



**Australian Government**

**Office of the Australian Information Commissioner**

## External complaints about OAIC employees or contractors – overarching policy

Operational policy for the management of external complaints about the behaviour of OAIC employees or contractors



Audience and location: All staff

Review Date: 30 September 2021

26 November 2020

OAIC

Version	Name	Changes	Date
0.1	E. Hampton	Initial draft	23 August 2020
0.2	AGS	Amendments	24 September 2020
0.3	A.Falk	Approved	26 November 2020

## Executive summary

This operational policy describes the way in which the Office of the Australian Information Commissioner (OAIC) will manage external complaints about the behaviour of its employees or contractors (staff members).

Members of the public, businesses and government agencies have the right to complain about OAIC staff members. The OAIC's service commitment to the community it regulates is contained in the Service Charter (D2020/015181).

There are two types of complaints that external people or entities might make about OAIC staff members:

1. Complaints that an OAIC staff member has interfered with the privacy of an individual
2. Complaints about conduct that does not involve interference with the privacy of an individual.

Either type of complaint can involve conduct that may amount to a breach of the Australian Public Service (APS) Code of Conduct by a current or former employee and which may be handled under OAIC's *Breaches of the APS Code of Conduct Procedures* instead of being handled under the relevant complaints policy.

This policy provides guidance to staff members about the correct handling of all types of complaints.

## Complaints of an interference with privacy

Where a complaint is received that an OAIC staff member has interfered with an individual's privacy it must be managed in accordance with the *Privacy complaints about the OAIC* policy.

Such complaints will be managed by the Legal team.

## Complaints about conduct

Where a complaint is received about the conduct of a staff member that does not involve interference with an individual's privacy it must be managed in accordance with the *External complaints about OAIC employees or contractors – operational policy* – found at [D2021/004230](#).

Complaints about conduct might include:

- rudeness
- delay
- failing to respond to reasonable requests.

Such complaints will be managed by the staff member's manager and reported to the relevant Assistant Commissioner or Principal Director.

## Complaints about breaches of the APS Code of Conduct

The above policies do not preclude action being taken under the *Breaches of the APS Code of Conduct Procedures* if the complaint relates to a current or former OAIC employee (but not a contractor). Where a complaint concerns the conduct of a current or former OAIC employee that may amount to a breach of the APS Code of Conduct, such complaints may be managed in accordance with the *Breaches of the APS Code of Conduct Procedures* – found at [D2021/004229](#). The *Breaches of the APS Code of Conduct Procedures* also apply where concerns come to light other than through an external complaint.

If you are uncertain about which policy applies to a complaint, please discuss the matter with the Principal Lawyer or a member of Executive.

Regardless of the type of complaint made, the staff member receiving the complaint must register the matter as a complaint in Resolve.



## External complaints about OAIC employees or contractors

### Operational policy for the management of external complaints about the behaviour of OAIC employees or contractors

Audience and location: All staff

Review Date: 30 September 2021

Version	Name	Changes	Date
0.1	E. Hampton	Initial draft	5 June 2020
0.2	A. Falk	Amendment to draft	29 June 2020
0.3	A. Falk	Cleared	30 June 2020
0.4	E. Hampton	Amendment	23 August 2020
0.5		AGS amendments	23 September 2020
0.6	A. Falk	Approved	26 November 2020

### Executive summary

This operational policy describes the way in which the Office of the Australian Information Commissioner (OAIC) will manage external complaints about the behaviour of its employees or contractors (staff members).

Complaints that a staff member has interfered with the privacy of an individual are not managed under this operational policy. Such complaints must be managed in accordance with the [Privacy Complaints about OAIC](https://www.oaic.gov.au/about-us/our-corporate-information/operational-information/privacy-complaints-about-the-oaic) <<https://www.oaic.gov.au/about-us/our-corporate-information/operational-information/privacy-complaints-about-the-oaic>>.

This policy is modelled on the [Better Practice Guide to Complaint Handling](https://www.ombudsman.gov.au/publications/better-practice-guides%20published%20by%20the%20Office%20of%20the%20Commonwealth%20Ombudsman) <<https://www.ombudsman.gov.au/publications/better-practice-guides%20published%20by%20the%20Office%20of%20the%20Commonwealth%20Ombudsman>> published by the Office of the Commonwealth Ombudsman.

This policy does not preclude action being taken under the *Breaches of the APS Code of Conduct Procedures* (if the complaint relates to a current or former OAIC employee) or under an applicable contract (if the complaint relates to a contractor).

### The value of complaints

The OAIC values complaints and recognises their importance in highlighting weaknesses in its systems, processes or customer service, providing an opportunity to resolve problems with stakeholders and improve its accountability and effectiveness.

In line with this, the OAIC defines a **complaint** broadly, as

*an expression of dissatisfaction by a complainant, inquirer, subject or respondent, for which there is a reasonable expectation that the OAIC will consider and, where appropriate, investigate and resolve the matter.*

This is different from **feedback**



where information is provided to the OAIC for the purposes of improving its systems or processes, but about which there is no expectation of an investigation or response.

Complaints can be provided to the OAIC through a range of mechanisms:

- over the telephone
- in an email
- in formal correspondence
- during a meeting (such as an exit interview for an assessment)

and at any time during an individual's interaction with the OAIC. There is no requirement for a complaint to be made using a specific form, or in a specified manner.

Staff must be aware of the different ways an individual may make a complaint and follow this policy in the event a complaint about an OAIC staff member is made.

If a complaint is a public interest disclosure, the complaint must be handled in accordance with OAIC's *Public Interest Disclosure Procedures* rather than under this policy.

## Complaint handling process

### Resolution by the staff member involved

Complainants are encouraged to raise concerns about the behaviour of staff members with the staff member concerned.

Staff members should attempt to resolve the complaint with the individual directly. Sometimes this might be possible by providing an explanation of the OAIC's processes and timeframes for managing different matters or apologising if the staff member has not met the commitment the OAIC provides to members of the public through its Charter.

Where the staff member is able to successfully resolve the complaint, the staff member must still create an 'OAIC complaint' Resolve record to capture the complaint and its resolution.

The staff member must advise their manager of the complaint and its resolution and the Resolve record relating to the complaint must be sent to the staff member's manager.

### Complaint is unable to be resolved by the staff member involved

Where the complainant prefers to raise the matter with someone other than the staff member involved, or where the attempt to resolve the matter with the staff member involved has been unsuccessful, the complainant should be provided with the contact details of the staff member's manager. The complainant may make their complaint by telephone, email or in hard copy correspondence.

The manager should follow the processes outlined below in relation to the complaint.

### Acknowledge

All complaints must be acknowledged quickly. The acknowledgement should outline the complaint process and likely timeframes.

Complaints can be acknowledged over the phone, by email or through formal correspondence, depending on the circumstances.

Complaints must be entered into Resolve by the person receiving the complaint, using the 'OAIC complaints' case type. The manager receiving the complaint must resolve the matter as confidentially as possible – that is, without discussing the matter with other staff, with the exception of the person's Assistant Commissioner or Principal Director or others who have a clear need to know. All complaints that have been made to a manager about a staff member must be reported to the relevant Assistant Commissioner or Principal Director. In some circumstances it will be necessary for the staff member concerned to be advised of the complaint if necessary to provide them with procedural fairness, including where an investigation occurs under this policy or OAIC's *Breaches of the APS Code of Conduct Procedures*.

### Assess

The complaint must be assessed by the manager of the staff member about whom the complaint is made.

The manager will decide who should investigate the complaint, the timeframes for that investigation, and whether any changes to processes should be implemented while the investigation is undertaken. For example, if the complaint relates to a difficult interaction between an individual and a staff member, the manager may decide that another staff member will be responsible for contact with the individual while the complaint is investigated.

FOI REF: 200272-007

The manager will also decide whether the complaint should be managed in accordance with this policy, or (if it relates to a current or former OAIC employee) referred under the OAIC's *Breaches of the APS Code of Conduct Procedures*, in which case those procedures take precedence. The manager may seek the advice of their Assistant Commissioner, Principal Director or Principal Lawyer in relation to that decision. If the complaint is referred for consideration under OAIC's *Breaches of the APS Code of Conduct Procedures* and there is a decision not to handle it under those procedures, the manager may resume managing the complaint in accordance with this policy.

If the complaint relates to the conduct of a contractor, the manager will also decide whether the complaint should be managed in accordance with this policy, or in accordance with any relevant provisions of the applicable contract.

The manager may contact the complainant to ask how they would like to see the complaint resolved – what outcome they are seeking – if that is not evident from the complaint. They may also provide more information to the complainant about the investigation of the complaint and the contact details of the person who will undertake the investigation.

The manager may decide that a complaint does not need to be investigated. For example, the subject of the complaint may have been previously considered, or the staff member about whom the complaint is made may no longer work for the OIAC and the complaint does not identify any systemic issues that would otherwise warrant investigation.

The manager must record the outcome of their assessment in the Resolve 'OAIC complaint' record – including the details of the person to whom it is assigned for investigation and required timeframes for any investigation, or a decision not to investigate the matter.

The manager may decide to investigate the matter themselves or may assign the matter to a different investigator.

In the event of a decision not to investigate the matter, the manager must advise the complainant of that decision and close the matter in Resolve.

## Plan

The person to whom the complaint is assigned for investigation should prepare a short, written plan for the investigation that includes:

- what is the issue to be investigated?
- what information is required?
- how will that information be obtained?
- how long will it take to obtain that information?
- are there any special considerations that apply to the complaint – for example, is there sensitive or confidential information that needs to be safeguarded?

The investigation plan must be attached to the Resolve 'OAIC complaint' record within two days of the matter being assigned to the investigator.

## Investigate

The investigation must be quick, confidential (subject to contrary legal obligations such as procedural fairness) and impartial.

### Quick:

Investigations into complaints about staff members should take no more than two weeks.

### Confidential:

Confidentiality is owed to both the complainant and the staff member, subject to contrary legal obligations such as the obligation to give procedural fairness. For example, this policy provides for the staff member about whom the complaint has been made to be advised of the details of the complaint and provided an opportunity to respond.

For the complainant:

- staff members investigating regulatory matters raised by the complainant do not need to know that the complainant has made a complaint about the behaviour of a staff member.
- the Resolve record relating to the complaint must only be accessed by individuals who have a need to know about the complaint.

For the staff member:

- confidentiality is also owed to the staff member ~~FOI 3502/00272 of 008~~ complaint. The fact that there has been a complaint made and the nature of the complaint should not be shared with other staff members. In the event the complaint is substantiated, any appropriate steps will be managed between the staff member and their manager or in accordance with OAIC's *Breaches of the APS Code of Conduct Procedures*.

### **Impartial:**

The investigation should be impartial and fair. There is no onus on the complainant to 'prove' their complaint, nor any obligation on the staff member to 'prove' they behaved appropriately. Rather, the matter must be weighed carefully through a balanced investigation of all relevant facts and circumstances and findings reached on the balance of probabilities.

Findings on disputed facts should be based on evidence, not preconceptions, assumptions or 'how we usually do things'.

A written record should be kept and relevant evidence, including statements where appropriate, attached to the Resolve record.

The staff member about whom the complaint has been made should be advised of the details of the complaint and provided an opportunity to respond.

A complainant should be given an opportunity to comment on information or claims that are inconsistent with their account of the matter. A complainant is not obliged to substantiate each fact or element in their complaint but it is reasonable for the investigator to ask them to assist the investigation by providing information about what they know, including documents and dates where applicable.

It is acknowledged that in some cases there will not be clear evidence to support or dispute the complaint.

An investigation report must be attached to the Resolve record.

### **Respond**

When the investigation has been completed, the complainant should be advised of the findings and decision reached. The relevant Assistant Commissioner or Principal Director must clear any response.

Thought should be given to whether a remedy can be provided to a complainant where the complaint is substantiated. Remedies might include an apology or a change in process. Advice to complainants about the outcomes of investigations will be consistent with the requirements of the Privacy Act and any applicable guidance from the Australian Public Service Commission.

The response can be provided by telephone, email or formal correspondence, depending on the circumstances.

## **Systemic issues**

**In all cases** following the investigation and resolution of a complaint, consideration must be given to whether the complaint identifies systemic weaknesses in the OAIC's policies, procedures or training. Even if the complaint is unsubstantiated, the investigation may identify matters that could have been managed differently and better, the need for training (for particular staff or in relation to particular interactions) or improvements to recordkeeping.

Every complaint provides an opportunity for the OAIC to improve its work practices, procedures and interactions.

Either as part of the response to the complainant, or following as appropriate, the investigator should consider and document whether the complaint identifies systemic issues and must bring them to the attention of the relevant Assistant Commissioner or Principal Director.

The Assistant Commissioner or Principal Director will decide how those systemic issues can be addressed.

The Resolve record must include a file note about whether and what systemic issues have been raised by the complaint, and how they will be addressed. The matter must not be finalised in Resolve until that note has been attached.

### **Complaints regarding Assistant Commissioners or Principal Directors**

Complaints made by an external person about Assistant Commissioners or Principal Directors will be handled by the Deputy Commissioner personally, or by Legal Services or an external provider as appropriate.

Appropriate record keeping and procedural fairness requirements must be complied with.

### **Complaints regarding the Deputy Commissioner**

Complaints made by an external person about the Deputy Commissioner will be handled by the Commissioner personally, or by Legal Services or an external provider as appropriate.

Appropriate record keeping and procedural fairness requirements must be complied with.







**Australian Government**  
**Office of the Australian**  
**Information Commissioner**

# Guidance for staff

Dealing with privacy  
complaints about the OAIC

[oaic.gov.au](http://oaic.gov.au)

OAIC

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# Background

## Purpose

This Guide applies to any officer of the Office of the Australian Information Commissioner (**OAIC**) who receives a complaint from an individual alleging that the OAIC has interfered with their privacy.

References in this Guide to provisions are to those contained in the *Privacy Act 1988* (Cth) (**Privacy Act**) unless otherwise indicated.

This Guide outlines:

- The process for handling a first instance complaint about an act or practice on the part of the OAIC that may be an interference with the privacy of an individual
- The role of the OAIC's privacy officers
- The process for managing a complaint made under s 36 about an act or practice of the OAIC
- The legal basis for appointing an external investigator to conduct an investigation under s 40(1) and the role of the external investigator
- The role of Legal Services team and Corporate Services Branch in procuring and appointing the external investigator
- The role of the relevant Assistant Commissioner, General Counsel and Director of the Legal team in progressing the s 36 privacy complaint
- Supporting the officer about whom a privacy complaint is made.

This policy does not preclude action being taken under the '[Breaches of the APS Code of Conduct Procedures](#)' (if the complaint relates to a current or former OAIC employee) or under an applicable contract (if the complaint relates to a contractor).

