



## **ATTACHMENT A**

### **DECISION RECORD**

#### **Request Details**

File Number: 2015/022348

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:

*'All briefings to the immigration minister that relate to allegations that people smugglers were paid by Australian officials in a May asylum seeker turn back operation.'*

#### **Relevant material**

In reaching my decision, I have referred to the following:

- the terms of your request;
- the documents relevant to your request;
- the FOI Act;
- Guidelines published by the Office of the Australian Information Commissioner under s 93A of the FOI Act, and
- advice from Departmental officers with responsibility for matters relating to the documents to which you sought access.

#### **Reasons for Decision**

References in my reasoning below to ACBPS include the Department from 1 July 2015.

The schedule of the two documents that fall within the scope of your request at **ATTACHMENT B** 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 33 of the FOI Act – Documents affecting National Security, Defence or International Relations**

Section 33(a)(iii) of the FOI Act exempts a document (or part of a document) if disclosure would, or could reasonably be expected to, cause damage to the international relations of the Commonwealth.

The phrase 'would, or could reasonably be expected to' requires an assessment of the likelihood of the predicted effect occurring after disclosure of a document.<sup>1</sup> The test does not require a decision-maker to be satisfied on the balance of probabilities that the production of documents will in fact cause the predicted effect.

The phrase 'international relations of the Commonwealth' is not defined in the FOI Act. The term has previously been found to refer to the social, political or personal contact between the Commonwealth and foreign governments. Whether a dispute may have ramifications sufficiently extensive to affect 'relations' between governments must be determined on the facts of each case.

Importantly, 'damage' in the context of s 33(a)(iii) of the FOI Act is not confined to loss or damage in monetary terms. Damage may be intangible, such as inhibiting future negotiations between the Australian Government and a foreign government.<sup>2</sup>

Due to the transnational nature of illegal people smuggling, the Australian Government is required to maintain close and productive working relationships with the governments of major transit countries, including the country in question in the documents. I consider that the release of the material in question has the capacity to cause damage to the working relationship that exists between the Australian Government and the government of the foreign country on countering illegal people smuggling activities. The information is not in the nature of 'routine' information or correspondence.

I consider that there are real and substantial grounds for expecting that the disclosure of parts of the documents would or could reasonably be expected to cause damage to the international relations of the Commonwealth with respect to a particular foreign government, and I have therefore decided that parts of the documents are exempt from disclosure under section 33(a)(iii) of the FOI Act.

## **2 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.

ACBPS is part of a whole-of-government response to border protection issues that has been established through the Operation Sovereign Borders Joint Agency Task Force. Australia's national interests are potentially threatened by any unauthorised arrival of people and the Australian Government is responsible for the lawful entry of people into Australia and ensuring only appropriately authorised foreign nationals can stay within Australia. The integrity of Australia's borders is integral to the operations of ACBPS.

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<sup>1</sup> *Guidelines issued under s 93A of the FOI Act (FOI Guidelines)* [5.13].

<sup>2</sup> *FOI Guidelines* at [5.25].

Parts of the information contained within the documents relate directly to the interception of a vessel that posed a potential threat against Australia's national interests. They contain details of the people smuggling venture and the measures taken in respect of this vessel by border security assets. Accordingly the information disclosed by these documents goes directly to the operational activities at the heart of Operation Sovereign Borders.

I have decided that the parts of the documents referred to above are conditionally exempt under section 47E(d) of the FOI Act. I must now turn my mind to whether the information would be contrary to the public interest. Please see below my decision with respect to s.11B of the FOI Act.

### **3 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 the documents would disclose personal information relating to an ACBPS officer with responsibility for preparing the documents in question. The information would reasonably identify a person, either through names, positions or descriptions of their role or employment circumstance. This individual is a non-Senior Executive Service officer whose personal information is not publicly available.

The FOI Act states that, when deciding whether the disclosure of the personal information would be 'unreasonable', I 'must' have regard to four factors set out in s.47F(2) of the FOI Act. I have considered each of these factors below:

(a) *the extent to which the information is well known;*

The third party's information is not well known and would only be known to a limited group of people with a business need to know.

(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;*

As the third party's information is only known to a limited group of people, the individual concerned is not generally known to be associated with the matters discussed in the document.

(c) *the availability of the information from publicly available resources;*

The documents are Question Time Briefs and the information consists of the action officer's name and contact details. This information is restricted in its circulation and would only be known to a limited group of people with a business need to know. This information is not available from publicly accessible sources.

(d) *any other matters that I consider relevant.*

I do not consider that the third party's information would be relevant to the broader scope of your request, as you are seeking access to information "*relating to the payment of people smugglers in order to "turn the boats around"*". Rather, the information wholly relates to an individual involved in an administrative task.

I am satisfied that the disclosure of the information within these documents would involve an unreasonable disclosure of personal information about an individual.

I have decided that the information referred to above is conditionally exempt under section 47F of the FOI Act. I must now turn my mind to whether the information would be contrary to the public interest. Please see below my decision with respect to s.11B of the FOI Act.

#### **4 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 the conditionally exempt information 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.

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 the parts of the documents that are conditionally exempt under section 47E(d) of the FOI Act could reasonably be expected to prejudice operational activities associated with Operation Sovereign Borders 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 operational activities associated with these functions is not compromised or prejudiced in any way. I consider that this factor weighs heavily against disclosure.
- The disclosure of the personal information which is conditionally exempt under section 47F of the FOI Act could reasonably be expected to prejudice the protection of that individual's 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. 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.



