



22/10283

30 June 2023

Ms Toni Pirani
a/g FOI Commissioner
Office of the Australian Information Commissioner
By email: foidr@oaic.gov.au

Dear Ms Pirani

Consultation on draft revised procedure directions

Thank you for the opportunity to provide comments on the OAIC's draft revised procedure directions for Information Commissioner (IC) reviews. The department is pleased to provide the following comments on the draft directions.

Timeframes in the draft agency direction

The department supports a transparent process between the OAIC and the agency, so each party is clear about what will happen, and when. However, whilst the revised draft direction for agencies provides clarity about timeframes that will apply to the agency, we seek greater clarity about timeframes the OAIC will be required to meet. For example, paragraph 2.2 of the draft revised direction provides:

2.2 Before commencing an IC review, the Information Commissioner will notify the relevant agency or minister that an applicant has applied for IC review of the agency or minister's decision (s 54Z notice of IC review).

The department suggests the direction clarify the time period between the date of the OAIC receiving a review application and the date of notification to the agency.

Given the potential duration of the IC review process, the department suggests that agencies be provided a copy of the review application close to the time of receipt by the OAIC, so the agency can be proactive from an earlier stage. Alternatively, agencies should be made aware the OAIC has received the notice of review and should be advised when they can expect to receive a copy. One option may be to amend the direction to require the applicant to send a copy of the review application to the agency at the same time they lodge it with the OAIC, subject to any confidential or sensitive information being removed (if relevant).

The department would appreciate clarification if paragraph 2.2 of the draft revised agency direction amounts to an early notification before a review is commenced. This could be seen to conflict with paragraph 4.1, where the notice is issued advising a review has commenced. Early engagement with the applicant by the agency could be helpful. However, the 54Z notice at paragraph 4.1 can be received a significant number of months after the IC review application is

made. It is unclear if at that point (ie paragraph 4.1) the OAIC has confirmed whether the applicant wishes to continue (due to the passage of time) or whether that is intended to be one of the outcomes of agency engagement at paragraphs 4.2 and 4.3.

We understand that sometimes agencies have not been notified of review applications for more than 12 months after they have been lodged with the OAIC. In those circumstances, the additional time that has passed since the FOI decision was made may make it necessary for an agency to re-consult internal or external stakeholders on exemption claims. Factoring in the new proposed requirement to engage with the applicant, it may not be possible to respond to the s 54Z notice within the 8-week timeframe if that additional third-party consultation is required (and particularly if both open and confidential submissions need to be prepared). The department expects that extensions might be needed more routinely than only in 'extenuating circumstances' as is anticipated at para 4.4.

There also needs to be consistency in the expectations provided to applicants. The procedural guidance to be followed by applicants is proposed to indicate (at [1.23]) that *Agencies are required to contact applicants for IC review shortly after the IC review application is lodged to arrange a suitable time for the engagement process*. This is an expectation agencies could not be expected to meet in circumstances where they have not been notified about an IC review application having been made. However, under the current notification process we understand that applicants may not be aware when agencies are notified about the IC review application.

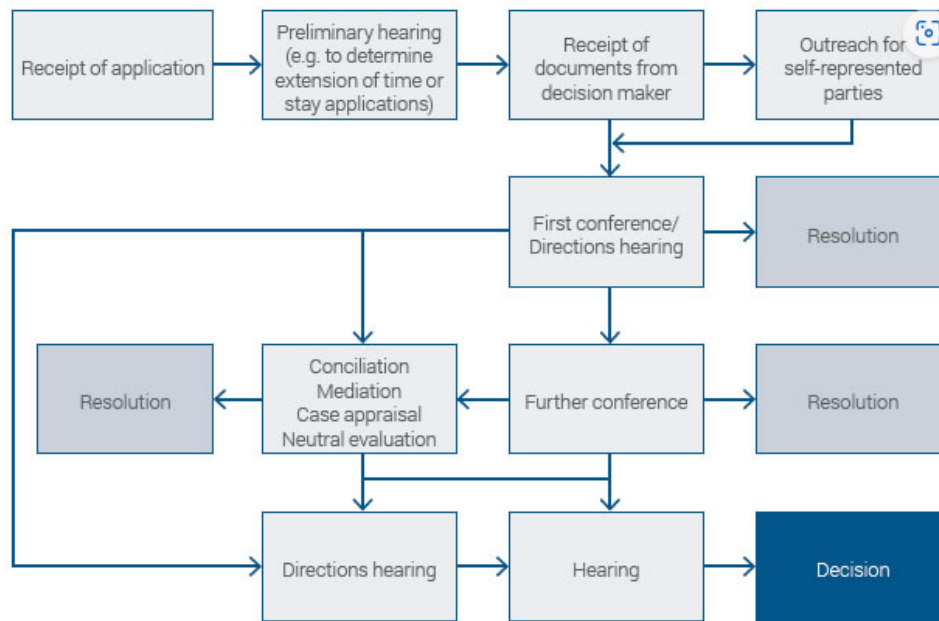
Transparency of OAIC processes

In respect of paragraph 5.6, the department submits that the OAIC should commit to confirming receipt of agency responses and outlining next steps.

The OAIC states in paragraph 6.6 that it will contact agencies in two circumstances—procedural fairness or where a preliminary view can be provided. However, it is unclear whether the OAIC will contact agencies in other circumstances. The department submits that the OAIC should commit to status updates to agencies in more circumstances than this, and at defined intervals.

More generally, the department suggests that the OAIC could develop a checklist, or some other method of transparency, about its review process. Detail about certain steps in the review process are not explained in the draft direction. For example, there is no explanation in the draft directions about when the OAIC will endeavour to make its decision, and how long it will take to publish on AustLII, nor the timeframe for providing documents to the applicant (if the IC decides to vary the decision) and the timeframe for destruction or return of evidence documents to agencies for discontinued reviews. The department suggests that additional guidance for participants in the IC review process, in addition to the proposed revised directions would be useful. For example, a flowchart of the OAIC review process could be developed to accompany the directions, similar to the following flowchart outlining AAT processes:

Figure 2.2 Case management process



Source: <https://www.aat.gov.au/about-the-aat/corporate-information/annual-reports/2014-15-annual-report/annual-report-2014-15/chapter-02-overview-of-the-aat#:~:text=Figure%202.2%20Case%20management%20process>

In relation to para 7.3, which provides for the IC to report non-compliance with the IC directions to the Office of Legal Services Coordination (OLSC), the department appreciates the close links between agency compliance with procedural directions issued by the OAIC and the model litigant obligations contained in Appendix B to the *Legal Services Directions 2017* (LSDs).

In OLSC’s experience, while there is often overlap between the two, it is important to be clear that non-compliance with the procedural direction may not always amount to non-compliance by the agency with its model litigant obligations. Accordingly, any allegations of non-compliance with the OAIC’s procedural directions will inform a parallel consideration of non-compliance with model litigant obligations, but will be considered separately by the agency and OLSC under the department’s Compliance Framework. The department has suggested some minor language changes to section 7 to reflect the separate roles between the procedural directions and the LSDs:

7. Non-compliance with this Direction

- 7.1 Because the model litigant obligations under the *Legal Services Directions 2017* extends to Commonwealth entities involved in merits review proceedings, failure to adhere to the requirements of this Direction may separately amount to non-compliance with the model litigant obligations.^[1]
- 7.2 The Information Commissioner may report non-compliance with this Direction in the Office of the Australian Information Commissioner’s Annual Report.

^[1] See paragraph 3 of Appendix B to the *Legal Services Directions 2017*.

- 7.3 The Information Commissioner may also report non-compliance with this Direction to the Office of Legal Services Coordination in the Attorney-General's Department, **in respect of separate possible non-compliance with the entity's model litigant obligations.**
- 7.4 The Information Commissioner may also consider investigating the non-compliance under Part VIIIB of the FOI Act.

Requirement to engage with the applicant

The guidance could be read to suggest that the engagement requirement only applies to access refusal or access grant decisions (not deemed refusals). This would not appear to take into account third-party consultations.

Engagement with applicants could assist agencies to understand what is actually within the scope of the review, noting it can often be unclear from the application for IC review which part of a decision an applicant is seeking to review. However, without the OAIC's involvement as part of this engagement, or a clear framework to support the process, there is the potential for disputes about what occurs during the engagement process, including what is agreed in relation to the narrowing or resolution of issues.

The department is also concerned that this mandatory engagement process may expose agency staff dealing with abusive applicants to particular WHS risks. While the engagement conversation could be a useful step for many reviews, it may be counter-productive or even harmful for department staff dealing with a cohort of applicants who might be regarded as not participating in the FOI process in good faith.

The verbal engagement requirement may not be practicable in relation to applicants who are incarcerated, who are disabled, who are located overseas or who have English as a second language. It also does not take into account the applicant's preferred mode of communication (which may not include a telephone discussion). The department is strongly of the view that the department should have discretion as to the method by which it engages with the applicant, so long as this is sufficiently documented.

Some additional OAIC guidance about the engagement process would be helpful. This might include, for example, providing agencies with template letters to applicants, template file notes or a form for completion during the engagement with the applicant, and a template 'outcome of engagement' form, which could promote consistency across government agencies.

The guidance to applicants could also include information for applicants about conducting themselves appropriately during the engagement process with the agency. For example, this might provide that the agency will terminate the engagement if the applicant behaves in a rude, offensive or threatening manner. This could potentially mitigate the risk of staff dealing with abusive applicants.

The engagement section also does not appear to reflect that different matters may require different levels of engagement. For example, what will be required on a deemed refusal may be different to what is required where the IC review application concerns an internal review decision, or where significant negotiation regarding scope has already occurred as part of a s 24AB process. It might be helpful for the guidelines to provide some detail about the kind of engagement required in different circumstances.

The department submits that the requirement for engagement should be accompanied by some more information about what the agency has already done or normally does to resolve the issues at the early resolution phase (that is, before the review is commenced). This would inform what steps are then reasonable for subsequent engagement.

Issues arising from separate Applicant directions

AGD queries if it may be simpler and more effective for all users of the FOI system to have a single direction, addressed to both the agency and the applicant. This would ensure all parties have a consistent understanding of the IC review process. By comparison, we note the AAT General Practice Direction, under s 18B of the *Administrative Appeals Tribunal Act 1975*,¹ applies to all parties to a review and appears to provide greater consistency in the explanation of process and responsibilities.

If separate directions are maintained, the OAIC should ensure they are consistent. It is also unclear what practice directions (if any) apply to third parties joined to an IC review or whether the process for an IC review in the directions for agencies and applicants may differ where there are other parties to the review.

Other general remarks on the draft directions

As a matter of form, the department suggests that the instruments should clarify the status of the previous directions (ie that the new directions are intended to revoke previous directions).

As a matter of practice, the department notes that its FOI officers are more likely to refer to the FOI Guidelines for information to assist them navigate an IC review process. It may be useful either for the Guidelines to cross-reference the directions, or for the substance of the directions to be placed in the Guidelines, to avoid them being inadvertently overlooked.

The department looks forward to working further with OAIC on the development of these revised IC review directions.

Yours sincerely



Sarah Christensen
Director, FOI & Privacy Section
Strategy & Governance Branch

¹ [General-Practice-Direction.pdf \(aat.gov.au\)](#)