

June 2023

FOI Complaints: Overview of investigation process

This resource applies to investigating complaints by individuals and should be read in conjunction with [Part 11 of the FOI Guidelines](#), the [Regulatory Action Policy](#) and [FOI Complaints – Intake and early resolution process](#) resource, FOI Complaints recommendation case – Overview of process (see worksheet D2020/007324) and FOI Complaints – Transfer to Ombudsman (see worksheet D2020/021386).

Key principles

- The Information Commissioner can investigate under Part VIIB of the FOI Act agency actions relating to the handling of FOI matters. This involves investigating complaints received from complainants (s 70) as well as conducting own motion investigations (s 69(2)).
- The complaints process set out in Part VIIB is primarily intended to deal with the manner in which agencies handle FOI requests and procedural compliance matters.
- Generally, it is the Information Commissioner's view that making a complaint is not an appropriate mechanism where IC review is available, unless there is a special reason to undertake an investigation for example, where the agency's practice appears to be systemic in nature.
- The FOI Act sets out certain rules that apply to the conduct of the Information Commissioner's complaint investigations and Commissioner initiated investigations. The guiding principle is that an investigation shall be conducted in private and in the way the Information Commissioner considers fit (s 76(1)).
- Section 73 of the FOI Act provides that the Information Commissioner has the discretion not to investigate or continue investigating a complaint in certain circumstances.
- Section 74 of the FOI Act provides the Information Commissioner with the discretion whether to transfer a complaint to the Commonwealth Ombudsman if satisfied that the complaint would be more effectively or appropriately dealt with by the Ombudsman.
- When making a decision to transfer a complaint to the Ombudsman, the Information Commissioner must clearly outline the steps in the decision-making process, namely:
 - Information Commissioner's level of satisfaction must be reached that a complaint could be more effectively or appropriately dealt with by the Ombudsman

- Ombudsman must be consulted, and
- Information Commissioner must make a decision not to investigate or not to continue to investigate the complaint.

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FOI Complaint Investigation Process

Stage	Actions
Registration	<ol style="list-style-type: none"> 1. Register complaint and send acknowledgement letter to complainant. 2. Allocate the Resolve complaint case file to 'FOI Complaints – Assessments' Resolve queue. 3. Assign a Resolve action item to Director of Reviews and Investigations for early assessment of complaint.
Assessment	<ol style="list-style-type: none"> 4. Director Reviews and Investigations to assess the complaint to determine whether the complaint should proceed to investigation, be declined or preliminary inquiries are required. Relevant considerations to consider whether to commence investigation includes: <ul style="list-style-type: none"> – whether the practice is systemic – whether significant issues are raised – whether there has been a breach of the FOI Act or non-compliance with the FOI Guidelines – whether there has been non-compliance with the timeframes, or – the outcome sought. 5. Director Reviews and Investigations to allocate complaint to Case Officer. 6. Case Officer to review complaint file and compile evidence matrix (see worksheet: D2019/013612).
Preliminary inquiries	<ol style="list-style-type: none"> 7. Case Officer to draft a set of relevant preliminary inquiries in consultation with Director Reviews and Investigations. 8. Case Officer to provide the preliminary inquiries to the respondent agency. 9. Once a response is received, Case Officer to assess the response to preliminary inquiries and assign a Resolve action item to Director of Reviews and Investigations for re-assessment of complaint. 10. Director Reviews and Investigations to undertake an assessment and assign the matter to Case Officer for next steps. 11. Case Officer to update evidence matrix with next steps: <ul style="list-style-type: none"> - Transfer to the Commonwealth Ombudsman (s 74) Step 12 below - Decline to investigate (s 73) Steps 13 - 22 below - Proceed to investigation Step 10 below 12. Director Reviews and Investigations to Allocate the Resolve complaint case file to the relevant Resolve queue.
Transfer to Commonwealth Ombudsman (s 74)	<ol style="list-style-type: none"> 13. If transferring complaint to Commonwealth Ombudsman (see worksheet: D2020/021386 for next steps and templates).
Discretion not to investigate (s 73)	<ol style="list-style-type: none"> 14. If declining to investigate complaint, Case Officer to draft Intention to Decline (ITD) in consultation with Director Reviews and Investigations. 15. Case Officer to assign a Resolve action item to Director of Reviews and Investigations to clear draft ITD. 16. Director Reviews and Investigations to clear draft ITD and assign a Resolve action item to Case Officer to send ITD to complainant.

Stage	Actions
	<p>17. Once approved, Case Officer to send ITD to complainant providing a response date of 2 weeks and create a Resolve action 'await response – complainant' to monitor response due date.</p> <p>18. If a response is received, Case Officer to assess the response to ITD and assign a Resolve action item to Director of Reviews and Investigations for re-assessment of complaint.</p> <p>19. Director Reviews and Investigations to undertake an assessment and assign the matter to Case Officer for next steps. Proceed to Step 24</p> <p>20. If no response is received and/or no change to preliminary assessment, then Case Officer is to draft a closure notice (s 75(3)) to complainant to be issued by the FOI Commissioner.</p> <p>21. Proceed to assign Resolve clearance action through the following levels:</p> <ul style="list-style-type: none"> - Director Reviews and Investigations - Assistant Commissioner - FOI Commissioner <p>22. Once approved, Case Officer to send closure notice to complainant.</p> <p>23. Case Officer to close Resolve complaint file.</p>
Commencement of an investigation	<p>24. Case Officer to prepare correspondence following assessment:</p> <ul style="list-style-type: none"> - draft s 75 investigation notice to the respondent agency, and - draft commencement of investigation letter to complainant. <p>25. Proceed to assign Resolve clearance action through the following levels:</p> <ul style="list-style-type: none"> - Director Reviews and Investigations - Assistant Commissioner - FOI Commissioner <p>26. Once draft s 75 Notice has been approved:</p> <ul style="list-style-type: none"> - Information Commissioner or relevant delegate to call the respondent agency to advise that this matter will proceed to investigation providing the following information: <ul style="list-style-type: none"> - issues - outline process, and - Case Officer contact details. <p>27. Case Officer to follow up on phone call to the respondent agency by the Information Commissioner or relevant delegate by sending the s 75 Notice.</p>
Investigation	<p>28. Case Officer to monitor respondent agency's response due date to s 75 Notice.</p> <p>29. Once response received, Case Officer to assess the respondent agency's response and add the information to the evidence matrix.</p> <p>30. Case Officer to discuss next steps with Director Reviews and Investigations and/or Assistant Commissioner. Next steps include:</p> <ul style="list-style-type: none"> - request for further information from the respondent agency - request for further information from the complainant - providing a set of the respondent agency's open submissions to the complainant for their comment - recommend decline to investigate the matter further, or - proceed to s 86 Notice.

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

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

Commissioner Initiated Investigation Process

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

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

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

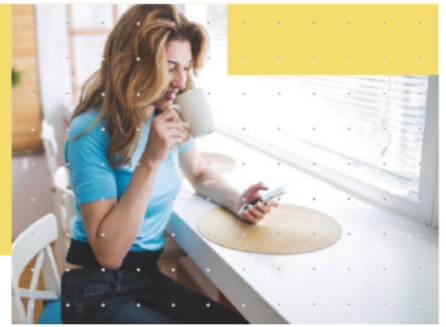
Prior to commencing a CII, the Information Commissioner will consider the information before the office at that time. The Information Commissioner may decide to conduct preliminary inquiries with an agency prior to commencing investigation.

Stage	Actions
Preliminary inquiries	<ol style="list-style-type: none"> 1. Case Officer to draft a set of relevant preliminary inquiries in consultation with Director Reviews and Investigations. 2. Case Officer to provide the preliminary inquiries to the agency and monitor response due from the respondent agency.
Assessment	<ol style="list-style-type: none"> 3. Complaint and respondent agency response to preliminary inquiries to be assessed to determine whether the complaint should proceed to a CII investigation. Relevant considerations to consider whether to commence a CII includes: <ul style="list-style-type: none"> – whether the practice is systemic – whether significant issues are raised – whether there has been a breach of the FOI Act or non-compliance with the FOI Guidelines – whether it is in the public interest to investigate 4. Director Reviews and Investigations or Assistant Director to undertake assessment and assign the matter to Case Officer for next steps.
Allocation	<ol style="list-style-type: none"> 5. If the recommendation is to proceed to commence a CII: 6. Case Officer to prepare a brief to the Information Commissioner including the following information: <ul style="list-style-type: none"> – recommendations – background – potential case studies – information before the office – relevant agency statistics – related IC review issues – considerations – outcomes/benefits – resourcing implications – project plan 7. Proceed to assign Resolve clearance action through the following levels: <ul style="list-style-type: none"> – Director Reviews and Investigations – Assistant Commissioner

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

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

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



June 2023

FOI Complaints: transfer to Ombudsman

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

Key principles

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

¹ See *FOI Guidelines* [11.14].

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

Key steps and relevant templates

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

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

June 2023

FOI Complaint recommendation cases: Overview of process

This resource applies to managing FOI Complaint Recommendation Cases and should be read in conjunction with [Part 11 of the FOI Guidelines](#), the [Regulatory Action Policy](#) and [FOI Complaints: Overview of investigation process](#) resource.

Key principles

- The Information Commissioner can investigate under Part VIIB of the FOI Act agency actions relating to the handling of FOI matters. This involves investigating complaints received from complainants (s 70) as well as conducting own motion investigations (s 69(2)).
- The complaints process set out in Part VIIB is primarily intended to deal with the manner in which agencies handle FOI requests and procedural compliance matters.
- The FOI Act sets out certain rules that apply to the conduct of the Information Commissioner's complaint investigations and Commissioner initiated investigations. The guiding principle is that an investigation shall be conducted in private and in the way the Information Commissioner considers fit (s 76(1)).
- On completing an investigation, the Information Commissioner must provide a 'notice on completion' to the agency and to the complainant (if there is one) (s 86).
- The Information Commissioner's notice must include the investigation results, the investigation recommendations (if any), and the reasons for those results and any recommendations (s 86(2)).
- In addition to including opinions, conclusions or suggestions in a notice on completion, the Information Commissioner may also make 'formal recommendations to the respondent agency that the Information Commissioner believes that the agency ought to implement' (s 88).
- If the Information Commissioner is not satisfied that the agency has taken adequate and appropriate action to implement a formal recommendation, the Information Commissioner may issue a written 'implementation notice' requiring the agency to provide within a specified time particulars of any action the agency will take to implement the Information Commissioner's recommendations (s 89).

