OAIC Self-Assessment Tool

Overview

The OAIC's self-assessment tool aims to assist agencies understand the effectiveness of their information access systems and the extent to which these comply with the FOI Act. The self-assessment tool helps agencies to identify gaps or areas where attention is needed and helps agencies identify where they are doing well.

A further benefit of the self-assessment tool is that it captures an overview of agencies' FOI compliance and practice that can be used to track improvements over time.

The OAIC has developed the self-assessment tool in accordance with our regulatory powers set out in the *Australian Information Commissioner Act 2010* (AIC Act):

- promoting awareness and understanding of the FOI Act and its objects (s 8(a))
- providing information, advice, assistance and training relevant to the operation of the FOI Act (s 8(d)).

Using the self-assessment tool

The self-assessment tool is an interactive document created in Excel. It is structured in 8 areas, each presented on a different tab.

1. Culture and Leadership
2. Governance arrangements
3. Proactive release
4. Access requests
5. Disclosure log publication
6. FOI statistics
7. Supporting tools and systems
8. Education, training and engagement

For each area, agencies answer a series of questions using drop-down menus. In completing the tool, every question should be answered – please note that unanswered questions will receive a zero score. Agencies can also enter their reflections about areas they are doing well in, and where they can improve, in the free-text spaces provided.

After all questions are completed, the tool will generate a summary report. The tool calculates scores for each of the 8 areas and these are presented on the Results page. In order to obtain accurate results, all questions for each of the 8 areas should be answered. The Results page will automatically list items where your agency is doing well, is currently progressing, or needs improvement.

The self-assessment tool is complemented by a table providing short strategies, including links to OAIC guidance. Each strategy aligns to a question in the tool. We encourage agencies to refer to this resource in planning actions to remediate the gaps identified in completing the self-assessment tool. Agencies can consider and plan these actions in the Results tab's free-text fields.

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OAIC Self-Assessment Tool

Progress

0% 10% 20% 30% 40% 50% 60% 70% 80% 90% 100%

Area 1: Culture and Leadership

Q1 Does your agency have an information access strategy that brings together how information can be made available or requested through the Information Publication Scheme, administrative access arrangements or through an access request under the FOI Act?

Response

Q2 Does your agency consider Open by Design principles in making decisions, including in the creation or publication of documents?

Response

Q3 Does your agency have a nominated Information Champion and/or nominated escalation contact point at SES level?

Response

Reflection: What is your agency doing well at in this area? In what ways could your agency improve, in both the short and long term?

OAIC Self-Assessment Tool

Progress

0% 10% 20% 30% 40% 50% 60% 70% 80% 90% 100%

Area 2: Governance Arrangements

Q1 Does your agency record its authorisations, under s 23 of the FOI Act, of officers to make decisions about FOI requests?

Response

Q2 Does your agency have a process for ensuring that staff who make decisions under the FOI Act are able to do so independently?

Response

Q3 Does your agency have a process in place to ensure that contractual arrangements with parties delivering a service on behalf of the agency allow for the agency to receive documents held by these contractors or subcontractors, if a person requests access to those documents under the FOI Act? Does your agency use the model clause as provided by the OAIC?

Response

Reflection: What is your agency doing well at in this area? In what ways could your agency improve, in both the short and long term?

OAIC Self-Assessment Tool

Progress

0% 10% 20% 30% 40% 50% 60% 70% 80% 90% 100%

Area 3: Proactive Release

Q1 Does your agency have an administrative access scheme?

Response

Q2 Does your agency include information on how to seek access to documents under administrative access, APP 12 and the FOI Act? Does it include an explanation on how each of these systems may work with each other, the limitations of each scheme and the review rights, if any?

Response

Q3 Does your agency have a process in place to identify information routinely requested that can be released administratively (for example, staff seeking their own information from Human Resources, parties seeking access to their case files)?

Response

Q4 Does your agency have a process for identifying updates to the IPS entries on your website?

Response

Reflection: What is your agency doing well at in this area? In what ways could your agency improve, in both the short and long term?

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Progress

0% 10% 20% 30% 40% 50% 60% 70% 80% 90% 100%

Area 4: Access Requests

Q1 Does your agency engage with applicants over the phone or in writing to clarify the scope of an FOI access request prior to requesting business areas to conduct search and retrieval of the documents?

Response

Q2 Does your agency's internal process for requesting search and retrieval of documents include specific timeframes?

Response

Q3 Does your agency have a process manual setting out how FOI requests are triaged, processed and decided? Is it broadly available to staff across the agency?

Response

Q4 Does your agency use templates for statements of reasons to provide adequate reasons for refusing access?

Response

Q5 Does your agency seek an extension of time by agreement with the applicant under s 15AA prior to seeking an extension of time with the OAIC?

Response

Q6 Does your agency have information on their website that explains how to make an access request under the FOI Act? Is this information clearly accessible from the home page? Does the page include links to the disclosure log, Information Publication Scheme and (if applicable) other information regularly updated?

Response

Q7 Does your agency have internal policies which support the FOI processing manual? How often are the relevant policies reviewed and updated? Do these policies reflect the principles set out in the FOI Guidelines issued by the Information Commissioner under s 93A of the FOI Act?

Response

Q8 How frequently are FOI matters referred to legal advice/management by your agency?

Response

Reflection: What is your agency doing well at in this area? In what ways could your agency improve, in both the short and long term?

OAIC Self-Assessment Tool

Progress

0% 10% 20% 30% 40% 50% 60% 70% 80% 90% 100%

Area 5: Disclosure Log Publication

Q1 Does your agency have a process or system for ensuring that documents that are released under FOI are published on the disclosure log?

Response

Q2 Does your agency meet the timeframe of 10 days to publish documents on the disclosure log?

Response

Q3 Does your agency publish documents released in response to an FOI request on the disclosure log for direct download?

Response

Q4 Does your agency use the OAIC's sample disclosure log table?

Response

Q5 Do your agency's publications conform to current accessibility standards?

Response

Reflection: What is your agency doing well at in this area? In what ways could your agency improve, in both the short and long term?

OAIC Self-Assessment Tool

Progress

0% 10% 20% 30% 40% 50% 60% 70% 80% 90% 100%

Area 6: FOI Statistics

Q1 Does your agency have an SES escalation point for feedback regarding the submission of FOI quarterly statistics?

Response

Q2 Does your agency have a quality assurance process for lodgement of quarterly and annual statistics?

Response

Q3 Does your agency have a process for reviewing statistics to identify trends in non-compliance with timeframes or increases in access refusals, use of exemptions, or issue of practical refusal notices or charges notices?

Response

Q4 Does your agency provide their quarterly or annual statistical returns on time?

Response

Q5 Does your agency routinely identify or analyse any trends on incoming access requests or on original and internal review FOI decisions?

Response

Reflection: What is your agency doing well at in this area? In what ways could your agency improve, in both the short and long term?

OAIC Self-Assessment Tool

Progress

0% 10% 20% 30% 40% 50% 60% 70% 80% 90% 100%

Area 7: Supporting Tools and Systems

Q1 Does your agency use smartforms to receive FOI requests?

Response

Q2 Does your agency have case management systems which support processing of FOI requests and publication to the disclosure log within relevant timeframes?

Response

Q3 Does your agency have a plan to manage receiving an increased number of FOI requests?

Response

Q4 Does your agency have an existing surge team to assist with incoming FOI matters?

Response

Q5 Does your agency have a process for identifying improvements to be made to FOI processes following relevant IC review decisions or FOI complaint investigation recommendations/suggestions?

Response

Q6 Does your agency have process documentation to support business areas to conduct search and retrieval?

Response

Q7 Does your agency have process documentation to identify documents routinely released in response to an access request and to address how this information should be made available on the IPS?

Response

Reflection: What is your agency doing well at in this area? In what ways could your agency improve, in both the short and long term?

OAIC Self-Assessment Tool

Progress

0% 10% 20% 30% 40% 50% 60% 70% 80% 90% 100%

Area 8: Education, Training and Engagement

Q1 Do FOI practitioners in your agency attend decision making training? What is included in the training? How often are training sessions conducted?

Response

Q2 Does your agency have an accreditation or specific training program for its FOI decision makers?

Response

Q3 Does your agency have ongoing training for business areas, for example on general FOI obligations, search and retrieval? How often are training sessions conducted?

Response

Q4 Does your agency have training for new SES staff on general FOI obligations? How often are training sessions conducted?

Response

Q5 Does your agency have ongoing training for SES staff on general FOI obligations? How often are training sessions conducted?

Response

Q6 Does your agency subscribe to the OAIC's Information Contact Officer Network (ICON) alert?

Response

Q7 Does your agency attend the OAIC's webinars for FOI practitioners?

Response

Q8 Does your agency attend other FOI-specific forums?

Response

Q9 Does the relevant SES Band 1 in your agency attend the SES Leadership Group Quarterly Forum?

Response

Q10 Is your agency up to date on recent IC review decisions?

Response

Q11 Is your agency up to date on recent FOI investigation outcomes?

Response

Q12 Is your agency up to date on recent amendments to the FOI Guidelines?

Response

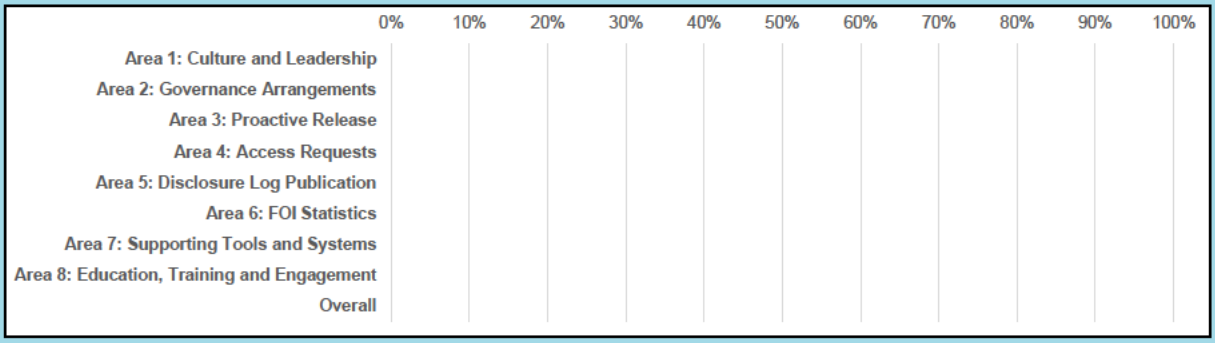
Reflection: What is your agency doing well at in this area? In what ways could your agency improve, in both the short and long term?

OAIC Self-Assessment Tool

Results

Area 1: Culture and Leadership	Area 2: Governance Arrangements	Area 3: Proactive Release	Area 4: Access Requests
Area 5: Disclosure Log Publication	Area 6: FOI Statistics	Area 7: Supporting Tools and Systems	Area 8: Education, Training and Engagement

Overall Score:



Reflection (4-5 sentences each)

What areas are your agency doing well in? What has enabled your agency to do well in these areas?
Note: in forming your response, you should consider the topics in the automatically-generated list below.

Areas of achievement:

Where could your agency make improvements? What actions will be taken to make improvements in these areas, and by when?
Note: in forming your response, you should consider the topics in the automatically-generated lists below.

Areas for improvement:

- Q1.1: Overall information access strategy
- Q1.2: Regard to Open by Design principles
- Q1.3: Nominated Information Champion and/or escalation contact point
- Q2.1: Record of authorisations under s 23
- Q2.2: Independence of FOI decision-makers
- Q2.3: Access to documents held by contractors
- Q3.1: Existence of an administrative access scheme
- Q3.2: Guidance about accessing documents under various schemes
- Q3.3: Administrative access to routinely requested information
- Q3.4: Process for identifying updates to IPS entries
- Q4.1: Engagement with applicants prior to search and retrieval
- Q4.2: Timeframes for internal search and retrieval processes
- Q4.3: Existence and availability of a FOI processing manual
- Q4.4: Templates for statements of reasons
- Q4.5: Seeking of extensions of time by agreement
- Q4.6: Availability and accessibility of information about FOI on website
- Q4.7: Policies in support of the FOI processing manual
- Q4.8: Reliance on legal advice and management
- Q5.1: Process for publishing documents on the disclosure log
- Q5.2: Compliance with timeframe for disclosure-log publication
- Q5.3: Availability of documents released under FOI for direct download
- Q5.4: Use of sample disclosure log table
- Q5.5: Compliance with accessibility standards
- Q6.1: Officer responsible for feedback regarding quarterly FOI statistics
- Q6.2: Quality assurance process for FOI statistics
- Q6.3: Review of FOI statistics to identify trends
- Q6.4: Timeliness of quarterly and annual FOI statistics
- Q6.5: Identification or analysis of trends in FOI processing
- Q7.1: Use of smartforms for FOI requests

Areas in progress:

