Part 11 — Investigations and complaints

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Key Principles

11.1 Under Part VIIB of the FOI Act, the Information Commissioner can investigate an action taken by an agency in the performance of its functions or the exercise of its powers under the FOI Act. This involves investigating complaints (s 69(1)), as well as conducting investigations at the Commissioner's initiative (Commissioner initiated investigations (CIIs)) (s 69(2)).[1]

11.2 The Information Commissioner cannot investigate a minister's handling of FOI matters.[2] However, a complaint about the way an agency has handled a FOI request made to Minister may be treated as a complaint about that agency for the purposes of s 70(1) of the FOI Act.

11.3 The complaints process set out in Part VIIB is intended to deal with the way agencies handle FOI requests and procedural compliance matters. Examples include:

- a complaint that an agency did not provide adequate assistance to a FOI applicant to make a FOI request in accordance with s 15(3) of the FOI Act
- a complaint by a third party that an agency failed to consult them before deciding to release a document[3]
- a complaint that an agency is not complying with the applicable statutory timeframes in relation to making FOI decisions[4] or publishing documents on its disclosure log
- a complaint that an agency is not complying with its obligations under Part II of the FOI Act (the Information Publication Scheme).[5]

11.4 Agencies are encouraged to develop internal FOI complaint mechanisms to be set out in FOI decision letters and their information access webpages. This information should include information about how the Information Commissioner will consider complaints where the complainant has already complained to the agency, and the agency has already adequately dealt with the complaint or has not had adequate time to do so.

11.5 When deciding whether to commence an investigation, the Information Commissioner is guided by the OAIC's *Statement of Regulatory Approach*. Specific matters that will often be relevant include:

- the objects of the FOI Act
- the risks and impact of the alleged non-compliance
- whether the practice complained of is systemic
- whether significant issues are raised by the complaint
- whether there has been systemic non-compliance with statutory timeframes

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1 The OAIC's Freedom of information regulatory action policy | OAIC provides guidance on the Information Commissioner's approach to the exercise of FOI regulatory powers, including the investigation of complaints and conducting CIIs.

2 See s 70(1) of the FOI Act which only provides a person the right to complaint about an action taken by an agency, not a minister.

3 In accordance with ss 26A, 27, or 27A of the FOI Act.

4 This includes decisions made in relation to a request for the amendment or annotation of a record under Part V of the FOI Act.

5 For more information on the Information Publication Scheme, see these FOI Guidelines at Part 13: Information Publication Scheme | OAIC.

- the outcome(s) sought by the complainant and the outcomes that may be achieved through by an investigation under the FOI Act.[6]

11.6 An investigation may look at a single agency decision or action, or a systemic problem or recurring pattern in an agency's practices and processes in handling FOI matters. The investigation may also look at more than one agency in relation to a common practice or problem occurring in those agencies. The issue to be investigated may come to the attention of the Information Commissioner through various mechanisms, including as a result of an IC review, a series of applications for IC review or FOI complaints, or through an agency's FOI statistical return, information publication scheme or disclosure log.

Summary of complaints process

11.7 The table below sets how the relevant stages of the complaints process. A commissioner-initiated investigation will rely on the functions, powers and requirements as set out in Division 2, Part VIIB of the FOI Act (see [11.33]- [11.78]).

Stages	Description	Guidelines references
Intake	Registration and assessment of complaint for jurisdiction, including whether a matter is more appropriately considered by the Commonwealth Ombudsman	[11.8] – [11.15]
Preliminary inquiries	Inquiries made with the complainant and/or respondent to inform consideration of whether to decide not to investigate or investigate	[11.16] – [11.20]
Decision not to investigate	Finalisation of complaint and decision not to investigate under s 73	[11.21] – [11.33]
Investigation	Commencement of investigation request for information, consideration and analysis of evidence provided	[11.33] – [11.53]
Finalisation of investigation and monitoring of recommendations (if any)	Issuance of notice on completion, including publication of summary or entire notice, and monitoring of implementation of recommendations	[11.54] – [11.78]

[6] For further information about the OAIC's regulatory approach see Statement of regulatory approach and Freedom of information regulatory action policy.