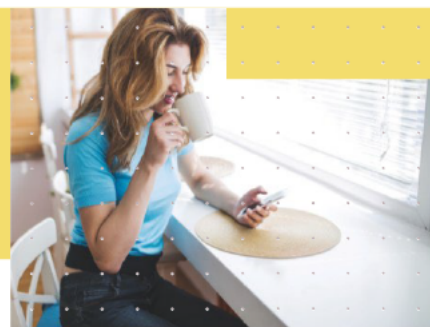
FOI Complaint Recommendation Case Process

Stage	Actions
Registration	<ol style="list-style-type: none"> 1. When finalising an FOI complaint, the case Officer will be prompted to record whether any recommendations have been made by the FOI/Information Commissioner. If there has been recommendations made, Resolve will automatically raise a new case type called a 'Recommendation case'.¹ 2. Once a 'Recommendation case has been raised, the Case Officer is to ensure that the Recommendation case file has been x-referenced with the original complaint and add the s 86 Notice to the documents tab of the Recommendation case file. 3. Case Officer to complete triage process including updating any relevant fields on Resolve file. 4. Case Officer to allocate the Resolve Recommendation case file to 'FOI Complaints – Rec' Resolve queue. 5. Director Reviews and Investigations to monitor response due date.
Awaiting agency's response to recommendations	<ol style="list-style-type: none"> 6. Once a response has been received from the agency, Director Reviews and Investigations team to assign the recommendation case to a Case Officer. 7. Case Officer to review the agency's response and provide a recommendation to Director Reviews and Investigations on whether the agency has responded to each recommendation or whether there are any outstanding issues.
Assessment of response to recommendations	<ol style="list-style-type: none"> 8. Director Reviews and Investigations to undertake assessment and assign the matter to relevant Case Officer for next steps. 9. Discuss in collaboration with Director Reviews and Investigations team, Assistant Commissioner and FOI Commissioner (FOI Commissioner input meeting). Considerations on whether the agency has taken reasonable steps to implement the recommendations include: <ul style="list-style-type: none"> — Whether the recommendation related to a systemic issue — Whether the agency has taken any action to implement the recommendation — The investigation conclusions and the agency's actions which led to the recommendation being made — The impact on individual's right to access information if the recommendation is not implemented — Other relevant factors which may impact on an agency's ability to implement a recommendations such as technology issues, occurrence of a pandemic or machinery of government changes. 10. If satisfied with the agency response, proceed to 'Recommendation Acquittal' stage. 11. If not satisfied, proceed to 'Further information required' stage.
Recommendation Acquittal	<ol style="list-style-type: none"> 12. Case Officer to draft Executive Brief and acquittal notice to the FOI/Information Commissioner outlining the action taken by the agency to implement the recommendations. 13. Proceed to assign Resolve clearance action through the following levels: <ol style="list-style-type: none"> 14. Director Reviews and Investigations 15. Assistant Commissioner 16. Once the Draft has been cleared, Case officer to provide Executive Brief and draft acquittal notice to the FOI/Information Commissioner for consideration.

¹ To close a complaint where there are no actions or identifiable workflows, create new actio

Stage	Actions
	<p>17. Once approval obtained from FOI/Information Commissioner, case officer to provide acquittal notice to respondent.</p> <p>18. Case Officer closes Resolve case file.</p> <p>19. Case Officer to update Outcome of FOI investigations document: D2021/020081 and provide to Communications team for publication.</p>
Further information	<p>20. Case Officer Draft RFI to be issued by the Assistant Commissioner.</p> <p>21. Proceed to assign Resolve clearance action through the following levels:</p> <ul style="list-style-type: none"> — Director Reviews and Investigations — Assistant Commissioner — FOI Commissioner <p>22. Once approved, Case Officer to provide RFI to agency.</p> <p>23. Director Reviews and Investigations to monitor response due date.</p> <p>24. Once response is received, return to 'Assessment of response to recommendations' stage.</p> <p>25. If satisfied with the agency response, proceed to Acquittal stage.</p> <p>26. If not satisfied, proceed to 'Implementation notice' stage.</p>
Implementation notice	<p>27. If FOI/Information Commissioner considers the agency's actions to implement their recommendations s inadequate in the circumstances and decides to issue an Implementation Notice, Case Officer to draft implementation Notice to agency.</p> <p>28. Proceed to assign Resolve clearance action through the following levels:</p> <p>29. Director Reviews and Investigations</p> <p>30. Assistant Commissioner</p> <p>31. FOI/Information Commissioner</p> <p>32. Once the draft has been approved by the FOI/Information Commissioner, Case Officer to send the Implementation Notice to the agency.</p> <p>33. Case Officer to monitor response due date specified in the Implementation Notice.</p> <p>34. Once response to Implementation Notice has been received, Case Officer to assess the response and provide an Executive Brief to the FOI/Information Commissioner for their consideration on whether the agency's response outlines whether the agency has taken reasonable steps to implement the investigation recommendations.</p> <p>35. If the FOI/Information Commissioner is satisfied with the agency response:</p> <ul style="list-style-type: none"> — Case Officer to send signed letter from FOI/Information Commissioner to agency. — Case Officer to finalise actions on resolve and closes Resolve file. — Case Officer to update Outcome of FOI investigations document: D2021/020081 and provide to Comms for publication. <p>36. If the FOI/Information Commissioner is not satisfied, proceed to 'Report to Minister' stage.</p>
Report to Minister	<p>37. Commence drafting a report to be provided the Attorney-General as the Responsible Minister. The report must include:</p> <ul style="list-style-type: none"> • A copy of the s 86 Notice on Completion • A copy of the Implementation Notice • The agency's response (if any) to the Implementation Notice • State that the Information Commissioner is not satisfied that the agency has taken adequate action that is adequate and appropriate in the circumstances

Stage	Actions
	<ul style="list-style-type: none">state the action that the Information Commissioner believes if taken by the agency, would be adequate and appropriate in the circumstances, to implement the investigation recommendations.
	38. Once the draft has been approved by the FOI/Information Commissioner, Case Officer to provide a copy of the Draft to the responsible Minister on behalf of the Information Commissioner.
	39. Information Commissioner to contact the Head of the Agency to advise that a Report has been provided to the responsible Minister.
	40. Once the Report has been provided to the responsible Minister and it has been tabled in Parliament, Case Officer to close Recommendation Case. Case Officer to update Outcome of FOI investigations document: D2021/020081 and provide to Comms for publication.



Updated June 2023

Conducting IC review: Assessments

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

Preliminary assessments

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

Preliminary assessment involves a review of:

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

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

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

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

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

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

Attachment B sets out sample summaries.

Attachment C sets out sample assessor notes for common issues.

Attachment A: Issues and considerations

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

Issues	Considerations
OAIC is the Respondent	<ul style="list-style-type: none"> Whether the application should be declined under s 54W(b) Sample assessment: <i>It is the Information Commissioner's view that it will usually not be in the interests of the administration of the FOI Act to conduct an IC review of a decision, or an internal review decision, made by the agency that the Information Commissioner heads: the OAIC.</i> <i>Please proceed to draft an intent to decline to the applicant under s 54W(b) and advise the Legal Services area of the OAIC that an application has been received.</i>
Applicant requests expedition of IC review application	<ul style="list-style-type: none"> Sample assessment: <i>Applicant requests to have the application expedited. Contact Respondent to seek their comments, including whether the Respondent is able to make a revised decision under s 55G of the FOI Act and request a response by [insert 2 weeks],</i>
Applicant requests matter to be finalised under s 54W(b)	<ul style="list-style-type: none"> Sample assessment: <i>Applicant seeks to have the matter finalised under s 54W(b). Contact Respondent to seek their comments and request a response by [insert 2 weeks].</i>

Attachment B

Case Summary field

**Current template

Summary

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

Request:

Decision under review: original decision dated @.

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

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

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

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

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

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

Notes for assessor:

Attachment C

New Assessor notes:

All matters generally:

Post triage notes: Commence review & send opening letters:

Opening letter to A: Standard opening email.

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

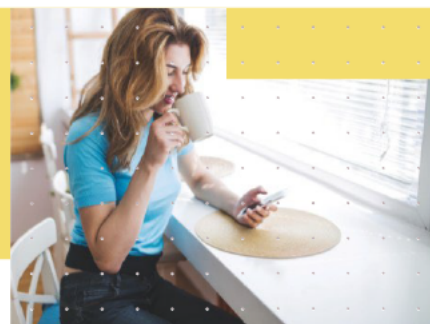
Practical refusal matters:

Post triage notes: Commence review & send opening letters:

Opening letter to A: Standard opening email.

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

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



Updated June 2023

Conducting an IC review: Identification of systemic and significant issues

The identification of systemic and significant issues can occur through 4 stages:

- Intake
- Senior assessment: pre-commencement of review
- Senior assessment: post-commencement of review, including review of documents at issue prior to allocation
- IC Review: Case management

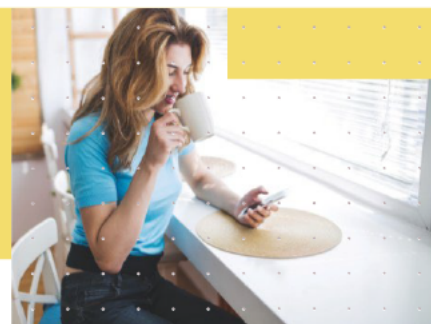
The table below sets out the considerations taken at each stage to enable identification of systemic and significant issues and the potential actions and next steps.

IC reviews involving systemic and significant issues are assigned case category 5.

This worksheet should be read in conjunction with IC Review Case Categories ([D2020/000377](#)) and Conducting an IC review: Assessments worksheets: [D2019/002542](#).

Stages	Considerations	Actions/next steps
<ul style="list-style-type: none"> • Intake 	<ul style="list-style-type: none"> • Applications made by parliamentarians • IC review applications relating to Ministers (Respondents or subject matter) • Exemptions: ss 4(1) (whether documents are official documents of a minister/party/political), 25 (Neither confirm nor deny), 33 (National Security), 34 (Cabinet), 46 (Contempt of Parliament), 47B (Commonwealth/State relations), 47D (Financial interests or property interests of the Commonwealth), 47H (Research), 47J (The Economy) • Whether request relate to official documents of a minister, senior officials' diaries, electronic communications, incoming government briefs • Whether request relates to ongoing public debate or highly publicised investigations • Whether exemptions relate to waiver of legal professional • Whether request relates to a <i>Public Interest Disclosure</i> 	<ul style="list-style-type: none"> • Identify appropriate category under 'sensitivity' • Identify relevant exemptions under 'Assessor note' • Add relevant cross-references • If deemed access refusal, proceed with preliminary inquiries process. • For all other matters, proceed to Mail Assessment.

