



Decision not to investigate a FOI complaint under s 73(b) of the *Freedom of Information Act 1982*

Complainant	Ms Emily Lacey
Respondent agency	National Disability Insurance Agency
Decision date	18 June 2024
OAIC reference number	CP24/00588
Agency reference number	FOI 23/24-0358

1. As a delegate of the Information Commissioner, I am authorised to make a decision under s 73 of the *Freedom of Information Act 1982* (FOI Act) not to investigate a FOI complaint about an action made under s 70 of the FOI Act.
2. I have decided not to investigate the complainant's FOI complaint under s 73(b) of the FOI Act as I am satisfied the FOI complaint is more appropriately considered through an IC review.

Background

3. On 3 March 2024, the complainant submitted an FOI complaint to the Office of the Australian Information Commissioner (the OAIC) in accordance with s 70 of the FOI Act in relation to a FOI request submitted to the National Disability Insurance Agency (the Agency).

Issue raised by complainant

4. The complaint raised the following issue:
 - The Agency did not provide a decision within the statutory timeframe, as required by s 15(5)(b) of the FOI Act.

Considerations and preliminary inquiries

5. In making my decision, I have had regard to the following:
 - the FOI complaint of 3 March 2024,
 - the Agency’s deemed access refusal decision dated 27 October 2023, that is the subject of the FOI complaint,
 - the FOI Act, in particular s 73(b), and
 - the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act to which agencies must have regard in performing a function or exercising a power under the FOI Act (FOI Guidelines), in particular paragraph [\[11.5\]](#).

Decision not to investigate the FOI complaint

6. Under s 73(b) of the FOI Act, I may decide not to investigate a FOI complaint if the complainant:
 - i. has or had a right to have the action reviewed by the Agency, a court or a tribunal, or by the Information Commissioner under Part VII of the FOI Act; and
 - ii. has not exercised, or did not exercise, the right; and
 - iii. it would be, or would have been, reasonable for the complainant to exercise the right.

7. The FOI Guidelines at [\[11.5\]](#) states:

The Information Commissioner’s view is that making a complaint is not an appropriate mechanism where IC review is available, unless there is a special reason to undertake an investigation and the matter can be dealt with more appropriately and effectively in that manner. IC review will ordinarily be the more appropriate avenue for a person to seek review of the merits of an FOI decision, particularly an access refusal or access grant decision.

8. In considering whether to investigate a FOI complaint, it is open to me to decline to investigate a FOI complaint if the issues raised are more appropriately dealt with through IC review. The outcome the complainant has sought from the OAIC is to investigate the Agency’s deemed access refusal decision to withhold documents under s 15AC the FOI Act. I understand the outcome primarily sought by the complainant is access to documents. This outcome can only be achieved by reviewing the Agency’s deemed access refusal decision.
9. Accordingly, the issue raised in the FOI complaint regarding the Agency’s deemed access refusal decision to withhold documents is more appropriately considered through the IC review process pursuant to s 73(b) of the FOI Act. This is consistent with the Information Commissioner’s approach as per the FOI Guidelines at [\[11.5\]](#).

10. Should the complainant wish to make an application for IC review of the Agency's deemed access refusal decision, further information about this process is available at [here](#) or further assistance please email FOIDR@oaic.gov.au.
11. In light of my findings above, I consider the discretion under s 73 not to investigate the FOI complaint is enlivened in this matter. In deciding whether to exercise the discretion not to investigate the FOI complaint, I have considered that:
- the FOI complaint is more appropriately considered through an IC review (s 73(b))
 - the parties have not provided any additional information that alters my view above, and
 - investigating the FOI complaint will not promote the objects of the FOI Act (s 3).

Finalisation of the FOI complaint and review rights

12. I confirm the FOI complaint is now finalised and the file is closed. Information about review rights is set out below.
13. Information about how the OAIC's handles a FOI complaint can be accessed on the OAIC's website [here](#).

Yours sincerely,



Rocelle Ago
Assistant Commissioner
Freedom of Information

18 June 2024

Your review rights

Judicial review

You can apply to the Federal Court of Australia or the Federal Circuit Court for a review of a decision of the Information Commissioner if you think that a decision by the Information Commissioner not to investigate, or not to continue to investigate, a complaint under the *Freedom of Information Act 1982* (the FOI Act) is not legally correct. You can make this application under the *Administrative Decisions (Judicial Review) Act 1977*.

The Court will not review the merits of your case but it may refer the matter back to the Information Commissioner for further consideration if it finds the decision was wrong in law or the Information Commissioner's powers were not exercised properly.

An application for review must be made to the Court within 28 days of receiving the decision. You may wish to seek legal advice as the process can involve fees and costs. Please contact the Federal Court registry in your state or territory for more information, or visit the Federal Court website at <http://www.fedcourt.gov.au>.

Making a complaint to the Commonwealth Ombudsman

If you believe you have been treated unfairly by the OAIC, you can make a complaint to the Commonwealth Ombudsman (the Ombudsman). The Ombudsman's services are free. The Ombudsman can investigate complaints about the administrative actions of Australian Government agencies to see if you have been treated unfairly.

If the Ombudsman finds your complaint is justified, the Ombudsman can recommend that the OAIC reconsider or change its action or decision or take any other action that the Ombudsman considers is appropriate. You can contact the Ombudsman's office for more information on 1300 362 072 or visit the Commonwealth Ombudsman's website at <http://www.ombudsman.gov.au>.

Accessing your information

If you would like access to the information that we hold about you, please contact FOIDR@oaic.gov.au. More information is available on the [Access our information](#)¹ page on our website.

¹ <https://www.oaic.gov.au/about-us/access-our-information/>.