Australian Government

Office of the Australian Information Commissioner

Office of the Australian Information Commissioner

Information Session on FOI statistics - July 2024

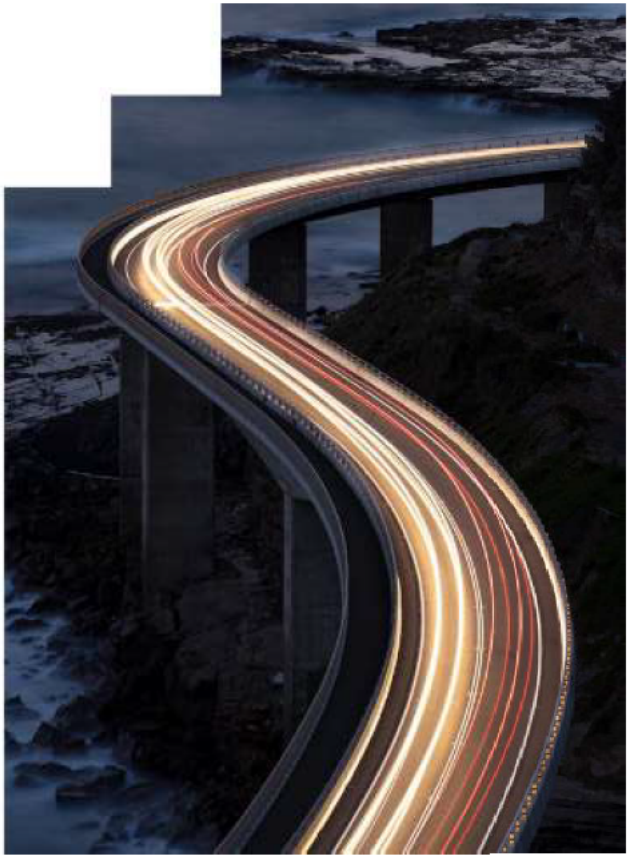


OAIC

Overview

- Legislative powers & reporting obligations
- FOI Guidelines
- Timeframes and Regulations
- Statistics Guide and updates
- Quarterly and Annual returns
  - Recording practical refusal decisions
  - Recording partial access decisions
  - Recording Exemptions
- Annual reporting –
  - Staff resources and staff hours (Q 2 & 3)
  - Recording non-labour costs (Q 4)
- Adding comments

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Legislative powers and reporting obligations

- The *Freedom of Information (Prescribed Authorities, Principal Officers and Annual Report) Regulations 2017*
  - Regulates the timeframes for when agencies and ministers must provide information to the Information Commissioner for the OAIC annual report – refer Regulation 8

    - Quarter 1 due 21 October
    - Quarter 2 due 21 January
    - Quarter 3 due 21 April
    - Quarter 4 due 21 July

    - Annual due 31 July



Legislative powers and reporting obligations continued

Freedom of Information Act 1982 (FOI Act)

- Section 93 of the FOI Act requires agencies & ministers to provide the Information Commissioner with information that the Commissioner requests to prepare an annual report and to publish that material (OAIC Annual Report)

Australian Information Commissioner Act 2010 (AIC Act)

- Section 30 of the AIC Act requires the Information Commissioner to:
  - report annually to the Minister on the OAIC's operations, including on matters set out in s 31 of the AIC Act
  - provide FOI statistics [ss 31(1)(a), (f), (h) and (i))].



FOI Guidelines and reporting obligations

- Part 15 of the FOI Guidelines provides information on reporting obligations for the Information Commissioner (IC) as set out in the FOI Act, the AIC Act and the Regulation
- Parts 15.3 and 15.5 of the Guidelines set out the obligations for agencies and ministers to provide FOI information and statistics to the OAIC

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FOI Statistics Guide revisions

- The Guide provides detailed FOI Stats Portal instructions, including completion of quarterly and annual returns
- Examples and PDF copies of the returns are included in the guide
- The Guide was updated in June 2024 to include:
    - Guidance on question 5 of the quarterly form – makes it clear this question is asking about FOI decisions made – *not* FOI requests finalised (which includes withdrawn and transferred requests).
    - Explicit instruction that contractors performing routine FOI work are to be included as '*staff*' for the purposes of annual reporting and not 'administrative', 'legal' or 'other' costs.

Accessing the database, whitelisting of IP addresses

- Background to database security (why we have whitelisting)
- How to identify that your IP address needs to be whitelisted – go to **whatismyipaddress.com**
- How to identify if your IP address cannot be whitelisted
- The information you need to provide to the OAIC
- Timeframes to whitelist and need to get in early
- Manual forms and errors in Questions **3** and **6**.



Reporting Statistics

- **Quarterly reporting**
  - Fields that cannot be amended
  - Reporting practical refusals
  - Exemptions
  - Publication of quarterly data
- **Annual reporting**
  - Staff hours vs staff resources (Q2 and Q3)
  - Reporting non-staff costs (Q4)
  - Adding comments



Fields in the quarterly return that cannot be updated

- 2 A. ‘On hand at beginning of period’
- 2 C. ‘Finalised during period’
- 2 D. ‘Outstanding at end of period’

Item 2 of the quarterly return – Request numbers

2. REQUEST NUMBERS (include only valid requests under section 15)

	Predominantly Personal Information*	Other	Total
A. On hand at beginning of period	0	0	0
B. Received during period			
- direct from applicant	0	0	0
- on transfer from another agency	0	0	0
C. Finalised during the period	0	0	0
D. Outstanding at end of period	0	0	0



Recording practical refusals (Question 4)

- Agencies are asked to enter the number of s 24AB notices *sent* and the number of those requests that are subsequently processed
- Do not enter the number of requests subsequently *refused* (withdrawn/deemed to have been withdrawn/refused)

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Exemptions (Question 5)

- 5A asks for the # of requests **decided** during the quarter in which exemptions were not relevant or not applied – e.g., full access, practical refusals, no documents found – add to column for personal or 'other' requests
- Exemptions are listed (**5B—5S**) – add the # decided in which the exemption was applied, regardless of whether it determined the outcome.
- Record each exemption once for each request finalised, even if used multiple times.

Item 5 – Exemptions claimed

5. EXEMPTIONS CLAIMED

For all requests **decided** in the period please indicate all the types of exemptions initially claimed (if any), whether or not the exemptions claimed were determinative of the outcome. Only indicate each type of exemption once for each request decided even if the type was used multiple times in relation to that request.	**Predominantly Personal Information***	**Other**	**Total**
A. Exemptions were not relevant or not claimed.	0	0	0
Division 2 of Part IV - Exemptions			
B. Documents affecting national security, defence or international relations (s 33)	0	0	0
C. Cabinet documents (s 34)	0	0	0
D. Documents affecting enforcement of law and protection of public safety (s 37)	0	0	0
E. Documents to which secrecy provisions of enactments apply (s 38)	0	0	0

The Annual Return – staff resources

Staff resources (Q 2)

- The number of staff who spend more than 75% doing FOI/IPS work
- The number of staff who do FOI/IPS work, but it comprises less than 75% of their time



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The Annual Return – calculating staff hours

- 2000 hours = 1 year full-time
- For people whose usual duties include FOI or IPS work, identify the percentage of time they spend on this work
- For staff **not** involved in FOI/IPS work as part of their usual duties (i.e., line areas or SMEs) you will need to estimate their hours

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The Annual return – ‘staff resources’ vs ‘staff hours’

2. STAFF RESOURCES INVOLVED IN FOI or IPS WORK

	FOI	IPS
A. Number of staff who spent at least 75% of their time on FOI or IPS work	0	0
B. Number of staff who spent more than 0% but less than 75% of their time on FOI or IPS work	0	0

3. STAFF-HOURS SPENT ON FOI or IPS work

A. Agency **(Estimated Staff-Hours to nearest whole hour)**

	FOI	IPS
(i) Officers whose duties included FOI or IPS work as part of their normal duties.	0	0

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The Annual return – recording hours worked for staff whose usual duties do not include FOI/IPS

(ii) Other officers (eg in line or policy areas) involved in processing FOI requests or IPS work including decision-making or advising decision-makers		
- SES officers (or equivalent)	0	0
- Australian Public Service Level 6 & Executive Levels 1-2	0	0
(iii) Support staff (Australian Public Service Levels 1-5)	0	0
Total for Agency	0	0
B. Minister's Office	**FOI**	
(i) Minister and advisers	0	
(ii) Minister's support staff	0	
Total for Minister's Office	0	
	FOI	**IPS**
TOTAL STAFF-HOURS / AGENCY AND MINISTER'S OFFICE	0	0

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The Annual Return – recording non-labour costs

- General administrative costs
- General legal advice
- Litigation costs
- Training costs
- ‘Other’ (specify)





The Annual Return continued

Comments

- Are published on data.gov.au
- Explain any trends or unusual or significant changes in your agency's FOI activity
- Provide context by comparison with the previous year

OAIC contact details

Contact details are found on our website:
Contact us - Home (oaic.gov.au)



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Questions

- Agency FOI statistics are published at data.gov.au – beta
- Agency FOI statistics are discussed in OAIC annual reports - Refer Appendix E
- Newsletters:
  - Information Contact Officer Network (ICON) Alerts and
  - Information Matters newsletters & subscriptions are available on our website or by searching 'Newsletters'

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Office of the Australian Information Commissioner

IC Review Practice Update Webinar

26 August 2024

Hannah Holswilder – Director, Intake and Early Resolution
Justin Lodge – Director, Significant Decisions



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Procedure Directions and Part 10 of the FOI Guidelines

OAIC

The New Procedure Directions and amendments to Part 10 of the FOI Guidelines focus on:



Transparency



Engagement



Early Resolution

OAIC

Transparency







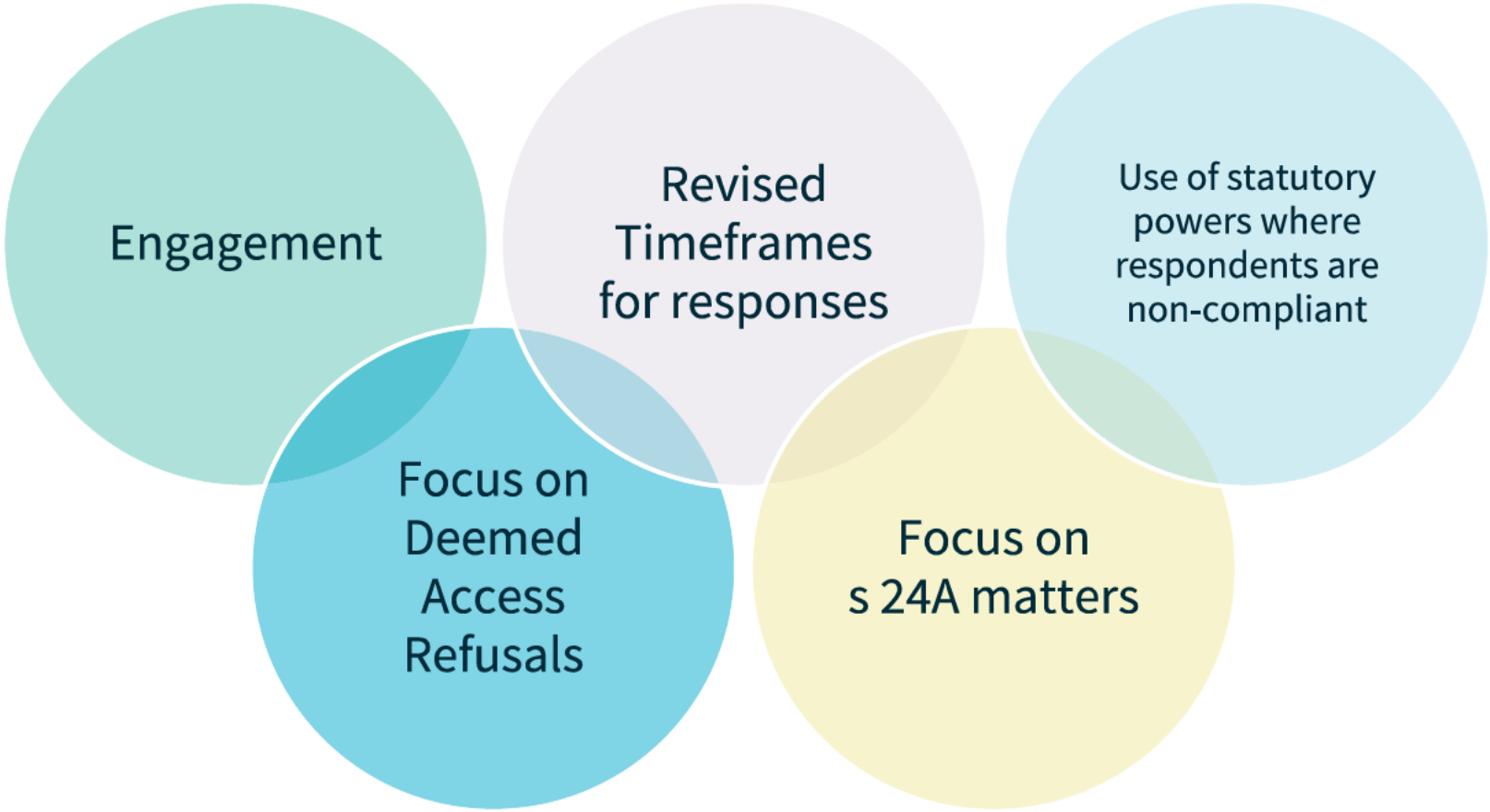
- Notices we issue to respondents are now be issued to both the respondent and the IC review applicant at the same time
- Respondents and Applicants are required to share their submissions with the other party at the same time as they are provided to the OAIC

Engagement

- The OAIC now requires respondents to provide proof of engagement (or attempts to engage) with IC review applicants to resolve or narrow the issues in dispute
- Where an applicant fails to participate in engagement without a reasonable excuse the IC may decide not to continue to undertake an IC review on the basis the applicant is failing to cooperate
- The OAIC has published a checklist to assist respondents to undertake this engagement

Attempts to resolve issues in dispute	
File note of engagement with applicant	☐ Attached ☐ Not applicable
Suggestions made by agency/minister to resolve IC review	☐ Attached ☐ Not applicable
Response provided by applicant, and any suggestions made by applicant to resolve IC review	☐ Attached ☐ Not applicable

Early Resolution Focus



New Resources

- Direction as to certain procedures to be followed by agencies and ministers in IC reviews | OAIC
- Direction as to certain procedures to be followed by applicants in Information Commissioner reviews | OAIC
- Engagement checklist – IC review compulsory conference | OAIC
- Submissions checklist – Making submissions following notification of an IC review application (agency or minister) | OAIC
- Direction as to certain procedures to be followed in Information Commissioner reviews (for agencies). FAQs for agencies and ministers | OAIC
- Part 10: Review by the Information Commissioner | OAIC (updated)

Reminders and updates for Agencies:



Let us know if you have made, or are considering making, a revised decision relevant to a specific IC Review

Part 10 of the Guidelines has been updated

Documents for production are now set out in the updated Procedure Direction to agencies



Agencies are required to notify affected third parties of IC Reviews (s 54P)

Decision notices must contain correct review rights

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Priority matters - update

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What does prioritisation mean?

