



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

Information Commissioner review applicant	Verity Pane
Agency	Office of the Australian Information Commissioner
Decision date	26 February 2024
OAIC reference number	MR23/00027
Agency reference number	FOIREQ22/00357

Decision

1. I refer to the application made by Verity Pane (the FOI applicant) for Information Commissioner review (IC review) of a deemed access refusal decision made by the Office of the Australian Information Commissioner (the Agency) on 29 November 2022 under the *Freedom of Information Act 1982* (Cth) (the FOI Act).
2. As a delegate of the Information Commissioner, I am authorised to make decisions under s 54W(b) of the FOI Act.
3. Under s 54W(b) of the FOI Act, I have decided not to undertake an IC review on the basis that the interests of the administration of the FOI Act make it desirable that the IC reviewable decision be considered by the Administrative Appeals Tribunal (AAT).
4. A copy of the IC review application is attached. The effect of my decision is to allow the FOI applicant to apply directly to the AAT, in accordance with s 57A of the FOI Act.

Background

5. On 5 January 2024, the OAIC wrote to the FOI applicant to advise of its intention to recommend that a delegate of the Information Commissioner finalise the IC review application under s 54W(b) of the FOI Act on the basis that it is in the interests of the administration of the FOI Act that the IC reviewable decision be considered by the AAT.
6. On 23 January 2024, the OAIC followed up this correspondence alerting the applicant that we had not received a response disagreeing with the recommendation. The OAIC

advised the applicant that their IC review was likely to be finalised soon and that they will have 28 days to lodge an application with the AAT from the date of decision.

7. Based on the information before me, the OAIC has not received a response from the FOI applicant.

Discretion not to undertake an IC review

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

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

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

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

¹ <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 FOI 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)).

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

Reasons for decision

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

Next steps

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

Yours sincerely

A handwritten signature in black ink that reads "Heath Baker". The signature is written in a cursive style and is positioned above a light blue rectangular stamp.

Heath Baker

Director
Freedom of Information Branch
Office of the Australian Information Commissioner

26 February 2024

Review rights

Judicial review

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

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

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

Making a complaint to the Commonwealth Ombudsman

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

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

Accessing your information

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