



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

OAIC Submission

To the Senate Legal and Constitutional
Affairs Legislation Committee – Inquiry
into the Freedom of Information
Legislation Amendment (Improving
Access and Transparency) Bill 2018

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Introduction

The Office of the Australian Information Commissioner (OAIC) welcomes the opportunity to provide information to assist the Senate Legal and Constitutional Affairs Legislation Committee in relation to its inquiry into the Freedom of Information Legislation Amendment (Improving Access and Transparency) Bill 2018 (the Bill).

The Bill proposes a number of amendments to the *Archives Act 1983*, the *Australian Information Commissioner Act 2010* (AIC Act), and the *Freedom of Information Act 1982* (FOI Act).

The OAIC's role is to uphold the enforceable right of access to documents held by government agencies and ministers and the legislatively required proactive release of information by government agencies.

Through the development of resources, submissions, instruments, regulatory activities, education and engagement the OAIC supports the management of information held by the Government as a national resource. This objective is pursued through the exercise of the legislated functions in relation to FOI, privacy and information policy.

The OAIC's 2018-2019 Corporate Plan sets out how we promote and uphold information access rights under the FOI Act through promoting awareness and understanding in the community, developing the FOI capabilities of Australian Government agencies and ministers, promoting best practice, conducting Information Commissioner (IC) reviews, investigating FOI complaints and conducting Commissioner initiated FOI investigations.

This submission provides general information, to assist the Committee, in relation to the OAIC's regulatory role and functions, particularly in the context of its merits review function (IC reviews).

Further information about the way the OAIC discharges its regulatory functions under the FOI Act can be found in the OAIC's Freedom of Information Regulatory Action Policy¹, in the Guidelines issued by the Australian Information Commissioner under s 93A² (the FOI Guidelines), in particular Parts 10 (Review by the Information Commissioner)³ and 11 (Complaints and investigations)⁴ and in its Annual Reports.⁵

¹ <https://www.oaic.gov.au/about-us/our-regulatory-approach/freedom-of-information-regulatory-action-policy/>

² All legislative references in this submission are to the FOI Act unless otherwise stated,

³ <https://www.oaic.gov.au/freedom-of-information/foi-guidelines/part-10-review-by-the-information-commissioner>.

⁴ <https://www.oaic.gov.au/freedom-of-information/foi-guidelines/part-11-complaints-and-investigations>.

⁵ <https://www.oaic.gov.au/about-us/corporate-information/annual-reports/all/>

The OAIC's regulatory role

The OAIC is an independent statutory agency established under the AIC Act.

The OAIC has three functions:

- freedom of information functions, including review of decisions made by agencies and ministers and investigation of actions taken by agencies under the FOI Act
- privacy functions, conferred by the *Privacy Act 1988* (Privacy Act) and other laws
- government information policy functions, conferred under the AIC Act.

The Australian Information Commissioner (Commissioner) has the power to perform all FOI regulatory functions.⁶ Under section 10 of the AIC Act, the Commissioner has the information commissioner functions (set out in section 7), the freedom of information functions (set out in section 8) and the privacy functions (set out in section 9).

The FOI regulatory functions include to:⁷

- review FOI decisions of agencies and ministers (IC review) (Part VII)
- investigate complaints about agency actions relating to the handling of FOI matters (Part VIIB)
- issue guidelines under s 93A
- decide on extension of time applications by an agency or minister in relation to decisions on FOI requests
- decide on whether to make a vexatious applicant declaration to restrict a person's rights to make an FOI request or application following an application from an agency or minister or on the Commissioner's own motion
- determine that the requirement to publish information in a disclosure log does not apply to specified information
- oversee the Information publication scheme (IPS)
- raise awareness of FOI and educate Australians and agencies about their rights and obligations
- monitor agencies' compliance with the FOI Act
- compile FOI data and assess trends,
- report and recommend to the Minister proposals for legislative change to the FOI Act or desirable or necessary administrative action in relation to the FOI Act.