Stages	Considerations	Actions/next steps
<ul style="list-style-type: none"> Senior assessment: pre-commencement of review 	<ul style="list-style-type: none"> In accordance with intake considerations Whether novel issues raised or whether it can be a lead case to address systemic issues Whether there is an application currently before the OAIC for a vexatious applicant declaration to be made in relation to the IC review applicant or an investigation into a complaint 	<ul style="list-style-type: none"> Note in assessment Insert relevant cross-references
<ul style="list-style-type: none"> Senior assessment: post-commencement of review, including review of documents at issue prior to allocation 	<ul style="list-style-type: none"> In accordance with senior assessment: pre-review of documents considerations Whether respondent's decision or ability to make a revised decision is affected by consultation with other government agencies 	<ul style="list-style-type: none"> Note in assessment Insert relevant cross-references
<ul style="list-style-type: none"> IC Review: Case management 	<ul style="list-style-type: none"> In accordance with intake considerations Whether respondent's decision or ability to make a revised decision is affected by consultation with other government agencies 	<ul style="list-style-type: none">



June 2023

IC review case categories

IC review case categories provide an indication of the complexity and range of issues to be determined in an IC review application.

IC review case categories are used to allocate IC reviews efficiently and equitably across all teams and assist in the implementation of strategies to address the backlog in IC reviews awaiting allocation.

The table below sets out the case categories and identifies the range of issues to be determined within each category.

In relation to matters assessed as a categories [cat 4] and [cat 5.4] (most complex and voluminous), consideration may be given as to whether the application should be declined under s 54W(b) in line with part [10.88] of the FOI Guidelines. This worksheet should be read in conjunction with the conducting IC review assessments worksheet: [D2019/002542](#)

Related guidance

These documents contain further guidance about the issues to be determined in IC reviews:

Conducting an IC review: Identification of systemic and significant issues: [D2019/001898](#).

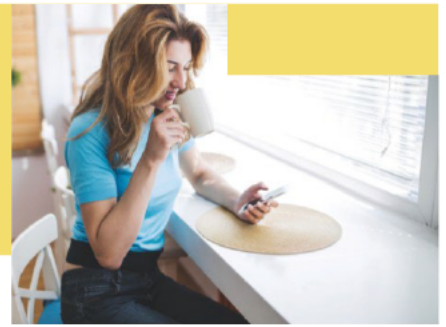
Conducting IC reviews: Assessments: [D2019/002542](#).

Category	Description	Issues
Category 0 [Cat 0]	Invalid applications	<p>Section 54N (Out of Jurisdiction)</p> <p>The IC review application does not meet the requirements of s54N (copy of decision not provided) – after a reasonable opportunity to provide one.</p> <p>The IC review application does not meet the requirements of s 54S and a s54T extension of time has been declined/or not been made following an invitation to make one (IC review application is out of time)</p> <p>The IC review application is intended for a state jurisdiction.</p> <p>Misdirected (Not FOI related)</p> <p>Misdirected (FOI request not yet made)</p> <p>No IC reviewable decision (e.g., in circumstances where an agency has issued a Practical refusal consultation notice)</p>

Category	Description	Issues
Category 0.5 [Cat 0.5]	Deemed access refusal	Access refusal reason: s15AC (decision not made on request within time) – deemed refusal.
Category 1 [Cat 1]	Less complex May be resolved by way of of ss 54W, 55F or 55K	Access refusal reason: charges Access refusal reason: searches (sole issue) Access refusal reason: material irrelevant to FOI request (s 22 only) Access refusal reason: exception to FOI Act (s 7 only) Access refusal reason: s 4 Access refusal reason: s 20 Access refusal reason: s 21
Category 2 [Cat 2]	Less complex May be resolved by way of of ss 54W, 55F or 55K	Access refusal reason: practical refusal Access refusal reason: searches and s 12 Access refusal reason: searches and s 17 Access refusal reason: s 25 Access refusal reason: single non-conditional exemption (may include s 22) (33, 34, 37, 38, 42, 45, 46, 47) Access refusal reason: searches and single non-conditional exemption (may include s 22) (ss 33, 34, 37, 38, 42, 45, 46, 47) Access refusal reason: single conditional exemption (may include s 22) (47B, 47C, 47D, 47E(b), 47E(c), 47E(d), 47F, 47G, 47H, 47J) Access refusal reason: searches and single conditional exemption (may include s 22) (47B, 47C, 47D, 47E(b), 47E(c), 47E(d), 47F, 47G, 47H, 47J)
Category 3 [Cat 3]	Complex May be resolved by way of of ss 54W, 55F or 55K	Access refusal reason: various exemptions (more than one) involving a small number (<50) of documents OR < 200 pages of exempt material Access refusal reason: searches and various exemptions (more than one) involving a small number (<50) documents OR < 200 pages of exempt material May involve third party issues
Category 4 [Cat 4]	Most complex and voluminous May be resolved by way of of ss 54W, 55F or 55K	Access refusal reason: amendment Access refusal reason: various exemptions (more than one) involving a large number (>50) of documents OR > 200 pages of exempt material Access refusal reason: searches and various exemptions (more than one) involving a large number (>50) of documents OR > 200 pages of exempt material May involve third party issues
Category 5 [Cat 5]	IC reviews with systemic and significant issues More likely to be resolved by way of s 55K decision	IC reviews with the following significant and systemic issues: <ul style="list-style-type: none"> - Access grant decisions - IC review applicant is a Parliamentarian - IC review applications relating to Ministers (Respondents or subject matter).

Category	Description	Issues
		<ul style="list-style-type: none"> - Access refusal reason includes following exemptions (4, 25, 33, 34, 46, 47B, 47D, 47H, 47J) - Request relates to official documents of a minister, senior officials' diaries, electronic communications, incoming government briefs - Requests relates to ongoing public debate or highly publicised investigations - Exemptions relate to waiver of privilege - Whether novel issues raised or whether it can be a lead case to address systemic issues - Request relates to PID complaint
Category 5.1	Category 5.1	Significant and systemic issues identified above and:
[Cat 5.1]	[Cat 5.1]	<p>Access refusal reason: charges</p> <p>Access refusal reason: searches (sole issue)</p> <p>Access refusal reason: material irrelevant to FOI request (s 22 only)</p> <p>Access refusal reason: exception to FOI Act (s 7 only)</p> <p>Access refusal reason: s 4</p> <p>Access refusal reason: s 20</p> <p>Access refusal reason: s 21</p>
Category 5.2	Category 5.2	Significant and systemic issues identified above and:
[Cat 5.2]	[Cat 5.2]	<p>Access grant decisions</p> <p>Access refusal reason: practical refusal</p> <p>Access refusal reason: searches and s 12</p> <p>Access refusal reason: searches and s 17</p> <p>Access refusal reason: s 25</p> <p>Access refusal reason: single non-conditional exemption (may include s 22) (33, 34, 37, 38, 42, 45, 46, 47)</p> <p>Access refusal reason: searches and single non-conditional exemption (may include s 22) (33, 34, 37, 38, 42, 45, 46, 47)</p> <p>Access refusal reason: single conditional exemption (may include s 22) (47B, 47C, 47D, 47E(b), 47E(c), 47E(d), 47F, 47G, 47H, 47J)</p> <p>Access refusal reason: searches and single conditional exemption (may include s 22) (47B, 47C, 47D, 47E(b), 47E(c), 47E(d), 47F, 47G, 47H, 47J)</p>
Category 5.3	Category 5.3	Significant and systemic issues identified above and:
[Cat 5.3]	[Cat 5.3]	<p>Access refusal reason: various exemptions (more than one) involving a small number (<50) of documents OR < 200 pages of exempt material</p> <p>Access refusal reason: searches and various exemptions (more than one) involving a small number (<50) documents OR < 200 pages of exempt material</p> <p>May involve third party issues</p>

Category	Description	Issues
Category 5.4 [Cat 5.4]		Significant and systemic issues identified above and: Access refusal reason: amendment Access refusal reason: various exemptions (more than one) involving a large number (>50) of documents OR > 200 pages of exempt material Access refusal reason: searches and various exemptions (more than one) involving a large number (>50) of documents OR > 200 pages of exempt material May involve third party issues



June 2023

Conducting an IC review: Review Adviser preliminary steps checklist

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

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

Review officer introduction to review parties

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

Reviewing the IC review file

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

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

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

Appendix A: D2023/002296

Review Case Plan – Reviews and Investigations

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

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

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

Use of the attachments for planning and review

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

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

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

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

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

Completed by	[insert name and position]
Date of completion	

Attachment A: Documents at issue

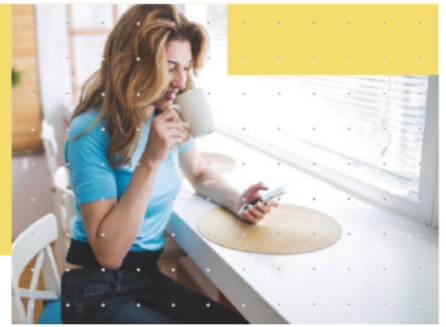
If an issue to be determined in this IC review is the application of exemptions to documents, this table should be completed to indicate which documents (or page numbers, if documents are not numbered) are in scope. Please only list the documents over which exemption issues need to be decided at IC review.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

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

Attachment B: Further information required

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

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



June 2023

Conducting an IC review: General information about case management

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

Precedents and resources

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

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

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

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

Handling exempt/sensitive material

Handling exempt material and confidential submissions

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

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

Deleting/destroying exempt material

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

Managing a caseload: efficient and timely action

General

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

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

Progressing matters efficiently

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

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

Clearance process

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

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

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

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

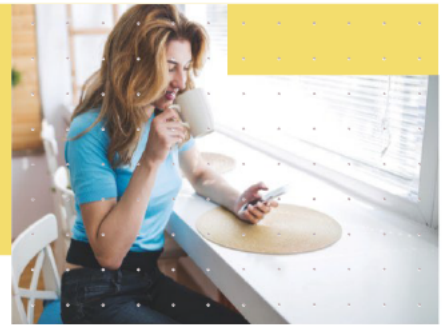
Generally, draft documents should be saved into Resolve for clearance. The draft document should be clearly labelled, and a clearance action should be allocated to the appropriate person for clearance with a brief description of the document to be cleared.

