

Our ref: QA38405

30 June 2023

Ms Angelene Falk  
Australian Information Commissioner  
Office of the Australian Information Commissioner

By email: [foidr@oaic.gov.au](mailto:foidr@oaic.gov.au)

### **Submissions – Draft revisions to directions regarding Information Commissioner reviews**

Dear Ms Falk

Thank you for the opportunity to provide submissions to the Office of the Australian Information Commissioner (OAIC) regarding proposed revisions to directions given under section 55(2)(e)(i) of the *Freedom of Information Act 1982* (FOI Act):

- Direction as to certain procedures to be followed in Information Commissioner reviews’ (Agency Direction), and
- Direction as to certain procedures to be followed by applicants in Information Commissioner reviews (Applicant Direction).

#### **Purpose of the revisions**

As advised by the OAIC, we note changes to the Agency Direction are ‘intended to facilitate greater engagement between applicants and respondent agencies and ministers during the IC review, with a view to resolving IC reviews in a more timely and cost effective way.’

The purpose of the Applicant Direction is to ‘assist IC review applicants to better understand how the IC review process operates and their obligations with respect to their IC review application.’

The Office of the Commonwealth Ombudsman (OCO) welcomes the OAIC’s clarification of the responsibilities of agencies and applicants during the IC review process. We acknowledge that meaningful engagement with applicants throughout all Freedom of Information (FOI) processes, including during IC reviews, may lead to earlier and more effective resolution of matters. Below, we offer the following suggestions on the Agency Direction and some general comments, for your consideration.

#### **Suggestions on the Agency Direction**

- Title – We suggest amending the title to specifically refer to agencies and ministers (as for the Applicant Direction which refers to ‘applicants’ in the title).
- Paragraph 4.3 – Noting the purpose of the Agency Direction is to facilitate greater engagement with applicants with a view to resolving matters more quickly, you could provide greater flexibility around the ways of engaging with applicants. This would enable agencies to engage with applicants in a way that reflects any communication needs or preferences expressed by the applicant. For example, applicants for whom English is not their first language or applicants with particular vulnerabilities, may have communication preferences.

- Paragraph 4.4 – To assist agencies and applicants and reduce enquiries to the OAIC, you may wish to provide examples of what may constitute ‘extenuating circumstances’, noting it is to be determined on a case-by-case basis.
- Paragraph 6.4/6.6 – In relation to providing further submissions, either by an applicant or an agency, the OCO notes there may be circumstances where further submissions should be taken into account for the purposes of the IC Review that do not relate to procedural fairness as provided for in paragraph 6.6. In the absence of a review mechanism, you may wish to consider including a reference to ‘extenuating circumstances’ as a basis for the OAIC accepting further submissions (as provided for regarding extensions of time in paragraph 4.4).
- Paragraph 6.7-6.9 – The OCO notes the Direction provides a mechanism for an agency or minister to provide submissions in-confidence. Given OCO’s functions, notably to investigate complaints in private, including about Public Interest Disclosures, we anticipate circumstances where the OCO will need to make such requests. We note the Direction is not clear to what extent requests to make submissions in-confidence (and any processing or consideration time required by the OAIC), impact the timeframe in which submissions must be provided (generally 4 weeks as per paragraph 6.5 of the Agency Direction).

#### General comments

- We suggest reviewing any overlapping references across both Directions to ensure consistency and minimise confusion. For example, at paragraph 1.23 of the Applicant Direction, it states “Agencies are required to contact applicants for IC review shortly after the IC review application is lodged.” This may result in unreasonable expectations by applicants about when they are to be contacted by agencies. Agencies usually only become aware of a request of IC review when notified by the OAIC under section 54Z of the FOI Act which may be some time after an application is lodged with the OAIC.
- We suggest in both Directions cross-referencing the other, to make clear for applicants what is expected of agencies and ministers and vice versa.

Finally, we note the Directions are to commence on 1 July 2023. We await further information from the OAIC regarding a revised commencement date.

We appreciate the opportunity to provide a submission. You are welcome to contact me if you have any questions via email to [information.access@ombudsman.gov.au](mailto:information.access@ombudsman.gov.au).

Yours sincerely



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