



Australian Government
**Department of Employment
and Workplace Relations**

Ms Elizabeth Tydd
Australian Information Commissioner
Office of the Australian Information Commissioner

By email: Guidanceandpublications@oaic.gov.au

Dear Ms Tydd

Consultation on Part 13 of the FOI Guidelines – Information Publication Scheme

Thank you for the opportunity to comment on the updated Part 13 (v1.6) of the FOI Guidelines (Information Publication Scheme) (the updated Guidelines).

The Department of Employment and Workplace Relations (the department) also appreciates the work of the Office of the Australian Information Commissioner (OAIC) in preparing and publishing the [Automated decision-making and public reporting under the Freedom of Information Act](#) (Report). The Report has provided the baseline for consultation on the proposed updates around Automated Decision-Making (ADM).

Primary suggestion – updated Guidelines should clarify how the ADM obligations interact with other obligations relating to ADM

The department notes that the Report highlighted:

In a contemporary context, operational information should be interpreted to include information about the use of ADM systems which support decision making and recommendations, including the rules and procedures that agencies apply in making decisions

The department supports publishing information to support transparency and build public trust in the use of ADM systems by Commonwealth agencies.

The department's overarching comment in response to this consultation is that the updated Guidelines should more clearly address the cumulative regulatory impost on agencies arising from overlapping, but distinct, publication and transparency requirements relating to ADM and Artificial Intelligence (AI).

The department’s primary suggestion is that it would be helpful for the updated Guidelines to outline how the obligation to publish operational information about ADM systems overlaps with, and interacts with:

- the new publication obligation in ‘Part 15 – Automated Decision and Privacy Policies’ of the *Privacy and Other Legislation Amendments Act 2024* (POLA), which will commence on 10 December 2026
- the Policy for the Responsible use of AI in the government (including the AI transparency statement), and
- reforms to government use of ADM being led by the Attorney-General’s Department.

The department notes that the concurrent but different requirements may result in duplicate effort. It also increases confusion about what agencies are required to publish and where, and creates a risk of inconsistencies with how AI and ADM use is described in different parts of the agency’s website. Such inconsistencies could lead to public confusion, complaints, and reduce trust in how the government uses AI and ADM. The department therefore suggests the updated Guidelines should:

- be consistent, where possible, with the existing requirements about what information is required to be published,
- specifically indicate whether the requirement to publish information about generative AI and ADM use in the Information Publication Scheme (IPS) may be satisfied by publishing the information in the agency’s Privacy Policy or AI transparency statement,
- clearly identify the additional information that agencies must publish that is not captured in the POLA and AI transparency statement requirements, and
- outline how agencies could best manage the concurrent obligations.

Further suggestions

The department provides further suggestions on specific paragraphs of the updated Guidelines below.

Paragraph	Suggestion
13.22 (and Annexure B)	The department considers that an IPS information register would be administratively burdensome and is unlikely to result in the outcome sought. In the department’s experience, website users are more likely to use search engines and AI tools to locate the information they seek. The department therefore suggests that the updated Guidelines should instead encourage agencies to ensure that their websites are optimised to be mined accurately by search engines and AI tools.
13.118-13.120 (placement)	The department suggests paragraphs 13.118-13.120 related to generative AI and ADM use, would be better placed under their own heading. Currently, these paragraphs sit under the heading ‘Information that can assist the agency’. This heading reflects only one of the four terms that appear in the definition of ‘operational