Prioritisation means that we prioritise these types of matters during the IC review process including when:

- allocating the matters for case management
- transferring the matters to the Decisions Team for a decision to be made

What matters are our priority?

The OAIC is prioritising the following matters for case management and decision:

- IC reviews lodged in 2020 and 2021
- Practical refusals, charges and searches
- Access grants
- IC reviews where a Minister is a respondent
- Single issue s 38 matters

NOTE: Deemed access refusals are also a priority however the above priorities relate to matters that go through the entire IC review process.

Why are we prioritising these matters?

- To reduce the backlog of IC reviews by focusing on our oldest matters (IC reviews lodged in 2020 and 2021)
- In searches, charges, and practical refusals, the applicants may not have received a substantive decision on access
- In access grants, the FOI applicants have received a decision granting (at least some) access but have not received the documents
- Prioritising those matters, as well as single issue IC reviews, promotes public access to information promptly and at the lowest reasonable cost

Insights regarding priority matters

2020/2021 matters

- In June 2024, the OAIC wrote to agencies to advise of the allocation of priority matters
- All 2020 matters are currently allocated to a case manager or with the decisions team
- We are aiming to finalise 2020 matters by the end of the 2024 calendar year
- We have also begun allocating 2021 matters and are aiming to finalise these by end of the 24/25 financial year

Tip for agencies

2021 matters

Given the passage of time, it may benefit the agency to reassess their previous submissions and decision to ensure they are up to date and reflect their current position on access. It is open to the agency to proactively update their submissions, and/or provide further access to the applicant.

Process for aged matters after allocation to a case manager

Given the passage of time, the OAIC usually gives the agency a current opportunity to provide an up to date submission before a decision is made. However, agencies should be aware that if they do not make submissions at that time, the matter may proceed to a decision without any further opportunity.

See generally, *'AIB' and Department of Defence (Freedom of information)* [2024] AICmr 46 and *Doctors 4 Refugees and Comcare (No. 2) (Freedom of information)* [2023] AICmr 20

Insights - searches

- The OAIC receives many IC reviews involving just searches
- We decline a large proportion of these as lacking in substance based on searches evidence provided by the respondent
- Where it is unclear that reasonable searches have been undertaken, they may go to a decision by the Commissioner or a delegate
- We may use our compulsory powers (ss 55V, 55(2)(e)(ii)) to require the agency to undertake further searches before setting aside a searches decision

Insights - Searches (continued)

- The main issues arising in searches matters are scope/relevance and a lack of evidence provided by the respondent. For an example of a set aside regarding searches, see *'AKT' and Services Australia (Freedom of information)* [2024] AICmr 114 (5 June 2024)

Tips for agencies

Searches

- Undertake a reasonable search on a flexible and common sense interpretation of the terms of the request at the decision stage
- When in doubt, check the interpretation of scope with the applicant
- During an IC review, evidence of searches is extremely important. Ensure you have provided searches minutes and/or internal correspondence to evidence the searches undertaken
- Consider proactively undertaking additional searches during an IC review if significant time has passed since the decision under review

Insights – practical refusals

- In recent set aside decisions the OAIC relied heavily on onus (s 55D) see for example *Josh Taylor and Department of Health and Aged Care (Freedom of information)* [2024] AICmr 164

- An agency receiving a revised request in response to s 24AB notice does not absolve that agency of its obligation to undertake 'reasonable steps' to consult

- In order to establish 'substantial diversion of resources', the respondent first needs to satisfy the OAIC that their estimates of the processing time are accurate

Tips for agencies

- Where the applicant revises the request, and it does not remove the practical refusal reason, adjust the estimate accordingly after consideration of the revised request and check any samples conducted are still relevant

Tips for agencies *(continued)*

- Where estimates are contingent on the number of pages/documents:
    - Ensure searches to establish the number of pages/documents in scope reasonably capture the intended scope, and provide evidence of searches
- Accuracy of estimates – provide a breakdown of the processing time and evidence in the form of a representative sample
- Check for inconsistencies in estimates/calculations
- Recent examples: *Diane Lee and the Department of the Prime Minister and Cabinet (Freedom of information)* [2024] AICmr 89 (26 April 2024)

Insights - charges

- The legislative framework for charges is discussed at length in the decision of *'ABX' and Department of Veterans' Affairs (Freedom of Information)* [2022] AICmr 57 ('ABX')
- ABX noted that where there is a danger that the cost of calculating and collecting a charge might exceed the cost to the agency of processing the request, this would militate in favour of the waiver of the charge
- As noted in ABX, in those circumstances, proceeding with a charge would likely only serve to delay access at a net financial cost to the Commonwealth
- Recent IC review decisions have followed the approach in ABX

Insights

- For example, in *'ALN' and Department of Home Affairs (Freedom of information)* [2024] AICmr 136, the decisionmaker found the preferable decision would have been to decide that the applicant was not liable to pay a charge of $67.50, considering factors such as the public interest and the cost of calculating and collecting the charge.

- The decisionmaker gave significant weight to the fact that while the FOI Act and Charges Regulations would not, by their terms, have prevented the Department from deciding the applicant was liable to pay a charge, the preferable decision would have been to decide that the applicant was not liable to pay a charge.

Insights – s 38

- Over the last year the OAIC has set aside some decisions under s 38 such as *AFV and Services Australia (No.3) (Freedom of information)* [2023] AICmr 127 (14 December 2023)

- In a general sense this was because the decision makers couldn't be satisfied that the elements of the provision were met due to factors such as:

  - inconsistent redactions in the documents at issue

  - inconsistent redactions across similar documents at issue in related IC reviews involving the same applicant

  - insufficient reasons or explanation as to the elements

Tips for agencies – s 38

- Ensure consistency of redactions in the documents at issue, and across FOI requests involving the same applicant
- Don’t assume the OAIC is an expert in your secrecy provisions, and provide sufficient explanation and context to demonstrate the elements are met
- Some legislation may allow for release through certain administrative processes but not under the FOI Act. It may assist to provide an explainer to the OAIC outlining how that process works in the context of the legislation
- Specifically address exceptions to the secrecy provisions in their relevant legislation and why they don’t apply (sometimes agencies address why ss 38(1A) and 38(2) don’t apply but they don’t address the exceptions in their own legislation)



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Thank you

corporate@oaic.gov.au

oaic.gov.au

oaic.gov.au/updates/sign-up

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Extension of Time Applications

Freedom of Information Branch



OAIC

Contents

- Processing period for requests lodged under the *Freedom of Information Act 1982*
- Extending the processing period
- Extending the processing period – Common Mistakes
- Extension applications to the OAIC
- Extension applications to the OAIC – Common Mistakes
- Resources

Processing Period

"30 days after the day on which the request is received"





- Requests for Access (s 15(5)(b))
- Amendment and Annotation Requests (s 51D)1))
- Internal Review Requests (s 54C(3))
- Reminder: Clock commences even if a practical refusal reason exists

Extending the processing period

Extension by agreement with the applicant (s 15AA)

- Up to 30 days
- Must be notified to the OAIC

Request consultation process (s 24AB)

- Consultation regarding a practical refusal reason
- Stops clock
- Clock restarts when applicant withdraws, revises or does not revise (s 24AB(6))

Third party consultations (s 15(6) & (8))

- Period extended by 30 days
- s 26A Commonwealth-State
- s 27 business
- s 27A personal privacy
- s 15(8) foreign entity

Charges (s 31)

- Issuing charge stops clock
- Clock restarts when charge or deposit is paid, or if/when charge is waived

Extension applications to the OAIC

Complexity/Volume:

- s 15AB (original access requests)

Deemed matters:

- s 15AC original access requests
- s 51DA amendment or annotation
- s 54D Internal Review

Extending the processing period – Common Mistakes

Extension by agreement with the applicant (s 15AA)

- Seeking agreement to extend for longer than 30 calendar days e.g. where public holiday or weekend had extended original notification date
- Agency fails to notify the OAIC
- Agency does not seek a 15AA early enough in processing the FOI request

Request consultation process (s 24AB)

- Invalid s 24AB consultations (do not meet the requirements of s 24AB(2))
- Failure to stop and/or start the clock accurately under s 24AB(7) & (8)
- Issuing a s 24AB consult notice after a Deemed Refusal

Third party consultations (s 15(6) & (8))

- Notifying the applicant of the consultation after Deemed Refusal 15(6)(b)

Charges (s 31)

- Issuing a charge after a Deemed Refusal e.g. due to incorrectly calculated processing period

Extension Applications to the OAIC







Extension Applications

- Lodged via our Webform
- We process approximately 90-100 extension applications each month
- We process most extension applications within 10 calendar days
- 77% of EOT applications decided by the OAIC between June to August 2024 were granted

Extension Applications to the OAIC

s 15AB - Complexity/Volume

- Extension of time justified due to complexity or volume
- Deemed Decision has not yet occurred
- Agency can apply for multiple s 15AB extensions

ss 15AC, 51DA, 54 - Deemed Matters

- Deemed Decision has occurred
- A revised Decision on the request has not already been issued to the applicant
- If granted, the deemed decision is taken never to have applied
- No further extension allowed

Extension Applications to the OAIC – Common Mistakes

A common reason for extension applications is staff absences or peak processing periods.

Part 3.155 of the FOI Guidelines states:

"Staff absences due to public holidays or agency shutdown periods may be relevant to whether an extension should be granted, if the particular staff members have skills or knowledge that may be required to process the request in the normal statutory timeframe. However a lack of staff because of inadequate allocation of resources to FOI processing or failure to assign additional temporary resources to FOI processing at peak times will not normally justify an extension in the absence of other extenuating circumstances."

Extension Applications to the OAIC – Common Mistakes

s 15AB - Complexity/Volume

- Processing timeframe has been calculated incorrectly and decision has already been Deemed refused
- s 15AA agreement/s not notified to the OAIC (invalid) so decision has been Deemed refused
- Agency has provided insufficient information in the extension application to justify an extension
- It is clear the extension is not justified due to significant periods of inactivity in the processing of the FOI request
- Claiming the request is voluminous, but the volume of documents is not provided
- The complexity reasons given are general FOI processes that should already be accounted for (the need to review each document thoroughly for exemptions, write a decision letter, obtain clearance, etc).

Extension Applications to the OAIC – Common Mistakes

ss 15AC, 51DA, 54 - Deemed Matters

- Agency has provided insufficient information in the extension application to justify an extension
- It is clear the extension is not justified due to significant periods of inactivity in the processing of the FOI request

OAIC

Resources





- Timeframes and extensions — FOI Essentials for Australian Government agencies and ministers
- Apply for an extension of time to process a freedom of information request
- Part 3: Processing and deciding on requests for access [3.144 – 3.165]
- FOI agency resource Managing increased volume of FOI requests
- OAIC Web Form
- (Coming Soon) Processing Timeframe calculator

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International Access to Information Day

OAIC



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Welcome and opening

Elizabeth Tydd

Australian Information Commissioner



Welcome to Country

Violet Sheridan

Senior Ngunnawal Elder

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Freedom of Information: Trends, Priorities and Looking Forward

Toni Pirani

Freedom of Information Commissioner

OAIC

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Overview of the FOI landscape

- Commissioners' and FOI Priorities
- Statistics and jurisdiction update
- 2023 Information Publication Scheme Review
- FOI Practitioners' Survey
- New guidance, tools and resources
- Recent IC review decisions

OAIC

Commissioners' priorities



1. Promote Open Government to better serve the Australian community
2. Increase OAIC FOI regulatory and case management effectiveness
3. Uplift agency capability in the exercise of FOI functions
4. Make FOI compliance easier

