

## Submission – Department of Employment and Workplace Relations - v 1.4 Part 6 of the FOI Guidelines (Conditional exemptions)

We refer to the consultation on updates to Part 6 (v 1.4) of the FOI Guidelines: conditional exemptions (draft new guidelines) being undertaken by the OAIC. The Department of Employment and Workplace Relations (DEWR) notes the draft new guidelines and takes this opportunity to provide our comments below. The FOI Guidelines are a valuable resource for all FOI practitioners when interpreting and processing requests under the *Freedom of Information Act 1982* (Cth) (FOI Act).

DEWR agrees with restructuring Part 6 to more closely follow the decision making process. It makes sense for the discussion of the conditional exemptions to appear before the public interest test, and ‘the public interest test and s 47B’ and ‘inhibition of frankness and candour’ sections to be moved to the public interest section at the end of Part 6. However, it may be useful to include a reference to these sections in the discussions of Documents affecting Commonwealth-State relations (s 47B) and Documents subject to deliberative process (s 47C) so they are not inadvertently overlooked by FOI practitioners when considering these conditional exemptions.

### **6.5 Flow chart**

We welcome the introduction of a flow chart to assist decision makers determine whether a document is conditionally exempt. The new flow chart is a helpful and visual overview of the decision-making process. We note that the flow chart does not prompt decision makers to consider whether consultation with a third party is required.

### **Documents affecting Commonwealth-State relations (s 47B)**

We note the clarification provided in paragraph 6.40 about the arrangements for consultation with States. We understand agreement has been obtained from the States, and would like to know whether a copy of this agreement is available to agencies and decision makers. We would also welcome further information on how to locate the ‘delegated FOI contact officer of the particular agency’ as in certain circumstances, it might be more practical to contact the author or action officer whose name appears in the document in the first instance.

### **Substantial adverse effect on management or assessment of personnel (s 47E(c)): Public servants and s 47E(c)**

We welcome the further clarity on disclosure of public servants’ personal information in various parts of the new guidelines. We note that paragraphs 6.104-6.105 of the draft new guidelines refer to the potential use of section 47E(c) of the FOI Act to exempt public servants’ names and contact details. It states that an assessment is to be made on a case by case basis, based on objective evidence. Further, at paragraph 6.147, the draft new guidelines state that concerns about the work health and safety impacts of disclosing public servants’ personal information may be more appropriately addressed under the conditional exemption in section 47E(c) rather than under section 47F (see [6.104]). It would be useful to have examples or further guidance on what ‘objective evidence’ is required in order to be able to claim this conditional exemption to exempt public servants’ personal information.

### **Incoming government briefs and the public interest test**

We welcome the guidance provided in relation to incoming government briefs and the public interest test, and we wonder whether the OAIC might be able to provide similar guidance on the application of the public interest test on senate estimates briefs. DEWR has seen an increase in requests for access to senate estimates briefs, including requests for access to briefs which have been prepared for senate estimates hearings, but not necessarily for agency heads or Ministers, and not tabled. Further guidance would assist us in determining the application of the public interest test for each documents (and type of brief; for example, hot topic brief or backpocket brief) rather than applying general public interest considerations to all briefs prepared for senate estimates.

### **Formatting issue**

DEWR notes that there is a typo at paragraph 6.220 in the consultation version of Part 6. It appears that there may be an issue with the clause cross-referencing macro in the Word version of the document which has created the following typo: **Error! Reference source not found.**

### **General comments on consultation process**

While we acknowledge that this consultation was published on the OAIC's website on 10 August 2023, DEWR only became aware of this consultation through the OAIC Information Matters e-newsletter dated 31 August 2023, leaving just one week until the end of the consultation period. Agencies may benefit from more notice and/or longer consultation periods to consider draft new guidelines so that they can provide comprehensive feedback to the OAIC.

Thank you again for the opportunity to be consulted. Should you have any questions or required any additional information, please contact me.