

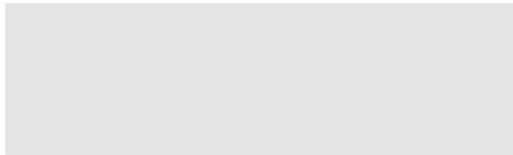


Australian Government
**Australian Customs and
Border Protection Service**

Customs House
5 Constitution Avenue
CANBERRA ACT 2601

9 April 2014

File No: 2013/042072



Dear [REDACTED]

Freedom of Information Request

I refer to your email dated 17 December 2013 in which you request access to documents held by the Australian Customs and Border Protection Service (ACBPS) under the *Freedom of Information Act 1982* (the FOI Act).

I am authorised under section 23 of the FOI Act to make decisions to release and to refuse access to exempt documents.

Scope of Request

You have requested access to the following documents:

- a) *"Copies of: Minutes of the ACBPS meeting that determined the change of practice from that of ACN2007/56 to that of ACBPN2013/64 or such relevant sections of those minutes in which the decision was made;*
- b) *legal advice sought and given prior to that meeting or any legal advice sought and received at any time in respect of change of practice; and*
- c) *email correspondence relevant to the issue of ACBPS2013/64, including any in which my name appears".*

On 3 March 2014, you agreed to vary the scope of your request to exclude any correspondence between yourself and ACBPS.

Charges

On 13 February 2014, ACBPS notified you of the estimated charges associated with processing this request in the amount of \$ [REDACTED] .

On 14 February 2014, you requested that ACBPS waive the charges imposed on the grounds that the release of the information would be in the public interest.

On 18 March 2014, ACBPS issued a decision affirming the imposition of charges, but agreed to reduce the charges imposed to \$ [REDACTED] to reflect the revised scope agreed by you on 3 March 2014.

On 19 March 2014, you paid the charges in full.

Decision on access

ACBPS has identified 44 documents that fall within the scope of your request. These documents were in the possession of ACBPS on 17 December 2013 when your FOI request was received.

I make the following decision in relation to the documents in the possession of ACBPS which come within the scope of your request:

- Exempt one document in full;
- Release 38 documents in part with deletions, and
- Release five documents in full.

A schedule of these documents is at **Attachment A** for your reference.

I have provided detailed reasons for my decision below.

Reasons for Decision

The schedule of the 44 documents that fall within the scope of your request at Attachment A sets out the decision on access and, where appropriate, refers to various sections of the FOI Act. My reasoning in relation to the application of each section to particular documents is set out below.

1 Section 22(1)(a)(ii) of the FOI Act – irrelevant to request

I have decided that the deleted parts of documents numbered 2-4, 7-12, 15-18 and 22-24 would disclose information that could reasonably be regarded as irrelevant to your request. I note that most of this information consists of emails between yourself and ACBPS, which you have agreed to remove from the scope of this request.

Therefore, the irrelevant information has been deleted from the documents.

The remainder of the documents have been considered for release to you as they are relevant to your request.

2 Section 47C of the FOI Act – Deliberative Processes

I consider that documents numbered 2, 4, 5, 13, 15, 16, 19, 21, 27, 30, 42 and 43 contain opinion and deliberations prepared or recorded in the course of, or for the purposes of, the deliberative processes involved in the functions of ACBPS.

In relation to documents numbered 2, 4, 5, 13, 15, 16, 19, 21, 27 and 30, these documents consist of draft wording proposed in relation to the ACBPN. This wording did not reach a final conclusion by being included in the final version of the ACBPN and as such I regard it as deliberative material.

In relation to documents numbered 42 and 43, these documents contain the opinions of individuals offered up during the deliberations relating to the functions of ACBPS. These deliberative processes include a process of reflection in relation to the matters under consideration at that time.

The information does not fall within any of the exclusions in subsections 47C(2) and (3) of the FOI Act.

The information satisfies the conditional exemption in section 47C of the FOI Act.

I have discussed the relevant public interest considerations below.

3 Section 47E of the FOI Act – Operations of Agencies

I consider that the disclosure of part of document numbered 7 would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of ACBPS.

This information contains reference to a computer system used by ACBPS for the purposes of managing the security and integrity of Australia's borders. This function is integral to the operations of ACBPS. Any prejudice to the effectiveness of law enforcement methods and procedures used in undertaking that role would result in a substantial adverse effect on the operations of ACBPS.

Any disclosure resulting in the prejudice of the effectiveness of those lawful methods and procedures would result in the need for this Service, and potentially other law enforcements agencies, to change those methods and/or procedures to avoid jeopardising their future effectiveness.

Accordingly, I have decided that part of document numbered 7 is conditionally exempt under section 47E(d) of the FOI Act.