## OAIC as an agency and as a regulator

The OAIC acts as the regulator in handling privacy complaints made about other Australian Privacy Principle (**APP**) entities.

Under s 36 an individual may complain to the Commissioner about an act or practice that may be an interference with their privacy. If such a complaint is made, and the act or practice may be an interference with the privacy of an individual, under s 40 the Commissioner is obliged to investigate the act or practice, subject to exceptions.

The requirement to investigate only applies if the complainant complained to the respondent first or if the Commissioner decides that it was not appropriate for the complainant to first complain to the respondent.

As an APP entity, the OAIC may also receive complaints from individuals who claim that the OAIC has interfered with their privacy. In these instances, the OAIC is the respondent agency.

Where an individual lodges a complaint about the OAIC's conduct, the OAIC must generally first consider dealing with that complaint in its capacity as a respondent agency, and second, in the event that the complainant continues to press their complaint after an unsuccessful attempt to resolve, in its capacity, as a regulator. There may be instances where it is not appropriate for the complainant to complain in the first instance to the OAIC as an agency, and the Commissioner may, pursuant to s 40(1A), decide to investigate the complaint under s 36.

Where an individual complains to the OAIC under s 36 (in its capacity as a regulator), that the OAIC has interfered with their privacy, there is a risk that the OAIC will be perceived to be biased or may

have a conflict of interest in investigating its own actions. That is, a reasonable observer might consider that the OAIC may not bring an impartial mind as the regulator, in regulating its own actions.

In order to mitigate this risk, the OAIC has decided on a process by which it may seek the assistance of an appropriately qualified and experienced external consultant to conduct an independent investigation into the act or practice about which the complainant complains. The decision to outsource a s 36 privacy complaint against the OAIC to an external investigator must be made by the Australian Information Commissioner (**the Commissioner**) or an Executive delegate.

## Related material

- [Privacy regulatory action policy](#)
- [Guide to privacy regulatory action](#)
- [Privacy Officer Appointment Instrument](#)
- [OAIC Privacy Management Plan](#) (D2018/011921)

## Guidance

### Role of Privacy Officers

The *Privacy (Australian Government Agencies — Governance) APP Code 2017* (**the Code**) made under s 26G requires the OAIC to appoint at least one privacy officer who is the primary point of contact for advice on privacy matters in an agency and who handles privacy complaints, among other responsibilities.

Under the existing [Instrument of Appointment](#), the General Counsel is the Chief Privacy Officer (**CPO**), while Lawyers, including Senior Lawyers and the Director of the Legal Services team constitute OAIC privacy officers for the purposes of the Code.

In the event that an OAIC officer, including Enquiries staff, receives a complaint in writing from an individual, which alleges that the OAIC has interfered with their privacy, the officer should acknowledge the complaint and refer the complaint to the CPO. The CPO will decide whether attempts to resolve the matter should be undertaken as the agency involved, or whether the matter should be considered under s 36. The CPO will consider the complexity of the matter in reaching their decision, with more complex matters more likely to be managed under s 36.

Privacy officers will liaise with the OAIC Executive about how to approach privacy complaints made against the OAIC. In some instances, as noted above, the Commissioner may consider exercising their discretion to find that it is not appropriate for the complainant to complain to the OAIC and may instead invite the complainant to make, or may decide to treat the first instance complaint as, a complaint under s 36.

### Officers who are subjects of the complaint

On receipt of a privacy complaint, the CPO will talk to the manager/s of the officer who is the subject of the complaint. The CPO will generally refer the complaint to privacy officers within the Legal Services team to assist with management of the complaint.

Any officer who is the subject of the complaint will be advised in broad terms of the nature of the complaint and will be directed not to access any of the OAIC's document management systems (such as Content Manager or Resolve) relating to the complaint.



They will be offered support by their manager, including information about accessing such services as Employee Assistance Program.

Complaints will be handled with an appropriate level of confidentiality. Information about the complaint will be disclosed to relevant staff on a need to know basis, including where it is necessary to give procedural fairness to the officer concerned.

## Outcomes of Privacy Complaints against the OAIC

If a complainant is dissatisfied with the outcome of their privacy complaint at first instance, they are entitled to make the complaint to the OAIC as a regulator under s 36 of the Act.

If the complainant considers that the OAIC's privacy officer erred in law in their making of a decision about the complaint, it is open to the complainant to seek judicial review of that decision.

Alternatively, if the complainant is dissatisfied with the outcome of the complaint or the way in which the complaint was handled, they may contact the Commonwealth Ombudsman.

## OAIC as an agency

The CPO will decide whether the OAIC should attempt to resolve the matter as an agency, ahead of moving to s 36 processes. Relatively straightforward matters, where the officer who is the subject of the complaint agrees with the facts and circumstances put forward by the complainant, may be able to resolved less formally.

In those circumstances, the resolution of the matter will be attempted by the Lawyer assigned to the matter by the CPO. This may involve:

- Obtaining a statement of facts from the officer involved
- Reaching a decision regarding whether those facts amount to an interference with the privacy of the complainant
- Attempting to resolve the matter with the complainant.

Where the matter is more complex, or attempts to resolve the matter informally are unsuccessful and the complainant wishes to pursue the matter, the CPO may decide to investigate the complaint under s 36.

## Section 36 complaint

### Role of Case Manager

#### In-house management of s 36 complaint

On receipt of the complaint made under s 36 about the OAIC the CPO will generally allocate the complaint to a Lawyer within Legal Services (**the case manager**). Though the CPO will maintain oversight, the case manager will be responsible for both the management of the s 36 complaint and the procurement of an external investigator. Section 36 complaints against the OAIC will be expedited.

#### Management of s 36 complaint by an external investigator

Before an investigator is engaged, the OAIC must advise the complainant that the OAIC will engage the third-party investigator (**the investigator**) to investigate the complaint.

The case manager will write to the complainant explaining the decision to outsource the complaint to the investigator, advising that information about the complaint, including the original complaint to the OAIC and the complainant's submissions, will be sent to the investigator.

The case manager will undertake a procurement process to engage an external investigator in accordance with the OAIC's usual legal procurement process. Final approval of the external investigator will be given by the Deputy Commissioner.

The CPO will also ensure that the investigator is appointed to the role under the relevant instrument of appointment. The CPO and Corporate Services will be responsible for processing the invoices provided by the investigator.

The external investigator will treat the complaint under s 36 in the same way that the OAIC would treat any other complaint about an APP entity, including by following the relevant parts of the guidance contained in [Case Management Overview](#). However neither the case manager or the CPO, or the external investigator will be the decision-maker. The decision-maker will be a member of the Executive, usually the Assistant Commissioner or the Deputy Commissioner.

The case manager will liaise with the investigator. The case manager should also write to the complainant, notifying them of the investigator's details and the fact that the investigator will be in contact with them.

The case manager should contact the investigator as soon as the complainant has been notified of the investigator's details. The case manager will generally be the point of contact for the management of the investigation. The case manager will provide the investigator with the documents relevant to the complaint. The case manager will be the contact person if the investigator has any questions during the investigative process.

Apart from outsourcing of the investigative role, the case manager will treat the complaint under s 36 in the same way that it would treat any other complaint about an APP entity. This means that the case manager will communicate with the complainant, providing them with updates on the progress of the case.

On receipt of the draft investigation report from the investigator, the case manager and/or the CPO will review the findings, reasons and recommendations for the following:

- understanding of all the complainant's claims
- factual findings based on evidence
- logical reasoning
- correct application of the law and policy
- consistency with other cases
- any other matters the case manager considers relevant.

It is open to the case manager to go back to the investigator seeking clarification on any aspect contained in the report. The case manager should liaise with the CPO and the decision-maker on these inquiries.

Once the case manager, CPO and decision-maker are satisfied that they agree with the investigator's report, they should provide procedural fairness to the complainant by providing the report and inviting comment, ensuring that enough information is provided to the complainant to enable them to understand why the information is relevant to their complaint.

Depending on the comments made by the complainant in response, the case manager, on consultation with the CPO and decision-maker, may need to confer further with the investigator.

## Role of External Investigator

Under s 24 of the *Australian Information Commissioner Act (AIC Act)*, the Commissioner may engage consultants to assist in the performance of their functions and exercise of their powers, including privacy functions, where the relevant function or power can be delegated to a member of staff of the OAIC under s 25 of the AIC Act.

While it is not open to delegate a power to make a determination about a complaint under s 52, an external consultant is able to make a recommendation arising out of their investigation.

An investigator may find that there has been **no interference** with privacy and may recommend in their report that the complaint be finalised under one or more of the grounds in s 41, with the effect that the investigation is terminated.

Alternatively, the investigator may find that there **has been an interference** with privacy on the part of the OAIC, in which case, if this finding is accepted by the decision-maker, conciliation should be considered (see below).

The decision-maker will not be bound by any findings or recommendations made by the investigator. The investigator's report will amount to relevant information to which the decision-maker is to have regard.

## Decision-maker

For s 36 privacy complaints about the OAIC, the decision-maker will be a member of the Executive, usually the Assistant Commissioner or the Deputy Commissioner. It is for the decision-maker in the OAIC to make the decision on a complaint.

Where the investigation of the complaint is outsourced to an investigator, the investigator's report will likely comprise the relevant information upon which the decision-maker makes the final decision but will not be definitive. The decision-maker should set out in a decision record their consideration of the investigator's report.

## Decisions

Before making a decision to accept the findings and recommendations of the case manager, CPO and/or investigator the decision-maker will need to be satisfied of the matters outlined above.

*Where the complaint investigation has been outsourced*

An investigator may find that there has been **no interference** with privacy and may recommend in their report that the complaint be finalised under one or more of the grounds in s 41, with the effect that the investigation is terminated. Provided that the decision-maker is satisfied with the investigator's report, including they are satisfied with the matters outlined above, it is open to the decision-maker to finalise the matter by adopting the findings and recommendations of the investigator.

In the event that the investigator finds that there **has been an interference** with privacy on the part of the OAIC, conciliation should be considered. If conciliation is unsuccessful, the decision-maker will need to carefully consider next steps and may wish to seek legal advice.

Depending on the circumstances of the case, it may be that the investigator is asked to provide recommendations to remedy the conduct. If those recommendations are agreed, it may be that the decision-maker considers it appropriate to finalise the matter under s 41(1)(da) on the basis that further investigation is not warranted having regard to all the circumstances.

However, whether to decline to investigate further, and if so on what ground, is a matter that will need to be considered on a case-by-case basis.

#### *Conduct of an OAIC employee*

An interference of an individual's privacy is taken to be an act of the OAIC. However, the Code of Conduct requires all APS employees to act with care and diligence and to comply with Australian laws in connection with their employment. Consideration may be given to any conduct by an employee resulting in any interference of an individual's privacy and whether the employee's conduct ought to be referred for consideration under the [OAIC's Breaches of the APS Code of Conduct Procedures](#).

## Records Management

Privacy officers will be responsible for registering the matter on Content Manager, liaising with the complainant, dealing with the complaint at first instance and advising the complainant of the outcome. A Resolve LEG case file will also be opened, but will act as a duplicate folder, with all documents to be placed on both the Content Manager and Resolve files.

Access to the Content Manager and Resolve files concerning privacy complaints against the OAIC, for both complaints made to the OAIC as an agency and subsequent s 36 complaints, should only be available to officers within the Legal Services team and Executive.

Version	Name	Changes	Date
0.1	A. Nowland	Initial draft	June 2020
0.2	E. Hampton	Amendment to draft	23 August 2020
0.3	C. Whip	Revised draft	22 December 2020
	E. Hampton	Approval of final draft	23 December 2020



**From:** [Sandra Wavamunno](#)  
**To:** [Raewyn Harlock](#)  
**Subject:** FW: Your service complaint about [name] [SEC=OFFICIAL]  
**Date:** Monday, 9 May 2022 11:16:00 AM  
**Attachments:** [FW Service Complaints Case entity type SECOFFICIAL.msg](#)

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Hi Raewyn

Some information on service complaints.

-acknowledgment of service complaint [below]

-case type information [attached email].

Thanks

Sandra

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**From:** Emma Liddle <[xl@xxx](#)>  
**Sent:** Thursday, 3 February 2022 12:32 PM  
**To:** Sandra Wavamunno <[xl@xxx](#)>; Cecilia Rice <[xl@xxx](#)>  
**Subject:** Your service complaint about [name] [SEC=OFFICIAL]

[Hi Cecilia and Sandra](#)

[Here is a sample acknowledgement letter, FYI.](#)

[Sandra – you may like to add a para about the open Ombo complaint in your corro.](#)

[Thanks](#)  
[Emma.](#)

### **Acknowledgment of service complaint**

I acknowledge receipt of your emails which have been assessed as a service complaint in relation to [name].

The OAIC values complaints and recognises their importance in highlighting weaknesses in its systems, processes or customer service, providing an opportunity to resolve problems with stakeholders and improve its accountability and effectiveness.

### **Complaints process**

The *OAIC's Operational policy for the management of external complaints about the behaviour of OAIC employees or contractors* sets out a complaints process whereby every complaint is initially acknowledged and assessed.

This is followed by the preparation of a short, written plan for the investigation and the conduct of a quick and confidential investigation that is impartial.

Following the investigation, the matter must be weighed carefully through a balanced investigation of all relevant facts and circumstances and findings will be reached on the balance of probabilities. In some cases there will not be clear evidence to support or dispute the complaint.

The findings and decision relevant to your complaint will be communicated to you.

Based on your correspondence (**attached**), I have identified the following issues for investigation:

1. [set out issue]
- 2.
- 3.

**Next steps**

I invite you to provide any information that you consider relevant to the investigation of this complaint.

Please also advise the OAIC about how you would like to see the complaint resolved and what outcome you are seeking.

I invite you to provide your response by [date]

Regards



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**OAIC**

**February 2021**

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# Background

## Purpose

This Guide applies to any officer of the Office of the Australian Information Commissioner (**OAIC**) who receives a complaint from an individual alleging that the OAIC has interfered with their privacy.

References in this Guide to provisions are to those contained in the *Privacy Act 1988* (Cth) (**Privacy Act**) unless otherwise indicated.

This Guide outlines:

- The process for handling a first instance complaint about an act or practice on the part of the OAIC that may be an interference with the privacy of an individual
- The role of the OAIC's privacy officers
- The process for managing a complaint made under s 36 about an act or practice of the OAIC
- The legal basis for appointing an external investigator to conduct an investigation under s 40(1) and the role of the external investigator
- The role of Legal Services team and Corporate Services Branch in procuring and appointing the external investigator
- The role of the relevant Assistant Commissioner, General Counsel and Director of the Legal team in progressing the s 36 privacy complaint
- Supporting the officer about whom a privacy complaint is made.

This policy does not preclude action being taken under the '[Breaches of the APS Code of Conduct Procedures](#)' (if the complaint relates to a current or former OAIC employee) or under an applicable contract (if the complaint relates to a contractor).

