissions.

Consideration of whether reasonable steps undertaken

Section 24A requires that an agency or minister 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.

The Guidelines issued under s 93A of the Act explain:

> The Act is silent on what constitutes 'all reasonable steps'. The meaning of 'reasonable' in the context of s 24A(1)(a) has been construed as not going beyond the limit assigned by reason, not extravagant or excessive, moderate and of such an amount, size or number as is judged to be appropriate or suitable to the circumstances or purpose.

Agencies and ministers should undertake a reasonable search on a flexible and common-sense interpretation of the terms of the request. What constitutes a reasonable search will depend on the circumstances of each request and will be influenced by the normal business practices in the agency's operating environment or the minister's office. At a minimum, an agency or minister should take comprehensive steps to locate documents, having regard to:

- the subject matter of the documents
- the current and past file management systems and the practice of destruction or removal of documents, and
- 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.[1]

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]).

The Department's decision

The Department found that documents falling within the scope of the applicant's request cannot be found or do not exist. In its reasons for decision, the Department said:

s 22 [redacted]

[redacted]

Parties' submissions

On 22 March 2021, you submitted:

s 22 [redacted]

[1] Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the* Freedom of Information Act (FOI Guidelines) [3.88] — [3.89].

On 25 March 2021, you further submitted:

s 22 [redacted]

On 13 May 2021, the Department submitted:

s 47E(d) [redacted]

[redacted]

Evidence of searches undertaken

The Department provided the OAIC with details of the searches undertaken in relation to the FOI request and the outcome of those searches. I have considered these records, which indicate that Department undertook searches through the relevant:

- Records Management System

I have also considered the records of the above searches undertaken by the Department , which it also provided to the OAIC during the course of this IC review or detailed in its reasons for decision, which identified:

- The date searches were undertaken
- The person/s who undertook the searches
- The locations searched
- The search terms used
- The outcomes of the searches undertaken

Discretion not to 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.

Having regard to the scope of your request, the parties' submissions and the AGD's evidence of searches, it appears that the AGD has taken all reasonable steps to find documents within the scope of the request as it was required to do by s 24A and that relevant documents, if they existed, would have been found.

For these reasons, I intend to recommend that the Information Commissioner exercises the discretion to decide not to continue to undertake this IC review under s 54W, because I am of the view that this IC review application is lacking in substance.

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

If you disagree with this proposed recommendation, please write to us by **27 October 2021** 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 s 22 . In all correspondence please quote s 22 .

Yours sincerely

s 22

s 22

15 October 2021

ATTACHMENT A
Key procedural steps

Date	Events
25 March 2021	IC review application received
22 April 2021	Respondent agency notified under s 54Z
13 May 2021	Request for information due
13 May 2021	Information received

Our reference: s 22

s 22

[redacted]

Your application for Information Commissioner review of Australian Federal Police's decision

Dear s 22

I refer to your application for Information Commissioner review (IC review) of a decision made by the Australian Federal Police (AFP) on 20 August 2020 under the *Freedom of Information Act 1982* (Cth) (the FOI Act).

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

The reasons for my recommendation follow.

Background

The key procedural steps in this IC review are set out at **Attachment A**.

Scope of IC review

The issue to be decided in this IC review is whether the AFP has taken all reasonable steps to find documents within the scope of the request (s 24A of the FOI Act).

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

i. the AFP's decision and reasons for decision of 20 August 2020
ii. evidence of searches undertaken by the AFP
iii. the FOI Act, in particular s 24A

iv. 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, in particular paragraphs [3.85] – [3.94]

v. relevant case law, in particular *De Tarle and Australian Securities and Investments Commission (Freedom of information)* [2015] AATA 770, and

vi. the parties' submissions.

Consideration of whether reasonable steps undertaken

Section 24A requires that an agency or minister 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.

The Guidelines issued under s 93A of the Act explain:

> The Act is silent on what constitutes 'all reasonable steps'. The meaning of 'reasonable' in the context of s 24A(1)(a) has been construed as not going beyond the limit assigned by reason, not extravagant or excessive, moderate and of such an amount, size or number as is judged to be appropriate or suitable to the circumstances or purpose.
>
> Agencies and ministers should undertake a reasonable search on a flexible and common-sense interpretation of the terms of the request. What constitutes a reasonable search will depend on the circumstances of each request and will be influenced by the normal business practices in the agency's operating environment or the minister's office. At a minimum, an agency or minister should take comprehensive steps to locate documents, having regard to:
>
> - the subject matter of the documents
> - the current and past file management systems and the practice of destruction or removal of documents, and
> - 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.[1]

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]).

[1] Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the* Freedom of Information Act (FOI Guidelines) [3.88] — [3.89].

AFP' decision

The AFP found that documents falling within the scope of the applicant's request cannot be found or do not exist. In its reasons for decision, the AFP said:

s 22

Parties' submissions

You submitted:

s 22

s 22

s 22

The AFP submitted:

s 47E(d)

s 47E(d)

[redacted]

[redacted]

Evidence of searches undertaken

The AFP provided the OAIC with details of the searches undertaken in relation to the FOI request and the outcome of those searches. I have considered these records, which indicate that AFP undertook searches through:

- Case Management System
- Records Management System
- Electronic documents saved on computers (for example emails on Outlook, computer drives etc)

I have also considered the records of the above searches undertaken by the AFP, which the AFP also provided to the OAIC during the course of this IC review or AFP detailed in its reasons for decision, which identified:

- The date searches were undertaken
- The person/s who undertook the searches
- The locations searched
- The search terms used
- The outcomes of the searches undertaken
- Reasons as to why no documents have been found
- Limitations of the search

Discretion not to 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.

Having regard to the scope of your request, the parties' submissions and the AFP's evidence of searches, it appears that the AFP has taken all reasonable steps to find documents within the scope of the request as it was required to do by s 24A and that relevant documents, if they existed, would have been found.

For these reasons, I intend to recommend that the Information Commissioner exercises the discretion to decide not to continue to undertake this IC review under s 54W, because I am of the view that this IC review application lacking in substance.

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

If you disagree with this proposed recommendation, please write to us by three weeks **5 November 2021** 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 s 22 or on s 22. In all correspondence please quote s 22.

Yours sincerely

s 22

s 22

15 October 2021

ATTACHMENT A
Key procedural steps

Date	Events
8 July 2020	FOI request
20 August 2020	Decision refusing access on the basis that documents do not exist
4 September 2020	IC review application received
10 November 2020	Respondent agency notified under s 54Z
10 November 2020	Request for information issued under s 54Z
1 December 2020	Request for information due
7 January 2021	Information received
14 October 2021	Submissions provided to parties

Our reference: s 22
Agency reference: s 22

s 22

By email: s 22

Your application for Information Commissioner review of the Administrative Appeals Tribunal's decision

Dear s 22 ,

I refer to your application for Information Commissioner review (IC review) of a decision made by the Administrative Appeals Tribunal (AAT) on 23 June 2021 under the *Freedom of Information Act 1982* (Cth) (the FOI Act).

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

The reasons for my recommendation follow.

Background

The key procedural steps in this IC review are set out at **Attachment A**.

Scope of IC review

The issue to be decided in this IC review is whether the AAT has taken all reasonable steps to find documents within the scope of the request (s 24A of the FOI Act).

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

i. the AAT's decision and reasons for decision of 1 July 2020
ii. the AAT's revised decision and reasons for decision of 23 June 2021
iii. evidence of searches undertaken by the AAT
iv. the FOI Act, in particular s 24A

v. 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, in particular paragraphs [3.85] – [3.94]

vi. relevant case law, in particular *De Tarle and Australian Securities and Investments Commission (Freedom of information)* [2015] AATA 770, and

vii. the parties' submissions.

Consideration of whether reasonable steps undertaken

Section 24A requires that an agency or minister 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.