Intake of complaints

Assessment of complaints

11.8 A person (a complainant) may complain to the Information Commissioner about an action taken by an agency under the FOI Act (s 70(1)).[7] A complaint must be in writing and identify the agency against which the complaint is made (s 70(2)). The OAIC requests, where possible, for complaints to be submitted via the online form on the OAIC website.

11.9 The OAIC must give 'appropriate assistance' to anyone who wishes to complain and needs help to formulate their complaint (s 70(3)). This need may arise, for example, if a person has language or literacy difficulties or otherwise needs assistance ascertaining the scope of an agency's obligations under the FOI Act or making a complaint against an agency.

11.10 Complainants are encouraged to first make a complaint to the relevant agency about the conduct being complained about before making a complaint to the Information Commissioner under the FOI Act. This provides the complainant and agency with an opportunity to address the issues raised by the complaint before any complaint is made to the Information Commissioner.

11.11 The Information Commissioner encourages agencies to develop appropriate internal complaint mechanisms for FOI complaints and to include advice about internal complaint options in the agency's decision letters to provide agencies the opportunity to quickly identify and address complaints in the first instance.[8]

Transfers from the Commonwealth Ombudsman

11.12 Under the *Ombudsman Act 1976*, the Commonwealth Ombudsman retains authority to investigate a complaint about action taken by an agency under the FOI Act (s 89F). However this is qualified by s 6C(2) of the *Ombudsman Act 1976* which requires the Ombudsman to consult the Information Commissioner before deciding to investigate a complaint about a matter that is the subject of a completed investigation by the Information Commissioner, or that is or could be the subject of a complaint to the Information Commissioner which could be dealt with more appropriately or effectively by the Information Commissioner. The Ombudsman and the Information Commissioner must consult with a view to avoiding the same matter being investigated by both offices. If the Ombudsman decides not to investigate a complaint on this basis, the Ombudsman must transfer the complaint and all relevant documents and information to the Information Commissioner and notify the complainant in writing (with reasons for the decision).[9] The Information Commissioner must then deal with the matter as a complaint under Part VIIB of the FOI Act.[10]

Transfers to the Commonwealth Ombudsman under s 74

11.13 The Information Commissioner has a similar power to transfer a complaint (or part of a complaint) to the Ombudsman if the Information Commissioner is satisfied that it could be

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7 See Make a freedom of information complaint | OAIC.

8 Noting that this information should also set out the complainant's right to make a complaint directly to the Information Commissioner under s 70 of the FOI Act.

9 See the *Ombudsman Act 1976* s 6C(3).

10 See the *Ombudsman Act 1976* s 6C(4).

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dealt with more effectively or appropriately by the Ombudsman (s 74). Two examples of such situations are given in the FOI Act:

- when the complaint is about how the Information Commissioner dealt with an IC review
- when the FOI complaint is part of a wider grievance about an agency's actions.

11.14 The factors that the Information Commissioner may consider when deciding whether to transfer a complaint (or part of a complaint) to the Ombudsman include:

- whether the complaint is about actions by the OAIC, including how the OAIC has dealt with:
  - an IC review
  - a FOI complaint
  - a vexatious applicant declaration application
  - a FOI request, or
  - an extension of time application
- whether there may be a perceived or actual conflict of interest in the Information Commissioner considering the complaint, including where:
  - the complaint relates to a FOI decision made by the Information Commissioner (or their delegate), and the complainant does not wish to seek internal review or IC review
  - the complainant has complaints under the Privacy Act in which the Information Commissioner is the respondent
  - the complaint relates to specific functions exercised by the Information Commissioner under the Privacy Act
  - the complainant has matters in other forums, including the Administrative Review Tribunal or Federal Court and the Information Commissioner is the respondent
- whether the issues raised relate to other active complaints lodged with the Commonwealth Ombudsman.