## OAIC as an agency and as a regulator

The OAIC acts as the regulator in handling privacy complaints made about other Australian Privacy Principle (**APP**) entities.

Under s 36 an individual may complain to the Commissioner about an act or practice that may be an interference with their privacy. If such a complaint is made, and the act or practice may be an interference with the privacy of an individual, under s 40 the Commissioner is obliged to investigate the act or practice, subject to exceptions.

The requirement to investigate only applies if the complainant complained to the respondent first or if the Commissioner decides that it was not appropriate for the complainant to first complain to the respondent.

As an APP entity, the OAIC may also receive complaints from individuals who claim that the OAIC has interfered with their privacy. In these instances, the OAIC is the respondent agency.

Where an individual lodges a complaint about the OAIC's conduct, the OAIC must generally first consider dealing with that complaint in its capacity as a respondent agency, and second, in the event that the complainant continues to press their complaint after an unsuccessful attempt to resolve, in its capacity, as a regulator. There may be instances where it is not appropriate for the complainant to complain in the first instance to the OAIC as an agency, and the Commissioner may, pursuant to s 40(1A), decide to investigate the complaint under s 36.

Where an individual complains to the OAIC under s 36 (in its capacity as a regulator), that the OAIC has interfered with their privacy, there is a risk that the OAIC will be perceived to be biased or may



have a conflict of interest in investigating its own actions. That is, a reasonable observer might consider that the OAIC may not bring an impartial mind as the regulator, in regulating its own actions.

In order to mitigate this risk, the OAIC has decided on a process by which it may seek the assistance of an appropriately qualified and experienced external consultant to conduct an independent investigation into the act or practice about which the complainant complains. The decision to outsource a s 36 privacy complaint against the OAIC to an external investigator must be made by the Australian Information Commissioner (**the Commissioner**) or an Executive delegate.

## Related material

- [Privacy regulatory action policy](#)
- [Guide to privacy regulatory action](#)
- [Privacy Officer Appointment Instrument](#)
- [OAIC Privacy Management Plan](#) (D2018/011921)

## Guidance

### Role of Privacy Officers

The *Privacy (Australian Government Agencies — Governance) APP Code 2017* (**the Code**) made under s 26G requires the OAIC to appoint at least one privacy officer who is the primary point of contact for advice on privacy matters in an agency and who handles privacy complaints, among other responsibilities.

Under the existing [Instrument of Appointment](#), the General Counsel is the Chief Privacy Officer (**CPO**), while Lawyers, including Senior Lawyers and the Director of the Legal Services team constitute OAIC privacy officers for the purposes of the Code.

In the event that an OAIC officer, including Enquiries staff, receives a complaint in writing from an individual, which alleges that the OAIC has interfered with their privacy, the officer should acknowledge the complaint and refer the complaint to the CPO. The CPO will decide whether attempts to resolve the matter should be undertaken as the agency involved, or whether the matter should be considered under s 36. The CPO will consider the complexity of the matter in reaching their decision, with more complex matters more likely to be managed under s 36.

Privacy officers will liaise with the OAIC Executive about how to approach privacy complaints made against the OAIC. In some instances, as noted above, the Commissioner may consider exercising their discretion to find that it is not appropriate for the complainant to complain to the OAIC and may instead invite the complainant to make, or may decide to treat the first instance complaint as, a complaint under s 36.

### Officers who are subjects of the complaint

On receipt of a privacy complaint, the CPO will talk to the manager/s of the officer who is the subject of the complaint. The CPO will generally refer the complaint to privacy officers within the Legal Services team to assist with management of the complaint.

Any officer who is the subject of the complaint will be advised in broad terms of the nature of the complaint and will be directed not to access any of the OAIC's document management systems (such as Content Manager or Resolve) relating to the complaint.

They will be offered support by their manager, including information about accessing such services as Employee Assistance Program.

Complaints will be handled with an appropriate level of confidentiality. Information about the complaint will be disclosed to relevant staff on a need to know basis, including where it is necessary to give procedural fairness to the officer concerned.

## Outcomes of Privacy Complaints against the OAIC

If a complainant is dissatisfied with the outcome of their privacy complaint at first instance, they are entitled to make the complaint to the OAIC as a regulator under s 36 of the Act.

If the complainant considers that the OAIC's privacy officer erred in law in their making of a decision about the complaint, it is open to the complainant to seek judicial review of that decision.

Alternatively, if the complainant is dissatisfied with the outcome of the complaint or the way in which the complaint was handled, they may contact the Commonwealth Ombudsman.

## OAIC as an agency

The CPO will decide whether the OAIC should attempt to resolve the matter as an agency, ahead of moving to s 36 processes. Relatively straightforward matters, where the officer who is the subject of the complaint agrees with the facts and circumstances put forward by the complainant, may be able to resolved less formally.

In those circumstances, the resolution of the matter will be attempted by the Lawyer assigned to the matter by the CPO. This may involve:

- Obtaining a statement of facts from the officer involved
- Reaching a decision regarding whether those facts amount to an interference with the privacy of the complainant
- Attempting to resolve the matter with the complainant.

Where the matter is more complex, or attempts to resolve the matter informally are unsuccessful and the complainant wishes to pursue the matter, the CPO may decide to investigate the complaint under s 36.

## Section 36 complaint

### Role of Case Manager

#### In-house management of s 36 complaint

On receipt of the complaint made under s 36 about the OAIC the CPO will generally allocate the complaint to a Lawyer within Legal Services (**the case manager**). Though the CPO will maintain oversight, the case manager will be responsible for both the management of the s 36 complaint and the procurement of an external investigator. Section 36 complaints against the OAIC will be expedited.

#### Management of s 36 complaint by an external investigator

Before an investigator is engaged, the OAIC must advise the complainant that the OAIC will engage the third-party investigator (**the investigator**) to investigate the complaint.

The case manager will write to the complainant explaining the decision to outsource the complaint to the investigator, advising that information about the complaint, including the original complaint to the OAIC and the complainant's submissions, will be sent to the investigator.

The case manager will undertake a procurement process to engage an external investigator in accordance with the OAIC's usual legal procurement process. Final approval of the external investigator will be given by the Deputy Commissioner.

The CPO will also ensure that the investigator is appointed to the role under the relevant instrument of appointment. The CPO and Corporate Services will be responsible for processing the invoices provided by the investigator.

The external investigator will treat the complaint under s 36 in the same way that the OAIC would treat any other complaint about an APP entity, including by following the relevant parts of the guidance contained in [Case Management Overview](#). However neither the case manager or the CPO, or the external investigator will be the decision-maker. The decision-maker will be a member of the Executive, usually the Assistant Commissioner or the Deputy Commissioner.

The case manager will liaise with the investigator. The case manager should also write to the complainant, notifying them of the investigator's details and the fact that the investigator will be in contact with them.

The case manager should contact the investigator as soon as the complainant has been notified of the investigator's details. The case manager will generally be the point of contact for the management of the investigation. The case manager will provide the investigator with the documents relevant to the complaint. The case manager will be the contact person if the investigator has any questions during the investigative process.

Apart from outsourcing of the investigative role, the case manager will treat the complaint under s 36 in the same way that it would treat any other complaint about an APP entity. This means that the case manager will communicate with the complainant, providing them with updates on the progress of the case.

On receipt of the draft investigation report from the investigator, the case manager and/or the CPO will review the findings, reasons and recommendations for the following:

- understanding of all the complainant's claims
- factual findings based on evidence
- logical reasoning
- correct application of the law and policy
- consistency with other cases
- any other matters the case manager considers relevant.

It is open to the case manager to go back to the investigator seeking clarification on any aspect contained in the report. The case manager should liaise with the CPO and the decision-maker on these inquiries.

Once the case manager, CPO and decision-maker are satisfied that they agree with the investigator's report, they should provide procedural fairness to the complainant by providing the report and inviting comment, ensuring that enough information is provided to the complainant to enable them to understand why the information is relevant to their complaint.

Depending on the comments made by the complainant in response, the case manager, on consultation with the CPO and decision-maker, may need to confer further with the investigator.

## Role of External Investigator

Under s 24 of the *Australian Information Commissioner Act (AIC Act)*, the Commissioner may engage consultants to assist in the performance of their functions and exercise of their powers, including privacy functions, where the relevant function or power can be delegated to a member of staff of the OAIC under s 25 of the AIC Act.

While it is not open to delegate a power to make a determination about a complaint under s 52, an external consultant is able to make a recommendation arising out of their investigation.

An investigator may find that there has been **no interference** with privacy and may recommend in their report that the complaint be finalised under one or more of the grounds in s 41, with the effect that the investigation is terminated.

Alternatively, the investigator may find that there **has been an interference** with privacy on the part of the OAIC, in which case, if this finding is accepted by the decision-maker, conciliation should be considered (see below).

The decision-maker will not be bound by any findings or recommendations made by the investigator. The investigator's report will amount to relevant information to which the decision-maker is to have regard.

## Decision-maker

For s 36 privacy complaints about the OAIC, the decision-maker will be a member of the Executive, usually the Assistant Commissioner or the Deputy Commissioner. It is for the decision-maker in the OAIC to make the decision on a complaint.

Where the investigation of the complaint is outsourced to an investigator, the investigator's report will likely comprise the relevant information upon which the decision-maker makes the final decision but will not be definitive. The decision-maker should set out in a decision record their consideration of the investigator's report.

## Decisions

Before making a decision to accept the findings and recommendations of the case manager, CPO and/or investigator the decision-maker will need to be satisfied of the matters outlined above.

*Where the complaint investigation has been outsourced*

An investigator may find that there has been **no interference** with privacy and may recommend in their report that the complaint be finalised under one or more of the grounds in s 41, with the effect that the investigation is terminated. Provided that the decision-maker is satisfied with the investigator's report, including they are satisfied with the matters outlined above, it is open to the decision-maker to finalise the matter by adopting the findings and recommendations of the investigator.

In the event that the investigator finds that there **has been an interference** with privacy on the part of the OAIC, conciliation should be considered. If conciliation is unsuccessful, the decision-maker will need to carefully consider next steps and may wish to seek legal advice.

Depending on the circumstances of the case, it may be that the investigator is asked to provide recommendations to remedy the conduct. If those recommendations are agreed, it may be that the decision-maker considers it appropriate to finalise the matter under s 41(1)(da) on the basis that further investigation is not warranted having regard to all the circumstances.

However, whether to decline to investigate further, and if so on what ground, is a matter that will need to be considered on a case-by-case basis.

#### *Conduct of an OAIC employee*

An interference of an individual's privacy is taken to be an act of the OAIC. However, the Code of Conduct requires all APS employees to act with care and diligence and to comply with Australian laws in connection with their employment. Consideration may be given to any conduct by an employee resulting in any interference of an individual's privacy and whether the employee's conduct ought to be referred for consideration under the [OAIC's Breaches of the APS Code of Conduct Procedures](#).

## Records Management

Privacy officers will be responsible for registering the matter on Content Manager, liaising with the complainant, dealing with the complaint at first instance and advising the complainant of the outcome. A Resolve LEG case file will also be opened, but will act as a duplicate folder, with all documents to be placed on both the Content Manager and Resolve files.

Access to the Content Manager and Resolve files concerning privacy complaints against the OAIC, for both complaints made to the OAIC as an agency and subsequent s 36 complaints, should only be available to officers within the Legal Services team and Executive.



Version	Name	Changes	Date
0.1	A. Nowland	Initial draft	June 2020
0.2	E. Hampton	Amendment to draft	23 August 2020
0.3	C. Whip	Revised draft	22 December 2020
	E. Hampton	Approval of final draft	23 December 2020



**Australian Government**

**Office of the Australian Information Commissioner**

## External complaints about OAIC employees or contractors – overarching policy

Operational policy for the management of external complaints about the behaviour of OAIC employees or contractors



Audience and location: All staff

Review Date: 30 September 2021

26 November 2020

OAIC

Version	Name	Changes	Date
0.1	E. Hampton	Initial draft	23 August 2020
0.2	AGS	Amendments	24 September 2020
0.3	A.Falk	Approved	26 November 2020

## Executive summary

This operational policy describes the way in which the Office of the Australian Information Commissioner (OAIC) will manage external complaints about the behaviour of its employees or contractors (staff members).

Members of the public, businesses and government agencies have the right to complain about OAIC staff members. The OAIC's service commitment to the community it regulates is contained in the Service Charter (D2020/015181).

There are two types of complaints that external people or entities might make about OAIC staff members:

1. Complaints that an OAIC staff member has interfered with the privacy of an individual
2. Complaints about conduct that does not involve interference with the privacy of an individual.

Either type of complaint can involve conduct that may amount to a breach of the Australian Public Service (APS) Code of Conduct by a current or former employee and which may be handled under OAIC's *Breaches of the APS Code of Conduct Procedures* instead of being handled under the relevant complaints policy.

This policy provides guidance to staff members about the correct handling of all types of complaints.

## Complaints of an interference with privacy

Where a complaint is received that an OAIC staff member has interfered with an individual's privacy it must be managed in accordance with the *Privacy complaints about the OAIC* policy.

Such complaints will be managed by the Legal team.

## Complaints about conduct

Where a complaint is received about the conduct of a staff member that does not involve interference with an individual's privacy it must be managed in accordance with the *External complaints about OAIC employees or contractors – operational policy* – found at [D2021/004230](#).

Complaints about conduct might include:

- rudeness
- delay
- failing to respond to reasonable requests.

Such complaints will be managed by the staff member's manager and reported to the relevant Assistant Commissioner or Principal Director.

## Complaints about breaches of the APS Code of Conduct

The above policies do not preclude action being taken under the *Breaches of the APS Code of Conduct Procedures* if the complaint relates to a current or former OAIC employee (but not a contractor). Where a complaint concerns the conduct of a current or former OAIC employee that may amount to a breach of the APS Code of Conduct, such complaints may be managed in accordance with the *Breaches of the APS Code of Conduct Procedures* – found at [D2021/004229](#). The *Breaches of the APS Code of Conduct Procedures* also apply where concerns come to light other than through an external complaint.

If you are uncertain about which policy applies to a complaint, please discuss the matter with the Principal Lawyer or a member of Executive.

Regardless of the type of complaint made, the staff member receiving the complaint must register the matter as a complaint in Resolve.



**Australian Government**

**Office of the Australian Information Commissioner**

## External complaints about OAIC employees or contractors

Operational policy for the management of external complaints about the behaviour of OAIC employees or contractors



Audience and location: All staff

Review Date: 30 September 2021

26 November 2020

OAIC

Version	Name	Changes	Date
0.1	E. Hampton	Initial draft	5 June 2020
0.2	A. Falk	Amendment to draft	29 June 2020
0.3	A. Falk	Cleared	30 June 2020
0.4	E. Hampton	Amendment	23 August 2020
0.5		AGS amendments	23 September 2020
0.6	A. Falk	Approved	26 November 2020



## Executive summary

This operational policy describes the way in which the Office of the Australian Information Commissioner (OAIC) will manage external complaints about the behaviour of its employees or contractors (staff members).