Freedom of information priorities

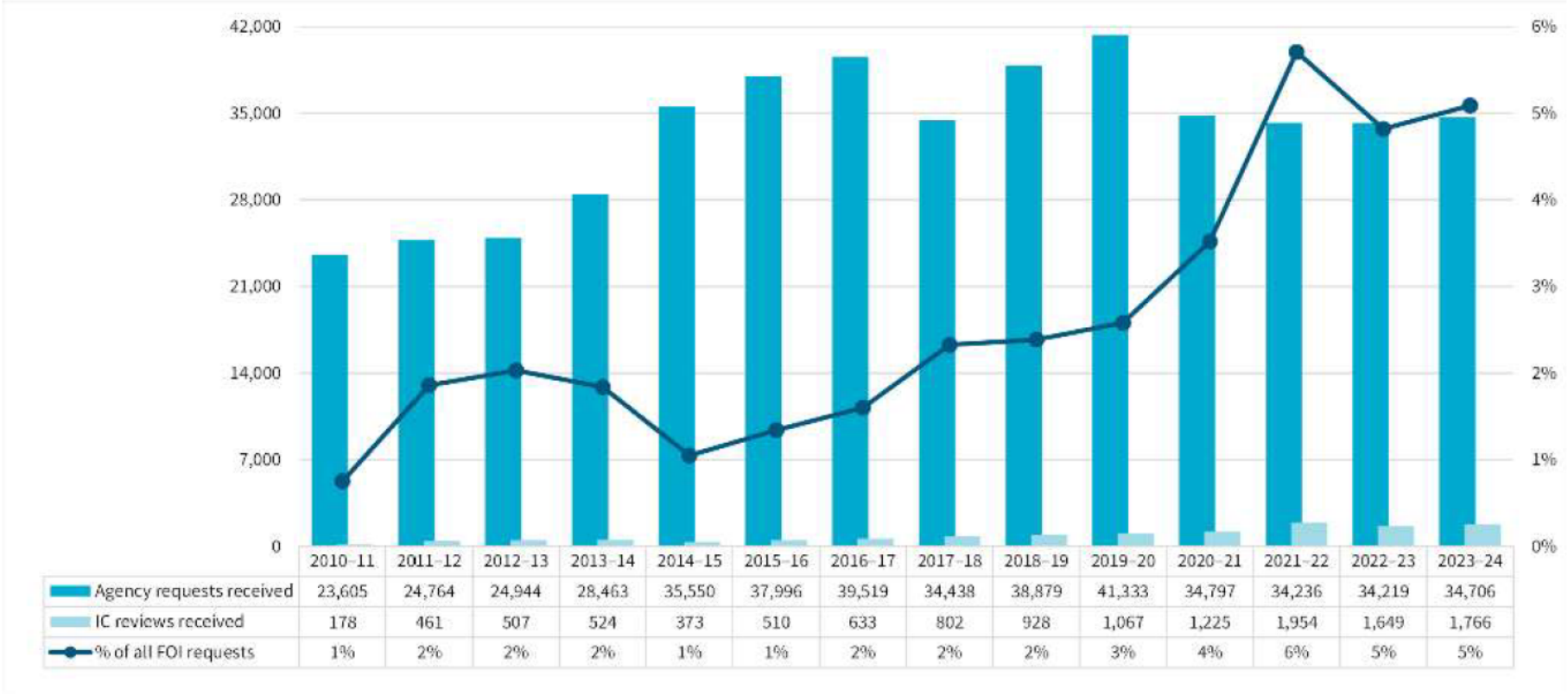
Priority 1 – Promote Open Government to better serve the Australian Community	Priority 2 – Increase OAIC FOI regulatory effectiveness	Priority 3 – Uplift of agency capability	Priority 4 – Make FOI compliance easier for agencies
Increase public participation in government decision making	Reduce the backlog of IC reviews and improve timeliness	Improve first instance decision making	Facilitate public reporting and agency self-assessment and reporting
Ensure that information held by Government is managed for a public purpose and is a national resource	Enhance the regulatory impact of IC reviews	Identify and elevate practitioner capability gaps	Promote low cost, high impact compliance practices

IC reviews on hand



	2010–11	2011–12	2012–13	2013–14	2014–15	2015–16	2016–17	2017–18	2018–19	2019–20	2020–21	2021–22	2022–23	2023–24
Received	178	461	507	524	373	510	633	802	928	1,067	1,225	1,954	1,649	1,766
Finalised	26	254	419	646	482	454	515	610	659	829	1017	1374	1518	1748
On hand at period close	152	359	447	325	216	272	390	582	851	1,089	1,297	1,877	2,008	2,026

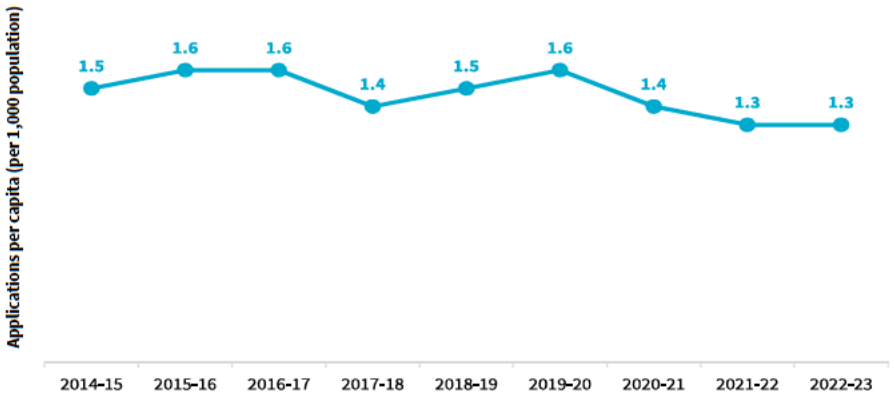
IC reviews received - as a percentage



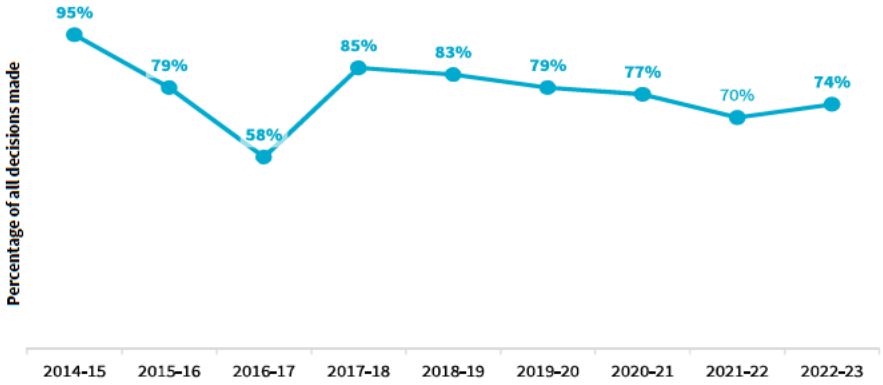
	2010–11	2011–12	2012–13	2013–14	2014–15	2015–16	2016–17	2017–18	2018–19	2019–20	2020–21	2021–22	2022–23	2023–24
Agency requests received	23,605	24,764	24,944	28,463	35,550	37,996	39,519	34,438	38,879	41,333	34,797	34,236	34,219	34,706
IC reviews received	178	461	507	524	373	510	633	802	928	1,067	1,225	1,954	1,649	1,766
% of all FOI requests	1%	2%	2%	2%	1%	1%	2%	2%	2%	3%	4%	6%	5%	5%

Agency Statistics - Australian Government FOI statistics (2014 to 2023)

Formal applications received per capita (Commonwealth)

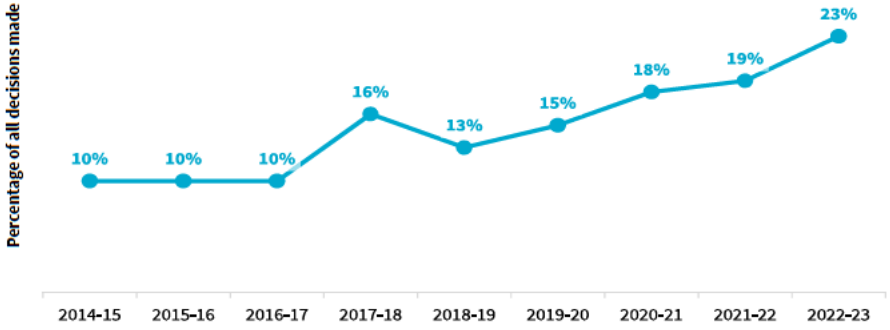


Percentage of all decisions made within the statutory timeframe (Cth)

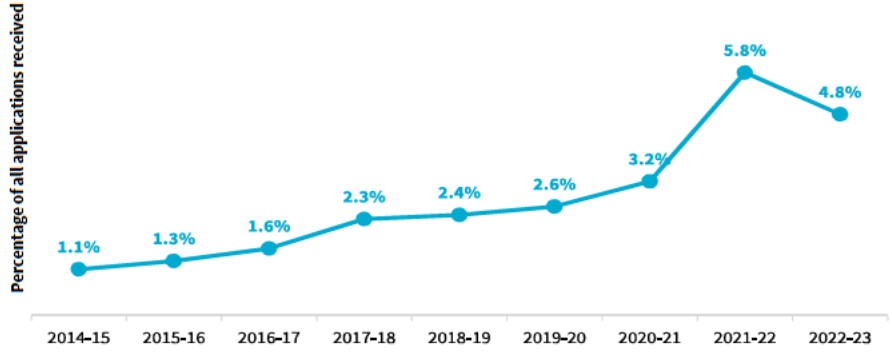


* Data not available for QLD, and only available from 2017-18 for WA and NT

Percentage of all decisions made on formal applications/pages where access was refused in full (Cth)



Percentage of applications received which are reviewed by the jurisdiction Information Commissioner (Cth)



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2023-24 Australian Government FOI jurisdiction update

- **34,706 FOI requests received**
- **72% of all requests sought access to personal information** and 28% 'other' (non-personal) information
- **21% of all requests were granted in full**. **55%** of all requests were granted in **part** and **24%** of all requests were **refused**
- **Personal privacy (s 47F) most applied exemption** (39% of all exemptions claimed) followed by ss 47E, 47C, 38 and 37
- **15% fewer practical refusal notices issued 2023-24** (2,450 notices). 38% of these requests were subsequently processed
- **15% less collected in charges**
- **74% of requests decided in time**
- **2,481 new entries added to agency disclosure logs -** however only 75% of these made documents available to the public directly from agency websites
- **7% decrease in internal review** applications with **55%** of internal reviews **affirming** the original decision.

OAIC

Information Publication Scheme (IPS) Review 2023

Compliance with the IPS is an ongoing statutory responsibility under the FOI Act

Results showed continued commitment to the IPS

Results also provide persuasive evidence that there is much to be done to realise the objects of the FOI Act in managing government-held information for public purposes and as a national resource

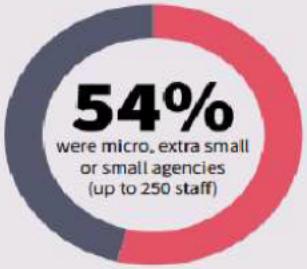
Information Publication Scheme

Information Publication Scheme

2023 agency survey findings

About the survey

196
Australian Government agencies (94%) participated in the IPS agency survey in 2023
↑ up from 190 (82%) in 2018



15%
conducted a review of the operation of their IPS in conjunction with the Information Commissioner prior to participating in the survey
↑ up from 6% in 2018

62%
have an officer who participates in the OAIC's Information Contact Officers Network
↑ up from 53% in 2018

The survey showed a continued strong commitment across the Australian Government to the IPS

Accessibility of IPS documents

82% indicated that most or all IPS documents conform to Web Content Accessibility Guidelines 2.0
↑ up from 69% in 2018
↑ up from 50% in 2012

IPS governance and administration

78% have appointed a senior executive officer to lead IPS compliance in their agency

90%
have published an **agency IPS plan** on their website

82%
said they **don't charge** for information required or permitted to be published under the IPS
↑ up from 73% in 2018
↑ up from 68% in 2012

Agencies were most likely to publish:

- Annual reports (99%)
- Functions and decision-making powers (97%)
- Contact details to access information on agency websites (97%)
- Organisation structure (96%)
- Information released in response to FOI requests via an agency disclosure log (95%)

OAIC

Information Publication Scheme

Information Publication Scheme

2023 agency survey findings

Areas for improvement

1. Strategy

Have a strategy to increase open access to information.

Around a third of agencies currently have such a strategy in place (29%, down from 35% in 2018).

This strategy should actively identify information that can be published in compliance with privacy and secrecy requirements.

2. Asset management

Invest in information asset management.

Only 20% of agencies maintain an IPS information register (down from 38% in 2018) and only 34% of the remaining agencies intend to develop one in the next 12 months (down from 53% in 2018).

Establishing and maintaining an information register was the single most commonly identified challenge agencies faced in publishing information (36%, up from 18% in 2018).

3. Identify connections

Identify connections between information released under FOI, information published on the disclosure log and what should be routinely published.

Less than half of agencies have mechanisms for identifying other information that can be published under the IPS (42%, down from 59% in 2018 and 72% in 2012).

4. Publish proactively

Consider the categories of information published proactively.

Agencies were least likely to publish:

- consultation arrangements for the public to comment on agency policy proposals (75%, up from 72% in 2018 but down from 86% in 2012)
- information in documents to which agencies routinely give access in response to FOI requests (73%, down from 79% in 2018 and 86% in 2012).

5. Training

Use training to increase the culture of proactive publication.

Only 55% of agencies have assigned responsibility for the management or coordination of staff training and awareness of IPS obligations.

6. Promote feedback mechanisms

Promote how to make a complaint or provide feedback.

67% of agencies' websites provided information about how to complain about an agency's IPS entry. 87% of agencies did not receive any complaints specifically related to the IPS in 2022–23.

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FOI Practitioners' Survey



147 Australian Government agencies (71%) completed the OAIC FOI Practitioners' Survey



82% of agencies reported the FOI Guidelines were the most used resource to assist them in performing FOI Act functions



Over half of agencies indicated they use OAIC resources at least weekly (32%), fortnightly (13%) or monthly (13%).

FOI Practitioners Survey – training findings

Most agencies use **Informal, on the job training** (79%) and **Internal Resources** (69%) to provide FOI Act training within their agency, while 42% provide this training via the AGS and 39% via their internal legal services.

84% per cent of agencies are subscribed to receive the OAIC's ICON alerts.

The three most frequently used OAIC resources are **FOI Guidelines** followed by the **FOI Essentials Toolkit** and general **website publications** (3.29).

Agencies considered certain resources more helpful including: fact sheets/aids to explain specific issues, templates, e-learning modules, flow charts and process guidance.

More than **60%** of agencies reported subject matter guidance would assist most

- **Conditional exemptions** (73%)
- **Exemptions** (71%)
- **Decision making** (68%)
- **Procedural requirements** (64%)
- **Practical refusals** (63%).

