

NOTICE OF FILING

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A handwritten signature in blue ink that reads "Sia Lagos". The signature is fluid and cursive, with the first letters of "Sia" and "Lagos" being capitalized and prominent.

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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Form 59
Rule 29.02(1)

Affidavit

No. VID519 of 2021

Federal Court of Australia
District Registry: Victoria
Division: General

REX PATRICK

Applicant

AUSTRALIAN INFORMATION COMMISSIONER

Respondent

Affidavit of: **Rocelle Ann Dowsett**
Address: 175 Pitt Street Sydney NSW 2000
Occupation: Assistant Commissioner (Freedom of Information)
Date: 6 March 2023

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2.	GEN.0005	Worksheet titled 'Conducting IC review: Assessments'	[34]	209-224
3.	GEN.0008	OAIC IC review case categories guide, as at June 2021	[34]	225-228

Filed on behalf of (name & role of party) Australian Information Commissioner (the Respondent)

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4.	GEN.0006	Auditor-General's audit report <i>Administration of the Freedom of Information Act 1982</i> (Auditor-General Report No. 8 of 2017-18)	[37]	229-287
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6.	00054.021	Email from the OAIC (Review Adviser) to DFAT dated 15 September 2021	[42]	291-294
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14.	00424.036	File note of phone call between OAIC and DISR on 6 September 2022	[63]	413
15.	00424.038	Email chain between the OAIC and DISR, including: <ul style="list-style-type: none"> Email from DISR to OAIC (Review Adviser) dated 19 September 2022; Email from OAIC (Review Adviser) to DISR dated 20 September 2022 	[64], [65]	414-419

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16.	00424.039	<p>Emails from DISR's external lawyer to the OAIC (Review Adviser), including:</p> <ul style="list-style-type: none"> Email from DISR's external lawyer to the OAIC (Review Adviser) dated 25 September 2022; and Email from DISR's external lawyer to the OAIC (Review Adviser) dated 25 September 2022. 	[66]	420-427
17.	00424.040	Email from the OAIC (Review Adviser) to DISR's external lawyer dated 26 September 2022	[67]	428-435
18.	00424.041	<p>Email chain between the OAIC (Review Adviser) and DISR's external lawyer, including:</p> <ul style="list-style-type: none"> Email from DISR's external lawyer to the OAIC (Review Adviser) dated 26 September 2022 at 10:14am; Email from the OAIC (Review Adviser) to DISR's external lawyer dated 26 September 2022 at 10:17am; and Email from the OAIC (Review Adviser) to DISR's external lawyer dated 26 September 2022 at 11:50am. 	[67]	436-445
19.	00424.050	Email from the OAIC (Review Adviser) to DISR's external lawyer dated 2 March 2023	[71]	446
20.	00544.153	Information Commissioner's decision on MR20/00544 dated 28 February 2023	[76]	447-456
21.	RES.00613.03	Resolve Record for IC Review MR20/00613 (as at 2 March 2023)	[77]	457-463
22.	00613.010	Email from the OAIC (Assistant Director of the Intake and Early Resolution team) to the Treasury dated 31 August 2020	[80]	464-465
23.	00613.014.A1	Treasury's open (non-confidential) submissions regarding MR20/00613 dated 29 September 2020	[80]	466-471

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24.	RES.00760.03	Resolve Record for IC Review MR20/00760 (as at 2 March 2023)	[83]	472-477
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26.	00863.069.A1	DISR submissions regarding MR20/00863 dated 11 June 2021	[90]	493-496
27.	00863.071.A1	Applicant's submissions dated 10 September 2021	[90]	497-498
28.	00863.072.A1	Correspondence from DISR to the OAIC (Review Adviser) dated 27 September 2021	[92]	499-500
29.	00863.035	Email chain between the OAIC and DISER, including: <ul style="list-style-type: none"> Email from the OAIC (Review Adviser) to DISER dated 22 February 2022; Email from DISER to the OAIC dated 7 March 2022; Email from the OAIC (Review Adviser) to DISER dated 7 March 2022; Email from DISER to the OAIC dated 22 March 2022; Email from the OAIC (Review Adviser) to DISER dated 22 March 2022 	[94]	501-506
30.	00863.038	Email from DISER to the OAIC (Review Adviser) dated 31 March 2022	[95]	507-509
31.	00863.048	Email from the OAIC (Review Adviser) to DISER dated 20 April 2022	[95]	510-514
32.	00863.074	Email chain between the OAIC and DISR, including: <ul style="list-style-type: none"> Email from OAIC (Review Adviser) to DISR dated 16 November 2022; Email from OAIC (Review Adviser) to DISR dated 8 December 2022 	[99], [100]	515-516

No.	Document ID	Document Description	Paragraph Reference	Pages
33.	00863.075	Email chain between the OAIC and DISR, including: <ul style="list-style-type: none"> Email from DISR to OAIC (Review Adviser) dated 3 January 2023; Email from OAIC (Review Adviser) to DISR dated 5 January 2023 	[103], [104]	517-520
34.	00863.077	Email from OAIC (Review Adviser) to DISR dated 2 February 2023	[108]	521-525
35.	RES.00922.03	Resolve Record for IC Review MR20/00922 (as at 2 March 2023)	[110]	526-529
36.	RES.01189.03	Resolve Record for IC Review MR20/01189 (as at 2 March 2023)	[115]	530-534

I **ROCELLE ANN DOWSETT**, of 175 Pitt Street Sydney NSW 2000, Assistant Commissioner (Freedom of Information), sincerely declare and affirm:

1. I am the Assistant Commissioner, Freedom of Information at the Office of the Australian Information Commissioner (**OAIC**).
2. I am authorised to make this affidavit on behalf of the respondent, the Australian Information Commissioner (**Information Commissioner**).
3. By making this affidavit, I do not intend and have no authority to waive privilege in any communication, or record of communication, that is the subject of the respondent's legal professional privilege. Nothing in this affidavit ought to be construed as involving a waiver of privilege. To the extent that anything in this affidavit may be construed as involving a waiver of privilege, I withdraw and do not rely on that part of this affidavit.
4. Unless otherwise stated, I make this affidavit from my own knowledge and from my review of records held by the OAIC.
5. I refer to my affidavit affirmed on 22 August 2022 (**First Affidavit**) and my supplementary affidavit affirmed on 8 September 2022 (**Second Affidavit**). In this affidavit, capitalised terms have the same meaning as in my previous affidavits.
6. This affidavit has four parts:
 - (a) In Part A, I describe changes which were implemented recently in the FOI branch and to the IC Review process.

- (b) In Part B, I give an overview of the current workload of pending IC Reviews in the FOI branch.
 - (c) In Part C, I address some aspects of the IC Review process, in response to particular issues raised by the Applicant in this proceeding.
 - (d) In Part D, I give updated information about the progress of the seven remaining IC Reviews that are the subject of the separate question.
7. In Part D of this affidavit, I refer to correspondence and extracts from the OAIC's Resolve database regarding the eight IC Reviews that are the subject of the separate question. Now produced and shown to me and marked **RAD-3** is an exhibit comprising a bundle of documents referred to in this affidavit. Each document in exhibit **RAD-3** has been marked with an individual number or code. In this affidavit, where I intend to refer to a particular document within exhibit **RAD-3**, I have referred to the number or code corresponding to the document in square brackets. Some of the documents in **RAD-3** are emails. Unless relevant, attachments to emails have not been included in exhibit **RAD-3**, on the basis that those attachments are generally not relevant to the issues in dispute in this proceeding and often contain confidential or sensitive information. Some of the documents included in exhibit **RAD-3** have been redacted because the information is privileged, confidential or personal, or because the redacted information relates to IC Reviews that are not the subject of this proceeding.

