



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

Information Commissioner review applicant	Fraser Tweedale
Agency	Services Australia
Decision date	6 June 2025
OAIC reference number	MR22/00021
Agency reference number	LEX 64833

### Decision

1. I refer to the application made by Fraser Tweedale (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. As a delegate of the Information Commissioner, I have decided to exercise my discretion not to continue to undertake an IC review under s 54W(b) of the FOI Act.
3. The background of this matter is provided at **Attachment A**.

### 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 Administrative Review Tribunal (the ART), rather than initially by the Information Commissioner. I note the ART commenced operation from 14 October 2024, replacing the former Administrative Review Tribunal (ART).
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>

<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 ART 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 ART 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 ART or a court
- where there is an apparent inconsistency between earlier IC review decisions and ART decisions
- where, should the application progress to an IC review decision, the IC review decision is likely to be taken on appeal to the ART 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 ART
- 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 ART or Federal Court and the Information Commissioner is the respondent
- where consideration by the ART 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.

8. Further, 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

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

determine whether the interests of the administration of the FOI Act make it desirable for the ART consider the IC reviewable decision.

### Reasons for decision

9. I am satisfied that it is in the interests of the administration of the FOI Act that the IC reviewable decision be considered by the ART in the first instance because:

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

10. In deciding whether to exercise the discretion not to undertake a review, I have considered:

- the Agency's decisions dated 13 September 2021 and 11 November 2021.
- the documents at issue and the nature of the request
- the FOI Act, in particular s 54W and 47E.
- the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act<sup>3</sup> to which agencies must have regard in performing a function or exercising a power under the FOI Act, in particular [10.104] and [10.105]
- The Explanatory Memorandum to the Freedom of Information Amendment (Reform) Bill 2009

11. With consideration to the above, I am satisfied, as a delegate of the Information Commissioner, that it would be more appropriate and efficient for the application to be made directly to the ART. As such, I have decided to exercise my discretion to decide not to continue to undertake an IC review under s 54W(b) of the FOI Act.

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<sup>3</sup> See 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).

12. The applicant has 28 calendar days from the date of this notice to make an application for review of the IC reviewable decision to the ART, in accordance with s 57A of the FOI Act.

13. I confirm that this IC review is now closed. Your review rights are set out below.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'AC', written over a horizontal line.

**Annette Cole**

Assistant Director

Freedom of Information Case Management Branch

Office of the Australian Information Commissioner

6 June 2024

## ATTACHMENT A

### Background

Date	Events
13 July 2021	<p>FOI request made to the Agency</p> <p><i>(1). Source code of the myGov Code Generator iOS and Android apps, including build scripts, manifests, software license terms, and media assets (icons, audio files, etc).</i></p> <p><i>(2). Technical documentation describing the operation of the myGov Code Generator app, such as design documents, architecture diagrams, API documentation, security assessments, technical presentation slides, and similar documents.</i></p> <p><i>If it assists in the expeditious processing of my request, source code may be delivered as a "snapshot" or export of source repositories, in ZIP, "tarball" or similar format. However, the full development history is preferred'</i></p>
10 January 2022	IC review application received by the Office of the Australian Information Commissioner.
14 November 2022	Agency notified of receipt of IC review application and request for documents provided under 54Z of the FOI Act.
15 May 2023	Agency submission received to establish why the Information Commissioner should make a decision adverse to the applicant under s 55D(1) of the FOI Act.
20 May 2025	Submissions were requested from the parties for consideration by the Information Commissioner, or a delegated member of staff, as to why the Information Commissioner should not exercise discretion to finalise IC review application s 54W(b) of the FOI Act by 3 June 2025

## Review rights

### Judicial review

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

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

An application for review must be made to the Court within 28 days of the OAIC sending the decision or determination to you. You may wish to seek legal advice as the process can involve fees and costs. Please contact the Federal Court registry in your state or territory for more information or visit the Federal Court website.<sup>4</sup>

### Making a complaint to the Commonwealth Ombudsman

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

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

### Accessing your information

If you would like access to the information that we hold about you, please contact [FOIDR@oaic.gov.au](mailto:FOIDR@oaic.gov.au). More information is available on the [Access our information](#) page on our website.

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<sup>4</sup> See [Federal Court of Australia](#)