OAIC existing guidance includes

- FOI Guidelines
- IC review practice documents
- Revised IC review Procedure Directions
- Checklists, handouts and templates
- Sample FOI notices
- Video – 12 tips for decision makers
- FOI Essentials Toolkit
- Range of general resources – see Freedom of information guidance for government agencies webpage
- Webinar series for FOI practitioners
- ICON and Information Matters

New and upcoming OAIC Guidance, Tools and Resources

- FOI Guidelines updates
- Information Publication Scheme ‘individual agency reports’
- Agency Self-Assessment Tool
- E-learning modules
- New practice guidance for ministerial offices and agencies supporting ministerial offices
- Upcoming webinars on complaints and vexatious applicant declarations



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Information Commissioner review decisions

Recent decisions covering:

- Adequacy of searches (s 24A)
- Charges (s 29)
- Practical refusal reason (s 24AA)
- Documents of a Minister
- Irrelevant matter and removal of staff names (s 22)
- Legal professional privilege (s 42)
- Secrecy provisions (s 38)
- Conditional exemptions including (s 47F)

IC review decisions

- **Searches:** *Trevor Kingsley Ferdinands and Department of Defence (Freedom of information)* [2024] AICmr 182 (29 August 2024)
- **Charges:** *'ABX' and Department of Veterans' Affairs (Freedom of information)* [2022] AICmr 57 (29 July 2022) (ABX)
- **Cost of calculating and collecting charge:** *'ALN' and Department of Home Affairs (Freedom of information)* [2024] AICmr 136 (1 July 2024) (ALN)
- **Practical refusal:** *'AMX' and Department of Foreign Affairs and Trade (Freedom of information)* [2024] AICmr 177 (AMX)
- **Documents of a Minister:** *Paul Farrell and the Prime Minister of Australia (Freedom of information)* [2024] AICmr 183 (30 August 2024)
- **Secrecy provisions:** *'AFV' and Services Australia (Freedom of information)* [2023] AICmr 125 (14 December 2023) (and related matters) (AFV)
- **Legal Professional Privilege:** *'ACV' and Tertiary Education Quality and Standards Agency (Freedom of information)* [2023] AICmr 3 (1 February 2023) (ACV).

IC review decisions and what agencies are doing well

- Agency's engagement with the OAIC is generally productive
- Agencies often process requests in accordance with the OAIC decision – rather than seeking AAT review
- Agencies often incorporate learnings into their FOI processes
- Agencies are seen to be engaging productively with applicants
- Some agencies are proactively facilitating access outside FOI
- IC reviews for *charges* decisions has *dropped*
- The OAIC has seen a reduction in the number of Complaints *received.*

Tips for the IC review process

- Effectively communicate with applicants at the decision stage
- Keep comprehensive records of searches undertaken and provide to the OAIC as early as possible
- Provide revised submissions based on recent IC review decisions
- Ensure estimates in practical refusals are accurate and supported by evidence
- Don’t assume the OAIC is an expert in your agency’s secrecy provisions and be consistent
- Consider providing access even in circumstances where exemptions may apply.



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Thank you

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FOI Complaints Webinar

22 August 2024



Presented by

Jackie Scolyer and Hannah Hunter
Reviews and Investigations - FOI Complaints

OAIC

Summary of topics to be covered in today's presentation

- ☑ How to make an FOI complaint
- ☑ The FOI complaints investigation process
- ☑ Common complaint issues and trends
- ☑ Investigation outcomes and recommendations
- ☑ FOI complaint statistics
- ☑ Focus for FOI complaints
- ☑ Key takeaways and questions



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Information Commissioner Investigations

Power to investigate FOI complaints

OAIC

Information Commissioner investigations – power to investigate under the FOI Act

- Section 69(1) of the FOI Act places an obligation on the Information Commissioner to investigate an FOI complaint made under s 70.
- Section 69(2) of the FOI Act provides that at the Information Commissioner's initiative (CII), investigate an action taken by an agency in the performance of functions or the exercise of powers under the FOI Act.

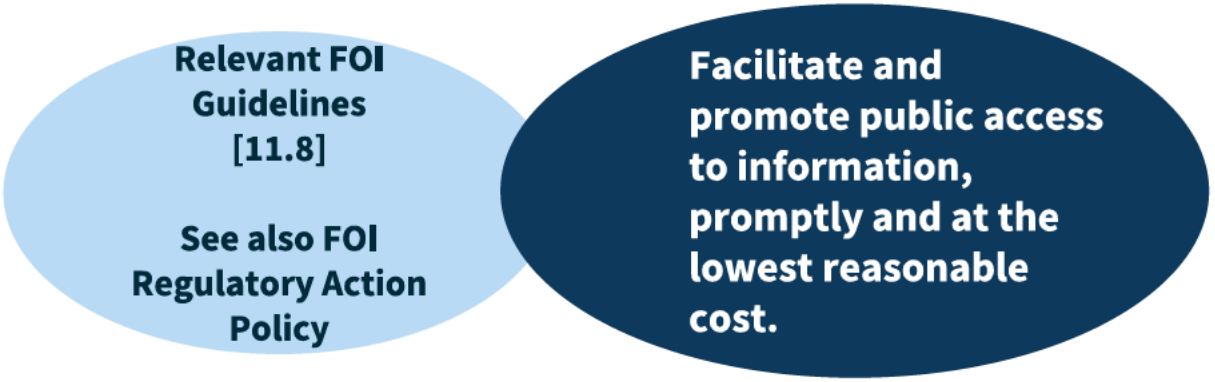
Relevant FOI Guidelines

[11.7]

CIIs are published on the OAIC's website under Freedom of information reports.

Factors taken into consideration when deciding whether to commence and investigation

- ☑ the objects of the FOI Act (s 3(4))
- ☑ 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, and
- ☑ the outcome sought.





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Making an FOI complaint

Who can complain and how

OAIC

Who can make an FOI complaint to the OAIC

Relevant FOI Guidelines

[11.9]

- If a person is dissatisfied with the way an agency has handled their FOI request, they're encouraged to complain to the agency first. If the agency doesn't respond to the FOI complaint or they're not happy with the agency's response, they can lodge a complaint with the OAIC.
- A person can't make an FOI complaint about a Minister.
- It's free to make an FOI complaint.
- A person can withdraw their FOI complaint at any time.
- If a person is seeking an agency's decision to be changed, they need to ask for an internal review or an Information Commissioner review (see FOI Guidelines at [11.5] and [11.12]) as an FOI complaint is about the process.

Making an FOI Complaint - Requirements under section 70 of the FOI Act

- ✓ (1) A person may complain to the Information Commissioner about an action taken by an **agency** in the **performance of functions**, or the **exercise of powers**, under **the FOI Act**.
- ✓ (2) A complaint must:
  - (a) be in writing; and
  - (b) identify the agency in respect of which the complaint is made.
- ✓ (3) The OAIC must provide appropriate assistance to a person who:
  - (a) wishes to make a complaint; and
  - (b) requires assistance to formulate the complaint.

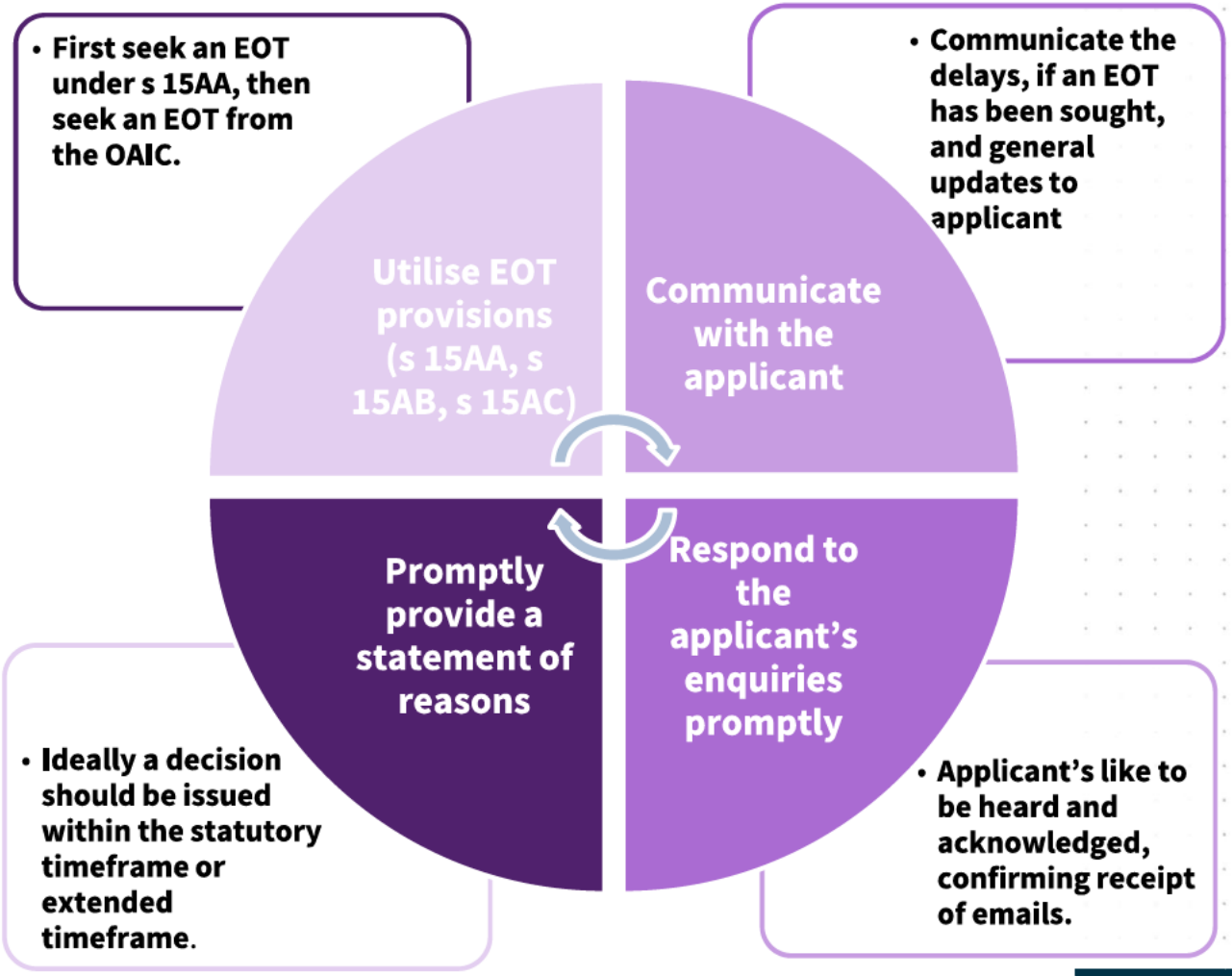
Relevant FOI Guidelines

[11.9]

OAIC

Common complaint issues and trends

- × FOI Complaints often include concerns in relation to agencies not providing a decision within the statutory timeframe prescribed under s 15(5)(b) of the FOI Act (i.e. delays).
- × Issues concerning inadequate communication during the FOI process.
- × Seeking a merits review.
- ✓ To mitigate these common issues, an agency should keep the person informed during the FOI process on things such as EOTs and delays, and additionally provide an apology for any delay where necessary.
- !! Agencies should be seeking an EOT if they will not meet the statutory timeframe.



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Decision to investigate

Factors to be considered

OAIC

When will the Information Commissioner Investigate?

Preliminary inquiries – section 72 of the FOI Act

- The Information Commissioner may make inquiries of the agency for the purpose of determining whether or not to investigate an FOI complaint made (or purported to be made under s 70).
- This is an important tool used by the Information Commissioner to determine the appropriate next steps in an FOI complaint.

The agency's response to preliminary inquiries will determine whether or not the Information Commissioner will investigate an FOI complaint.

OAIC has received positive responses to Preliminary Inquiries in improving FOI practices

Relevant FOI Guidelines

[11.10]

Responding to a preliminary inquiries request

☑ The OAIC might ask the following questions or request the following information as part of its preliminary inquiries under s 72 of the FOI Act:

- ✓ a timeline/chronology of events
- ✓ any applicable review rights the person might have and whether they exercised that right (such as internal review)
- ✓ whether the person can or has complained to another body (such as the NACC where the FOI complaint issues are about misconduct or corruption)
- ✓ whether the person has complained to the agency and any outcome
- ✓ whether in response to the FOI complaint the agency has apologised to the person and/or taken any steps to address the issue/s complained of and/or proposed steps to remediate the issue/s complained of, and
- ✓ any current and future initiatives being undertaken to address issues with statutory compliance with processing timeframes or provide updates on the agency's initiatives already underway.

☑ Respond to the request within the specified time (which is ordinarily 10 business days).

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Discretion not to investigate

Factors to consider

OAIC

Discretion not to investigate or not to continue to investigate

Under s 73 of the FOI Act the Information Commissioner has a discretion not to investigate, or not to continue to investigate, an FOI complaint in the following circumstances.

Agency will be provided with the closure letter

Relevant FOI Guidelines

[11.11] to [11.14]

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))

OAIC

Discretion not to investigate/not to continue to investigate – section 73(b) of the FOI Act

- The Information Commissioner has the discretion not to investigate, or not to continue to investigate a complaint under s 73(b) of the FOI Act, where 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.

- Where a person has applied for IC review and also 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 Information Commissioner has not had a reasonable opportunity to conduct the review.

- Section 73(b) is the most common decline mechanism we see at OAIC in relation to FOI complaints.