4 Section 47F of the FOI Act – Personal Privacy

The disclosure of parts of documents numbered 1-4, 6-18, 20 22-25 28 31 33 35 37-43 would disclose personal information relating to third parties. Some of the paragraphs contain information which would reasonably identify an ACBPS officer, either through names, positions or descriptions of their role or employment circumstance. These individuals are non-Senior Executive Service officers whose personal information is not publicly available. The remainder of this personal information relates to third party private individuals.

I have decided that the disclosure of the information within these documents would involve an unreasonable disclosure of personal information about a number of individuals. Accordingly, parts of these documents are conditionally exempt under section 47F of the FOI Act.

I have discussed the relevant public interest considerations below.

5 Section 47G of the FOI Act – Business Affairs

I have decided that document numbered 44 and parts of documents numbered 13, 15, and 43 contain information concerning the business, commercial or financial affairs of an organisation. This information consists of opinions of a private business sought by ACBPS and was not intended for disclosure to the public at large. This information is not in the public domain. I note that reference to this information is contained on that entity's website, but access to the content of that item is restricted and access is by means of a password and authorised login.

I consider that disclosure of the information would, or could reasonably be expected to, unreasonably affect that organisation in respect of its lawful business, commercial or financial affairs.

Accordingly, the documents are conditionally exempt under section 47G of the FOI Act.

Consultation regarding business affairs

On 9 January 2014, ACBPS notified you that it was consulting a number of third parties under section 27 of the FOI Act. It appeared to ACBPS that those third party organisations or undertakings might reasonably wish to make an exemption contention because of business information in the document.

One third party organisation that was consulted made submissions contending that the release of their information contained within the documents is conditionally exempt under section 47G of the FOI Act, and that access to the document, on balance, would be contrary to the public interest.

In making my decision in relation to the application of section 47G, I have had regard to those submissions received from the third party organisation.

I have discussed the relevant public interest considerations below.

6 The public interest – section 11A of the FOI Act

As I have decided that parts of the documents are conditionally exempt, I am now required to consider whether access to those documents would be contrary to the public interest (section 11A of the FOI Act).

A part of a document which is conditionally exempt must also meet the public interest test in section 11A(5) before an exemption may be claimed in respect of that part.

In summary, the test is whether access to the conditionally exempt part of the document would be, on balance, contrary to the public interest.

In applying this test, I have noted the objects of the FOI Act and the importance of the other factors listed in section 11B(3) of the FOI Act, being whether access to the document would do any of the following:

- (a) *promote the objects of this Act (including all the matters set out in sections 3 and 3A);*
- (b) *inform debate on a matter of public importance;*
- (c) *promote effective oversight of public expenditure;*

(d) *allow a person to access his or her own personal information.*

Having regard to the above:

- I am satisfied that access to the documents would promote the objects of the FOI Act.
- I consider that the subject matter of the documents does not, in itself, seem to have the character of public importance. The matter has a very limited scope and, in my view, would be of interest to a very narrow section of the public.
- I consider that no insights into public expenditure will be provided through examination of the documents.
- I am satisfied that you do not require access to the documents in order to access your own personal information, noting that you have agreed to remove from the scope of the request any correspondence between yourself and ACBPS.

Disclosure of all aspects of the documents would not provide a person with sufficient information to assess the rigour or efficiencies of internal decision making processes within ACBPS, promote scrutiny of government decision making or reveal the reasoning for a government decision. I consider these considerations as neutral.

I have also considered the factors that weigh against the release of the documents:

- Disclosure of the conditionally exempt information under section 47C could reasonably be expected to prejudice the ability of ACBPS to manage future deliberations with internal and external stakeholders. I consider that the disclosure of this type of deliberative material may hinder the future cooperation or participation in those deliberative processes, and that there is a real public interest in this agency being able to undertake unhindered deliberations in the future. This is a factor which I consider strongly weighs against disclosure.
- I consider that the disclosure of the part of document numbered 7 that is conditionally exempt under section 47E(d) of the FOI Act could reasonably be expected to prejudice law enforcement functions and, as a result, the ability of ACBPS to protect Australia's borders. I consider there to be a strong public interest in ensuring that the ability of ACBPS to conduct its law enforcement functions is not compromised or prejudiced in any way. I consider that this factor weighs heavily against disclosure.
- The disclosure of the personal information of individuals contained in the documents could reasonably be expected to prejudice the protection of those individuals' right to privacy.
- In addition, the disclosure of the personal information of ACBPS officers contained in documents could reasonably be expected to prejudice the protection of those individuals' right to privacy. The names of these particular officers are not available through any other publicly available source and are not included in the ACBPS organisational chart.

- It is my view that it is firmly in the public interest to uphold the rights of individuals to their own privacy. I consider that this factor weighs heavily against disclosure.
- I consider that the disclosure of document numbered 44 and parts of documents numbered 13, 15 and 43 that are conditionally exempt under section 47G of the FOI Act could reasonably be expected to prejudice the business activities of a third party organisation. The third party organisation has been consulted by ACBPS in relation to the release of its information, and it has indicated that it regards this information as having been provided to the original recipients as part of their business activities. I consider that this factor weighs heavily against disclosure.

