

PART 11 — COMPLAINTS AND INVESTIGATIONS

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PART 11 — COMPLAINTS AND INVESTIGATIONS

11.1 The Information Commissioner can investigate under Part VIIB of the FOI Act agency actions relating to the handling of FOI matters. This involves investigating complaints as well as conducting own motion investigations (that is, investigations at the Information Commissioner's initiative) (s 69(1)).¹

11.2 The Information Commissioner cannot investigate a minister's handling of FOI matters. A similar restriction applies to the Commonwealth Ombudsman.

Investigating complaints or undertaking IC review

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

- a complaint that an agency did not provide adequate assistance to an FOI applicant to frame a request
- a complaint by a third party that an agency failed to consult with them before deciding to release a document, or
- a complaint alleging a conflict of interest by the decision maker.

11.4 The Commissioner's view is that making a complaint is not an appropriate mechanism where IC review is available, unless there is a special reason to undertake an investigation and the matter can be dealt with more appropriately and effectively in that manner. IC review will ordinarily be the more appropriate avenue for a person to seek review of the merits of an FOI decision, particularly an access refusal or access grant decision.²

Own motion investigations

11.5 The Information Commissioner may undertake an own motion investigation into an agency's actions in performing its functions or exercising its powers under the FOI Act (s 69(2)).³ The investigation may look at a single agency decision or action, at a systemic problem or recurring pattern in an agency's practices and processes in handling FOI matters, or at a practice or problem occurring in more than one agency. The issue to be investigated

¹ The Office of the Information Commissioner has issued a *Freedom of Information Regulatory Action Policy* which provides guidance on the approach of the Australian Information Commissioner to the exercise of FOI regulatory powers, including the investigation of complaints and conducting own motion investigations. The Policy is located at <<https://www.oaic.gov.au/about-us/our-regulatory-approach/all/>>.

² See resource 'What is the difference between a complaint and an application for review of an Freedom of Information decision?' located at <<https://www.oaic.gov.au/freedom-of-information/faqs-for-agencies/what-is-the-difference-between-a-complaint-and-an-application-for-review-of-an-freedom-of-information-decision>>.

³ See for example the following reports of own motion investigations: 'FOI at the Department of Human Services' published on 2 December 2014 and located at <<https://www.oaic.gov.au/freedom-of-information/foi-decisions/foi-omi-reports/foi-at-the-dhs>> and 'Processing of non-routine FOI requests by the Department of Immigration and Citizenship' published on 26 September 2012 and located at <<https://www.oaic.gov.au/freedom-of-information/foi-decisions/foi-omi-reports/processing-of-non-routine-foi-requests-by-the-department-of-immigration-and-citizenship>>.

may come to the attention of the Information Commissioner as a result of an IC review or a series of applications for IC review, or in some other way.

How to make a complaint

11.6 A person may complain to the Information Commissioner about an action taken by an agency under the FOI Act (s 70(1)).⁴ A complaint must be in writing and identify the agency against which the complaint is made (s 70(2)). The Information Commissioner's office must give 'appropriate assistance' to anyone who wishes to complain and needs help to formulate their complaint (s 70(3)). This need may arise, for example, if a person has language or literacy difficulties or otherwise needs assistance in ascertaining the scope of an agency's FOI Act obligations and framing a complaint against the agency.

Preliminary inquiries

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

Deciding whether to expedite a matter

11.8 The Information Commissioner may expedite the investigation of a complaint. The Information Commissioner may decide to expedite an investigation in response to a request or as a result of identifying individual IC review applications that involve factors that are outlined below.

11.9 When considering whether to expedite the investigation of a complaint, the Information Commissioner may have regard to any of the following factors:

- whether expedition would best facilitate and promote public access to information
- whether expedition would best increase the promptness of public access to information. For example, this factor may be relevant where the FOI complaint is related to an IC review
- whether expedition would best facilitate public access to information at the lowest reasonable cost, and
- taking into account the objects of the FOI Act, any other factors which the Information Commissioner considers relevant in the circumstances.