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

Matters to escalate to supervisor

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

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



October 2023

Conducting an IC review: Submissions

Contents

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

Submissions

General

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

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

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

Request to provide confidential submissions: Respondents

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

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

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

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

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

Provision of ‘confidential’ submissions by agencies without a request

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

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

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

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

Request to provide confidential submissions: Applicants

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

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

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

Submissions from third parties

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

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

Timeframes for responses

Timeframes for responses from agencies

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

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

Discuss with your supervisor if:

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

Longer timeframes may be appropriate when:

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

Timeframes for responses from applicants and third parties

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

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

Requests for an extension of time to provide information/submissions

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

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

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

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

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

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

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

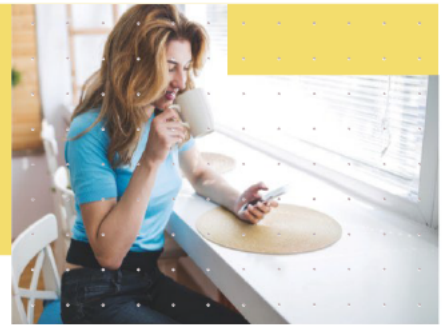
Requests for an extension of time from agencies

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

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

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

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



June 2023

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

Introduction

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

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

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

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

Before drafting an ITD

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

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

Drafting an ITD

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

Important points to remember:

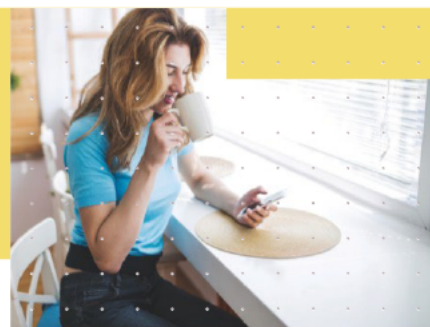
- References to the legislation and FOI Guidelines must be correct. Be very careful if paraphrasing legislation to ensure it is accurate: where possible, use the wording in the FOI Guidelines or previous IC review decisions if you want to simplify a concept or legal test.
- An ITD should use plain language.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

Clearance of ITD

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

Before sending the ITD

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



June 2023

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

Introduction

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

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

Before drafting a closure letter

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

Drafting a closure letter

General templates for closure letters are available on Resolve.

Important points to remember:

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

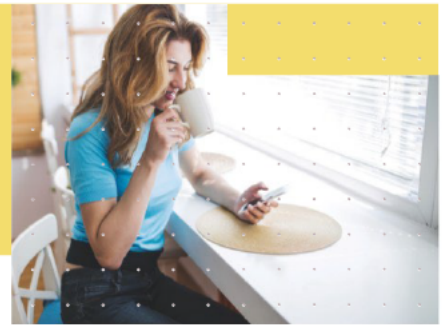
- The delegate's reasons should be drafted using plain language to address any submissions made in response to the ITD.

Clearance of closure letter

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

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

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



June 2023

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

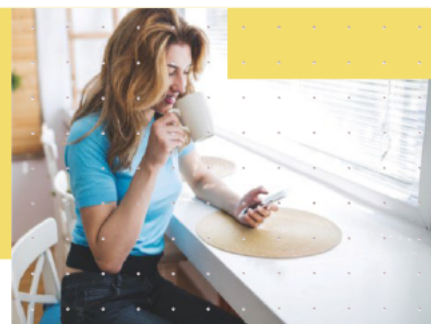
The purpose of this checklist is to assist in the review of

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

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

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

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



June 2023

Decisions review checklists

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

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

First review

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

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

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

Second review

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

The second review should focus on:

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



June 2023

Conducting an IC review – Electronic Clearance using Resolve Checklist

Introduction

The purpose of this checklist is to assist in the clearance of matters using documents on Resolve.

Clearance using documents on Resolve

Once the draft decision is ready for Executive clearance, the Assistant Commissioner or responsible Director will email the draft decision for clearance to the relevant member of Executive using the snapshot at Attachment A.

Finding the case file on Resolve

- Identify the file number of the case from the subject of the email or the ‘Topic for clearance’ in the snapshot.
- Using the file number, search for the file on Resolve using the ‘Find case’ button.

Finding the key documents referred to in the cover sheet

- Open the case file and click on the ‘Documents’ tab.
- In the ‘Documents’ tab, click on the ‘Comments’ button and then the ‘Category’ button to order the documents. It is important to click on these buttons in that sequence so that the documents are correctly ordered.
- Scroll down the documents until you find the documents that have been categorised as a ‘Key document’. These are the documents that are identified in the coversheet. These documents will be named on the Documents tab in Resolve using the following naming convention:
 1. * Tab 0. Cover sheet
 2. ***Tab 1. Draft decision**
 3. *Tab 2. FOI request
 4. *Tab 3. FOI decision
 5. *Tab 4. Internal review decision
 6. *Tab 5. IC review application

7. *Tab 6. Revised decision
8. *Tab 7
 - a. *Tab 7(a). A's submissions (delivered to Reception 5.02.2018)
 - b. *Tab 7(b). A's submissions
 - c. *Tab 7(c). A's submissions
 - d. *Tab 7(d). A's submissions (evidence only - 30 January 2014 email and attachments)
9. *Tab 8
 - a. *Tab 8(a). R's submissions
 - b. *Tab 8(b). R's submissions (evidence only)
 - c. *Tab 8(c). R's submissions
10. *Tab 9. IGIS
11. *Tab 10. Document in issue – [short form name of document]

Editing the draft IC decision on Resolve

- Select the draft decision by clicking on it once. Right click to access the list of options. Select the option 'CheckOut and Edit Document'.
- Edit the draft decision.
- Ensure all edits to the draft decision have been saved before closing the document.
- Select the draft decision by clicking on it once. Right click to access the list of options. Select the option 'Check In'.

Identifying the material at issue in the document(s) at issue.

- The last tab will identify the document(s) at issue.
- The draft decision will precisely identify the location of the material at issue in footnote(s) and the exemption applied.

Notes:

- If the decision is left checked out, the document cannot be modified by anyone else until it is checked in.
- The 'Status' column on Resolve records whether a document is checked in or checked out.
- Detailed instructions available in OAIC, *Resolve User Guide*.

Attachment A – Template Snapshot

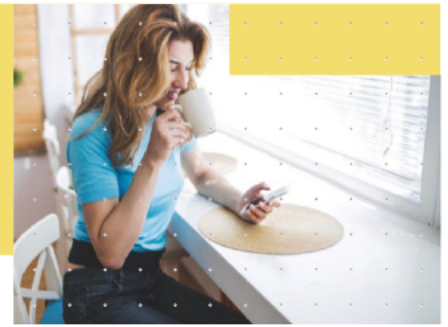
The Director/Assistant Commissioner will use the following Snapshot template provided by Executive at the top of the email. **[TIP: The list of documents can be copied using the 'snip' function']**.

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

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

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

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



February 2020

Information Commissioner reviews: Key cases

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

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

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

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

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

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

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

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

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

8. [Searches – Wickr and Whatsapp](#)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conditional exemptions

Cases

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

For further information

GPO Box 5218 Sydney NSW 2001 | P 1300 363 992 | E enquiries@oaic.gov.au

Or visit our website www.oaic.gov.au

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



Australian Government
Office of the Australian Information Commissioner

Delegation of FOI powers and functions by the Australian Information Commissioner

Freedom of Information Act 1982

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

A handwritten signature in black ink, appearing to read 'A. Falk', written in a cursive style.

Angelene Falk
Australian Information Commissioner
Australian Privacy Commissioner
3 February 2023

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

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

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

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



Angelene Falk
Australian Information Commissioner
Australian Privacy Commissioner
3 February 2023



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

Guidance for staff

Referring conduct to the AFP

oaic.gov.au



Contents

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

Background

When this guidance applies

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

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

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

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

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

Purpose

This guidance material outlines:

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

Offence provisions

Privacy Act

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

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

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

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

FOI Act

The following table sets out the FOI Act offence provisions.

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

Identifying circumstances that may amount to an offence

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

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

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

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

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

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

Consideration of referral

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

Relevant factors

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

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

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

Irrelevant factors

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

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

Other factors

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

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

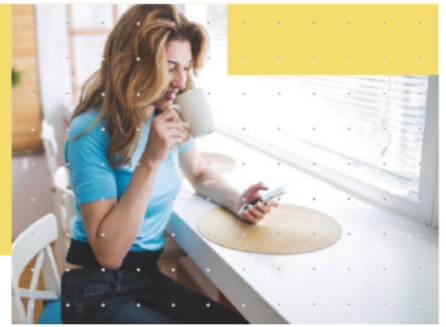
AFP requirements

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

Commissioner briefing

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

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



Handling Portable Media Devices

This worksheet includes information on the receipt, storage, viewing and destruction of the following portable media devices received during an IC review or the investigation of an FOI complaint:

- USB and other external storage devices and
- CDs and DVDs.

Key points:

- All information provided through portable media devices during an IC review or the investigation of an FOI complaint must be registered on Resolve and must be scanned for malware.
- Contents of any portable media device must not be copied onto Resolve.
- All portable media devices must be stored in the FOI B Class safe and should only be taken out when the material is being reviewed by the allocated case officer or supervisor.
- When viewing the contents of the portable media device, the case officer should ensure they maintains a clean desk policy at all times and do not leave the portable media device unattended.
- The content of the portable media device must not be disclosed. If this happens, you must immediately report it to your supervisor.
- All portable media devices must be destroyed or returned once the matter has been finalised.

Registration and receipt of portable media devices

- Upon receipt of a portable media device from an agency, an 'Exempt material' action must be created in Resolve on the same day it is received. This action item will remain on Resolve until the portable media device is destroyed or returned to the respondent agency at the finalisation of the matter.
 - Do **not** save an electronic copy of exempt material received on a portable media device on the Resolve file.
- Write to the respondent agency confirming receipt of the portable media device.
- If the portable media device is password protected, the password is to be stored on the Resolve file, *not* with the portable storage device.
- Send a request to the Information Systems Manager to scan the portable media device for malware. Arrangements should be made with the Information Systems Manager to conduct supervised scanning of the device.

