



**Australian Government**

**Department of Immigration and Border Protection**

File No: 2015/009639

12 June 2015



***Request for access to documents – Freedom of Information Act 1982 (FOI Act)***

I refer to your email dated 9 March 2015 in which you requested access to documents held by the Australian Customs and Border Protection Service (ACBPS) under the *Freedom of Information Act 1982* (the FOI Act).

As of 1 July 2015, ACBPS consolidated with the Department of Immigration and Border Protection (the Department). As such, whilst your request has been processed by ACBPS in relation to documents in the possession of ACBPS at the date your request was received, a decision is now being made in relation to your request by the Department.

**Scope of Request**

You requested access to the following documents held by ACBPS:

1. *The number of people intercepted at Australian airports by the ACBPS Counter Terrorism Unit since 22 August 2014 on suspicion of travelling overseas to engage in foreign hostilities. Or, alternatively, the number of people intercepted at Australian airports by the Customs and Border Protection Counter Terrorism Unit since 22 August 2014 due to national security concerns;*
2. *A list of the items, images and materials seized during these interceptions that warranted suspicion or investigation;*
3. *The amount of cash that has been seized during these interceptions;*
4. *The number of infringement notices issued by the ACBPS Counter Terrorism Unit since 22 August 2014 and a breakdown of which infringements they were;*
5. *A list of the names and suburbs of all people issues with infringement notices;*

6. *How many investigations by the ACBPS Counter Terrorism Unit are ongoing, as at the date of the FOI application being granted;*
7. *Any documents relating to "standard operating procedures", protocols or rules - or equivalent terms - for the ACBPS Counter Terrorism Unit; and*
8. *Any emails sent to ACBPS Counter Terrorism Unit staff advising them on standard protocols or procedures for identifying and intercepting people who raise national security concerns or on suspicion of travelling to engage in foreign hostilities.'*

**Practical Refusal Notice – revised scope of request**

On 23 March 2014 ACBPS issued a Practical Refusal Notice, notifying you that the work involved in processing your request in its current form would substantially and unreasonably divert the resources of this agency from its other operations due to its broad nature, size and complexity.

On 7 April 2015 you notified ACBPS that you wished to revise the scope of your request to:

- A. *A document containing the number of real-time assessments conducted by the Border Force Counter Terrorism Unit as of the date of the extraction;*
- B. *A document containing the number of infringement notices issued by the Border Force Counter Terrorism Unit, the type of infringement alleged and the suburb of the person issued with the infringement;*
- C. *A document containing a list of all items and/or material seized during the CTU's real-time assessments;*
- D. *A document containing the number of people prevented from flying following a CTU real-time assessment;*
- E. *A document containing the amount of cash seized as a result of interceptions by the CTU;*
- F. *The standard operating procedures or operating guidelines for the Border Force Counter Terrorism Unit staff.*

On 5 May 2015 ACBPS notified you that ACBPS could process Part A, D, E and F of your request in accordance with the revised scope but the practical refusal reasons still remained for Part B and C.

On 14 May 2015 you agreed to modify the scope of your request to:

- A. *A document containing the number of real-time assessments conducted by the Border Force Counter Terrorism Unit as of the date of the extraction;*
- B. *A document containing the number of people prevented from flying following a CTU real-time assessment;*
- C. *A document containing the amount of cash seized as a result of interceptions by the CTU;*
- D. *The standard operating procedures or operating guidelines for the Border Force Counter Terrorism Unit staff.*

## **Decision on access**

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

ACBPS has identified five documents that fall within the scope of your request. These documents were in the possession of ACBPS on 7 April 2015 when your revised FOI request was received.

Additionally, in accordance with section 17 of the FOI Act, ACBPS has used its computer system to produce one of these documents (that contains the requested information for Part D of the request).

The data produced in this document existed in the possession of ACBPS on 7 April 2015 when your revised 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:

- Release four documents in full; and
- Exempt one document in full from disclosure.

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

In relation to document 5, the information in this document is information ACBPS has recorded in regards to undeclared currency in excess of \$AUD10,000 detected by the CTU, that the Australian Federal Police (AFP) have taken from the traveller. Whether this currency is seized is a matter for the AFP.