I have also had regard to section 11B(4) which sets out the factors which are irrelevant to my decision, which are:

- (a) access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government;*
- (b) access to the document could result in any person misinterpreting or misunderstanding the document;*
- (c) the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made;*
- (d) access to the document could result in confusion or unnecessary debate.*

I have not taken into account any of those factors in this decision.

Upon balancing all of the above relevant public interest considerations, I have concluded that the disclosure of the conditionally exempt documents is not in the public interest and therefore exempt from disclosure under the FOI Act.

Legislation

I have attached an extract of the exemption provisions of the FOI Act and the public interest test for your information at **Attachment B**.

Your Review Rights

The FOI Act grants you rights to have my decision reviewed.

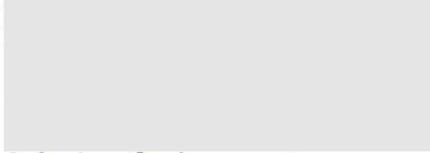
Information regarding your review rights is available in the Office of the Australian Information Commissioner's (OAIC) FOI Fact Sheet 12 at **Attachment C** for your reference.

Making a Complaint

At **Attachment D** is FOI fact sheet 13 from the OAIC. This sets out how you may complain to the Australian Information Commissioner if you have concerns about how ACBPS has handled your request for documents under the FOI Act.

Contact

Should you wish to discuss my decision, please do not hesitate to contact Ms Rebecca Azzopardi, FOI Coordinator on (02) 6275 5621 or via email at foi@customs.gov.au.



Anita Langford
Director, Trade Policy and Advice | Trade Branch
Australian Customs and Border Protection Service

ATTACHMENT A

Schedule of Documents

	Date of document	No. of pages	Description	Decision on release	
1.	21/03/2012	1	ACBPS email: Authorities to Act Advice	Release in part	Section 47F
2.	23/07/2012	1	ACBPS email: Draft ACN – “customs brokerage” claims and letters of authority	Release in part	s22(1)(a)(ii) s47C s47F
3.	18/04/2013	2	ACBPS email Chain: Request	Release in part	s22(1)(a)(ii) s 47F
4.	18/04/2013	3	Draft ACN: Brokers and Authorities	Release in part	s22(1)(a)(ii) s47C s47F
5.	18/04/2013	1	ACN: Customs Brokers – False Advertising	Release in part	s47C
6.	01/04/2009	2	AGS Legal Advice: Advising Brokers to Act	Release in part	s47F
7.	03/09/2013	3	ACBPS email Chain: Referral from Mr David Brush	Release in part	s22(1)(a)(ii) s47E(d) s47F
8.	04/09/2013	3	ACBPS email Chain: Re my letter regarding DHL	Release in part	s22(1)(a)(ii) s47F
9.	20/09/2013	4	ACBPS email Chain: TYPOS!!! Re my letter regarding DHL	Release in part	s22(1)(a)(ii) s47F
10.	20/09/2013	4	ACBPS email Chain: Re my letter regarding DHL	Release in part	s22(1)(a)(ii) s47F
11.	20/09/2013	2	ACBPS email Chain: Re my letter regarding DHL	Release in part	s22(1)(a)(ii) s47F
12.	20/09/2013	2	Email Chain: Possible question for CEO at CBFCFA Conference next week	Release in part	s22(1)(a)(ii) s47F
13.	01/10/2013	3	Email Chain: Authority to Act	Release in part	s47C s47F s47G
14.	02/10/2013	1	Email Chain: Re DHL and ACBPS	Release in part	s47F
15.	04/10/2013	9	Email Chain: Heads up: Authority to Act	Release in part	s22(1)(a)(ii) s47C s47F s47G
16.	17/10/2013	2	Email and Attachment: ACBPN – Authority to Act;	Release in part	s22(1)(a)(ii) s47C s47F
17.	29/10/2013	1	Email Chain: Authority to Act	Release in part	s22(1)(a)(ii) s47F
18.	31/10/2013	1	Email: ACBPN – Authority to act; DRAFT	Release in part	s22(1)(a)(ii) s47F
19.	31/10/2013	1	DRAFT ACBPN: 2013/XX – Owners of Goods and Authorised Agents: Authority to Act	Release in part	s47C