The OAIC has published a '[Freedom of information regulatory action policy](#)'. This policy provides the Australian community and agencies and ministers with guidance on the approach of the OAIC to the exercise of FOI regulatory powers.

Agencies and ministers must also have regard to the Guidelines issued under s 93A ([FOI Guidelines](#)) in performing a function or exercising a power under the FOI Act.

In relation to the IC review function, agencies must comply with the 'Direction as to certain procedures to be followed in IC reviews', issued under s 55(2)(e)(i) (Procedure Direction).

⁶ The AIC Act confers power on each of the three statutory positions, the Information Commissioner, Freedom of Information Commissioner and Privacy Commissioner to do all things necessary or convenient to perform the freedom of information (FOI) functions defined in the AIC Act, ss 8, 10(2), 11(3) and 12(3)).

⁷ See the AIC Act, ss 8(k), 10(2), 11(3) and 12(3).

All IC review decisions made under s 55K are published. These are available through the [OAIC website](#) (as part of the Australian Information Commissioner ([AICmr](#)) series on the AustLII website).

The OAIC has published a range of other guidance materials to assist agencies and ministers in exercising their functions under the FOI Act. The OAIC has also published resources and other general information to assist members of the public to understand and promote their right to access information under the FOI Act. These documents are all available on the OAIC's website and include fact sheets that provide a general overview about particular topics of relevance to members of the public, and animated videos about access rights under the FOI Act.

The IC review function

A number of the proposed amendments in the Bill relate to the IC review function of the OAIC. The following information is intended to provide the Committee with information about this function, including statistical information.

IC reviewable decisions

A person (including a natural person, body politic or corporation) who disagrees with an agency or minister's decision received on a request for access to a document or for amendment or annotation of personal records may apply to the Commissioner for review of that decision under Part VII of the FOI Act. A person does not have to apply for internal review with the agency before seeking IC review. However, the Commissioner considers that it is usually better for a person to seek internal review of an agency decision before applying for IC review.⁸

The Commissioner can review the following decisions by an agency or minister:

- an 'access refusal decision' (s 54L(2)(a))
- an 'access grant decision' (s 54M(2)(a))
- a refusal to extend the period for applying for internal review under s 54B (s 54L(2)(c))
- an agency internal review decision made under s 54C (ss 54L(2)(b) and 54M(2)(b))
- a decision that is deemed to have been made by an agency or minister where the statutory timeframe was not met.⁹

Principles of the IC review process

Review by the Commissioner of decisions about access to government documents is designed around four key principles:¹⁰

- it is a merit review process where the Commissioner makes the correct or preferable decision at the time of the Commissioner's decision
- it is intended to be as informal as possible
- it is intended to be non-adversarial, and
- it is intended to be timely.

⁸ FOI Guidelines [10.2].

⁹ FOI Guidelines [10.3]-[10.4].

¹⁰ FOI Guidelines [10.15].

Merit review

Review by the Commissioner is a merit review process. The Commissioner does not simply review the reasons given by the agency or minister, but determines the correct or preferable decision in the circumstances. The Commissioner can access all relevant material, including material that the agency or minister claims is exempt.

The Commissioner can also consider additional material or submissions not considered by the original decision maker, including relevant new material that has arisen since the decision was made. For example, for the purpose of deciding whether a document requested by an applicant is conditionally exempt, the Commissioner can take account of contemporary developments that shed light on whether disclosure would be contrary to the public interest.¹¹

If the Commissioner finds that the original decision was not correct in law or not the preferable decision, the decision can be varied or set aside and a new decision substituted. For example, the Commissioner may decide that a document is not an exempt document under the FOI Act or that an access charge was not correctly applied.¹²

An informal process

IC reviews are intended to be a simple, practical and cost-efficient method of external merit review. This is consistent with the objects of the FOI Act, which provides that functions and powers are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost (s 3(4) of the FOI Act).¹³

