

# Part 11 – Investigations and complaints

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## Information Commissioner investigations

- 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)).<sup>1</sup>
- 11.2 The Information Commissioner cannot investigate a minister's handling of FOI matters..
- 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 an FOI applicant to make an FOI request
  - a complaint by a third party that an agency failed to consult them before deciding to release a document
  - a complaint that an agency did not make a decision on their FOI request within the applicable statutory timeframe
  - a complaint alleging a conflict of interest by the decision maker.
- 11.4 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).

## Relationship with IC reviews

- 11.5 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 in that manner. IC review will ordinarily be the more appropriate avenue for a person to seek review of the merits of an FOI decision, particularly an access refusal or access grant decision.<sup>2</sup>
- 11.6 There may be some instances where the Information Commissioner may consider it appropriate to conduct both an IC review and an investigation into an 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 non-compliance with statutory timeframes or a breach of specific legislative requirements. In such circumstances, the investigation of a complaint may be put on hold until the IC review has been finalised. This

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<sup>1</sup> The OAIC has issued a *Freedom of Information Regulatory Action Policy* which provides guidance on the Information Commissioner's approach to the exercise of FOI regulatory powers, including the investigation of complaints and conducting CIIs. See *Freedom of Information Regulatory Action Policy* on the OAIC website <https://www.oaic.gov.au/about-us/our-regulatory-approach/freedom-of-information-regulatory-action-policy/> ..

<sup>2</sup> See *What is the difference between a complaint and an application for review of a freedom of information decision?* on the OAIC website, <https://www.oaic.gov.au/freedom-of-information/frequently-asked-questions/what-is-the-difference-between-a-complaint-and-an-application-for-review-of-a-freedom-of-information-decision/>.

may be appropriate when it seems likely that processing deficiencies will be addressed during the IC review and will require no further investigation.

## Power to investigate

11.7 The Information Commissioner may investigate an agency's actions in performing its functions or exercising its powers under the FOI Act in response to a complaint made under s 70 of the FOI Act (s 69(1)), or at the Information Commissioner's own initiative (s 69(2)).<sup>3</sup> The investigation may look at a single agency decision or action, at a systemic problem or recurring pattern in an agency's practices and processes in handling FOI matters, or at a practice or problem occurring in more than one agency. The issue to be investigated may come to the attention of the Information Commissioner as a result of an IC review, a series of applications for IC review, or in some other way.

11.8 When deciding whether to commence an investigation, the Information Commissioner will take into consideration:<sup>4</sup>

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

## How to make a complaint

11.9 A person may complain to the Information Commissioner about an action taken by an agency under the FOI Act (s 70(1)).<sup>5</sup> A complaint must be in writing and identify the agency against which the complaint is made (s 70(2)). 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.

## Decision to investigate

### Preliminary inquiries

11.10 The Information Commissioner may make preliminary inquiries for the purpose of determining whether or not to investigate a complaint (s 72). This can be done, for example,

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<sup>3</sup> See for example the following CII reports (referred to as own motion investigations): *FOI at the Department of Human Services*, published on 2 December 2014, and *Processing of non-routine FOI requests by the Department of Immigration and Citizenship*, published on 26 September 2012, on the OAIC website, <https://www.oaic.gov.au/freedom-of-information/foi-reports/>.

<sup>4</sup> For further information about the Information Commissioner's regulatory approach see 'Freedom of information regulatory action policy' on the OAIC website [www.oaic.gov.au](http://www.oaic.gov.au).

<sup>5</sup> See *Make an FOI Complaint* on the OAIC website [www.oaic.gov.au](http://www.oaic.gov.au).

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.

## Deciding not to investigate

11.11 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 (s73(a))
- 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))
- 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))
- 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))
- the complaint is frivolous, vexatious, misconceived, lacking in substance or not made in good faith (s 73(e))
- the complainant does not have a sufficient interest in the subject matter of the complaint (s 73(f)).

