



Australian Government
Department of Education

Your Ref
Our Ref LEX 769

Ms Angelene Falk
Australian Information Commissioner
Office of the Australian Information Commissioner
GPO Box 5218
SYDNEY NSW 2001

Dear Ms Falk

1. Thank you for the opportunity to provide comments on the draft revisions to part 6 of the Freedom of Information Guidelines (the Guidelines) issued by the Australian Information Commissioner under section 93A of the *Freedom of Information Act 1982* (FOI Act). The department makes the following comments in regard to the draft revised Guidelines.

Flow chart

2. Paragraph 6.5 of the draft Guidelines includes a flowchart described as representing the decision making process under Division 3 of Part IV of the FOI Act.
3. The flowchart indicates that documents will not be conditionally exempt if the public interest factors against disclosure do not outweigh the public interest factors in favour of disclosure. The department respectfully submits that this is not an accurate representation of the decision making process for conditionally exempt documents.
4. As defined in section 4 of the FOI Act, a document is conditionally exempt if Division 3 of Part IV (public interest conditional exemptions) applies to the document. Section 11A(5) of the FOI Act provides that access must be given to the document if it is conditionally exempt at a particular time, unless (in the circumstances), access to the document at that time would, on balance, be contrary to the public interest.
5. As set out in draft paragraph 6.220 of the draft Guidelines, a decision maker is not required to consider the public interest test (section 11A(5)) until they have first determined that the document is conditionally exempt. A document will be conditionally exempt if it satisfies one or more of the exemption provisions in Division 3 of Part IV of the FOI Act, even if, on balance, disclosure would not be contrary to the public interest.
6. There is also a minor typographical error in the flowchart (“outweight” rather than “outweigh”).

Prejudice

7. Paragraph 6.21 of the draft Guidelines provides that:

6.21 A prejudicial effect is one which would cause a bias or change to the expected results leading to detrimental or disadvantageous outcomes. There is no need to establish a 'substantial adverse effect' (see discussion above) and proof of prejudice is sufficient.

8. The new paragraph amends the current paragraph 5.23 of the Guidelines by changing the second sentence of the current paragraph to include a reference to "proof of prejudice". Paragraph 5.23 in the current Guidelines reads as follows:

5.23 A prejudicial effect is one which would cause a bias or change to the expected results leading to detrimental or disadvantageous outcomes. The expected outcome does not need to have an impact that is 'substantial and adverse'.

9. The footnotes to the current paragraph 5.23 and to draft paragraph 6.21 refer to *Re James and Ors and Australian National University* (1984) 6 ALD 687, where DP Hall stated:

The question, in the present case, therefore, is whether the expression "the conduct of the operations of agency", when applied to the University, extends not only to the way in which it carries out its "administrative" operations, but also its "academic" operations. Given that sub-paragraphs (a) and (b) of s 40(1) apply specifically to documents the disclosure of which would prejudice examinations conducted by an agency (in the respects referred to in those paragraphs), there is something to be said for the view that s 40(1)(d) requires the agency to establish a "substantial adverse effect" whilst ss 40(1)(a) and (b) require proof of no more than "prejudice".

10. In using the phrase "require proof of no more than prejudice", DP Hall was distinguishing "prejudice" from "substantial adverse effect". The draft guidelines have paraphrased DP Hall's statement as "proof of prejudice is sufficient". The department respectfully submits that, when taken out of the context of the decision in *Re James and Ors*, the paraphrased words may be open to misinterpretation.
11. The department submits there is a risk that an unintended emphasis may be placed on the word "proof" in draft paragraph 6.21. In ordinary English usage, "proof" may be considered to be a high standard of evidence. For example, the Macquarie Dictionary definitions of "proof" include "evidence sufficient to establish a thing as true, or to produce belief in its truth".
12. The word "prejudice" appears in sections 37(1)(a), 37(2)(a)-(c), 47E(a) and (b) and 47G(1)(b) of the FOI Act. Sections 37(1), 37(2) and 47E specify that a document is exempt or conditionally exempt if disclosure "would, or could reasonably be expected to ... prejudice", while section 47G(1)(b) provides that a document is conditionally exempt if disclosure "could reasonably be expected to prejudice". The department submits that introducing a requirement of "proof of prejudice" is inconsistent with the wording of these sections. In the department's view, the test is more accurately described in draft paragraph 6.16, which provides that:

The mere risk, allegation, possibility, or chance of prejudice does not qualify as a reasonable expectation. There must, based on reasonable grounds, be at least a real, significant or material possibility of prejudice.

13. The department submits that the second sentence of draft paragraph 6.21 should revert to the wording used in the current paragraph 5.23 of the Guidelines.

Commonwealth–State relations

14. The Commonwealth–State consultation provisions in section 26A of the FOI Act refer to *“arrangements ... entered into between the Commonwealth and a State about consultation under this section ...”*.
15. The department appreciates that OAIC has amended the Guidelines to include new paragraph 6.40, stating that arrangements have been made to facilitate consultation where this is required under section 26A. The paragraph is helpful in confirming that arrangements are in place and describing the arrangements, however the department notes that the new paragraph does not contain a footnote referencing the date the arrangements were made or the document (if any) recording them.
16. If you have any questions in regard to these submissions, please contact foi@education.gov.au.

Yours sincerely

Freedom of Information Team
Department of Education

28 September 2023