Consistent with the object of prompt and cost-effective access to information, most matters will be reviewed on the papers rather than through formal hearings. The Commissioner has formal information gathering powers (see Division 8 of Part VII), however documents are usually requested from agencies without the need to invoke those provisions. Where required, the OAIC can use powers to compel agencies that do not cooperate with requests by the OAIC.¹⁴

Non-adversarial

Under s 55DA of the FOI Act, agencies and ministers must use their best endeavours to assist the Commissioner to make the correct or preferable decision in relation to access to information held by the Government. The OAIC also encourages all parties to minimise their use of legal representation in IC review proceedings, to reduce formality and costs.¹⁵

Timely

The IC review process is intended to be efficient and lead to resolution as quickly as possible.

In order to facilitate the efficient and timely resolution of IC reviews, a case officer may provide the parties with a preliminary view on the merits of the application after review of the documents at issue and conduct conferences between the parties.¹⁶

¹¹ FOI Guidelines [10.16].

¹² FOI Guidelines [10.17].

¹³ FOI Guidelines [10.18].

¹⁴ FOI Guidelines [10.20].

¹⁵ FOI Guidelines [10.21]-[10.22].

¹⁶ FOI Guidelines [10.21]-[10.23].

The Commissioner may also decide to expedite the conduct of an IC review application in response to a request from the IC review applicant or as a result of identifying individual applications that involve factors that warrant expedition.¹⁷

Onus

In an IC review of an access refusal decision, the agency or minister has the onus of establishing that the decision is justified or that the Commissioner should give a decision adverse to the IC review applicant (s 55D(1)).

In an IC review of an access grant decision, the affected third party has the onus of establishing that a decision refusing the request is justified or that the Commissioner should give a decision adverse to the person who made the request (s 55D(2)).¹⁸

How the Commissioner may finalise an IC review

The Commissioner may finalise an IC review by:

- accepting a written agreement between the parties (s 55F),
- making a written decision under s 55K,
- deciding not to undertake a IC review if satisfied that certain grounds exist (s 54W), or
- receiving a written notice from the applicant withdrawing the application for review (s 54R).

Reviewing an IC reviewable decision

IC review officers manage the application for review, including undertaking the preliminary assessment of the merits of the decision after reviewing the documents in dispute.

At any stage during an IC review, an agency or minister may revoke or vary an access refusal decision to favour the applicant.¹⁹ Where an agency or minister no longer contends that material is exempt or has identified further material within the scope of a request during an IC review, a revised decision under s 55G facilitates the prompt release of further material to the applicant.²⁰ A revised decision does not automatically conclude the IC review and the revised decision will be the decision under review. The OAIC will generally consult the applicant as to whether they wish to continue the IC review on the basis of the revised decision.²¹

At any stage during an IC review, the Commissioner (or delegate) may also resolve an application in whole or in part by giving effect to an agreement between the parties (s 55F). Before making the decision, the Commissioner (or delegate) must be satisfied that the terms of the written agreement would be within the powers of the Commissioner and that all parties have agreed to the terms.²²

If the parties do not reach agreement, and unless the IC review applicant withdraws their application under s 54R, the Commissioner must make a decision after conducting a merit review

¹⁷ FOI Guidelines [10.24].

¹⁸ FOI Guidelines [10.13]-[10.14].

¹⁹ FOI Guidelines [10.67].

²⁰ FOI Guidelines [10.68].