	Date of document	No. of pages	Description	Decision on release	
20.	04/11/2013	1	Email: ACBPN – Authority to act	Release in part	s47F
21.	04/11/2013	2	DRAFT ACBPN: 2013/XX – Owners of Goods and Authorised Agents: Authority to Act	Release in part	s47C
22.	08/11/2013	8	Email Chain:{Disarmed} Re: Authority to Act	Release in part	s22(1)(a)(ii) s47F
23.	28/11/2013	10	Email Chain: Authority to Act	Release in part	s22(1)(a)(ii) s47F
24.	02/12/2013	4	Email Chain: SPWG Meeting	Release in part	s22(1)(a)(ii) s47F
25.	02/12/2013	1	Email Chain: ACBPN – Authority to Act v0.7	Release in part	s 47F
26.	02/12/2013	2	Draft ACBPN: 2013/XX – Authorised Agents	Release in full	
27.	02/12/2013	3	Draft ACBPN: 2013/XX – Owners of Goods and Authorised Agents	Release in part	s47C
28.	02/12/2013	2	Email Chain: Authority to Act v0.7	Release in part	s47F
29.	02/12/2013	2	Draft ACBPN: 2013/XX – Authorised Agents	Release in full	
30.	02/12/2013	3	Draft ACBPN: 2013/XX – Owners of Goods and Authorised Agents	Release in part	s47C
31.	03/12/2013	2	Email Chain: ACBPN – Authority to Act v0.7	Release in part	s47F
32.	03/12/2013	2	Draft ACBPN: 2013/XX – Authorised Agents	Release in full	
33.	04/12/2013	2	Email Chain: ACBPN – Authority to Act v0.7	Release in part	s47F
34.	04/12/2013	2	Draft ACBPN: 2013/XX – Authorised Agents	Release in full	
35.	05/12/2013	2	Email Chain: ACBPN – Authority to Act v0.8	Release in part	s47F
36.	05/12/2013	2	Draft ACBPN: 2013/XX – Authorised Agents	Release in full	
37.	06/12/2013	2	Email Chain: ACBPN – Authority to Act v0.8	Release in part	s47F
38.	06/12/2013	3	ACBPN: 2013/64 – Authorised agents (and internal email of notification)	Release in part	s47F
39.	06/12/2013	3	ACBPN: 2013/64 – Authorised agents (and internal email of notification)	Release in part	s47F
40.	06/12/2013	1	Email Chain: Letter to David Brush RE Authority to Act	Release in part	s47F
41.	09/12/2013	2	Email Chain: ACBPN on Authority to Act	Release in part	s47F
42.	09/10/2013	2	Email Attachment: Authority to Act	Release in part	s47C s47F
43.	11/12/2013	3	Email Chain: NNF 2013/129 ACBPS Notice on 'Authority to Act'	Release in part	s47C s47F s47G
44.	11/12/2013	2	Email Chain: NNF 2013/129 ACBPS Notice on 'Authority to Act' – Change of Practice	Exempt in full	s47G

ATTACHMENT B

Relevant Legislation

Section 47C - Public interest conditional exemptions—deliberative processes

General rule

- (1) A document is conditionally exempt if its disclosure under this Act would disclose matter (***deliberative matter***) in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of:
 - (a) an agency; or
 - (b) a Minister; or
 - (c) the Government of the Commonwealth; or
 - (d) the Government of Norfolk Island.

Exceptions

- (2) Deliberative matter does not include either of the following:
 - (a) operational information (see section 8A);
 - (b) purely factual material.
- (3) This section does not apply to any of the following:
 - (a) reports (including reports concerning the results of studies, surveys or tests) of scientific or technical experts, whether employed within an agency or not, including reports expressing the opinions of such experts on scientific or technical matters;
 - (b) reports of a body or organisation, prescribed by the regulations, that is established within an agency;
 - (c) the record of, or a formal statement of the reasons for, a final decision given in the exercise of a power or of an adjudicative function.

Section 47E - Public interest conditional exemptions—certain operations of agencies

A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to, do any of the following:

...

- (d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

Section 47F - Public interest conditional exemptions—personal privacy

- (1) A document is conditionally exempt if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).
- (2) In determining whether the disclosure of the document would involve the unreasonable disclosure of personal information, an agency or Minister must have regard to the following matters:
 - (a) the extent to which the information is well known;
 - (b) whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document;
 - (c) the availability of the information from publicly accessible sources;
 - (d) any other matters that the agency or Minister considers relevant.

- (3) Subject to subsection (5), subsection (1) does not have effect in relation to a request by a person for access to a document by reason only of the inclusion in the document of matter relating to that person.

Access given to qualified person instead

- (4) Subsection (5) applies if:
- (a) a request is made to an agency or Minister for access to a document of the agency, or an official document of the Minister, that contains information concerning the applicant, being information that was provided by a qualified person acting in his or her capacity as a qualified person; and
 - (b) it appears to the principal officer of the agency or to the Minister (as the case may be) that the disclosure of the information to the applicant might be detrimental to the applicant's physical or mental health, or well-being.
- (5) The principal officer or Minister may, if access to the document would otherwise be given to the applicant, direct that access to the document, so far as it contains that information, is not to be given to the applicant but is to be given instead to a qualified person who:
- (a) carries on the same occupation, of a kind mentioned in the definition of **qualified person** in subsection (7), as the first-mentioned qualified person; and
 - (b) is to be nominated by the applicant.
- (6) The powers and functions of the principal officer of an agency under this section may be exercised by an officer of the agency acting within his or her scope of authority in accordance with arrangements referred to in section 23.
- (7) In this section:
- qualified person** means a person who carries on, and is entitled to carry on, an occupation that involves the provision of care for the physical or mental health of people or for their well-being, and, without limiting the generality of the foregoing, includes any of the following:
- (a) a medical practitioner;
 - (b) a psychiatrist;
 - (c) a psychologist;
 - (d) a counsellor;
 - (e) a social worker.