Storage of the portable media device

- The portable media device should be placed back in its envelope and packaging and be placed in a suspension file clearly marked with the IC review number (e.g. MR19/0000) or FOI complaint reference (e.g. CP19/00000).
- Place the suspension file containing the portable media device into the FOI B Class safe, filing it in numerical order.
- If the portable media device has a classification or caveat marking, review officers should discuss with their supervisor how to handle the material in accordance with the [Protective Security Policy Framework](#). Talk to the OAIC's Information Systems Manager/Records Officer if you have any questions.
- Access to the FOI B Class safe is only to authorised case officers holding the relevant security clearance. The case officer who opens the FOI B Class safe to store the portable storage device must ensure the safe is closed and locked in accordance with the security instructions on the front of the safe.
- At all times the FOI B Class safe is to remain locked.

Viewing material contained on portable media devices

- All portable media devices must be stored in the FOI B Class safe and should only be taken out when the material is being reviewed by the allocated case officer or supervisor.
- When viewing the contents of the portable media device, the case officer should ensure they maintain a clean desk policy at all times and do not leave the portable media device unattended.
- Once the case officer has finished viewing the contents of the portable media device, they should return it to the nominated safe immediately and ensure it is stored in accordance with the [Protective Security Policy Framework](#).
- The content of the portable media device must not be disclosed. If this happens, you must immediately report it to your supervisor.

Destroying/returning portable media devices

- All portable media devices must be destroyed or returned once the matter has been finalised:
 - Ask the agency/minister whether it requires the CD/DVD to be returned or destroyed.
 - If the agency/minister does not want the CD/DVD to be returned, destroy the CD/DVD by shredding it.
 - If the agency/minister wants the CD/DVD to be returned, arrange delivery either by safe hand or collection by the agency/minister.
 - All USBs should be returned by safe hand delivery or collection by the agency/minister.
- Update 'Exempt material' action on Resolve to record whether the portable media device has been destroyed or returned and the date that the action was completed.
 - Use the 'awaiting advice' option if you have contacted the agency/minister to confirm whether the portable media device should be returned/destroyed and are

awaiting a response. It is the review officer's responsibility to diarise to follow up with the agency/minister if a response is not received.

- Whilst awaiting advice, the portable media device must remain in the FOI B Class safe until the agency/minister advises whether they would like it destroyed or returned.

For further information

GPO Box 5218 Sydney NSW 2001 | **P** 1300 363 992 | **E** enquiries@oaic.gov.au

Or visit our website www.oaic.gov.au

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



Information Commissioner (IC) review process

Stage	Process	Guidelines	Sample letters / guidance	Notes
Stage 1: Intake and Early Resolution / Production of documents	1. Triage: a) Review and acknowledge application (received via email, fax or smartform) for validity a. Invalid applications to be finalised under s 54N b. Valid applications – deemed – proceed to ‘Deemed process’ below and invite s 54T application (extension of time to make IC review application) c. Valid applications within time proceed to ‘Assessment’- see below	10.28 – 10.32 (Application for IC review) 10.41 – 10.44 (extension of time for applying) 10.81 – 10.82 (Preliminary inquiries)	<ul style="list-style-type: none"> Acknowledgement letter D2022/011173 Acknowledgement letter where OAIC is respondent D2022/026515 	
	2. Deemed access refusals a) Conduct preliminary inquiries with Respondent and invite the applicant to lodge an application to make an IC review application under s 54T if required. b) If Respondent advises that the FOI request is not deemed to have been refused as the statutory processing time has not expired, the application is invalid and the application will be finalised under s 54N. c) If Respondent advises that the FOI request is deemed to have been refused as the statutory processing time has expired: a. Grant the applicant’s s 54T application if required b. Commence review, issue s 54Z/54T letter to the respondent and request relevant documentation d) If the Respondent makes a revised decision, confirm with the applicant whether they wish to proceed e) If the Respondent provides the processing documentation, proceed to ‘Review s 54Z response’ below	10.4 – 10.5 (Deemed decisions) 10.82 (Preliminary inquiries) 10.67 – 10.74 (Revising the decision in the course of an IC review) 10.100 (Steps in the Information Commissioner review process) 10.105 – 10.107 (Deemed refusal or deemed affirmation of original decision)	<ul style="list-style-type: none"> Notice to commence review (DHA): D2022/019558 Deemed email templates (proceeds, withdrawals, ITDs) D2022/002690 	<i>Proposed amendments to the procedure directions if implemented will impact on these matters.</i>
	3. Assessment a) Review IC review application and statement of reasons and decide whether to: a. Commence review - see below b. Decline under s 54W - see below c. Conduct further enquiries	10.81 – 10.82 (Preliminary inquiries)	<ul style="list-style-type: none"> Conducting IC reviews - assessments D2019/002542 Conducting IC reviews – case categorisation D2020/000377 Conducting IC reviews: Identification of systemic and significant issues worksheet D2019/001898 	
	4. Notice of commencement of IC review / Request for information (s 54Z) a) Issue notice of commencement of review and request for information, including notifying relevant parties	10.55 (Obtaining information) 10.91 – 10.93 (The Information Commissioner’s powers to gather information) 10.100 (Steps in the Information Commissioner review process) 10.114 – 10.115 (Methods of providing documents to the Information Commissioner)	<ul style="list-style-type: none"> 54Z notice of IC review D2022/002669 Opening letter to applicant and 54Z cover email to respondent D2022/026520 55A notice of added party to proceeding D2019/009911 	<i>We have previously considered adopting a similar approach to the AAT in relation to the production of submissions – for a copy to be provided to the applicant as well, and then the applicant to have x weeks to provide submissions in response. I</i>
	5. Decline a) Issue intent to decline the applicant if under s 54W(a)(i) and to both applicant and respondent if under s 54W(b)	10.85 – 10.90 (When the Information Commissioner will not review a matter)	<ul style="list-style-type: none"> Intention to decline (s 54W checklist) D2018/016246 Closure letter (s 54W checklist) D2018/016247 Conducting an IC review: Review of preliminary views/s 54W letters D2018/016248 54W (b) Intent to decline notice - D2022/011204 	

Stage	Process	Guidelines	Sample letters / guidance	Notes
	<p>a. s 54W(a)(i): if the applicant responds, consider the response and determine whether to proceed to close under s 54W or whether further information is required. If the applicant does not respond, proceed to close under s 54W.</p> <p>b. s 54W(b): If the parties do not respond, proceed to close. If the parties respond, consider the response and determine whether to proceed to close under s 54W or whether to re-assess.</p>		<ul style="list-style-type: none"> 54W(b) Decision notice D2022/026476 54W (a) Decline advice letter to applicant (i) (ii) (iii) D2022/011179 D2022/011181 D2022/011189 54W (a) Close letter to Applicant (i) (ii) (iii) D2022/011182 D2022/011183 D2022/011184 	
2: Case Management	<p>8. Review of s 54Z response</p> <p>a) If scope of IC review involves ss 33/34 exemptions and the OAIC does not hold the material at issue</p> <p>a. Consider whether to issue s 55U notice</p> <p>b. If a s 55U notice has been issued and the Respondent has provided the material at issue, consider whether on further review, more information is required from the applicant or respondent</p> <p>b) For all other reviews, consider:</p> <p>a. requests to provide confidential submissions</p> <p>b. whether more information is required from the applicant or respondent, including where a notice to compel the document at issue is required</p> <p>c. whether the request for information should be in the form of an intent to decline to the applicant or a preliminary view to the applicant or respondent</p>	<p>10.13 – 10.14 (Onus)</p> <p>10.67 – 10.74 (Revising the decision in the course of an IC review)</p> <p>10.77 – 10.80 Evidence by the Inspector-General of Intelligence and Security</p> <p>10.91 – 10.99 (The Information Commissioner’s powers to gather information)</p> <p>10.108 – 10.113 (Preliminary assessment and view)</p>	<ul style="list-style-type: none"> Reviews and Investigations case plan: D2023/002296 Preliminary steps checklist D2018/016244 Conducting an IC review – general information about case management D2018/016249 Submissions D2018/016243 Conducting an IC review: Preliminary view checklist D2018/016245 IC review case plan D2021/017910 55T notice to produce exempt documents - D2019/003535 55R notice to produce to agency - D2016/006882 	<i>Review advisers are encouraged to complete the case plan to assist with planning review, identifying and addressing procedural fairness issues and providing a brief document that sets out the history of the case</i>
	<p>7. Informal resolution and procedural fairness steps</p> <p>a) Ensure procedural fairness steps have been undertaken and where possible, facilitate resolution through the use of preliminary views/inviting s 55G decisions</p> <p>b) If the application proceeds to a decline under s 54W – see ‘Decline’ process above</p> <p>c) If the application proceeds to a decision under s 55K – see ‘Decision and finalisation’ stage below</p>	<p>10.52 – 10.62 (General procedure)</p> <p>10.67 – 10.74 (Revising the decision in the course of an IC review)</p> <p>10.85 – 10.90 (When the Information Commissioner will not review a matter)</p>		
3: Decision and finalisation	<p>8. Draft decision for clearance</p> <p>a) Decision drafted for Director and Assistant Commissioner clearance</p> <p>b) IC review applications involving searches, charges, practical refusals will proceed to the Assistant Commissioner for decision</p> <p>c) All other decisions will proceed to the FOI Commissioner or Information Commissioner for clearance</p> <p>d) At any time during the clearance stage, the matter may need to return to the case management stage.</p>	<p>10.118 (Written reasons to be given)</p> <p>10.125 – 10.26 (Compliance with the Information Commissioner’s decision)</p>	<ul style="list-style-type: none"> Decision writing checklist D2018/016241 Conducting an IC review- clearance using documents on Resolve check list D2020/005955 Snapshot for clearance of IC review decisions D2022/001851 Section 55K decision – s47C D2021/003889 Section 55K decision – s 47 F D2021/003888 	
	<p>9. Finalisation of Decision</p> <p>a) Once the decision has been approved, the decision is assigned a citation and is then sent to the relevant parties.</p> <p>b) For matters that are set aside or varied, a letter seeking confirmation of compliance/appeal is also sent to the Respondent.</p>	<p>10.125 – 10.126 (Compliance with the Information Commissioner’s decision)</p>	<ul style="list-style-type: none"> Attachment E of Decision writing checklist D2018/016241 Section: 55K compliance letter template D2020/012832 	
	<p>10. Return/destruction of exempt material</p>	<p>10.94 (Producing documents claimed to be exempt: general)</p>	<ul style="list-style-type: none"> Conducting an IC review – general information about case management D2018/016249 	
	<p>11. Publication of decision</p> <p>a) The decision is sent to AUSTLII for overnight publication.</p>	<p>10.118 (Written reasons to be given)</p>		
	<p>12. Summary</p>			