²¹ FOI Guidelines [10.70]

²² FOI Guidelines [10.123].

of the matter under s 55K. The Commissioner has the power to affirm vary or set aside the decision of the agency or minister.²³ The final decision on a review under s 55K is non delegable.²⁴

An agency or minister must comply with an IC review decision (s 55N). If an agency or minister fails to comply, the Commissioner or the review applicant may apply to the Federal Court for an order directing them to comply (s 55P(1)).²⁵

Deciding not to review an IC reviewable decision

The Commissioner (or delegate) has the discretion not to undertake an IC review, or not to continue an IC review if:

- the applicant fails to comply with a direction by the Commissioner (s 54W(c)), or
- the Commissioner is satisfied that: a) the review application is frivolous, vexatious, misconceived, lacking in substance or not made in good faith; (b) the review applicant has failed to cooperate in progressing the application or review without reasonable excuse; or (c) the Commissioner cannot contact the applicant after making reasonable attempts (s 54W(a)).
- the Commissioner is satisfied the decision should be considered by the AAT (s 54W(b)).

Under s 54W(b), the Commissioner can decline to undertake a review if satisfied ‘that the interests of the administration of the [FOI] Act make it desirable’ that the AAT consider the review application.

Circumstances in which the Commissioner may decide that it is desirable for the AAT to consider a matter instead of the Commissioner continuing with the IC review include:

- the IC review is linked to ongoing proceedings before the AAT or a court
- there is an apparent inconsistency between earlier IC review decisions and AAT decisions
- IC review decision is likely to be taken on appeal to the AAT on a disputed issue of fact, and
- the FOI request under review is complex or voluminous, resolving the IC review matter would require a substantial allocation of OAIC resources, and the matter could more appropriately be handled through the procedures of the AAT.

The OAIC consults the parties involved in a matter before making a decision under s 54W(b) to conclude an IC review.²⁶

Statistics

The OAIC has experienced an increase in the numbers of IC review applications received from 2015-16.

The OAIC has met its key performance indicator of finalising 80% of IC reviews within 12 months of receipt since 2015-16.²⁷ This is in part due to the implementation of early resolution processes which seek to resolve IC review applications or narrow the issues in contention at an early stage of

²³ FOI Guidelines [10.124].

²⁴ FOI Guidelines [10.83].

²⁵ FOI Guidelines [10.132].

²⁶ FOI Guidelines [10.88].

²⁷ The target timeframe for completion of IC reviews changed from 80% completed within 6 months to 80% completed within 12 months in 2013-14.

the case management process. The tables below indicate how and in what timeframes IC reviews have been finalised since 2011-12.

In 2018-19 the OAIC will continue to develop and implement refinements to its early resolution and case management processes, to meet the objectives of providing an informal, non-adversarial and timely review process.²⁸ The Commissioner has issued a procedure direction for agencies and ministers for the purposes of ensuring that IC reviews are processed efficiently.

The following tables provide a statistical overview of IC review applications received, finalised and the outcome of applications for 2011-17.

Table 1: Overview of IC review applications received and finalised

Type	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17
IC reviews received	456	507	524	373	510	632
IC reviews finalised	253	419	646	482	454	515
IC reviews where s 55K decision made by IC	25	89	98	128	80	104
IC reviews finalised without s 55K decision being made	238 (90.5%)	330 (78.8%)	548 (84.8%)	354 (73.4%)	374 (82.4%)	411 (79.8%)

Table 2: Overview of IC review finalisation times

Note: The first four rows are cumulative.

Finalised	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17
within 120 days	100 (39%)	124 (30%)	191 (30%)	165 (34%)	196 (43%)	198 (38%)
within 6 months	145 (57%)	167 (40%)	270 (42%)	247 (51%)	274 (60%)	291 (57%)
within 9 months	203 (80%)	242 (58%)	359 (56%)	301 (62%)	347 (76%)	392 (76%)
within 12 months	232 (92%)	289 (69%)	462 (72%)	343 (71%)	395 (87%)	445 (86%)
over 12 months	21 (8%)	130 (31%)	184 (28%)	139 (29%)	59 (13%)	70 (14%)
Total	253	419	646	482	454	515