Part A — Restructure of the FOI branch and changes to the IC Review process

A.1 — Restructure of the FOI branch

8. From time to time the OAIC refines its processes and structures for the conduct of IC Reviews, in order to maximise the efficiency of the process and to respond to changing circumstances, such as changes in the number or type of review applications. The OAIC restructured the FOI branch with effect from 1 February 2023. This restructure was accompanied by some changes to the IC Review process which I describe below at paragraphs [14]–[21].
9. The intention of the recent restructure was to increase the ability of each team in the FOI branch to focus on certain tasks relating to the IC review process. I anticipate that, with this greater level of focus, case management steps in IC Reviews will be completed more quickly, and IC Reviews will be finalised more quickly overall.
10. In my First Affidavit at paragraphs [12]–[13], I described that the FOI branch comprised four teams: Investigations and Compliance; Intake and Early Resolution; Reviews; and Significant and Systemic Review (**SSR**).
11. Since 1 February 2023, the FOI branch has consisted of four teams: [REDACTED]

- (a) Monitoring, Guidance and Engagement;
- (b) Intake and Early Resolution;
- (c) Reviews and Investigations; and
- (d) Significant Decisions.

12. In overview, the role of each team is:

- (a) **Monitoring, Guidance and Engagement team:** this team performs the OAIC's FOI regulatory guidance and advice work, which is described in paragraphs [21] and [40] of my First Affidavit. Members of this team are not involved in IC Reviews. Regulatory advice work was previously done by the SSR team, and was balanced with the team's IC Review workload.
- (b) **Intake and Early Resolution team (Intake team):** the Intake team performs the registration, intake and triage of IC Review applications and FOI complaints, as well as determining applications for extensions of time under the FOI Act. The intake process for IC Review applications has remained largely the same as before the restructure, described in paragraphs [26]–[28] and [42] of my First Affidavit. However, from around December 2021, the Intake team would consider the responses from respondent agencies to s 54Z notices, and determine whether the OAIC needed to share the submissions with applicants. Since the restructure, the Intake team no longer evaluates s 54Z responses. The Intake team follows up respondent agencies to ensure that responses are provided, but once s 54Z responses are received, the IC Review is assigned to the Reviews and Investigations team.
- (c) **Reviews and Investigations team (R&I team):** the main function of the R&I team is to case manage IC Reviews, with a view to resolving the dispute without a decision being required or preparing the application for a decision. For example, the R&I team will consider the issues raised in the respondent agency's s 54Z response; seek responses from the applicant as required; and gather the materials and information necessary to make a decision. In addition:
 - (i) Review Advisers within the R&I team may provide a preliminary view to the parties about the merits of an IC Review. The R&I team reviews the documents and submissions provided by the parties and considers whether the claimed exemptions appear to be justified. If a preliminary view is reached against the respondent agency's position, the R&I team Review Adviser informs the respondent agency. The R&I team Review Adviser may also give preliminary views to an applicant where a matter is considered clear, or where

there are precedents adverse to their application. The applicant will be given the chance to withdraw their application.

- (ii) Review Advisers within the R&I team draft decisions in IC Reviews which are considered more “routine” or “less complex”, for consideration by the Information Commissioner, FOI Commissioner, or her or his delegate.
 - (iii) Separately from IC Reviews, the R&I team also investigates FOI complaints.
 - (d) **Significant Decisions team:** the primary role of the Significant Decisions team is to draft decisions for the Information Commissioner or FOI Commissioner’s consideration under s 55K of the FOI Act. The Significant Decisions team generally will not case-manage IC Reviews, but may undertake some incidental case management for reviews allocated to the team in order to obtain all information required to prepare a decision. The Significant Decisions team also determines applications for vexatious applicant declarations under the FOI Act.
13. To date, the restructure has involved reallocating existing staff within the FOI branch, and has not involved an overall increase in the number of staff employed in the FOI branch, although there will shortly be a small increase in the resources in the FOI branch, as explained below. However, it is intended that there will be a greater number of employees focussed on IC Reviews, compared to the previous structure.
- (a) The Intake team performs largely the same role as before the restructure. In my Second Affidavit at paragraph [18], I stated that there have been between 4 and 7 full-time-equivalent (**FTE**) employees in that team over the past three years. Under the restructure, there are 8.0 FTE employees in the team. From 7 March, this will increase to 8.2 FTE employees.
 - (b) The work of the previous Reviews, SSR and Investigations and Compliance teams has been divided between the R&I, Significant Decisions and Monitoring, Guidance and Engagement teams. The Monitoring, Guidance and Engagement team currently has 0.8 FTE employees. The R&I and Significant Decisions teams are more focussed on IC Reviews, and together have 11.2 FTE employees, being 7.4 employees in the R&I team, and 3.8 employees in Significant Decisions. The previous Reviews and SSR teams together had between 7–11 FTE employees, as described in my Second Affidavit at paragraphs [20]–[21]. From 20 March 2023, there will be 8.4 FTE employees in Reviews. It is expected that the OAIC will engage a secondee for 3 days per week (0.6 FTE) in the Significant Decisions team, for approximately 6 months from 20 March 2023.

A.2 — Changes to the IC Review process

14. One of the key changes in the restructure is to create a specialised case-management team.
15. In summary: before the restructure, the Intake team performed some initial case management work, and assigned IC Reviews to the Reviews team or to the SSR team. Once an IC Review was assigned to the Reviews or SSR team, the review generally awaited allocation to a Review Adviser in the assigned team before further case management steps were taken. However, in some circumstances, further steps may have been taken by a Review Adviser in the Reviews or SSR team, before allocation, on a case-by-case basis. Once allocated to a Review Adviser, in either the Reviews or SSR team, a single Review Adviser undertook case management steps and then prepared a draft decision (if the review did not resolve during the case management process).
16. Under the restructure, once the respondent agency has responded to the s 54Z notice, the IC Review is assigned to the R&I team. The review then awaits allocation to a Review Adviser in the R&I team.
17. IC Reviews are allocated manually by the Director of the R&I team. The factors considered when deciding when to allocate an IC Review to a Review Adviser in the R&I team are the same as the allocation factors listed in my First Affidavit at paragraph [30]. As part of the roll-out of the restructure, the FOI Commissioner has reiterated to OAIC staff that the OAIC must, to the extent possible, prioritise 2018 and 2019 matters. The OAIC's allocation principles have not changed, but finalising the oldest IC Reviews has been identified by the FOI Commissioner as a primary focus of the FOI branch at the moment. This means that all outstanding IC Reviews from 2018 were allocated to Review Advisers by January 2023, and all outstanding IC Reviews from 2019 are expected to be allocated to Review Advisers by 31 March 2023. Review Advisers are expected to focus their time on the 2018 or 2019 IC Reviews that have been allocated to them, whilst balancing those matters with other IC Reviews assigned to them that are close to finalisation.
18. Once allocated to a Review Adviser in the R&I team, that Review Adviser performs all necessary case management steps and may provide a preliminary view to the parties (explained above at paragraph [12(c)(i)]). The Review Adviser in the R&I team, may, as noted above at paragraph [12(c)(ii)], draft decisions in IC Reviews which are considered more "routine" or "less complex", for consideration by the Information Commissioner, FOI Commissioner, or her or his delegate.
19. If an IC Review is not resolved by the Review Adviser in the R&I team, once all case management steps are completed, the IC Review is assigned to the Significant Decisions

team. The Review then awaits allocation to a Review Adviser in the Significant Decisions team.

