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20 June 2025

Ms Toni Pirani
Freedom of Information Commissioner
Office of the Australian Information Commissioner
By email: guidanceandpublications@oaic.gov.au

Dear Ms Pirani

Consultation on Freedom of Information Guidelines Part 3 – Processing and deciding FOI requests

Thank you for the opportunity to provide comments on the Office of the Australian Information Commissioner's (OAIC) revised Part 3 of the Freedom of Information Guidelines. The department welcomes changes to improve Part 3's readability and to reflect legislative changes, as well as relevant Federal Court, Tribunal and Information Commissioner review decisions. The department makes the following suggestions with the intention of ensuring the Guidelines are clear and provide comprehensive and useful assistance.

Requirements, timeframes and responding to a request

When a request has met requirements [3.41]

We suggest paragraph 3.41 would benefit from amendment to clarify that, consistent with the FOI Act, a request must meet the requirements in ss 15(2) and 15(2A), before the timeframes in section 15(5) commence. The current drafting of paragraph 3.41 appears to raise an issue of consistency with guidance at paragraph 3.39, which provides that 'Once further information is provided, [to meet requirements under s 15(2)], 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'. It is essential that the request requirements – including that the request is made in writing and that sufficient information is provided to identify the documents – are met for a request to be able to be appropriately processed and within the required timeframe.

The guidance, particularly at paragraph 3.40, 3.178 and 3.179, would also benefit from clarifying the sequencing of steps concerning supporting an applicant to provide a compliant request at s 15, and taking reasonable steps to assist an applicant in the situation of a possible practical refusal at s 24AB.

Existence of a document [3.165 – 3.174]

The Guidelines discuss decisions to neither confirm nor deny the existence of documents responsive to a request. While paragraph 3.168 makes clear that a decision under s 25 of the FOI Act does not require searches for documents, the Guidelines could clarify that the test for s 26 is different in this

regard. The OAIC may wish to consider incorporating the guidance from the Federal Court in *iNova* at [60]:

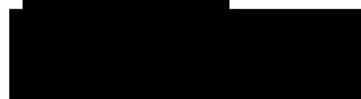
Section 25 authorises a response that neither confirms nor denies the existence of documents, absent any search for documents of the kind requested. A similar response under s 26(2) is authorised, after a search has been undertaken. That response, however, is permitted only where the inclusion of information about documents would make the notice required under s 26(1) itself an exempt document. They are quite different tests and procedures.

Deemed refusals [3.250-3.251]

The paragraphs as 3.250 and 3.251 seek to provide clarity about the process for an agency to follow when there has been a deemed refusal. Paragraph 3.250 states that an agency or minister “is still able to process the request and provide a statement of reasons”. Agencies and ministers may benefit from further guidance on what should be explained to the applicant in this situation, in particular, that it is the deemed refusal in relation to which review may be sought, not the statement of reasons (noting that provision of a statement of reasons in this circumstance would not be a ‘decision’ made under the Act). It also may be beneficial if further guidance is provided, in this context, about the OAIC’s expectation for agencies or ministers to seek an extension of time from the OAIC under relevant provisions (ss 15AC(4), 51DA(3) or 54D(3)).

Thank you again for the opportunity to make comments.

Yours sincerely

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Dianne Orr
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