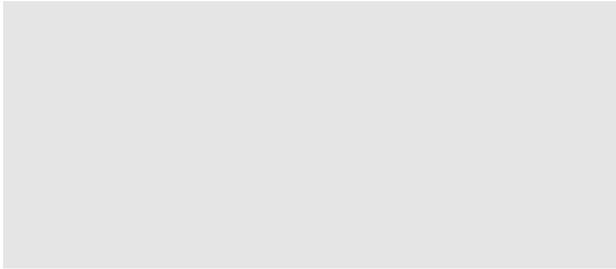




12 September 2014

File No: 2014/006816



Dear [REDACTED]

Freedom of Information Request

I refer to your email dated 19 February 2014 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:

- "1. a copy of the full report of the Customs/Defence internal review into Australian vessels breaching Indonesian Territory six times, and*
- 2. correspondence between the Minister, Defence, Customs and Immigration relating to the release of the report".*

By email dated 4 March 2014, you clarified part 2 of your request to be for:

"correspondence between the Minister for Immigration and Border Protection and the Australian Customs and Border Protection Service relating to the release of the report".

Background

On 4 April 2014, ACBPS issued an original decision on access in relation to one document that fell within the scope of your request. The decision was made to release that one document to you in part with deletions.

On 10 April 2014, the Office of the Australian Information Commissioner (OAIC) notified ACBPS that you had requested that the Information Commissioner review the ACBPS decision dated 31 March 2014, to refuse access to documents.

On 20 June 2014, the OAIC notified ACBPS that the Information Commissioner had decided to review the ACBPS decision, and required ACBPS to produce to the Information Commissioner the documents that were the subject of the review.

On 15 July 2014, ACBPS produced to the OAIC the document that is subject to the review.

On 30 July 2014, ACBPS notified the OAIC that in an attempt to resolve this matter, ACBPS had formed the view that additional information may be released to you. As such, ACBPS indicated it would prepare a Notice of Substitute Decision under section 55G of the FOI Act.

Substitute Decision on Access

In relation to paragraph 2 of your request, I confirm that ACBPS has undertaken reasonable searches in relation to this part of your request. No documents were in the possession of ACBPS on 19 February 2014 when your FOI request was valid and ACBPS therefore has no records to produce. My decision in this regard is based on the application of section 24A of the FOI Act.

In relation to part 1 of your request, I have decided to release one document in part with deletions, noting that additional information is now being released to you.

I have provided detailed reasons for my decision below.

Document within scope of request

The document that falls within the scope of your request is a Joint Review of Operation Sovereign Borders Vessel Positioning between December 2013 and January 2014. The scope of this Joint Review was to independently investigate the facts and circumstances surrounding the entry of Australian vessels into Indonesian waters in connection with Operation Sovereign Borders (OSB) during the period 1 December 2013 to 20 January 2014.

The Review was supported by officials from the Department of Defence (Defence) and ACBPS and advice from the Attorney General's Department and the Department of Foreign Affairs and Trade.

The report contains detailed information relating to:

- the incidents in which Australian vessels entered Indonesian waters;
- the tasks assigned to the vessels identified as entering Indonesian waters; and
- Force assignment and preparation.

In addition to commentary relating to background information, Innocent Passage and the contiguous zone, the Report contains:

- details of the incidents themselves, including assets involved;
- details of the circumstances in which those assets were operating at the time of the incursions;
- details describing the location of the vessel, including GPS pinpoints;
- details of the incursions that occurred; and
- details of task direction, supervision and reporting.

Vessel tasks

The vessels referred to in the Joint Review Report are engaged in a range of operations on behalf of the Australian Government, patrolling waters off the Australian coast. In undertaking that work the vessels are under the direction of Border Protection Command (BPC). BPC is Australia's lead maritime law enforcement agency. It brings together officers from the ACBPS and Defence as a joint multi-agency taskforce to identify and respond to illegal activity in Australia's Maritime Jurisdiction (the AMJ). The vessels include Australian Navy vessels, ACBPS vessels and civilian vessels contracted to ACBPS.