20. The Director of the Significant Decisions team allocates reviews to Review Advisers in that team. The Director considers the allocation factors described in my First Affidavit at paragraph [30] when allocating reviews to Review Advisers.
21. Once allocated to a Review Adviser in the Significant Decisions team, that Review Adviser will draft a decision and reasons for consideration by the FOI Commissioner. The process for finalising a decision remains as described at paragraph [40] of my Second Affidavit.

Delegation of decision-making power under s 55K

22. Section 25 of the *Australian Information Commissioner Act 2010* was amended by the *Privacy Legislation Amendment (Enforcement and Other Measures) Act 2022* with effect from 13 December 2022. Section 25(2)(a) now permits the Information Commissioner to delegate the decision-making power under s 55K to employees at Senior Executive Service level.
23. The Information Commissioner has delegated powers and functions including the power to make decisions under s 55K to OAIC staff employed at the level “SES Band 1” in the FOI branch. I am the only person employed at that level in the FOI branch. The Information Commissioner is in the process of developing “business rules” to identify the types of matters which are appropriate to be decided pursuant to this delegation, such as more routine or less complex matters.

A.3 — Effect on pending IC Reviews

24. Before the restructure, approximately 400 IC Reviews had been assigned to the “Reviews” or “SSR” team and were awaiting allocation to a Review Adviser. When the restructure was implemented, those “unallocated” reviews were assigned to the R&I team. The reviews are now awaiting allocation to a Review Adviser in the R&I team for case management, and will follow the decision-making process I explained above at paragraphs [18]–[21].
25. The restructure has not changed the order of allocation for outstanding IC Reviews. Each outstanding IC Review will be allocated to a Review Adviser for case management according to the allocation factors described in my First Affidavit at paragraph [30].
26. Reviews which had already been allocated to a Review Adviser in the Reviews or SSR team before the restructure will not be affected by the restructure. Each allocated Review Adviser will continue to case manage the Reviews and then proceed to draft a decision, as though they were still working in the SSR team (or Reviews team), consistent with the processes described in my First Affidavit at [31]–[39].

27. The OAIC decided that in cases where a matter has been substantially progressed by a Review Adviser, that person should generally retain responsibility for the review because they will have developed some familiarity with it and have access to the relevant documents.
28. The restructure means that the FOI branch is in a period of transition, with Review Advisers in the R&I team and the Significant Decisions team performing their new roles and continuing to manage previously-allocated reviews. For example, a Review Adviser in the Significant Decisions team may continue to case-manage an IC Review, although their role (after the restructure) does not usually involve case management.

Part B — Pending IC Reviews

29. Statistics about the number of IC Reviews received and finalised each year are set out in the annual reports of the OAIC. As stated on page 14 of the annual report, in the 2022 financial year:
 - (a) the OAIC received 1,995 IC reviews; and
 - (b) the OAIC finalised 1,392 IC reviews.
30. A copy of the annual report for the financial year ending 30 June 2022 is at [GEN.0004]. These statistics differ slightly from the information set out in the Information Commissioner's Concise Statement in Response dated 17 October 2022, because at that time the statistics were continuing to be checked for the purpose of the annual report which resulted in some minor changes.
31. As at 2 March 2023, there is a total of 2,021 IC Reviews awaiting finalisation by the OAIC.
 - (a) 45 of the pending IC Reviews were lodged in 2018. All of the pending IC Reviews from 2018 have been allocated to Review Advisers.
 - (b) 228 of the pending IC Reviews were lodged in 2019. 23 of the pending IC Reviews from 2019 are waiting to be allocated to a Review Adviser.
 - (c) 327 of the pending IC Reviews were lodged in 2020. 265 of the pending IC Reviews from 2020 are waiting to be allocated to a Review Adviser.
32. Since the restructure, I have continued to supervise the progress of IC Reviews at a high level, and I am consulted as required, often when more complex issues or questions arise. The Directors of each team are responsible for managing the workload of their team, and the performance of Review Advisers within the team, supported by Assistant Directors in the Intake team and the R&I team.

Part C — Further explanation of aspects of the IC Review process

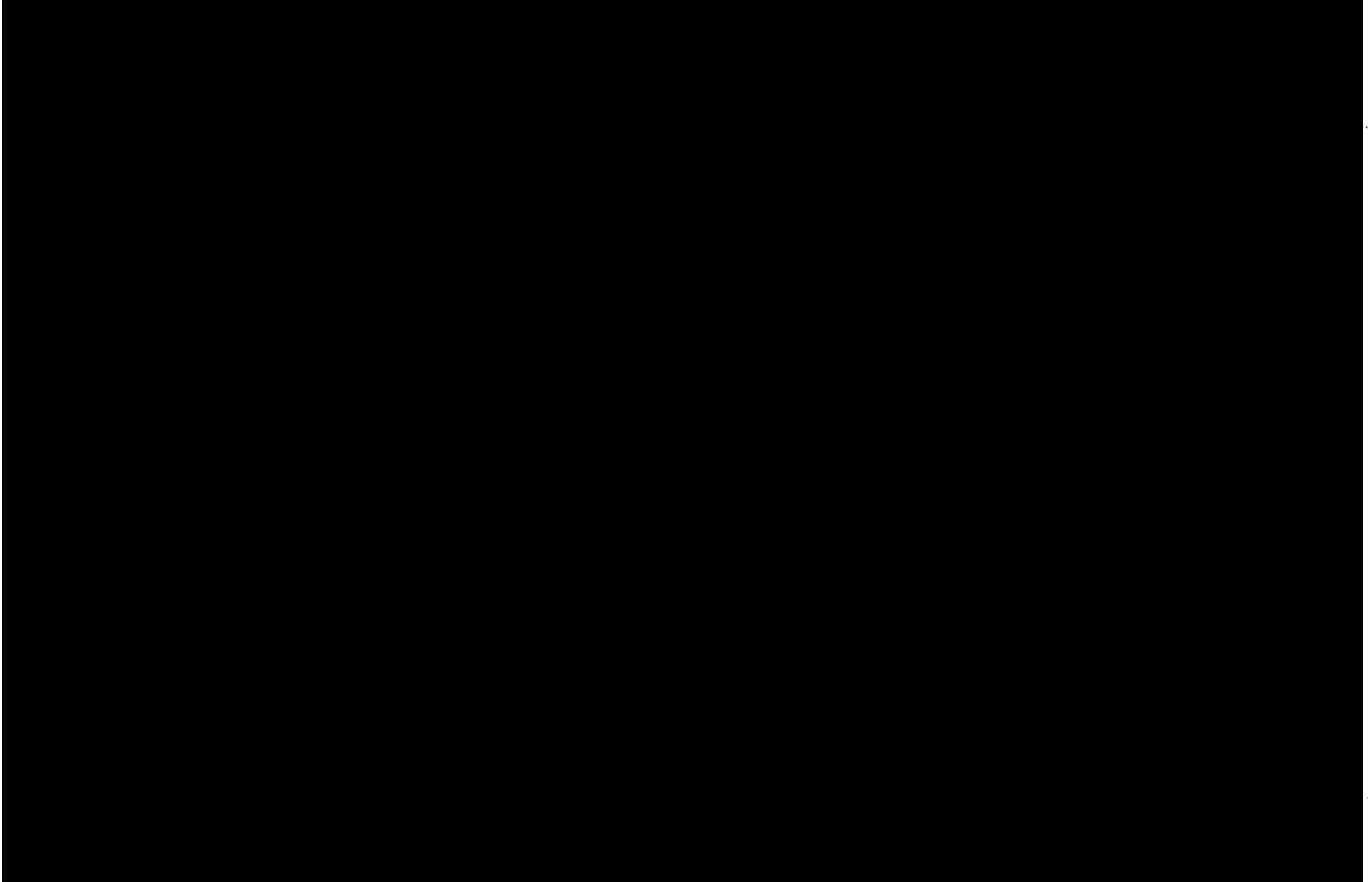
33. I have read the Applicant's supplementary submissions dated 6 February 2023. I address below some of the issues raised by the Applicant in relation to the Information Commissioner's processes.