**Rod Thiele**  
**Authorised Decision Maker**  
**Department of Immigration and Border Protection**

24 July 2015

## ATTACHMENT B

### Schedule of Documents

	Date of document	No. of pages	Description	Decision on release	
1.	11 June 2015	2	Question Time Brief - 11 June 2015	Release in part	s33(a) (ii), s47E (d) & 47F
2.	14 June 2015	2	Question Time Brief - 14 June 2015	Release in part	33(a) (ii), s47E (d) & 47F

## ATTACHMENT C

### 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:

...

- (iii) the international relations of the Commonwealth; or

...

#### 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.





## 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)

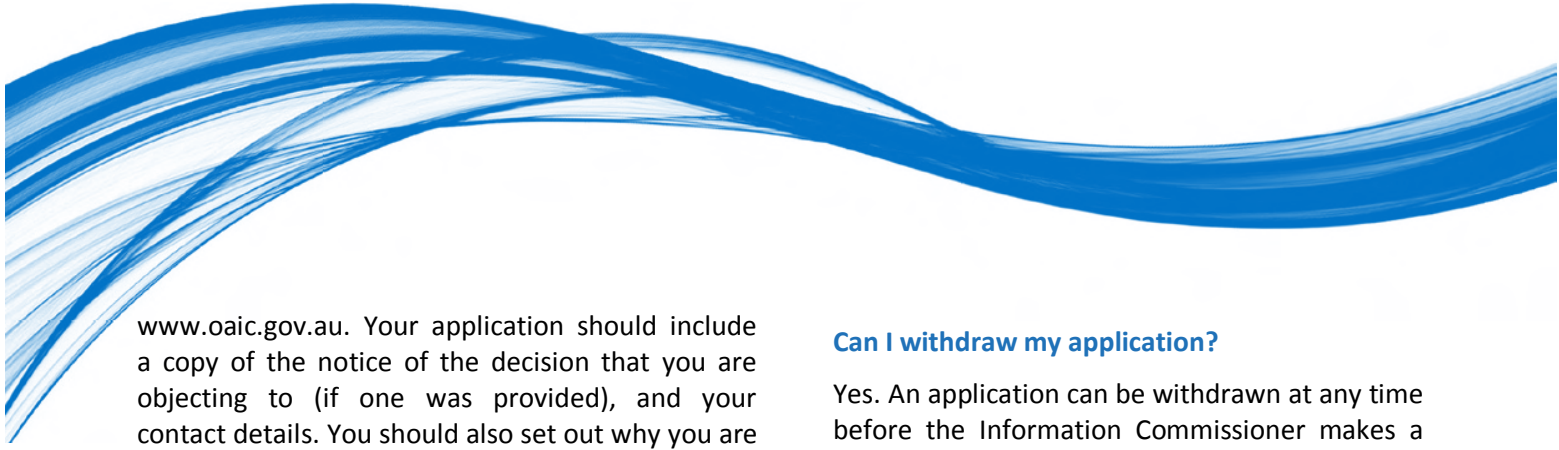
**post:** GPO Box 2999, Canberra ACT 2601

**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?**

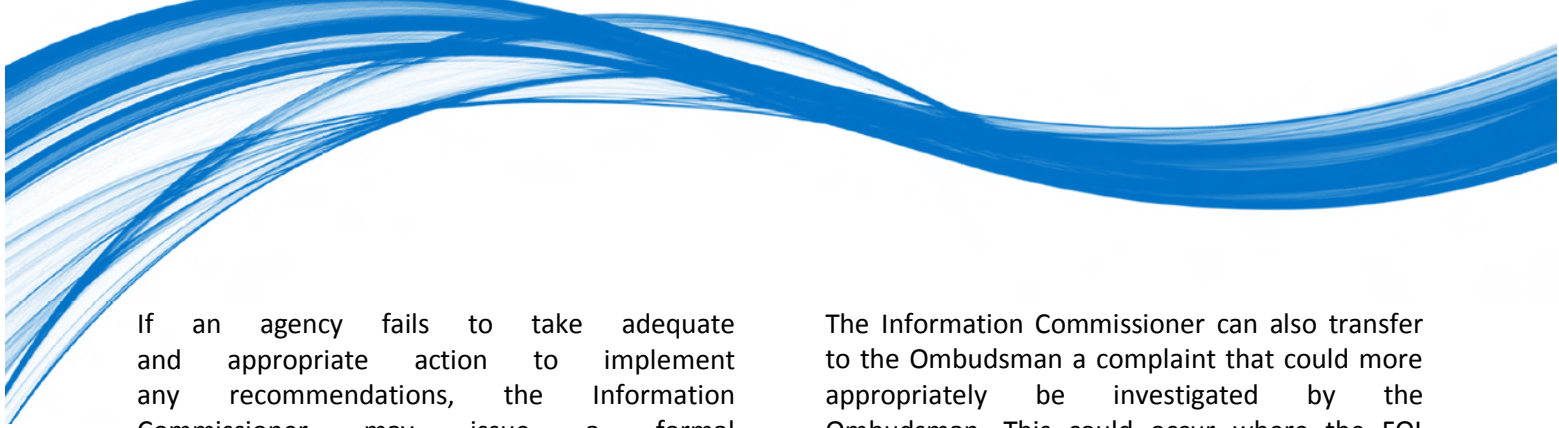
Yes. The Information Commissioner may decide not to investigate, or may discontinue an investigation, if:

- 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.

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)**