11.15 The Information Commissioner must consult the Ombudsman to avoid any overlap in inquiries, and may decide not to investigate or not to continue to investigate, after consulting (s 74(2)). If the Information Commissioner decides not to investigate a complaint on this basis, the Information Commissioner must transfer the complaint and all relevant documents and information to the Ombudsman, and notify the complainant in writing (with reasons for the decision) (ss 74(3)–(4)).

Preliminary inquiries to inform whether to investigate

11.16 The Information Commissioner may make preliminary inquiries to an agency for the purpose of determining whether or not to investigate a complaint (s 72). This can be done, for example, to determine whether the complaint relates to an action taken by an agency under the FOI Act or whether the process to which the complaint relates has been rectified by the agency.

11.17 If the complainant has not provided enough information to satisfy the requirements of s 70(2) of the FOI Act, the Information Commissioner will request further information from the

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complainant for the purposes assisting the complainant to formulate the complaint (s 70(3)). If the complaint is invalid, the complainant will be notified that the complaint is invalid, and no further action will be taken.

11.18 The Information Commissioner will make preliminary inquiries of the agency under s 72 of the FOI Act. The agency will generally be given 5-10 working days to respond to the preliminary inquiries, depending on the nature of the information requested and response required.

11.19 The Information Commissioner will require an agency to share a copy of its response to the preliminary inquiries with the complainant at the same time as it provides that response to the Information Commissioner.

11.20 The Information Commissioner will assess the agency's response to the preliminary inquiries, and may issue further preliminary inquiries (s 72) if it considers that further information is required.

Decision not to investigate a complaint

11.21 If the Information Commissioner decides not to investigate, or not to continue to investigate, a complaint, the Information Commissioner must give a written notice (with reasons) to the complainant and to the agency (ss 75(2)–(4)). An agency must also be notified if the Information Commissioner discontinues a Commissioner initiated investigation (s 75(2)(b)).

11.22 Prior to proceeding to a decision not to investigate, the complainant may be provided with an opportunity to make written submissions in response to the agency's preliminary inquiry response. The complainant will generally be given 5-10 working days to respond to the preliminary inquiries, depending on the nature of the information requested and response required. The complainant must provide a copy of their submissions to the agency at the same time they are given to the Information Commissioner.

Circumstances where a complaint may not be investigated

11.23 The Information Commissioner has a discretion not to investigate, or not to continue to investigate, a complaint in the following circumstances (set out in s 73):

The action is not related to an agency performing its functions or exercising its powers under the FOI Act (s 73(a))

11.24 The Information Commissioner has a discretion not to investigate, or not to continue to investigate, a complaint if the action is not related to an agency performing its functions or exercising its powers under the FOI Act (s73(a)). Examples of when this discretion has been exercised includes where:

- The complaint relates to conduct or a decision that were the subject of a FOI request, but the complaint does not raise issues about the processing or outcome of the FOI request itself.
- The complaint relates to broader policy issues that were the subject of a FOI request, but the complaint does not raise issues about the processing or outcome of the FOI request itself.

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- The complaint is about an action taken by an agency that is unrelated to any action or performance of that agency's functions under the FOI Act.

The complainant has or had a right to have the action reviewed by the agency, a court or a tribunal, or by the Information Commissioner (s 73(b))

11.25 The Information Commissioner has a discretion not to investigate, or not to continue to investigate, a complaint if the complainant has or had a right to have the action reviewed by the agency, a court or a tribunal, or by the Information Commissioner under Part VII of the FOI Act, and has not exercised that right when it would be reasonable to do so (s 73(b)). Examples of when this discretion has been exercised includes where:

- The complaint relates to the merits (correctness) of an agency's FOI decision and the complainant has or had a right to seek internal review or IC review of that FOI decision but has not done so, or has not fully exercised that right through their ongoing internal review or IC review.
- The complaint relates to a deemed FOI decision[11] (which occurs the agency has not made a decision within the applicable statutory timeframe) and the complainant has or had a right to seek IC review of that deemed decision but has not done so, or has not fully exercised that right through an ongoing IC review.
- The complaint relates to a FOI decision that has already been considered through a finalised IC review process, and the complainant has or had a right to seek review of the decision made as a result of the IC review process but has not done so (for example, by seeking review of a decision under s 55K of the FOI Act by the Administrative Review Tribunal).

