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Ms Angelene Falk  
Australian Information Commissioner and Privacy Commissioner  
Office of the Australian Information Commissioner  
GPO Box 5218  
SYDNEY NSW 2001

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

Dear Ms ~~Falk~~ *Angelene,*

The Department of Defence (Defence) welcomes the opportunity to comment on the proposed changes by the Office of the Australian Information Commissioner (OAIC) to the 'Direction as to certain procedures to be followed in Information Commissioner reviews' (for agencies) and the 'Direction as to certain procedures to be followed by applicants in Information Commissioner reviews'.

In Defence's view, the revisions have broad implications for agencies and ministers and may not achieve the desired result of improving the outcome of Information Commissioner (IC) reviews.

Requirement to engage with the applicant

The revisions to the Directions make it compulsory for agencies and ministers to engage with IC review applicants via a telephone or video conference at the commencement of an IC review. Defence has a number of comments in relation to this proposed change. Firstly, Defence considers this may unnecessarily delay the review process where the agency and the IC review applicant have already constructively engaged through the internal review process. Noting that, by this time, the IC review applicant will generally have already received two decision letters from the agency or minister explaining why access cannot be granted to the documents sought. As such, it may not be possible to provide any further meaningful information to the IC review applicant, other than in cases where an FOI request has been refused on the basis of a practical refusal reason. Therefore, Defence suggests that these 'conferences' be optional for both parties using any method considered reasonable by the parties, including email exchanges. This may also assist applicants who wish to remain anonymous.

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An additional advantage of allowing the parties to decide the method of the conference would be enabling agencies to provide an appropriate level of protection to their staff. This would be from both a work health and safety and security perspective. These are particularly important considerations for Defence.

Regardless of whether participation in a telephone or video conference is mandatory or voluntary, Defence considers the involvement of the OAIC in this process would be vital as a credible and impartial third party. This would reduce any perceived imbalance between the parties, noting Defence receives FOI requests from a variety of individuals, including members of the public, journalists and members of Parliament. Further, the OAIC's active participation in such a conference at an early stage in the process would encourage engagement in the review process including participation in negotiations in a constructive and genuine manner. This would make the overall process more productive, efficient and beneficial for all parties.

In relation to the timing of a conference, Defence proposes the OAIC considers including this either during or after the IC preliminary investigation stage, or as part of the initial intake and early resolution stage. Defence notes the process would also give agencies and ministers a further opportunity to understand the nature of the documents sought by the applicant and their contentions in relation to the decision they received.

Defence considers that by the OAIC providing parties with an early high level merits assessment (as part of the intake and early resolution stage) and promoting informal resolution strategies as part of the IC review process, this may allow for fuller, and quicker assessments of the merits of a review, and reduce the number of IC reviews proceeding to a decision. This would result in IC reviews being resolved in a timelier, efficient and cost effective manner.

Defence also notes that as the proposed changes significantly alter the current IC review procedures, further consideration should be given as to when these revisions should come into effect. We consider that internal departmental procedures would need to be reviewed and staff would need additional training to have the skills to participate in these conferences to make them effective. This is particularly important given the nature of the documents sought and the variety of applicants Defence engages with.

#### Section 54Z notice

The revised directions stipulate agencies and ministers will now have eight weeks to respond to the section 54Z notice, inclusive of the engagement with the applicant, with an expectation that agencies or ministers will not require any additional time. Defence considers that if engagement with the IC review applicants at the start of an IC review is required, then a response and engagement time of 10 business days should be considered, in addition to the eight weeks; similar to the consultation period stipulated in the FOI Act. This will not only allow the agency and minister to appropriately engage with the applicant, but also allow the applicant enough time to work with the agency and potentially resolve the matter, noting some applicants may be difficult to contact or may not wish to engage with this process.

Further, staff members participating in the conference may not be able to accept any offers made by the IC review applicant without seeking further internal instructions. If the issues in dispute in the IC review are not resolved through this engagement process, Defence suggests consideration of having the IC review applicant advise the OAIC what the agencies' or ministers' response to their issue was, and why the IC review applicant was not satisfied with the response in the interest of resolving the IC review in a timely way.

In addition, if an agreement is reached at a conference between the parties that a further review of the FOI request will be conducted by an agency with a view to providing a revised decision under section 55G of the *Freedom of Information Act 1982*, Defence suggests the section 54Z notice be suspended until such time as this process has been completed. This would then allow an applicant time to consider if the revised decision has resolved their issue, enabling the IC review to be withdrawn.

#### Production of documents

The revisions, at paragraph 5.5, request for a “sufficiently representative sample of documents” when the IC review involves charges or a practical refusal reason. Defence considers this requirement to be ambiguous and suggests the IC consider providing further clarity for agencies and ministers, for example, providing a percentage or similar.

In Defence’s view, the inspection of sensitive documents at the IC’s office will not always be practicable for Defence. In our experience, the reasons for a document requiring inspection and not production is because they are highly classified documents which could impact national security or international relations and attract section 33 exemptions. Ensuring that these documents are handled in an appropriately secure manner is paramount, and removing the document from Defence premises in Canberra and providing it to the OAIC office in Sydney would be contrary to this. Defence requests that the direction provide a flexible approach which would allow for the IC to inspect documents on an agency’s premises where the agency considers this appropriate.

#### Submissions

While agencies and ministers bear the onus of establishing an access refusal decision is justified, Defence considers that, as outlined below, having the IC review applicant articulate in sufficient detail their reasons for disagreeing with a particular aspect of the agency’s or minister’s decision at the time they lodge an application for review, would assist the agencies and ministers in providing a considered and targeted submission. Defence considers this is vital, particularly as this is the only opportunity to provide submissions and the revisions do not currently provide an agency or minister with a right of reply to the applicant’s submissions. Having a full understanding of the applicant’s contentions prior to providing submissions would lead to more targeted submissions by agencies and ministers, thus meeting procedural fairness requirements. It could also lead to a more efficient process by confining the IC review to the issues identified by the IC review applicant.

#### Seeking a review

Should the IC move forward with these revisions, including requiring engagement with the IC review applicant at the commencement of an IC review, Defence proposes that the IC consider making internal review compulsory, in circumstances which allow it. This would allow for agencies and ministers to have further meaningful engagement with the applicant before they seek an IC review in an attempt to resolve the issues in an informal and timely way, thus reducing the workload for the OAIC.

Further, at paragraph 1.18, the revisions suggest that an IC review application *should* also, inter alia, identify why the agency’s or minister’s decision is wrong. Defence proposes making this compulsory as part of the IC review application. Clarifying the issues under review would assist the agency or minister to better understand them and could lead to the issues being resolved in a meaningful, informal and timely way.

Commencement date of the revisions

The implementation of the revised directions would require agencies and ministers to make substantial changes to their resources, training and processes which are necessary to address these new requirements. I ask you to consider a commencement date for any revised procedures, not earlier than 1 October 2023.

Defence would be grateful for further consultation on these matters. I note the former FOI Commissioner sponsored a Senior Executive Service FOI Leadership Group and this may be an appropriate forum for the OAIC to engage with the agencies to ensure any new procedures would enable a more effective and efficient outcome for the OAIC, applicants, agencies and ministers.

I understand a copy of this submission will be published. Please do not hesitate to contact me should you have any queries or require further information.

Yours sincerely



Matt Yannopoulos, PSM  
Associate Secretary

30 June 2023