²⁸ See the OAIC's 2018-19 Corporate Plan page 30. Available at www.oaic.gov.au

Table 3: Overview of IC review outcomes

IC Review Decisions	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17
s 54N – out of jurisdiction or invalid	40	66	59	37	44	34
s 54R – withdrawn	108	95	111	59	81	115
s 54R – withdrawn / conciliated	-	13	71	51	78	93
s 54W(a) – deemed acceptance of PV / appraisal	-	2	27	26	7	0
s 54W(a)(i) – lacking in substance, misconceived etc	42	86	170	87	94	66
s 54W(a)(ii) – failure to cooperate	5	33	62	19	7	57
s 54W(a)(iii) – lost contact	9	9	0	5	5	3
s 54W(b) – refer AAT	22	17	41	61	32	15
s 54(c) – failure to comply	-	2	0	0	0	0
s 55F – set aside by agreement	-	0	1	0	2	7
s 55F – varied by agreement	2	0	1	2	7	5
s 55F – affirmed by agreement	-	0	1	2	1	1
s 55G – substituted	-	7	6	5	16	15
s 55K – affirmed by IC	17	58	32	48	28	48
s 55K – affirmed by IC following revised decision	-	-	8	5	11	17
s 55K – set aside by IC	8	28	53	52	22	23
s 55K – varied by IC	0	3	5	23	19	16
Total	253	419	646	482	454	515

The proposed amendments

Below is information to assist the Committee in relation to particular aspects of the Bill's proposed amendments to the AIC Act and the FOI Act. The items are found in Schedule 1 of the Bill.

Items 2 and 3: Qualification of Commissioners

In relation to Schedule 1; Items 2 and 3 of the Bill, the AIC Act provides that the Information Commissioner and the Privacy Commissioner, as well as the Freedom of Information Commissioner, have the freedom of information functions which are set out in section 8 of the AIC Act and include reviewing decisions under Part VII of the FOI Act. However certain functions and powers of the FOI Commissioner may only be undertaken with the approval of the Information Commissioner, such as the issuing, variation or revocation of the FOI Guidelines.²⁹

Under the AIC Act there is no requirement for the Information Commissioner or Privacy Commissioner to have legal qualifications. Since 2010 the Information Commissioner and the Privacy Commissioner have exercised the FOI functions including making IC review decisions.

Item 4: Appointment of Commissioners

Schedule 1; Item 4 of the Bill provides that all three statutory Commissioner roles are filled separately.

Ms Angelene Falk was appointed by the Governor-General on 16 August 2018 to the statutory positions of Australian Information Commissioner and Privacy Commissioner for a three year term.

Under section 10 of the AIC Act, the Information Commissioner has the information commissioner functions (set out in section 7), the freedom of information functions (set out in section 8) and the privacy functions (set out in section 9).

As the Australian Information Commissioner Ms Falk performs the freedom of information functions.

Item 8: Preventing agencies from publishing information released under FOI for at least 10 days

In relation to Schedule 1; Item 8 of the Bill, under the FOI Act agencies and ministers must publish information that has been released in response to each FOI access request, subject to certain exceptions (s 11C). This publication is known as a 'disclosure log'.³⁰

The FOI Act requires agencies and ministers publish this information within ten working days of giving the FOI applicant access to the information (s 11C(6)).³¹

Item 8 of the Bill would require information to be published on a disclosure log to occur within the window of 10-14 working days from the date access is provided to the FOI applicant. This is a narrower period of time in which to comply.

²⁹ See section 11(4) AIC Act

³⁰ FOI Guidelines [14.1].

³¹ FOI Guidelines [14.6].

The issue of the timing of publication of documents on a disclosure log was considered by the *Review of the Freedom of Information Act 1982 and the Australian Information Commissioner Act 2010* (Hawke Report).³² The Hawke Report recommended that there should be a period of five working days before documents released to an applicant are published on the disclosure log, but considered that it would be preferable for this to be set out in guidelines rather than in the FOI Act.