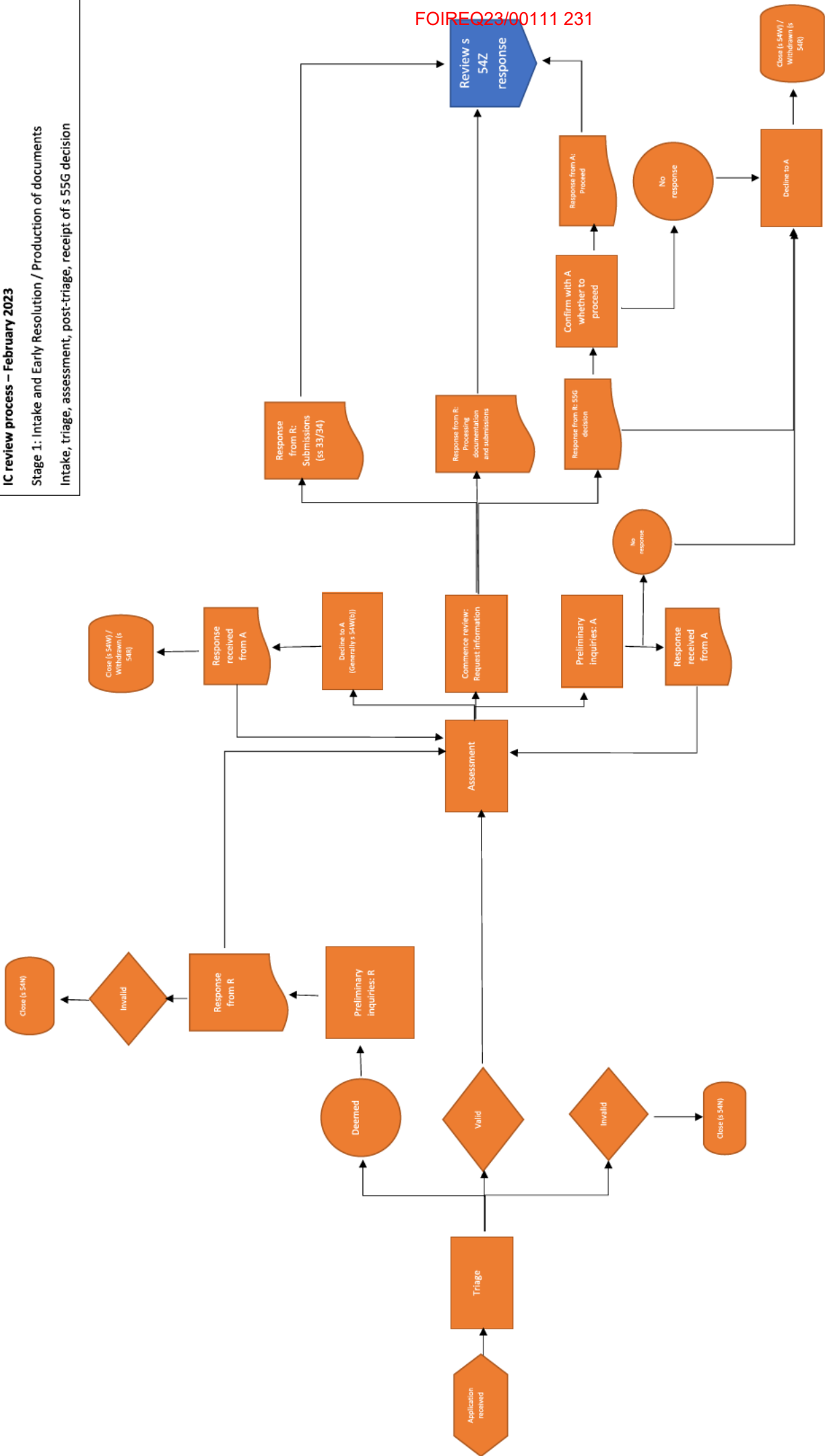
Stage	Process	Guidelines	Sample letters / guidance	Notes
	a) A summary of the decision, noting key points and whether any changes are required to the FOI Guidelines or IC review process, is circulated to the Commissioners, media, legal and FOI Branch.			

IC review process – February 2023

Stage 1: Intake and Early Resolution / Production of documents

Intake, triage, assessment, post-triage, receipt of s 55G decision

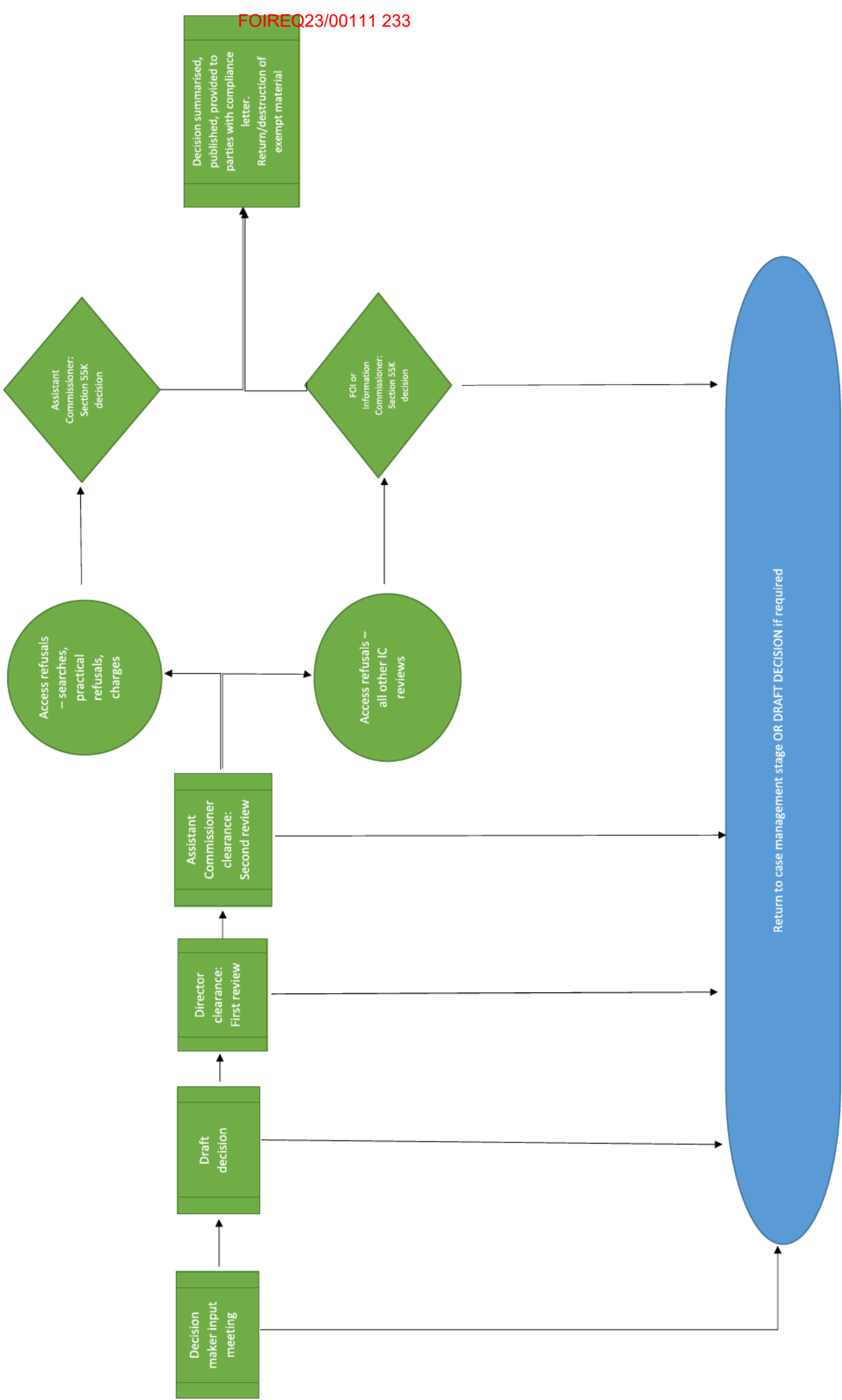
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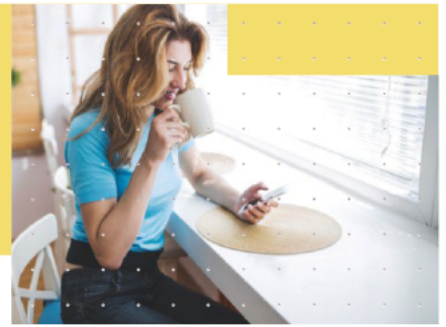


IC review process

Stage 3: Decision and finalisation

Draft decision, clearance and finalisation





November 2018

Conducting an IC review: Preliminary view checklist

Contents

- Introduction 2
- Before drafting a preliminary view/appraisal 2
- Drafting a preliminary view/appraisal..... 3
- Preliminary views to agencies 3
- Preliminary views to applicants..... 3
- Clearance of preliminary view/appraisal 5
- Before sending the preliminary view/appraisal..... 5
- Attachment A –Template preliminary views to agency 6
- Attachment B – Template preliminary views to applicant – access refusal decisions..... 13
- Attachment C – Template preliminary view to applicant – access grant decisions 21



Introduction

This checklist provides general guidance to review officers to assist with drafting preliminary views (PVs) and should be read alongside [Part 10 of the FOI Guidelines](#), in particular [10.115] – [10.120].

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

It is important that the language used in a PV makes clear that the PV is setting out the view of the review officer and is not a decision by the Information Commissioner under [s 55K](#). Even where a PV has been provided, there is an obligation for the Information Commissioner to make the correct and preferable decision, which is not restricted by an earlier PV.

