From:	FOI.LEGAL.TEAM
To:	OAIC - FOI DR
Cc:	FOI.LEGAL.TEAM
Subject:	Services Australia's submission - OAIC's consultation on draft revisions to the 'Direction as to certain procedures to be followed in Information Commissioner reviews' [SEC=OFFICIAL]
Date:	Friday, 30 June 2023 4:55:06 PM
Attachments:	image001.jpg

Dear Freedom of Information team at the Office of the Australian Information Commissioner (OAIC),

Please find **below** Services Australia's (the Agency) submission to the OAIC's consultation on draft revisions to the 'Direction as to certain procedures to be followed in Information Commissioner reviews' (the revised direction).

Revised direction – Requirement to engage with the applicant

The Agency understands from paragraphs [4.2]-[4.3] of the revised direction that the following would be stipulated:

a. An agency is to engage, or make reasonable attempts to engage with, the applicant at the commencement of an Information Commissioner review (IC review), for the purpose of genuinely attempting to resolve or narrow the scope of the IC review
b. That engagement is required to occur by way of a telephone or video conference between the parties
c. The agency will bear the responsibility of initiating contact and making the necessary arrangements for the engagement process
d. The OAIC will not be involved in either the making of the engagement arrangements, or in the engagement process itself, including attending the telephone or video conference
e. Agencies will have 8 weeks to participate in this engagement process after which period they will be required to respond to the IC review notice issued under s 54Z of the *Freedom of Information Act 1982* (FOI Act)
f. In responding to the s 54Z notice, an agency will be required to provide evidence:
    i. that genuine steps have been made to contact the applicant, including written correspondence or file notes of telephone calls
    ii. demonstrating attempts made by the parties to resolve issues in dispute, including agency proposals to resolve the application informally, and any response from the applicant
    iii. of the outcome of the engagement, including applicant correspondence that they have otherwise withdrawn their application as a result of the agency engagement

There does not appear to be any exceptions in the revised direction regarding an agency's obligation to engage with applicants in this way.

The Agency's submission

Consistent with Model Litigant obligations set out in Appendix B to the *Legal Services Directions 2017*, the Agency is not opposed in principle to early engagement with applicants through alternative dispute resolution (ADR) processes about their IC review with a view to narrowing the scope of the issues to be determined. However, the Agency has some reservations about the proposed direction as it is currently put.

Respectfully, questions of procedural fairness may arise if the OAIC's proposed ADR engagement with applicants is not facilitated by an independent third party. The direction as drafted shifts what would otherwise be an independent third-party burden onto agencies and does not *prima facie* allow for departure from the stipulated process. The Agency considers this is restrictive and unnecessarily rigid in circumstances where the obligation as a model litigant to engage on a proper basis in ADR already applies.

In many if not most instances, throughout the initial request and review processes the Agency actively engages with applicants to try and narrow the scope of a dispute where this is possible. The nature of the engagement is necessarily dictated by limitations that may be in place regarding an applicant's preferred mode of communication, or access to communication channels, as well any restricted servicing arrangements (RSA) that may be in place. RSAs are put in place to counter inappropriate, threatening or aggressive behaviours, and requiring telephone or video conferencing contact without third-party facilitation is potentially harmful to agency staff and counter-productive.

The proposed changes also place a significant administrative burden on agencies generally (as regards undertaking the engagement process, and then evidencing it), and in practice agencies are effectively instructed to conduct the ADR as a facilitator while concurrently participating in that process. The Agency's submission is that this approach is fraught. An agency (through their representative) is unlikely to be able to robustly represent its own interests fulsomely in such circumstances. Arguably any benefit of an objective, third-party umpire ultimately determining the review is undermined by the inevitable tension arising from ADR being facilitated, or led, by an agency party in a proceeding.

Noting the Agency's comments above concerning the usual practice of engaging with applicants in respect of their applications and review requests, the Agency nonetheless recognises there is a role for proactive engagement with some applicants having regard to the individual circumstances of the case. Most clearly this can be seen in instances of deemed refusal where there is a clear benefit to be gained through engagement with an applicant, (re)consideration of the underlying request and then reporting on the process and outcome to the OAIC. Where engagement by telephone or video conference may not be appropriate, the Agency considers a requirement to notify OAIC of the reasons for *not* engaging in its preferred ADR channels is a suitable alternative.

Thank you for the opportunity to consult with the OAIC on the revised direction.

Kind regards,

Lisa O'Donnell, General Counsel
[redacted]
Freedom of Information and Ombudsman Branch
LEGAL SERVICES DIVISION

I acknowledge the Traditional Custodians of the lands we live on. I pay my respects to all Elders, past and present, of all Aboriginal and Torres Strait Islander nations

Please note I work Tuesday – Friday (I am out of office on Mondays)

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