Complaints that a staff member has interfered with the privacy of an individual are not managed under this operational policy. Such complaints must be managed in accordance with the *Privacy Complaints about OAIC employees or contractors* policy.

This policy is modelled on the *Better Practice Guide to Complaint Handling* published by the Office of the Commonwealth Ombudsman.

This policy does not preclude action being taken under the *Breaches of the APS Code of Conduct Procedures* (if the complaint relates to a current or former OAIC employee) or under an applicable contract (if the complaint relates to a contractor).

## The value of complaints

The OAIC values complaints and recognises their importance in highlighting weaknesses in its systems, processes or customer service, providing an opportunity to resolve problems with stakeholders and improve its accountability and effectiveness.

In line with this, the OAIC defines a complaint broadly, as

*an expression of dissatisfaction by a complainant, inquirer, subject or respondent, for which there is a reasonable expectation that the OAIC will consider and, where appropriate, investigate and resolve the matter.*

This is different from feedback

*where information is provided to the OAIC for the purposes of improving its systems or processes, but about which there is no expectation of an investigation or response.*

Complaints can be provided to the OAIC through a range of mechanisms:

- over the telephone
- in an email
- in formal correspondence
- during a meeting (such as an exit interview for an assessment)

and at any time during an individual's interaction with the OAIC. There is no requirement for a complaint to be made using a specific form, or in a specified manner.

Staff must be aware of the different ways an individual may make a complaint and follow this policy in the event a complaint about an OAIC staff member is made.

If a complaint is a public interest disclosure, the complaint must be handled in accordance with OAIC's *Public Interest Disclosure Procedures* rather than under this policy.

## Complaint handling process

### Resolution by the staff member involved

Complainants are encouraged to raise concerns about the behaviour of staff members with the staff member concerned.

Staff members should attempt to resolve the complaint with the individual directly. Sometimes this might be possible by providing an explanation of the OAIC's processes and timeframes for managing different matters or apologising if the staff member has not met the commitment the OAIC provides to members of the public through its Charter.

Where the staff member is able to successfully resolve the complaint, the staff member must still create an 'OAIC complaint' Resolve record to capture the complaint and its resolution.

The staff member must advise their manager of the complaint and its resolution and the Resolve record relating to the complaint must be sent to the staff member's manager.

### Complaint is unable to be resolved by the staff member involved

Where the complainant prefers to raise the matter with someone other than the staff member involved, or where the attempt to resolve the matter with the staff member involved has been unsuccessful, the complainant should be provided with the contact details of the staff member's manager. The complainant may make their complaint by telephone, email or in hard copy correspondence.

The manager should follow the processes outlined below in relation to the complaint.

### Acknowledge

All complaints must be acknowledged quickly. The acknowledgement should outline the complaint process and likely timeframes.

Complaints can be acknowledged over the phone, by email or through formal correspondence, depending on the circumstances.

Complaints must be entered into Resolve by the person receiving the complaint, using the 'OAIC complaints' case type.

The manager receiving the complaint must resolve the matter as confidentially as possible – that is, without discussing the matter with other staff, with the exception of the person's Assistant Commissioner or Principal Director or others who have a clear need to know. All complaints that have been made to a manager about a staff member must be reported to the relevant Assistant Commissioner or Principal Director. In some circumstances it will be necessary for the staff member concerned to be advised of the complaint if necessary to provide them with procedural fairness, including where an investigation occurs under this policy or OAIC's *Breaches of the APS Code of Conduct Procedures*.

## Assess

The complaint must be assessed by the manager of the staff member about whom the complaint is made.

The manager will decide who should investigate the complaint, the timeframes for that investigation, and whether any changes to processes should be implemented while the investigation is undertaken. For example, if the complaint relates to a difficult interaction between an individual and a staff member, the manager may decide that another staff member will be responsible for contact with the individual while the complaint is investigated.

The manager will also decide whether the complaint should be managed in accordance with this policy, or (if it relates to a current or former OAIC employee) referred under the OAIC's *Breaches of the APS Code of Conduct Procedures*, in which case those procedures take precedence. The manager may seek the advice of their Assistant Commissioner, Principal Director or Principal Lawyer in relation to that decision. If the complaint is referred for consideration under OAIC's *Breaches of the APS Code of Conduct Procedures* and there is a decision not to handle it under those procedures, the manager may resume managing the complaint in accordance with this policy.

If the complaint relates to the conduct of a contractor, the manager will also decide whether the complaint should be managed in accordance with this policy, or in accordance with any relevant provisions of the applicable contract.

The manager may contact the complainant to ask how they would like to see the complaint resolved – what outcome they are seeking – if that is not evident from the complaint. They may also provide more information to the complainant about the investigation of the complaint and the contact details of the person who will undertake the investigation.

The manager may decide that a complaint does not need to be investigated. For example, the subject of the complaint may have been previously considered, or the staff member about whom the complaint is made may no longer work for the OIAC and the complaint does not identify any systemic issues that would otherwise warrant investigation.

The manager must record the outcome of their assessment in the Resolve 'OAIC complaint' record – including the details of the person to whom it is assigned for investigation and required timeframes for any investigation, or a decision not to investigate the matter.

The manager may decide to investigate the matter themselves or may assign the matter to a different investigator.

In the event of a decision not to investigate the matter, the manager must advise the complainant of that decision and close the matter in Resolve.

## Plan

The person to whom the complaint is assigned for investigation should prepare a short, written plan for the investigation that includes:

- what is the issue to be investigated?

- what information is required?
- how will that information be obtained?
- how long will it take to obtain that information?
- are there any special considerations that apply to the complaint – for example, is there sensitive or confidential information that needs to be safeguarded?

The investigation plan must be attached to the Resolve 'OAIC complaint' record within two days of the matter being assigned to the investigator.

## Investigate

The investigation must be quick, confidential (subject to contrary legal obligations such as procedural fairness) and impartial.

### Quick:

Investigations into complaints about staff members should take no more than two weeks.

### Confidential:

Confidentiality is owed to both the complainant and the staff member, subject to contrary legal obligations such as the obligation to give procedural fairness. For example, this policy provides for the staff member about whom the complaint has been made to be advised of the details of the complaint and provided an opportunity to respond.

For the complainant:

- staff members investigating regulatory matters raised by the complainant do not need to know that the complainant has made a complaint about the behaviour of a staff member.
- the Resolve record relating to the complaint must only be accessed by individuals who have a need to know about the complaint.

For the staff member:

- confidentiality is also owed to the staff member who is the subject of the complaint. The fact that there has been a complaint made and the nature of the complaint should not be shared with other staff members. In the event the complaint is substantiated, any appropriate steps will be managed between the staff member and their manager or in accordance with OAIC's *Breaches of the APS Code of Conduct Procedures*.

### Impartial:

The investigation should be impartial and fair. There is no onus on the complainant to 'prove' their complaint, nor any obligation on the staff member to 'prove' they behaved appropriately. Rather, the matter must be weighed carefully through a balanced investigation of all relevant facts and circumstances and findings reached on the balance of probabilities.

Findings on disputed facts should be based on evidence, not preconceptions, assumptions or 'how we usually do things'.

A written record should be kept and relevant evidence, including statements where appropriate, attached to the Resolve record.

The staff member about whom the complaint has been made should be advised of the details of the complaint and provided an opportunity to respond.

A complainant should be given an opportunity to comment on information or claims that are inconsistent with their account of the matter. A complainant is not obliged to substantiate each fact or element in their complaint but it is reasonable for the investigator to ask them to assist the investigation by providing information about what they know, including documents and dates where applicable.

It is acknowledged that in some cases there will not be clear evidence to support or dispute the complaint.

An investigation report must be attached to the Resolve record.

## Respond

When the investigation has been completed, the complainant should be advised of the findings and decision reached. The relevant Assistant Commissioner or Principal Director must clear any response.

Thought should be given to whether a remedy can be provided to a complainant where the complaint is substantiated. Remedies might include an apology or a change in process. Advice to complainants about the outcomes of investigations will be consistent with the requirements of the Privacy Act and any applicable guidance from the Australian Public Service Commission.

The response can be provided by telephone, email or formal correspondence, depending on the circumstances.

## Systemic issues

In all cases following the investigation and resolution of a complaint, consideration must be given to whether the complaint identifies systemic weaknesses in the OAIC's policies, procedures or training. Even if the complaint is unsubstantiated, the investigation may identify matters that could have been managed differently and better, the need for training (for particular staff or in relation to particular interactions) or improvements to recordkeeping.

Every complaint provides an opportunity for the OAIC to improve its work practices, procedures and interactions.

Either as part of the response to the complainant, or following as appropriate, the investigator should consider and document whether the complaint identifies systemic issues and must bring them to the attention of the relevant Assistant Commissioner or Principal Director.

The Assistant Commissioner or Principal Director will decide how those systemic issues can be addressed.

The Resolve record must include a file note about whether and what systemic issues have been raised by the complaint, and how they will be addressed. The matter must not be finalised in Resolve until that note has been attached.

**Complaints regarding Assistant Commissioners or Principal Directors**

Complaints made by an external person about Assistant Commissioners or Principal Directors will be handled by the Deputy Commissioner personally, or by Legal Services or an external provider as appropriate.

Appropriate record keeping and procedural fairness requirements must be complied with.

**Complaints regarding the Deputy Commissioner**

Complaints made by an external person about the Deputy Commissioner will be handled by the Commissioner personally, or by Legal Services or an external provider as appropriate.

Appropriate record keeping and procedural fairness requirements must be complied with.



**Australian Government**

**Office of the Australian Information Commissioner**

# Breaches of the APS Code of Conduct Procedures

Operational policy for the management of breaches of the APS Code of  
Conduct by OAIC employees



Audience and location: All staff  
Review Date: 30 September 2021  
26 November 2020

OAIC



Version	Name	Changes	Date
1.0		Original	June 2017
1.1		Updated Word template	January 2019
2.0	E. Hampton	AGS amendments	24 August 2020
2.1	A. Falk	Approved	26 November 2020

**Statement from Agency Head**

I, Angelene Falk, Agency Head of the Office of the Australian Information Commissioner, establish these procedures under subsection 15(3) of the *Public Service Act 1999* (the PS Act).

These procedures commence on 26 November 2020.

These procedures supersede the previous procedures made under subsection 15(3) of the PS Act, and apply, from their date of commencement, to all new and ongoing processes for determining breaches of the APS Code of Conduct and for determining sanction.

Angelene Falk

**Australian Information Commissioner**

November 2020

## Introduction

1. The APS Code of Conduct (the Code) sets out the behavioural standards expected of APS employees. The Code is set out in [section 13 of the \*Public Service Act 1999\*](#) (PS Act). The PS Act requires the head of each agency to establish procedures for determining whether an employee has breached the Code and what sanction, if any, is to be imposed if a breach is found.

## Application of procedures

2. These procedures apply when determining whether a person who is an APS employee in the Office of the Australian Information Commissioner (OAIC), or who is a former APS employee who was employed in the OAIC at the time of the suspected misconduct, has breached the Code.

Note: These procedures give effect to the relevant provisions of the Australian Public Service Commissioner's Directions 2016 about the procedural requirements for dealing with suspected breaches of the Code; see Part 5 of the Australian Public Service Commissioner's Directions 2016.

3. These procedures also apply when determining any sanction to be imposed on an employee in the OAIC who has been found to have breached the Code.
4. In these procedures, a reference to a breach of the Code includes reference to conduct set out in subsection 15(2A) of the PS Act in connection with their engagement as an APS employee.

## Availability of procedures

5. As provided for in subsection 15(7) of the PS Act, these procedures are made publicly available on the OAIC's intranet.

## Initial decision-maker – initiation of Code process

6. As soon as practical after a suspected breach of the Code has been identified the matter must be brought to the attention of the Deputy Commissioner by a member of the Executive. Where a staff member receives a complaint that may constitute a breach of the Code, they must discuss the matter with the relevant Assistant Commissioner, Principal Director or Principal Lawyer.
7. The Deputy Commissioner will decide whether to deal with the suspected breach under these procedures (the initial decision-maker).

Note: There is no procedural fairness obligation to provide any employee an opportunity to comment before deciding to initial an inquiry under these procedures.

8. Where the conduct of an APS employee raises concerns that relate both to effective performance and possible breaches of the Code, the initial decision maker must, before making a decision to initiate an inquiry under these procedures, have regard to any relevant standards and guidance issued by the Australian Public Service Commissioner.

Note: Not all suspected breaches of the Code need to be dealt with by way of determination under these procedures. In particular circumstances, another way of dealing with a suspected breach of the Code may be more appropriate.

Note: Section 40 of the Australian Public Service Commissioner's Directions 2016 provides that where conduct of an APS employee raises concerns that relate both to effective performance and possible breaches of the Code, the Agency Head must, before making a decision to initiate an inquiry under procedures established by the Agency Head under subsection 15(3) of the PS Act, have regard to any relevant standards and guidance issued by the Commissioner. The standards and guidance are set out in the Australian Public Service Commission, *Handling misconduct: a human resource manager's guide* (9 June 2015), paras 5.1.5 – 5.1.9.

### **Breach decision-maker**

9. Where the initial decision-maker decides to initiate an inquiry under these procedures, they may authorise any independent person to determine in writing whether a breach of the Code has occurred (the breach decision-maker).
10. These procedures do not prevent the initial decision-maker from being the breach decision-maker in the same matter.

### **Sanction delegate**

11. The person (the sanction delegate) who is to decide what, if any, sanction is to be imposed on an APS employee who is found to have breached the Code must be the Information Commissioner or hold a delegation of the powers under the PS Act to impose sanctions.
12. These procedures do not prevent the initial decision-maker or the breach decision-maker from being the sanction delegate in the same matter.

### **Independence**

13. The breach decision-maker and the sanction delegate must be, and must appear to be, independent and unbiased.
14. They must advise the initial decision-maker in writing if they consider that they may not be independent and unbiased, or if they consider that they may reasonably be perceived not to be independent and unbiased, for example if they are a witness in the matter.

### **Suspension and temporary reassignment of duties**

15. Section 28 of the PS Act and regulation 3.10 of the Public Service Regulations (the Regulations) set out the criteria and procedural requirements for suspending an APS employee who is suspected of having breached the Code.
16. As an alternative to suspension, the Information Commissioner or delegate may decide that it is more appropriate to temporarily reassign the employee's duties.

### **Determination process**

17. The role of the breach decision-maker is to determine in writing whether a breach of the Code has occurred. The process for determining whether a person has breached the Code must be carried out with as little formality, and as much expedition, as a proper consideration of the matter allows.
18. The process must be consistent with the principles of procedural fairness.