Relevant FOI Guidelines

[11.5] – [11.6] and [11.11] to [11.14]

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Transfer to the Commonwealth Ombudsman

Transferring an FOI complaint

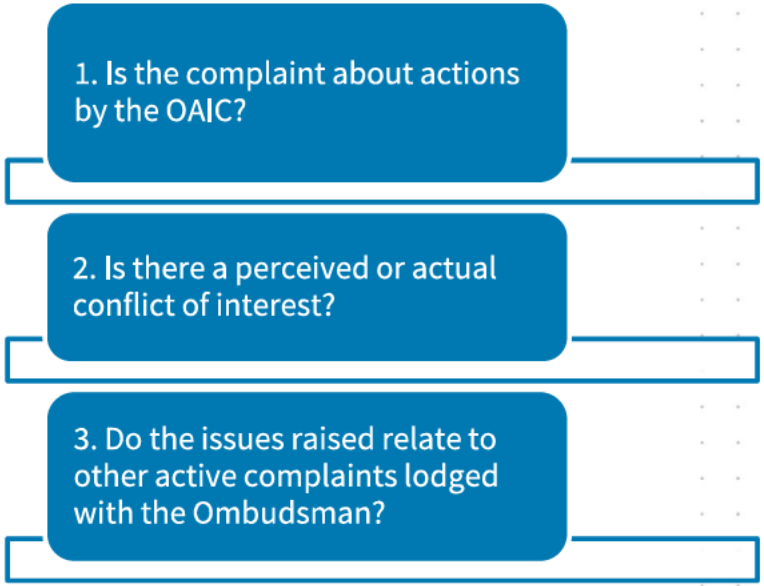
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Transfer to Ombudsman

- Under s 74 of the FOI Act, a FOI complaint may be transferred to the Commonwealth Ombudsman if the Information Commissioner is satisfied that a complaint about an action could be more effectively or appropriately dealt with by the Ombudsman.
- 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)).
- The Information Commissioner does not investigate its own complaints.

Relevant FOI Guidelines

[11.15] to [11.18]



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Commencement of investigation

Notice requirements

OAIC

Decision to investigate – notice requirements s 75 of the FOI Act

- Under s 75(1) of the FOI Act, the Information Commissioner must notify an agency before investigating an FOI complaint or a CII is commenced.

- A copy of the notice will also be provided to the complainant setting out the issue/s to be investigated.

- The Information Commissioner must also give written notice (with reasons) to an agency and to the complainant if they decide not to investigate, or not to continue to investigate.

Both parties receive the notice which stipulates the issue/s to be investigated

Relevant FOI Guidelines

[11.19] to [11.20]

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Investigation procedure

Conduct of an investigation

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Conduct of an investigation – section 76 of the FOI Act

- 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).

  ! The request for information will usually be requested in the notice of investigation issued under s 75 or, can be requested at anytime throughout the investigation.

→ Seek an EOT if the stipulated timeframe is not enough

Relevant FOI Guidelines

[11.21] to [11.25]

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Outcome of investigation

Once the investigation is complete

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Notice on completion – requirement to notify agency – section 86 of the FOI Act

If the Information Commissioner completes an investigation, the Information Commissioner must, as soon as practicable, notify the agency usually, the agency head or another senior officer within the agency (s 86).

The s 86 notice must state the following:

(a) the investigation results (s 87)
(b) the investigation recommendations (if any) (s 88)
(c) the reasons for the investigation results and the making of the investigation recommendations.

The agency may give to the Information Commissioner any comments about the notice that the agency wishes to make and **notify the Information Commissioner if it accepts or rejects the recommendations**.

The Information Commissioner must give a copy of the notice to the complainant (if any), unless the notice would contain matters of the kind mentioned in s 89C(2).

Please tell us if you accept or reject the recommendations made together with your reasons within 2 weeks

Relevant FOI Guidelines

[11.41] to [11.44]

What are investigation recommendations and suggestions?

- Section 88 of the FOI Act – investigation recommendations

  - The ***investigation recommendations***, in relation to the investigation, are the formal recommendations to the respondent agency that the Information Commissioner believes that the respondent agency ought to implement.

- Section 87(d) of the FOI Act – suggestions

  - The Information Commissioner may any suggestions to the respondent agency the implementation of which the Information Commissioner believes might improve the processes of the agency.

- If the Information Commissioner is satisfied the agency has taken adequate and appropriate action to implement the formal recommendation(s), the Information Commissioner will issue correspondence to the agency formally acquitting them.

Previous issues investigated and recommendations

Issue complained of/ investigated	Recommendation made to the Agency
• Manner in which the FOI request was handled	• Letter of apology. • Update formal FOI guidance.
• Inadequate communication with FOI applicant • Delays in processing the request	• FOI staff undertake training. • Undertake an assessment of FOI requests to ensure training has been effective. • Report findings of the assessment to the Information Commissioner.
• Charging practices	• Update FOI charges policy. • Publish charges policy on the Information Publication Scheme. • Undertaken an assessment and report back to the Information Commissioner.
• Not processing valid FOI requests	• Provide the FOI applicant with statements of reasons. • Undertake an assessment, acknowledge and process any outstanding requests then and report back to the Information Commissioner.

Publication of the outcome of an investigation

- 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 at Freedom of information investigation outcomes.
- Any notice will include the name of the agency but not the name of the complainant (where there is one).
- 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.

Relevant FOI Guidelines

[11.45] to [11.46]

Freedom of information investigation outcomes

Click this link for updated investigation outcomes

← Freedom of information

Information Commissioner decisions and reports

Freedom of information investigation outcomes

Freedom of information reports +

Information Commissioner review decisions +

Listen

See outcomes and recommendations from FOI complaints investigations (PDF, 478 KB) current as of August 2024

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 powers under the FOI Act. This involves investigating complaints (s 69(1)), as well as conducting investigations at the Commissioner's own initiative (Commissioner initiated investigations (CIIs)) (s 69(2)).

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)).

Failure to implement investigation recommendations

Relevant FOI Guidelines

[11.47] to [11.52]

- Section 89 of the FOI Act applies if, the Information Commissioner:
  - completes an investigation; and
  - gives an agency a notice under s 86; and
  - is not satisfied that the agency has taken action that is adequate and appropriate in the circumstances to implement the investigation recommendations for the investigation.
- The Information Commissioner may, by notice in writing (implementation notice), require the agency to give the:
  - Information Commissioner particulars of any action that the agency proposes to take to implement the investigation recommendations for the investigation, and
  - particulars within the time specified in the notice.
- The agency must comply with the implementation notice.
- Section 89A of the FOI Act applies where the agency fails to respond or take action that is adequate and appropriate in response to an implementation notice.

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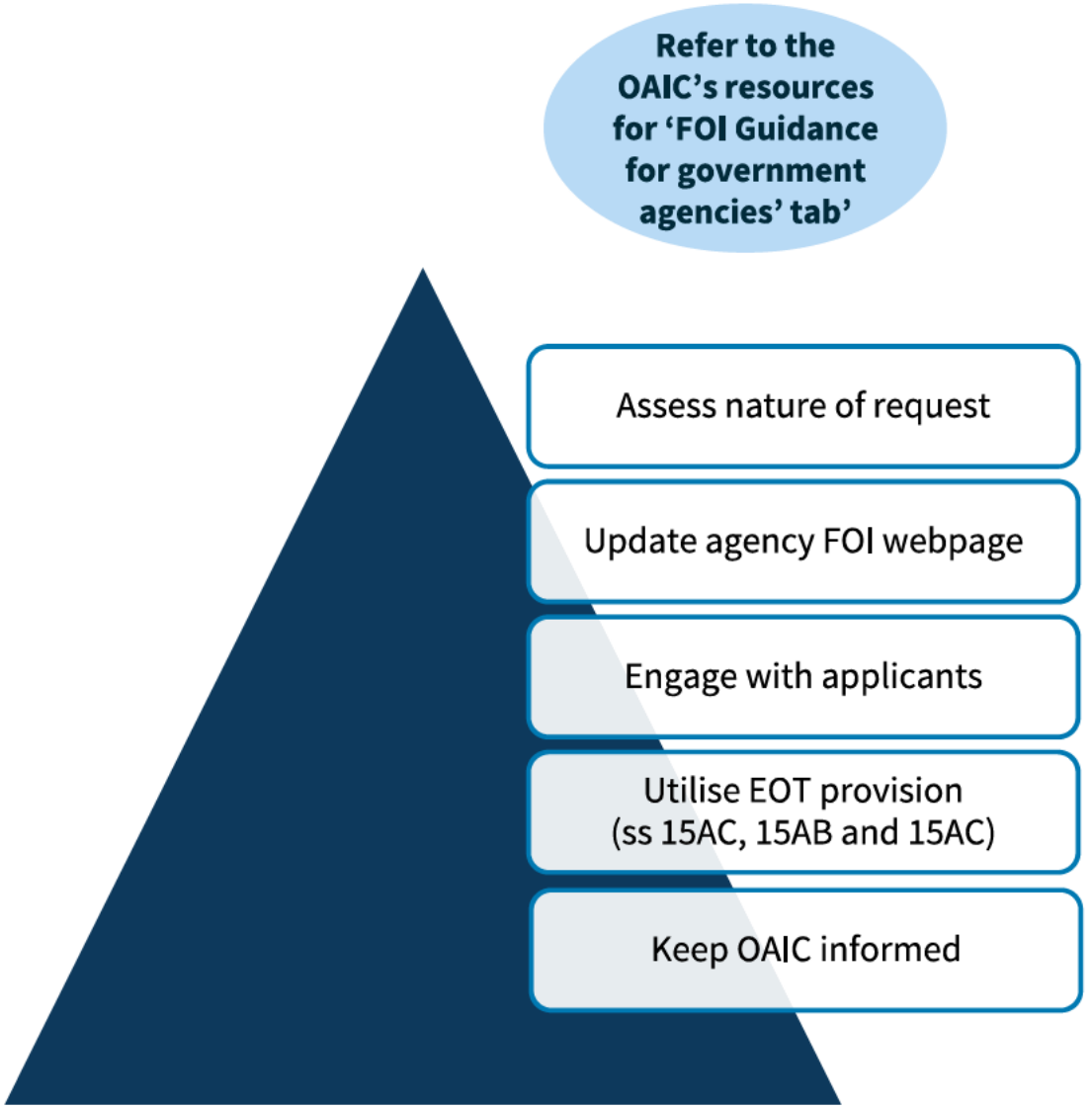
Office of the Australian Information Commissioner

FOI Complaint statistics

OAIC

FOI complaint statistics

- During the 2023 – 2024 FY there was a 27% increase in FOI complaints, with a 204% increase in finalisations.
- 92% of OAIC's recommendations following FOI complaint investigations were accepted by agencies.
- Agencies not meeting statutory timeframes in processing an FOI request was the most common.
- The most common mechanism to finalise FOI complaints has been under s 73(b) of the FOI Act, seeking access to documents and IC review is the more appropriate mechanism.
- As of 21 October 2024, the OAIC has 40 FOI complaints on hand. The significantly reduced volume of FOI complaints allows the OAIC to be in a position to consider contemporary issues of concern.



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Regulatory priorities for FOI complaints

What we're focussing on

OAIC

The focus for FOI complaints

- Increasing OAIC FOI regulatory and case management effectiveness and uplifting agency capabilities are key regulatory priorities for 2024-25.
- The OAIC is committed to delivering a timely complaint process, informed by the principles of informality, responsiveness and proportionality.
- The increased finalisation rate of FOI complaints has contributed to the elimination of the backlog of FOI complaints currently on hand, this has been achieved through an enhanced regulatory posture and a focus on the effectiveness of the OAIC's FOI practices, coupled with process changes such as the increased use of preliminary inquiries which has resulted in more complaints being finalised without proceeding to an investigation.
- We encourage agencies to continue to identify and address areas of improvement including as providing this information as part of a response to preliminary inquiries or complaint investigation.
- We are looking to consider FOI complaints in a thematic way.

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Thank you

You can reach us at Contact us | OAIC

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Vexatious Applicant Declarations

Justin Lodge – Acting General Manager,
FOI Case Management

Meka Larsen – Acting Senior Review
Advisor, Significant Decisions Team



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Vexatious applicant declarations

What, When and How



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Today's presentation will cover:

- **What** are vexatious applicant declarations
- **When** the Commissioner can make them and on what basis
- **How** the OAIC's process works, including considerations and evidence

What is a vexatious applicant declaration?

Under s 89K of the FOI Act, the Commissioner may declare a person to be a vexatious applicant, either on the Commissioner's own initiative or on the application of an agency or minister.

What do the terms and conditions of a declaration look like?

A declaration may be made subject to terms and conditions (s 89M(1)), including (but not limited to):

- an agency or minister may refuse to deal with an access action without the written permission of the Information Commissioner, and
- the Commissioner may refuse to consider an IC review application from the person (s 89M(2)).



When may the Commissioner make a declaration?

The Commissioner may make a vexatious applicant declaration where:

- the person has repeatedly engaged in access actions which involve an abuse of process; or

- the person is engaging in a particular access action that would involve an abuse of process, or be manifestly unreasonable (s 89L(1).

Repeated access actions that involve an abuse of process

- There is no fixed number of access actions required to establish a pattern of repeated requests.
- Whether such a pattern exists will depend in part on the nature of the abuse of process that is said to be involved
- The agency or minister is not required to show that all of the conduct of the person is an abuse of process.



A particular access action involving an abuse of process, or that is manifestly unreasonable

- A declaration may be based on one access action only – specifically, 'a particular access action' that would involve either an abuse of process or be manifestly unreasonable.

- For an example of an access action involving an abuse of process, see *Department of Defence and Ronald Francis* [2014] AICmr 68

When does an access action involve an abuse of process?

'Abuse of process' includes but is not limited to:

- harassing or intimidating an individual or an agency employee
- unreasonably interfering with an agency's operations
- seeking to use the FOI Act to circumvent access restrictions imposed by a court (s 89L(4)).