The vessels are responsible for a number of functions, including in relation to:

- illegal exploitation of natural resources;
- illegal activity in protected areas;
- illegal maritime arrivals;
- prohibited imports and exports;
- maritime terrorism;
- piracy, robbery or violence at sea;
- compromise to biosecurity; and
- marine pollution.

In respect of these areas of responsibility, the vessels and their crew have a range of functions and powers including:

- patrolling the AMJ;
- surveillance and intelligence gathering;
- detaining and inspecting vessels suspected of illegal activity within the AMJ;
- taking control of vessels or directing them to take particular action, including leaving the AMJ or sailing under the Australian vessel's watch to a designated destination; and
- where necessary, destroying craft which pose a risk to Australia (such as craft which are infected with biohazardous organisms, or craft engaged in maritime terrorism).

Operation Sovereign Borders

To ensure a whole-of-government response to border protection issues, the Australian Government has established the Operation Sovereign Borders Joint Agency Task Force (JATF). Operation Sovereign Borders is the name given to a military-led, border security operation supported and assisted by a wide range of federal government agencies. Operation Sovereign Borders has a particular focus on coordinating the whole of government response to persons attempting to arrive illegally by boat and dealing with illegal maritime arrivals. It aims to ensure that Australia has effective control of the circumstances in which people enter Australia.

The JATF is supported by three operational task groups:

- Disruption and Deterrence Task Group—led by the Australian Federal Police;
- Detection, Interception and Transfer Task Group—led by ACBPS, which includes BPC; and
- Offshore Detention and Returns Task Group—led by the Department of Immigration and Border Protection.

I note that in paragraph 44 on page 11 of the Joint Review Report, the responsibilities of the AFP and BPC within the Task Force have been erroneously transposed.

The vessels referred to in the Joint Review Report are part of BPC's assets in contributing to the work of the Detection, Interception and Transfer Task Group within Operation Sovereign Borders. That task group deals in particular with:

- detecting and intercepting vessels attempting to enter Australia by sea with the intention of offloading passengers without the authority of the Australian Government (illegal maritime arrivals); and
- taking steps to maintain Australia's borders when such vessels are intercepted, either by preventing those vessels from approaching Australian controlled land or by transferring those people on board those vessels to a facility where their entry into Australia can be dealt with via regular (lawful) channels under Australian law.

Substitute Reasons for Decision

The relevant FOI Act sections have been marked on the document to indicate which exemption is being applied to each part of the document. My reasoning in relation to the application of each section is set out below.

1 Section 33 of the FOI Act – Documents affecting National Security, Defence or International Relations

Section 33(a)(i)

I have decided that parts of the document are exempt from disclosure under section 33(a)(i) of the FOI Act, as disclosure of that information would, or could reasonably be expected to, cause damage to the security of the Commonwealth.

'Security of the Commonwealth' is defined in section 4(5) of the FOI Act as:

- (5) *Without limiting the generality of the expression **security of the Commonwealth**, that expression shall be taken to extend to*
- (a) *matters relating to the detection, prevention or suppression of activities, whether within Australia or outside Australia, subversive of, or hostile to, the interests of the Commonwealth or of any country allied or associated with the Commonwealth ...*

The operations of the vessels referred to in the Joint Review Report form part of maintaining the security of the Commonwealth. Maintaining the integrity of Australia's physical borders is an Operation Sovereign Borders activity and is a part of national security. Australia's national interests are threatened by any unauthorised arrival of people and the Australian Government has responsibility for the lawful and orderly entry of people into Australia, along with ensuring that only those foreign nationals who are appropriately authorised are allowed to enter and remain. If Australia cannot effectively manage who enters the country, and the circumstances and conditions of such entry, then the security of the Commonwealth is compromised.

For a document (or part of a document) to be exempt under s 33(a)(i), I must be satisfied that, on the balance of probabilities, disclosure would, or could reasonably be expected to, cause damage to the security of the Commonwealth.

