Australian Government
Department of Foreign Affairs and Trade

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Ms Karen Tulloch
Assistant Director
Monitoring, Guidance and Engagement
Office of the Australian Information Commissioner

By email: foidr@oaic.gov.au

Dear Ms Tulloch

DFAT submissions on proposed new Chapter 5 guidelines

Thank you for the opportunity to make submissions on the proposed new Chapter 5 guidelines and for providing the Department of Foreign Affairs and Trade (DFAT) with an extension to the timeframe in which to do so.

DFAT is broadly supportive of the proposed clarifications but has one particular concern and some questions. DFAT's primary concern relates to the proposed changes to paragraph 5.56 of the Guidelines. Our view is that the Guidelines need to clarify whether it is OAIC's intent that, in matters where sections 33(a)(iii) or 33(b) exemptions may apply, consulting with foreign parties becomes a mandatory step, noting that the legislation currently does not include such a requirement. We note that changes to the legislation would be required to mandate this over and above inclusion in the Guidelines.

If OAIC is intending for this to be a mandatory step, we are concerned that this will be impractical and lead to a significant increase in workload for DFAT without any corresponding benefit. Our concerns are further detailed below.

Consultation with foreign entities

Currently, when questions relating to the application of sections 33(a)(iii) or 33(b) arise in requests made to DFAT, it is DFAT's practice is to consult our internal subject matter experts or 'desk officers' for the country, international body or international issue in question, to help determine whether release of the relevant material could damage Australia's international relationships. Desk officers may have worked for these international bodies in the past and / or may have spent time posted to the country to on which desk they now sit.

On a semi-regular basis, DFAT also receives questions and requests for advice from other Australian government departments where their decision-maker is proposing to exempt

material under section 33(a)(iii) or section 33(b). These requests are referred to our 'desks' for advice.

In practice, DFAT does not consult with foreign entities with regard to the application of sections 33(a)(iii) or 33(b).

Furthermore, foreign entities are not bound by Australia's Freedom of Information (FOI) regime.

Finally, a requirement for consultation would dramatically increase DFAT's workload. As the agency responsible for managing Australia's international relationships, requests for foreign government consultation regarding input into FOI decisions from across the Commonwealth would need to managed by DFAT. This will require a significant diversion of resources from DFAT's day-to-day operations, including from our processing of FOI requests which are made to DFAT directly.

This is because formal government-to-government consultations are primarily conducted through issuance of a Third Party Note (TPN) typically issued between foreign ministries. This means, in practice, that foreign government consultations for all Australian government departments should be conducted by DFAT in accordance with Article 41(2) of the *Vienna Convention on Diplomatic Relations*.

As an aside, we note also that foreign government consultation is not standard practice among countries which have similar FOI regimes. It is very uncommon for DFAT to receive a request for consultation from a foreign government.

If, despite this, OAIC's intent is that consultation with a foreign government or entity is always necessary to exempt information under sections 33(a)(iii) or 33(b), DFAT's view is that an extension of 30 days is likely to be insufficient to manage that consultation for the reasons outlined above. While this extension is set by legislation, our view is that the existence of a need for international consultation should, at a minimum, be a relevant factor when determining whether to grant an extension on the basis that a matter is complex or voluminous under s 15AB of the FOI Act.

Additionally, if OAIC's intent is that consultation with a foreign government or entity is always necessary to exempt information under sections 33(a)(iii) or 33(b), the Guidelines should make explicit provision for circumstances where the foreign bodies in question do not respond to requests for consultation. We anticipate that this will happen quite regularly, and it will be necessary for the Guidelines to set out what assumptions agencies are entitled to make when this occurs.

Comments on other suggested amendments:

- Paragraph 5.25 – DFAT notes that this now appears to limit the requirement to come to a conclusion about whether a document could cause damage to sections 33(a)(i)-(iii). We query why section 33(b) has been excluded.

- Paragraph 5.27 – DFAT agrees with the expansion of this paragraph to note the importance of trust and confidence in international relations.

- Paragraph 5.28 – while we agree that the fact that information is in the public domain is relevant to consideration of the damage its release will cause, DFAT is of the view that the new guidelines miss some nuance, in that how a document entered the public domain will also be relevant. In some circumstances, such as the deliberate leak of official records, the fact that the information is in the public domain does not diminish the damage that may be done by Australia further releasing that information. In our view, there is a real difference between a document being leaked or accidentally released and a document being formally released by an Australian government entity.

- Paragraph 5.41 – DFAT notes that the effect of this paragraph appears to be to confirm that the convention of confidentiality around communications between the Australian government and the Queen referred to in *Summers* is a relevant consideration for the purposes of s 33(a)(iii) and notes that similar international conventions apply to diplomatic practice more broadly.

- Paragraph 5.46 – DFAT agrees with the expansion of this paragraph to explicitly refer to Australian government agencies.

- Paragraphs 5.47 and 5.48 – DFAT understands the intent of these paragraphs is that, where a document could be exempt under section 33, the decision maker may still have the discretion to release it. We would be grateful for confirmation that this is the intent of these paragraphs. We note that the passage of time does not always lead to lesser damage from potential release.

- Paragraph 5.52 – We note that in the new version of this sentence: "*Information communicated by an Australian Government agency to a foreign government can also fall under s 33(b)*", the word "can" has been replaced by "may". Please clarify what the intended effect of this change is.

I would be happy to discuss these comments further, should you wish.

Yours sincerely,

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A/g First Assistant Secretary
Regulatory and Legal Policy Division