Deciding not to investigate

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

- the action that is the subject of the complaint is not taken by an agency in 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))

⁴ See resource 'How do I make an FOI complaint?' located at <<https://www.oaic.gov.au/freedom-of-information/foi-complaints>>.

- the complainant has or had a right to complain to another body and has not exercised that right when it would be reasonable to do so (s 73(c))
- the agency has dealt, or is dealing, adequately with the complaint, or has not yet had an adequate opportunity to do so (s 73(d))
- the complaint is frivolous, vexatious, misconceived, lacking in substance or not made in good faith (s 73(e))
- the complainant does not have a sufficient interest in the subject matter of the complaint (s 73(f)).

11.11 If the Information Commissioner decides not to investigate or continue investigating a complaint, the Information Commissioner must give a written notice (with reasons) to the complainant and the agency (s 75). An agency must also be notified if the Information Commissioner discontinues an own motion investigation (s 75(2)(b)).

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

Relationship with Commonwealth Ombudsman investigations

11.13 The Commonwealth Ombudsman retains authority to investigate under the Ombudsman Act a complaint about action taken by an agency under the FOI Act (s 89F). However, an amendment to the Ombudsman Act qualifies the Ombudsman's discretion to deal with such complaints. Section 6C of the Ombudsman Act provides that the Ombudsman must consult with the Information Commissioner before deciding to investigate a complaint about a matter that is the subject of a completed investigation by the Information Commissioner, or that is or could be the subject of a complaint to the Information Commissioner and could be dealt with more appropriately or effectively by the Information Commissioner. The Ombudsman and the Information Commissioner must consult with a view to avoiding the same matter being investigated by both officers. If the Ombudsman decides not to investigate a complaint on this basis, the Ombudsman must transfer the complaint and all relevant documents and information to the Information Commissioner, and notify the complainant in writing (with reasons for the decision) (s 6C(3) of the Ombudsman Act). The Information Commissioner must then deal with the matter as a complaint under Part VIIB of the FOI Act (s 6C(4) of the Ombudsman Act).

11.14 The Information Commissioner has a similar power to transfer a complaint (or part of a complaint) to the Ombudsman if the Information Commissioner is satisfied that it could be dealt with more effectively or appropriately by the Ombudsman (s 74). Two examples of such situations are given in the FOI Act (examples to s 74). One is where the complaint is about how the Information Commissioner dealt with an Information Commissioner review. The second example is where the complaint is only one part of a wider grievance about an agency's actions. The Information Commissioner must consult with the Ombudsman to avoid any overlap in inquiries, and may decide not to investigate or continue an investigation after that consultation (s 74(2)). If the Information Commissioner decides not to investigate a complaint on this basis, the Information Commissioner must transfer the complaint and all relevant documents and information to the Ombudsman, and notify the complainant in writing (with reasons for the decision) (ss 74(3), (4)).

Giving notice of an investigation

11.15 The Information Commissioner must notify the agency where an investigation of a complaint or an own motion investigation is proposed (s 75(1)). Similarly, the Information Commissioner must give written notice (with reasons) to the agency and the complainant (if there is one) if the Information Commissioner decides not to investigate or continue to investigate (ss 75(2)–(4)).

Conduct of investigations

11.16 The FOI Act sets out certain rules that apply to the conduct of the Information Commissioner's complaint investigations and own motion investigations. The guiding principle is that an investigation shall be conducted in private and in the way the Information Commissioner considers fit (s 76(1)). The same principle applies to investigations conducted by the Commonwealth Ombudsman (Ombudsman Act s 8(2)).

General powers

11.17 The Information Commissioner may obtain information from an agency officer and make any inquiry relevant to an investigation (s 76(2)). The Information Commissioner also has specific powers to compel the production of information by agencies (discussed below at [11.23]–[11.32]).

Entering premises

11.18 The Information Commissioner has a limited power to enter premises to carry on an investigation or to inspect documents on the premises. This could be done, for example, to inspect agency documents, or to investigate whether an agency conducted a proper search for documents.

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

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

11.21 Certain places require written ministerial approval before entry is allowed (s 78(1)). These are:

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

11.22 The Attorney-General may also prohibit entry to a place by declaration, if satisfied an investigation at that place may prejudice the security or defence of the Commonwealth (ss

78(3), (4)).