11.26 The Information Commissioner's view is that making a complaint is not an appropriate mechanism where IC review is available, unless there is a special reason to undertake an investigation and the matter can be dealt with more appropriately and effectively through an investigation instead of an IC review. IC review will ordinarily be the more appropriate avenue for a person to seek review of the merits of a FOI decision, including deemed FOI decisions.[12]

11.27 Generally, where a person has applied for IC review and made a FOI complaint and the issues raised are more appropriately dealt with in the IC review, it is open to the Information Commissioner to decline to investigate the FOI complaint under s 73(b) of the FOI Act on the basis that the IC review has not had a reasonable opportunity to be conducted. The Information Commissioner may exercise this discretion prior to the commencement of an investigation or during the course of an investigation.

11.28 There may be some instances where the Information Commissioner may consider it appropriate to conduct both an IC review and an investigation into a FOI complaint. An example is when the outcome sought by the applicant is both access to documents, and a remedy to address procedural or processing issues, including systemic non-compliance with

[11] Including deemed decisions made under ss 15AC(3), 51DA(2), and 54D(2) of the FOI Act.

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statutory timeframes or a breach of specific legislative requirements that cannot be sufficiently addressed in an IC review and aligns with the OAIC's regulatory priorities.[13]

Right to complain to another body (s 73(c))

11.29 The Information Commissioner has a discretion not to investigate, or not to continue to investigate, a complaint if the complainant has or had a right to complain to another body and has not exercised that right when it would be reasonable to do so (s 73(c)). Examples of when this discretion has been exercised includes where:

- The complaint relates to alleged breaches of the Australian Public Service Code of Conduct[14] and the complainant has not made a complaint to the agency.
- The complaint relates to alleged corrupt conduct, and the complainant has not made a complaint to the National Anti-Corruption Commission.
- The complaint relates to alleged discrimination, and the complainant has not made a complaint to the Australian Human Rights Commission or the Commonwealth Ombudsman.

Agency has dealt, or is dealing, adequately with the complaint or has not yet had an adequate opportunity to do so (s 73(d))

11.30 The Information Commissioner has a discretion not to investigate, or not to continue to investigate, a complaint if the agency has dealt, or is dealing, adequately with the complaint, or has not yet had an adequate opportunity to do so (s 73(d)). Examples of when this discretion has been exercised includes where:

- The complainant has already complained to the agency, and the agency has adequately dealt with the issues complained about.
- The complainant has made a complaint to the agency, and the agency has confirmed it is dealing with the complaint in a manner that appears adequate to the Information Commissioner.

Complaint is frivolous, vexatious, misconceived, lacking in substance or not made in good faith (s 73(e))

11.31 The Information Commissioner has a discretion not to investigate, or not to continue to investigate, a complaint if the complaint is frivolous, vexatious, misconceived, lacking in substance or not made in good faith (s 73(e)). Examples of when this discretion has been exercised includes where:

- The complainant raises general conduct concerns or processing concerns but does not respond to the Information Commissioner's requests for clarification about the particulars of the complaint.
- The complaint raises an issue that has been rectified by the agency, and the complainant has not complained about this issue to the agency.

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[14] Set out in s 13 of the *Public Service Act 1999*.

