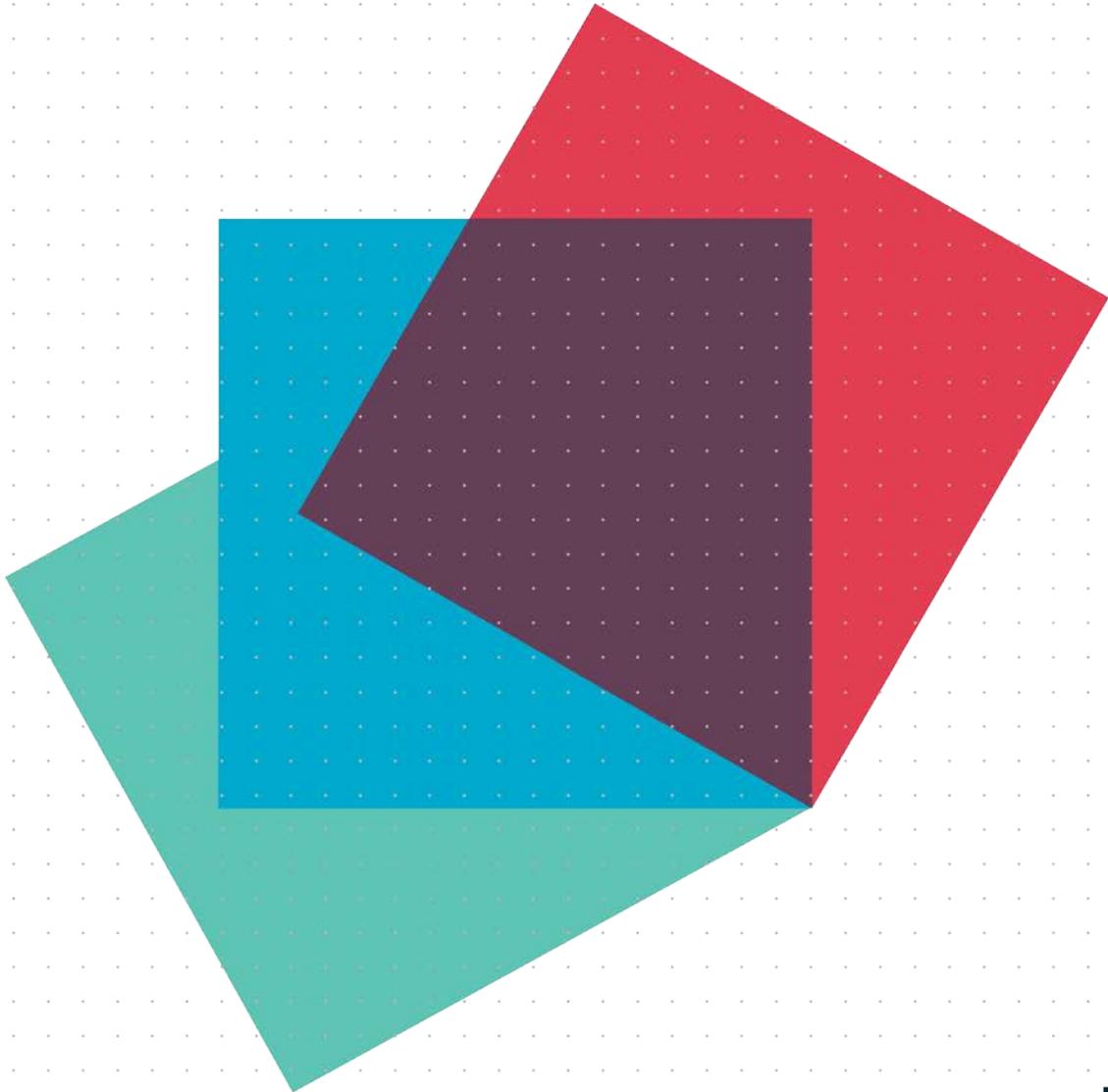




**Australian Government**  
**Office of the Australian  
Information Commissioner**

# Freedom of information regulatory action policy

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**February 2018**

**OAIC**

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## Overview

1. The purpose of this policy is to inform the Australian community and Australian Government agencies (agencies) and ministers covered by the *Freedom of Information Act 1982* (FOI Act) of the regulatory strategy and approach of the Australian Information Commissioner with respect to freedom of information (FOI) regulatory powers.
2. This policy provides guidance on the approach of the Australian Information Commissioner to the exercise of FOI regulatory powers. The policy should be read together with the *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982*<sup>1</sup> (which provide guidance on the operation of the FOI Act) to understand why and how the Information Commissioner elects to exercise FOI regulatory powers.

## The OAIC and its jurisdiction

3. The Office of the Australian Information Commissioner (OAIC) is an independent statutory agency established under the *Australian Information Commissioner Act 2010* (AIC Act).
4. The head of the agency is the Australian Information Commissioner. References to the Information Commissioner include the Office of the Australian Information Commissioner (OAIC) where the Information Commissioner has delegated powers in writing to a member of staff of the OAIC.<sup>2</sup>
5. The AIC Act confers on the Information Commissioner the power to perform FOI functions which includes the power to:<sup>3</sup>
  - **review FOI decisions of agencies and ministers:** review decisions under Part VII of the FOI Act (Information Commissioner reviews)<sup>4</sup>
  - **investigate FOI complaints:** undertake investigations of agency actions relating to the handling of FOI matters under Part VIIB of the FOI Act<sup>5</sup>
  - **issue FOI Guidelines:** issue guidelines under s 93A of the FOI Act<sup>6</sup>

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<sup>1</sup> Section 93A of the FOI Act requires that regard must be had to guidelines issued under s 93A for the purposes of the performance of a function or the exercise of a power under the FOI Act.

