



Australian Government

Office of the Australian Information Commissioner

Committee Secretary

Parliamentary Joint Committee on Intelligence and Security
PO Box 60121
Parliament House
Canberra ACT 2600

Inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press

Dear Committee

Please find below the Office of the Australian Information Commissioner's (OAIC) response to questions on notice.

Questions

Since 1 July 2004, please provide a year-by-year breakdown of:

- 1. How many times has the OAIC reviewed an FOI decision to refuse access to a document in reliance on the national security exemption in section 33?**
- 2. How many times has the OAIC reviewed an FOI decision to refuse access to part of a document in reliance on the national security exemption in section 33?**

OAIC response

The OAIC commenced operation on 1 November 2010, under the *Australian Information Commissioner Act 2010*. As a result, I provide the Committee with the following information about Information Commissioner reviews (IC reviews) from the date the office was established – 1 November 2010.¹

Section 33 of the *Freedom of Information Act 1982* (FOI Act) provides:

Documents affecting national security, defence or international relations

A [document](#) is an [exempt document](#) if disclosure of the [document](#) under this Act:

- (a) would, or could reasonably be expected to, cause damage to:
 - (i) the security of the Commonwealth;
 - (ii) the defence of the Commonwealth; or

¹ Before the establishment of the OAIC, the first level of external merits review of FOI decisions lay with the Administrative Appeals Tribunal.

- (iii) the international relations of the Commonwealth; or
- (b) would divulge any information or matter communicated in confidence by or on behalf of a foreign government, an authority of a foreign government or an international organization to the Government of the Commonwealth, to an authority of the Commonwealth or to a person receiving the communication on behalf of the Commonwealth or of an authority of the Commonwealth.

Since 1 November 2010, the OAIC has received 61 applications for IC review of decisions refusing access to documents under section 33(a)(i) (national security) of the FOI Act, either in full or in part, or in combination with other exemptions under the FOI Act.

Of these 61 applications, 24 were subsequently withdrawn by the applicant, 12 were declined under section 54W(b) of the FOI Act,² 13 were declined under other subsections of section 54W,³ and a further two were found to be out of jurisdiction.

Ten applications progressed to a formal decision by the Information Commissioner under section 55K of the FOI Act. In seven, the Information Commissioner affirmed the original decision. One decision was set aside and two were varied by the Information Commissioner, however section 33(a)(i) was not the basis for the variation of these decisions.

A year-by-year breakdown of the outcome of IC review outcomes is at **Attachment A** to this letter.

a. How many of those decisions have related to a document marked “secret” or “top secret”?

OAIC response

Documents which are the subject of an exemption claim under section 33(a)(i) would ordinarily have a classification marking. However this classification marking is not determinative of the exemption claim.

As noted at part 5.26 of the FOI Guidelines (which relates to exemptions under section 33):

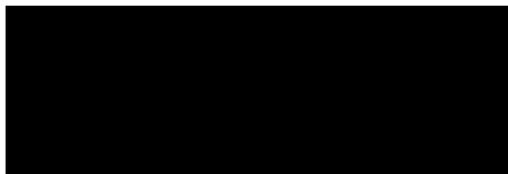
5.26 The classification markings on a document (such as ‘secret’ or ‘confidential’) are not of themselves conclusive of whether the exemption applies (see also [5.41] – [5.47] below in relation to information communicated in confidence).

² Section 54W(b) of the FOI Act provides that the Information Commissioner may decide not to undertake an IC review, or not to continue to undertake an IC review, if the Information Commissioner is satisfied that the interests of the administration of the FOI Act make it desirable that the reviewable decision be considered by the Administrative Appeals Tribunal.

³ These subsections provide that the Information Commissioner may decide not to undertake an IC review, or not to continue to undertake an IC review, if satisfied that the IC review application is frivolous, vexatious, misconceived, lacking in substance or not made in good faith, if the IC review applicant has failed to cooperate in progressing the IC review without reasonable excuse, if the IC review applicant cannot be contacted despite reasonable attempts being made, or when the IC review applicant fails to comply with a direction of the Information Commissioner.

I trust this information assists the Committee.

Yours sincerely



Angelene Falk
Australian Information Commissioner

16 September 2019

Attachment A

Outcome of IC review applications – section 33(a)(i) of the FOI Act (national security)
 – 1 November 2010 to 30 August 2019

2010–11

Outcome	Number
Out of jurisdiction ⁴	1

2011–12

Outcome	Number
Withdrawn by the applicant	2

2012–13

Outcome	Number
Withdrawn by the applicant	2
Referred to the Administrative Appeals Tribunal under section 54W(b) of the FOI Act ⁵	1
The discretion in section 54W(a)(iii) of the FOI Act was exercised not to conduct an IC review (lost contact) ⁶	1

2013–14

Outcome	Number
Affirmed by the Information Commissioner, following a revised decision, in a published decision under s 55K of the FOI Act ⁷	1
Set aside by the Information Commissioner in a published decision under section 55K of the FOI Act ⁸	1

⁴ The FOI request was made before 1 November 2010. The OAIC only has jurisdiction to review decisions made with respect to FOI requests made after this date.