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- The complaint has been made by a person who is subject to an active vexatious applicant declaration under s 89K, and the issues raised in the complaint are captured by the terms of that declaration made under s 89K of the FOI Act.[15]

Complainant does not have a sufficient interest in the subject matter of the complaint (s 73(f))

11.32 The complainant does not have a sufficient interest in the subject matter of the complaint (s 73(f)). This discretion has been exercised includes where the complainant is purporting to make the complainant about the processing of a FOI request on behalf of another person but has not provided the OAIC with evidence of their authority to represent that other person.

Proceeding to investigation: procedure

Giving notice of an investigation

11.33 The Information Commissioner must notify the agency before investigating a complaint or a Commissioner initiated investigation is commenced (s 75(1)). In a complaint investigation, the investigation notice may ask the agency to provide information to the Information Commissioner, for example, copies of correspondence, an explanation or reasons for a particular course of action being adopted, the agency's procedures and practices in relation to the complaint issues, or submissions in response to the issues raised.

Conduct of investigations

11.34 The FOI Act sets out rules that apply to the conduct of the Information Commissioner's complaint investigations. The guiding principle is that an investigation shall be conducted in private and in a way the Information Commissioner thinks fit (s 76(1)).

11.35 The Information Commissioner may decide to prioritise the investigation of a complaint because it informs issues being investigated in a CII, or other FOI complaints have been made to the Information Commissioner which raise the same issues and it is more efficient and effective to deal with these complaints at the same time.

General investigation powers

11.36 The Information Commissioner may obtain information from any officer of an agency, and make any inquiry, that they think is relevant to the investigation (s 76(2)). The request for information may include:

- procedural documents such as a processing manual or relevant guidance provided to staff and/or decision-makers
- documents relating to the process followed in processing relevant FOI request(s)
- statistical information relevant to the issues under investigation

[15] For more information on vexatious applicant declarations, see Part 12 of these Guidelines at https://www.oaic.gov.au/freedom-of-information/freedom-of-information-guidance-for-government-agencies/foi-guidelines/part-12-vexatious-applicant-declarations. Vexatious applicant declarations are published by the OAIC on AustLII at https://www.austlii.edu.au/cgi-bin/viewdb/au/cases/cth/AICmr/.

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- submissions in response to the allegations made by the complainant (if any), and
- a completed copy of the OAIC's self-assessment tool for agencies[16]
- written responses to questions from the OAIC, and
- that a person meet with OAIC staff or participate in an interview about the subject of the investigation.

11.37 The request for information will specify a timeframe for provision of information and/or documents. The period of time given will depend on the nature of the issues under investigation, the type of information required to be produced and the volume of documents requested.

11.38 Where an agency fails to provide information and documents within the initial or extended timeframe, the Information Commissioner may require the provision of information and documents pursuant to s 79 of the FOI Act. The Information Commissioner also has specific powers to compel the production of information by agencies, and powers to oblige persons to appear (discussed below at [11.43]–[11.53]).

Entering premises

11.39 The Information Commissioner has a limited power to enter premises to carry out an investigation or to inspect documents on the premises. This can be done, for example, to inspect agency documents, or to investigate whether an agency conducted a proper search for documents (s 77).

11.40 An authorised person may enter premises occupied by an agency, or premises occupied by a contracted service provider that are used predominantly for the purposes of a Commonwealth contract (ss 77(1)–(2)). An authorised person means an information officer (the Information Commissioner, the FOI Commissioner or the Privacy Commissioner, as defined in the *Australian Information Commissioner Act 2010*), or an APS employee at Senior Executive Service 1 or above in the OAIC who has been authorised by the Information Commissioner for the purposes of s 77 (s 77(6)).[17]

11.41 The power to enter premises is conditional on the consent of the principal officer of the agency or, in the case of a contracted service provider, the person in charge (s 77(3)). The authorised person must leave the premises if the consenting person asks (s 77(4)).

11.42 Entry to certain places requires written ministerial approval (s 78(1)). These are:

- a place referred to in s 80(c) of the *Crimes Act 1914* (mainly defence-related places)
- a place that is a prohibited area for the purposes of the *Defence (Special Undertakings) Act 1952*
- a restricted area declared under s 14 of the *Defence (Special Undertakings) Act 1952*.