<sup>2</sup> *Australian Information Commissioner Act 2010* (AIC Act) s 25 and Australian Information Commissioner, *Delegation of FOI powers by the Australian Information Commissioner*, 14 December 2016, viewed 29 November 2017, OAIC website <<https://www.oaic.gov.au/about-us/corporate-information/operational-information/delegation-of-foi-powers-by-the-australian-information-commissioner>>.

<sup>3</sup> The AIC Act confers power on each of the Information Commissioner, Freedom of Information and Privacy Commissioner to do all things necessary or convenient to perform the freedom of information (FOI) functions defined in the AIC Act, ss 8, 10(2), 11(3) and 12(3).

<sup>4</sup> See the AIC Act, ss 8(h), 10(2), 11(3) and 12(3)

<sup>5</sup> See the AIC Act, ss 8(i), 10(2), 11(3) and 12(3).

<sup>6</sup> See *Freedom of Information Act* (the FOI Act), s 93A and the AIC Act, ss 8(e), 10(2), 11(3) and 12(3).

- **consider extension of time applications:** consider extension of time applications by an agency or minister in relation to decisions on FOI requests<sup>7</sup>
- **consider vexatious applicant declarations:** consider whether to make a vexatious applicant declaration to restrict a person's rights to make an FOI request or application following an application from an agency or minister or on the Commissioner's own motion,<sup>8</sup> and
- **make disclosure log determinations:** make determinations that the requirement to publish information in a disclosure log does not apply to specified information<sup>9</sup>
- **oversee the Information publication scheme (IPS):** assist agencies to publish information in accordance with the IPS<sup>10</sup> and review, investigate and monitor compliance with the IPS<sup>11</sup>
- **raise awareness of FOI and educate Australians and agencies about their rights and obligations:** promote awareness and understanding of the FOI Act and the objects of the Act<sup>12</sup> and provide information, advice, assistance and training on the operation of the Act<sup>13</sup>
- **monitor agencies' compliance with the FOI Act:** monitor, investigate and report on compliance by agencies with the FOI Act<sup>14</sup>
- **compile FOI data and assess trends:** collect information and statistics from agencies and ministers about FOI matters,<sup>15</sup> and
- **make recommendations on the operation of the FOI Act:** report and recommend to the Minister<sup>16</sup> proposals for legislative change to the FOI Act or desirable or necessary administrative action in relation to the FOI Act.<sup>17</sup>

## The goals of taking FOI regulatory action

6. The goals of taking particular FOI regulatory action are to facilitate the operation of the FOI Act to uphold the community's right to access public information consistent with the objects of the FOI Act and to promote the management of Australian Government information as a national resource.

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<sup>7</sup> The AIC Act confers power on the Information Commissioner to perform FOI functions conferred by the FOI Act. See the AIC Act, ss 8(k), 10(2), 11(3) and 12(3).

<sup>8</sup> The AIC Act confers power on the Information Commissioner to perform FOI functions conferred by the FOI Act. See the AIC Act, ss 8(k), 10(2), 11(3) and 12(3).

<sup>9</sup> The AIC Act confers power on the Information Commissioner to perform FOI functions conferred by the FOI Act. See the AIC Act, ss 8(k), 10(2), 11(3) and 12(3).

<sup>10</sup> See the AIC Act, ss 8(b), 10(2), 11(3) and 12(3).

<sup>11</sup> See the FOI Act, s 8F and the AIC Act, ss 8(c), 10(2), 11(3) and 12(3).

<sup>12</sup> See the AIC Act, ss 8(a), 10(2), 11(3) and 12(3).

<sup>13</sup> See the AIC Act, ss 8(d), 10(2), 11(3) and 12(3).

<sup>14</sup> See the AIC Act, ss 8(g), 10(2), 11(3) and 12(3).

<sup>15</sup> See the AIC Act, ss 8(j), 10(2), 11(3) and 12(3), 30 and 31.

<sup>16</sup> The Commonwealth Attorney-General is the Minister responsible for the administration of the FOI Act.

<sup>17</sup> See the AIC Act, ss 8(f), 10(2), 11(3) and 12(3).

7. Parliament intends that the functions and powers given by the FOI Act are performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost.<sup>18</sup>
8. Regulatory action can facilitate the objects of the Act by:
  - **encouraging best practice by agencies:** ensuring compliance and influencing best practice by agencies and ministers in relation to the FOI Act and its objects
  - **capacity building agencies to increase compliance:** improving the capabilities of agencies and ministers to act consistently with the FOI Act and its objects
  - **influencing Australian Government open access culture:** influencing policy makers to consider access to information impacts when drafting legislation and new policy proposals, deterring conduct that is inconsistent with the FOI Act and its objects (both specifically and generally) and addressing systemic issues in relation to acting consistently with the FOI Act and its objects, and
  - **raising public awareness and building public confidence:** increasing public knowledge of access rights and obligations and the Information Commissioner's FOI regulatory powers, instilling public confidence in the Information Commissioner's role as regulator by appropriately addressing conduct that is inconsistent with the FOI Act and its objects and communication of the Information Commissioner's regulatory activities.