Note: Procedural fairness generally requires that:

- The person suspected of breaching the Code is informed of the case against them (i.e. any material that is before the decision-maker that is credible, relevant and significant in relation to any proposed findings or decision adverse to the person or their interests)
- The person is provided with a reasonable opportunity to respond and put their case, in accordance with these procedures, before any decision is made on breach or sanction
- The decision-maker acts without bias or an appearance of bias
- There is logically probative evidence to support the making, on the balance of probabilities, of adverse findings.

19. The breach decision-maker may undertake an investigation or seek the assistance of an investigator. The investigator may investigate the alleged breach, gather evidence and make a report of recommended factual findings to the breach decision-maker and provide any other assistance requested by the breach decision-maker.

Note: The breach decision-maker is responsible for independently finding what conduct the employee engaged in and for determining whether or not that conduct was in breach of the Code.

20. A determination may not be made in relation to a suspected breach of the Code by a person unless reasonable steps have been taken to:

- a. inform the person, in writing, of:
  - i. the details of the suspected breach of the Code (including any subsequent variation of those details)
  - ii. the sanctions that may be imposed on them under subsection 15 (1) of the PS Act, and
- b. give the person reasonable opportunity to make a statement in relation to the suspected breach or provide further evidence in relation to the suspected breach, within seven calendar days or any longer period that is allowed.

Note: A person may make a statement in relation to the suspected breach within seven calendar days of a preliminary decision, or any longer period that is allowed by the breach decision-maker. The breach decision-maker may also allow the person to make an oral statement within the same seven day period, or any other specified period, on whatever conditions the decision-maker considers reasonably, including requiring that an oral statement be recorded and that the statement be given at a particular time and place.

Note: This clause is designed to ensure that by the time the breach decision-maker comes to make a determination, reasonable steps have been taken for the person suspected of breach to be informed of the case against them. It will generally also be good practice (but not a legal obligation) to give the person notice at an early stage in the process of a summary of the details of the suspected breach that are available at that time and notice of the elements of the Code that are suspected to have been breached.

21. A person who does not make a statement in relation to the suspected breach is not, for that reason alone, to be taken to have admitted to committing the suspected breach.
22. For the purpose of determining whether a person has breached the Code, a formal hearing is not required.
23. The breach decision-maker (or the person assisting the breach decision-maker, if any) may agree to a request made by the person who is suspected of breaching the Code to have a support person present in a meeting or interview they conduct. The breach decision-maker (or the person assisting) can restrict the role of support person as considered appropriate, including making clear that the support person cannot act as a representative.

Note: A breach decision-maker should ensure that they also conform to any procedural requirements to which an employee suspected of breaching the Code is legally entitled under their terms and conditions of employment such as under an enterprise agreement.

## Sanctions

24. The sanction delegate's role will commence after a breach determination is made. The role of the sanction delegate is to determine in writing what, if any, sanction or sanctions should be imposed on an APS employee for a breach of the Code.
25. The process for deciding on sanction must be consistent with the principles of procedural fairness.
26. If a determination is made that an APS employee has breached the Code, a sanction may not be imposed on the employee unless reasonable steps have been taken to:
  - a. inform the employee of:
    - i. the breach determination that has been made; and
    - ii. the sanction or sanctions that are under consideration, and
    - iii. the factors that are under consideration in determining any sanction to be imposed, and
  - b. give the employee a reasonable opportunity to make a statement in relation to the sanction or sanctions under consideration.
27. A written statement may be made in relation to any sanction under consideration within seven calendar days of a preliminary decision, or any longer period that is allowed by the sanction delegate. The sanction delegate may decide to give the employee the opportunity to make an oral statement within the same seven day period on whatever conditions the sanction delegate considers reasonable, including requiring that an oral statement be recorded and that the statement be given at a particular time and place.
28. The sanction delegate may agree to a request made by the person determined to have breached the Code to have a support person when making an oral statement. The sanction delegate can restrict the role of the support person as considered appropriate, including making clear that the support person cannot act as a representative.

Note: Where a sanction of termination of employment is under consideration the sanction delegate should not unreasonably refuse to allow the employee to have a support person present to assist at any discussion relating to termination to ensure that any termination of employment will not be found unfair by the Fair Work Commission because of any such refusal: s 387(d) of the *Fair Work Act 2009*. A sanction delegate should ensure that they also

conform to any procedural requirements to which to which an employee is legally entitled under their terms and conditions of employment such as under an enterprise agreement.

29. The sanction delegate may impose one or more of the following sanctions where an employee is found to have breached the Code:

- termination of employment
- reduction in classification
- re-assignment of duties
- reduction in salary
- deductions from salary, by way of fine, of no more than 2% of an employee's annual salary or
- a reprimand.

30. The sanction delegate may also decide to impose no sanction.

31. Sanctions may not be imposed on former employees.

### **Record of determination and sanction**

32. If a determination in relation to a suspected breach of the Code is made, a written record must be made of:

- the suspected breach
- the determination
- any sanctions imposed as a result of a determination that the employee has breached the Code, and
- if a statement of reasons was given to the employee in relation to the determination and/or the sanction decision — that statement of reasons.

33. Records relating to misconduct should not be placed on the employee's personal file but kept on a separate misconduct file and held in secure storage.

34. The *Archives Act 1983* and the *Privacy Act 1988* (Privacy Act) apply to OAIC records.

### **Advice to complainants**

35. Advice to complainants about the outcomes of investigations into alleged breaches of the Code will be consistent with the requirements of the Privacy Act and any applicable guidance from the Australian Public Service Commission.

### **Moving to a different agency or resignation**

36. This paragraph applies if:

- a. an ongoing APS employee in the OAIC is suspected of having breached the Code
- b. the employee has been informed of the details of the suspected breach
- c. the matter to which the suspected breach relates has not yet been resolved, and



- d. a decision has been made that, apart from this clause, would result in the employee moving to another Agency (including on promotion) under section 26 of the PS Act.

37. Movement between agencies (including on promotion) for employees suspected of a breach of the Code will not take effect until the matter is resolved, unless agreed by the respective Agency Heads.

38. Resolution is by:

- a determination being made as to whether or not the APS employee has breached the Code, or
- a decision that a determination is not necessary.

39. Should the Agency Heads agree to a move prior to the resolution of a suspected breach of the Code, the receiving agency may continue an investigation, determine whether or not the APS employee has breached the Code and/or impose a sanction based on the former agency's investigation.

40. Where an employee resigns during the course of an investigation the Information Commissioner or delegate may choose, depending on the circumstances, to discontinue or continue the process to determine whether or not the APS employee has breached the Code.

## Review rights

41. Non-SES employees who have been found to have breached the Code and who wish to challenge either the determination that a breach has occurred or the sanction imposed (except in the case of termination) may lodge an application under Division 5.3 of the PS Regulations. Making an application for review does not stay the action.

42. An application for review of a determination that an employee has breached the Code or a sanction imposed as a result of the breach must be made to the Merit Protection Commissioner, as required by Regulation 5.24(2). Time limits apply.

43. An employee who has been dismissed may have remedies under the *Fair Work Act 2009*, or other Commonwealth laws.

## Criminal matters

44. Where an employee has been charged with a criminal offence (including in relation to activity occurring in a person's private life), the initial decision-maker may decide that it is appropriate to investigate the matter as a possible breach of the Code.

## References

[Public Service Act 1999](#)

[Public Service Regulations 1999](#)

[Australian Public Service Commissioner's Directions 2016](#)

[APS Values and Code of Conduct in Practice](#)

Australian Public Service Commission, Handling misconduct: a human resource manager's guide



Australian Government  
Office of the Australian Information Commissioner

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## OAIC service charter

The following information sets out the standard of service you can expect from the OAIC, explains how you can assist us to help you, and provides an opportunity for you to comment on our performance.

### Our service commitment

We aim to provide services that are:

- independent
- accessible
- practical
- timely

### You can expect that we will

- treat you with respect and courtesy
- provide you with clear and accurate information
- keep you informed about the progress of your matter
- act impartially and professionally
- provide clear reasons for our decisions

### How you can assist us

To assist us to provide you with the best service possible, we expect that you will:

- treat our officers with respect and courtesy
- respond to our requests for information in a timely manner and give us accurate information
- read the information we provide and contact us if you have any questions
- keep us informed about any changes to your contact details
- tell us if you have any special requirements to access our services, if you need an interpreter or information provided in an alternative format

### How to make a complaint about the services we provide

If you are unhappy with an aspect of our service, or you feel you have not been treated in accordance with our service charter, as a first step you should raise your concerns with the officer who has been handling your enquiry, complaint or Information Commissioner review. You can raise your concerns in an email or phone call.

If, after raising your concern with the officer handling your matter you remain dissatisfied, you can complain to their manager. Upon request, we will provide you with the name and contact details of the relevant manager. You may speak to the manager, send an email or write a letter. The manager will consider your complaint and decide on the best course of action. They will contact you to discuss your complaint and let you know the outcome in writing, if required.

The OAIC takes every complaint seriously. An appropriate course of action will be decided by a senior officer according to the nature of the allegations that have been made.

### The Commonwealth Ombudsman

FOI REF: 200272-052

If you have concerns about the way we have handled your inquiry, complaint or Information Commissioner review, you may complain to the Commonwealth Ombudsman. This service is free, and you can contact the office on 1300 362 072 or visit [www.ombudsman.gov.au](http://www.ombudsman.gov.au) <<http://www.ombudsman.gov.au/>>.

## What to do if you disagree with a decision we make

If you disagree with a decision that we have made, you may have the right to seek review of these decisions externally.

### The Administrative Appeals Tribunal

You may have the right to seek merits review of a decision made by the Information Commissioner at the Administrative Appeals Tribunal.

## Feedback to the OAIC

We are committed to continual improvement of our service and we value your feedback.

Please let us know if you think we have provided you with a good service or if you have any suggestions on how the service may be improved. You can do this by sending your feedback directly to the officer who dealt with your inquiry, complaint or review.





April 2021

# FOI Complaints: Overview of investigation process

This resource applies to investigating complaints by individuals and should be read in conjunction with [Part 11 of the FOI Guidelines](#), the [Regulatory Action Policy](#) and [FOI Complaints – Intake and early resolution process](#) resource.

## Key principles

- The Information Commissioner can investigate under Part VIIB of the FOI Act agency actions relating to the handling of FOI matters. This involves investigating complaints received from complainants (s 70) as well as conducting own motion investigations (s 69(2)).
- The complaints process set out in Part VIIB is primarily intended to deal with the manner in which agencies handle FOI requests and procedural compliance matters.
- Generally, it is the Commissioner's view that making a complaint is not an appropriate mechanism where IC review is available, unless there is a special reason to undertake an investigation for example, where the agency's practice appears to be systemic in nature.
- The FOI Act sets out certain rules that apply to the conduct of the Information Commissioner's complaint investigations and Commissioner initiated investigations. The guiding principle is that an investigation shall be conducted in private and in the way the Information Commissioner considers fit (s 76(1)).
- Section 73 of the FOI Act provides that the Information Commissioner has the discretion not to investigate or continue investigating a complaint in certain circumstances.
- Section 74 of the FOI Act provides the Information Commissioner with the discretion whether to transfer a complaint to the Commonwealth Ombudsman if satisfied that the complaint would be more effectively or appropriately dealt with by the Ombudsman.
- When making a decision to transfer a complaint to the Ombudsman, the Information Commissioner must clearly outline the steps in the decision-making process, namely:
  - Commissioner's level of satisfaction must be reached that a complaint could be more effectively or appropriately dealt with by the Ombudsman,
  - Ombudsman must be consulted
  - Commissioner must make a decision not to investigate or not to continue to investigate the complaint.

## FOI Complaint Investigation Process

Stage	Actions	Next steps
Intake	1. Register complaint and send acknowledgement letter to complainant	– Assign action Director Investigations and Compliance for early assessment.
Senior assessment	2. Complaint to be assessed to determine whether the complaint should proceed to investigation, be declined or preliminary inquiries are required.  Relevant considerations to consider whether to commence investigation includes: <ul style="list-style-type: none"> <li>– whether the practice is systemic</li> <li>– whether significant issues are raised</li> <li>– whether there has been a breach of the FOI Act or non-compliance with the FOI Guidelines</li> <li>– whether there has been non-compliance with the timeframes, or</li> <li>– the outcome sought.</li> </ul>	– Director or Principal Director to undertake assessment and assign the matter to relevant Review and Investigation Adviser for next steps.
Allocation	3. Director Investigations and Compliance team to allocate matter to relevant Review and Investigation Adviser or Assistant Director	– Review and Investigation Adviser to review file and compile evidence matrix ( <a href="#">D2019/013612</a> ).
Preliminary inquiries	4. Review and Investigation Adviser draft a set of relevant preliminary inquiries in consultation with Director.  5. Review and investigation Adviser provides the preliminary inquiries to the agency.	– Review and investigation Adviser to monitor response due from the agency. – Once a response is received and no further preliminary inquiries are required, the Review and Investigation Adviser is to assess the response and allocate a file note to Director Investigations and Compliance team for re- assessment. – Director Investigations and Compliance team to update evidence matrix with next steps: <ul style="list-style-type: none"> <li>○ Decline to investigate (s 73) <b>Step 6 below</b></li> <li>○ Transfer to the Commonwealth Ombudsman (s 74) <b>Step 9 below</b></li> <li>○ Proceed to investigation <b>Step 10 below</b></li> </ul>
Case Management/ Next steps	6. If declining to investigate:	– Once approved by the Director Investigations and Compliance, Review and

Stage	Actions	Next steps
<b>Declining to investigate</b>	Review and Investigation Adviser to prepare ITD in consultation with Director or Principal Director	Investigation Adviser to send ITD to complainant. – Timeframe for response to ITD: two weeks.
	7. Await response from complainant	– Review and Investigation Adviser to monitor response due from complainant. – If response received, consider submissions and discuss with Director for re-assessment.
Closure under s 73	8. If no change to preliminary assessment, Review and Investigation Adviser to prepare closure letter for review and approval by Director, Principal Director and Information Commissioner.  Review and Investigation Adviser to prepare the documents on Resolve in accordance with e-clearance process ( <a href="#">D2020/005955</a> )	– Once approved by the Commissioner, Review and Investigation Adviser send closure to the complainant – Send closure notice to respondent (s 75(3)) – Close Resolve file.
Case Management/Next Steps <b>Transfer to Commonwealth Ombudsman</b>	9. If transferring to Commonwealth Ombudsman:  Refer to worksheet for next steps and templates TRIM: <a href="#">D2020/021386</a>	– Refer to TRIM: <a href="#">D2020/021386</a>
Case Management/Next steps <b>Commencing investigation</b>  <b>See <a href="#">D2021/014232</a></b>	10. Review and Investigation Adviser to prepare correspondence following assessment: – draft investigation notice to the agency – draft commencement of investigation letter to complainant – proceed through clearance	Once draft s 75 Notice has been approved: – Information Commissioner or relevant delegate to call the respondent agency to advise that this matter will proceed to investigation providing the following information: o Issues o Outline process o Review and Investigation Adviser contact details – Review and Investigation Adviser follows up on phone call to the agency by the Information Commissioner or relevant delegate by sending the investigation notice. – Review and Investigation Adviser to monitor agency response due date. – Once response received Review and Investigation Adviser to assess the response and add the information to the evidence matrix. – Review and Investigation Adviser to discuss next appropriate steps with Director or Principal Director. Next steps include:



Stage	Actions	Next steps
		<ul style="list-style-type: none"> <li>○ Request for further information from the agency</li> <li>○ Request for further information from the complainant</li> <li>○ Providing a set of the agency's open submissions to the complainant for their comment</li> <li>○ Recommend decline to investigate the matter further.</li> <li>○ Proceed to s 86 notice.</li> </ul>
	<p>11. Review and Investigation Adviser to prepare in consultation with Director and Principal Director:</p> <ul style="list-style-type: none"> <li>– s 86 notice (including any recommendations)</li> <li>– Letter accompanying s 86 notice to agency</li> <li>– Updated evidence matrix</li> <li>– Snapshot summary</li> </ul> <p>When considering whether the findings of the investigations warrant making recommendations consider the appropriateness of recommendations that:</p> <ul style="list-style-type: none"> <li>– Promote cultural change</li> <li>– Reinforce the requirement to promote the objects of the FOI Act</li> <li>– Implement training</li> <li>– Update FOI manuals</li> <li>– Develop policies and procedures</li> <li>– Conduct audits with a reporting timeframe of up to 6 months</li> </ul>	<ul style="list-style-type: none"> <li>– Relevant documents to be compiled on Resolve file according to e-clearance process (<a href="#">D2020/005955</a>) for review and approval by Director, Principal Director, Deputy Commissioner and Information Commissioner</li> </ul>
Providing the investigation outcome to the parties	12. Once the s 86 notice has been signed by the Information Commissioner	<ul style="list-style-type: none"> <li>– Information Commissioner or relevant delegate to call the respondent agency to advise that the matter has been finalised and advise: <ul style="list-style-type: none"> <li>○ whether any recommendations have been made</li> <li>○ relevant next steps in the process.</li> </ul> </li> <li>– If relevant, Review and Investigation Adviser on the advice of the Director or Principal Director to advise media of the outcome of the investigation prior to sending out the s 86 notices to the parties.</li> <li>– Review and Investigation Adviser to send out the s 86 notice to the respondent agency inviting any comments within two weeks where recommendations have been made</li> </ul>



Stage	Actions	Next steps
		<p>or 5 days where no recommendations have been made.</p> <ul style="list-style-type: none"> <li>– The s 86 Notice will also advise the respondent agency that the complainant will also receive a copy after the two week/ five day period for the respondent to provide comments in response and a summary of the investigation will be published on the OAIC website.</li> </ul>
	<ul style="list-style-type: none"> <li>– After the two week/ five day period (or once a response has been received from the respondent) the Director in consultation with the Principal Director review the respondent's comments.</li> </ul>	<ul style="list-style-type: none"> <li>– Where no issues are raised by the respondent in response to the investigation outcome <ul style="list-style-type: none"> <li>○ Proceed to <b>step 13</b></li> </ul> </li> <li>– Where the respondent raises concerns regarding the outcome of the investigation an email is sent to the Commissioner advising of the adverse comments which includes: <ul style="list-style-type: none"> <li>○ A brief background outlining the complaint, parties and whether recommendations were made.</li> <li>○ The comments from the respondent is provided as an attachment</li> <li>○ Information which addresses the adverse comments</li> </ul> </li> <li>– If needed, a follow up discussion between the Director, Principal Director, Deputy Commissioner and Commissioner to discuss next appropriate steps.</li> </ul>
	13. Providing s 86 Notice and comments from the respondent to the complainant	<ul style="list-style-type: none"> <li>– Review and Investigation Adviser to send an email providing s 86 notice (Attachment A) and may include any comments provided by the respondent.</li> </ul>
Closure of investigation file	14. If no recommendations made	<ul style="list-style-type: none"> <li>– Review and Investigation Adviser closes the complaint file.</li> </ul>
	If recommendations made	<ul style="list-style-type: none"> <li>– Review and Investigation Adviser closes the complaint file and raises a 'Recommendation case' on resolve x-ref the original complaint file.</li> <li>– Review and Investigation Adviser to note when response to s 86 notice is due and monitor response.</li> <li>– Review and Investigation Adviser to update weekly 'FOI insights' to include the outcome of the investigation.</li> <li>– Review and Investigation Adviser to provide a case summary for distribution to FOI</li> </ul>

Stage	Actions	Next steps
		Regulatory Group, Legal and Enquiries teams.
Publication of complaint outcome	15. Review and Investigation Adviser to provide draft summary of the outcome of the investigation to Director and Principal Director for clearance and approval to publish the outcome on the OAIC website ( <a href="#">D2019/014345</a> ).	<ul style="list-style-type: none"> <li>Review and Investigation Adviser to liaise with media once approval has been provided for the publication of the outcome of the complaint.</li> </ul>
Recommendation Case	16. Review and Investigation Adviser to monitor due date of response to the s 86 notice  See Worksheet: <a href="#">D2020/007324</a>	<ul style="list-style-type: none"> <li>Review and Investigation Adviser in consultation with Director or Principal Director to assess the agency's response to the investigation recommendations made in s 86 notice.</li> <li>If response received satisfies the Information Commissioner that the agency has taken action that is adequate and appropriate in the circumstances to implement the investigation recommendations Review and Investigation Adviser prepare:               <ul style="list-style-type: none"> <li>Recommendation outcome table</li> <li>finalisation letter to agency for review and approval by Director, Principal Director, Deputy Commissioner and Information Commissioner in accordance with e-clearance process (<a href="#">D2020/005955</a>).</li> </ul> </li> <li>Once finalisation (acquittal) letter has been approved by the Commissioner, Review and Investigation Adviser:               <ul style="list-style-type: none"> <li>Sends correspondence to agency</li> <li>Closes recommendation case</li> </ul> </li> <li>If response received does not satisfy the Information Commissioner that the agency has taken action that is adequate and appropriate in the circumstances to implement the investigation recommendations, Review and Investigation Adviser in consultation with Director or Principal Director to consider:               <ul style="list-style-type: none"> <li>whether further information is required</li> <li>whether an implementation notice (s 89(2) is required.</li> </ul> </li> </ul>
Implementation notice	17. Review and Investigation Adviser to prepare draft implementation notice to agency for review and approval by Director, Principal Director, Deputy Commissioner and Information Commissioner.	<ul style="list-style-type: none"> <li>Review and Investigation Adviser to monitor response due from agency.</li> <li>If response received satisfies the Information Commissioner that the agency has taken action that is adequate and appropriate in the circumstances to implement the investigation</li> </ul>

Stage	Actions	Next steps
		<p>recommendations and comply with the implementation notice then draft closure letter to agency for review and approval by Director, Principal Director, Deputy Commissioner and Information Commissioner.</p> <ul style="list-style-type: none"> <li>- If response received does not satisfy the Information Commissioner that the agency has taken action that is adequate and appropriate in the circumstances to implement the investigation recommendations and comply with the time specified in the implementation notice, Review and Investigation Adviser to discuss with Director or Principal Director whether to proceed to providing a written report to the responsible minister (s 89A).</li> </ul>
Particulars of report to relevant minister	18. Review and Investigation Adviser in consultation with Director or Principal Director to prepare an executive brief on next steps for Information Commissioner approval.	<ul style="list-style-type: none"> <li>- Review and Investigation Adviser in consultation with Director or Principal Director to prepare report to the relevant minister in accordance with (ss 89B and 89C) for review and approval by Director, Principal Director, Deputy Commissioner and Information Commissioner.</li> </ul>
Finalisation of Recommendation Case	19. Information Commissioner to provide the report to the relevant minister.	<ul style="list-style-type: none"> <li>- The relevant minister to cause the report to be laid before each House of the Parliament.</li> <li>- Review and Investigation Adviser to provide a copy of the report to the agency.</li> <li>- Review and Investigation Adviser to close the recommendation case recording the date the report was tabled in parliament.</li> </ul>

## Commissioner Initiated Investigation Process

Where the Information Commissioner has identified systemic or significant issues with an agency's processing of FOI requests, the Commissioner can commence investigation of the agency on her own initiative (Commissioner Initiated Investigation (CII)).

Systemic or significant issues may be identified through a number of methods:

- FOI complaints
- IC reviews
- Audits
- Information provided to the OAIC

Prior to commencing a CII, the Information Commissioner will consider the information before the office at that time. The Information Commissioner may decide to conduct preliminary inquiries with an agency prior to commencing investigation.

Stage	Actions	Next steps
Preliminary inquiries	20. Review and Investigation Adviser to draft a set of relevant preliminary inquiries in consultation with Director.  21. Review and investigation Adviser provides the preliminary inquiries to the agency.	<ul style="list-style-type: none"> <li>– Review and investigation Adviser to monitor response due from the agency.</li> <li>– Once a response is received and no further preliminary inquiries are required, the Review and Investigation Adviser is to reassign the matter to the 'Mail Assessor' queue.</li> </ul>
Senior assessment	22. Complaint and agency response to preliminary inquiries to be assessed to determine whether the complaint should proceed to a CII investigation.  Relevant considerations to consider whether to commence a CII includes: <ul style="list-style-type: none"> <li>– whether the practice is systemic</li> <li>– whether significant issues are raised</li> <li>– whether there has been a breach of the FOI Act or non-compliance with the FOI Guidelines</li> <li>– whether it is in the public interest to investigate</li> </ul>	<ul style="list-style-type: none"> <li>– Director or Principal Director to undertake assessment and assign the matter to relevant Review and Investigation Adviser for next steps.</li> </ul>
Allocation	23. Principal Director to allocate matter to relevant Review and Investigation Adviser or Assistant Director	<ul style="list-style-type: none"> <li>– Review and Investigation Adviser to form a recommendation in consultation with Director and Principal Director on whether to proceed to recommend that the Information Commissioner commence a CII.</li> </ul>
Case management	If the recommendation is to proceed to commence a CII:  24. Review and Investigation Adviser to prepare a brief to the Information Commissioner including the following information: <ul style="list-style-type: none"> <li>– recommendations</li> </ul>	<ul style="list-style-type: none"> <li>– Review and Investigation Adviser to compile documents on Resolve file in accordance with e-clearance process (<a href="#">D2020/005955</a>)</li> </ul>

Stage	Actions	Next steps
	<ul style="list-style-type: none"> <li>– background</li> <li>– potential case studies</li> <li>– information before the office</li> <li>– relevant agency statistics</li> <li>– related IC review issues</li> <li>– considerations</li> <li>– outcomes/benefits</li> <li>– resourcing implications</li> <li>– project plan</li> </ul>	
Commencement of CII	<ul style="list-style-type: none"> <li>– If the Commissioner decides to commence a CII, the review adviser is to draft the s 75 Notice to the Respondent for clearance.</li> <li>– Review and Investigation Adviser to compile documents on Resolve file in accordance with e-clearance process (<a href="#">D2020/005955</a>)</li> </ul>	<ul style="list-style-type: none"> <li>– The draft s 75 Notice to proceed through clearance for Information Commissioner signature.</li> </ul>
Case management	<ul style="list-style-type: none"> <li>– Once the Information Commissioner has settled the s 75 Notice, the Commissioner or relevant delegate to call the respondent agency to advise that this matter will proceed to a CII investigation providing the following information: <ul style="list-style-type: none"> <li>○ Issues</li> <li>○ Outline process</li> <li>○ Review and Investigation Adviser contact details</li> </ul> </li> <li>– Media statement prepared and finalised by the Information Commissioner</li> </ul>	<ul style="list-style-type: none"> <li>– Review and Investigation Adviser follows up on phone call to the agency by the Information Commissioner or relevant delegate by sending the investigation notice.</li> <li>– Review and Investigation Adviser to notify affected third party that their matter will be used as a case study in the CII (if required).</li> <li>– Review and Investigation Adviser to monitor agency response due date.</li> </ul>
Assessment	<p>25. Once a response has been received from the Respondent agency to the s 75 Notice, Review and Investigation Adviser to assess the evidence and form preliminary view.</p> <p>26. After discussion with Director or Principal Director, Review and Investigation Adviser to prepare relevant correspondence to either the agency or the complainant.</p>	<ul style="list-style-type: none"> <li>– Review and Investigation Adviser to discuss next appropriate steps with Director or Principal Director.</li> </ul> <p>Next steps include:</p> <ul style="list-style-type: none"> <li>– Request for further information from the agency</li> <li>– Request for further information from affected third parties</li> <li>– Providing a set of the agency's open submissions to affected third parties for their comment</li> <li>– Proceed to s 86 notice.</li> </ul>
Requesting further information	If further information required, Review Adviser to draft request and provide to	<ul style="list-style-type: none"> <li>– Review and Investigation Adviser to monitor response</li> </ul>



Stage	Actions	Next steps
	<p>Director and Principal Director for clearance.</p> <p>Review and Investigation Adviser to compile documents on Resolve file in accordance with e-clearance process (<a href="#">D2020/005955</a>)</p>	<ul style="list-style-type: none"> <li>– If response received, consider submissions and discuss with Director for re-assessment.</li> <li>– If Director in consultation with Principal director is satisfied that no further information is required proceed to finalisation.</li> </ul>
Finalisation proceeding to issue a s 86 Notice	<p>27. If proceeding to s 86 Notice:</p> <p>Review and Investigation Adviser to prepare in consultation with Director and Principal Director:</p> <ul style="list-style-type: none"> <li>– s 86 notice</li> <li>– List of recommendations</li> <li>– Letter accompanying s 86 notice to agency</li> <li>– Executive brief outlining next steps</li> </ul> <p>When considering whether the findings of the CII warrant making recommendations consider the appropriateness of recommendations that:</p> <ul style="list-style-type: none"> <li>– Related FOI complaint outcomes</li> <li>– Promote cultural change</li> <li>– Reinforce the requirement to promote the objects of the FOI Act</li> <li>– Implement training</li> <li>– Update FOI manuals</li> <li>– Develop policies and procedures</li> <li>– Conduct audits with a reporting timeframe of up to 6 months</li> </ul>	<ul style="list-style-type: none"> <li>– Review and Investigation Adviser to compile documents on Resolve file in accordance with e-clearance process (<a href="#">D2020/005955</a>)</li> </ul>
Providing the investigation outcome to the parties	<p>28. Once the s 86 notice has been signed by the Information Commissioner</p>	<ul style="list-style-type: none"> <li>– Information Commissioner or relevant delegate to call the respondent agency to advise that the matter has been finalised and advise: <ul style="list-style-type: none"> <li>○ whether any recommendations have been made</li> <li>○ relevant next steps in the process.</li> </ul> </li> <li>– Review and Investigation Adviser to advise media of the outcome of the investigation prior to sending out the s 86 notices to the agency.</li> <li>– Review and Investigation Adviser to send out the s 86 notice to the respondent agency inviting them to provide comments they wish to make within 2 weeks and advising them that the Information Commissioner will consider any comments and then provide a copy of the s 86 Notice and</li> </ul>