These requirements are consistent with the rules applying to the Ombudsman's powers of entry for an investigation (Ombudsman Act ss 14(2), (3)).

Powers to compel agencies to produce information

11.23 The Information Commissioner has certain compulsory powers:

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

11.24 Each of these powers is discussed below. The powers are the same as the Commissioner's powers when conducting a review (ss 55R–55U, 55W–55X — see Part 10 of these Guidelines).

Production of information and documents

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

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

Exempt documents

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

Attendance to answer questions

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

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

Protections for those involved

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

11.31 A person is immune from civil proceedings and from criminal or civil penalty, for the action of giving information, producing a document or answering a question in good faith for the purposes of an investigation (s 85). The protection applies even if the person did not produce information in response to the exercise by the Information Commissioner of powers to compel production of information (a person can voluntarily give information under s 76(2) which gives the Information Commissioner the power to obtain information from any officer of an agency that he or she thinks is relevant to the investigation).

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

Completing an investigation

11.33 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 must include the investigation results, the investigation recommendations (if any), and the reasons for those results and any recommendations (s 86(2)). A notice must not include exempt matter or information about the existence or non-existence of a document that would be exempt under s 33, 37(1) or 45A (ss 89C and 25(1)).

11.34 The 'investigation results' under s 87 are:

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

11.35 The agency may provide comments on the notice to the Information Commissioner (s 86(3)).⁵ The FOI Act does not detail a procedure the Information Commissioner is to follow upon receiving comments from an agency. Whether the Information Commissioner replies to the agency or takes further action will depend on the nature of the agency's comments in responding to any opinions, conclusions or suggestions of the Information Commissioner in the notice on completion. If the notice included an investigation recommendation, the Information Commissioner will take the agency comments into account in deciding whether to take further action.

11.36 In addition to including opinions, conclusions or suggestions in a notice on

⁵ See for example the Department of Immigration and Citizenship's response to the OMI report on processing non-routine FOI requests located at <<https://www.oaic.gov.au/freedom-of-information/foi-decisions/foi-omi-reports/diac-response-to-omi-report-on-processing-of-non-routine-foi-requests>>.

completion, the Information Commissioner may also make ‘investigation recommendations’, which are ‘formal recommendations to the respondent agency that the Information Commissioner believes that the agency ought to implement’ (s 88). If the Information Commissioner is not satisfied that the agency has taken adequate and appropriate action to implement a formal recommendation, the Information Commissioner may issue a written ‘implementation notice’ requiring the agency to provide within a specified time particulars of any action the agency will take to implement the Information Commissioner’s recommendations (s 89).

11.37 The Information Commissioner may subsequently report to the minister responsible for the agency and the minister responsible for the FOI Act if the Information Commissioner is not satisfied that the agency has taken adequate and appropriate action to implement the recommendations or has not responded to the implementation notice within the specified time (s 89A). The minister responsible for the FOI Act must table the report before each House of the Parliament (s 89A(5)). Section 89B prescribes the matters that must be addressed in a report to ministers, including the action that the Information Commissioner believes would be adequate and appropriate to implement the investigation recommendations. The report must not include exempt matter or information about the existence or non-existence of a document that would be exempt under s 33, 37(1) or 45A (ss 89C and 25(1)).

11.38 In deciding whether and how to exercise the power to enforce recommendations, the Information Commissioner balances the following factors:

- whether the enforcement action would facilitate and promote public access to information
- whether the enforcement action would increase the promptness of public access to information
- whether the enforcement action would facilitate public access to information at the lowest reasonable cost, and
- any other factors which the Information Commissioner considers relevant in the circumstances.

Amending records

11.39 Under Part V of the FOI Act, a person has the right to apply for amendment or annotation of an incorrect record of personal information that is used by an agency for administrative purposes (see Part 7 of these Guidelines). As in an IC review, the Information Commissioner as part of an own motion investigation or complaint investigation can recommend that such incorrect records be amended, subject to certain limitations (s 89D).