11.43 The Attorney-General may also prohibit entry to a place by declaration if satisfied an investigation at that place may prejudice the security or defence of the Commonwealth (ss 78(3) and (4)). These requirements are consistent with the rules applying to the Ombudsman's powers of entry for an investigation (*Ombudsman Act 1976* ss 14(2) and (3)).

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[16] See Self-assessment tool for agencies | OAIC.

[17] See Delegation of freedom of information powers and functions: https://www.oaic.gov.au/about-the-OAIC/our-corporate-information/operational-information/delegation-of-freedom-of-information-powers-and-functions

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Obliging production of information and documents

11.44 The Information Commissioner has certain compulsory powers:

- to require production of information and documents (s 79)
- to require production of exempt documents (s 81)
- to require a person to attend to answer questions and to take an oath or affirmation (ss 82 and 83).

11.45 Each of these powers is discussed below. The powers are the same as the Information Commissioner's powers when conducting an IC review (see ss 55R–55U and 55W–55X and Part 10 of these Guidelines).

Production of information and documents

11.46 The Information Commissioner can, by written notice, require the production of information and documents in connection with an investigation (s 79). This power ensures the Information Commissioner can obtain all the material relevant to an investigation. Failure to comply with a production notice is an offence punishable by six months imprisonment (s 79(5)).

11.47 The Information Commissioner can take possession of the documents, make copies, take extracts and hold the documents as long as is necessary for the investigation (s 80(1)). While the Information Commissioner holds the documents, the Information Commissioner must permit a person to exercise any right they might otherwise have to inspect the documents (s 80(2)).

Exempt documents

11.48 The Information Commissioner has the same power to require production of exempt documents in conducting investigations as in exercising the IC review function (s 81). The limitations that apply to the exercise of this power under the IC review function, including in relation to national security and cabinet documents, also apply to investigations. These include the requirement to return exempt documents and to ensure they are not disclosed to people other than OAIC staff in the course of performing their duties. For more information about these limitations, see Part 10 of these Guidelines.

Obliging persons to appear

11.49 The Information Commissioner can, by written notice, require a person to attend to answer questions for the purpose of an investigation (ss 82(1) and (2)). Failure to comply with a notice is an offence punishable by six months imprisonment (s 82(3)).

11.50 A person who appears before the Information Commissioner pursuant to a notice under s 82 can be required to take an oath or affirmation that their answers will be true (ss 83(1) and (2)). Refusing to take an oath or affirmation, refusing to answer a question, or giving false evidence are offences punishable by six months imprisonment (s 83(3)).

Protections for those involved

11.51 A claim for legal professional privilege is preserved in respect of information or a document given to the Information Commissioner in connection with an investigation (s 84).

11.52 A person is immune from civil proceedings and from criminal or civil penalty, for the action of giving information, producing a document or answering a question in good faith for the

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purposes of an investigation (s 85). The protection applies even if the person did not produce information in response to the exercise by the Information Commissioner of powers to compel production of information (a person can voluntarily give information under s 76(2) which gives the Information Commissioner the power to obtain information from any officer of an agency that he or she thinks is relevant to the investigation).

11.53 A person who complains to the Commissioner under s 70 is also immune from civil proceedings, provided the complaint is made in good faith (s 89E).

Outcome of an investigation

Notice on completion

11.54 On completing an investigation, the Information Commissioner must provide a 'notice on completion' to the agency and to the complainant (if there is one) (s 86). The Information Commissioner's notice on completion must include the investigation results, the investigation recommendations (if any), and the reasons for those results and any recommendations (s 86(2)). A notice on completion must not include exempt matter or information about the existence or non-existence of a document that would be exempt under ss 33, 37(1) or 45A.[18]

11.55 The investigation results under s 87 are:

- the matters the Information Commissioner has investigated
- any opinion the Information Commissioner has formed in relation to those matters
- any conclusions the Information Commissioner has reached
- any suggestions the Information Commissioner believes might improve the agency's processes, and
- any other information of which the Information Commissioner believes the agency should be aware.