The Guidelines issued under s 93A of the Act explain:

> The Act is silent on what constitutes 'all reasonable steps'. The meaning of 'reasonable' in the context of s 24A(1)(a) has been construed as not going beyond the limit assigned by reason, not extravagant or excessive, moderate and of such an amount, size or number as is judged to be appropriate or suitable to the circumstances or purpose.
>
> Agencies and ministers should undertake a reasonable search on a flexible and common-sense interpretation of the terms of the request. What constitutes a reasonable search will depend on the circumstances of each request and will be influenced by the normal business practices in the agency's operating environment or the minister's office. At a minimum, an agency or minister should take comprehensive steps to locate documents, having regard to:
>
> - the subject matter of the documents
> - the current and past file management systems and the practice of destruction or removal of documents, and
> - 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.[1]

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]).

[1] Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the* Freedom of Information Act (FOI Guidelines) [3.88] — [3.89].

The AAT's decision

The AAT found that documents falling within the scope of your request cannot be found or do not exist. In its reasons for decision, the AAT said:

s 22

[redacted]

s 22

Parties' submissions

You submitted:

s 22

The AAT submitted:

s 47E(d)

s 47E(d)

[redacted]

A copy of the AAT's submissions dated 18 August 2021 is **enclosed**.

Evidence of searches undertaken

The AAT provided the OAIC with details of the searches undertaken in relation to the FOI request and the outcome of those searches. I have considered these records, which indicate that AAT undertook searches through:

- Case Management System
- Records Management System
- Hardcopy files archived with the s 47E(d)
- s 47E(d)

I have also considered the records of the above searches undertaken by the AAT, which the AAT also provided to the OAIC during the course of this IC review and the AAT detailed in its reasons for decision, which identified:

- The date searches were undertaken
- The person/s who undertook the searches
- The locations searched
- The search terms used
- The outcomes of the searches undertaken
- Reasons as to why some documents have not been found, for example, they have been destroyed
- The AAT's Record Destruction Authority
- The details of the AAT's offsite archive contractor in possession of documents within the scope of the request
- Limitations of the search

Discretion not to 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.

Having regard to the scope of your request, the parties' submissions and the AAT's evidence of searches, it appears that the AAT has taken all reasonable steps to find documents within the scope of the request as it was required to do by s 24A and that relevant documents, if they existed, would have been found.

For these reasons, I intend to recommend that the Information Commissioner exercises the discretion to decide not to continue to undertake this IC review under s 54W, because I am of the view that this IC review application is lacking in substance.

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

If you disagree with this proposed recommendation, please write to us by 27 October 2021 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 s 22 or on s 22. In all correspondence please quote s 22.

Yours sincerely

s 22

s 22

15 October 2021

ATTACHMENT A
Key procedural steps

Date	Events
2 May 2020	FOI request for: s 22 [redacted]
1 June 2020	The AAT sought an extension of time under s15AB of the FOI Act
1 July 2020	The AAT made a decision granting access to documents
13 July 2020	IC review application received
11May 2021	Respondent agency notified under s 54Z
2 July 2021	Request for information issued under s 55(2)(a)
23 July 2021	Request for information due
18 August 2021	Information received
14 October 2021	Submissions provided to parties
23 June 2021	Revised decision

Australian Government
Office of the Australian Information Commissioner

Our reference: s 22
Agency reference: s 22

s 22

By email to: s 22

Your application for Information Commissioner review of the Department of Home Affairs' decision

Dear s 22

I refer to your request for Information Commissioner review (IC review) of a decision made by the Department of Home Affairs (Department) under the *Freedom of Information Act 1982* (Cth).

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 continue to undertake a review of your IC review application under s 54W of the FOI Act, on the basis that your IC review application is lacking in substance, and
- to give you an opportunity to provide reasons for me to reconsider making this recommendation.

The reasons for my recommendation follow.

Background

On 16 February 2021, you applied to the Department for access to[1]:

s 22 .

s 22 [redacted]

On 22 March 2021, you sought IC review of the Department's deemed decision under s 54L of the FOI Act.

On 12 April 2021, the Department made a substantive decision refusing the request under s 24A(1)(a)(ii) of the FOI Act on the basis that all reasonable steps had been taken to find documents and the Department was satisfied that documents falling within the scope of the request do not exist.

Scope of IC review

The issue to be decided in this IC review is whether the Department has taken all reasonable steps to find documents within the scope of your 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 Department's decision and reasons for decision
- the FOI Act, in particular ss 24A and 54W(a)
- 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 paragraph [3.89]
- relevant case law, in particular *De Tarle and Australian Securities and Investments Commission (Freedom of Information)* [2015] AATA 770, and
- the Department's submissions.

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

In their reasons for decision the Department said:

s 22 [redacted]

Section 24A of the FOI Act requires the Department 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 Department has provided evidence of searches conducted, being email correspondence between the decision maker and relevant business areas and individuals who conducted searches. The Department also provided submissions, a copy of which are enclosed. The annexures have not been shared.

Based on the submissions and evidence provided, it appears that the Department has taken all reasonable steps to locate documents in the scope of your request. The submissions and evidence demonstrate that:

- the Department's FOI section identified and contacted the relevant business area that may hold documents within the scope of your request, and

- s 47E(d) [redacted]

I also consider it relevant that:

s47E(d) [redacted]

[redacted]

Discretion not to 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.

As discussed above, based on the Department's submissions and evidence of searches, and taking into account the scope of your request, it appears that the Department has taken all reasonable steps to find documents within the scope of your request as required by s 24A of the FOI Act.

Further, there is no evidence before the OAIC to support the view that there are documents that fall within the scope of your request that are in the Department's possession.

For these reasons, I intend to recommend that a delegate of the Information Commissioner exercises the discretion to decide not to continue to undertake this IC review under s 54W, because I am of the view that this IC review application is lacking in substance.

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

Next steps

If you disagree with this proposed recommendation, please write to us by **7 October 2021** 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 s 22 or s 22 . In all correspondence please quote s 22 .

Yours sincerely

s 22

s 22

16 September 2021

Australian Government
Office of the Australian Information Commissioner

Our reference: s 22
Agency reference: s 22

s 22

By email to: s 22

Your application for Information Commissioner review of the Minister for Home Affairs' decision

Dear s 22

I refer to your request for Information Commissioner review (IC review) of a decision made by the Minister for Home Affairs (the Minister) under the *Freedom of Information Act 1982* (Cth) (FOI Act).

The purpose of this letter is to:

- advise you of my intention to recommend that the delegate of the Information Commissioner exercises the discretion to decide not to continue to undertake a review of your IC review application under s 54W of the FOI Act, on the basis that your IC review application is lacking in substance, and
- to give you an opportunity to provide reasons for me to reconsider making this recommendation.

The reasons for my recommendation follow.

Background

On 16 February 2021, you applied to the Minister for access to:

s 22

On 22 March 2021, you sought IC review of the Minister's deemed decision under s 54L of the FOI Act.

On 30 March 2021, the Hon Karen Andrews MP was sworn in as Minister for Home Affairs, however, the request was made to the previous Minister, the Hon Peter Dutton MP. Under the FOI Act the request is taken to have been made to the new Minister.

On 14 May 2021, the person authorised by the then Minister made a substantive decision refusing the request under s 24A(1)(a)(ii) of the FOI Act on the basis that all reasonable steps had been taken to find documents and the Minister was satisfied that documents falling within the scope of the request do not exist.

Scope of IC review

The issue to be decided in this IC review is whether the Minister has taken all reasonable steps to find documents within the scope of your request, in accordance with s 24A(1) of the FOI Act.

The definition of 'official document of a Minister' or 'official document of the Minister' in s 4 of the FOI Act appears relevant to the issue of searches.

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

- the Minister's decision and reasons for decision
- the FOI Act, in particular ss 4(1), 15, 24A and 54W(a)
- 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 [2.52], [3.89]
- relevant case law, in particular *De Tarle and Australian Securities and Investments Commission (Freedom of Information)* [2015] AATA 770, and
- the Office of the Minister for Home Affairs' submissions.