I consider that the disclosure of the information contained within the document that I regard as exempt under s 33(a)(i) could cause damage to the security of the Commonwealth by compromising operational functions, increasing the risk to Australian vessels and personnel and encouraging illegal activity. I consider the particular damage to the security of the Commonwealth to be as follows:

- (a) Information within the documents would provide insight into the manner in which vessels involved in national security operations undertake those functions, including tactics, training and procedures.
- (b) Australia's maritime borders are vast. Australia's maritime domain comprises some 12 million square nautical miles – about 11.5% of the world's oceans. Australia has insufficient resources to continuously patrol every possible point of maritime entry into Australia. Even if the insight afforded is considered to be slight, any reduction in the efficiency or effectiveness of current operational methods is likely to have significant consequences given the ever-present challenge of managing such an enormous jurisdiction with finite resources.
- (c) If the exempt information contained within this Joint Review Report were released, border protection authorities would be forced to revise current operational methodology to minimise the harm caused by those disclosures. This is, by definition, damage to security operations. Current procedures and activities are set with a view to achieving maximum security outcomes with the available resources. Any changes required by a need to counter the advantage afforded to vessels or persons engaging in illegal maritime activities necessarily represents a compromise to operational effectiveness.
- (d) Increasing the risk to Australian vessels and personnel undertaking border protection work. Patrolling and protecting Australia's AMJ is an inherently dangerous task. By releasing information that would make the activities of Australian vessels more predictable, the risk that a person would be willing to, and successful in, causing harm or damage to Australian vessels or people is increased.
- (e) A significant component of Australia's border protection strategy is the deterrent effect of routine patrolling of the AMJ. Persons with an interest in undertaking illegal activities in the AMJ - and compromising Australia's border security in the process - run the risk that they will be detected and intercepted by Australian vessels. By disclosing information which has the potential, or even creates a perceived potential, to assist in circumventing those patrol operations, encouragement is given to those persons that they may be able to more successfully elude border protection patrol vessels.
- (f) In some cases a people smuggling voyage sets out with the intention of intersecting with border protection vessels at an early stage. The release of vessel positioning information is likely to be used by people smugglers to good effect to increase the confidence of potential passengers in the likelihood of the success of the people smuggling venture, thereby encouraging more passengers on more voyages. Given the finite resources available for detecting and dealing with such activities, this increases the risk that such activities will be successful. This increased risk of success itself is reasonably expected to damage the security of the Commonwealth.

- (g) The disclosure of the exempt information would likely provide people smuggling operators with official government information which they could use to manipulate and convince any potential illegal immigrants to embark on voyages to Australia. This would be an improper use of the information which may also cause a risk to human life. To disclose information that indicates the success or otherwise of ventures may also encourage others to engage in people smuggling activities. I consider that there is a strong public interest in preventing the potential risk to human life associated with people smuggling.

Section 33(a)(iii)

I have decided that parts of the document are exempt from disclosure under section 33(a)(iii) of the FOI Act, as disclosure of that information would, or could reasonably be expected to, cause damage to the Commonwealth's international relations.

I consider that the disclosure of parts of the document would disclose information that may adversely impact upon Australia's relations with foreign states and undermine any potential cooperation and agreement on ameliorating people smuggling issues and operational engagement related to broader law enforcement and security issues at an international level.

The Department of Foreign Affairs and Trade has been consulted in relation to the disclosure of this information, and supports the contention that it is exempt under section 33(a)(iii) of the FOI Act. I afford significant weight to the views expressed by those whose role it is to ensure that Australia's pursuit of its global, regional and bilateral interests is coordinated effectively.

2 Section 42 of the FOI Act – Legal Professional Privilege

I have decided that parts of the document are exempt from disclosure as they comprise confidential communications passing between ACBPS and Defence and its legal advisers for the dominant purpose of giving or receiving legal advice.

This advice has been provided by both the Attorney-General's Department and the Department of Foreign Affairs, and its disclosure would reasonably be expected to cause real harm to Australia and its interests.

The content of these documents are not part of the rules, guidelines, practices or precedents relating to the decisions and recommendations of ACBPS. The documents do not fall within the definition of operational information and remain subject to legal professional privilege.

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

I consider that the disclosure of parts of the document would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of both Defence and ACBPS (section 47E(d)).

Managing the security and integrity of Australia's borders is integral to the operations of both Defence and ACBPS. Any prejudice to the effectiveness of operational activity would result in a substantial adverse effect on the operations of both Defence and ACBPS.