## Regulatory action principles

9. The Information Commissioner will be guided by the following principles when taking FOI regulatory action:
  - Independence — the Information Commissioner will act independently and take action that is impartial and objective.
  - Accountability — the Information Commissioner is accountable for its FOI regulatory action through a range of review and appeal rights, and will ensure stakeholders are aware of those rights.<sup>19</sup>
  - Proportionality — the Information Commissioner's FOI regulatory action will be proportionate to the situation or conduct concerned.
  - Consistency — the Information Commissioner will strive to act consistently in a manner that is guided by and reflects this policy.
  - Timeliness — the Information Commissioner will strive to conduct and finalise regulatory action as promptly as practicable.
  - Transparency — the Information Commissioner will be open about how FOI regulatory powers are used, including by publishing relevant guidance (including this policy and the

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<sup>18</sup> See the FOI Act, s 4(3).

<sup>19</sup> See the FOI Act, ss 56 and 57A. Review and appeal rights are also set out in Parts 10 and 11 of Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* (the FOI Guidelines).

FOI Guidelines), information about the regulatory action taken and decisions on Information Commissioner reviews.

10. When taking FOI regulatory action, the Information Commissioner will act consistently with general principles of good decision making, as explained in the *Best Practice Guides* published by the Administrative Review Council.<sup>20</sup> In particular, the Information Commissioner will act fairly and in accordance with principles of natural justice (or procedural fairness).
11. When dealing with conduct that may be inconsistent with the FOI Act and its objects, the Information Commissioner will consider the conduct on a case-by-case basis and have regard to all relevant circumstances.
12. In any litigation the Information Commissioner is a party to, the Information Commissioner will act in accordance with its obligation to act as a model litigant in accordance with the *Legal Services Directions 2017*.<sup>21</sup>

## Regulatory powers

13. The Information Commissioner undertakes an assessment of the risks and impact of non-compliance by agencies or ministers with the FOI Act in determining whether to exercise the regulatory powers and which regulatory powers are appropriate to exercise in the particular circumstances.
14. This policy documents the Information Commissioner's approach to the exercise of the regulatory powers to:
  - review FOI decisions of agencies and ministers
  - investigate FOI complaints and commence Commissioner-initiated FOI investigations
  - issue FOI Guidelines
  - perform other statutory FOI functions, in particular:
    - consider applications for extensions of time
    - consider vexatious applicant declarations, and
    - make determinations that the requirement to publish information in a disclosure log does not apply to specific information
  - oversee the Information publication scheme (IPS)
  - raise awareness of FOI and educate Australians and agencies about their rights and obligations
  - monitor agencies' compliance with the FOI Act
  - compile FOI data and assess trends, and

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<sup>20</sup> Administrative Review Council 2007, *Best Practice Guides*, Attorney-General's Department, viewed 19 October 2017, Administrative Review Council website <[www.arc.ag.gov.au/Publications/Reports/Pages/OtherDocuments.aspx](http://www.arc.ag.gov.au/Publications/Reports/Pages/OtherDocuments.aspx)>.

<sup>21</sup> The obligation to act as a model litigant extends to Commonwealth agencies involved in merits review proceedings (Appendix B to *Legal Services Directions 2017*).

- make recommendations on the operation of the FOI Act.

## Review FOI decisions of agencies and ministers

15. The Information Commissioner has the power to review decisions under Part VII of the FOI Act (IC reviews).<sup>22</sup> This is a mandatory power and once a valid application for IC review is received, the Information Commissioner must either exercise the discretion not to conduct the review<sup>23</sup> or conduct the review.<sup>24</sup>
16. This section also sets out the Information Commissioner's enforcement powers during and after the conduct of an IC review.
17. During an IC review, the Information Commissioner can exercise powers to:
  - issue directions about the conduct of IC reviews generally or in relation to a specific IC review<sup>25</sup>
  - expedite an IC review upon request<sup>26</sup>
  - obtain information upon request<sup>27</sup>
  - compel the production of information and documents<sup>28</sup>
  - require a person to appear before the Information Commissioner to answer questions under oath or affirmation<sup>29</sup>
  - refer a question of law to the Federal Court of Australia,<sup>30</sup> and
  - exercise the discretion not to undertake an IC review including where it is appropriate that matters be referred to the Administrative Appeals Tribunal.<sup>31</sup>
18. In exercising the power to conduct review of decisions about access to documents and amendment or annotation of personal records, the Information Commissioner is guided by four key principles:
  - it is a merit review process where the Information Commissioner makes the correct or preferable decision at the time of decision by the Information Commissioner
  - it is intended to be as informal as possible

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<sup>22</sup> See the AIC Act, ss 8(h), 10(2), 11(3) and 12(3).

<sup>23</sup> See the FOI Act, s 54W.

<sup>24</sup> See the FOI Act, Part VII.

<sup>25</sup> See the FOI Act, s 55(2)(e) and the FOI Guidelines, Part 10. See for example, Australian Information Commissioner, *Direction as to certain procedures to be followed in IC reviews* (Practice Direction – Certain procedures in IC reviews).

<sup>26</sup> See the FOI Guidelines, Part 10.

<sup>27</sup> See the FOI Guidelines, Part 10.

<sup>28</sup> See the FOI Act, ss 55R, 55T, 55U and the FOI Guidelines, Part 10 and Practice Direction – Certain procedures in IC reviews.

<sup>29</sup> See the FOI Act, ss 55W and 55X and the FOI Guidelines Part 10 and Practice Direction – Certain procedures in IC reviews.

<sup>30</sup> See the FOI Act, s 55H and the FOI Guidelines, Part 10.

<sup>31</sup> See the FOI Act, s 54W and the FOI Guidelines, Part 10.