Official document of a minister (s 4(1))

Section 15 of the FOI Act sets out the procedure which applies where a person wishes to obtain access to an 'official document of a Minister'.

For a document to be an 'official document of a Minister' or 'official document of the Minister' it must be in the possession or deemed to be in the possession of the minister pursuant to s 4(1) of the FOI Act. The first element of this definition is that a document is 'in the possession of a Minister … in his or her capacity as a Minister'.

Section 4(1) of the FOI Act explains that the term 'official document of a Minister' means:

> ... a document that is in the possession of a Minister, or that is in the **possession of the Minister concerned**, as the case requires, in his or her capacity as a Minister, being a document that relates to the affairs of an agency or of a Department of State and, for the purposes of this definition, a Minister shall be deemed to be in possession of a document that

has passed from his or her possession if he or she is entitled to access to the document and the document is not a document of an agency. (emphasis added)

Where an FOI request is made naming a Minister as a respondent and there is a change of Minister, generally the request continues with the new Minister as the respondent. However, if the request relates to a document that was in the possession of the former Minister but is not in the possession of the new Minister, that document would no longer be an official document of a Minister and will therefore not be subject to the FOI Act.

What is an 'official document of a minister'?

An 'official document of a minister' is a document in a minister's possession that relates to the affairs of an agency. 'Possession' can include a document held in the minister's office or a document a minister is entitled to hold.

s22 [redacted]

s22 [redacted]

…

s22 [redacted]

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

s47E(d) [redacted]

Section 24A of the FOI Act requires the 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 Office of the Minister for Home Affairs has provided submissions, which are enclosed.

s47E(d) [redacted]

Discretion not to 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.

As set out at [2.52] of the FOI Guidelines, the application of s 4 of the FOI Act excludes by implication documents held by a former minister. s22 [redacted] s22

s22 [redacted]

Further, there is no evidence before the OAIC to support the view that there are documents that fall within the scope of your request that are in the Minister's possession.

For these reasons, I intend to recommend that a delegate of the Information Commissioner exercises the discretion to decide not to continue to undertake this IC review under s 54W, because I am of the view that this IC review application is lacking in substance.

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

Next steps

If you disagree with this proposed recommendation, please write to us by **7 October 2021** 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 s 22 [redacted] or s 22 [redacted]. In all correspondence please quote s 22 [redacted].

Yours sincerely

s 22 [redacted]

s 22 [redacted]

16 September 2021

Our reference: s 22
Agency reference: s 22

s 22

By email to: s 22

Your application for Information Commissioner review of the Minister for Home Affairs' decision

Dear s 22

I refer to your request for Information Commissioner review (IC review) of a decision made by the Minister for Home Affairs (the Minister) under the *Freedom of Information Act 1982* (Cth) (FOI Act).

The purpose of this letter is to:

- advise you of my intention to recommend that the delegate of the Information Commissioner exercises the discretion to decide not to continue to undertake a review of your IC review application under s 54W of the FOI Act, on the basis that your IC review application is lacking in substance, and
- to give you an opportunity to provide reasons for me to reconsider making this recommendation.

The reasons for my recommendation follow.

Background

On 3 March 2021, you applied to the Minister for access to:

s 22

On 17 March 2021, the person authorised by the then Minister made a decision refusing the request under s 24A(1)(a)(ii) of the FOI Act on the basis that all reasonable steps had been taken to find documents and the Minister was satisfied that documents falling within the scope of the request do not exist.

On 30 March 2021, the Hon Karen Andrews MP was sworn in as Minister for Home Affairs, however, the decision was made by the previous Minister, the Hon Peter Dutton MP. Under the FOI Act the request is taken to have been made to the new Minister.

On 13 May 2021, you sought IC review of the Minister's decision under s 54L of the FOI Act.

Scope of IC review

The issue to be decided in this IC review is whether the Minister has taken all reasonable steps to find documents within the scope of your request, in accordance with s 24A(1) of the FOI Act.

The definition of 'official document of a Minister' or 'official document of the Minister' in s 4 of the FOI Act appears relevant to the issue of searches because of the change of minister since the decision was made.

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

- the Minister's decision and reasons for decision
- the FOI Act, in particular ss 4(1), 15, 24A and 54W(a)
- 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 [2.52], [3.89]
- relevant case law, in particular *De Tarle and Australian Securities and Investments Commission (Freedom of Information)* [2015] AATA 770, and
- the Office of the Minister for Home Affairs' submissions.

Official document of a minister (s 4(1))

Section 15 of the FOI Act sets out the procedure which applies where a person wishes to obtain access to an 'official document of a Minister'.

For a document to be an 'official document of a Minister' or 'official document of the Minister' it must be in the possession or deemed to be in the possession of the minister pursuant to s 4(1) of the FOI Act. The first element of this definition is that a document is 'in the possession of a Minister … in his or her capacity as a Minister'.

Section 4(1) of the FOI Act explains that the term 'official document of a Minister' means:

> ... a document that is in the possession of a Minister, or that is in the **possession of the Minister concerned**, as the case requires, in his or her capacity as a Minister, being a document that relates to the affairs of an agency or of a Department of State and, for the purposes of this definition, a Minister shall be deemed to be in possession of a document that has passed from his or her possession if he or she is entitled to access to the document and the document is not a document of an agency. (emphasis added)

Where an FOI request is made naming a Minister as a respondent and there is a change of Minister, generally the request continues with the new Minister as the respondent. However, if the request relates to a document that was in the possession of the former Minister but is not in the possession of the new Minister, that document would no longer be an official document of a Minister and will therefore not be subject to the FOI Act.

What is an 'official document of a minister'?

An 'official document of a minister' is a document in a minister's possession that relates to the affairs of an agency. 'Possession' can include a document held in the minister's office or a document a minister is entitled to hold.

Paragraph [2.52] of the FOI Guidelines explains:

> The application of the FOI Act to documents 'in the possession of a minister' excludes by implication documents held by a former minister. Those documents may, however, be available under the Archives Act 1983 (see [2.55] below). Where an FOI request is made to a minister and there is a change of minister in the course of the request or an IC review, the new minister is the respondent. If the requested document is not in the possession of the new minister, the FOI Act will not apply as the document is no longer an 'official document of a minister'.

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

s22 [redacted]

s22 [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Section 24A of the FOI Act requires the 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 Office of the Minister for Home Affairs has provided submissions, which are enclosed.

s47E(d) [redacted]

Discretion not to 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.

As set out at [2.52] of the FOI Guidelines, the application of s 4 of the FOI Act excludes by implication documents held by a former minister. s22 [redacted]

Further, there is no evidence before the OAIC to support the view that there are documents that fall within the scope of your request that are in the Minister's possession.

For these reasons, I intend to recommend that a delegate of the Information Commissioner exercises the discretion to decide not to continue to undertake this IC review under s 54W, because I am of the view that this IC review application is lacking in substance.

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

Next steps

If you disagree with this proposed recommendation, please write to us by **8 October 2021** 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 s 22 or s 22 . In all correspondence please quote s 22 .

Yours sincerely

s 22

s 22

17 September 2021

Our reference: s 22
Agency reference: s 22

s 22

By email: s 22

Your application for Information Commissioner review of the Department of Health's decision

Dear s 22

I refer to your application for Information Commissioner review (IC review) of a decision made by the Department of Health (the Department) on 24 March 2021 under the *Freedom of Information Act 1982* (Cth) (the FOI Act).

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

The reasons for my recommendation follow.

Background

On 20 February 2021 you sought access to documents.

On 25 February 2021, you clarified the scope of the request as:

s 22

On 26 February 2021, the Attorney General forwarded your request to the Department requesting that the Department accept the request under a s 16 of the FOI Act.