It is important that PVs are accurate, evidence-based and cover all relevant issues. PVs are a case management tool but are also:

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

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

Before drafting a preliminary view/appraisal

- Consider whether the steps identified in the *Conducting a review checklist* have been completed.
- Ensure that [s 54Z](#) notice has been provided to the agency/Minister as it is possible for an application for IC review to have progressed only on the basis of preliminary inquiries made under [s 54V](#).
- Confirm affected third parties have been identified and invited to participate in review.
- Consider whether the scope of the IC review is settled – further clarification from the applicant may be required and the scope narrowed where possible.
- Consider whether it is clear from the unredacted documents which material has been found exempt/irrelevant to the request and whether any mark-ups are consistent with the decision under review.
- Confirm the decision that is under review, eg check the validity of internal review decisions.
- Note: If you do not have enough information to provide a PV on the merits of the decision, it is fine to first seek further submissions from the parties.

- In some cases, it may be necessary to provide more than one PV during the course of an IC review (for example, where an agency has raised new contentions during the course of an IC review or has made a [s 55G](#) decision relying on different exemptions).

Drafting a preliminary view/appraisal

Preliminary views are provided in .pdf letter format and should concisely set out the relevant issues and discussion.

Preliminary views generally contain the following components:

- A summary of the background to the IC review (in a similar format to how it is set out in an IC review decision)
- The scope of the IC review, that is, the issues to be decided.
- Any submissions that have not been shared between parties, that are not confidential.
- An explanation of the relevant exemption or part of FOI Act on which the decision under review is based. If a conditional exemption applies, include discussion of [s 11A\(5\)](#).
- A brief introduction to the relevant law and Guidelines (if something is agreed or not in issue, there is no need to go over the law).
- Discussion of relevant IC review/AAT/Federal Court decisions.
- A brief statement under each exemption, outlining whether and why the review officer is of the view that the exemption has or has not been made out, including a discussion of onus where appropriate.
- The next steps – what the applicant/agency should do based on whether they accept our preliminary view or not (tailor to the specific circumstances)

Preliminary views to agencies

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

Preliminary views to applicants

- For PVs to applicants in access refusal decisions, refer to the templates at [Attachment B](#).
- For PVs to applicant in access grant decisions, refer to the template at [Attachment C](#).
- Tailor the language and level of detail provided to suit your audience. The preliminary view should be easy to read and understand. Using short sentences and including headings can help break up the text into relevant discussions.
- Do not disclose confidential submissions or content of exempt material (except as described in the agency or minister's decision, provided to the applicant, or in non-confidential submissions). Consider characterising the exempt material (e.g. the names and contact details of third parties) and providing a general description of the context of

the confidential submissions (e.g. Although I cannot disclose the content of the confidential submissions, I can tell you that they provide further particulars of why the Department submits that disclosure would damage the international relations of the Commonwealth).

Important points to remember:

- References to the legislation and FOI Guidelines must be correct. Be very careful if paraphrasing legislation to ensure it is accurate: where possible, use the wording in the FOI Guidelines or previous IC review decisions if you want to simplify a concept or legal test.
- A PV should use plain language. Refer to the [OAIC quick reference style guide](#) for citing cases and legislation, punctuation and grammar.
- A PV should be easy to read and understand:
 - use appropriate headings to introduce topics
 - avoid long sentences/paragraphs
 - do not include irrelevant information
 - consider referring to an attachment to the FOI request/submissions if they are lengthy to quote.
- Focus on what is in dispute and provide only the relevant information to enable the recipient to understand the issues and legal discussion.
- Referring to previous IC review decisions (available on [AustLii](#)) dealing with similar issues when drafting a PV will ensure that the PV is consistent with previous IC review decisions in terms of language and discussion of the issues.
- Consider and refer to OAIC resources, including:
 - overviews of IC review decisions that have addressed the same exemption/issue (check with your supervisor if these are available)
 - draw from a cross section of the most recent published decisions that have addressed the same exemption/issue (use keyword searches and the ‘NoteUp references’ function in [AustLii](#))
 - the relevant section of the FOI Guidelines, and
 - recent Federal Court, AAT and IC review decisions on relevant issues considered/cited/distinguished if necessary.
- Each paragraph of the PV is a building block and should logically describe and discuss the issues in the IC review. Start by including all potentially relevant information in the PV and during the drafting process, remove any information that is not directly relevant to the issues at hand.

Clearance of preliminary view/appraisal

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

Before sending the preliminary view/appraisal

- Once the draft PV has been approved, consider calling the applicant/agency to discuss the steps you have taken to form your view on the IC review application, including review of the parties' submissions the relevant law and previous IC review decisions. Explain the purpose of the PV and the timeframe for a response.
- Check that the PV is signed and correctly date.
- Convert the PV to .pdf format.

Attachment A –Template preliminary views to agency

Preliminary view to agency – general/straightforward

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

Our reference: [insert]

Your reference: [insert]

[First Name Last Name]

[Company Name]

[Address Line 1]

[Address Line 2]

By email: [insert]

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

Dear [Salutation] [Last name]

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

[Succinctly explain your reasons for reaching this view.]

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

I would be grateful if the [agency/minister] could provide any submissions it wishes to make in response to this preliminary view [and if relevant, advise whether it is willing to make a revised decision under s 55G of the FOI Act] by **close of business on @**.

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

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

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

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

Yours sincerely

[First Name Last Name]

[Position Title]

[date]



Preliminary view to agency – complex

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

Our reference: [insert]

Your reference: [insert]

[First Name Last Name]

[Company Name]

[Address Line 1]

[Address Line 2]

By email: [insert]

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

Dear [Salutation] [Last name]

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

My reasons are set out below. I would appreciate your response by **close of business on @ 2 weeks**.

Reasons

[Succinctly explain your reasons for reaching this view. Include dot points as sub-headings for separate issues.]

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

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

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

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

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

Next steps

I would be grateful if the [agency] could provide any submissions it wishes to make in response to this preliminary view [and if relevant, advise whether it is willing to make a revised decision under s 55G of the FOI Act] by **close of business on @**.

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

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

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

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

Yours sincerely

[First Name Last Name]

[Position Title]

[date]

Preliminary view to agency – searches

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

Our reference: [insert]

Your reference: [insert]

[First Name Last Name]

[Company Name]

[Address Line 1]

[Address Line 2]

By email: [insert]

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

Dear [Salutation] [Last name]

I write further to previous correspondence in relation to [insert name]'s (the applicant) application for IC review of a decision made by the [agency (include shortened version in brackets)] under the *Freedom of Information Act 1982* (Cth) (the FOI Act).

I am writing to provide you with a preliminary view based on my experience as a review officer and my analysis of the issues. I note that the preliminary view is not a decision by the Information Commissioner, but its purpose is to assist the [agency] to consider revising its decision under s 55G or to provide further submissions to address the issues raised.

In summary, it is my preliminary view that the [agency] has not established that its decision is justified or that the Information Commissioner should give a decision adverse to the IC review applicant (s 55D(1)) and therefore if this matter were to proceed to a decision by the Information Commissioner, I would recommend that the [agency]'s decision be set aside.

I have requested the [agency]'s response by **close of business on @ 2 weeks**.

Background and scope of IC review

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

[insert quote or attach a copy if it is too lengthy to quote].

[insert any details about revision to scope]

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

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

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

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

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

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

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

[insert details of decision]

Section 24A of the FOI Act requires [the agency/minister] to take 'all reasonable steps' to find a requested document before refusing access to it on the basis that it cannot be found or does not exist. Whether 'all reasonable steps' have been taken is a question of fact in the individual case, to be decided having regard to matters such as (FOI Guidelines at [3.89]):

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

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

Preliminary view

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

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

- [if relevant] the range of documents searched and how that range was identified, including:
 - whether searches of [type of record-keeping system – for example, electronic messaging applications] were undertaken
 - whether consideration was given to s 17 of the FOI Act to produce a written document containing the information by using a 'computer or other equipment that is ordinarily available' to the agency for retrieving or collating stored information (see FOI Guidelines at [3.204] – [3.210])
- [if relevant] the methods used to search the documents and what technology was used (for example, by using keywords to search electronic documents)
- [if relevant] the limitations of any searches conducted
- [if relevant] whether the [agency/minister] consulted with any individuals in the [agency/Minister's office] who may have been able to assist in locating the documents, or
- [if relevant] reasons for why the documents cannot be found in light of the [agency/minister]'s record-keeping practices.
- [any other relevant issues].

For these reasons, it is my preliminary view as review officer that the [agency/minister] has not discharged its onus to establish that the decision given in respect of the applicant's FOI request is justified (s 55D of the FOI Act).

If this matter proceeds to a decision by the Information Commissioner, I would recommend that the [agency/minister]'s decision under s 24A of the FOI Act is set aside.

Next steps

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

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

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

In preparing its submissions, the [agency/minister] should have regard to Part 5 of the *Direction as to certain procedures to be followed in IC reviews* relating to the procedure in relation to submissions made during an IC review. In particular, please note the information at [5.2] – [5.4] about sharing submissions and requests to provide submissions in confidence.

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

Yours sincerely

[First Name Last Name]

[Position Title]

[date]

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

Preliminary view to applicant – general

Our reference: [insert]

[if applicable] Your reference: [insert]

Agency reference: [insert]

[First Name Last Name]

[Company Name]

[Address Line 1]

[Address Line 2]

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

Dear [Salutation] [Last name]

I write further to previous correspondence in relation to your application to the Office of the Australian Information Commissioner (OAIC) for IC review of a decision made by the [agency/minister (include shortened version in brackets)] under the *Freedom of Information Act 1982* (the FOI Act). [if the applicant has more than one ongoing IC review, include the date of the decision under review]

I am looking to progress this matter to a decision by the Information Commissioner. However, before I do so, I would like to provide you with a preliminary view based on my experience as a review officer and my analysis of the issues. I note that the preliminary view is not a decision by the Information Commissioner, but its purpose is to assist you to consider whether you want to continue with your application and if so, to give you the opportunity to provide information in response to the issues raised in this preliminary view if you would like to.

In summary, based on the information before the OAIC, if this matter were to progress to a decision by the Information Commissioner under s 55K of the FOI Act, I would recommend that the decision of the [agency/minister] be [affirmed/varied].

I would be grateful if you would consider the information in this letter and provide a response within two weeks, that is by **@ 2 weeks**.

Background

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

[insert quote or attach a copy if it is too lengthy to quote].

[insert any details about revision to scope]

On [date], the [agency/minister] advised you that [insert details of decision].

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

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

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

Scope of IC review

The issues in this IC review are [insert].

Your IC review application and submissions

[Summarise or quote the applicant's IC review application/submissions to note what the outcome sought by the applicant is]

[Agency/Minister]'s submissions

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

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

[Issue] (s [x])

[tailor this section to your audience by considering the level of knowledge of the FOI Act and FOI Guidelines that the recipient holds].