- it is intended to be non-adversarial, and
  - it is intended to be timely.
19. The factors the Information Commissioner takes into account in deciding whether or not to exercise the powers during an IC review may include:
- the objects of the FOI Act
  - the factors set out in Part 10 of the FOI Guidelines that the Information Commissioner considers in deciding whether it is appropriate to exercise the discretion not to undertake a review or continue a review in keeping with the objects of the FOI Act<sup>32</sup>
  - whether a party to an IC review has requested that the matter be expedited or the IC review application or submissions by the parties reveal matters that warrant expedition of the IC review, and
  - the factors set out in Part 10 of the FOI Guidelines that the Information Commissioner considers in deciding which information gathering powers are most appropriate to resolve the IC review at hand.<sup>33</sup>
20. The Information Commissioner uses a range of sources to obtain information on these factors which may include:
- applications for IC review and submissions by parties to an IC review
  - relevant IC review decisions, AAT decisions, judgments of the Federal Court of Australia and the High Court of Australia, and
  - other sources of relevant information in the circumstances.
21. During and after an IC review, the Information Commissioner can exercise enforcement powers to compel compliance with, or where relevant, to seek prosecution of a failure to comply with:
- a notice to produce<sup>34</sup>
  - a notice to appear<sup>35</sup>
  - an oath or affirmation administered by the Information Commissioner that the answers that a person<sup>36</sup> will give will be true,<sup>37</sup> and
  - an IC review decision.<sup>38</sup>
22. The factors the Information Commissioner takes into account in deciding whether or not to exercise the enforcement powers may include:
- the objects of the FOI Act

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<sup>32</sup> See the FOI Act, s 54W and the FOI Guidelines, Part 10.

<sup>33</sup> See the FOI Act, Part VII, Division 8 and the FOI Guidelines, Part 10.

<sup>34</sup> See the FOI Act, s 55R and the FOI Guidelines, Part 10.

<sup>35</sup> See the FOI Act, s 55W and the FOI Guidelines, Part 10.

<sup>36</sup> A person who is required to appear under a notice to appear. See the FOI Act, s 55X(1) and (2).

<sup>37</sup> See the FOI Act, s 55X and the FOI Guidelines, Part 10.

<sup>38</sup> See the FOI Act, s 55P and the FOI Guidelines, Part 10.

- whether or not the agency, minister or individual has complied with the notice to produce, notice to appear or IC review decision
  - whether or not the agency, minister or individual has attempted to comply with the notice to produce, notice to appear or IC review decision and any reasons given for non-compliance, and
  - any other factors the Information Commissioner considers relevant in the circumstances.
23. The Information Commissioner uses a range of sources to obtain information on these factors which may include:
- submissions by parties to the IC review, and
  - other sources of relevant information in the circumstances.

## Investigate an action taken by an agency

24. The Information Commissioner has the power to undertake investigations under Part VIIB of the FOI Act.<sup>39</sup> Once a valid FOI complaint is received, the Information Commissioner must either exercise the discretion not to investigate the complaint or investigate the complaint. The Information Commissioner cannot investigate a minister's handling of FOI matters.
25. The Information Commissioner also has the power to undertake an investigation on the Information Commissioner's own initiative, this is known as a 'Commissioner-initiated investigation' (CII).<sup>40</sup>
26. In relation to FOI complaints and CIIs, the Information Commissioner can exercise powers to:
- exercise the discretion not to investigate an FOI complaint including where it is appropriate that matters be considered within an IC review<sup>41</sup>
  - conduct preliminary inquiries in relation to FOI complaints<sup>42</sup>
  - transfer the FOI complaint to the Ombudsman<sup>43</sup>
  - commence a CII
  - conduct the investigation of an FOI complaint or CII
  - expedite an investigation of an FOI complaint or CII
  - obtain information upon request<sup>44</sup>
  - compel the production of information and documents<sup>45</sup>

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<sup>39</sup> See the AIC Act, ss 8(i), 10(2), 11(3) and 12(3).

<sup>40</sup> See the FOI Act, s 69(2).

<sup>41</sup> See the FOI Act, s 73 and the FOI Guidelines, Part 11.

<sup>42</sup> See the FOI Act, s 72 and the FOI Guidelines, Part 11.

<sup>43</sup> See the FOI Act, s 74 and the FOI Guidelines, Part 11.

<sup>44</sup> See the FOI Guidelines, Part 11.

<sup>45</sup> See the FOI Act, s 79 and the FOI Guidelines, Part 11.

- authorise a person to enter premises occupied by an agency or a contracted service provider,<sup>46</sup> and
- require a person to appear before the Information Commissioner to answer questions under oath or affirmation.<sup>47</sup>

27. In exercising the power to decline to investigate an FOI complaint, the Information Commissioner may consider the following factors:

- the factors set out in Part 11 of the Guidelines that the Information Commissioner considers in deciding whether it is appropriate to exercise the discretion to not investigate an FOI complaint<sup>48</sup>
- whether the action subject to the complaint was not taken in the performance of the agency's functions under the FOI Act<sup>49</sup>
- whether the matter falls within the jurisdiction of the Information Commissioner and another body such as the Commonwealth Ombudsman<sup>50</sup>
- where the matter falls within the jurisdiction of another body, whether the Information Commissioner is the most appropriate body to investigate and resolve the complaint,<sup>51</sup>
- where the matter falls within the jurisdiction of another body, whether the complainant made a complaint or application to the other body<sup>52</sup>
- where the complainant has made a complaint or application to another body and how the other body has dealt with or is dealing with the complaint or application<sup>53</sup>
- whether the complaint is frivolous, vexatious, misconceived, lacking in substance or not made in good faith<sup>54</sup>, and
- whether the complainant has sufficient interest in the subject matter of the complaint.<sup>55</sup>

28. In deciding whether or not to exercise the powers to investigate a complaint, commence a CII as well as exercise powers during and following an investigation of an FOI complaint or CII, the Information Commissioner may take into account the following factors:

- the objects of the FOI Act
- the risks and impact of non-compliance by agencies or ministers with the FOI Act

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<sup>46</sup> See the FOI Act, s 77.