On 1 March 2021, the Department accepted transfer s22 [redacted]

On 24 March 2021, the Department issued a decision refusing access to the documents on the basis that documents do not exist.

On 25 March 2021, you sought review of the Department's decision.

The key procedural steps in this IC review are set out at **Attachment A**.

Scope of IC review

The issue to be decided in this IC review is whether the Department has taken all reasonable steps to find documents within the scope of the request (s 24A of the FOI Act).

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

i. the Department's decision and reasons for decision of 24 March 2021
ii. the Department's reasoning why records of searches were not created
iii. the FOI Act, in particular s 24A
iv. 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, in particular paragraphs [3.85] – [3.94]
v. relevant case law, in particular *De Tarle and Australian Securities and Investments Commission (Freedom of information)* [2015] AATA 770, and
vi. the parties' submissions.

Consideration of whether reasonable steps undertaken

Section 24A requires that an agency or minister 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.

The Guidelines issued under s 93A of the Act explain:

> The Act is silent on what constitutes 'all reasonable steps'. The meaning of 'reasonable' in the context of s 24A(1)(a) has been construed as not going beyond the limit assigned by reason, not extravagant or excessive, moderate and of such an amount, size or number as is judged to be appropriate or suitable to the circumstances or purpose.
>
> Agencies and ministers should undertake a reasonable search on a flexible and common-sense interpretation of the terms of the request. What constitutes a reasonable search will

depend on the circumstances of each request and will be influenced by the normal business practices in the agency's operating environment or the minister's office. At a minimum, an agency or minister should take comprehensive steps to locate documents, having regard to:

- the subject matter of the documents
- the current and past file management systems and the practice of destruction or removal of documents, and
- 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.[1]

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]).

The Department's decision

The Department found that documents falling within the scope of your request do not exist. In its reasons for decision, the Department said:

s 22 [redacted]

Parties' submissions

On 25 March 2021, you submitted:

s 22 [redacted]

[1] Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the* Freedom of Information Act (FOI Guidelines) [3.88] — [3.89].

s 22 [redacted]

[redacted]

The Department submitted:

s 47E(d) [redacted]

[redacted]

Evidence of searches undertaken

s 47E(d) [redacted]

As such the Department submits that no documents relevant to the request exist and therefore "the FOI Unit did not create records of searches or internal departmental consultations in relation to this FOI request".

Discretion not to 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 lacking in substance.

Having regard to the scope of your request and the parties' submissions, it appears that the Department has taken all reasonable steps to find documents within the scope of the request as it was required to do by s 24A and that relevant documents, if they existed, would have been found.

For these reasons, I intend to recommend that the Information Commissioner exercises the discretion to decide not to continue to undertake this IC review under s 54W, because I am of the view that this IC review application is lacking in substance.

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

If you disagree with this proposed recommendation, please write to us by **27 October 2021** 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 s 22 . In all correspondence please quote s 22 .

Yours sincerely

s 22

s 22

19 October 2021

ATTACHMENT A
Key procedural steps

Date	Events
25 March 2021	IC review application received
22 April 2021	Respondent agency notified under s 54Z
13 May 2021	Request for information due
10 May 2021	Information received

Our references: s 22 and s 22
Agency references: s 22 and s 22

s 22
By email: s 22

Your application for Information Commissioner review of DOH - Department of Health's decision

Dear s 22

I refer to your applications for Information Commissioner review (IC review) of the internal review decisions made by the Department of Health (the Department) under the *Freedom of Information Act 1982* (Cth) (the FOI Act) on 9 October 2020:

- s 22 (OAIC reference s 22)
- s 22 (OAIC reference s 22).

The purpose of this letter is to advise you of my intention to recommend that a delegate of the Information Commissioner exercises the discretion to decide not to continue to undertake IC reviews of the above decisions under s 54W(a)(i) of the FOI Act on the basis that your IC review applications are lacking in substance, and to give you an opportunity to provide reasons for me to reconsider making this recommendation.

The reasons for my recommendation follow.

Background

The key procedural steps in this IC review are set out at **Attachment A**.

Scope of IC review

The issues to be decided in these IC reviews are whether the Department has taken all reasonable steps to find documents within the scope of the requests (s 24A of the FOI Act).

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

i. the Department's original decision of 13 August 2020 and reasons for decision, in respect to agency reference s22
ii. the Department's original decision of 13 August 2020 and reasons for decision, in respect to agency reference s22
iii. the Department's internal review decision of 9 October 2020 and reasons for decision, in respect to agency reference s22
iv. the Department's internal review decision of 9 October 2020 and reasons for decision, in respect to agency reference s22
v. evidence of searches undertaken by the Department in respect to each of your FOI requests
vi. the FOI Act, in particular s 24A
vii. 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, in particular paragraphs [3.85] – [3.94]
viii. relevant case law, in particular *De Tarle and Australian Securities and Investments Commission (Freedom of information)* [2015] AATA 770, and
ix. the parties' submissions.

Consideration of whether reasonable steps undertaken

Section 24A requires that an agency or minister 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.

The Guidelines issued under s 93A of the Act explain:

> The Act is silent on what constitutes 'all reasonable steps'. The meaning of 'reasonable' in the context of s 24A(1)(a) has been construed as not going beyond the limit assigned by reason, not extravagant or excessive, moderate and of such an amount, size or number as is judged to be appropriate or suitable to the circumstances or purpose.
>
> Agencies and ministers should undertake a reasonable search on a flexible and common-sense interpretation of the terms of the request. What constitutes a reasonable search will depend on the circumstances of each request and will be influenced by the normal business practices in the agency's operating environment or the minister's office. At a minimum, an agency or minister should take comprehensive steps to locate documents, having regard to:
>
> - the subject matter of the documents
> - the current and past file management systems and the practice of destruction or removal of documents, and
> - 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.[1]

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]).

s 22 [redacted]

The Department's decision

The Department found that documents falling within the scope of your request cannot be found or do not exist. In its original decision, the Department said:

s 22 [redacted]

In its internal review decision, the Department said:

s 22 [redacted]

The parties' submissions

In your application for IC review you submitted:

s 22 [redacted]

[1] Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the* Freedom of Information Act (FOI Guidelines) [3.88] — [3.89].

In the Department's response to our notice of IC review, it submitted:

s 47E(d)

[redacted]

A copy of the Department's submission is attached.

Evidence of searches undertaken

The Department provided the OAIC with details of the searches undertaken in relation to the FOI request and the outcome of those searches. I have considered these records, which demonstrate that the Department undertook searches through 'TRIM', the Department's records management system, based on each of the following search criteria: s 22 [redacted].

These records, which the Department provided to the OAIC during the course of this IC review, demonstrate that no records were found in response to the searches conducted in TRIM based on the search criteria outlined above.

s 22 [redacted]

The Department's decision

The Department found that documents falling within the scope of your request cannot be found or do not exist. In its original decision, the Department said:

> s 22 [redacted]

In its internal review decision, the Department said:

> s 22 [redacted]

