



Law Council
OF AUSTRALIA

Office of the President

31 July 2023

Ms Rocelle Ago
Assistant Commissioner
Freedom of Information
Office of the Australian Information Commissioner
GPO Box 5288
SYDNEY NSW 2001

By email: foidr@oaic.gov.au

Dear Assistant Commissioner

Consultation on draft revisions to Part 5 of the FOI Guidelines: Exemptions

1. The Law Council of Australia welcomes the opportunity to contribute to the consultation by the Office of the Australian Information Commissioner (the **OAIC**) on draft revisions to Part 5 of the Freedom of Information (**FOI**) Guidelines (the **Guidelines**).
2. The Law Council acknowledges the assistance of its Federal Dispute Resolution Section's Administrative Law Committee in preparing this submission.

General comments

3. Part 5 of the Guidelines, last updated in June 2019,¹ outlines the exemptions in Division 2 of Part IV of the *Freedom of Information Act 1982* (Cth) (**FOI Act**) and explains the criteria that must be met before an agency or Minister refuses access to a document in response to an FOI request.
4. As set out in the Law Council's recent submission to the Senate Legal and Constitutional Affairs Reference Committee in relation to its inquiry into the operation of Commonwealth FOI laws, Commonwealth entities are increasingly—and at times, incorrectly—relying upon the exemptions under Part IV of the FOI Act.² Given the importance of ensuring that Australia's FOI regime promotes open and accountable governance, it is critical that clear and up-to-date guidance is provided by the OAIC to ensure that Commonwealth entities only rely upon statutory exemptions in circumstances where it is appropriate to do so.
5. The Law Council broadly supports the proposed revisions, and welcomes the OAIC's efforts to improve the readability of the Guidelines while also seeking to reflect recent Administrative Appeals Tribunal (**AAT**) and Information Commissioner review decisions. In addition, it supports the proposed redraft of paragraph 5.2 to clarify that agencies and

¹ Office of the Australian Information Commissioner ('OAIC'), Freedom of Information Guidelines Part 5: Exemptions (Version 1.5, June 2019) <https://www.oaic.gov.au/__data/assets/pdf_file/0015/7602/part-5-exemptions-v1-5.pdf>.

² Law Council of Australia, The operation of Commonwealth Freedom of Information Laws (Submission, 14 June 2023) <<https://lawcouncil.au/publicassets/a77217a5-8f14-ee11-9483-005056be13b5/2023%2006%2014%20-%20S%20-%20The%20operation%20of%20Commonwealth%20FOI%20laws.pdf>> 14.

ministers retain a discretion to provide access to a document where the law permits, even if the document is exempt under Part IV of the FOI Act.

6. The Law Council considers that the proposed revisions to Part 5 of the Guidelines are likely to assist in promoting agency understanding of the exemptions available in Part IV of the FOI Act. However, it acknowledges that broader systemic change is required, to support agencies to decrease their reliance on statutory exemptions and build a culture of disclosure which is consistent with the intent behind the FOI Act, and with broader community expectations.³

Recommendations

Legal professional privilege (or client legal privilege) exemption

7. The Law Council considers that proposed paragraph 5.142 of the Guidelines should be revised further to more accurately reflect the operation of legal professional privilege (or as it is better characterised, client legal privilege) in Australia, and assist Commonwealth entities in their understanding and application of this exemption.
8. Proposed paragraph 5.142 of the Guidelines is set out below, formatted so as to indicate amendments recommended by the Law Council. The underlined text is suggested for inclusion; the text that has been struck through is suggested for removal:

Legal professional privilege applies to some, but not all, communications between legal advisers and clients. It also applies to some, but not all, communications between the client or their agent (such as a legal adviser) and a third party, to enable the client to obtain legal advice or for use in litigation, either actual or within the reasonable contemplation of the client.⁴ The underlying policy basis for legal professional privilege is to promote full and frank disclosure between a lawyer and client to the benefit of the effective administration of justice. It is the purpose of the communication that is determinative.⁵ Legal professional privilege protects documents which would reveal such communications between a client and their lawyer made for the dominant purpose of giving or obtaining legal advice.⁶ The information in a document is relevant and may assist in determining the purpose of the communication, but the information in itself is not determinative.

Status of FOI Guidelines

9. While outside the scope of the OAIC's current consultation, the Law Council recommends that paragraph 1.2 in Part 1 of the Guidelines be expanded to clarify the non-binding status of the Guidelines and acknowledge that provisions of the FOI Act are occasionally the subject of interpretation by the AAT and the Federal Court of Australia.⁷

³ Ibid 6.

⁴ A new footnote will be required as follows: *Nickmar Pty Ltd v Preservatrice Skandia Insurance Ltd* (1985) 3 NSWLR 44; *Ritz Hotel v Charles of the Ritz (No 22)* (1988) 14 NSWLR 132; *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) ALR 217; *Tabcorp Holdings Ltd v State of Victoria* [2013] VSC 302 at [99]-[118].

⁵ Proposed footnote 130: *Comcare v Foster* [2006] FCA 6 [22]-[40]; (2006) 42 AAR 434.

⁶ Proposed footnote 131: *Esso Australia Resources Ltd v Federal Commissioner of Taxation* [1999] HCA 67 [80]; (1999) 201 CLR 49 at 73; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* [2002] HCA 49 [9]-[10].

⁷ OAIC, Freedom of Information Guidelines Part 1: Introduction (Version 1.4, December 2016) <https://www.oaic.gov.au/__data/assets/pdf_file/0017/9413/part-1-introduction-to-the-freedom-of-information-act-1982-v1-4.pdf>.

10. The Law Council suggests that the following paragraph be added to paragraph 1.2 (following the bullet points):

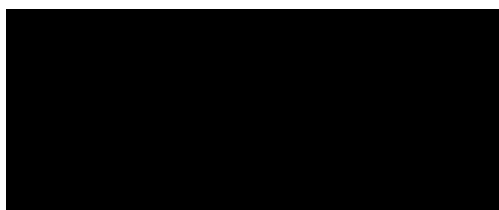
While agencies are required to have regard to these Guidelines, they are not bound by them. The provisions of the FOI Act, particularly the exemptions and conditional exemptions in Part IV, are, from time to time, the subject of interpretation by the Administrative Appeals Tribunal and the Federal Court of Australia (see Parts 5 and 6 of the Guidelines). While these Guidelines are updated on a periodic basis, changes to the interpretation of provisions of the FOI Act may not be reflected in the current version of these Guidelines.

11. The Commonwealth has announced it will abolish the AAT and establish a new federal administrative review body.⁸ Upon the establishment of the new administrative review body, the reference to the AAT in the paragraph proposed above, and in the Guidelines more broadly, will obviously require replacing.

Contact

12. If the OAIC requires further information or clarification, please contact in the first instance Mr Nathan MacDonald, Deputy Director of Policy on (02) 6246 3721 or at nathan.macdonald@lawcouncil.au.

Yours sincerely



Luke Murphy
President

⁸ Attorney-General's Department, A new system of federal administrative review (Web Page, 2023) <<https://www.ag.gov.au/legal-system/new-system-federal-administrative-review>>.