

Consultation on Part 3 FOI Guidelines – Processing and deciding FOI requests

Comments from the Department of Agriculture, Fisheries and Forestry on draft revisions to Part 3 of the FOI Guidelines: Processing and deciding FOI requests

1. The Department of Agriculture, Fisheries and Forestry (**DAFF**) welcomes the opportunity to comment on the draft revisions by the Office of the Australian Information Commissioner (the **OAIC**) to Part 3 of the Freedom of Information (**FOI**) Guidelines (the **Guidelines**). Our comments are below.

Artificial Intelligence

2. The draft revisions include additional paragraphs seeking to address the use of Artificial Intelligence (**AI**) to make FOI requests without human intervention. Is timely to address this issue in the guidance.
3. Paragraph [3.18] states that agencies may consider publishing an online FOI request form that includes technology to identify whether the user is a robot, and paragraph [3.30] states that ‘such forms can incorporate technology to help identify whether a request has been artificially generated.’
4. We would be grateful for clarification to be provided about what steps agencies should take if it is identified that a request has been submitted by a robot, including how this may impact the initial processing of a FOI request – particularly where an application otherwise appears to meet the requirements in section 15 of the *Freedom of Information Act 1982* (**FOI Act**).
5. The draft suggestion in [3.18] that publishing a form that can identify robots will ‘reduce the possibility of AI generated FOI requests’ should, however, be removed. This suggestion is inaccurate due to both the inability to require all requests to be made on such a form and uncertainties regarding such technologies.

Assisting an applicant

6. Additional paragraphs have been added under the subheading ‘*Assisting an applicant*’, which discuss the duty of an agency to take reasonable steps to assist a person to make a request in a manner that complies with the formal requirements of the FOI Act.
7. Some of the proposed changes at paragraphs [3.30] – [3.42] appear to contradict one another in relation to:
 - a. when a request should be taken as ‘valid’ for the purposes of the FOI Act, and
 - b. whether the statutory timeframe for processing a request that does not comply with section 15 commences the day after such a request is received, or not.
8. For example, paragraph [3.41] states:

...an FOI request should be treated as valid upon receipt even if it does not comply with the formal requirements of s 15(2) or 15(2A). This view arises as a result of the duty agencies have to assist applicants make FOI requests that comply with the formal requirements of the FOI Act. As a result, the processing period under s 15(5) commences on the day after the FOI request is received. Agencies should make a decision on the request and notify the FOI applicant of the decision within the relevant statutory time frame if they conclude the FOI request is invalid.’

9. Further, paragraph [3.39] provides:

*‘An agency should also be flexible in assisting an applicant to provide the details necessary for a request to fulfil the formal requirements of the FOI Act (for example, notifying the FOI applicant of a missing detail by telephone or email)... **Once the further information is provided, the agency or minister’s office should inform the FOI applicant that their request meets the statutory requirements and that the timeframe for deciding the FOI request has commenced.**’*

10. The proposed new guidance appears to misalign with the OAIC’s guidance to agencies on when to treat a request as ‘valid’ for the purposes of the FOI Act and when the obligation to commence processing a request commences, with potential unintended consequences.

11. The [guidance](#) for government agencies on the OAIC’s website makes clear that the 30 day period for notifying the applicant of a decision commences on the day after the day the agency or minister received the request, provided the request meets the formal requirements of s 15(2) of the FOI Act. If the changes mean that the processing period under section 15(5) of the FOI Act is taken to commence on the day after a request is received regardless of it meets the formal requirements in the FOI Act, this will reduce the time in which agencies can process requests based on the FOI applicant’s intended scope. If applicants do not engage with agencies about their request in a timely way, the reduction in processing time may be substantial.

12. Further, if the processing period for a flawed request commences from the day it is received, this will compress the timeframe for FOI applicants to engage with agencies to clarify their request to ensure it meets the requirements of the FOI Act. This could compromise clarification processes – particularly for less experienced FOI applicants. It is also unclear how such a position would align with the legislation, which stipulates that a request will be considered ‘valid’ once the formal requirements in s 15(2) are met.

Section 22 – Deleting exempt or irrelevant content from a document

13. The proposed amendments to paragraphs [3.151] – [3.160] under the heading *‘Deleting exempt or irrelevant content from a document’* outline that it will generally only be appropriate for decision makers to treat public servants’ names and contact details as irrelevant under section 22 of the FOI Act if the FOI applicant clearly and explicitly states that they do not require that information.

14. Requiring active and explicit statements by FOI applicants displaces streamlined ways of ascertaining intent. Further, in DAFF’s experience most FOI applicants are interested in the substantive content of the requested documents rather than the details of junior (non-SES) public servants in the documents. As such, it is unclear what the rationale for this change is. Finally, requiring disclosure of junior public servants’ names and contact details by default will increase the need for extra interactions with applicants and often may unnecessarily increase processing times, including where third party consultation becomes appropriate.

Providing access to documents through SIGBOX

15. New paragraph [3.288] explains that while agencies and ministers may use SIGBOX and other secure file sharing/delivery systems with the applicant’s agreement, agencies need to be mindful of the Australian Privacy Principles (**APPs**) when utilising these systems.

16. To facilitate consistent practice that accords with the APPs, further guidance would be welcome about how agencies should best navigate electronic delivery of documents where email is not possible due to size restrictions.

Third party review rights

17. New paragraph [2.95] explains that agencies and ministers should check directly with any affected third party whether that affected third party intends to apply for IC review, including a date by which the third party should respond. Paragraph [2.95] specifically suggests 3 working days as an appropriate timeframe to give the affected third party to respond.
18. This imposes a new burden on potential review applicants to communicate their intentions with a potential party to a review and may undermine a third party's ability to seek IC review of an access grant decision. In practice, many third parties are individuals who do not reply within 3 working day time frames. Additionally, the FOI Act requires a third party to apply for IC review within a specific period of time and does not have any further requirements for the third party to ensure their review rights are exercised by providing additional confirmation or correspondence to the decision making agency. Further, in our experience, once a formal application for IC review has been submitted, applicants are less likely to liaise directly with an agency, preferring for all such correspondence to be facilitated through the OAIC.
19. In light of the above, we recommend that the most appropriate approach is for agencies to continue to seek confirmation from the OAIC regarding third party requests for IC review of an access grant decision, as the review body to whom such applications are made. This will ensure that where a third party has made an application for IC review of an access grant decision under section 54M, and where notification has not yet been provided to an agency or a minister under section 54Z, the document/s at issue would not be prematurely disclosed in the absence of a secondary confirmation by the third party.