It should be noted that ACBPS does not seize currency; any undeclared currency in excess of \$AUD10,000 detected by the CTU is referred to the AFP for appropriate action, such as issuing penalties including infringement notices, seizing the currency, or further investigation. ACBPS is not privy to the outcomes of all AFP investigations related to the referrals of the undeclared excess currency. For this reason the value of the column titled 'combined \$AUD' may include currency that has been taken from an individual, but subsequently returned. This data should not be seen as an outcome of investigations conducted by the AFP.

I have provided detailed reasons for my decision below.

## **Reasons for Decision**

The schedule of the five 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. References to ACBPS in my reasoning below also apply to the Department from 1 July 2015.

### **1 Section 22 of the FOI Act – irrelevant to request**

I have decided that the deleted parts of documents numbered 4 and 5 would disclose information that could reasonably be regarded as irrelevant to your request. Therefore, the irrelevant information has been deleted from the documents pursuant to section 22(1)(a)(ii) of the FOI Act.

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

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

### (a) Section 33(a)(i) –national security

Section 33(a)(i) of the FOI Act permits exemption of a document from disclosure if disclosure of the document would, or could reasonably be expected to, cause damage to the security of the Commonwealth. For the reasons set out below, I have found that there are real and substantial grounds for expecting that document numbered 3 and parts of documents numbered 1 and 2 are exempt from disclosure under s 33(a)(i) as the disclosure of that information would cause damage to the security of the Commonwealth.

### *Security*

‘Security’ is a concept with a fluctuating content which can depend upon the circumstances as they exist from time to time.<sup>1</sup> ‘Security of the Commonwealth’ is defined in s 4(5) of the FOI Act as follows:

(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; and ...

It is instructive to consider also the definition of ‘security’ in the *Australian Security and Intelligence Organisation Act 1979*<sup>2</sup>. It defines ‘security’ as:

- (a) The protection of, and of the people of, the Commonwealth and the several States and Territories from:
  - (i) Espionage
  - (ii) Sabotage
  - (iii) Politically motivated violence
  - (iv) Promotion of communal violence
  - (v) Attacks on Australia’s defence system; or
  - (vi) Acts of foreign interference;Whether directed from, or committed within, Australia or not; and
- (aa) the protection of Australia’s territorial and border integrity from serious threats; and
- (b) The carrying out of Australia’s responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a) or the matter mentioned in paragraph (aa).

There can be no doubt that the operations of the CTU officers in question form part of maintaining the security of the Commonwealth. Focussing on the CTU officers’ activities, the integrity of Australia’s physical borders is an obvious part of national security.

Recognising the concept of security can include a range of threats against Australia’s interests, functions connected to terrorism, prohibited imports and exports and biosecurity can all readily be seen as aspects of maintaining the security of the Commonwealth through detection, prevention or suppression of these activities. These are all functions of the CTU officers in question.

<sup>1</sup> *Church of Scientology v Woodward* (1982) 154 CLR 25 at [19].

<sup>2</sup> See *Staats and National Archives of Australia* [2010] AATA 531 at [99].

Presently ACBPS plays an important role in intercepting people who are attempting to undertake unlawful activities. Document 3 and parts of document 1 and 2 reveal the processes that ACBPS undertakes when assessing and stopping certain people from crossing Australia's border. These documents directly relate to measures taken in respect of travellers by operational staff.

For these reasons, I have formed the view that document 3 and parts of document 1 and 2 relate to the security of the Commonwealth.

### *Damage*

I consider that the release of the material in document 3, and parts of documents 1 and 2 have the capacity to cause damage to the security of the Commonwealth by:-

- Actually compromising operational functions. If the information in the documents were released, it would provide significant insight into the manner in which CTU officers involved in national security operations undertake that function, in terms of capabilities, tactics, procedures and posture.
- It can reasonably be expected that any person who is intending to engage in, or is engaging in, activities that fall within the responsibility of the CTU officers will be seeking to avoid detection by them. Disclosing publicly such specific details of the operational capacity and activities of the CTU officers as is contained in the documents in issue can reasonably be expected to assist such persons in avoiding detection, or in avoiding adverse action if detected.
- Even if the assistance 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 large increasing volumes of travellers with finite resources.
- If the details 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 a damage to security operations. Current procedures and activities are set with a view to achieving maximum security outcomes with the available resources. Any change required by a need to counter the advantage afforded to CTU officers necessarily represents a compromise to operational effectiveness.
- Additionally, the damage could be in increasing the risk to personnel undertaking border protection work. Patrolling and protecting Australia's borders is an inherently dangerous task. It is not at all fanciful to suggest that people who are involved in illegal acts may be willing to harm Australian personnel in order to escape detection or sanction for their activities. By releasing information that would make the activities of CTU officers more predictable, the risk that a person would be willing to, and successful in, causing harm or damage to these officers is increased.