The parties' submissions

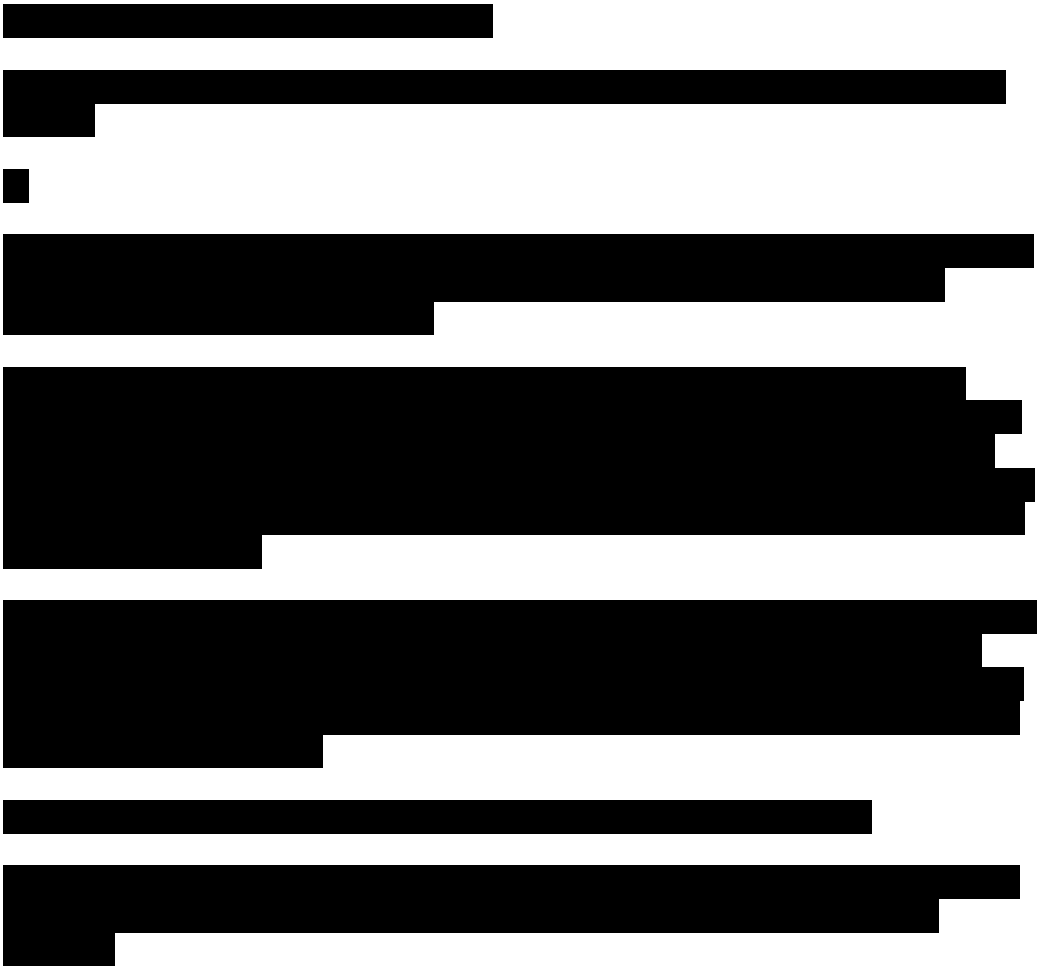
In your application for IC review you submitted:

> s 22 [redacted]

In the Department's response to our notice of IC review, it submitted:

> s 47E(d) [redacted]

s 47E(d)



A copy of the Department's submission is attached.

Evidence of searches undertaken

The Department provided the OAIC with details of the searches undertaken in relation to the FOI request and the outcome of those searches. I have considered these records, which demonstrate that the Department undertook searches through TRIM, based on each of the following search criteria: s 22

These records, which the Department provided to the OAIC during the course of this IC review, demonstrate that no records were found in response to any of the above search criteria.

Discretion not to continue to undertake an IC review

Under s 54W(a) 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.

Having regard to the scope of your requests, the parties' submissions and the Department's evidence of searches, it appears that the Department has taken all reasonable steps to find documents within the scope of the requests as it was required to do by s 24A and that relevant documents, if they existed, would have been found.

s 47E(d)

For these reasons, and based on the available information, I intend to recommend that the Information Commissioner exercises the discretion to decide not to continue to undertake these IC reviews under s 54W(a)(i), because I am of the view that the IC review applications are lacking in substance.

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

If you disagree with this proposed recommendation, please write to us by **27 October 2021** and advise us of your reasons. Your reasons will be taken into account before a decision is made on whether to finalise these matters under s 54W(a)(i).

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

If you would like to discuss this matter, please contact me on s 22 or on s 22 or FOIDR@oaic.gov.au. In all correspondence please quote s 22 and s 22.

Yours sincerely

s 22

s 22

19 October 2021

ATTACHMENT A
Key procedural steps

Date	Events: s 22 [redacted]
16 July 2020	FOI request for access to: s 22 [redacted]
13 August 2020	Original decision
1 September 2020	Internal review application made
1 September 2020	IC review application received
9 October 2020	Internal review decision
10 November 2020	Respondent agency notified under s 54Z
30 November 2020	Agency response to s 54Z

Date	Events: s 22 [redacted]
16 July 2020	FOI request for access to: s 22 [redacted]
13 August 2020	Original decision
1 September 2020	Internal review application made
1 September 2020	IC review application received
9 October 2020	Internal review decision
10 November 2020	Respondent agency notified under s 54Z
30 November 2020	Agency response to s 54Z

Our reference: s 22
Agency reference: s 22

s 22
By email: s 22

Your application for Information Commissioner review of the Department of Health's decision

Dear s 22

I refer to your application for Information Commissioner review (IC review) of a decision made by the Department of Health (the Department) on 20 November 2020 under the *Freedom of Information Act 1982* (Cth) (the FOI Act).

The purpose of this letter is to advise you of my intention to recommend that a delegate of the Information Commissioner exercises the discretion to decide not to continue to undertake an IC review of the Department's decision under s 54W(a) of the FOI Act on the basis that your IC review application is lacking in substance, and to give you an opportunity to provide reasons for me to reconsider making this recommendation.

The reasons for my recommendation follow.

Background

The key procedural steps in this IC review are set out at **Attachment A**.

Scope of IC review

The issue to be decided in this IC review is whether the Department has taken all reasonable steps to find documents within the scope of your request (s 24A of the FOI Act).

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

i. the Department's decision and reasons for decision of 20 November 2020
ii. evidence of searches undertaken by the Department
iii. the FOI Act, in particular s 24A

iv. 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, in particular paragraphs [3.85] – [3.94]

v. relevant case law, in particular *De Tarle and Australian Securities and Investments Commission (Freedom of information)* [2015] AATA 770, and

vi. the parties' submissions.

Consideration of whether reasonable steps undertaken

Section 24A requires that an agency or minister 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.

The Guidelines issued under s 93A of the Act explain:

> The Act is silent on what constitutes 'all reasonable steps'. The meaning of 'reasonable' in the context of s 24A(1)(a) has been construed as not going beyond the limit assigned by reason, not extravagant or excessive, moderate and of such an amount, size or number as is judged to be appropriate or suitable to the circumstances or purpose.
>
> Agencies and ministers should undertake a reasonable search on a flexible and common-sense interpretation of the terms of the request. What constitutes a reasonable search will depend on the circumstances of each request and will be influenced by the normal business practices in the agency's operating environment or the minister's office. At a minimum, an agency or minister should take comprehensive steps to locate documents, having regard to:
>
> - the subject matter of the documents
> - the current and past file management systems and the practice of destruction or removal of documents, and
> - 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.[1]

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]).

[1] Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the* Freedom of Information Act (FOI Guidelines) [3.88] — [3.89].

The Department's decision

The Department found that documents falling within the scope of your request cannot be found or do not exist. In its reasons for decision, the Department said:

s 22 [redacted]

The parties' submissions

In your IC review application you submitted:

s 22 [redacted]

The Department submitted:

s 47E(d) [redacted]

s 47E(d) [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Evidence of searches undertaken

The Department provided the OAIC with details of the searches undertaken in relation to the FOI request and the outcome of those searches. I have considered these records, which indicate that the Department undertook searches of the following:

- ‘TRIM’ Records Management System
- Department Databases
- Emails, including individual and group email accounts
- Electronic documents on shared and personal drives, including USB, Floppy Disks, CDs and other devices.

I have also considered the records of the above searches undertaken by the Department, which the Department has provided to the OAIC during the course of this IC review, which identify:

- The date searches were undertaken
- The person who undertook the searches
- The locations searched, and

- The outcomes of the searches undertaken.

Discretion not to 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.

