

18 June 2025

Ms Elizabeth Tydd
Australian Information Commissioner
Office of the Australian Information Commissioner
GPO Box 5218
Sydney NSW 2001

By email: guidanceandpublications@oaic.gov.au

Dear Commissioner

Consultation on Part 3—Processing and deciding FOI requests

The Law Council of Australia is grateful for the opportunity to make a submission in response to the proposed updates to Part 3 of the Office of the Australian Information Commissioner's (OAIC's) *FOI Guidelines: Processing and deciding on FOI requests* (the **Guidelines**).

This submission is informed by contributions from the Law Society of New South Wales and the Law Institute of Victoria.

The Law Council is encouraged by the OAIC consultation, and its commitment to improve the Guidelines to advance the objects of the *Freedom of Information Act 1982* (Cth) (**FOI Act**) which support and promote public access to information. In general, we consider that the updates to Part 3 of the Guidelines are comprehensive and take account of current case law. We commend the OAIC's approach to incorporate case law through Part 3 of the Guidelines to support practical application and understanding, and highlight key principles. We would welcome this approach being readily adopted throughout the Guidelines more broadly.

Comments on the Consultation Draft

Administrative release and use of informal processes

The Law Council recognises that proposed paragraphs [3.5] to [3.11] of the Guidelines address access through administrative release (informal processes). Members of the legal profession report that informal avenues for accessing information are rarely utilised in practice and there is a pressing need for more detailed guidance regarding accessing information outside the FOI regime. The Law Council suggests that the Guidance should make clear the expectation that dialogue and negotiation between parties occur before formal legal processes are used. With greater encouragement and clarity of an informal process, the Guidelines could significantly contribute to achieving the objectives of the FOI Act,¹ and facilitate a shift towards a more accessible information landscape.

¹ *Freedom of Information Act 1982* (Cth) s 3(4)

Use of Artificial Intelligence (AI)

The Law Council acknowledges that the Guidelines—at proposed paragraphs [3.18] and [3.19]—aim to establish guardrails and protections surrounding AI use, particularly to safeguard against AI-generated FOI requests.

The Law Council cautions against using discretionary language that grants agencies unfettered flexibility in managing the risks associated with AI. The Law Council encourages the adoption of a comprehensive AI policy and guidance for agencies, encompassing cybersecurity considerations and risk assessments to mitigate the impact of fraudulent FOI requests prompted by AI technology. Furthermore, it is essential that a clear pathway for applicants and agencies to rectify the wrongful identifications as AI is explored within the guidance, and that an obligation to notify applicants be introduced.

The Law Council submits that these Guidelines could also include permitted uses of AI by applicants, agencies, and departments, emphasising the opportunities for improved access to government information. There is nothing in the FOI Act to suggest that a person is not able to use AI to generate the content of an FOI request. Further, in our view, there is nothing inherently improper about this practice. We therefore suggest that proposed paragraphs [3.18] and [3.19] be clarified to more clearly address the possible situation of an FOI request being lodged through the use of an AI application.

Furthermore, guidance as to the possible use of AI in decision-making, processing of FOI requests or any other procedures could be included to enhance transparency, understanding and trust across all stakeholders. We refer to our recent submission to the Attorney-General's Department on the use of automated decision-making by government in this context.²

Disclosure of public servants' names and contact details

The Law Council notes the additional guidance at proposed paragraph [3.49], which addresses the practice of agencies using section 22 of the FOI Act to delete the names of officials below Senior Executive Service level. We suggest that the Guidelines could also address the increasingly common use of other sections of the FOI Act for similar purposes—for example, subsection 47E(c) of the FOI Act (substantial adverse effect on the management or assessment of personnel), subsection 47E(d) (substantial adverse effect on agency operations) and section 47F (personal privacy).

We understand that the OAIC sought submissions from Commonwealth agencies in 2019 around the use of public servants' names and contact details, and that various Commonwealth agencies provided submissions to this inquiry.³ While we understand that the majority of OAIC decisions regarding disclosure of public servants' details are determined by the facts in individual cases, we would recommend that consideration be given to balancing the public interest in disclosure and transparency with the legitimate interests of junior public servants in their personal privacy, particularly when such individuals may become a target for harassment or abuse on social media and other platforms.

² Law Council of Australia, [Use of automated decision-making by government: Consultation Paper](#), Submission to the Attorney-General's Department, 24 January 2025.

³ Office of the Australian Information Commissioner, [Disclosure of public servants' names and contact details](#) (Discussion Paper, July 2019).

Principles of good decision making under the FOI Act

The ‘principles of good decision-making’ at proposed paragraphs [3.93]–[3.127] serve as the foundation for the effective operation of the FOI framework. Accordingly, the content of the Guidelines must remain clear and accessible to all readers. These principles are organised under clear sub-headings, such as ‘General Principles’, followed by detailed descriptions to provide context. To further improve clarity, we recommend including additional examples which would assist a reader in fully grasping the concepts presented.

Furthermore, given that the content is drafted across six pages, it may be beneficial to summarise the information in table format to enhance accessibility and comprehension. This table could include key provisions referenced in the FOI Act alongside an overview of the general principles.