[insert the requirements of the relevant provision of the FOI Act and refer to relevant IC review/AAT/Federal Court decisions. If the recipient appears to have misunderstood/misinterpreted the requirements of the relevant provision, provide clarification].

Preliminary view

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

For these reasons, if this matter proceeds to a decision by the Information Commissioner, I would recommend that the [agency/minister]'s decision be [varied/affirmed].

Next steps

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

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

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

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

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

Yours sincerely

[First Name Last Name]

[Position Title]

[date]

Preliminary view to applicant – exemptions and irrelevant material

Our reference: [insert]

[if applicable] Your reference: [insert]

Agency reference: [insert]

[First Name Last Name]

[Company Name]

[Address Line 1]

[Address Line 2]

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

Dear [Salutation] [Last name]

I write further to previous correspondence in relation to your application to the Office of the Australian Information Commissioner (OAIC) for IC review of a decision made by the [agency/minister (include shortened version in brackets)] under the *Freedom of Information Act 1982* (the FOI Act). [if the applicant has more than one ongoing IC review, include the date of the decision under review]

I am looking to progress this matter to a decision by the Information Commissioner. However, before I do so, I would like to provide you with a preliminary view based on my experience as a review officer and my analysis of the issues. I note that the preliminary view is not a decision by the Information Commissioner, but its purpose is to assist you to consider whether you want to continue with your application and if so, to give you the opportunity to provide information in response to the issues raised in this preliminary view if you would like to.

In summary, based on the information before the OAIC, if this matter were to progress to a decision by the Information Commissioner under s 55K of the FOI Act, I would recommend that the decision of the [agency/minister] be [affirmed/varied].

I would be grateful if you would consider the information in this letter and provide a response within two weeks, that is by **@ 2 weeks**.

Background

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

[insert quote or attach a copy if it is too lengthy to quote].

[insert any details about revision to scope]

On [date], the [agency/minister] advised you that it had identified [number] documents falling within the scope of your request. The [agency/minister] decided to give you access to [number] documents in full, [number] documents in part and refused access to [number] documents.² In making its decision, the [agency/minister] relied on the [insert name of exemption(s) with section number in brackets].

² Footnotes

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

On [date], the [agency/minister] made its internal review decision. The [agency/minister] decided to give you access to [number] documents in full, [number] documents in part and refused access to [number] documents. In making its decision, the [agency/minister] relied on the [insert name of exemption(s) with section number in brackets].

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

Scope of IC review

[insert any details about revised decision, updates to exemption contentions or revisions to the scope of the request/issues during the course of the IC review]

The issues in this IC review are:

- [for non-conditional exemptions] whether the material that the [agency/minister] decided is exempt under s [insert] is exempt under this provision
- [for conditional exemptions] whether the material that the [agency/minister] decided is exempt under s [insert] is conditionally exempt under this provision, and if so, whether giving you access to conditionally exempt material at this time would be contrary to the public interest
- [if relevant] whether the material that the [agency/minister] decided is irrelevant to the request is irrelevant to the request.

Your IC review application and submissions

[Summarise or quote the applicant's IC review application/submissions to note what the outcome sought by the applicant is]

[Agency/Minister]'s submissions

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

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

Preliminary view

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

Section 22 provides that an agency may prepare an edited copy of a document by deleting information 'that would reasonably be regarded as irrelevant to the request for access' (s 22(1)(a)(ii)).

The FOI Guidelines at [3.54] explain that a request should be interpreted as extending to any document that might reasonably be taken to be included within the description the applicant has used.

I have had the opportunity to examine an unedited copy of the documents identified as falling within the scope of your request and it is apparent that the [agency/minister] deleted the following categories of material as irrelevant to the request:

[insert]

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

[insert quote that describes the material/documents found irrelevant].

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

For these reasons, if this matter proceeds to a decision by the Information Commissioner, I would recommend that the [agency/minister]'s decision to find material irrelevant to the request under s 22(1)(a)(ii) is affirmed.

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

[insert a basic explanation of the requirements of the exemption (refer to the wording in previous IC review decisions/the FOI Guidelines).

The [agency/minister] decided that [insert summary of decision – for example, the agency decided that material in six documents is exempt under s 47F].

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

[insert quote that describes the material/documents found exempt].

[introduce your reasoning for agreeing with the agency/minister's decision by referring to particularly relevant parts of the FOI Guidelines/IC review decisions/AAT decisions]

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

For these reasons, if this matter proceeds to a decision by the Information Commissioner, I would recommend that the [agency/minister]'s decision under s [x] of the FOI Act be affirmed.

Next steps

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

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

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

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

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

Yours sincerely

[First Name Last Name]

[Position Title]

[date]

Preliminary view to applicant – searches

Our reference: [insert]

[if applicable] Your reference: [insert]

Agency reference: [insert]

[First Name Last Name]

[Company Name]

[Address Line 1]

[Address Line 2]

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

Dear [Salutation] [Last name]

I write further to previous correspondence in relation to your application to the Office of the Australian Information Commissioner (OAIC) for IC review of a decision made by the [agency/minister (include shortened version in brackets)] under the *Freedom of Information Act 1982* (the FOI Act). [if the applicant has more than one ongoing IC review, include the date of the decision under review]

I am looking to progress this matter to a decision by the Information Commissioner. However, before I do so, I would like to provide you with a preliminary view based on my experience as a review officer and my analysis of the issues. I note that the preliminary view is not a decision by the Information Commissioner, but its purpose is to assist you to consider whether you want to continue with your application and if so, to give you the opportunity to provide information in response to the issues raised in this preliminary view if you would like to.

In summary, based on the information before the OAIC, if this matter were to progress to a decision by the Information Commissioner under s 55K of the FOI Act, I would recommend that the decision of the [agency/minister] be [affirmed/varied].

I would be grateful if you would consider the information in this letter and provide a response within two weeks, that is by @ 2 weeks.

Background and scope of IC review

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

[insert quote or attach a copy if it is too lengthy to quote].

[insert any details about revision to scope]

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

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

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

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

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

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

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

[insert details of decision]

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

Section 24A of the FOI Act requires [the agency/minister] to take ‘all reasonable steps’ to find a requested document before refusing access to it on the basis that it cannot be found or does not exist. Whether ‘all reasonable steps’ have been taken is a question of fact in the individual case, to be decided having regard to matters such as (FOI Guidelines at [3.89]):

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

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

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

Preliminary view

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

- [insert]

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

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

Next steps

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

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

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

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

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

Yours sincerely

[First Name Last Name]

[Position Title]

[date]



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

Preliminary view to applicant – general

Our reference: [insert]

[if applicable] Your reference: [insert]

Agency reference: [insert]

[First Name Last Name]

[Company Name]

[Address Line 1]

[Address Line 2]

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

Dear [Salutation] [Last name]

I write further to previous correspondence in relation to your application to the Office of the Australian Information Commissioner (OAIC) for IC review of a decision made by the [agency/minister (include shortened version in brackets)] under the *Freedom of Information Act 1982* (the FOI Act). [if the applicant has more than one ongoing IC review, include the date of the decision under review]

I am looking to progress this matter to a decision by the Information Commissioner. However, before I do so, I would like to provide you with a preliminary view based on my experience as a review officer and my analysis of the issues. I note that the preliminary view is not a decision by the Information Commissioner, but its purpose is to assist you to consider whether you want to continue with your application and if so, to give you the opportunity to provide information in response to the issues raised in this preliminary view if you would like to.

In summary, based on the information before the OAIC, if this matter were to progress to a decision by the Information Commissioner under s 55K of the FOI Act, I would recommend that the decision of the [agency/minister] be [affirmed/varied].

I would be grateful if you would consider the information in this letter and provide a response within two weeks, that is by @ 2 weeks.

Background

On [date], an application was made to the [agency/minister] for access to documents under the FOI Act.

On [date], the [agency/minister] issued you a consultation notice under s [26/27/27A] of the FOI Act inviting submissions about [insert details with reference to information in the consultation notice – for example, the agency invited you to comment on whether you object to the disclosure of your personal information appearing in the documents falling within the scope of the FOI request on the basis that the information is exempt under the personal privacy exemption (s 47F) of the FOI Act].

On [date], you responded to the request consultation notice to object to disclosure of the documents on the basis that [insert reasons].

On [date], the [agency/minister] made a decision on the FOI request and decided to give the FOI applicant access to [insert details – for example, the agency decided to give the FOI applicant access to three documents in full and one documents in part]. In making its decision, the [agency/minister] relied on the [insert name of exemption(s) with section number in brackets].

[if relevant] On [date], you applied for internal review of the [agency/minister]'s decision to grant the FOI applicant access to the documents comprising [insert details – for example, the documents comprising your personal information].

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

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

Scope of IC review

[if relevant] In your IC review application, you contend that the documents are exempt under ss [insert – for example, ss 42, 45 and 47] of the FOI Act. In an IC review of an access grant decision, an IC review applicant does not have the right to seek IC review on grounds other than those specified in the provisions under which it was consulted.³ The scope of this IC review is therefore limited to your contentions under ss [insert – for example s 47] of the FOI Act.

The issues in this IC review are [insert].

Under s 55D(2) of the FOI Act, as the IC review applicant, you bear the onus of establishing that a decision refusing the request is justified, or that the Information Commissioner should give a decision adverse to the FOI applicant in this case.

Your IC review application and submissions

[Summarise or quote the applicant's IC review application/submissions to note what the outcome sought by the applicant is]

[Agency/Minister]'s submissions

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

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

[Issue] (s [x])

[tailor this section to your audience by considering the level of knowledge of the FOI Act and FOI Guidelines that the recipient holds].

[insert the requirements of the relevant provision of the FOI Act and refer to relevant IC review/AAT/Federal Court decisions. If the recipient appears to have misunderstood/misinterpreted the requirements of the relevant provision, provide clarification].

³ Section 53B of the FOI Act and 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) [6.209].

Preliminary view

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

For these reasons, if this matter proceeds to a decision by the Information Commissioner, I would recommend that the [agency/minister]'s decision be affirmed.

Next steps

In light of the above discussion, I would be grateful if you could please advise the Oaic whether you wish to proceed with this application for IC review on or before [two weeks].

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

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

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

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

Yours sincerely

[First Name Last Name]

[Position Title]

[date]