Having regard to the scope of your request, the parties' submissions and the Department's evidence of searches, it appears that the Department has taken all reasonable steps to find documents within the scope of the request as it was required to do by s 24A and that relevant documents, if they existed, would have been found.

s 47E(d) [redacted]

For these reasons, based on the available information, I intend to recommend that the Information Commissioner exercises the discretion to decide not to continue to undertake this IC review under s 54W, because I am of the view that this IC review application is lacking in substance.

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

If you disagree with this proposed recommendation, please write to us by **27 October 2021** 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(a)(i).

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

If you would like to discuss this matter, please contact me on s 22 [redacted] or on s 22 [redacted]. In all correspondence please quote s 22 [redacted].

Yours sincerely

[redacted]

[redacted]

19 October 2021

ATTACHMENT A
Key procedural steps

Date	Events
13 October 2020	FOI request for access to: s 22 [redacted]
20 November 2020	Original decision

25 November 2020	IC review application received
8 April 2021	Respondent agency notified under s 54Z
7 May 2021	Agency response to s 54Z notice

Our reference: s 22
Agency reference: s 22

Dear Emily

The Department of Home Affairs has advised that it re-issued the decision and documents to s 22 applicant via email on 14 October 2021. These were sent over 3 emails due to the email attachment size limitation.

The Department has advised that s 22 will be sent by post as soon as possible but due to lockdowns this may be delayed, and they cannot provide a date for this at present.

Can you please notify us **by 3 November 2021**, if you now wish to:

- Withdraw the IC review application, or
- Proceed with the IC review application, and make a submission about the grounds on which you wish to proceed.

I note that s 54W(a)(ii) of the FOI Act provides that the Information Commissioner may decide not to undertake an IC review where an applicant fails to cooperate in progressing an IC review application without reasonable excuse. Should we not receive a response from you to this email by **3 November 2021**, your IC review application may be finalised by a delegate of the Information Commissioner under s 54W(a)(ii).

If you have any questions regarding this email please contact me on s 22 or by return email. Please quote OAIC reference number at the top of this email in all correspondence.

Kind regards

s 22

OAIC

s 22

| | | *Subscribe to Information Matters*

Our reference: s 22
Agency reference: s 22

s 22

By email to: s 22

Dear s 22

I refer to your application on behalf of s 22 for IC review of a decision the Department of Home Affairs (the Department) was deemed to have refused on 15 April 2021, and to my email of 21 September 2021.

On 13 September 2021, the Department provided a decision to you on your FOI request.

On 21 September 2021, I wrote to you seeking your advice on whether you wished to proceed or withdraw your IC review. In that correspondence I requested you respond by 5 October 2021. We extended this timeframe at your request to 12 October 2021. The OAIC does not appear to have received a response from you to date.

In light of the above and in order to progress your IC review, can you please advise if you would like to proceed or withdraw your request for IC review? Please provide a response **by 27 October 2021**.

Intention to finalise IC review

I note that s 54W(a)(ii) of the FOI Act provides that the Information Commissioner may decide not to undertake an IC review where an applicant fails to cooperate in progressing an IC review application without reasonable excuse. Should we not receive a response from you to this email by **27 October 2021**, your IC review application may be finalised by a delegate of the Information Commissioner under s 54W(a)(ii).

If you have any questions regarding this email please contact me on s 22 or by return email. Please quote OAIC reference number at the top of this email in all correspondence.

Kind regards

s 22

OAIC

s 22

Subscribe to Information Matters

Our reference: s 22 and s 22
Agency reference: s 22 and s 22

s 22

By email to: s 22

Dear s 22

I refer to your applications for Information Commissioner review (IC review) of the deemed access refusal decisions by the Department of Home Affairs (the Department) in relation to s 22 , and to my previous correspondence.

On 25 August 2021 and 8 September 2021 respectively, the Department provided decisions to you on your FOI requests.

On 6 October 2021, I wrote to you seeking your advice on whether you wished to proceed or withdraw your IC reviews. In that correspondence I requested you respond by 20 October 2021. The OAIC has not received a response from you.

In light of the above and in order to progress your IC review, can you please advise if you would like to proceed or withdraw your request for IC review? Please provide a response **by 29 October 2021**.

Intention to finalise IC reviews

Please note that s 54W(a)(ii) of the FOI Act provides that the Information Commissioner may decide not to undertake an IC review where an applicant fails to cooperate in progressing an IC review application without reasonable excuse. Should we not receive a response from you to this email by **29 October 2021,** your IC review applications will be finalised by a delegate of the Information Commissioner under s 54W(a)(ii).

If you have any questions regarding this email please contact me on s 22 or via email foidr@oaic.gov.au. Please quote OAIC reference number at the top of this email in all correspondence.

Yours sincerely

s 22

OAIC

s 22

Subscribe to Information Matters

Our reference: s 22
Agency reference: s 22

s 22
Email to: s 22

Dear s 22

I refer to your application on behalf of s 22 for IC review of a decision the Department of Home Affairs (the Department) was deemed to have refused on 12 April 2021, and to our previous email of 29 September 2021.

On 23 September 2021, the Department provided a decision to you on your FOI request.

On 29 September 2021, we wrote to you seeking your advice on whether you wished to proceed or withdraw your IC review. In that correspondence we requested you respond by 13 October 2021. The OAIC does not appear to have received a response from you.

In light of the above and in order to progress your IC review, can you please advise if you would like to proceed or withdraw your request for IC review? Please provide a response **by 29 October 2021**.

Intention to finalise IC review

I note that s 54W(a)(ii) of the FOI Act provides that the Information Commissioner may decide not to undertake an IC review where an applicant fails to cooperate in progressing an IC review application without reasonable excuse. Should we not receive a response from you to this email by **29 October 2021**, your IC review application may be finalised by a delegate of the Information Commissioner under s 54W(a)(ii).

If you have any questions regarding this email please contact me on s 22 or by return email. Please quote OAIC reference number at the top of this email in all correspondence.

Yours sincerely

s 22

OAIC

s 22

| | | *Subscribe to Information Matters*

Our reference: s 22
Your reference: s 22

s 22
By email to: s 22

Your IC review application about the Department of Home Affairs

Dear s 22

I refer to your application on behalf of s 22 for IC review of a decision the Department of Home Affairs (the Department) was deemed to have refused on 12 July 2021, and to our previous email of 29 September 2021.

On 20 September 2021, the Department provided a decision to you on your FOI request.

On 29 September 2021, we wrote to you seeking your advice on whether you wished to proceed or withdraw your IC review. In that correspondence we requested you respond by 13 October 2021. The OAIC does not appear to have received a response from you.

0In light of the above and in order to progress your IC review, can you please advise if you would like to proceed or withdraw your request for IC review? Please provide a response **by 29 October 2021**.

Intention to finalise IC review

I note that s 54W(a)(ii) of the FOI Act provides that the Information Commissioner may decide not to undertake an IC review where an applicant fails to cooperate in progressing an IC review application without reasonable excuse. Should we not receive a response from you to this email by **29 October 2021**, your IC review application may be finalised by a delegate of the Information Commissioner under s 54W(a)(ii).

If you have any questions regarding this email please contact me on s 22 or by return email. Please quote OAIC reference number at the top of this email in all correspondence.

Yours sincerely

s 22

OAIC

s 22

| | | *Subscribe to Information Matters*

Our reference: s 22
Agency reference: s 22

s 22
By email to: s 22

Your IC review application about the Department of Home Affairs

Dear s 22

I refer to your application on behalf of s 22 for IC review of a decision the Department of Home Affairs (the Department) was deemed to have refused on 15 March 2021, and to our previous email of 29 September 2021.

On 23 September 2021, the Department provided a decision to you on your FOI request.

On 29 September 2021, we wrote to you seeking your advice on whether you wished to proceed or withdraw your IC review. In that correspondence we requested you respond by 13 October 2021. The OAIC does not appear to have received a response from you.