Assisting an applicant

The Law Council is encouraged by the scope of assistance offered to the applicant. However, we believe that the guidance could be improved by practically stepping through the process of assistance to ensure fairness and equity to any persons making an FOI request. Substantial guidance regarding assistance of the applicant will support a streamlined and consistent approach across departments/agencies, promoting greater access to government information.

Additionally, the definition of ‘reasonable steps’ should be prominently displayed, with a more detailed explanation of its application to provide greater guidance to users. Overall, a more structured and illustrative approach would greatly aid Guideline use while navigating the FOI system.

To enhance comprehension, it could be beneficial to incorporate subheadings for each respective duty, clearly illustrating the general principles and expectations for all stakeholders. Implementing a structure similar to that used for the material contained under the heading ‘principles of good decision-making under the FOI Act’, would effectively highlight the obligations and clarify key responsibilities.

Style and structure of the Guidelines

Some paragraphs within the Guidelines contain lengthy descriptions that encompass one or more principles or considerations. The Law Council suggests that distinct considerations or related matters could be presented in sub-sections or separate paragraphs to clearly demonstrate the key issues that require attention. For example, at proposed paragraph [3.14], three themes are discussed within a single paragraph: limitations on usage, discretions regarding disclosure, and the individual assessment of an application on its own merits. We highlight proposed paragraphs [3.129]–[3.144] as best practice examples for drafting purposes. The material is logically constructed: definitions are highlighted, followed by key elements and legal principles under subheadings and contextualised examples.

The Law Council welcomes helpful examples and applications of key principles where included in specific paragraphs. This improves the guidelines by illustrating meaning and contextualising the material. However, in some instances, an example follows the principle in the same paragraph, resulting in lengthy text that may be difficult for a reader to digest. We suggest that examples be placed in sub-paragraphs to improve readability and accessibility. By way of illustration, proposed paragraph [3.33] presents the ‘duty to take reasonable steps’ in the first sentence, while the subsequent two sentences provide contextualised examples that could be better organised as sub-paragraphs to assist the reader.

Where the guidelines refer to a list of ‘factors’ or state ‘including’ before providing a list, these matters would be more effectively presented in a sub-paragraph or bulleted list to enhance readability and accessibility. An example can be found in proposed paragraph [3.37].

Additional comments

Implementation and Review of the Guidelines

While the Guidelines appear to serve as a comprehensive support to agencies dealing with FOI requests, we note the importance of ensuring that public servants are trained to use them effectively. The OAIC’s dashboard shows that, in FY23–24, only 21 per cent of FOI requests were granted in full and 55 per cent were granted in part. It appears that the number of FOI requests granted in full has reduced significantly from FY19–20, when 47 per cent of requests were granted in full and 38 per cent were granted in part.⁴ While it is difficult to draw strong conclusions from the data around the decrease in ‘full releases’, which may be attributable to more efficient and nuanced approaches by Commonwealth agencies in deciding FOI requests, it remains crucial to apprise agencies of the critical importance of transparency to the FOI scheme.

Given the volume of case law on FOI matters and the fact that ministers and agencies are required to have regard to the Guidelines in performing a function or exercising a power under the FOI Act,⁵ we also recommend that they are subject to regular review.

FOI delays and refusals

The OAIC’s FOI caseload reports highlight that the average time to finalise an FOI Application (Financial Year to Date) is 13.7 months for the period of 1 January – 31 March 2025.⁶ While delay is trending down as compared to the previous two quarters,⁷ the length of time that an applicant remains without resolution is problematic. The value of the information obtained by an FOI request may be eroded by the time it is received. Furthermore, in circumstances of litigation, the parties may be greater assisted by disclosure as compelled by the courts. The practical implications of these delays are far reaching and broad, and need to be addressed within the FOI Act and Guidelines as a holistic change.

The provisions of the FOI Act provide considerable discretion to agencies and ministers to refuse an FOI application. The Law Council has particular concerns about deemed decisions, whereby the decision is deemed to be refused if the statutory time for making a decision expires, and the applicant has not been given notice of a decision.⁸ Irrespective of whether the FOI request is dealt with in a timely manner and within the timeframe, community members and stakeholders would not ordinarily expect their request to be refused on this basis.

These provisions can be construed as contrary to the FOI Act’s intention to facilitate and promote public access to information. The Law Council suggests that the onus remain on the agency or minister for positive action to notify any extension or refusal in the interest of fairness and transparency.

⁴ Office of the Australian Information Commissioner, [Australian Government freedom of information statistics](#) (Dashboard, 13 January 2025).

⁵ *Freedom of Information Act 1982* (Cth) s 93A.

⁶ Office of the Australian Information Commissioner, [Caseload reports and focus areas 2024-25](#) (Web Page, 25 March 2025).

⁷ *Ibid.* The average time was 14.4 months for the period 1 October–31 December 2024 and 14.8 months for the period 1 July–30 September 2024.

⁸ *Freedom of Information Act 1982* (Cth) s 15AC.

Contact

Thank you for the opportunity to comment. If you would like to discuss this submission, please contact John Farrell, Executive Policy Lawyer, [REDACTED]
[REDACTED]

Yours sincerely

[REDACTED]

Tania Wolff
President-elect