<sup>47</sup> See the FOI Act, ss 82 and 83 and the FOI Guidelines, Part 11.

<sup>48</sup> See the FOI Guidelines, Part 11.

<sup>49</sup> See the FOI Act, ss 73(a).

<sup>50</sup> See the FOI Act, ss 73(c) and 74.

<sup>51</sup> See the FOI Act, ss 73(c) and 74.

<sup>52</sup> See the FOI Act, ss 73(b).

<sup>53</sup> See the FOI Act, s 73(d).

<sup>54</sup> See the FOI Act, ss 73(e).

<sup>55</sup> See the FOI Act, ss 73(f).

- the factors set out in Part 11 of the Guidelines that the Information Commissioner considers in deciding whether it is appropriate to exercise the discretion to not investigate an FOI complaint<sup>56</sup>
- whether a party to an investigation of an FOI complaint or CII has requested that the matter be expedited or the application or submissions by the parties reveal matters that warrant expedition of the investigation<sup>57</sup>
- the factors set out in Part 11 of the Guidelines that the Information Commissioner considers in deciding which information gathering powers are most appropriate to the investigation at hand,<sup>58</sup> and
- any other factors which the Information Commissioner considers relevant in the circumstances.

29. The Information Commissioner uses a range of sources to obtain information on these factors which may include:

- stakeholder engagement
- submissions by parties to the FOI complaint or CII
- IC review decisions, AAT decisions, judgments of the Federal Court of Australia and the High Court of Australia
- trends that emerge from applications for IC review, FOI complaints and information that is revealed during CIIs
- a report of FOI statistics by an agency
- a referral from another regulator, and
- other sources of relevant information in the circumstances.

30. During and after the investigation of a complaint or CII, the Information Commissioner can exercise enforcement powers to compel compliance with or, where relevant, to seek prosecution of a failure to comply with:

- a notice to produce<sup>59</sup>
- a notice to appear<sup>60</sup>
- an oath or affirmation administered by the Information Commissioner that the answers that a person<sup>61</sup> will give will be true,<sup>62</sup> and

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<sup>56</sup> See the FOI Guidelines, Part 11.

<sup>57</sup> See the FOI Guidelines, Part 11.

<sup>58</sup> See the FOI Guidelines, Part 11.

<sup>59</sup> See the FOI Act, s 79 and the FOI Guidelines, Part 11.

<sup>60</sup> See the FOI Act, s 82 and the FOI Guidelines, Part 11.

<sup>61</sup> A person who is required to appear under a notice to appear. See the FOI Act, s 83.

<sup>62</sup> See the FOI Act, s 83 and the FOI Guidelines, Part 11.

- a recommendation following the investigation of the complaint.<sup>63</sup>
31. The factors the Information Commissioner takes into account in deciding whether or not to exercise the enforcement powers may include:
- the objects of the FOI Act
  - whether or not the agency, minister or individual has complied with the notice to produce, notice to appear or recommendation
  - whether or not the agency, minister or individual has attempted to comply with the notice to produce, notice to appear or recommendation and any reasons given for non-compliance, and
  - any other factors the Information Commissioner considers relevant in the circumstances.
32. The Information Commissioner uses a range of sources to obtain information on these factors which may include:
- submissions by parties to the FOI complaint, and
  - other sources of relevant information in the circumstances.

## Issue FOI guidelines

33. The Information Commissioner has issued guidelines about the operation of the FOI Act under s 93A of that Act.<sup>64</sup> Section 93A requires Australian Government ministers and agencies to have regard to these guidelines when performing a function or exercising a power under the FOI Act. The Information Commissioner may review or reissue the guidelines to reflect legislative and case law developments and this regulatory policy.

## Extend the period of time to decide FOI requests

34. The FOI Act confers on the Information Commissioner the power to extend the period of time to decide FOI requests on application by an agency or minister.<sup>65</sup>
35. The Information Commissioner may grant extensions of time in response to an application by an agency or minister under ss 15AB, 15AC, 51DA and 54D of the FOI Act.
36. Section 15AB allows for an extension of time to decide a complex or voluminous FOI request. When deciding an application for an extension of time under s 15AB the Information Commissioner considers factors that may include:

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<sup>63</sup> See the FOI Act, s 89 and the FOI Guidelines, Part 11.

<sup>64</sup> See the FOI Act, s 93A and the AIC Act, ss 8(e), 10(2), 11(3) and 12(3).

<sup>65</sup> See Office of the Australian Information Commissioner, *FOI agency resource 13: Extension of time for processing requests*, Office of the Australian Information Commissioner website < <https://www.oaic.gov.au/freedom-of-information/foi-resources/foi-agency-resources/foi-agency-resource-13-extension-of-time-for-processing-requests>>.