C.1 — Deciding not to undertake or continue a review under s 54W(b) of the FOI Act

34. In my First Affidavit at paragraphs [27] and [37], I explained generally how the Information Commissioner decides whether to finalise an IC Review application under s 54W of the FOI Act. During the initial assessment process, the Intake team considers whether a decision should be made under s 54W(b) of the FOI Act, that is, whether it is "desirable" that the reviewable decision be considered by the Administrative Appeals Tribunal (**AAT**). The Intake team considers s 54W(b) in accordance with [10.88] of the FOI Guidelines, including by considering the factors outlined in the worksheet 'Conducting IC review: Assessments' [**GEN.0005**] and the 'IC review case categories' guide. A copy of the IC review case categories guide, as at June 2021, is [**GEN.0008**].
35. An IC Review may also be finalised under s 54W(b) at a later stage in the IC Review, depending on the issues that arise in the review, and whether the IC Review applicant requests such a decision in order to enable them to apply to the AAT for review. If an IC Review applicant requests that an IC Review application be determined pursuant to s 54W(b), the Commissioner (or delegate) considers that request, having regard to the positions of each of the parties.
36. As well as the factors listed in the Guidelines and worksheets, when considering whether to make a decision under s 54W(b) the OAIC takes into account that the IC Review applicant will in most cases have to pay a filing fee in order to apply for review by the AAT, which is generally \$1,011, or \$100 if the applicant is eligible for a reduced fee (with exceptions for certain documents under some statutory schemes, such as documents concerning Centrelink and child support decisions or Commonwealth workers' compensation decisions). There is no filing fee to apply for Information Commissioner review. The OAIC also considers any submissions from the respondent agency about whether the matter should be finalised under s 54W(b), and the current status of the IC Review.
37. The Information Commissioner does not exercise the power under s 54W(b) not to undertake an IC review, or not to continue to undertake an IC review, as a way to reduce the workload of the OAIC. This reflects comments made by the Auditor-General in his performance audit report *Administration of the Freedom of Information Act 1982* (Auditor-General Report No. 8 of 2017-18). In that report at paragraph [2.17], the Auditor-General stated "that the exercise of a discretion not to review an application should be based on

the merits of the application rather than the discretion being used as a workload management tool". A copy of the Auditor-General's Report is at [GEN.0006].

38. During the period 1 January 2020 to 2 March 2023, a decision was made pursuant to s 54W(b) not to undertake, or not to continue, an IC Review in relation to 324 IC Review applications. The OAIC was the respondent to approximately 68 of those applications.





C.2 — Policies about obtaining documents and information from respondent agencies

40. The OAIC requires production of information and documents from respondent agencies in order to conduct IC Reviews. At the start of an IC Review, the OAIC requests information, documents and submissions from the agency informally, as part of issuing a s 54Z notice which notifies the agency about the IC Review.
41. In my experience, by and large, most agencies respond to an informal request for information in a s 54Z notice in around the 3-week timeframe requested by the OAIC, or the agency might request an extension of time, generally of no more than a few weeks. That did not occur in most of the IC Reviews that are the subject of the separate question in this proceeding, except in MR20/00922 and MR20/01189. In MR20/00613 and MR20/00544, the agencies responded to the s 54Z notice in around 2 months.
42. From early 2020, many Commonwealth agencies were working on the response to the COVID-19 pandemic. During this period, and until around late 2021, I observed that there was an increase in the number of requests by IC Review respondents for extensions of

time to undertake steps in IC Reviews. I was aware that many agencies were affected by the pandemic, either because their staff were working directly on the Commonwealth's response to the pandemic, or staff were transitioning to working remotely and adjusting logistics and staffing arrangements. The OAIC was informed by a number of different agencies on multiple occasions that there were fewer staff available to respond to IC Reviews due to redeployment of staff, and reduced staff numbers. The remote working environment also created difficulties in searching for and retrieving documents. Examples of some of these communications are [00054.006], [00054.021] and [00613.007.A1]. From part-way through 2020, the FOI branch did attempt to track the number of IC reviews that were affected by the COVID-19 pandemic, by recording information in our database about those IC reviews that were affected, such as by requests for an extension of time to provide information to the OAIC based on the agency's prioritisation of the pandemic response. However the information was not recorded consistently by staff, and therefore we do not have reliable data regarding the number of IC reviews that were affected by the pandemic.


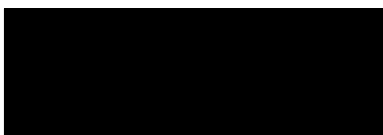
43. Requests for extension of time to respond to the OAIC's requests are considered on a case-by-case basis.
44. If a respondent agency has failed to comply with requests for information or documents during an IC Review, the OAIC may give a written direction to the agency under s 55(2)(e)(ii) of the FOI Act.
45. The Information Commissioner also has the power to request information and some documents under s 55R of the FOI Act, at any time during an IC Review. The Information Commissioner's policy in relation to issuing a notice to produce information or documents, under s 55R of the FOI Act is set out in the FOI Guidelines at [10.93] and [10.101], and the IC Review Process Directions at [3.8] [GEN.0001] [GEN.0002].
46. Section 55R notices are issued to an individual, and criminal penalties apply for non-compliance with a requirement specified in a s 55R notice. Before issuing a s 55R notice, the OAIC considers who the appropriate recipient of the notice would be, and whether it is appropriate to issue the notice to the particular officer at the agency who has been responding to OAIC's inquiries so far. For example, it may not be appropriate to issue a s 55R notice to that officer if they do not have control of the relevant documents to be produced, or if that person is not the repository of the information sought.
47. The OAIC does not collect statistics about agencies' response times to s 54Z notices compared to responses to s 55(2)(e)(ii) directions or s 55R notices. The Information Commissioner would not usually issue a 55(2)(e)(ii) direction or a notice pursuant to s 55R unless they consider that the agency has had sufficient time to respond to an informal request from the OAIC.