11.12 Where a person has applied for IC review and made an 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.

11.13 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 (s 75). An agency must also be notified if the Information Commissioner discontinues a Commissioner initiated investigation (s 75(2)(b)).

11.14 The Information Commissioner does not have the same power as the Commonwealth Ombudsman to decline to investigate a complaint that relates to action that occurred more than 12 months previously (see s 6(1)(a) of the *Ombudsman Act 1976*). However, this is a matter that the Information Commissioner will take into account in formulating the investigation results following completion of an investigation (see [11.33]–[11.38] below).

## Transfer to Commonwealth Ombudsman

11.15 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) (s 6C(3) of the *Ombudsman Act 1976*). The Information Commissioner must then deal with the matter as a complaint under Part VII B of the FOI Act (s 6C(4) of the *Ombudsman Act 1976*).

11.16 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 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.

11.17 The factors that the Information Commissioner may consider when deciding whether to transfer 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
  - an FOI complaint
  - a vexatious applicant declaration application
  - an 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 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.

11.18 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) and 74(4)).

## Giving notice of an investigation

11.19 The Information Commissioner must notify the agency before investigating a complaint or a Commissioner initiated investigation is commenced (s 75(1)). 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.

11.20 Similarly, the Information Commissioner must give written notice (with reasons) to the agency and the complainant (if there is one) if the Information Commissioner decides not to investigate, or not to continue to investigate (ss 75(2)–(4)).

## Investigation procedure

### Conduct of investigations

11.21 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)).

11.22 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 powers

11.23 The Information Commissioner may obtain information from any officer of an agency, and make any inquiry, that he or she thinks 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
- submissions in response to the allegations made by the complainant (if any).

11.24 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.

11.25 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 (discussed below at [11.31]–[11.32]).

### Entering premises

11.26 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).

11.27 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 Executive Level 2 or above in the OAIC who has been authorised by the Information Commissioner for the purposes of s 77 (s 77(6)).

11.28 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)).

11.29 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*.

11.30 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)).

## Obliging production of information and documents

11.31 The Information Commissioner has certain compulsory powers:

- to require production of information and documents
- to require production of exempt documents
- to require a person to attend to answer questions and to take an oath or affirmation.

11.32 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

11.33 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)).

11.34 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

11.35 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**

11.36 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)).

11.37 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**

11.38 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).

11.39 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 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).

11.40 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**

11.41 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 (ss 89C and 25(1)).

11.42 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.

11.43 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 a reasonable period of time, generally two weeks from the date of issue, to provide comments.<sup>6</sup>

11.44 The complainant will be given the following in accordance with s 86(4):

- the notice of completion under s 86
- agency comments (if any) <sup>7</sup>
- any further comments the Information Commissioner may wish to make.

### **Publication of the outcome of an investigation**

11.45 After providing the complainant with a copy of the finalised notice (with exempt material or material to which s 25(1) applies removed, see s 89C(2)), the Information Commissioner may publish a summary of the notice on the OAIC website. Any notice will include the name of the agency but not the name of the complainant (where there is one).

11.46 The Information Commissioner may also publish a copy or extract of the agency's comments made in response to the s 86 notice on completion.

## **Failure to implement investigation recommendation**

11.47 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).

11.48 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 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.

11.49 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.

11.50 The implementation notice will require the agency to outline particulars of any action the agency proposes to take to implement the investigation recommendations.

11.51 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.

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<sup>6</sup> See for example the Department of Home Affairs' response to the Commissioner-initiated investigation: *Department of Home Affairs' compliance with the statutory processing requirements under the Freedom of Information Act 1982 in relation to requests for non-personal information* (Attachment C) on the OAIC website [www.oaic.gov.au](http://www.oaic.gov.au).

<sup>7</sup> If the agency does not provide comments in response to the Information Commissioner's conclusions in the notice on completion within the specified period, the notice on completion will be provided to the complainant.

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

## Report to responsible Ministers

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

11.54 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.

11.55 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 (ss 89C and 25(1)). 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.

11.56 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.

11.57 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.