Recommendations

11.56 As per s 88 of the FOI Act, the Information Commissioner may also make formal recommendations to the agency that the Information Commissioner believes the agency ought to implement.

11.57 The factors that the Information Commissioner may consider in making recommendations may include:

- self-reported areas for improvement
- gaps in training, procedure or governance documents
- trends in agency data.

11.58 The types of recommendations that the Information Commissioner may make include, but are not limited to:

[18] See ss 89C and 25(1) of the FOI Act.

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- notifying the Information Commissioner about the outcomes of internal audits or reviews being undertaken by an agency
- reviewing and updating guidance material and FOI processing manuals[19]
- implementing training with its FOI staff, SES staff, and business areas about its obligations under the FOI Act.[20]

Other matters

11.59 Under Part V of the FOI Act, a person has the right to apply for amendment or annotation of an incorrect record of personal information used by an agency for administrative purposes (see Part 7 of these Guidelines). As part of a CII or complaint investigation, the Information Commissioner is able to recommend that incorrect records be amended, except if the affected individual is, or has been, entitled to have the amendment determined by the agency, the Information Commissioner (using the Information Commissioner's powers under Part VII), a court or a tribunal. Further, the Information Commissioner cannot recommend amendment of court or tribunal decisions (s 89D).

What the Information Commissioner cannot do as the result of an investigation

11.60 The Information Commissioner cannot do any of the following as the result of an investigation:

- set aside and substitute an agency's access refusal decision to grant the complainant access to documents[21]
- require compensation or reparations be paid to the complainant
- require any person to be investigated by another body or subject to criminal proceedings.

Providing parties the notice on completion

11.61 The Information Commissioner will provide the agency with an opportunity to provide comments about the notice (agency comments) (s 86(3)). The agency will be given generally 2 weeks from the date of issue, to provide comments.

11.62 If the Information Commissioner is investigating a complaint made by a complainant under s 70 of the FOI Act, the Information Commissioner will give the complainant the following in accordance with s 86(4):

- the notice of completion under s 86, (with exempt material or material to which s 25(1) applies removed, see s 89C(2))
- agency comments (if any)
- any further comments the Information Commissioner may wish to make.

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19 Including the publication of this material on the agency's website in accordance with the Information Publication Scheme.

20 See Freedom of information investigation outcomes | OAIC.

21 If a complainant is unhappy with a decision they should seek review of that decision, in order that the decision can be considered and if determined to be wrong may be set aside and substituted under the IC review decision power under s 55K of the FOI Act.

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Publication of the outcome of an investigation

11.63 In seeking to promote awareness and understanding of the FOI Act[22], outcomes of investigations under Part VIIB are typically published on the OAIC website.[23]

Complaint investigations

11.64 After providing the complainant with a copy of the finalised notice, the Information Commissioner may:

- publish a summary of the notice on the OAIC website,[24] which will include the name of the agency but not the name of the complainant (where there is one) or
- subject to s 89C, publish the notice on completion and the agency's comments made in response to the s 86 notice on completion.

11.65 In considering whether to publish the notice on completion and the agency's comments, the Information Commissioner may consider the extent to which publication would provide guidance or suggestions to other agencies to assist in improving their information access operations.

Commissioner-initiated investigations

11.66 Following the conclusion of a Commissioner-initiated investigation, the Information Commissioner may publish the notice on completion and the agency's comments made in response to the s 86 notice on completion. The Information Commissioner will also typically publish a report of investigation. The purpose of a report is to provide transparency to the community about the investigation and its outcome, and to support agencies to better meet their FOI obligations. As well as recommendations directed at the specific agency being investigated, a report following a Commissioner-initiated investigation directed at system wide issues may provide guidance or suggestions to FOI agencies generally.