- factors set out in Part 3 of the Guidelines that are taken into account by the Information Commissioner in deciding whether to exercise the power to grant an extension of time as well as the sources of information that may be relevant to these factors.<sup>66</sup>
  - the scope of the request and the range of documents covered
  - work already undertaken on the request
  - any consultation with the applicant concerning length of time
  - whether other agencies or parties have an interest in the request, and
  - measures to be taken by the agency or minister to ensure a decision is made within the extended time period and to keep the applicant informed about progress.
37. When deciding an application for an extension of time under ss 15AC, 51DA or 54D, the Information Commissioner considers factors that may include:
- factors set out in Part 3 of the Guidelines that are taken into account by the Information Commissioner in deciding whether to exercise the power to grant an extension of time as well as the sources of information that may be relevant to these factors<sup>67</sup>
  - the scope and complexity of the request
  - the reasons for delay in making an initial decision
  - the period of time sought
  - the estimated total processing time
  - whether discussions with the applicant about the delay and extension application have occurred
  - the total elapsed processing time, and
  - the desirability of the decision being decided by the agency or minister rather than by IC review.

## Declare a person to be a vexatious applicant

38. The FOI Act confers on the Information Commissioner the power to declare a person a vexatious applicant.<sup>68</sup>
39. The Information Commissioner may declare a person to be a vexatious applicant, either on the Commissioner's own motion or on the application of an agency or minister.<sup>69</sup> A declaration has effect in accordance with the terms and conditions stated in the declaration.<sup>70</sup>
40. A vexatious application declaration may provide that an agency or minister may refuse to consider an FOI request, an application to amend records under the FOI Act and an application

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<sup>66</sup> See the FOI Guidelines, Part 3.

<sup>67</sup> See the FOI Guidelines, Part 3.

<sup>68</sup> See the FOI Act, s 89K.

<sup>69</sup> See the FOI Act, s 89K.

<sup>70</sup> See the FOI Act, s 89M.

for internal review of an FOI decision if made without the written permission of the Information Commissioner.<sup>71</sup>

41. A declaration has the practical effect of preventing a person from exercising an important legal right conferred by the FOI Act. The power to make a declaration is discretionary and will not be lightly made. This power is an important element of the balance in the FOI Act between conferring a right of access to documents while ensuring that access requests do not interfere unreasonably with agency operations. In addition to considering the grounds for a declaration specified in s 89L,<sup>72</sup> the Information Commissioner may consider other relevant features of a person's access actions or the FOI administration of an agency that has applied for a declaration.
42. Part 12 of the Guidelines sets out the factors that are taken into account by the Information Commissioner in deciding whether to exercise the power to make a vexatious applicant declaration as well as the sources of information that may be relevant to these factors.<sup>73</sup>

## Make disclosure log determinations

43. The FOI Act confers on the Information Commissioner the power to make determinations that the requirement to publish information in a disclosure log does not apply to specified information.<sup>74</sup>
44. In deciding whether to make a determination, the Information Commissioner may consider matters such as:<sup>75</sup>
  - the extent to which publication of the information in question would further the objects of the FOI Act
  - whether there is an established and reasonable public demand for the information, and
  - the estimated resource requirement for an agency to publish the information, and whether this would require an unreasonable diversion of agency resources.
45. Determinations are published on the Office of the Australian Information Commissioner website.

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<sup>71</sup> See the FOI Act, s 89M.

<sup>72</sup> The Information Commissioner may declare a person to be a vexatious applicant only if the Commissioner is satisfied that the person has repeatedly engaged in access actions that involve an abuse of process; the person is engaging in a particular access action that would involve an abuse of process; or a particular access action by the person would be manifestly unreasonable. See the FOI Act, s 89L.

<sup>73</sup> See the FOI Guidelines, Part 12.

<sup>74</sup> See the FOI Act, s 11C and the FOI Guidelines, Part 14.

<sup>75</sup> See Office of the Australian Information Commissioner, *Information Publication Scheme (IPS) and Disclosure Log determinations policy and procedure*, Office of the Australian Information Commissioner website <<https://www.oaic.gov.au/freedom-of-information/foi-resources/foi-agency-resources/information-publication-scheme-ips-and-disclosure-log-determinations-policy-and-procedure>>.

## Oversee the Information publication scheme (IPS)

46. Part II of the FOI Act establishes an Information Publication Scheme (IPS) for Australian Government agencies subject to the FOI Act.<sup>76</sup>
47. The Information Commissioner has the power to:
- assist agencies to publish information in accordance with the IPS<sup>77</sup>
  - perform functions conferred by the FOI Act on the Information Commissioner for reviewing the operation of the IPS<sup>78</sup>
  - investigate complaints about an agency's IPS compliance,<sup>79</sup> and
  - undertake a CII into an agency's FOI actions.<sup>80</sup>
48. The factors the Information Commissioner takes into account in deciding to exercise the power to oversee the IPS may include:
- the objects of the FOI Act
  - the risks and impact of non-compliance by agencies or ministers with the FOI Act, and
  - any other factors which the Information Commissioner considers relevant in the circumstances.
49. The Information Commissioner uses a range of sources to inform the consideration of these factors which may include:
- the information published on the websites of agencies in accordance with IPS obligations
  - stakeholder engagement, and
  - other sources of relevant information in the circumstances.

## Raise awareness of FOI and educate Australians and agencies about their rights and obligations

50. The Information Commissioner has the power to:
- promote awareness and understanding of the FOI Act and the objects of the Act,<sup>81</sup> and
  - provide information, advice, assistance and training on the operation of the FOI Act.<sup>82</sup>
51. The preferred regulatory approach of the Information Commissioner, where there is a discretion, is to work with agencies and ministers to facilitate compliance and promote best

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<sup>76</sup> See the FOI Guidelines, Part 13.