0In light of the above and in order to progress your IC review, can you please advise if you would like to proceed or withdraw your request for IC review? Please provide a response **by 29 October 2021**.

Intention to finalise IC review

I note that s 54W(a)(ii) of the FOI Act provides that the Information Commissioner may decide not to undertake an IC review where an applicant fails to cooperate in progressing an IC review application without reasonable excuse. Should we not receive a response from you to this email by **29 October 2021**, your IC review application may be finalised by a delegate of the Information Commissioner under s 54W(a)(ii).

If you have any questions regarding this email please contact me on s 22 or by return email. Please quote OAIC reference number at the top of this email in all correspondence.

Yours sincerely

s 22

OAIC

s 22

| | | *Subscribe to Information Matters*

Our reference: s 22
Agency reference: s 22

Dear s 22

I refer to your application for Information Commissioner review (IC review) of a decision the AFP was deemed to have refused on 14 May 2021, and to my email of 5 October 2021.

On 24 September 2021, the AFP provided a decision to you on your FOI request.

On 5 October 2021, I wrote to you seeking your advice on whether you wished to proceed or withdraw your IC review. In that correspondence I requested you respond by 19 October 2021. The OAIC has not received a response from you.

In light of the above and in order to progress your IC review, can you please advise if you would like to proceed or withdraw your request for IC review? Please provide a response **by 29 October 2021.**

Intention to finalise IC review

I note that s 54W(a)(ii) of the FOI Act provides that the Information Commissioner may decide not to undertake an IC review where an applicant fails to cooperate in progressing an IC review application without reasonable excuse. Should we not receive a response from you to this email by **29 October 2021**, your IC review application may be finalised by a delegate of the Information Commissioner under s 54W(a)(ii).

If you have any questions regarding this email please contact me on s 22 or via return email. Please quote OAIC reference number at the top of this email in all correspondence.

Yours sincerely

s 22

OAIC

s 22

| | | *Subscribe to Information Matters*

Our reference: s 22
Agency reference: s 22

s 22
By email to: s 22

Dear s 22

I refer to your application on behalf of s 22 for IC review of a decision the Department of Home Affairs (the Department) was deemed to have refused on 12 July 2021, and to my email of 7 October 2021.

On 20 September 2021, the Department provided a decision to you on your FOI request.

On 7 October 2021, I wrote to you seeking your advice on whether you wished to proceed or withdraw your IC review. In that correspondence I requested you respond by 21 October 2021. The OAIC has not received a response from you.

In light of the above and in order to progress your IC review, can you please advise if you would like to proceed or withdraw your request for IC review? Please provide a response **by 29 October 2021**,.

Intention to finalise IC review

I note that s 54W(a)(ii) of the FOI Act provides that the Information Commissioner may decide not to undertake an IC review where an applicant fails to cooperate in progressing an IC review application without reasonable excuse. Should we not receive a response from you to this email by **29 October 2021**, your IC review application may be finalised by a delegate of the Information Commissioner under s 54W(a)(ii).

If you have any questions regarding this email please contact me on s 22 or by return email. Please quote OAIC reference number at the top of this email in all correspondence.

Yours sincerely

s 22

OAIC

s 22

Subscribe to Information Matters

Our reference: s 22
Agency reference: s 22

s 22
By email : s 22

Dear s 22

I refer to your application on behalf of s 22 for IC review of a decision the Department of Home Affairs (the Department) was deemed to have refused on 3 September 2021, and to my email of 7 October 2021.

On 20 September 2021, the Department provided a decision to you on your FOI request.

On 7 October 2021, I wrote to you seeking your advice on whether you wished to proceed or withdraw your IC review. In that correspondence I requested you respond by 21 October 2021. The OAIC has not received a response from you.

In light of the above and in order to progress your IC review, can you please advise if you would like to proceed or withdraw your request for IC review? Please provide a response **by 29 October 2021**.

Intention to finalise IC review

I note that s 54W(a)(ii) of the FOI Act provides that the Information Commissioner may decide not to undertake an IC review where an applicant fails to cooperate in progressing an IC review application without reasonable excuse. Should we not receive a response from you to this email by **29 October 2021**, your IC review application will be finalised by a delegate of the Information Commissioner under s 54W(a)(ii).

If you have any questions regarding this email please contact me on s 22 or by return email. Please quote OAIC reference number at the top of this email in all correspondence.

Yours sincerely

s 22

OAIC

s 22

Subscribe to Information Matters

Our reference: s 22
Agency reference: s 22

s 22
By email to: s 22

Your IC review application about the Department of Home Affairs

Dear s 22

I refer to your application on behalf of s 22 for IC review of a decision the Department of Home Affairs (the Department) was deemed to have refused on 24 August 2021, and to my email of 7 October 2021.

On 27 September 2021, the Department provided a decision to you on your FOI request.

On 7 October 2021, I wrote to you seeking your advice on whether you wished to proceed or withdraw your IC review. In that correspondence I requested you respond by 21 October 2021. The OAIC has not received a response from you.

In light of the above and in order to progress your IC review, can you please advise if you would like to proceed or withdraw your request for IC review? Please provide a response **by 29 October 2021**.

Intention to finalise IC review

I note that s 54W(a)(ii) of the FOI Act provides that the Information Commissioner may decide not to undertake an IC review where an applicant fails to cooperate in progressing an IC review application without reasonable excuse. Should we not receive a response from you to this email by **29 October 2021**, your IC review application will be finalised by a delegate of the Information Commissioner under s 54W(a)(ii).

If you have any questions regarding this email please contact me on s 22 or by return email. Please quote OAIC reference number at the top of this email in all correspondence.

Yours sincerely

s 22

OAIC

s 22

Subscribe to Information Matters

Our reference: s 22

s 22

By email: s 22

Your application for Information Commissioner review of Commonwealth Ombudsman's decision

Dear s 22

I refer to your application for Information Commissioner review (IC review) of a decision made by the Commonwealth Ombudsman (Ombudsman) on 3 November 2020 under the *Freedom of Information Act 1982* (Cth) (the FOI Act).

The purpose of this letter is to advise you of my intention to recommend that the delegate of the Information Commissioner exercises the discretion to decide not to continue to undertake a review of your IC review application under s 54W of the FOI Act on the basis that your IC review application 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

The key procedural steps in this IC review are set out at **Attachment A**.

Scope of IC review

The issue to be decided in this IC review is whether the Ombudsman has taken all reasonable steps to find documents within the scope of the request (s 24A of the FOI Act).

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

i. the Ombudsman's decision and reasons for decision of 3 November 2020
ii. evidence of searches undertaken by the Ombudsman

iii. the FOI Act, in particular s 24A

iv. 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, in particular paragraphs [3.85] – [3.94]

v. relevant case law, in particular *De Tarle and Australian Securities and Investments Commission (Freedom of information)* [2015] AATA 770, and

vi. the parties' submissions.

Consideration of whether reasonable steps undertaken

Section 24A requires that an agency or minister 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.

The Guidelines issued under s 93A of the Act explain:

> The Act is silent on what constitutes 'all reasonable steps'. The meaning of 'reasonable' in the context of s 24A(1)(a) has been construed as not going beyond the limit assigned by reason, not extravagant or excessive, moderate and of such an amount, size or number as is judged to be appropriate or suitable to the circumstances or purpose.
>
> Agencies and ministers should undertake a reasonable search on a flexible and common-sense interpretation of the terms of the request. What constitutes a reasonable search will depend on the circumstances of each request and will be influenced by the normal business practices in the agency's operating environment or the minister's office. At a minimum, an agency or minister should take comprehensive steps to locate documents, having regard to:
>
> - the subject matter of the documents
> - the current and past file management systems and the practice of destruction or removal of documents, and
> - 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.[1]

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]).

[1] Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the* Freedom of Information Act (FOI Guidelines) [3.88] — [3.89].

