



Australian Government
Department of Education

Your Ref
Our Ref LEX 1548

Ms Elizabeth Tydd
Australian Information Commissioner
Office of the Australian Information Commissioner

By email: guidanceandpublications@oaic.gov.au

Dear Ms Tydd

Consultation on revisions to part 3 of the FOI Guidelines

Thank you for the opportunity to comment on the updated draft of Part 3 of the FOI Guidelines (Processing and deciding FOI requests) (updated Guidelines).

We note that substantial amendments are proposed to Part 3 of the Guidelines, many of which could impose a not insignificant additional administrative burden on agencies. This could increase the staffing resources required to process requests in accordance with the timeframes and other requirements under the *Freedom of Information Act 1982* (FOI Act). Agencies can experience considerable difficulty appropriately resourcing FOI teams and it is not always possible to divert resources to the processing of FOI from broader delivery and policy implementation work undertaken by agencies (particularly given budget and ASL pressures).

In the circumstances, noting the volume and scope of the additional requirements OAIC is seeking to address in the updated Guidelines, we respectfully submit that legislative reform to the FOI Act may be a more appropriate avenue to consider.

We make the following comments with regard to some of the more substantive proposed amendments in the updated Guidelines.

Invalid requests

We consider that the statements in paragraphs 3.41 and 3.226 that “*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)*” are potentially inconsistent with sections 15(2) and 15(2A) of the FOI Act.

The department takes a flexible approach, consistent with the objects of the Act, in considering whether a request is valid and actively assists applicants to make requests that comply with section 15. However, there are circumstances in which the department is unable to process a request that does not comply with the requirements of subsections 15(2) or 15(2A) of the FOI Act. For example, if an applicant has not correctly entered their contact details in the department's online FOI application form (subsection 15(2)(c)), or has not directed their request to the agency in accordance with the requirements of subsection 2A, the department may be unable to consult with the applicant or provide them with a decision. We consider that it would not be appropriate to deem the department to have made an access refusal decision if it failed to notify the applicant of a decision in such circumstances. It is important for there to be a clear commencement point for the FOI processing timeframes and section 15 determines when the processing time commences. These proposed amendments to the Guidelines make this less clear and may mean that agencies do not have sufficient time to process FOI requests received in these circumstances.

Third party consultation

Paragraph 3.80 states that “... *the consultation requirement [in sections 26A, 27 and 27A] does not apply if the agency has itself formed the view that a relevant exemption or exemptions apply such that access should be denied*”.

While acknowledging the FOI Commissioner's discussion of this issue in paragraphs 26 and 27 of the decision in *Chris Drake and Australian Transaction Reports and Analysis Centre (Freedom of Information)* [2023] AICmr 6, we note that this discussion was in the context of the review of a practical refusal decision, and consider it should not be extended to impose restrictions on the third party consultation provisions in sections 26A, 27 or 27A more generally.

Third party consultation under these provisions is authorised by the legislation, provided that:

- it appears that the third party might reasonably wish to make a contention that the relevant document is exempt (sections 26A(1)(c), 27(1)(b) and 27A(1)(b)); and
- it is reasonably practicable for the agency or Minister to give the third party a reasonable opportunity to make submissions in support of the exemption contention, having regard to all the circumstances (sections 27(5) and 27A(4) as discussed in paragraph 3.85 of the updated Guidelines).

The department takes a practical approach to third party consultation and assesses whether consultation is necessary and appropriate on a case-by-case basis. In some cases, the department is satisfied that a document is exempt and that it is not necessary to consult with third parties. In other cases, the department undertakes consultation with third parties in order to test its preliminary view that documents are exempt. On occasion, a consulted third party will advise that it does not object to the release of documents that the department initially considered may be exempt under sections 47, 47B, 47G or 47F, meaning

that the consultation process results in additional material being released to an applicant which might not otherwise have been released.

We consider that appropriate third party consultation is essential to good administration and is good practice (as discussed at paragraphs 3.72 and 3.73 of the updated Guidelines), and that the final sentence of paragraph 3.80 potentially imposes a restriction on third party consultation that is not supported by the legislation.

Undue delay in releasing documents

The current Guidelines advise that where there is undue delay in providing access to documents, an applicant may consider making a complaint to the Information Commissioner (IC) (paragraph 3.196 of the current Guidelines). Paragraph 3.286 states that undue delay in providing access to documents is considered an access refusal decision under section 53A(c), and that an applicant may apply for IC review.

Additional guidance from OAIC on what constitutes “undue delay” would be of assistance (including for determining when the period for seeking formal review commences). We also question whether applicants may seek internal review of the “access refusal decision” in these circumstances.

We appreciate the opportunity to comment on the updated Guidelines. If you have any questions, please contact foi@education.gov.au.

Yours sincerely

Corporate and Information Law Team
Department of Education

24 June 2025