Abuse of process – harassment and intimidation

Harassment or intimidation may be established by circumstances such as:

- the content, tone and language of a person's correspondence with an agency
- unsubstantiated, derogatory or inflammatory allegations against agency staff
- requests that are targeted at personal information of agency employees



Abuse of process – harassment and intimidation (cont)

- requests that are designed to intimidate agency staff
- requests of a repetitive nature with the intention of annoying or harassing agency staff
- their failure to alter dubious conduct after being requested by an agency to do so

Abuse of process — unreasonable interference with agency operations

Possible considerations include:

- the total number of a person's access actions to the agency in a specific period
- the impact of the person's access actions on FOI administration in the agency
- the nature of a person's access actions,
- the impact of the person's access actions on other work in the agency,

Abuse of process — unreasonable interference with agency operations (cont)

- the size of the agency and the resources it can reasonably allocate to FOI processing
- whether the person has cooperated reasonably with the agency to enable efficient FOI processing
- whether the person has previously been declared vexatious
- whether deficiencies in an agency's FOI processing or general administration have contributed



What to consider before making an application

- ❑ Have you advised the person that they intend to make the application and consulted with them to try to remove the need for a declaration?
- ❑ Have you considered whether deficiencies in the agency's FOI processing or general administration have contributed to the situation?
- ❑ Have you considered what terms or conditions may be appropriate, including an appropriate timeframe?

Applying for a declaration

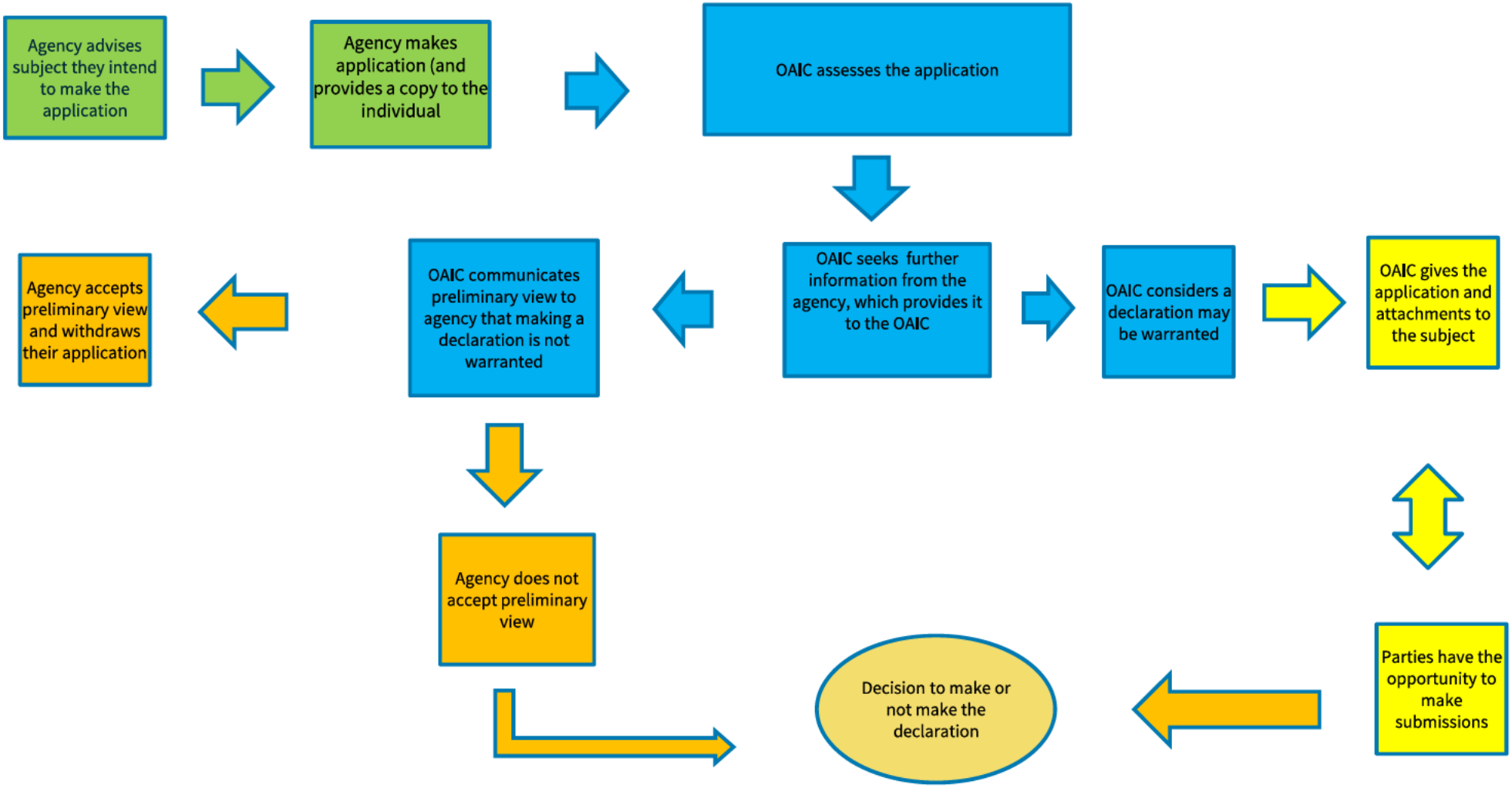
An application should include:

- ❑ information about the person's access actions and how they dealt with them
- ❑ grounds on which the agency or minister seeks the declaration
- ❑ proposed terms or conditions
- ❑ evidence of relevant correspondence with the person and their access actions, and a schedule identifying relevant parts of the evidence, and how it supports the application

The Agency should advise the person that they intend to make the application.

They should also provide them with a copy of the application after applying

Summary of the process



Evidence – Why it is important and a few tips

- The agency or minister has the onus of establishing that the declaration should be made (s 89K(3)).
- If providing the OAIC with voluminous correspondence, include a schedule with references to specific pages and details of how those parts of the documents support the application for a declaration.
- Consult the FOI Guidelines, which include details about what evidence an agency should provide for particular contentions.
- Look at previous declarations

Common issues

- The OAIC may only consider a person's engagement in 'access actions' when deciding whether to make a declaration. This does not include access requests under the Privacy Act (APP 12).
- Where the terms of a declaration cover access actions made 'on behalf of' the subject, the OAIC will need to be satisfied by evidence that the access action was made with the consent of the subject (to determine the access actions falls within the terms of the declaration).
- In considering if access actions will result in an unreasonable interference with an agency's operations, we will consider whether deficiencies in an agency's FOI processing or general administration have contributed.



Common issues (cont)

- A declaration will only impact access actions to the agency that made the application (not more broadly).
- A declaration will not prevent the subject from making access requests under APP 12.
- Anonymous requests/AI potential to generate requests

What happens to IC reviews?

- The OAIC may agree to put IC reviews on hold until an application for a declaration is finalised
- Separate to an application for a vexatious applicant declaration, it is open to the agency to submit that the OAIC decline particular IC reviews under s 54W(a) as vexatious.



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What happens if the Commissioner makes a declaration?

- The Information Commissioner will generally publish reasons for making a declaration.
- Published reasons may either name the person concerned or identify them using a pseudonym.

What are the review rights?

A decision by the Information Commissioner to declare a person to be a vexatious applicant is a decision that can be reviewed by the ART.

Though the OAIC is a party to the proceedings, the agency may be called upon to assist in providing submissions.

The decision can also be subject to review by the Federal Court of Australia or the Federal Circuit Court of Australia.

Resources

- Part 12: Vexatious applicant declarations | OAIC
- Vexatious applicant declarations | OAIC

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Thank you

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Extension of Time Applications

Freedom of Information Case Management Branch



OAIC

POLL QUESTION

How long have you been processing *Freedom of Information* requests?

- ❑ Less than 1 year
- ❑ 1-2 years
- ❑ 3-4 years
- ❑ 5+ years

OAIC

Contents

- Processing period for requests lodged under the *Freedom of Information Act 1982*
- Extending the processing period
- Extending the processing period – Common Mistakes
- Extension applications to the OAIC
- Extension applications to the OAIC – Common Mistakes
- Resources

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Processing Period

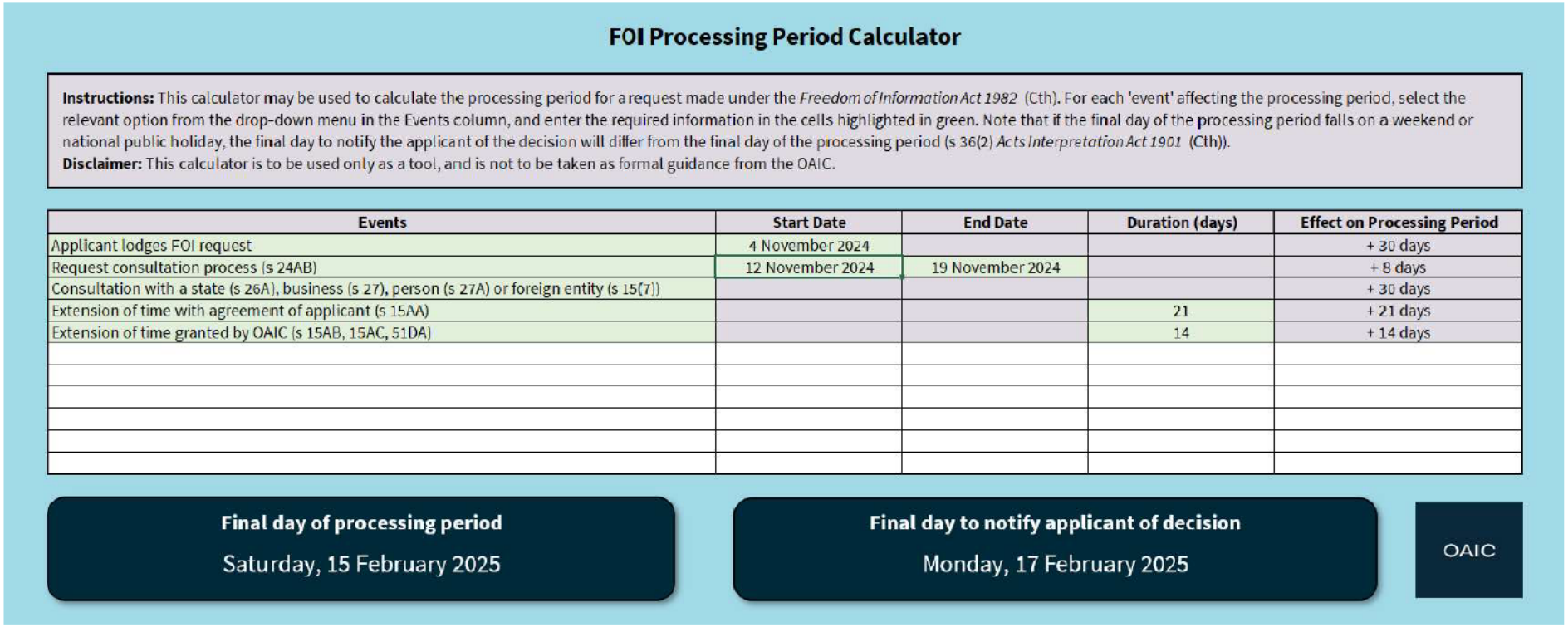
"30 days after the day on which the request is received"



- Requests for Access (s 15(5)(b))
- Amendment and Annotation Requests (s 51D)1))
- Internal Review Requests (s 54C(3))
- Reminder: Clock commences even if a practical refusal reason exists



Freedom of Information processing period calculator



FOI Processing Period Calculator

Instructions: This calculator may be used to calculate the processing period for a request made under the *Freedom of Information Act 1982* (Cth). For each 'event' affecting the processing period, select the relevant option from the drop-down menu in the Events column, and enter the required information in the cells highlighted in green. Note that if the final day of the processing period falls on a weekend or national public holiday, the final day to notify the applicant of the decision will differ from the final day of the processing period (s 36(2) *Acts Interpretation Act 1901* (Cth)).
Disclaimer: This calculator is to be used only as a tool, and is not to be taken as formal guidance from the OAIC.

Events	Start Date	End Date	Duration (days)	Effect on Processing Period
Applicant lodges FOI request	4 November 2024			+ 30 days
Request consultation process (s 24AB)	12 November 2024	19 November 2024		+ 8 days
Consultation with a state (s 26A), business (s 27), person (s 27A) or foreign entity (s 15(7))				+ 30 days
Extension of time with agreement of applicant (s 15AA)			21	+ 21 days
Extension of time granted by OAIC (s 15AB, 15AC, 51DA)			14	+ 14 days

Final day of processing period

Saturday, 15 February 2025

Final day to notify applicant of decision

Monday, 17 February 2025

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The calculator is available to download from our website: [Freedom of Information processing period calculator | OAIC]

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Extending the processing period

Extension by agreement with the applicant (s 15AA)

- Up to 30 days
- Must be notified to the OAIC

Request consultation process (s 24AB)

- Consultation regarding a practical refusal reason
- Stops clock
- Clock restarts when applicant withdraws, revises or does not revise (s 24AB(6))

Third party consultations (s 15(6) & (8))

- Period extended by 30 days
- s 26A Commonwealth-State
- s 27 business
- s 27A personal privacy
- s 15(8) foreign entity

Charges (s 31)

- Issuing charge stops clock
- Clock restarts when charge or deposit is paid, or if/when charge is waived

Extension applications to the OAIC

Complexity/Volume:

- s 15AB (original access requests)

Deemed matters:

- s 15AC original access requests
- s 51DA amendment or annotation
- s 54D Internal Review

Extending the processing period – Common Mistakes

Extension by agreement with the applicant (s 15AA)

- Seeking agreement to extend for longer than 30 calendar days e.g. where public holiday or weekend had extended original notification date
- Agency fails to notify the OAIC
- TIP: Remember to seek a 15AA early in processing the FOI request

Request consultation process (s 24AB)

- Invalid s 24AB consultations (do not meet the requirements of s 24AB(2))
- Failure to stop and/or start the clock accurately under s 24AB(7) & (8)
- Issuing a s 24AB consult notice after a Deemed Refusal

Third party consultations (s 15(6) & (8))

- Notifying the applicant of the consultation after Deemed Refusal 15(6)(b)

Charges (s 31)

- Issuing a charge after a Deemed Refusal e.g. due to incorrectly calculated processing period

Notification date for the decision

- Including the notification date in the processing period when the decision due date falls on a Saturday, Sunday or Public Holiday (i.e 31 days).
- Applying further extensions of time from the notification date when the original decision due date falls on a Saturday, Sunday or Public Holiday

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POLL QUESTION

Question: You have sought an extension of 30 days from the applicant under s 15AA of the FOI Act and need to notify the OAIC. Which of the answers below is the correct method of applying the extension and calculating the due date?