The FOI Guidelines provide guidance which seeks to appropriately achieve the balance between the pro-disclosure and equal public access objects of the FOI Act and individual circumstances.³³

Item 10: Entitling Senators and Members access to documents without charge unless the charge exceeds \$1000

In relation to Schedule 1; Item 10 of the Bill, information about the FOI Charges framework is set out in s 29 of the FOI Act and in the Freedom of Information (Charges) Regulations 1982 (Charges Regulations).³⁴

The OAIC considers that the proposal risks a fragmented approach to the application of charges, absent a fuller consideration. In 2011 the inaugural Australian Information Commissioner, Professor John McMillan, undertook a substantial review of the charges under the FOI Act and a report was published in February 2012.³⁵

The OAIC's guidance on the exercise of the discretion to impose a charge is set out in Part 4 of the FOI Guidelines and summarised below. The FOI Guidelines also contains guidance on matters to be taken into account in determining whether or not to reduce or waive a charge, including whether the giving of access to the document in question is in the general public interest or in the interest of a substantial section of the public.³⁶

Guiding principles from the FOI guidelines:

An agency or minister's decision to impose or not impose a charge, or to impose a charge that is lower than the applicable charge is discretionary. The FOI Guidelines advise agencies and ministers that in exercising that discretion, the agency or minister should take account of the 'lowest reasonable cost' objective, stated in the objects of the FOI Act (s 3(4)).³⁷

Agencies and ministers should interpret the 'lowest reasonable cost' objective broadly in imposing any charges under the FOI Act. That is, an agency or minister should have regard to the lowest reasonable cost to the applicant, to the agency or minister, and the Commonwealth as a whole. Where the cost of calculating and collecting a charge might exceed the cost to the agency to process the request, it would generally be more appropriate not to impose a charge. In assessing the costs of calculating and collecting a charge, agencies should also take into account the likely

³² The Hawke Report published in July 2013 is available at: <https://www.ag.gov.au/Consultations/Pages/ReviewofFOIlaws.aspx><https://www.ag.gov.au/Consultations/Pages/ReviewofFOIlaws.aspx>

³³ FOI Guidelines [14.27]

³⁴ FOI Guidelines [4.1].

³⁵ Review of charges under the Freedom of Information Act 1982: Report to the Attorney-General February 2012 available at <https://www.oaic.gov.au/freedom-of-information/foi-resources/foi-reports/review-of-charges-under-the-freedom-of-information-act-1982>

³⁶ Section 29(5)(b) FOI Act and FOI Guidelines [4.79-4.87]

³⁷ FOI Guidelines [4.3].

costs that may be incurred by the agency, as well as other review bodies, if the applicant decides to seek further review.³⁸

The objects of the FOI Act guide the following principles relevant to charges under the FOI Act:

- A charge must not be used to unnecessarily delay access or discourage an applicant from exercising the right of access conferred by the FOI Act.
- Charges should fairly reflect the work involved in providing access to documents on request.
- Charges are discretionary and should be justified on a case by case basis.
- Agencies should encourage administrative access at no charge, where appropriate.
- Agencies should assist applicants to frame FOI requests.
- Agencies should draw an applicant's attention to opportunities available to the applicant outside the FOI Act to obtain free access to a document or information (s 3A(2)(b)).
- A decision to impose a charge should be transparent.³⁹

Item 11: Preventing agencies from making additional exemption claims during the course of IC reviews

Schedule 1; Item 11 of the Bill would prevent further exemptions being raised during the course of an IC review. The Commissioner undertakes merits review of agency FOI decisions. During the review process, agencies may make submissions about any relevant exemption claimed over particular material subject to the FOI request, including any exemption not originally put forward in the initial decision.⁴⁰ The Commissioner will take the submissions of both parties into account and afford both parties procedural fairness when making a decision, which must be the correct or preferable decision at the time of the Commissioner's decision.