<sup>77</sup> See the AIC Act, ss 8(b), 10(2), 11(3) and 12(3).

<sup>78</sup> See the FOI Act, s 8F and the AIC Act, ss 8(c), 10(2), 11(3) and 12(3).

<sup>79</sup> See the FOI Act, s 70.

<sup>80</sup> See the FOI Act, s 69(2) and the FOI Guidelines, Part 11.

<sup>81</sup> See the AIC Act, ss 8(a), 10(2), 11(3) and 12(3).

<sup>82</sup> See the AIC Act, ss 8(d), 10(2), 11(3) and 12(3).

practice with respect to the obligations and objects of the FOI Act. This will often be a more efficient and effective means of pursuing the objects of the FOI Act.

52. The range of sources the Information Commissioner may use to assess how to exercise this power include:
- stakeholder engagement
  - reports of FOI statistics by agencies
  - individual applications for IC review, FOI complaints and information that is revealed during a CII
  - trends in applications for IC review and FOI complaints
  - the nature and frequency of queries received by the OAIC's FOI enquiries telephone line, and
  - other sources of relevant information in the circumstances.
53. As part of this approach the Information Commissioner will continue to:
- conduct activities to raise awareness about information access rights which may include Right to Know Day activities
  - engage with other Information Commissions to raise awareness about information access rights
  - engage with agencies and ministers to provide guidance including by:
    - providing policy guidance to agencies or ministers
    - directing agencies or ministers to relevant resources developed by the Information Commissioner
    - conducting open dialogue with specific agencies or ministers
    - notifying an agency or minister of any concerns that the agency or minister may not be acting consistently with the FOI Act and its objects, and
    - allowing the agency or minister an opportunity to respond to any concerns
  - promote best practice compliance, and
  - identify and address FOI concerns as they arise.
54. The OAIC website ([www.oaic.gov.au](http://www.oaic.gov.au)) provides various practical resources for the public and agencies on the operation and administration of the FOI Act. These include:
- written guidance such as the FOI Guide, FOI fact sheets and answers to frequently asked questions
  - resources for FOI decision makers (FOI agency resources) including step by step guidance, tips, checklists, and templates for notices and statements of reasons, and
  - a link to the published Information Commissioner review (IC review) decisions and vexatious applicant declaration decisions on AustLii.
55. The OAIC also operates an FOI enquiries line and has a dedicated enquiries email address. The OAIC responds to FOI enquiries by telephone, in writing and in person.

## Monitor agencies' compliance with the FOI Act

56. The Information Commissioner has the power to monitor, investigate and report on compliance by agencies with the FOI Act.<sup>83</sup>
57. The factors the Information Commissioner takes into account in monitoring compliance with the FOI Act may include:
- the objects of the FOI Act
  - the risks and impact of non-compliance by agencies or ministers with the FOI Act, and
  - any other factors which the Information Commissioner considers relevant in the circumstances.
58. The Information Commissioner uses a range of sources to inform the consideration of these factors which may include:
- stakeholder engagement
  - reports of FOI statistics by agencies
  - individual applications for IC review, FOI complaints and information that is revealed during a CII, and
  - other sources of relevant information in the circumstances.

## Compile FOI data and assess trends

59. Australian Government agencies and ministers must provide the Information Commissioner with information and statistics about FOI matters.<sup>84</sup> The Information Commissioner is required to prepare an annual report on the operations of the Information Commissioner during the year.<sup>85</sup> The report must include information about FOI administration in agencies.<sup>86</sup>
60. The FOI Act requires agencies and ministers to provide information and statistics to the Information Commissioner to enable the Commissioner to prepare a report.<sup>87</sup> An agency or minister must also comply with any additional requirements in the regulations regarding the provision of information or the maintenance of records for the purposes of providing the information and statistics to the Information Commissioner.<sup>88</sup>

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<sup>83</sup> See the AIC Act, ss 8(g), 10(2), 11(3) and 12(3).

<sup>84</sup> See the AIC Act, ss 8(j), 10(2), 11(3) and 12(3), 30 and 31.

<sup>85</sup> See the AIC Act, ss 30 and the FOI Guidelines, Part 15.

<sup>86</sup> See the AIC Act, ss 31(1)(b), (c), (d) and (e) and 31(2).

<sup>87</sup> See the FOI Act, s 93 and the AIC Act, s 30.

<sup>88</sup> See the FOI Act, s 93(3) and *Freedom of Information (Miscellaneous Provisions) Regulations 1982* reg 5.

## Make recommendations on the operation of the FOI Act

61. The Information Commissioner has the power to report and recommend to the Minister<sup>89</sup> proposals for legislative change to the FOI Act or desirable or necessary administrative action in relation to the operation of the FOI Act.
62. The factors the Information Commissioner takes into account in exercising the power to report and recommend legislative change or administrative action may include:
  - the objects of the FOI Act
  - the risks and impact of non-compliance by agencies or ministers with the FOI Act, and
  - any other factors which the Information Commissioner considers relevant in the circumstances.
63. The Information Commissioner uses a range of sources to inform the consideration of these factors which may include:
  - stakeholder engagement
  - reports of FOI statistics by agencies
  - trends in applications for IC review and FOI complaints, and
  - other sources of relevant information in the circumstances.

## Working with agencies, ministers and regulators

64. The Information Commissioner works with agencies, ministers and regulators (including other information commissioners) to promote access to information through regulatory action and participation in domestic and international networks.
65. The Information Commissioner will seek to work in partnership with agencies, ministers and regulators to promote access to information, recognising the practical and resource advantages in doing so.