The disclosure of this conditionally exempt information may be reasonably expected to undermine the tactical advantage that Defence, ACBPS, and partner border protection agencies, surveillance and response assets have over people smuggling ventures, illegal foreign fishing and other threats in the maritime domain by providing operational information about assets engaged in those operational activities.

Any disclosure resulting in the prejudice of the effectiveness of those operational activities would, or could be reasonably expected to cause, Defence and ACBPS to change or divert the conduct of border protection activities, which may prejudice current targets and on-water operations.

Accordingly, I have decided that parts of the document are conditionally exempt under section 47E(d) of the FOI Act.

4 Section 47F of the FOI Act – Personal Privacy

The disclosure of parts of the document would disclose personal information relating to third parties. This information would reasonably identify a person, either through names, positions or descriptions of their role or employment circumstance with either Defence or ACBPS. These individuals are non-Senior Executive Service officers whose personal information is not publicly available.

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

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

As I have decided that part the document is conditionally exempt, I am now required to consider whether access to the document would be contrary to the public interest (section 11A of the FOI Act). I have discussed the relevant public interest considerations below.

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 document would promote the objects of the FOI Act.
- I consider that the subject matter of some of the document does have some elements of public importance and that there may be a level of public interest in the document.
- I consider that no insights into public expenditure will be provided through examination of the document.
- I am satisfied that you do not require access to the document in order to access your own personal information.

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

- I consider that the disclosure of the parts of the document that are 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, and its partner agencies, to conduct on-water operations in an efficient manner is not compromised or prejudiced in any way. I also consider that there is a strong public interest in preventing the potential risk to human life associated with people smuggling, and that these factors weigh heavily against disclosure of this conditionally exempt information.
- The disclosure of the personal information of individuals contained in the document could reasonably be expected to prejudice the protection of those individuals' right to privacy. It is my view that it is firmly in the public interest to uphold the rights of individuals to their own privacy. The names of these particular officers are not available through any other publicly available source. I consider that the protection of an individual's right to privacy far outweighs any public interest there may be in the release of this material.

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 document is not in the public interest and therefore exempt from disclosure under the FOI Act.

Contextual information

I note that the content of recommendations 4, 5 and 6 contained on page 19 of the report were combined in the publically released Executive Summary to provide an unclassified overview of the content of those recommendations.

Legislation

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

Your Review Rights

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

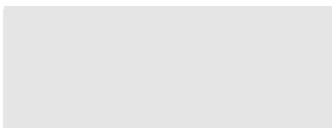
Information regarding your review rights is available in the Office of the Australian Information Commissioner's FOI Fact Sheet 12 at **Attachment B** for your reference.

Making a Complaint

At **Attachment C** 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.



Abigail Bradshaw
National Manager, Parliamentary & Executive Coordination
Australian Customs and Border Protection Service

ATTACHMENT A

Relevant Legislation

Section 33 - Documents affecting national security, defence or international relations

A document is an exempt document if disclosure of the document under this Act:

- (a) would, or could reasonably be expected to, cause damage to:
 - (i) the security of the Commonwealth;
 - ...
 - (iii) the international relations of the Commonwealth; or

...

Section 42 - Documents subject to legal professional privilege

- (1) A document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.
- (2) A document is not an exempt document because of subsection (1) if the person entitled to claim legal professional privilege in relation to the production of the document in legal proceedings waives that claim.
- (3) A document is not an exempt document under subsection (1) by reason only that:
 - (a) the document contains information that would (apart from this subsection) cause the document to be exempt under subsection (1); and
 - (b) the information is operational information of an agency.

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.

...