Part D — Update to the IC Review Applications the subject of the separate question***MR20/00054 — Respondent agency: Department of Foreign Affairs and Trade (DFAT)***

48. The history of this IC Review is described in my First Affidavit at paragraphs [44]–[86] and in my Second Affidavit at paragraphs [8]–[11]. The Resolve record for MR20/00054, as at 2 March 2023, is [RES.00054.03].
49. As described at paragraph [57] of my First Affidavit, DFAT informed the OAIC on 19 November 2020 that it had decided to revise its original decision under s 55G of the FOI Act, and expected to do so in January 2021. As stated at paragraph [59] of my First Affidavit, on 1 December 2020 I instructed OAIC staff to issue a direction or s 55U notice, requiring production of the relevant documents and submissions, but this was not done. The OAIC takes the view that a s 55U notice may be issued if: the OAIC has asked for evidence on affidavit or otherwise about the basis for exemption claims under ss 33, 34 or 45A; the respondent agency has been given a reasonable opportunity to provide that information; and no information has been provided.
50. As also stated in paragraph [59] of my First Affidavit, the Senior Review Adviser who was going to issue the s 55U notice resigned in January 2021 and ceased work at the OAIC on 18 February 2021. The usual handover process at that time required the Review Adviser to write handover file-notes for each IC Review allocated to them, and to meet with the Director of the SSR team to discuss any other outstanding issues. I have not been able to identify any handover file-note about MR20/00054 at that time, or a note of a handover meeting. The person who held the position of Director of the SSR team in early 2021 retired and ceased work at the OAIC on 31 March 2021. As far as I am aware, after the Senior Review Adviser left the OAIC in February 2021, no-one was assigned to monitor the progress of this IC Review and follow up due dates until it was allocated to a Review Adviser in August 2021.
51. I understand that this review was allocated to a Review Adviser so that someone was responsible for following-up DFAT.
52. The case management steps taken after 17 August 2021 are described in my First Affidavit in paragraphs [65]–[74]. This involved the OAIC following up DFAT to provide any revised decision. The OAIC has generally taken the view that s 55R cannot be used to compel an agency to make a revised decision under s 55G of the FOI Act.
53. On 3 December 2021, the OAIC issued a Direction under s 55(2)(e)(ii) of the FOI Act, directing DFAT to produce documents and submissions, and to issue a revised decision under s 55G of the FOI Act, by 17 December 2021. On 17 December 2021, DFAT requested an extension of time to comply with the Direction until 14 January 2022.
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54. The Information Commissioner generally does not rely on a notice pursuant to s 55R to compel the production of submissions. However, in MR20/00054, I issued a s 55R notice on 22 December 2021, which required DFAT to produce documents and submissions by 14 January 2022. The purpose of that notice was to ensure compliance with the new extended deadline.
55. DFAT made a revised decision on 14 January 2022 and also provided submissions with the revised decision. An unredacted copy of the decision and submissions provided by DFAT is [00054.031]. As described in my First Affidavit at [75], the Review Adviser wrote to the Applicant on 19 January 2022, asking whether he intended to proceed with the IC Review in light of the revised decision. The Applicant wanted the review to continue. His further submissions, received on 15 February 2022, are [00054.33].
56. DFAT's response to the s 55R notice raised a new issue. The response to the s 55R notice stated that some documents captured by the Applicant's request were classified as "CONFIDENTIAL" or "SECRET – AUSTEO". At that time, I understood that documents classified as "SECRET" could not be accommodated by the OAIC's infrastructure and could only be viewed by OAIC officers at DFAT's offices. After that issue arose, the Review Adviser, Director of the SSR team and I considered whether the IC Review should be finalised under s 54W(b) of the FOI Act, due to the complexity of the matter associated with the classification level of some of the documents. The OAIC consulted with the Applicant about the possibility of a decision by the Information Commissioner pursuant to s 54W(b) not to continue the IC Review. However, the Applicant opposed that course and instead, as described in paragraphs [79]–[81] of my First Affidavit, in mid-March 2022, the Applicant indicated that he would exclude certain material from the IC Review, so that the OAIC could continue the review. As a result of the narrowing of the scope of the review, I considered that the Information Commissioner could continue to conduct the IC Review, and no decision was made under s 54W(b).

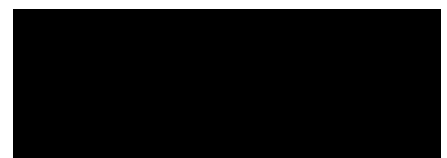
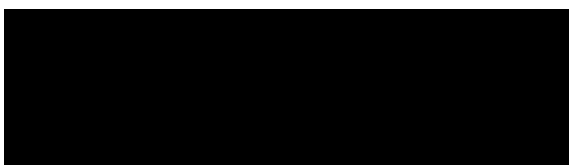
Current status and next steps in MR20/00054

57. In paragraph [11] of my Second Affidavit, I stated that the next step in this Review was for the Review Adviser to review the unredacted versions of the documents in dispute, which were produced by DFAT in response to a notice issued under s 55U of the FOI Act. The Review Adviser has finished reviewing the documents and has commenced preparing a draft decision. As part of that process, the Review Adviser considers the exemptions claimed by DFAT and the parties' submissions. Once the Review Adviser has considered the materials and formed a preliminary view, the Review Adviser will consider whether any further procedural steps are required, such as requesting evidence from the Inspector-General of Intelligence and Security (under s 55ZB(1) of the FOI Act), as described in my Second Affidavit in paragraph [11].
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58. The Review Adviser will not necessarily give DFAT particulars of their views before progressing to the decision stage, as requested in DFAT's 9 August letter. I would expect the Review Adviser to only seek further submissions from the parties at this stage if necessary to comply with the requirements of procedural fairness, for example because it is proposed to rely on a circumstance that the parties have not had a reasonable opportunity to address.
59. This IC Review was allocated to a Review Adviser in August 2021. The allocated Review Adviser remained responsible for this review after the restructure and I do not expect that the restructure will extend the likely timeframe for completion of the review.

MR20/00424 — Respondent agency: Department of Industry, Science and Resources (DISR, formerly DISER)

60. The history of this IC Review is described in my First Affidavit at paragraphs [87]–[107] and in my Second Affidavit at paragraphs [12]–[21]. The Resolve record for MR20/00424, as at 2 March 2023, is [RES.00424.03].
61. This matter has not been allocated to a Review Adviser yet.
62. As described in my First Affidavit at paragraph [107], on 29 July 2022, the OAIC issued a s 55U notice to DISR. As described in my Second Affidavit, a Review Adviser continued to correspond with DISR regarding compliance with the s 55U notice and related issues. Although the review had not been allocated to the Review Adviser, this work was done to ensure compliance with the s 55U notice, and because DISR raised a number of questions which required a response.
63. The Resolve record for MR20/00424 indicates that on 6 September 2022, the Review Adviser spoke to an officer of DISR and asked DISR to arrange Safehands delivery of the unredacted documents required by the s 55U notice as soon as possible. The Review Adviser also asked that DISR provide its "response" by 19 September 2022, meaning any further submissions or revised decision. The DISR officer confirmed that they were arranging Safehands delivery of the documents, and that DISR was aware that its response was due on 19 September 2022. A file note of this conversation is [00424.036]
64. On 19 September 2022, a lawyer at DISR emailed the Review Adviser stating that the Department was "experiencing delays in finalising submissions in this matter" [00424.038]. The email states:



We are in the process of outsourcing this piece of work, including the safe hand [delivery] of documents and finalising instructions necessary to inform the submissions.