	<p>information’ in section 8A of the <i>Freedom of Information Act 1982</i> (FOI Act). The department suggests that these paragraphs would be better placed under their own heading to outline when information about generative AI and ADM use may be operational information.</p>
13.119	<p>The department suggests that this paragraph should define what is ‘generative AI’ and clarify why (and possibly when) information about ‘generative AI use’ is operational information. The department’s understanding is that to be ‘operational information’ the information must meet the four terms of the definition in section 8A(1) of the FOI Act. This is not explained in this paragraph. In particular, there is no discussion about generative AI use being related to the performance or exercise of ‘functions or powers in making decisions or recommendations affecting members of the public’ as mentioned in section 8A(1).</p>
13.120	<p>In addition to the department’s primary suggestion above, the department suggests this paragraph should define ‘ADM’. The department considers that ‘generative AI’ is distinct from ‘ADM’. The definition of each could help explain this distinction.</p> <p>The department also suggests the updated Guidelines outline the publication responsibilities (if any) where a partner agency (the second agency) or contracted service provider has developed or implemented ADM to perform functions on behalf of the agency.</p>
First dot point of 13.120	<p>The department suggests that this dot point should clearly explain why publication is still expected despite section 8A(2) of the FOI Act and paragraph 13.131 of the updated Guidelines.</p> <p>There appears to be an overlap between the requirement for an agency to publish, as part of its IPS, the legislation that authorises it to use ADM, and the fact that legislation is already publicly available on the Federal Register of Legislation.</p> <p>While information about the legislation that authorises an agency to use ADM may, in one sense, be characterised as ‘operational information’ for the purposes of s 8A(1) of the FOI Act, that information is publicly available. Accordingly, it may fall within section 8A(2), which provides that information is not operational information if it is available to members of the public otherwise than by being published by (or on behalf of) the agency.</p> <p>The department further suggests that this dot point should clarify if agencies are required to publish information where they do not use ADM to assist in making decisions or recommendations affecting members of the public.</p>

	<p>The department notes that the first case study in the Report highlights that the FOI Act does not envisage providing information about what the agency does not do. As such, providing information that the agency does not use ADM would seem contrary to the commentary in the Report and the requirements of the FOI Act.</p> <p>Further, the fact that the agency does not use ADM where it is authorised by law may create confusion and unnecessarily increase public concern with the agency’s decision-making processes.</p> <p>Accordingly, if agencies should publish information where they do not use ADM to assist in making decisions or recommendations affecting members of the public, the department suggests this should be explicitly stated and explained in the updated Guidelines.</p>
<p>Second dot point of 13.120</p>	<p>Further to defining what is ‘ADM’, the department suggests that the term ‘automated decisions’ should be defined. In particular, the department suggests the updated Guidelines should outline if the IPS obligation applies to intermediate decisions and partially-automated decisions and if so, when an intermediate or partially-automated decision is captured in the requirement.</p> <p>The department also suggests that this dot point should link to a definition of the different types of ADM to encourage agencies to provide consistency in how they describe the types of ADM.</p>
<p>Third dot point of 13.120</p>	<p>Regarding the reference to ‘list of decisions’, as noted above it would be useful to clarify if the obligation applies to intermediate decisions and partially-automated decisions. The department also suggests that it may be more appropriate to refer to ‘use cases’ consistent with the Policy for the Responsible use of AI in the government or alternatively ‘kinds of decisions’ consistent with the POLA requirement. If a distinction is suggested by using ‘list of decisions’, the department suggests outlining that distinction.</p> <p>Regarding the reference to easy to understand examples, the department notes that it may be difficult in practice to provide easy to understand examples, particularly where there is partial automation, or the process is still being developed. The department therefore suggests that this paragraph should clarify that examples should be published where possible.</p>
<p>Fourth dot point of 13.120</p>	<p>The department suggests that this paragraph should be clarified to confirm whether publishing the AI Transparency Statement would satisfy this requirement.</p> <p>The department also suggests this paragraph should clarify that publishing a policy is not required where the policy contains</p>

	<p>information which would have adverse effects (such as, disclosing information that could have a substantial adverse effect on the financial or property interest of an agency, or disclosing information that could prejudice or have a substantial adverse effect agency operations).</p>
<p>Paragraph 13.124</p>	<p>The department suggests that this paragraph should clarify what sort of instruments are captured in the description provided. For example, is this limited to certain decisions or actions under the FOI Act or decisions under legislation? The department suggests that it could be further clarified as to whether this requirement applies to situations where a delegate authorises a person to carry out actions to give effect to their decision.</p>