Section 47G - Public interest conditional exemptions—business

- (1) A document is conditionally exempt if its disclosure under this Act would disclose information concerning a person in respect of his or her business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking, in a case in which the disclosure of the information:
- (a) would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his or her lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs; or
 - (b) could reasonably be expected to prejudice the future supply of information to the Commonwealth, Norfolk Island or an agency for the purpose of the administration of a law of the Commonwealth or of a Territory or the administration of matters administered by an agency.
- (2) Subsection (1) does not apply to trade secrets or other information to which section 47 applies.

- (3) Subsection (1) does not have effect in relation to a request by a person for access to a document:
 - (a) by reason only of the inclusion in the document of information concerning that person in respect of his or her business or professional affairs; or
 - (b) by reason only of the inclusion in the document of information concerning the business, commercial or financial affairs of an undertaking where the person making the request is the proprietor of the undertaking or a person acting on behalf of the proprietor; or
 - (c) by reason only of the inclusion in the document of information concerning the business, commercial or financial affairs of an organisation where the person making the request is the organisation or a person acting on behalf of the organisation.
- (4) A reference in this section to an undertaking includes a reference to an undertaking that is carried on by, or by an authority of, the Commonwealth, Norfolk Island or a State or by a local government authority.
- (5) For the purposes of subsection (1), information is not taken to concern a person in respect of the person's professional affairs merely because it is information concerning the person's status as a member of a profession.

11B - Public interest exemptions—factors

- (1) This section applies for the purposes of working out whether access to a conditionally exempt document would, on balance, be contrary to the public interest under subsection 11A(5).
- (2) This section does not limit subsection 11A(5).

Factors favouring access

- (3) Factors favouring access to the document in the public interest include whether access to the document would do any of the following:
 - (a) promote the objects of this Act (including all the matters set out in sections 3 and 3A);
 - (b) inform debate on a matter of public importance;
 - (c) promote effective oversight of public expenditure;
 - (d) allow a person to access his or her own personal information.

Irrelevant factors

- (4) The following factors must not be taken into account in deciding whether access to the document would, on balance, be contrary to the public interest:
 - (a) access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government;
 - (aa) access to the document could result in embarrassment to the Government of Norfolk Island or cause a loss of confidence in the Government of Norfolk Island;
 - (b) access to the document could result in any person misinterpreting or misunderstanding the document;
 - (c) the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made;
 - (d) access to the document could result in confusion or unnecessary debate.

Guidelines

- (5) In working out whether access to the document would, on balance, be contrary to the public interest, an agency or Minister must have regard to any guidelines issued by the Information Commissioner for the purposes of this subsection under section 93A.

Section 22 - Access to edited copies with exempt or irrelevant matter deleted

- (1) This section applies if:
 - (a) an agency or Minister decides:
 - (i) to refuse to give access to an exempt document; or
 - (ii) that to give access to a document would disclose information that would reasonably be regarded as irrelevant to the request for access; and
 - (b) it is possible for the agency or Minister to prepare a copy (an ***edited copy***) of the document, modified by deletions, ensuring that:
 - (i) access to the edited copy would be required to be given under section 11A (access to documents on request); and
 - (ii) the edited copy would not disclose any information that would reasonably be regarded as irrelevant to the request; and
 - (c) it is reasonably practicable for the agency or Minister to prepare the edited copy, having regard to:
 - (i) the nature and extent of the modification; and
 - (ii) the resources available to modify the document; and
 - (d) it is not apparent (from the request or from consultation with the applicant) that the applicant would decline access to the edited copy.

Access to edited copy

- (2) The agency or Minister must:
 - (a) prepare the edited copy as mentioned in paragraph (1)(b); and
 - (b) give the applicant access to the edited copy.

...



FOI fact sheet 12

Freedom of information – Your review rights

April 2011

If you disagree with the decision of an Australian Government agency or minister under the *Freedom of Information Act 1982* (the FOI Act), you can ask for the decision to be reviewed. You may want to seek review if you sought certain documents and were not given full access, if someone is to be granted access to information that is about you, if the agency has informed you that it will impose a charge for processing your request or if your application to have your personal information amended was not accepted. There are two ways you can ask for review of a decision: internal review by the agency, and external review by the Australian Information Commissioner.

Internal review

If an agency makes an FOI decision that you disagree with, you can ask the agency to review its decision. The review will be carried out by a different agency officer, usually someone at a more senior level. There is no charge for internal review.