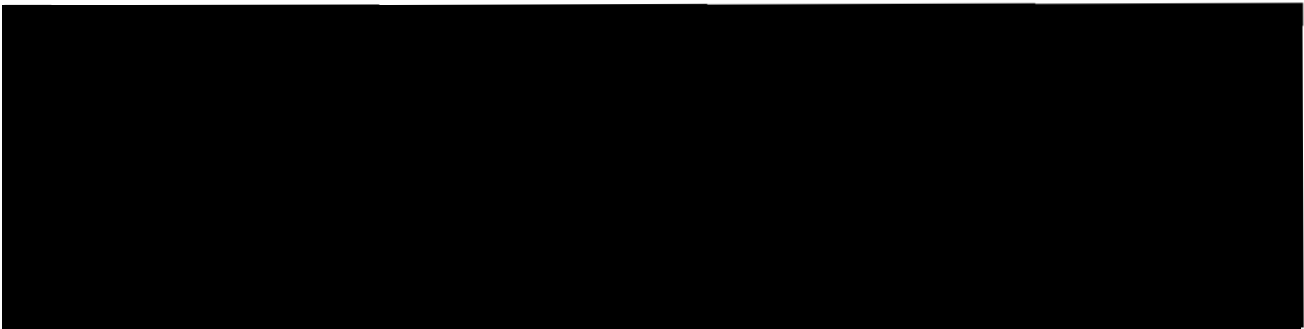
I anticipate being able to provide an updated timeframe in the next few days but we are not in a position to provide submissions today. Apologies for the short notice of this.

65. By email on 20 September 2022, the Review Adviser told the lawyer at DISR that OAIC would respond shortly [00424.038].
66. On 25 September 2022, DISR's external lawyer emailed the Review Adviser, stating that DISR was "consulting with PM&C in relation to the s 34 claims and requires additional time to provide its submissions". DISR requested an extension of time to provide submissions until 23 September 2022, but subsequently amended the request to 30 September 2022. The email also stated that, in the meantime, DISR could provide the documents at issue via Safehands delivery: [00424.039].
67. On 26 September 2022, the Review Adviser sent an email to DISR's external lawyer stating that they were available to receive the documents that day, and granting the extension of time: [00424.040]. DISR delivered (via Safehands delivery) the disputed documents on 26 September 2022 [00424.041].
68. DISR did not provide submissions or a revised decision on 30 September 2022.
69. On 24 February 2023, the Review Adviser called DISR's external lawyer, inquiring about the status of the submissions or revised decision. The Resolve record indicates that DISR's external lawyer looked at her file and said that she had been awaiting instructions during November 2022, and she believed that her contact at DISR had left. DISR's external lawyer said that she would make inquiries with DISR and inform the Review Adviser.
70. The Resolve record indicates that on 28 February 2023, DISR's external lawyer called the Review Adviser, and apologised for the delay. DISR's lawyer requested the opportunity to make submissions and potentially a s 55G decision, indicating that the matter was "complicated" because of ongoing legal proceedings. DISR requested a 4-week extension, allowing 2 weeks to obtain instructions and 2 weeks for the lawyer to prepare submissions. The Review Adviser told DISR's lawyer that she would discuss the extension of time request with her supervisor and respond by email. The Review Adviser's file notes of these conversations are in the Resolve record.
71. On around 28 February 2023, I spoke with the Review Adviser about this request and advised her to consult with the Director, Significant Decisions. On 2 March 2023, the Review Adviser sent an email to DISR's external lawyer, refusing the 4 week extension of time and asking that submissions be provided "as soon as possible". According to the

Resolve record, the Review Adviser stated that DISR had not given a sufficient explanation of why the further 4 weeks were required: [00424.050].

72. Due to the restructure, the next step is for this matter to be allocated to a Review Adviser within the R&I team for case management.
73. Once the Review Adviser is satisfied that no further information or procedural fairness step is required, the review will be assigned to the Significant Decisions team. The review will then await allocation to a Review Adviser in the Significant Decisions team to prepare a draft decision for consideration by the FOI Commissioner. If the FOI Commissioner is satisfied that no further step is required in the IC review, he will proceed to make a decision under s 55K(1) of the FOI Act.
74. As at 2 March 2023, there are 97 IC Review applications that have been assigned to the R&I team but are not yet allocated to a Review Adviser, that were lodged with the OAIC before MR20/00424.

MR20/00544 — Respondent agency: Attorney-General

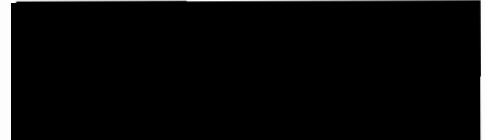
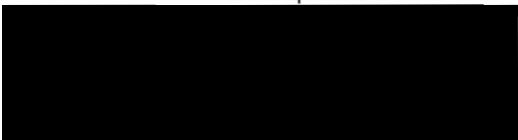


MR20/00613 — Respondent agency: Department of Treasury

77. The history of this IC Review is described in my First Affidavit at paragraphs [149]–[165] and in my Second Affidavit at paragraphs [24]–[26]. The Resolve record for MR20/00613, as at 2 March 2023, is [RES.00613.03].

Consideration of s 54W(b) of the FOI Act

78. The initial assessment of this IC Review was completed on 28 July 2020. At paragraph [154] of my First Affidavit, I refer to an email I sent on 27 August 2020 in which I agreed that the Department of Treasury should have an extension of time to respond to the s 54Z notice, and asked that the Intake team consider whether this review should progress to a s 54W(b) decision.
79. Around the time of that email, in August 2020, the Applicant had made two other IC Review applications, which also involved claims of exemption under s 34. The Applicant had asked that the two other applications be finalised under s 54W(b) of the FOI Act, or that questions of law be referred to the Federal Court of Australia under s 55H. In that



context, I suggested to the Intake team that s 54W(b) be considered in MR20/00613 as well.

80. By email on 31 August 2020 (which is document [00613.010] in my First Affidavit), the OAIC asked the Department of Treasury whether it objected to a decision being made in relation to MR20/00613 (and two other reviews) under s 54W(b). In the Department of Treasury's submissions provided on 29 September 2020, the Department opposed a decision being made not to continue the review in relation to MR20/00613. The Department's open (non-confidential) submission is [00613.014.A1]. The Intake team determined that OAIC should proceed with the review, and the Resolve record shows that the review was assigned to the SSR team on 2 October 2020.

Current status and next steps in MR20/00613

81. In my Second Affidavit at paragraphs [24]–[25], I described the next steps in this matter. The expected process remains the same, except for changes due to the restructure. Due to the restructure, the next step is for this matter to be allocated to a Review Adviser within the R&I team (not the SSR team), for case management. This review will follow the process summarised at paragraphs [18]–[21] and [73] above (although the respondent agency in this review is Treasury, not DISR).
82. As at 2 March 2023, there were approximately 146 IC Review applications that have been assigned to the R&I team but not yet allocated to a Review Adviser, that were lodged with the OAIC before MR20/00613.

