



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

Information Commissioner review applicant	Fraser Tweeddale
Agency	Services Australia
Recommendation date	20 May 2025
OAIC reference number	MR22/00021
Agency reference number	LEX 64833

### Summary

1. I refer to the application made by Fraser Tweeddale (the applicant) for Information Commissioner review (IC review) of a deemed access refusal decision made by Services Australia (the Agency) on 12 August 2021 under the *Freedom of Information Act 1982* (Cth) (the FOI Act), and the subsequent decisions of 13 September 2021 and 11 November 2021.
2. The purpose of this letter is to advise the parties of my intention to recommend that the Information Commissioner should exercise the discretion to decide not to continue to undertake an IC review under s 54W(b) of the FOI Act, as I am of the view that it may be in the interests of the efficient administration of the FOI Act that this review be closed and that the IC review applicant be provided the opportunity of applying directly to the Administrative Review Tribunal (ART) for review, in the first instance.
3. I am writing to both parties in this IC review to offer an opportunity to comment or make submissions objecting this recommendation.

### Discretion not to continue to undertake an IC review

4. Under s 54W(b) of the FOI Act, the Information Commissioner may exercise the discretion not to undertake a review, or not to continue to undertake a review, if the Information Commissioner is satisfied that the interests of the administration of the FOI Act make it desirable that the IC reviewable decision be considered directly by the ART, rather than initially by the Information Commissioner. I note the ART commenced operation from 14 October 2024, replacing the former Administrative Appeals Tribunal (AAT).
5. The effect of such a decision would allow the applicant to apply directly to the ART. The applicant would then have 28 days to lodge an application with the ART. ART filing fees may apply.<sup>1</sup>

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<sup>1</sup> See [Administrative Review Tribunal - Fees](#)



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

The Information Commissioner may decline to undertake a review if satisfied ‘that the interests of the administration of the [FOI] Act make it desirable’ that the AAT consider the IC reviewable decision (s 54W(b)). It is intended that the Information Commissioner will resolve most IC review applications. Circumstances in which the Information Commissioner may decide that it is desirable for the AAT to consider the IC reviewable decision instead of the Information Commissioner continuing with the IC review include:<sup>2</sup>

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

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

## Reasons for recommendation

8. In this IC review, it appears that it may be in the interests of the efficient administration of the FOI Act that that a delegate of the Information Commissioner exercises the discretion to decide not to continue to undertake an IC review under s 54W(b) of the FOI Act because:
- a. The issues under review are of a level of technical complexity, requiring technical knowledge of the subject matter area, including, technical knowledge related to the assessment of source code, and the ability to determine the detriment that could occur

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



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arising from disclosure. These assessments require in depth knowledge of technical specifications and data relating to the myGov Code Generator iOS and Android apps.

- b. Should the IC review progress, it appears that any IC review decision is likely be taken on appeal to the ART on a disputed issue of fact. As such, I am satisfied that it be desirable for the efficient administration of the FOI Act that the IC reviewable decision is reviewed by the ART at first instance. I also consider that such an approach is consistent with the objects of the FOI Act

**Next steps**

9. The Office of the Information Commissioner (OAIc) may take into account the views of the parties to an IC review before concluding an IC review pursuant to s 54W(b). While the Information Commissioner will consider the views of the review parties before finalising an IC review under s 54W(b), the decision whether it is more appropriate for the ART to consider the IC reviewable decision ultimately rests with the Information Commissioner. Through the functions conferred on the Information Commissioner under the FOI Act, the Information Commissioner will be in the most informed position to determine whether the interests of the administration of the FOI Act make it desirable for the ART to consider the IC reviewable decision.
10. If you disagree with this proposed recommendation, please write to us **by 3 June 2025** and advise us of your reasons. If you agree with the proposed recommendation, you are not required to respond. However, should either party wish to provide additional information for consideration by the Information Commissioner, or a delegated member of staff, you may do so by the abovementioned date.
9. If more time is needed, a request for an extension of time must be made to the OAIc at the earliest opportunity within the period provided for response, and no later than 2 days before that period is due to expire. Requests for more time must explain the exceptional circumstances that necessitate additional time and propose a new date for response. Approval of an extension request is at the discretion of the OAIc.
11. The parties will be notified and provided review rights if the IC review is finalised under s 54W(b) of the FOI Act.

Yours sincerely,

A handwritten signature in blue ink that reads 'Claire Lynch'.

**Claire Lynch**

A/g Review Advisor

Freedom of Information Case Management Branch

Office of the Australian Information Commissioner

20 May 2025