You must apply within 30 days of being notified of the decision, unless the agency extended the application time. You should contact the agency if you wish to seek an extension. The agency must make a review decision within 30 days. If it does not do so, its original decision is considered to be affirmed.

Internal review is not available if a minister or the chief officer of the agency made the decision personally.

Review by the Information Commissioner

The Information Commissioner is an independent office holder who can review the decisions of agencies and ministers under the FOI Act.

Is a review the same as a complaint?

No. The Information Commissioner also investigates complaints about agency actions under the FOI Act. However, if you are complaining that an agency decision is wrong, it will be treated as an application for a review. Your matter will be treated as a complaint when a review would not be practical

or would not address your concerns (for example, if you were not consulted about a document that contains your personal information before it was released). For more information see FOI fact sheet 13 – *Freedom of information: How to make a complaint*.

Do I have to go through the agency's internal review process first?

No. You may apply directly to the Information Commissioner. However, going through the agency's internal review process gives the agency the opportunity to reconsider its initial decision, and your needs may be met more quickly without undergoing an external review process.

Do I have to pay?

No. The Information Commissioner's review is free.

How do I apply?

You must apply in writing and you can lodge your application in one of the following ways:

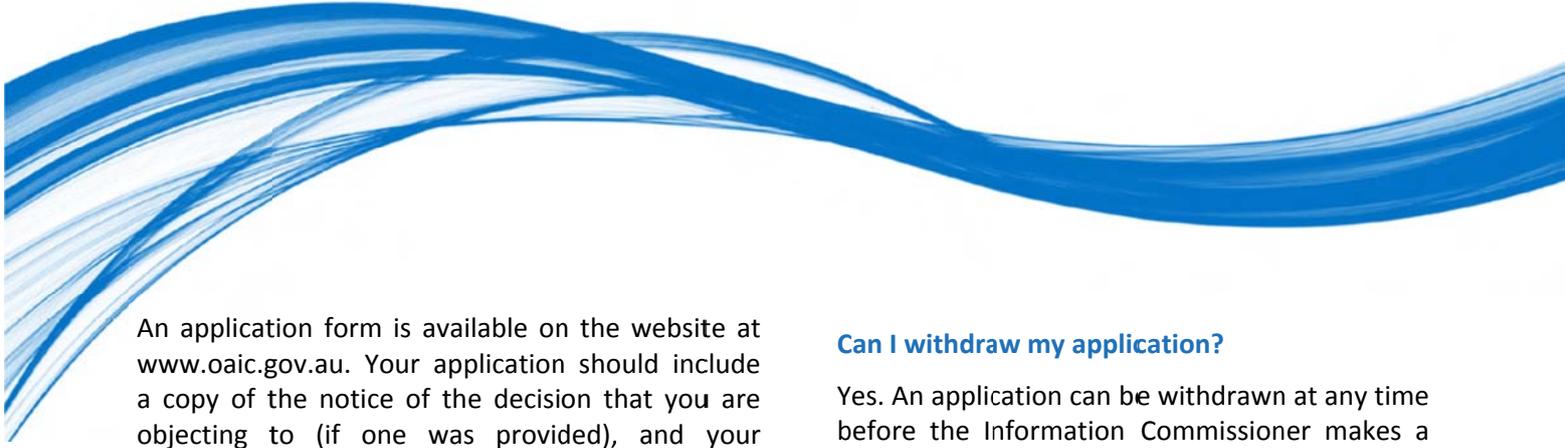
online: www.oaic.gov.au

post: GPO Box 2999, Canberra ACT 2601

fax: +61 2 9284 9666

email: enquiries@oaic.gov.au

in person: Level 3,
175 Pitt Street
Sydney NSW 2000



An application form is available on the website at www.oaic.gov.au. Your application should include a copy of the notice of the decision that you are objecting to (if one was provided), and your contact details. You should also set out why you are objecting to the decision.

Can I get help in completing the application?

Yes. The Information Commissioner's staff are available to help you with your application if anything is unclear.

When do I have to apply?

If you are objecting to a decision to refuse access to documents, impose a charge or refuse to amend a document, you must apply to the Information Commissioner within 60 days of being given notice of the decision. If you are objecting to a decision to grant access to another person, you must apply within 30 days of being notified of that decision.

You can ask the Information Commissioner for an extension of time to apply, and this may be granted if the Information Commissioner considers it is reasonable in the circumstances.

Who will conduct the review?

Staff of the Information Commissioner will conduct the review. Only the Information Commissioner, the FOI Commissioner or the Privacy Commissioner can make a decision at the end of the review.

Does the Information Commissioner have to review my matter?

No. The Information Commissioner may decide not to review an application that is frivolous, misconceived or lacking in substance, or if you fail to cooperate with the process or cannot be contacted after reasonable attempts. You cannot appeal against that decision.

Alternatively the Information Commissioner may decide that the Administrative Appeals Tribunal (AAT) would be better placed to review the matter, and if so, will advise you of the procedure for applying to the AAT. This will not be common.

Can I withdraw my application?