Agency/minister's decision

The Ombudsman found that documents falling within the scope of the applicant's request cannot be found or do not exist. In its reasons for decision, the Ombudsman said:

s 22 [redacted]

Parties' submissions

On 10 November 2020, you submitted:

s 22 [redacted]

s 22 [redacted]

On 8 January 2021, the Ombudsman submitted:

s 47E(d) [redacted]

Evidence of searches undertaken

The Ombudsman provided the OAIC with details of the searches undertaken in relation to the FOI request and the outcome of those searches. I have considered these records, which indicate that Ombudsman undertook searches through:

- Case Management System

- Records Management System
- Electronic documents saved on computers, electronic devices such as iPads, smartphones and apps (for example emails on Outlook, text messages etc)
- Electronic documents saved on portable media devices
- Hardcopy files stored in safes, compactus, tambours, desk drawers, etc

I have also considered the records of the above searches undertaken by the Ombudsman, which the Ombudsman also provided to the OAIC during the course of this IC review or Ombudsman detailed in its reasons for decision, which identified:

- The date searches were undertaken
- The person/s who undertook the searches
- The locations searched
- The search terms used
- The outcomes of the searches undertaken
- Reasons as to why no documents have been found

Discretion not to 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.

Having regard to the scope of your request, the parties' submissions and the Ombudsman's evidence of searches, it appears that the Ombudsman has taken all reasonable steps to find documents within the scope of the request as it was required to do by s 24A and that relevant documents, if they existed, would have been found.

s 47E(d) [redacted]

For these reasons, I intend to recommend that the Information Commissioner exercises the discretion to decide not to continue to undertake this IC review under s 54W, because I am of the view that this IC review application is lacking in substance as the document in question does not exist.

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

If you disagree with this proposed recommendation, please write to us by **9 November 2021** 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 s 22 or via email s 22 . In all correspondence please quote s 22

Yours sincerely

s 22

s 22

26 October 2021

ATTACHMENT A
Key procedural steps

Date	Events
10-11-2021	IC review application received
16-12-2021	Respondent agency notified under s 54Z
08-01-2021	Request for information due
08-01-2021	Information received

Our reference: s 22

s 22

By email: s 22

Your application for Information Commissioner review of Department of the Treasury's decision

Dear s 22

I refer to your application for Information Commissioner review (IC review) of a decision made by the Department of the Treasury (the Treasury) on 10 November 2020 under the *Freedom of Information Act 1982* (Cth) (the FOI Act).

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

The reasons for my recommendation follow.

Background

The key procedural steps in this IC review are set out at **Attachment A**.

Scope of IC review

The issue to be decided in this IC review is whether the Treasury has taken all reasonable steps to find documents within the scope of the request (s 24A of the FOI Act).

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

i. the Treasury's decision and reasons for decision of 10 December 2020
ii. the FOI Act, in particular s 24A
iii. 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, in particular paragraphs [3.85] – [3.94]

iv. relevant case law, in particular *De Tarle and Australian Securities and Investments Commission (Freedom of information)* [2015] AATA 770, and

v. the parties' submissions.

Consideration of whether reasonable steps undertaken

Section 24A requires that an agency or minister 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.

The Guidelines issued under s 93A of the Act explain:

> The Act is silent on what constitutes 'all reasonable steps'. The meaning of 'reasonable' in the context of s 24A(1)(a) has been construed as not going beyond the limit assigned by reason, not extravagant or excessive, moderate and of such an amount, size or number as is judged to be appropriate or suitable to the circumstances or purpose.
>
> Agencies and ministers should undertake a reasonable search on a flexible and common-sense interpretation of the terms of the request. What constitutes a reasonable search will depend on the circumstances of each request and will be influenced by the normal business practices in the agency's operating environment or the minister's office. At a minimum, an agency or minister should take comprehensive steps to locate documents, having regard to:
>
> - the subject matter of the documents
> - the current and past file management systems and the practice of destruction or removal of documents, and
> - 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.[1]

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]).

Agency/minister's decision

The Treasury found that documents falling within the scope of the applicant's request do not exist. In its reasons for decision, the Treasury said:

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[1] Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the* Freedom of Information Act (FOI Guidelines) [3.88] — [3.89].

s 22 [redacted]

[redacted]

Parties' submissions

On 10 November 2020, you submitted:

s 22 [redacted]

[redacted]

On 11 December 2020, you further submitted:

s 22

[redacted]

On 18 March 2021, the Treasury submitted:

s 47E(d)

- [redacted]
- [redacted]
- [redacted]
- [redacted]

[redacted]

s 47E(d)

[redacted]

[redacted]

[redacted]

Evidence of searches undertaken

The Treasury provided the OAIC with details of the searches undertaken in relation to the FOI request and the outcome of those searches. I have considered these records, which indicate that Treasury undertook searches through:

- Correspondence records
- Personal Record Management System
- Electronic documents saved on computers, electronic devices such as iPads, smartphones and apps (for example emails on Outlook, text messages etc)
- File notes

I have also considered the submissions relating to the above searches undertaken by the Treasury, which the Department also provided to the OAIC during the course of this IC review and Treasury detailed in its reasons for decision, which identified:

- The outcomes of the searches undertaken
- If applicable, reasons as to why no documents have been found
- Limitations of the search

Discretion not to 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.

Having regard to the scope of your request, the parties' submissions and the Treasury's evidence of searches, it appears that the Treasury has taken all reasonable steps to find documents within the scope of the request as it was required to do by s 24A and that relevant documents, if they existed, would have been found.

For these reasons, I intend to recommend that the Information Commissioner exercises the discretion to decide not to continue to undertake this IC review under s 54W, because I am of the view that this IC review application is lacking in substance.

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

If you disagree with this proposed recommendation, please write to us by **9 November 2021** 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 s 22 or via email s 22 . In all correspondence please quote s 22 .

Yours sincerely

s 22

s 22

26 October 2021

ATTACHMENT A
Key procedural steps

Date	Events
10-11-2020	IC review application received
25-02-2021	Respondent agency notified under s 54Z
18-03-2021	Request for information due
18-03-2021	Information received
27-07-2021	Submissions provided to parties

Our reference: s 22
Agency reference: s 22

s 22
By email to: s 22

Your IC review application about an FOI decision by Department of Home Affairs

Dear s 22

I refer to your application for Information Commissioner review (IC review) of a decision made by the Department of Home Affairs (the Department) on 11 July 2020, and to my email of 14 October 2021.

On 11 July 2020, the Department provided a decision to you on your FOI request, providing you with full access to the documents relevant to your request.

On 14 September 2020, you advised the OAIC that you wanted to proceed with the IC review to ensure that the Department had identified all documents relevant to your request.

The OAIC subsequently commenced a review of the Department's decision.

During the course of the IC review, the Department provided the OAIC with a submission advising of the steps taken to identify all documents relevant to your request. I provided a copy of this submission to you on 14 October 2021.

In particular, I note the Department's advice that it undertook searches of its Integrated Client Services Environment (ICSE), and 'TRIM' (the Department's record management system), in order to identify all relevant documents.

On 14 October 2021, I wrote to you seeking your advice on whether you wished to proceed or withdraw your IC review. In that correspondence I requested you respond by 28 October 2021. The OAIC has not yet received a response from you.

In light of the above and in order to progress your IC review, can you please advise if you would like to proceed or withdraw your request for IC review? Please provide a response **by 5 November 2021**.

If you wish to proceed with the IC review, s 22

Intention to finalise IC review

I note that s 54W(a)(ii) of the FOI Act provides that the Information Commissioner may decide not to undertake an IC review where an applicant fails to cooperate in progressing an IC review application without reasonable excuse. Should we not receive a response from you to this email by **5 November 2021**, your IC review application will be finalised by a delegate of the Information Commissioner under s 54W(a)(ii).

If you have any questions regarding this email please contact me on s 22 or by return email. Please quote OAIC reference number at the top of this email in all correspondence.

Yours sincerely

s 22

OAIC

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s 47E(d)