In an IC review of an access refusal decision, the agency or Minister has the onus of establishing that the reviewable decision is justified and that the Commissioner should give a decision adverse to the review applicant (s 55D(1)). Further, section 55DA requires the decision maker to assist the Commissioner in making her decision, conduct further searches for documents if access has been refused under section 24A (section 54V) and under section 55E an agency or Minister can be required to provide a statement of reasons for the decision if the Commissioner believes no statement has been provided or the statement provided is inadequate.

When making decisions under s 55K, it is open to the Commissioner to vary the decision of the agency or minister by deciding that documents in dispute are exempt under an exemption that is different to the exemption contended by the agency or minister. Accordingly, in order for the Commissioner to undertake a full merits review and reach the correct or preferable decision at the time of making the IC review decision, any relevant exemptions and submissions should continue to be permitted.

³⁸ FOI Guidelines [4.4].

³⁹ FOI Guidelines [4.5].

⁴⁰ The IC review process is a full merits review process and the Commissioner may affirm, vary or set aside and substitute a decision (s 55K(1) however the Commissioner cannot decide to provide access to a document that it is established in the IC review proceeding is exempt (s 55L)).

Item 12: Allowing applicants to seek AAT review during the course of an IC review

Schedule 1; Item 12 of the Bill provides for matters to be transferred from the OAIC to the AAT where the OAIC notifies the review applicant that it will take longer than 120 days to decide the matter or more than 120 days has passed since the application was made.

In general IC review applications are finalised ‘on the papers’, without the need for a formal hearing. The Commissioner has broad powers to finalise IC review applications in a number of ways. These include by agreement with the applicant (s 55F) in addition to an IC review decision under s 55K. Agencies also have the discretion to make a revised decision that is more favourable to the applicant during the IC review process (s 55G).

The number of IC reviews finalised within 120 days by the OAIC as a percentage of all IC reviews finalised was 39% in 2011-2012 (100 IC reviews), and 38% in 2016-17 (198 IC reviews). As set out above, the OAIC has met its key performance indicator of finalising 80% of IC review applications within 12 months since 2015-16. The Commissioner has issued a procedure direction for agencies and ministers for the purposes of ensuring that IC reviews are processed efficiently. The OAIC considers that s 54W(b) of the FOI Act provides sufficient flexibility to allow matters to proceed to the AAT prior to an IC review decision being made in appropriate circumstances.

Item 13: Allowing applicants to appeal directly to the AAT

Schedule 1; Item 13 of the Bill provides that applicants can elect to have their matter bypass the Commissioner to go directly to the Administrative Appeals Tribunal (AAT).

Under the FOI Act an application can be made to the AAT for 2nd tier merit review if the Commissioner makes a decision under s 55K or if a decision is made under s 54W(b) to enable the applicant to go direct to the AAT (ie, if it is in the interests of the administration of the FOI Act).

Table 3 sets out the number of referrals made to the AAT under s 54W(b) by the OAIC. The OAIC considers that this provision provides sufficient flexibility to allow matters to proceed to the AAT prior to an IC review decision being made in appropriate circumstances.

Item 16: Publication of external legal expenses for FOI reviews

In relation to Schedule 1; Item 16 of the Bill, section 93 of the FOI Act requires agencies to provide the Commissioner with information on ‘freedom of information matters’ for inclusion in the OAIC’s annual report.

Agencies and ministers provide to the OAIC annually the non-staff costs directly attributable to FOI request processing (FOI) and the Information Publication Scheme (IPS). Costs are separately provided for general legal advice costs (this is general legal advice on FOI or IPS matters either from an in-house legal section or external solicitor / legal counsel) and litigation costs (this is the cost of specific litigation in relation to particular FOI requests. It includes solicitor and legal counsel costs and internal agency legal services, if they can be costed).

Summary details of these costs are published in the OAIC annual reports.

The specific data provided by individual agencies about FOI processing and costs are published annually by the OAIC on the website: www.data.gov.au.