Stage	Actions	Next steps
		<p>comments to any affected parties and publish the Report on the OAIC website.</p> <ul style="list-style-type: none"> <li>– Review and Investigation Adviser to update weekly 'FOI insights' to include the outcome of the investigation.</li> <li>– Review and Investigation Adviser to provide a case summary for distribution to FOI Regulatory Group, Legal and Enquiries teams.</li> <li>– Two weeks later: (if there are notified third parties) Review and Investigation Adviser to call the affected third parties and advise that the matter has been finalised by the Information Commissioner. Follow up with email providing s 86 notice.</li> </ul>
Publication of CII outcome	<p>29. Director and Principal Director in consultation with SCaC consider whether a media statement is required.</p> <p>30. Director and Principal Director provide a copy of the Report to SCaC for publication on the OAIC website</p> <p>31. Review and Investigation Adviser to provide draft summary of the outcome of the investigation to Director and Principal Director for clearance and approval to publish the outcome on the OAIC website (<a href="#">D2019/014345</a>).</p>	<ul style="list-style-type: none"> <li>– Review and Investigation Adviser to liaise with media once approval has been provided for the publication of the outcome of the complaint.</li> </ul>
Closure of investigation file	<p>32. If no recommendations made</p> <p>If recommendations made</p>	<ul style="list-style-type: none"> <li>– Review and Investigation Adviser closes the CII file.</li> <li>– Review and Investigation Adviser closes the CII file and raises a 'Recommendation case' on resolve x-ref the original CII file.</li> <li>– Review and Investigation Adviser to note when response to s 86 notice is due and monitor response.</li> </ul>
Recommendation Case	33. Review and Investigation Adviser to monitor due date of response to the s 86 notice	<ul style="list-style-type: none"> <li>– Review and Investigation Adviser in consultation with Director or Principal Director to assess the agency's response to the investigation recommendations made in s 86 notice.</li> <li>– If response received satisfies the Information Commissioner that the agency has taken action that is adequate and appropriate in the circumstances to implement the investigation recommendations prepare finalisation letter to agency for review and approval by Director, Principal Director, Deputy</li> </ul>

Stage	Actions	Next steps
		<p>Commissioner and Information Commissioner.</p> <ul style="list-style-type: none"> <li>– If response received does not satisfy the Information Commissioner that the agency has taken action that is adequate and appropriate in the circumstances to implement the investigation recommendations, Review and Investigation Adviser in consultation with Director or Principal Director to consider: <ul style="list-style-type: none"> <li>○ whether further information is required</li> <li>○ whether an implementation notice (s 89(2)) is required</li> </ul> </li> </ul>
Implementation notice	34. Review and Investigation Adviser to prepare draft implementation notice to agency for review and approval by Director, Principal Director, Deputy Commissioner and Information Commissioner.	<ul style="list-style-type: none"> <li>– Review and Investigation Adviser to monitor response due from agency.</li> <li>– If response received satisfies the Information Commissioner that the agency has taken action that is adequate and appropriate in the circumstances to implement the investigation recommendations and comply with the implementation notice then draft closure letter to agency for review and approval by Director, Principal Director, Deputy Commissioner and Information Commissioner.</li> <li>– If response received does not satisfy the Information Commissioner that the agency has taken action that is adequate and appropriate in the circumstances to implement the investigation recommendations and comply with the time specified in the implementation notice, Review and Investigation Adviser to discuss with Director or Principal Director whether to proceed to providing a written report to the responsible minister (s 89A).</li> </ul>
Particulars of report to relevant minister	35. Review and Investigation Adviser in consultation with Director or Principal Director to prepare an executive brief on next steps for Information Commissioner approval.	<ul style="list-style-type: none"> <li>– Review and Investigation Adviser in consultation with Director or Principal Director to prepare report to the relevant minister in accordance with (ss 89B and 89C) for review and approval by Director, Principal Director, Deputy Commissioner and Information Commissioner.</li> </ul>
Finalisation of Recommendation Case	36. Information Commissioner to provide the report to the relevant minister.	<ul style="list-style-type: none"> <li>– The relevant minister to cause the report to be laid before each House of the Parliament.</li> <li>– Review and Investigation Adviser to provide a copy of the report to the agency.</li> <li>– Review and Investigation Adviser to close the recommendation case recording the date the report was tabled in parliament.</li> </ul>





# Declines – s 73

## Section 73(b) – IC review more appropriate

1. Complaint comes in and is registered and triaged by the Intake & Early Resolution team
2. If complaint is assessed as more appropriately dealt with under IC review the intake and early resolution team sends a combine acknowledgment to the complainant including:
  - a. Advice on IC review
  - b. Outcomes of FOI complaints
  - c. Seek withdrawal of complaint and make IC review instead
  - d. S 73(b) mini ITD putting them on notice that we may proceed to decline under s 73(b)
3. Intake to provide 1 week for response to correspondence above
4. Once the time has expired the following actions take place:
  - a. If they agree to seek IC review and with draw complaint – Intake finalise complaint and register an IC review
  - b. If they agree to seek IC review but want to proceed with complaint also:
    - i. Intake register IC review and x-ref to complaint
    - ii. Put the complaint into the Complaints queue
    - iii. Add file note to EL2 advising matter can proceed to s 73(b) closure
5. EL2 assesses complaint and where it appears more appropriate to consider under IC review then allocates to case officer.
6. Case officer:
  - a. creates s 73(b) draft closure (from Resolve action)
  - b. Drafts closure to agency via TRIM link: [D2021/014872](#)
  - c. updates case documents with e-clearance (\*Tab X, \*Tab XX)
  - d. provides draft to EL1/2 for clearance via Resolve action
7. Once cleared EL2 sends action note to FOIC
8. Once cleared by FOIC EL2 inserts FOIC signature and sends action note to case officer
9. Case officer PDFs both a closure to complainant (cleared by FOIC) and closure to agency (signed by EL2)
10. Sends closure to parties
11. Closes FOI complaint.

## Section 73(e) – without substance

1. Complaint comes in and is registered and triaged by the Intake & Early Resolution team
2. Complaint discussed at Intake and Complaints fortnightly meeting
3. If a valid complaint – Intake to acknowledge complaint and place the complaint into the FOI queue
4. EL2 assesses complaint and decides to:
  - a. Conduct PIs
  - b. RFI to complainant for further particulars
  - c. Proceed directly to draft ITD
5. Allocate to case officer
6. Case officer:
  - a. creates s 73(b) draft closure (from Resolve action)

- b. Drafts closure to agency via TRIM link: [D2021/014872](#)
  - c. updates case documents with e-clearance (\*Tab X, \*Tab XX)
  - d. provides draft to EL1/2 for clearance via Resolve action
- 7. Once cleared send snapshot email to AC for clearance
- 8. Once cleared by AC – AC will usually send snapshot email to FOIC
- 9. Once cleared by FOIC EL2 inserts FOIC signature and sends action note to case officer
- 10. Case officer PDFs both a closure to complainant (cleared by FOIC) and closure to agency (signed by EL2)
- 11. Sends closure to parties
- 12. Closes FOI complaint.

# Investigations – s 75 and 86

1. Complaint comes in and is registered and triaged by the Intake & Early Resolution team
2. Complaint discussed at Intake and Complaints fortnightly meeting
3. If a valid complaint – Intake to acknowledge complaint and place the complaint into the FOI queue
4. EL2 assesses complaint and decides to:
  - a. Conduct PIs
  - b. RFI to complainant for further particulars
  - c. Proceed directly to commence investigation (s 75)
5. EL2 add evidence matrix onto file and note assessment and any information to be requested.
6. Allocate to case officer
7. Case officer:
  - a. Assesses complaint and EL2 comments
  - b. Updates evidence matrix
  - c. Draft s 75 notice to agency: see sample about delays [D2021/014184](#)
  - d. Draft complaint investigation opening to complainant: [D2021/014231](#)
  - e. updates case documents with e-clearance (\*Tab X, \*Tab XX)
  - f. provides draft to EL1/2 for clearance via Resolve action
8. Once cleared, EL2 to sign investigation notice (or AC if sensitive)
9. Case officer to send to agency and complainant
10. Once s 75 response received, case officer updates evidence matrix and proposes next steps:
  - a. RFI to agency
  - b. Proceed to s 86 (finalisation)
11. Case management meeting with EL1/2 discuss proposed outcome and recommendations (invite AC where issues are sensitive/systemic/controversial)
12. As per outcome of case management meeting case officer to draft s 86 Notice send to EL2 via Resolve action
13. Once cleared send snapshot email to AC for clearance
14. Once cleared by AC – AC will usually send snapshot email to FOIC
15. Once cleared by FOIC EL2 inserts FOIC signature and sends action note to case officer to create PDF
16. Case officer PDFs s 86 Notice (cleared by FOIC) and sends to agency.
17. Agency then has 1 - 2 weeks to provide comments in response
  - a. 1 week where no recommendations made
  - b. 2 weeks where recommendations made
18. Once comments received in response Case officer to draft:
  - a. Closure letter to complainant: [D2021/017676](#)
  - b. For noting email to Commissioner: [D2021/017677](#)
19. Once cleared by EL2 send 'For noting' email to AC for clearance
20. Once cleared by AC – AC will usually send to FOIC
21. Once cleared by FOIC
22. Case officer to send closure letter to complainant attaching attachment A
23. Closes FOI complaint

24. Raises Recommendation case type (done automatically by Resolve if recommendations are made)
25. Update Investigations outcomes summary table: [D2021/020081](#)
26. Note the updated table to be sent to Comms for publication on website.

# Sample e-clearance and snapshots

## S 73 - Declines

### E-clearance code:

Comments

- \*Tab 1(a). Draft closure letter
- \*Tab 1(b) - Attachment A to closure – ITD
- \*Tab 2(a). FOI complaint
- \*Tab 3(a). Intention to decline letter to C

### Snapshot (s 73(e))

Snapshot	
Due date	24 March 2022
Fixed or flexible	Flexible
If fixed, why?	N/A
Topic for clearance	Singh and Services Australia (OAIC ref CP19/01870)
Product	Draft s73(e) closure letter
Length / no. of pages*	Draft complaint closure letter – 6 pages Key documents on Resolve record: CP19/01870 <ul style="list-style-type: none"> <li>• <b>*Tab 1. Draft s73(e) closure letter and attachments</b> <ul style="list-style-type: none"> <li>o <b>*Tab 1(a). Draft closure letter</b></li> <li>o <b>*Tab 1(b). Draft Attachment A – ITD to complainant</b></li> </ul> </li> <li>• <b>*Tab 2. FOI complaint and acknowledgement</b> <ul style="list-style-type: none"> <li>o <b>*Tab 2(a). IC review/complaint request</b></li> <li>o <b>*Tab 2(b). Acknowledgement of complaint</b></li> </ul> </li> <li>• <b>*Tab 3. R submissions to OAIC preliminary inquiries</b> <ul style="list-style-type: none"> <li>o <b>Tab 3(a). R submissions to OAIC preliminary inquiries</b></li> </ul> </li> </ul>
External party?	Yes – see above
Investigation Adviser	Eoin McMahon
Clearance	Irene Nicolaou, Elizabeth Hampton
Final Clearance	Acting Freedom of Information Commissioner

## S 86 – Notice on completion

### E-clearance code:

Comments
<p>*Draft snapshot</p> <p>*Tab 1(a) Draft s 86 letter</p> <p>*Tab 1(b) - Draft s 86 Attachment A</p> <p>*Tab 1(c) Attachment B - Key procedural events</p> <p>*Tab 2(a) Complaint</p> <p>*Tab 2(b) Pls to R</p> <p>*Tab 2(c) Pls resp</p> <p>*Tab 3(a) ITD to C</p> <p>*Tab 3(b) ITD resp</p> <p>*Tab 4(a) S 75 R</p> <p>*Tab 4(b) - s 75 resp</p> <p>*Tab 4(c) - corro between R and C (Attachment to ATO...</p>

### Snapshot:

Snapshot	
Due date	(2wks) 2 February 2022
Fixed or flexible	Flexible
If fixed, why?	n/a
Topic for clearance	Draft s 86 Notice – Tracey Copeland   National Disability Insurance Agency <b>CP18/02540</b>
Product	Key documents requiring approval: <ul style="list-style-type: none"> <li>○ Tab 1(a) Draft s 86 - Letter</li> <li>○ Tab 1(b) Draft s 86 - Attachment A</li> <li>○ Tab 1(c) Attachment B – Key procedural events</li> <li>○ Tab 2(a)- FOI complaint</li> <li>○ Tab 3(a) s 75 Notice to R</li> <li>○ Tab 4(a) Attachment C – s 75 response</li> </ul>
Length / no. of pages	Draft s 86 letter: 2 pages Draft s 86 - Attachment A: 5 pages
External party?	Yes
Clearance & consultation	Shelley Napper, Irene Nicolaou, Assistant Commissioner
Final clearance and approval	Acting Freedom of Information Commissioner





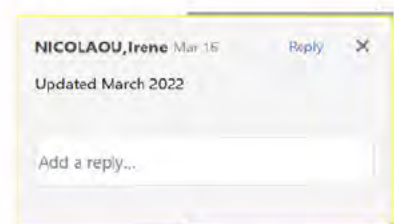
April 2021

## FOI Complaints: transfer to Ombudsman

This resource applies to transfers of FOI complaints to the Commonwealth Ombudsman under s 74 of the *Freedom of Information Act 1982* (FOI Act) and should be read in conjunction with [Part 11 of the FOI Guidelines](#).