Yes. An application can be withdrawn at any time before the Information Commissioner makes a decision.

What happens in the review process?

The review process is designed to be as informal as possible. The Information Commissioner may contact you or any of the other parties to clarify matters and seek more information. The Information Commissioner may also ask the agency or minister to provide reasons for their decision if the reasons given were inadequate.

Most reviews will be made on the basis of the submissions and papers provided by the parties. Sometimes the Information Commissioner may decide to hold a hearing if one of the parties applies. Parties may participate in a hearing by telephone. If confidential matters are raised, the hearing may be held partly or wholly in private.

Will there be other parties to the review?

There may be. The Information Commissioner can join other parties who are affected by the application. For example, if you are objecting to someone else being granted access to information that concerns you, that person may be joined in the review.

Can someone else represent me?

Yes, including a lawyer. However, the Information Commissioner prefers the process to be as informal and cost-effective as possible and does not encourage legal representation.

Will the Information Commissioner look at all documents, including ones that are claimed to be exempt?

Yes. The Information Commissioner's review is a fresh decision, so all the relevant material must be examined, including documents that the agency or minister has declined to release. Developments that have occurred since the original decision may also be considered.

What powers does the Information Commissioner have?

While the review process is designed to be informal, the Information Commissioner has formal powers to require anyone to produce information or documents, to compel anyone to attend to answer questions and to take an oath or affirmation that their answers will be true.

An agency or minister can also be ordered to undertake further searches for documents.

What decisions can the Information Commissioner make?

After reviewing a decision, the Information Commissioner must do one of three things:

- set the decision aside and make a fresh decision
- affirm the decision, or
- vary the decision.

The Information Commissioner will give reasons for the decision.

Will the decision be made public?

Yes. The Information Commissioner will publish decisions on the website. Exempt material (that is, material that is not released) will not be included. Nor will the name of the review applicant, unless that person requests otherwise or there is a special reason to publish it.

What can I do if I disagree with the Information Commissioner's review decision?

You can appeal to the AAT. The Information Commissioner will not be a party to those proceedings. The fee for lodging an AAT application is \$777 (at November 2010), although there are exemptions for health care and pension concession card holders and the AAT can waive the fee on financial hardship grounds.

FOI applications made before 1 November 2010

The Information Commissioner can only review an agency's or minister's FOI decision if you made your FOI request on or after 1 November 2010. If you made your FOI request before 1 November, even if the decision was made after that date, the review process is different.

You must first ask the agency for internal review of the decision. You may then appeal to the AAT if you are not satisfied with the decision.

The information provided in this fact sheet is of a general nature. It is not a substitute for legal advice.

For further information

telephone: 1300 363 992

email: enquiries@oaic.gov.au

write: GPO Box 2999, Canberra ACT 2601
or visit our website at www.oaic.gov.au



FOI fact sheet 13

Freedom of information – How to make a complaint

October 2010

You may complain to the Australian Information Commissioner if you have concerns about how an Australian Government agency handled a request for documents under the *Freedom of Information Act 1982* (the FOI Act) or took any other action under that Act. If you are unhappy with the agency's decision about giving or refusing access to documents, you should ask for the decision to be reviewed, which is a separate process.

Disagree with an FOI decision?

If you disagree with an agency's or minister's decision on your request under the FOI Act, you have the right to have the decision reviewed. You can ask an agency to review its decision internally. You also have the right to ask the Information Commissioner to review an agency's or minister's decision. See **FOI Fact Sheet 12 Freedom of information – Your review rights** for more information about the review process.

If you are concerned about the way an agency has handled your matter, you can complain to the Information Commissioner.

What are the powers of the Information Commissioner?

The Information Commissioner can investigate a complaint about how an agency handled an FOI request, or other actions the agency took under the FOI Act. The Information Commissioner cannot investigate a complaint about a minister.

In conducting the investigation the Information Commissioner has the power to:

- make inquiries of an agency
- obtain information from any person
- take possession of, or inspect, any relevant documents.

If the Information Commissioner decides to investigate your complaint, the agency you have complained about will be notified in writing of the complaint. The Information Commissioner conducts investigations of complaints in private.

Who can make a complaint?

Any person can make a complaint about the actions of an agency in relation to an FOI activity. You do not need to have requested documents under the FOI Act.

When should I make a complaint?

You can complain to the Information Commissioner at any time. If your complaint relates to an FOI request you can make the complaint at any stage of the process.

Before making a complaint to the Information Commissioner, you should contact the agency directly to try to resolve your concerns. The Information Commissioner may decide not to investigate your complaint if you have not raised your concerns first with the agency or you have not given the agency a reasonable opportunity to deal with your complaint.



How do I make a complaint?

Your complaint must be in writing and must specify the agency you are complaining about. You can send your complaint to us using the details at the end of this fact sheet. A complaint form is also available on our website at www.oaic.gov.au.

If you need help we can assist you. You can contact us on 1300 363 992 or by email to enquiries@oaic.gov.au.

What information do I need to put in the complaint?

To help the Information Commissioner give the best consideration to your complaint, please provide as much relevant information as possible. Be clear about the issues in your complaint and what action or outcome you would like to see as a result.

Is there a fee for making a complaint?

No. There are no costs involved in making a complaint to the Information Commissioner.

What will happen to my complaint?

An officer of the Information Commissioner will contact you to discuss your complaint and you will be kept informed of the progress of your complaint along the way.

Before deciding whether to investigate your complaint the Information Commissioner may make preliminary inquiries of the agency you have complained about.

If the Information Commissioner decides to investigate your complaint, the Commissioner will write to the agency and request information to assist with the investigation.

Can the Information Commissioner decide not to investigate my complaint?

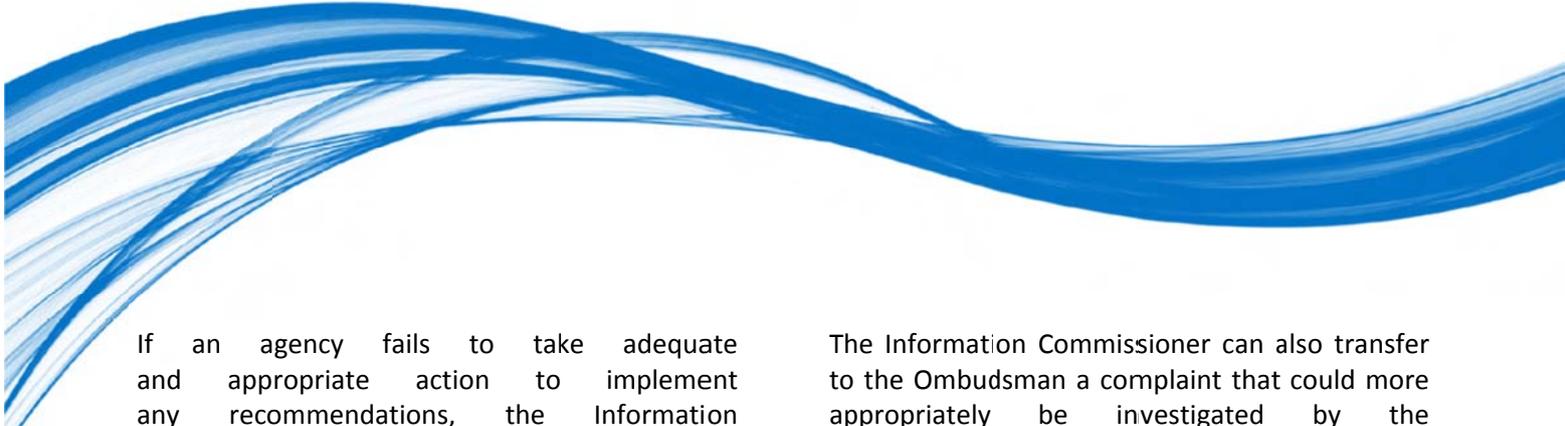
Yes. The Information Commissioner may decide not to investigate, or may discontinue an investigation, if:

- your complaint does not concern an agency's action under the FOI Act
- it is more appropriate for you to complain to another body (such as the agency or the Commonwealth Ombudsman)
- it is more appropriate for you to ask for the decision to be reviewed
- the agency you complained about has dealt with your complaint, or is in the process of dealing with it
- your complaint is frivolous, lacking in substance or not made in good faith
- you do not have sufficient interest in the matter.

If the Information Commissioner decides not to investigate or discontinues an investigation, the Commissioner will notify you and the agency of the reasons for this in writing.

How will my complaint be resolved?

In some cases the Information Commissioner's investigation and intervention may result in the agency addressing the issues that you have complained about. In other cases the Information Commissioner may make suggestions or recommendations that the agency should implement. You and the agency will be notified in writing of the outcome of the investigation.



If an agency fails to take adequate and appropriate action to implement any recommendations, the Information Commissioner may issue a formal implementation notice. This notice requires the agency to explain what action it will take to implement the recommendations. The Information Commissioner may also provide a written report to the minister responsible for the agency, and the report will be tabled in Parliament.

Your name will not be included in the report unless there is a special reason and you were first consulted.

Investigation by the Ombudsman

The Commonwealth Ombudsman can also investigate complaints about action taken by agencies under the FOI Act. However, if the issue complained about either could be or has been investigated by the Information Commissioner, the Ombudsman will consult the Information Commissioner to avoid the same matter being investigated twice. If the Ombudsman decides not to investigate, the complaint and all relevant documents must be transferred to the Information Commissioner.

The Information Commissioner can also transfer to the Ombudsman a complaint that could more appropriately be investigated by the Ombudsman. This could occur where the FOI complaint is only one part of a wider grievance about an agency's actions. It is unlikely that this will be common. You will be notified in writing if your complaint is transferred.

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