Timeline:
FOI request made on Thursday, 30 January 2025
Decision is due on Saturday, 1 March 2025 (30 days)
Agency seeks agreement to 15AA extension on Friday, 28 February 2025
Applicant agrees in writing to 15AA extension on Monday, 3 March 2025

- ❑ Option 1 - Extension is applied from Monday (due Wednesday, 2 April 2024)
- ❑ Option 2 - Extension is applied from Saturday (due Monday, 31 March 2025)

ANSWER: OPTION 2

✓ Option 2 - Extension is applied from Saturday (due Monday, 31 March 2025)

Extensions of time are always applied from the due date, not the notifiable date, even if the due date falls on a Saturday, Sunday or Public Holiday

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Extension Applications to the OAIC







Extension Applications

- Lodged via our EOT application form online
- We process approximately 90-100 extension applications each month
- We process over 90% of extension applications within 10 calendar days
- TIP: Keep the FOI applicant updated on the progress of their request

Extension Applications to the OAIC

s 15AB - Complexity/Volume

- Extension of time justified due to complexity or volume
- Deemed Decision has not yet occurred
- Agency can apply for multiple s 15AB extensions

ss 15AC, 51DA, 54 - Deemed Matters

- Deemed Decision has occurred
- A revised Decision on the request has not already been issued to the applicant
- If granted, the deemed decision is taken never to have applied
- No further extension allowed

POLL QUESTION

Question: The applicant is seeking access to documents, and you are applying to the OAIC for a further extension of time to deal with the request. Based on the timeline below, which is the correct extension to apply for.

Timeline:
Tuesday, 12 November 2024 – FOI request made to Agency/Minister
Thursday, 12 December 2024 – Decision is due to be provided to applicant
Friday, 13 December 2024 – Agency/Minister makes EOT application to OAIC

- ❑ Option 1 - Extension of time under s 15AC
- ❑ Option 2 - Extension of time under s 15AB

ANSWER: OPTION 1

✓ Option 1 - Extension of time under s 15AC

EOT applications for volume/complexity under s 15AB cannot be utilised if the processing period has lapsed and a deemed refusal decision has occurred.

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Extension Applications to the OAIC – Common Mistakes

A common reason for extension applications is staff absences or peak processing periods.

Part 3.155 of the FOI Guidelines states:

"Staff absences due to public holidays or agency shutdown periods may be relevant to whether an extension should be granted, if the particular staff members have skills or knowledge that may be required to process the request in the normal statutory timeframe. However a lack of staff because of inadequate allocation of resources to FOI processing or failure to assign additional temporary resources to FOI processing at peak times will not normally justify an extension in the absence of other extenuating circumstances."

Extension Applications to the OAIC – Common Mistakes

s 15AB - Complexity/Volume

- Processing timeframe has been calculated incorrectly and decision has already been Deemed refused
- s 15AA agreement/s not notified to the OAIC (invalid) so decision has been Deemed refused
- Agency has provided insufficient information in the extension application to justify an extension
- It is clear the extension is not justified due to significant periods of inactivity in the processing of the FOI request
- Claiming the request is voluminous, but the volume of documents is not provided
- The complexity reasons given are general FOI processes that should already be accounted for (the need to review each document thoroughly for exemptions, write a decision letter, obtain clearance, etc).

POLL QUESTION

An Agency received an FOI request 27 days ago. They have located all documents within the scope of request and have provided the following submissions to support a 15AB EOT:

'The request is considered complex because the Agency/Minister was required to conduct consultations with multiple internal business areas, and we are experiencing a large number of staff on leave'

What is wrong with these submissions?

- ❑ Option 1 - Agency has provided insufficient information in the extension application to justify an extension
- ❑ Option 2 - The complexity reasons given are general FOI processes
- ❑ Option 3 – Agency has not explained how documents/scope of request is considered complex
- ❑ Option 4 – All of the above

ANSWER: OPTION 4

✓ Option 4 – All of the above

Conducting consultations with internal business areas is expected and often required when processing an FOI request. You should explain why the consultations are complex and warranting further time.

When drafting extension of time applications, please refer to our resource:
Best practice when applying for an extension of time

Extension Applications to the OAIC – Common Mistakes

ss 15AC, 51DA, 54 - Deemed Matters

- Agency has provided insufficient information in the extension application to justify an extension
- It is clear the extension is not justified due to significant periods of inactivity in the processing of the FOI request

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Resources





- Timeframes and extensions — FOI Essentials for Australian Government agencies and ministers
- Apply for an extension of time to process a freedom of information request
- Part 3: Processing and deciding on requests for access [3.144 – 3.165]
- FOI agency resource Managing increased volume of FOI requests
- OAIC EOT Application Web Form
- Freedom of Information processing period calculator | OAIC

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IC Review Practice Update Webinar



Justin Lodge, Director
Anna Fields, Assistant Director
Natalie Crow, Senior Review Adviser

OAIC

Topics to be covered

1. Reminders and updates for agencies
2. Priority matters update
3. Focus on IC reviews involving third parties
4. Takeaways and further information

Reminders and updates for Agencies:



Documents for production are now set out in the updated Procedure Direction to agencies

Notices we issue to respondents are now to be issued to both the respondent and the IC review applicant at the same time



Respondents and Applicants are required to share their submissions with the other party at the same time as they are provided to the OAIC

If agencies wish to seek an extension, they should ask us and tell us the reason in advance of the due date and update the applicant

Reminders and Updates (cont)

The following links set out next steps if they agency or minister does not respond to a notice issued by the OAIC by the due date

- Quick guide to use of directions and information gathering powers https://www.oaic.gov.au/freedom-of-information/freedom-of-information-guidance-for-government-agencies/information-commissioner-reviews/information-commissioner-reviews-quick-guide-to-use-of-directions-and-information-gathering-powers

- Submissions checklist –following notification of an IC review application (agency or minister) https://www.oaic.gov.au/freedom-of-information/freedom-of-information-guidance-for-government-agencies/freedom-of-information-agency-resources/submissions-checklist-making-submissions-following-notification-of-an-ic-review-application-agency-or-minister

Please ensure you proactively update the contact list for SES staff so that we can issue notices to the correct person

Reminders and Updates (cont)

The OAIC publishes its regulatory statistics on a quarterly basis: https://www.oaic.gov.au/freedom-of-information/freedom-of-information-statistics-for-the-oaic

This includes a summary of the OAIC's FOI caseload as well as focus areas and caseload reports for IC reviews and FOI complaints

The OAIC intends to include statistics related to agency responses to compulsory notices in these published statistics

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Priority matters – update

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What does prioritisation mean?

Prioritisation means that we prioritise these types of matters during the IC review process including when:

- assessing jurisdiction upon receipt
- notifying parties of the IC review
- allocating the matters for case management
- transferring the matters to the Decisions Team for a decision to be made

What matters are our priority?

The OAIC is prioritising the following matters for case management and decision:

- IC reviews lodged in 2021 (currently our main priority)
- Practical refusals, charges and searches
- Access grants
- IC reviews where a Minister is a respondent

Previously we also focused on single issue s 38 matters however they are no longer a priority

Why are we prioritising these matters?

- To reduce the backlog of IC reviews by focusing on our oldest matters (IC reviews lodged in 2021)
- In searches, charges, and practical refusals, the applicants may not have received a substantive decision on access.
- In access grants, the FOI applicants have received a decision granting (at least some) access but have not received the documents
- Prioritising those matters promotes public access to information promptly and at the lowest reasonable cost.

Insights regarding priority matters

2021 matters

- Over the last year or so the OAIC has closed 2018, 2019 and 2020 IC reviews
- The OAIC wrote to agencies to advise of the allocation of 2021 matters in June 2024
- All 2021 matters are currently allocated to a case manager or with the decisions team
- We are aiming to finalise 2021 matters by the end of July 2025

Insights regarding priority matters (cont)

2022 matters

- We are contacting applicants in 2022 matters to confirm if they wish to proceed
- If you receive a notice or request for information in a 2022 matter, you should assume that the OAIC has recently confirmed the applicant wishes to proceed
- We have also begun allocating 2022 matters for case management

Insights regarding priority matters (cont)

Practical refusals

- In relation to practical refusals, the OAIC continues to rely heavily on onus (s 55D) see for example *'AVN' and Department of Home Affairs (Freedom of information)* [2025] AICmr 83 (7 May 2025)

- To meet their onus, agencies should ensure they take sufficient steps to meet the consultation requirements under s 24AB, ensure their estimates are reasonable and correct, and provide evidence in the form of sampling and searches evidence

Priority matters (cont)

Searches

- We decline a large proportion of searches matters as lacking in substance based on searches evidence provided by the respondent
- Where it is unclear that reasonable searches have been undertaken, they may go to a decision by the Commissioner or a delegate
- We may use our compulsory powers (ss 55V, 55(2)(e)(ii)) to require the agency to undertake further searches before setting aside a searches decision.

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IC reviews involving third parties

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General reminders and information – IC reviews involving third parties






- Agencies are required to notify affected third parties of IC Reviews (s 54P) at the time they are notified of the IC review
- Sections 47 and 47G may not be applied to the same material
- Agencies should consult with the OAIC before releasing additional material via a s 55G revised decision where an affected third party was consulted under ss 27 or 27A.

Case examples:

This was highlighted in the related cases of:

- *'AQS' and Department of Agriculture, Fisheries and Forestry (Freedom of information)* [2024] AICmr 256, and
- *'AQU' and Department of Agriculture, Fisheries and Forestry (Freedom of information)* [2024] AICmr 257.

OAIC case management of these related cases

Steps the OAIC took to case manage these matters:

- As the s 55G decision released more information to the applicant, over the third-party objections, it affected the appeal rights of the third party.
- In order to preserve the third-party's appeal rights, the OAIC accepted the third-party's objections as both a submission on the access refusal IC Review and as an application for a new access grant IC Review.
- A second IC Review was opened in relation to the access grant s 55G decision.
- A modified s 54Z notice was issued to the respondent.
- Two s 55K decisions were drafted together, cross-referencing each other, and the decisions were notified to the parties on the same day.

Requirement to notify third parties of an IC review under s 54P

- Under s 54P of the FOI Act, agencies and ministers are required to notify affected third parties of IC Reviews at the time the OAIC notifies the agency or minister of the IC review
- The Information Commissioner can make an order under s 54Q that it would not be appropriate to notify an affected third-party if an agency or Minister applies for an order, and certain conditions are met.

OAIC case management of matters involving third parties

Section 54W(b)

- In matters where there are a significant number of third-parties we may elect to decline the matter under s 54W(b) of the FOI Act.

Notification in access grant matters

- In access grant IC reviews, the OAIC is responsible for notifying any affected third-parties.

Directions to consult during IC review

- Even where an agency does not consult when making their original/internal review decision, if they are claiming ss 47F or 47G the OAIC may ask (or direct) them to consult during the course of the IC Review and/or provide submissions to explain why it's not reasonably practicable to do so.

OAIC case management of matters (cont)

Legacy matters

- With legacy matters, due to the passage of time since the original FOI decision was made, we may request that an agency provide documents to assist with the consultation.

Tips for agencies

- Ensure that you identify and consult with all relevant third-parties
- Ensure third parties are afforded procedural fairness
- Be very clear in consultation notices sent to relevant third-parties about exactly which provision they are being consulted under (ie ss 26A, 27 or 27A).
- Take all reasonable steps to notify them of an IC review, and give a copy of the notice to the OAIC, as soon as practicable as required by s 54P.
- If you consider that it is impracticable to consult with all relevant third-parties then provide clear submissions to the OAIC regarding why you consider this to be the case.

Tips continued

- In matters where different applicants may be seeking access to the same material, ensure that consultations with affected third-parties are consistent.

- Take care when considering possible s 55F agreements. All parties, including any third-parties to the IC review must agree. If a third-party does not agree then the matter will proceed to a s 55K decision.

- Ensure that you have provided up-to-date contact details for third-parties to the OAIC so we can contact them as required, and ensure they receive a copy from us of the s 55K decision.

- To ensure that third-parties have standing in a matter agencies should directly consult, where possible, with third-parties rather than doing so through intermediaries.

Tips continued

- When the OAIC decisionmaker sets aside an agency's decision and there is a third-party who may wish to appeal, the agency should liaise with the third-party prior to releasing documents to the applicant in order to preserve the third-party's rights of appeal.

- Reminder not to identify applicants when sending out consultations to third parties.

Takeaways and further information

- Refer to the FOI Guidelines for further information on third party consultation. See, in particular:
  - Processing and deciding on requests for access – [3.74]-[3.82]
  - Review by the Information Commissioner – [10.31]-[10.32]
  - Conditional exemptions – refer Part 6

Australian Government
Office of the Australian Information Commissioner

Thank you

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