MR20/00760 – Respondent agency: DISR

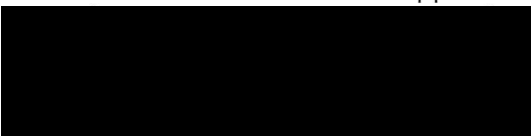
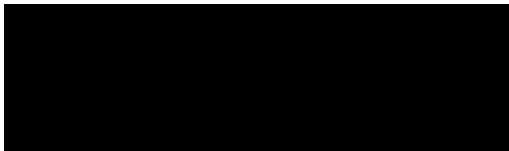
83. The history of this IC Review is described in my First Affidavit at paragraphs [166]–[179] and in my Second Affidavit at paragraphs [27]–[29]. The Resolve record for MR20/00760, as at 2 March 2023, is [RES.00760.03].
84. In my Second Affidavit at paragraph [27], I deposed that the next step was for this review to be allocated to a Review Adviser within the SSR team for further case management.
85. As stated in the Resolve record, on 27 October 2022, the Director of the SSR team allocated this review to a Review Adviser in the SSR team. That allocation was made in error, due to a misunderstanding by the Director of the SSR team that a decision had been made to expedite this review and another IC Review. However, no decision had been made to expedite the IC Reviews. When the misunderstanding was discovered, on 28 October 2022, the Director reassigned the record in Resolve to the SSR team. The order in which MR20/00760 will be allocated to a Review Adviser is not affected by the mistaken allocation and reversal.

86. The expected next steps are as described in paragraphs [27]–[28] of my Second Affidavit, except for changes due to the restructure. Due to the restructure, the next step is for this matter to be allocated to a Review Adviser within the R&I team (not the SSR team) for case management. Once the case management process has been completed, if a decision under s 55K is required, the matter will be assigned to the Significant Decisions team to prepare a draft decision for consideration by the FOI Commissioner.
87. As at 2 March 2023, there were approximately 176 IC Review applications assigned to the R&I team, but not yet allocated to a Review Adviser, that were lodged with the OAIC before MR20/00760.

MR20/00863 — Respondent agency: DISR

88. The history of this IC Review is described in my First Affidavit at paragraphs [180]–[207] and in my Second Affidavit at paragraphs [30]. The Resolve record for MR20/00863, as at 2 March 2023, is [RES.00863.03]. Where I have described the content of telephone calls conducted by OAIC officers below, that information is based on the Resolve record.
89. In his supplementary submissions dated 6 February 2023, the Applicant criticises the OAIC’s approach to procedural fairness in relation to MR20/00863, which he says involves having given the Applicant and DISR repeated rights of response during the period from 26 August 2021 to 9 June 2022. To explain the steps taken by the Review Adviser during that period, I have exhibited the parties’ submissions made to the OAIC during that period, which were not exhibited to my First Affidavit.
90. As referred to in my First Affidavit at paragraph [189], DISR made submissions on 11 June 2021 [00863.069.A1]. On 10 September 2021, the Applicant made submissions in response which disputed DISR’s approach to determining relevance [00863.071.A1].
91. As stated in paragraph [192] of my First Affidavit, on 14 September 2021 the Review Adviser sent the Applicant’s submissions to DISR, and asked DISR to consider conducting further searches or reassessing its interpretation of the scope of the FOI request, and determine whether it would be appropriate to issue a revised decision under s 55G of the FOI Act. It is the OAIC’s usual practice where there is a dispute between parties regarding the scope of an FOI request to ask the respondent agency to consider the issues raised by the applicant and conduct further searches if appropriate. That is because the agency holds the relevant documents and can conduct further searches, and there may have been communications between the applicant and the agency that have informed the scope of the initial request.
92. In response to the Review Adviser’s email of 14 September 2021, on 27 September 2021 DISR wrote to the Review Adviser explaining why it considered that the searches that had

been undertaken were appropriate to the terms of the request, and indicating that a revised decision would not be issued [00863.072.A1].

93. As described in my First Affidavit at paragraphs [195]–[198], on 5 November 2021 the Review Adviser requested DISR to provide marked up and unredacted copies of the documents at issue. DISR provided the documents on 2 December 2021, but some of the documents had been edited by DISR, relying on s 22 of the FOI Act. On 7 December 2021, the Review Adviser wrote to DISR requesting unedited copies of the documents, which were necessary given that the Applicant disputed DISR’s decision to edit the documents. DISR sent the documents to the OAIC by email on 22 December 2021, with a table explaining the exemptions claimed and the basis for the view that s 22 applied.
94. After the Review Adviser had reviewed the documents, they wrote to DISR on 22 February 2022. The letter (an unredacted version of the email is [00863.035]) set out the Review Adviser’s preliminary view about the scope of the Applicant’s FOI request, and their view that three of the documents that DISR had redacted on the basis of relevance appeared to be within the scope of the request. The letter invited DISR to provide further information regarding its decision to delete parts of the three documents under s 22.
95. DISR responded on 31 March 2022 indicating that it proposed to make a revised decision under s 55G in relation to two documents and making submissions regarding the third document (an unredacted version of the email is [00863.038]). The email explained why, although the third document technically fell within the scope of the Applicant’s FOI request, the view had been taken that it was unlikely to be relevant to him. DISR sought the Applicant’s view as to whether he pressed for access to that document, and indicated that if he did, it would be prepared to make a revised decision releasing the three documents, subject to consideration of exemption claims. In his response dated 18 April 2022 (an unredacted version of the email is [00863.048]), the Applicant confirmed his position that the document was relevant and indicated that he did not object to names of non-SES personnel being excluded from the request. As stated in paragraph [204] of my First Affidavit, DISR made a revised decision on 8 June 2022.
96. Part of the OAIC’s role is to improve the decision-making of agencies under the FOI Act. The Information Commissioner generally takes the view that allowing an agency to make a revised decision under s 55G of the FOI Act, when it has indicated an intention to do so, can facilitate an improvement in the agency’s understanding of the scope of the relevant exemptions under the FOI Act, in relation to particular circumstances of the IC Review, which may improve the agency’s decision-making under the FOI Act overall. In addition, if an agency makes a revised decision, this may facilitate the prompt release of further material to the applicant.
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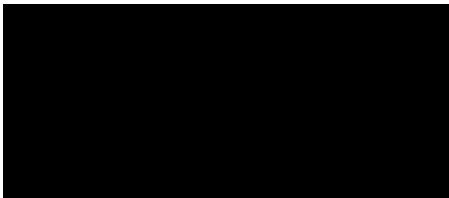
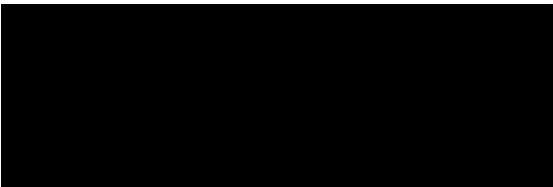
97. When an agency indicates that it proposes to make a revised decision, the OAIC pauses work on that IC Review. That is because any revised decision will become the decision under review, and the making of a revised decision will narrow the issues in dispute, or may result in the applicant withdrawing the IC Review, because they have obtained access to the documents sought. It is not efficient for the OAIC to continue progressing an IC Review when the scope of the review will change following the making of a revised decision.