For these reasons, I have decided that document 3 and parts of document 1 and 2 are exempt under section 33(a)(i) of the FOI Act.

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

Section 47E(d) of the FOI Act provides that documents are conditionally exempt if disclosure would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

I have considered whether, in the alternative, the information exempted under s 33(a)(i) is conditionally exempt on the basis that disclosure would result in a substantial adverse effect on the proper and efficient conduct on the operations of ACBPS under s 47E(d) of the FOI Act. There is also additional material that I consider is exempt under section 47E(d).

As noted above, I am satisfied that if the information in the documents were released it would provide an insight into the precise steps taken by CTU officers in assessing and stopping certain people from crossing Australia's border. Information that relates to the way in which CTU officers assess, intercept, the process following interception and the information gathered from interception is information that goes directly to maintaining Australia's security and would also have a substantial adverse effect on the operations of ACBPS.

The additional material that I consider is exempt under section 47E(d) contains information including operational details relating to the implementation of the CTU, resources employed to these tasks and methods and procedures utilised by the CTU.

Managing the security and integrity of Australia's borders is integral to the operations of ACBPS. Any prejudice to the effectiveness of methods and procedures used in undertaking this role, including the role of CTU officers in particular, has the capacity to 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 partner agencies, to change those methods and/or procedures to avoid jeopardising their future effectiveness

I consider that the disclosure of document 3 and parts of documents 1 and 2 would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of ACBPS.

Accordingly, I have decided that document 3 and parts of documents 1 and 2 are conditionally exempt under section 47E(d) of the FOI Act.

### **4 Section 47F of the FOI Act – Personal Privacy**

Section 47F of the FOI Act provides that a document is conditionally exempt if its disclosure under FOI would involve the unreasonable disclosure of personal information of any person. 'Personal information' means information or an opinion about an identified individual, or an individual who is reasonably identifiable, whether the information or opinion is true or not, and whether the information or opinion is recorded in a material form or not (see s 4 of the FOI Act and s 6 of the *Privacy Act 1988*).

I consider that disclosure of parts of documents numbered 1-3 would disclose personal information relating to ACBPS officers. Most of the paragraphs contain information which would reasonably identify a person, either through names, positions or descriptions of their role or employment circumstance.

I consider that the disclosure of the information within these documents would involve an unreasonable disclosure of personal information about a number of individuals.

I have decided that parts of these documents referred to above 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 document 3 and parts of documents 1 and 2 are conditionally exempt, I am now required to consider whether access to the conditionally exempt information in 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 have the character of public importance and that there may be broad public interest in the documents.
- 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.

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 conditionally exempt information in the documents:

- I consider that the disclosure of document 3 and parts of the documents 1 and 2 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 that this factor weighs heavily against disclosure as it is in the public interest for ACBPS, in its role of managing Australia's borders, to protect the security of the Commonwealth for national security related matters.

- There is a strong public interest in ensuring that the ability of the ACBPS to undertake national security related operations in an efficient manner is not prejudiced or compromised in any way. Disclosing current methodologies for assessing and interacting with people who may pose a security threat to Australia by crossing the Australian border is not within the public interest as this will likely prejudice the efficacy of those methodologies.
- The disclosure of this information may provide those undertaking illegal activities with information that may be used to avoid detection and circumvent CTU officers. Again, decreasing the efficacy of CTU officers, and thus the efficacy of protecting the security of the Commonwealth, is not within the public interest.
- I acknowledge that there is a public interest in documents of ACBPS being made available to the public for the purpose of encouraging public debate and to promote oversight of ACBPS's activities. The material conditionally exempted under s 47E(d) will only make a very slight contribution to that interest as it does not disclose detailed policy thinking or other reflections on the efficacy or appropriateness of the operations, but rather comprises largely operational details about the undertaking of specific operations. By contrast, I consider there is a very real capacity for the disclosure of those operational details to cause the kinds of public interest harms I have identified.
- 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. Disclosing the names of ACBPS officers who work in an operational environment may invite inappropriate approaches by third parties and may prejudice the safety of those officers and their families when the documents are made available to the public at large. The names of these particular officers are not available through any other publicly available source. 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 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 information in the 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 FOI Fact Sheet 12 at **ATTACHMENT C** for your reference.