## Working with agencies and ministers to promote information access through regulatory action

66. The Information Commissioner will continue to engage with agencies and ministers when:
  - reviewing FOI decisions of agencies and ministers
  - deciding whether to commence CIs or investigate an FOI complaint
  - deciding whether to make a vexatious applicant declaration
  - overseeing the IPS

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<sup>89</sup> The Commonwealth Attorney-General is the Minister responsible for the administration of the FOI Act.

- raising awareness of FOI and educating agencies about information access rights and obligations, and
- reporting FOI statistics .

## Working with agencies, ministers and regulators to promote information access through networks

67. The Information Commissioner will promote access to information through participation in domestic and international networks.

68. The Information Commissioner will continue to:

- participate in the Australian Government's Open Government Forum to monitor and drive implementation of the Open Government National Action Plan 2016-2018, develop the next Open Government National Action Plan and raise awareness about access to information
- provide information and engage with stakeholders through the Information Contact Officer Network (ICON) and OAICnet
- regularly engage with agencies, ministers and other Information Commissioners to raise awareness about information access rights, and
- participate in FOI networks, the Association of Information Access Commissioners and the International Conference of Information Commissioners.

## Public communication as part of FOI regulatory action

69. Public communication of the work of the Information Commissioner is an important element in FOI regulatory action and fulfilling the objectives of the FOI Act. Public communication:

- encourages FOI compliance by increasing awareness and knowledge of FOI rights and obligations, and deterring breaches of the FOI Act
- promotes public confidence in the regulatory activities of the Information Commissioner, by publicising actions taken to address breaches of the FOI Act and agencies that are not complying with obligations under the FOI Act, and
- ensures transparency and accountability around the Information Commissioner's use of the FOI regulatory powers.

## Communications approach

70. A decision to publicly communicate information will be guided by the regulatory action principles in this policy (see above).

71. The Information Commissioner's decision to publicly communicate information is subject to the AIC Act and FOI Act which prohibit the unauthorised disclosure or other use of information obtained in the course of performing FOI functions.<sup>90</sup>
72. The Information Commissioner will not comment publicly about the commencement of or ongoing complaint investigations and CII as the FOI Act provides that investigations must be conducted in private.<sup>91</sup>
73. The Information Commissioner will generally not comment publicly about ongoing IC review applications or the exercise of investigative powers.
74. The FOI Act requires that the Information Commissioner publishes all IC review decisions.<sup>92</sup> Where an IC review application proceeds to a decision under s 55K by the Commissioner directly, the decision is published on the [AustLII AICMr website database](#).
75. When publicly communicating information about FOI regulatory action the Information Commissioner will strive to ensure that:
  - all public statements are accurate, fair and balanced
  - a comment on a court proceeding involving an FOI Act issue, prior to the resolution of the proceedings, will generally be confined to the history of the proceedings and any earlier findings by the Information Commissioner or the Commonwealth Ombudsman, and
  - all public statements comply with the Information Commissioner's legal obligations, including privacy, confidentiality and secrecy obligations and court or tribunal orders.

### **Examples of communications**

76. The Information Commissioner may publicly communicate the outcome of FOI regulatory action, in the following ways:
  - publishing IC review decisions and vexatious applicant declarations made by the Information Commissioner,<sup>93</sup> and
  - issuing a public report following a CII.
77. The Information Commissioner will publish general statistics of the OAIC and from across the Australian Government which reflect both FOI regulatory action processes and regulatory outcomes.<sup>94</sup> These statistics will be contained in the OAIC's annual report, and will include:
  - the number and outcomes of FOI requests received and finalised
  - the number and outcomes of internal review applications received and finalised
  - the use of exemptions in FOI decisions

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<sup>90</sup> See the AIC Act, s 29 and the FOI Act, ss 55T(5) and 55U(4).

<sup>91</sup> See the FOI Act, s 76(1).

<sup>92</sup> See the FOI Act, s 55K(8) which obliges the Information Commissioner to publish a decision on an IC review to members of the public generally.

<sup>93</sup> See the FOI Act, s 55K(8) which obliges the Information Commissioner to publish a decision on an IC review to members of the public generally.

<sup>94</sup> See the AIC Act, ss 30 and 31.

- the time taken to respond to FOI requests, and any charges collected
- the number of determinations of FOI requests for amendment of personal records
- the number and outcomes of requests for extension of time to process FOI requests
- the number and outcomes of IC review applications
- the number and outcomes of vexatious applicant declaration applications
- the number of FOI complaints received and closed
- the number and outcomes of applications to the AAT for FOI review, and
- the comparative approximate yearly costs across the Australian Government of FOI processing and IPS activity.

## Key legislation

*Australian Information Commissioner Act 2010*

*Freedom of Information Act 1982*

*Freedom of Information (Charges) Regulations 1982*

*Freedom of Information (Miscellaneous Provisions) Regulations 1982*

## Glossary

AAT	Administrative Appeals Tribunal
AIC Act	<i>Australian Information Commissioner Act 2010</i>
CII	Commissioner-initiated investigation
FOI Act	<i>Freedom of Information Act 1982</i>
FOI regulatory action	regulatory action specified in AIC Act
Information Commissioner review	referred to in the FOI Act as ‘IC review’; merit review by the Information Commissioner of an agency’s decision regarding access to, or annotation of, a document, carried out at the request of an applicant or third party
IPS	Information Publication Scheme (established under Part II of the FOI Act)
OAIC	Office of the Australian Information Commissioner