11.67 Investigation reports describe the reason why the investigation was conducted, investigative steps taken, the investigation findings and any recommendations. They may include part or all of the s 86 notice issued to the agency at the conclusion of the investigation.

Implementation of investigation recommendation

11.68 In addition to including opinions, conclusions or suggestions in a notice on completion, the Information Commissioner may also make investigation recommendations, which are 'formal recommendations to the respondent agency that the Information Commissioner believes that the agency ought to implement' (s 88).

11.69 The agency will be given a timeframe in which to consider the recommendations and take action that is adequate and appropriate in the circumstances to implement the

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[22] In accordance with In accordance with s 8(a) of the *Australian Information Commissioner Act 2010 (Cth)*, the Information Commissioner and Freedom of Information Commissioner have freedom of information functions which include promoting awareness and understanding of the *Freedom of Information Act 1982* and the objects of that Act (including all the matters set out in sections 3 and 3A of that Act).

[23] See Freedom of information investigation outcomes | OAIC.

[24] See Freedom of information investigation outcomes | OAIC*Freedom of information investigation outcomes* available at: https://www.oaic.gov.au/freedom-of-information/information-commissioner-decisions-and-reports/freedom-of-information-investigation-outcomes.

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recommendation(s). The agency will be asked to advise the information Commissioner of the action taken to respond to the formal recommendations made in the notice of completion by the end of the timeframe given for implementation.

11.70 If the agency demonstrates that it has taken adequate and appropriate action to implement the formal recommendations, the Information Commissioner will notify the agency that the agency has acquitted those recommendations.

11.71 However, if the Information Commissioner is not satisfied the agency has taken adequate and appropriate action to implement the formal recommendation(s), the Information Commissioner may issue a written 'implementation notice' requiring the agency to provide within a specified time particulars of any action the agency will take to implement the Information Commissioner's recommendations (s 89). The Information Commissioner will take agency comments into account in deciding whether to take further action.

11.72 In the implementation notice, the Information Commissioner will give the agency a specified time to respond. This will normally be 30 days, but this can be extended depending on the nature of the investigation recommendations.

11.73 The agency must comply with the implementation notice (s 89(3)).

Failure to comply with an implementation notice – Report to responsible Ministers

11.74 If the Information Commissioner has issued an implementation notice to the agency and is not satisfied the agency has not responded to the implementation notice within the specified time, or has not taken adequate and appropriate action to implement formal recommendations, the Information Commissioner may subsequently report this in writing to the minister responsible for the agency and the minister responsible for the FOI Act (s 89A). The minister responsible for the FOI Act must table the report before each House of the Parliament (s 89A(5)).

11.75 Section 89B prescribes the matters that must be addressed in a report to ministers. A report to the minister must contain the following:

- the notice on completion
- the implementation notice
- any agency response to the implementation notice
- a statement by the Information Commissioner that the Information Commissioner is not satisfied, in the circumstances, that the agency has taken adequate and appropriate action to implement the investigation recommendations
- a statement by the Information Commissioner detailing the action that the Information Commissioner believes, if taken by the agency, would be adequate and appropriate in the circumstances to implement the investigation recommendations.

11.76 The report to the minister must not include exempt matter or information about the existence or non-existence of a document that would be exempt under ss 33, 37(1) or 45A.[25] If a report to the minister contains such information, the Information Commissioner must prepare a copy of the report that does not contain this information.

[25] See ss 89C and 25(1) of the FOI Act.

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11.77 In deciding whether to exercise the power to report, the Information Commissioner will have regard to relevant factors in the circumstances including whether the action would:

- facilitate and promote public access to information
- increase the promptness of public access to information
- facilitate public access to information at the lowest reasonable cost.

11.78 If the Information Commissioner gives a report to the responsible Minister, a copy of the report must be also given to the FOI Minister. The FOI Minister is the Minister responsible for the administration of the FOI Act.

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