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:

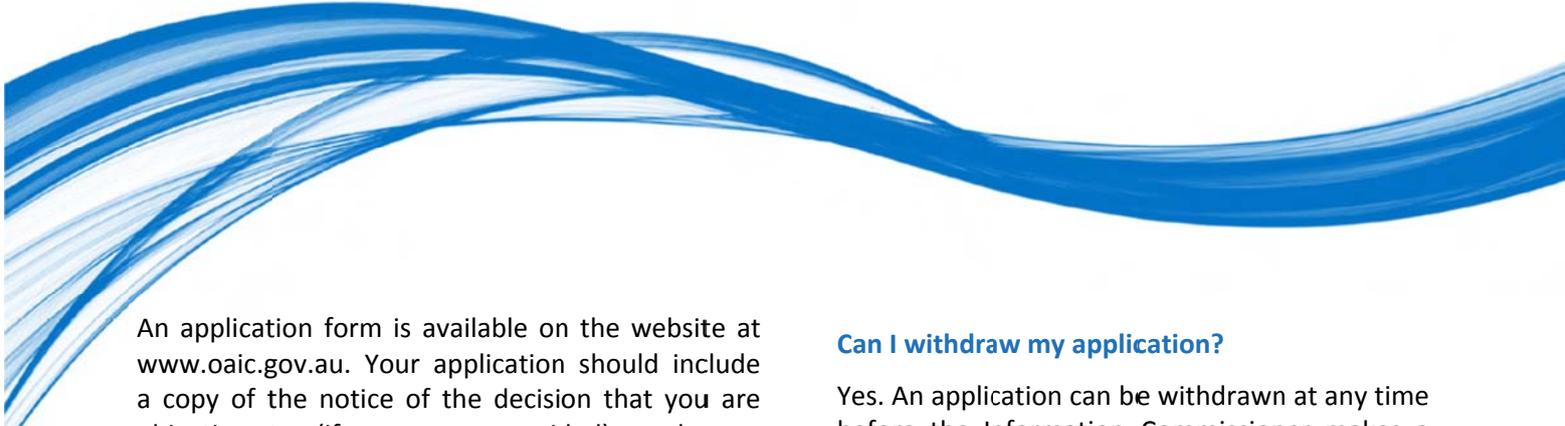
online: www.oaic.gov.au

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?

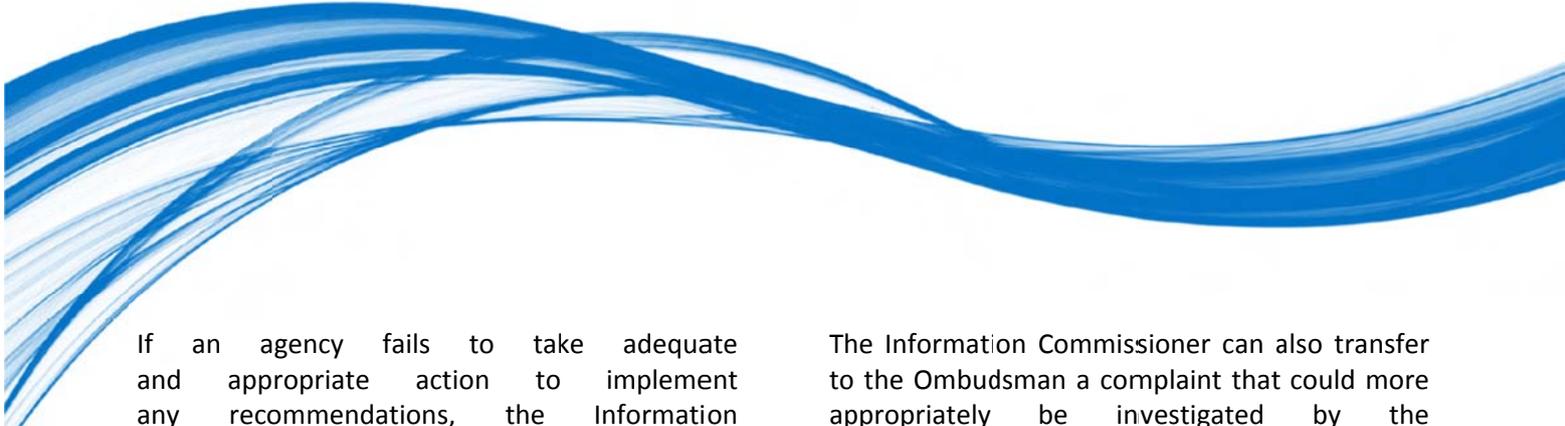
Yes. The Information Commissioner may decide not to investigate, or may discontinue an investigation, if:

- 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.

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