Current status and next steps in MR20/00863

98. In my First Affidavit at paragraph [207], I described the next steps for this matter, which were for the Review Adviser to review the material provided by both parties; to consider whether further information is required; and otherwise to draft reasons for a decision under s 55K for consideration by the FOI Commissioner. At the time of my Second Affidavit, there had been no change to the status of the review, due to the workload of the Review Adviser.
99. On 16 November 2022, the Review Adviser sent an email to DISR seeking unredacted copies of the 119 documents which were initially identified as possibly relevant, but were ultimately excluded as irrelevant. The Review Adviser requested that DISR provide those documents by 7 December 2022 [00863.074].
100. DISR did not provide the documents or otherwise respond to the Review Adviser's email. On 8 December 2022, the Review Adviser followed up his request, and asked that DISR provide the documents by 15 December 2022 [00863.074].
101. DISR did not provide the documents or otherwise respond to the Review Adviser's email by 15 December 2022.
102. On 22 December 2022 the Review Adviser called the officer at DISR to follow up his email sent on 8 December 2022. The officer at DISR stated that the documents had been sent to a lawyer to process and send to the OAIC. The officer said that he would follow up the lawyer and provide an update.
103. On 3 January 2023, a lawyer at DISR responded to the Review Adviser's email of 8 December 2022 [00863.075]. The email stated:

"We are actively working on this request and anticipate being in a position to provide the documents by the end of this month.

Given the elapse in time, and personnel changes we have had to manually review documents, collate and seek business area clearance to release the



documents outside the department. This has taken longer than anticipated and is in the final stages.”

104. On 5 January 2023, the Review Adviser replied to DISR’s email, agreeing to receive the documents by 31 January 2023 [00863.075].
105. On 17 January 2023, the officer at DISR called the Review Adviser to discuss arrangements for delivering the requested documents.
106. On 30 January 2023, an officer at DISR called the Review Adviser to confirm arrangements for providing the documents to the OAIC. The Review Adviser informed the DISR officer that it would be appropriate to send the documents by email.
107. The OAIC has been able to receive documents classified as “protected” by email since 18 July 2022, when the OAIC network was upgraded to become a “protected network”. I was advised in February 2023 by the Corporate Services Branch that the OAIC can store documents classified as “secret” within the OAIC’s designated area. Such documents must still be delivered via Safehands or in person, not by email.
108. The OAIC received the requested documents from DISR on 30 January 2023, in 20 emails. The OAIC confirmed receipt of the 20 emails on 2 February 2023 [00863.077].
109. The next steps in this review are for the Review Adviser to consider whether the OAIC has received all the information and submissions necessary in order to proceed to a decision under s 55K.

MR20/00922 — Respondent agency: Department of Health

110. The history of this IC Review is described in my First Affidavit at paragraphs [208]–[215] and in my Second Affidavit at paragraphs [31]–[34]. The Resolve record for MR20/00922, as at 2 March 2023, is [RES.00922.03].
111. In my Second Affidavit at paragraph [31], I stated that the next step was for this review to be allocated to a Review Adviser within the SSR team for further case management.
112. As reflected in the Resolve record, on 27 October 2022, this review was allocated to a Review Adviser in the SSR team, by the Director of the SSR team. This allocation was made in error, due to a misunderstanding by the Director of the SSR team that a decision had been made to expedite this review and review MR20/00760 (discussed above at paragraph [85]). No decision had been made to expedite the IC Reviews. When the misunderstanding was discovered, on 28 October 2022, the Director reversed the mistaken allocation. The order in which MR20/00922 will be allocated to a Review Adviser has not been affected by the mistaken allocation.
113. The expected next steps remain as described in paragraphs [32]–[33] of my Second Affidavit, except for changes due to the restructure. Due to the restructure, the next step is

for this matter to be allocated to a Review Adviser within the R&I team (not the SSR team), for case management. The review will then follow the processes described in paragraphs [18]–[21] and [73] above.

114. As at 2 March 2023, there were approximately 205 IC Review applications assigned to the R&I team, but not yet allocated to a Review Adviser, that were lodged with the OAIC before MR20/00922.

MR20/01189 — Respondent agency: Department of Prime Minister & Cabinet

115. The history of this IC Review is described in my First Affidavit at paragraphs [216]–[227] and in my Second Affidavit at paragraphs [35]–[39]. The Resolve record for MR20/01189, as at 2 March 2023, is [RES.01189.03].

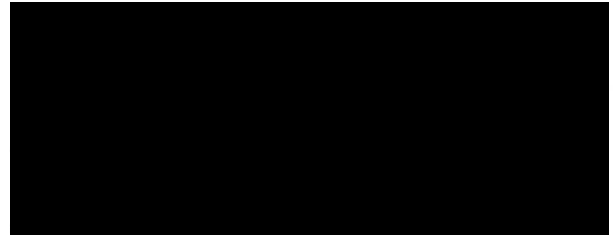
116. I described the next steps for this matter in paragraph [39] of my Second Affidavit, and that continues to be the position. That is, the next step is for the Review Adviser to review the materials provided by the Department of Prime Minister & Cabinet in response to the s 55U notice, and then to determine whether any further submissions are required from the parties.

117. Given that this review was allocated to the Review Adviser before the restructure was implemented, the same Review Adviser will perform the case management and decision-making steps, following the processes described in my First Affidavit at paragraphs [31]–[39].

Affirmed by the deponent
at Sydney NSW
on 6 March 2023

Before me: *Shawn Vincent*
Buckton.

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*I certify that I saw the face of
the person and*

Witness's qualification: *Solicitor admitted in NSW*

Witness's address:
Level 5, 60 Martin Place,
Sydney, NSW 2000 Australia

*identification
document a*

*I confirmed their
identity using their
driver's licence - s 39
Oaths Act NSW.*

Making the affirmation and the signing of this affidavit by the deponent, were witnessed by means of audio-visual link, in accordance with s14G of the *Electronic Transactions Act 2000* (NSW).

Exhibit Certificate

No. VID519 of 2021

Federal Court of Australia

District Registry: Victoria

Division: General

REX PATRICK

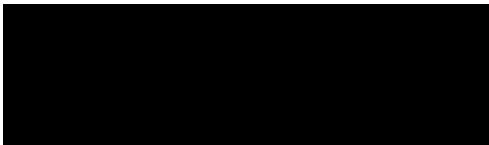
Applicant

AUSTRALIAN INFORMATION COMMISSIONER

Respondent

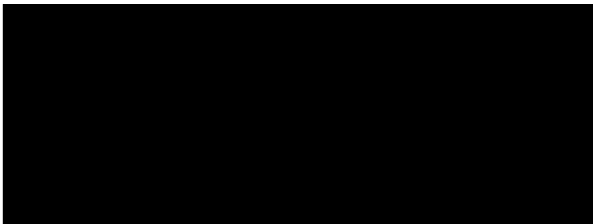
EXHIBIT "RAD-3"

Before me:



Witness's name: Shawn Vincent Buckton

Witness's qualification: Solicitor (admitted in NSW).

 Witness's address:
 Level 5, 60 Martin Place,
 Sydney, NSW 2000 Australia


Dated: 6 March 2023

I certify I saw the face of the deponent and confirmed the person's identity using an identification document being their NSW driver's licence (NSW s 34 Oath Act).

Making the affirmation and the signing of this affidavit by the deponent, were witnessed by means of audio-visual link, in accordance with s14G of the *Electronic Transactions Act 2000* (NSW).