



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

Complainant	BE
Respondent agency	Department of Defence
Decision date	20 June 2024
OAIC reference number	CP23/01863
Agency reference number	FOI 197/22/23

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.
2. I have decided not to investigate the complainant's FOI complaint under s 73 of the FOI Act as I am satisfied the FOI complaint is lacking in substance (s 73(e)).

Background

3. On 16 December 2022, the complainant sought Information Commissioner (IC review) of the Department of Defence's (the Department) deemed access refusal decision (FOI 197/22/23) regarding the FOI request of 12 October 2022 (OAIC reference: MR23/00024). The complainant also 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 an FOI request
4. On 29 August 2023, the complainant withdrew their IC review following the Department's decision of 22 December 2022. The complainant advised that they wished to proceed with their complaint about the Department's conduct.

Issues raised by complainant

5. The complaint raised the following issue:
 - The Department did not provide a decision within the statutory timeframe, as required by s 15(2) of the FOI Act and
 - The Department did not provide an update regarding when the decision would be made.

Considerations and preliminary inquiries

6. In making my decision, I have had regard to the following:
 - the FOI complaint of 16 December 2022
 - the Department's response to preliminary inquiries under s 72 of the FOI Act
 - the IC review (OAIC reference: MR23/00024)
 - the FOI Act, in particular s 73(e) 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 paragraphs [\[3.138\]](#), [\[11.4\]](#) to [\[11.5\]](#) and [\[11.11\]](#).

Preliminary inquiries

7. On 3 June 2024, the OAIC conducted preliminary inquiries with the Department in relation to the FOI complaint. I have assessed the issues and considered the response provided by the Department.
8. In their response of 18 June 2024, the Department acknowledges that when seeking the complainant's consent to the extension of time it should have explained the complexities of the request relating to the subject matter of the documents and the number of line areas needing to be consulted on their release. This may have affected the complainant's hesitancy to agree to a 30 day extension of time. When the Department received the complainant's consent to further extend the processing period from 25 November 2022 to 28 November 2022 it was still consulting with a line area. The Department should have advised the complainant that the extension until 28 November 2022 was insufficient and that an extension of time would be sought from the Information Commissioner under section 15AB of the FOI Act.
9. The Department apologises to the complainant for the delay in finalising the request, and for poor communication with regard to the reasons for the delay and the likely timeframe for the decision to be provided.

10. Since the complainant's FOI request the Department has increased the size of the FOI Directorate and created a new Deputy Secretary Governance role to oversee the FOI function with an aim to improve efficiencies and processes. Furthermore, all case officers in the FOI teams have been reminded of the various options for seeking extensions of time to ensure FOI requests are completed within the statutory timeframe.

Section 73(e) of the FOI Act

11. Under s 73(e) of the FOI Act, I may decide not to investigate a FOI complaint if the Information Commissioner is satisfied that a complaint about an action made under s 70 of the FOI Act is lacking in substance.
12. I note the Department has informed it is implementing changes in relation to the issue raised within the FOI complaint.
13. The OAIC notes the complainant's concerns in relation to the Department's non-adherence to the statutory timeframes and is actively monitoring the Department in relation to this issue.
14. For these reasons, I am satisfied the FOI complaint is lacking in substance pursuant to s 73(e) of the FOI Act.

Decision not to investigate the FOI complaint

15. 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 lacking in substance (s 73(e)).
 - 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

16. I confirm the FOI complaint is now finalised and the file is closed. Information about review rights is set out below.

17. 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

20 June 2024

The complainant's 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/>.