⁵ Section 54W(b) of the FOI Act gives the Information Commissioner a discretion not to undertake an IC review, or continue to undertake a review, if satisfied that the interests of the administration of the FOI Act make it desirable for the IC reviewable decision be considered by the Administrative Appeals Tribunal.

⁶ Section 54W(a)(iii) of the FOI Act gives the Information Commissioner a discretion not to undertake an IC review, or not to continue to undertake a review, if the Information Commissioner cannot contact the IC review applicant after making reasonable attempts.

⁷ *Welch and Department of Foreign Affairs and Trade (No. 2)* [2014] [AICmr 10](#) (31 January 2014).

⁸ *Welch and Department of Foreign Affairs and Trade* [2014] [AICmr 3](#) (14 January 2014). The original decision invoked section 25 (neither confirm nor deny the existence of documents because if they did exist, they would be exempt from disclosure under section 33(a)(i)). During the IC review the Department confirmed the documents did not exist. Section 33 was not considered in the published decision.

Outcome	Number
The discretion in section 54W(a)(i) of the FOI Act was exercised not to conduct an IC review (failure to cooperate) ⁹	2

2014-15

Outcome	Number
Referred to the Administrative Appeals Tribunal under section 54W(b) of the FOI Act	5
Affirmed by the Information Commissioner in a published decision under s 55K of the FOI Act ¹⁰	1
The discretion in section 54W(a)(ii) of the FOI Act was exercised not to conduct an IC review (failure to cooperate)	1

2015-16

Outcome	Number
Referred to the Administrative Appeals Tribunal under section 54W(b) of the FOI Act	5
Withdrawn by the applicant	3
The discretion in section 54W(a)(i) of the FOI Act was exercised not to conduct an IC review (lacking in substance) ¹¹	2
Affirmed by Information Commissioner in published decision under section 55K of the FOI Act ¹²	2
Varied by Information Commissioner in published decision under section 55K of the FOI Act ¹³	2

2016-17

Outcome	Number
Withdrawn by the applicant	1
Withdrawn/conciliated ¹⁴	1

⁹ Section 54W(a)(ii) of the FOI Act gives the Information Commissioner discretion not to undertake an IC review, or not to continue to undertake a review, if the IC review applicant has failed to cooperate in progressing the IC review application, or the IC review, without reasonable excuse.

¹⁰ *Prinn and Department of Defence* [2014] AICmr 84 (29 August 2014).

¹¹ Section 54W(a)(i) of the FOI Act gives the Information Commissioner discretion not to undertake an IC review, or not to continue to undertake an IC review, if the review application is frivolous, vexatious, misconceived, lacking in substance or not made in good faith.

¹² *HK and Department of Defence* [2015] AICmr 72 (6 November 2015) and *KG and Department of Defence* [2016] AICmr 90 (14 December 2016).

¹³ *Paul Farrell and Australian Customs and Border Protection Service* [2015] AICmr 52 (17 July 2015) and *Australian Associated Press Pty Ltd and Department of Immigration and Border Protection* [2016] AICmr 25 (22 April 2016).

¹⁴ This review outcome is used when the withdrawal of the IC review application follows conciliation of the review application by OAI staff.

Outcome	Number
The discretion in section 54W(a)(ii) of the FOI Act was exercised not to conduct an IC review (failure to cooperate)	2
Affirmed by the Information Commissioner in published decision under s 55K of the FOI Act ¹⁵	1

2017-18

Outcome	Number
Withdrawn by the applicant	2
Withdrawn/conciliated	2
Referred to the Administrative Appeals Tribunal under section 54W(b) of the FOI Act	1
The discretion in section 54W(a)(i) of the FOI Act was exercised not to conduct an IC review (lacking in substance)	1
Affirmed by Information Commissioner in published decision under section 55K of the FOI Act ¹⁶	2

2018-19

Outcome	Number
Out of jurisdiction	1
Withdrawn by the applicant	10
Withdrawn/conciliated	1
The discretion in s 54W(a)(i) of the FOI Act was exercised not to conduct an IC review (lacking in substance)	4

2019-2020¹⁷

Outcome	Number
Withdrawn by the applicant	1

¹⁵ 'LD' and Department of Defence (Freedom of information) [2017] AICmr 32 (5 April 2017).

¹⁶ 'OZ' and Department of Defence (Freedom of information) [2018] AICmr 49 (22 March 2018) and 'OL' and Department of Home Affairs (Freedom of information) [2018] AICmr 36 (20 March 2018).

¹⁷ For the period 1 July 2019 to 30 August 2019.