## **Making a Complaint**

FOI fact sheet 13 from the OAIC is at **ATTACHMENT D** for your reference. 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 the FOI section at [foi@border.gov.au](mailto:foi@border.gov.au)



**Rebecca Fraser**  
**Authorised Decision Maker**  
**Department of Immigration and Border Protection**

**ATTACHMENT A**

**Schedule of Documents**

	Date of document	No. of pages	Description	Decision on release	
1.		7	Concepts of Operations	Release in part	s33(a)(i) s 47E(d) s 47F
2.		23	National OPORD	Release in part	s33(a)(i) s 47E(d) s 47F
3.		1	Product 12	Exempt in full	s33(a)(i) s 47E(d) s 47F
4.		2	Question Time Brief	Release in part	s 22 (1)(a)(ii)
5.		1	Currency Statistics	Release in part	s 22 (1)(a)(ii)

## ATTACHMENT B

### 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;
  - (ii) the defence of the Commonwealth; or
  - (iii) the international relations of the Commonwealth; or
- (b) would divulge any information or matter communicated in confidence by or on behalf of a foreign government, an authority of a foreign government or an international organization to the Government of the Commonwealth, to an authority of the Commonwealth or to a person receiving the communication on behalf of the Commonwealth or of an authority of the Commonwealth.

#### 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:

- (a) prejudice the effectiveness of procedures or methods for the conduct of tests, examinations or audits by an agency;
- (b) prejudice the attainment of the objects of particular tests, examinations or audits conducted or to be conducted by an agency;
- (c) have a substantial adverse effect on the management or assessment of personnel by the Commonwealth, by Norfolk Island or by an agency;
- (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.

#### **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](http://www.oaic.gov.au)

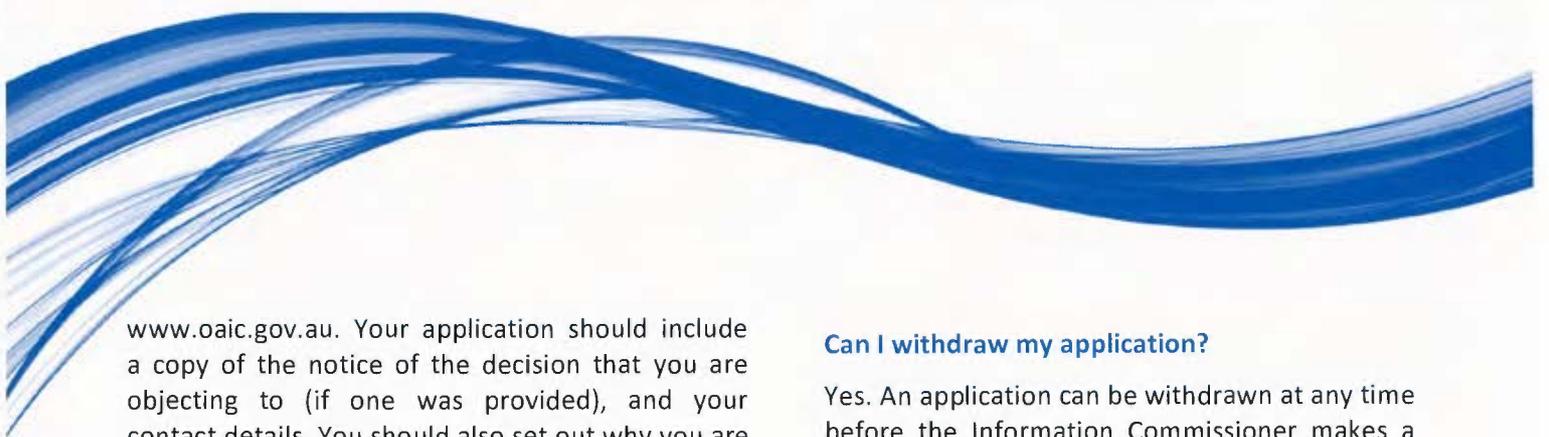
**post:** GPO Box 2999, Canberra ACT 2601

**fax:** +61 2 9284 9666

**email:** [enquiries@oaic.gov.au](mailto: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](mailto:enquiries@oaic.gov.au)

**write:** GPO Box 2999, Canberra ACT 2601

or visit our website at [www.oaic.gov.au](http://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](http://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](mailto: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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#### **For further information**

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