

FOI UPDATE

Commissioner-initiated investigation into the Department of Home Affairs

On 29 January 2021, the Australian Information Commissioner published a Commissioner-investigated investigation [report](#) into the Department of Home Affairs' compliance with statutory processing requirements under the *Freedom of Information Act 1982* for non-personal information requests.

This is only the third such report by the Commissioner since s 69(2) of the FOI Act was inserted, giving the Information Commissioner the power to investigate an action taken by an agency in the performance of functions, or exercise of powers under the FOI Act. This is the second investigation report by the Commissioner into the Department's processing of non-personal information requests.

The Commissioner's determination to undertake the investigation followed from her review of statistical evidence about delays in processing FOI requests for non-personal information, previous investigations, and the number and nature of FOI complaints and IC reviews made to the OAIC that highlighted the Department's failure to process FOI requests for non-personal information within the statutory processing period.

The Commissioner made 4 recommendations for the Department to improve its rate of compliance with the statutory processing period by:

- 1 appointing an Information Champion
- 2 preparing and implementing an operational manual for processing FOI requests for non-personal information
- 3 undertaking and completing FOI training for FOI section staff, FOI decision-makers and support staff, and making online FOI training available to all Departmental staff
- 4 undertaking an audit of the processing of FOI requests for non-personal information.



The Secretary's response to the Commissioner is published with the report. The Department accepted all recommendations and drew attention to the work already underway in the Department's continuous improvement program for FOI since October 2019 (when the OAIC opened the investigation). Of particular note was that:

- the Department finalised double the number of requests for non-personal information in 2019–20 than it did in 2018–19 (1789 compared to 870)
- the Department finalised double the number of requests for non-personal information between 1 July – 30 November 2020 compared with the same period in 2018-19, and had increased the rate finalised within statutory timeframes to 70% (a 30% increase).

Take away thoughts

The volume of requests for non-personal information the Department is dealing with far exceed those that most other agencies receive (combined with personal information requests the order of magnitude is even greater!). However, other agencies that have also experienced a surge in FOI requests (particularly complex and sensitive requests) may find the recommendations useful to boost their capacity to rise to manage this increased demand.

AGS regularly assists agencies with:

- developing and presenting FOI training materials and sessions, including those targeted for FOI decision-makers and staff providing support with searches and other processing tasks, and
 - reviewing FOI processes and guidance material.
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Recent updates to FOI Guidelines

On 9 February 2021, the Information Commissioner issued updates to the [FOI Guidelines](#) dealing with:

- Charges for providing access (Part 4)
- Review by the Information Commissioner (Part 10)
- Complaints and investigations (Part 11).

Part 4: Charges

The changes to this part are a relatively minor clarification of the more significant revisions in June 2020. However, one aspect that is worth highlighting is described as a '[C]larification of the circumstances in which an applicant may dispute the preliminary assessment of the charge.'

The Guidelines now advise that:

[4.57] The assessment notice must also inform applicants that they can still contest the preliminary costs assessment even if they have paid (an option that allows processing of the FOI request to continue while the charge is being contested).

Part 10: IC Review

While these are generally minor changes, practitioners may be interested to note that some clarification about the use of s 54W(b).

Section 54W(b) is the power for the Commissioner to decline to undertake a review if satisfied 'that the interests of the administration of the FOI Act make it desirable' that the AAT consider the IC reviewable decision. Agencies have reported an increase in the number of cases in which this discretion has been exercised, leading to more FOI reviews before the AAT.

The list of circumstances in which the Commissioner may decide that it is desirable for the AAT to consider the IC reviewable decision instead of the Commissioner continuing with the IC review has now been expanded to include:

- where there may be a perceived or actual conflict of interest in the Commissioner undertaking review, including where:
 - the FOI request under review was made to, or decided by, the Information Commissioner or their delegate

- the FOI request or material at issue relates to specific functions exercised by the Information Commissioner under the Privacy Act
- the applicant has active matters in other forums, including the AAT or Federal Court, and the Information Commissioner is the respondent
- where consideration by the AAT would further the objects of the FOI Act, particularly in relation to the performance and exercise of functions and powers given by the FOI Act to facilitate and promote public access to information, promptly and at the lowest reasonable cost (s 3(4)).

Part 11: Complaints and investigations

There are a number of changes to this part. Of particular note, is the addition of a list of factors the Commissioner will take into account when deciding whether to commence an investigation of an FOI complaint or at the Commissioner's own initiative:

- [11.8] When deciding whether to commence an investigation, the Information Commissioner will take into consideration:
 - the objects of the FOI Act
 - the risks and impact of non-compliance
 - whether the practice complained of is systemic
 - whether significant issues are raised
 - whether there has been non-compliance with statutory timeframes
 - the outcome sought.
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