### Key principles

- Under Part VIIB of the FOI Act the Information Commissioner can investigate agency actions relating to the handling of FOI matters. This involves investigating complaints received from complainants (s 70) as well as conducting own motion investigations (s 69(2)).
- The FOI Act sets out certain rules that apply to the conduct of the Information Commissioner's complaint investigations and Commissioner initiated investigations. The guiding principle is that an investigation shall be conducted in private and in the way the Information Commissioner considers fit (s 76(1)).
- Section 74 of the FOI Act provides the Information Commissioner with the discretion whether to transfer a complaint to the Commonwealth Ombudsman if satisfied that the complaint would be more effectively or appropriately dealt with by the Ombudsman.
- Part 11 of the *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* (FOI Guidelines) provides guidance on the operation of s 74.<sup>1</sup> In particular paragraph [11.14] explains that the Information Commissioner has the power to transfer a complaint (or part of a complaint) to the Ombudsman if the Information Commissioner is satisfied that the complaint could be dealt with more effectively or appropriately by the Ombudsman (s 74).
- The factors that the Information Commissioner considers when deciding to transfer a complaint to the Ombudsman include:
  - whether the complaint is about actions taken by the Office of the Information Commissioner (OAIC), including how the OAIC has dealt with an:
    - Information Commissioner review
    - FOI complaint
    - vexatious applicant declaration application
    - FOI request, or
    - extension of time application



<sup>1</sup> See *FOI Guidelines* [11.14].



- whether there may be a perceived or actual conflict of interest in the Commissioner considering the complaint, including where:
  - the complainant has active complaints under the Privacy Act where the Information Commissioner is the respondent
  - the complaint relates to specific functions exercised by the Information Commissioner under the Privacy Act
  - the complainant has active matters in other forums, including the Administrative Appeals Tribunal and Federal Court and the Information Commissioner is the respondent
- whether the issues raised relate to other active complaints lodged with the Commonwealth Ombudsman
- When making a decision to transfer a complaint to the Ombudsman, the Information Commissioner must reach a level of satisfaction that the complaint could be more effectively or appropriately dealt with by the Ombudsman.
- In making a decision on whether to transfer the complaint to the Ombudsman, the Information Commissioner will notify the complainant that the complaint may be transferred to the Ombudsman under s 74 of the FOI Act and take into consideration any submissions the complainant makes in response prior to making a decision on whether to transfer the complaint.
- If the Information Commissioner decides to transfer the complaint to the Ombudsman, the Commissioner must:
  - consult the Ombudsman (s 74(2)(a))
  - make a decision not to investigate or not to continue to investigate the complaint (s 74(2)(b))
  - provide the Ombudsman with any information or documents that relate to the complaint (s 74(3)(b)), and
  - notify the complainant in writing that the complaint has been transferred (s 74(3)(c)). The notification to the complainant must contain the Commissioner's reasons for transferring the complaint (s 74(4)).

## Key steps and relevant templates

Step	Template
1. Consultation with the Ombudsman	Consultation letter to the Ombudsman: <a href="#">D2020/021432</a>
2. If Ombudsman agrees <sup>2</sup> , notify the complainant of intent to transfer. Response to be provided within 2 weeks.	Intent to transfer under s 74 to complainant: <a href="#">D2020/021458</a>
3. Decision to transfer	Letter to the Ombudsman transferring the FOI complaint: <a href="#">D2020/021428</a> Letter to the complainant advising that the FOI complaint has been transferred to the Ombudsman: <a href="#">D2020/021429</a>

<sup>2</sup> Note: there is no requirement in s 74 for the Ombudsman to agree to transfer. In the event the Ombudsman does not agree to transfer, but the matter falls within the above parameters, the matter is to be escalated to the Deputy Commissioner.

**From:** Fran s 47E(d)  
**To:** Irene Nicolaou; Claire s 47E(d); Sandra Wavamunno  
**Subject:** RE: [External] OAIC/ OCO transfer process [SEC=OFFICIAL] [SEC=OFFICIAL]  
**Date:** Thursday, 3 March 2022 4:32:30 PM  
**Attachments:** [image001.png](#)  
[image002.jpg](#)  
[image003.png](#)  
[image004.png](#)  
[image005.png](#)  
[image006.png](#)

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OFFICIAL

OFFICIAL

Hi Irene

Thanks for this, and great point! I have updated the table below with the relevant phone numbers. I hope that you are faring okay there in this crazy weather.

For us, Claire is the best contact for the process as her team will receive the incoming information, I am the best contact for complaint issues.

- For process questions- Claire's team will receive the complaints s 47E(d)
- For consultation on sensitive complaint/ transfers- my team will action, so I am the best contact: s 47E(d)

Thanks  
Fran

Director, Complex Complaints  
Complaints Management and Education Branch  
COMMONWEALTH OMBUDSMAN  
**Proud to be working on the lands of the Jagera and Turabal peoples**  
Phone: s 47E(d)  
Email: s 47E(d)  
Website: [ombudsman.gov.au](http://ombudsman.gov.au)



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**From:** Irene Nicolaou <irene.nicolaou@oaic.gov.au>  
**Sent:** Tuesday, 1 March 2022 10:43 AM  
**To:** Fran <sup>s 47E(d)</sup> <<sup>s 47E(d)</sup> au>; Claire <sup>s 47E(d)</sup> <<sup>s 47E(d)</sup>>; Sandra Wavamunno <sandra.wavamunno@oaic.gov.au>  
**Subject:** [External] RE: OAIC/ OCO transfer process [SEC=OFFICIAL]

## OFFICIAL

Hi everyone

Thanks Fran, for the work-up of our discussion.

It might also be useful to add in that consultation may be also conducted through phone calls to the relevant Directors.

I understand that transfers coming to the OAIC Sandra is the best contact her direct line is: 02 9284 9724.

For transfers to the Ombudsman can you confirm whether the best contact is you or Claire?

Kind regards  
Irene



**Irene Nicolaou** | Director  
Investigations and Compliance  
Freedom of information Regulatory Group  
Office of the Australian Information Commissioner  
GPO Box 5218 Sydney NSW 2001 | [oaic.gov.au](https://www.oaic.gov.au)  
+61 2 9284 9605 | <sup>s 47E(d), s 47F</sup>  
[irene.nicolaou@oaic.gov.au](mailto:irene.nicolaou@oaic.gov.au)



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**From:** Fran <sup>s 47E(d)</sup> <<sup>s 47E(d)</sup>>  
**Sent:** Friday, 25 February 2022 6:03 PM  
**To:** Irene Nicolaou <[irene.nicolaou@oaic.gov.au](mailto:irene.nicolaou@oaic.gov.au)>; Claire <sup>s 47E(d)</sup> <<sup>s 47E(d)</sup>>; Sandra Wavamunno <[sandra.wavamunno@oaic.gov.au](mailto:sandra.wavamunno@oaic.gov.au)>  
**Subject:** RE: OAIC/ OCO transfer process [SEC=OFFICIAL]

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## OFFICIAL

Hi All

Here is a brief summary of the process we discussed when we spoke earlier this week. Nice to meet you Sandra, and thanks again Irene for arranging.

Can you please let me know if the below aligns with our discussion?

We had an operational discussion regarding the transfer process (in line with our respective legislation).

Process and key contacts below:

Transfers to OAIC	Transfers to Ombudsman
<p>Transfers to be sent via email to:</p> <p><a href="mailto:xxxxx@xxxx.xxx.xx">xxxxx@xxxx.xxx.xx</a></p> <p>*NOTE: IR reviews can be subject to specific timeframes, transfers should not be delayed.</p>	<p>Transfers to be sent via email to:</p> <p><a href="mailto:xxxxxxxxx@xxxxxxxxx.xxx.xx">xxxxxxxxx@xxxxxxxxx.xxx.xx</a></p>
<p>Send information relevant to the complaint and include:</p> <ul style="list-style-type: none"> <li>• Information relates to the complaint</li> <li>• A copy of the correspondence notifying the individual that the complaint is being transferred.</li> <li>• The complainants response to this (where relevant)</li> <li>• Information on the contact preferences of the individual (if known)</li> <li>• Related contact details</li> </ul>	<p>Send information relevant to the complaint and include:</p> <ul style="list-style-type: none"> <li>• Information that relates to the complaint</li> <li>• A copy of the correspondence notifying the individual that the complaint is being transferred.</li> <li>• The complainants response to this (where relevant)</li> <li>• Information on the contact preferences of the individual (if known)</li> <li>• Related contact details</li> </ul> <p>Email subject line to include: Complaint transfer to Ombudsman from OAIC</p>
<p>Where phone consultation is required:</p> <p>Director, Intake and Early Resolution Sandra, 02 9284 9724.</p>	<p>Where phone consultation is required:</p> <p>Process: Director Complaints, Claire <span style="background-color: black; color: red;">s 47E(d)</span> <span style="background-color: black; color: red;">s 47E(d)</span> <span style="background-color: black; color: black;">[REDACTED]</span></p> <p>Complaint consultation Director, Complex Complaints Fran <span style="background-color: black; color: red;">s 47E(d)</span></p>
<p>If sensitive, there is potential duplication (further consultation is needed)/ concerns with the transfer or a discussion is required:</p> <p>Contact: <a href="mailto:xxxxxxxxxxxxx@xxxx.xxx.xx">xxxxxxxxxxxxx@xxxx.xxx.xx</a></p>	<p>If sensitive, there is potential duplication (further consultation is needed)/ concerns with the transfer or a discussion is required:</p> <p>Contact: <span style="background-color: black; color: red;">s 47E(d)</span></p>

Director, Intake and Early Resolution

Director, Complex Complaints

Kind regards,  
Fran

Director, Complex Complaints  
Complaints Management and Education Branch  
COMMONWEALTH OMBUDSMAN

**Proud to be working on the lands of the Jagera and Turabal peoples**

Phone: s 47E(d)

Email: s 47E(d)

Website: [ombudsman.gov.au](http://ombudsman.gov.au)



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**Australian Government**

**Office of the Australian Information Commissioner**

## Section 86 Notice on Completion Steps

Action	Next steps
1. S 86 Notice on completion approved by Information Commissioner/Freedom of Information Commissioner	<p>Call Respondent agency advising that the Commissioner has finalised the investigation and will be issuing the Notice today.</p> <p>Advise of next steps in the process (comments due/provision to complainant)</p> <p>Confirm appropriate email (to addressee usually Secretary or CEO)</p>
2. S 86 Notice on completion approved by Information Commissioner/Freedom of Information Commissioner	<p>Prepare the following PDFs to be provided to the respondent agency:</p> <ol style="list-style-type: none"> <li>1. Letter to agency (noting correct email address)</li> <li>2. Attachment A (ensuring any edits to the letter's recommendations are updated in the Attachment A)</li> <li>3. Attachment B and C (if relevant)</li> </ol>
3. Save a copy of the draft email to the respondent agency with the correct attachments	<p>Assign action to Director for clearance/sending Note on case file 'Next steps';</p> <ul style="list-style-type: none"> <li>• when comments are due</li> <li>• when recommendations are due</li> </ul>
4. Once the s 86 has been send to the agency	<p>Update FOI insights including a TRIM link to a copy of the combined letter and Attachment A located in container: <a href="#">19/000223-006</a></p>
5. Once comments have been received from agency	<p>Prepare 'For Noting' email (<a href="#">D2021/017677</a>) including:</p> <ul style="list-style-type: none"> <li>• Whether comments in response received</li> </ul>
If no comments are received consider providing courtesy call	<ul style="list-style-type: none"> <li>• Any issues or concerns raised by the Respondent</li> </ul>

to Respondent to confirm whether providing comments in response.	<ul style="list-style-type: none"> <li>• draft closure letter to Complainant (<a href="#">D2021/017676</a>) <ul style="list-style-type: none"> <li>◦ including any comments from R (as a quote)</li> </ul> </li> <li>• Send for email to Director/ Assistant Commissioner for clearance</li> <li>• Once cleared by Director/Assistant Commissioner send to FOIC via email with the following attachments: <ul style="list-style-type: none"> <li>◦ Comments from R (if any)</li> <li>◦ Draft closure to C</li> </ul> </li> </ul>
6. Once 'For Noting' next steps have been approved by FOIC	<p>Insert Director signature.</p> <p>Send letter to complainant with</p> <ul style="list-style-type: none"> <li>• Attachment A (and B, C of relevant) only (the s 86 letter to respondent <u>does not</u> go to the complainant).</li> </ul>
7. Close FOI complaint Resolve file	<p>Raise Recommendation file and attach relevant documents. This is autogenerated when in the 'outcomes' section you tick 'recommendations made – yes'</p> <p>Note in Summary box the recommendations and date due.</p> <p>Copy s 86 Notice over to the created Recommendation case and x-ref the complaint file.</p>
8. 14 days after closure of Resolve file Assistant Director to send update to complaints summary table to SCaC for upload to website.	<p>See Recommendation Case Worksheet for next steps: <a href="#">D2020/007324</a></p>



FOI Complaint Assessment Matrix: CPXX/OXXXX – [Complainant] and [Agency]

Date Received: DD MMM 20XX

Complaint issues as particularised by the complainant:

Related IC review:

FOI request Summary:

Initial Assessment by Director Investigations and Compliance:

Within jurisdiction?

Relevant legislative provisions:

Related Policy issues?

Key procedural events: See Attachment A

Intention to decline ONLY:

NICOLAOU, Irene 10/14/2022 Reply X

Please insert key procedural events chronology below.

Add a reply...

Allegation	Decline provision	Notes

Draft ITD to Director	Date ITD issued	Date ITD response due	Response received from complainant	CO recommendation next steps

Draft closure to Director	Draft closure to PD	Draft closure to DC	Draft closure to IC	IC approval to finalise

Case officer:

**Proceeding to preliminary inquiries/investigation**

Allegation/s	FOI Act/FOI Guidelines	Complainant's submissions	Agency response to Preliminary Inquiries	Case officer assessment (PIs)	Agency response to Investigation Notice	Case officer assessment (Notice)
1.	s	.	.	.	.	.
2.	s	.	.	.	.	.
3.	s	.	.	.	.	.

**Preliminary Inquiries (s 72)**

Date complaint received	Date PIs drafted	Date PIs sent to agency	Response due from Agency	Date received from agency

Case officer:

## FOI Complaint assessment

Assessed by:		Date Assessed:	
Allegation	Decline/Investigate	Comments	
1.			
2.			
3.			

## Investigation Notice (s 75)

Further documents, submissions required				
<ul style="list-style-type: none"> <li>.</li> <li>.</li> <li>.</li> </ul>				
Date s 75 drafted	Date s 75 to Director/AC	Date s 75 sent to Agency	Response due from Agency	Date received from agency

## Notice on completion (s 86)

Issue/Allegation	FOI Act/FOI Guidelines	Conclusions	Evidence relied upon	Recommendation
1.	s	*	*	*
2.	s	*	*	*
3.	s	*	*	*

S 86 Assessment				
<ul style="list-style-type: none"> <li>· Conclusions <ul style="list-style-type: none"> <li>○</li> <li>○</li> </ul> </li> <li>· Proposed recommendations <ul style="list-style-type: none"> <li>○</li> </ul> </li> </ul>				
Date s 86 case conference with DC/PD	Proceed to s 86 Notice assessed by	Date draft s 86 Notice to Director	Date draft s 86 Notice to Executive	Date s 86 Notice signed by Commissioner

E- Clearance process completed: