

10 June 2025

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Dear OAIC,

### **Submission on Draft Revisions to Part 3 of the FOI Guidelines**

We thank the OAIC for the opportunity to provide comments on the proposed updates to Part 3 of the FOI Guidelines. We welcome efforts to clarify and enhance the guidance available to agencies and applicants under the *Freedom of Information Act 1982* (FOI Act) and offer the following observations and submissions.

#### **1. *Validity of requests***

We support the intention behind the proposed updates to paragraphs 3.39-3.42 which aim to ensure that applicants are assisted to make valid requests under section 15(2) of the FOI Act. However, we are concerned that the proposed guidance shifts the balance too far and may create unintended administrative burdens on agencies. While agencies should take reasonable steps to assist applicants with FOI, especially in circumstances where language or accessibility is a barrier, the expectation that requests be treated as valid where they do not meet the statutory requirements is problematic. This will blur the lines of where the statutory periods start and puts excessive burden on agencies to process requests which do not meet the minimum statutory requirement.

Whilst we acknowledge the importance of assisting applicants validate a request, agencies should be allowed to cut off this process and consider the request not valid once reasonable attempts have been made with an applicant who is unwilling or unable to engage meaningfully.

The draft also risks blurring the distinction between FOI and administrative access processes. Many applicants seeking personal information may be better served through informal processes and requiring agencies to treat every vague attempt at a FOI request as a valid one will be inefficient and counterproductive. This is partly because applicants, particularly the cohort which the Tribunal deals with, don't know and don't care whether access is under the FOI Act or otherwise. Attempting to confirm that a request is for the purpose of the FOI Act, thereby satisfying section 15(2)(aa) is not preferred where access is allowed under an administrative release policy.

We recommend that the guidelines:

- Reaffirm that requests must meet the core requirements of section 15(2) to trigger formal processing

- Encourage agencies to provide reasonable assistance to help applicants meet those requirements
- Clarify that where an applicant is unresponsive or unwilling to engage meaningfully, the agency may close off the request as not meeting minimum validity requirements

## **2. Section 17 of the FOI Act**

Paragraph 3.224, regarding section 17 of the FOI Act, introduces a new requirement to undertake formal consultation under section 24AB where processing a request would involve a substantial and unreasonable diversion of resources. We do not support this change and recommend that it be reconsidered.

Section 17 requests already pose unique technical challenges for agencies. Processing these type of requests requires liaison across business areas, interpretation of complex systems and creation of comprehensible documents based on electronically stored data. Throughout the process, FOI delegates engage with applicants to clarify and narrow scope, as required, and are forthcoming with what can and cannot be realistically produced.

Requiring a formal section 24AB consultation in every case where a section 17 request raises resource or capability concerns is unnecessary and redundant, adding red tape to situations that could be easily resolved through informal consultation, a practice which the Tribunal engages in regularly with regard to these types of requests. Imposing a formal process which serves the same purpose as the informal process will result in delays and unnecessary formality for both applicants and agencies.

We recommend the guidelines:

- Encourage early and informal engagement with applicants to clarify parameters of requests which require processing under section 17
- Recognise that section 24AB consultation should only be used where informal consultation has failed or clearly insufficient in the circumstances
- Avoid mandatory imposing of formal consultation requirements on all proposed section 17(2) refusals

## **3. Paragraph 3.176**

We recommend that paragraph 3.176 be redrafted for improved clarity. While we support the underlying message that decision-makers must provide adequate reasons when claiming exemptions, the proposed wording is somewhat difficult to comprehend. We suggest rephrasing this paragraph to clearly set out the minimum requirements for a valid statement of reasons would enhance usability for agencies and promote consistency in FOI decision-making.

## **4. Section 22 – deletion of irrelevant material [paragraph 3.149]**

We do not agree that deletion of irrelevant material under section 22 of the FOI Act should not be considered a 'full release' decision. In practice, section 22 is used by agencies to remove superfluous materials which is outside the scope of the request while providing the applicant the relevant information which specifically relates to the scope of their request. Where the only redactions to released document sets have been made because of irrelevance, then it is both accurate and appropriate to classify the release as a 'full release' for the purpose of statistical reporting.

Requiring agencies to classify requests where no exemptions have been applied as partial disclosure is incorrect and unnecessarily rigid. It may also appear to applicants that information has been withheld when in fact, only superficial and irrelevant content has been excluded under section 22.

#### **5. Section 24AA(2) – Additional factors for consideration**

We support the inclusion of additional factors set out in paragraphs 3.183 and 3.184. We acknowledge that these provide useful guidance for agencies undertaking a section 24AA assessment and demonstrate practical considerations that influence how requests can reasonably be managed.

#### **6. Sampling of documents [paragraph 3.192]**

We acknowledge that sampling can be a useful strategy in certain FOI matters, particularly where a request covers a large volume of documents and the agency must calculate the resource implications before undertaking the work involved in processing the request. However, we raise concern that the inclusion of paragraph 3.192 may be promoting sampling as the default or expected step in the assessment of whether the impact on the operations of an agency would be substantial and unreasonable.

In practice, the value of such sampling would depend on the nature of the request and would be beneficial in only very limited cases. For many complex or poorly worded requests the primary challenge is not in reviewing the documents, but in identifying and retrieving them from multiple sources. In these, more common instances, sampling a subset of documents offers limited insight into the overall resource burden and may actually add an unnecessary layer of work.

Additionally, where an applicant is unwilling to narrow the scope of the request, sampling would not promote faster resolution but rather have the opposite effect – prolonging consultation and setting unrealistic expectations about what can be provided.

We recommend that the guidelines:

- Clarify that sampling is one of several tools available to use when considering a request under section 24AA
- Make clear that its use should be guided by whether it would be likely to assist in assessing whether a request would unreasonably divert agency resources on the particular circumstances of a FOI request

#### **7. Use of FOI decision-makers' first names – [paragraph 3.263]**

We support the position in paragraph 3.212 that agencies may identify FOI decision-makers using their first name and surname initial. This strikes an appropriate balance between transparency and staff privacy. It is consistent with long-standing practice and helps limit the potential for inappropriate contact outside official channels.

#### **8. Use of secure platforms i.e. Sigbox**

We suggest that paragraph 3.288 should be revised to remove the suggestion that agencies should obtain applicants' permission before using secure platforms to share documents. In the Tribunal's experience, secure filesharing portals such as Sigbox are the preferred and most efficient way of despatching FOI documents. Sigbox is more secure than unencrypted email

and more reliable and timely than regular post, particularly for large and sensitive files or those which are to be delivered to remote communities.

Requiring agencies to seek permission before using a secure delivery method would introduce unnecessary delays and create administrative inefficiencies for both the agency and the applicant. We contend that where applicants are provided with clear instructions on how to access their documents via Sigbox then explicit consent should not be required.

We recommend that the guidelines:

- Affirm that agencies may use secure platforms by default when releasing documents
- Clarify that permission is not required where the method is secure, accessible and appropriately explained to the applicant

### **9. *Third party consultation [paragraph 3.295]***

We acknowledge that it may be appropriate for agencies to confirm whether an affected third party has lodged an OAIC review before releasing the documents in question. However, we do not support extending this obligation to include checks for whether the third party intends on lodging an internal review after the period for doing so has already expired.

The responsibility to initiate an internal review lies with the third party. Once the statutory period has expired and the third party has been provided with that decision, the agency should not be required to follow up or delay release on the off chance that a review will be lodged. Imposing this expectation creates unnecessary administrative burden and could result in unwarranted delays for FOI applicants.

We recommend that the guidelines clarify that agencies are not required to verify whether a third party has or intends to seek internal review after correct notification and may proceed with the release of the documents after the expiry of statutory timeframe has passed.

We appreciate the opportunity to comment on the draft revisions of Part 3 of the FOI Guidelines. Overall we support efforts to clarify and modernise the guidance. As outlined in the above submission, several proposed changes may place disproportionate administrative burdens on agencies or create ambiguity in applying FOI provisions. We encourage the OAIC to refine these areas to ensure the Guidelines remain operationally practical and aligned with the objects of the FOI Act.

Please contact me should you require additional input or clarity to any of the points above.

Yours sincerely,

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Assistant Director FOI & Privacy