Australian Government
Department of Foreign Affairs and Trade

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Ms Karen Tulloch
Assistant Director
Monitoring, Guidance and Engagement
Office of the Australian Information Commissioner

By email: foidr@oaic.gov.au

Dear Ms Tulloch

Submissions on the proposed 'new Directions as to certain procedures to be followed in IC reviews'

Thank you for the opportunity to make submissions on the proposed new Directions as to certain procedures to be followed in IC reviews (the Direction) and for providing the Department of Foreign Affairs and Trade (DFAT) with an extension to the timeframe in which to do so.

DFAT's primary concern relates to the new requirement for agencies to engage with applicants again before the Office of the Australian Information Commissioner (OAIC) commences its review of an application, found at part 4 of the Direction. It is DFAT's view that the proposal for compulsory engagement will not lead to benefits for applicants or agencies, will not reduce the workload of the OAIC or DFAT, and may in fact increase the burden on agencies' limited resources while putting agencies' staff at risk.

DFAT's processes are already built on extensive engagement with applicants to try and meet applicants' needs wherever possible. By the time an application makes it to OAIC review, DFAT has generally exhausted avenues for productive engagement with the applicant. Moreover, a significant portion of DFAT FOI decisions reviewed by OAIC involve the application of section 33 of the Act and relate to national security or international relations sensitivities that do not lend themselves to open discussion and negotiation with members of the public.

DFAT also provides views on several other matters contained in the Direction for OAIC's consideration below.

DFAT's current processes

To provide context for our submissions, it is useful to discuss DFAT's current processes.

At present, when an original decision is made by DFAT, it is usually after extensive internal and external consultation and consideration of an applicant's right to access information

and the agency's need to protect sensitive information, subject to the FOI Act's exemption provisions. The Department's decision-makers are almost all Senior Executive Service staff who are required to complete customised FOI decision-maker training in FOI law and procedure.

Decision-makers take their FOI decision-making duties seriously and make decisions which they believe to be the most correct decision in the circumstances. Further, when a matter is before IC review, a new FOI officer will consider the prior decision and is able to suggest possible concessions to the applicant in a section 55G decision to address an applicant's concerns, wherever possible.

DFAT's FOI processes already include extensive engagement with applicants. Our FOI decisions typically go through several layers of internal discussion before a decision on access is made by an SES decision-maker. In addition, we do not make decisions that processing a request would constitute an unreasonable diversion of resources without first consulting an applicant as required by section 24AB of the FOI Act.

In cases where we have not substantially engaged with an applicant prior to the matter reaching IC Review stage, it is because it is not appropriate or useful to do so.

Compulsory engagement

We understand the Direction is proposing to introduce a new step for agencies to convene and attend a conference with the applicant to try and resolve the matter before it is considered by the OAIC. We assume this is envisaged as engagement between applicants and DFAT's FOI staff, however, we note that, as discussed below, DFAT's FOI staff will not usually be the decision makers for the decisions under review.

Once a matter reaches the IC review phase, much of the benefit of IC review comes from an objective, external review by a qualified third party. External reviewing parties, in particular, the OAIC, have the expertise, objectivity, power and understanding of Government's risks and concerns and also of the importance of access to information, to make appropriate review decisions. For these reasons, it is difficult to imagine that unmediated engagement between an agency and an applicant would provide more opportunities for resolving FOI review matters, particularly where an applicant is challenging the application of exemptions.

An additional mandatory consultation step is unlikely to resolve a matter without OAIC intervention

We understand that part of the expected benefit of having mandated consultations would be that applicants could have the opportunity to negotiate variations to decisions under section 55G of the FOI Act or to provide further detail to agencies about the issue they are most aggrieved about.

FOI staff generally do not have the level of decision-making authority and therefore, the FOI decision-makers (which in DFAT means SES Band 1 staff at a minimum) would need to be engaged in the negotiations or advise in detail what further concessions may be possible if at all. Further detailed SES engagement at this point would not be practical. It would

inevitably slow down the process and in some cases make the 8-week deadline impossible to meet. It is also unlikely to be of benefit, given the robust decision-making process DFAT uses to ensure that exemptions are only sought when necessary and defensible.

Moreover, it has been DFAT's experience that a significant portion of the DFAT FOI decisions which are reviewed by OAIC involve the application of section 33 of the FOI Act. Where exemptions are applied to documents under section 33 of the FOI Act, they relate to sensitivities that do not lend themselves to open discussion and negotiation with members of the public.

Many of the other DFAT FOI decisions, which OAIC reviews, involve the application of section 24 of the FOI Act and whether processing the request would constitute an unreasonable diversion of resources. Before DFAT makes any decision under section 24, it always engages with the applicant to try and find an approach that can address the applicant's interests without constituting an unreasonable diversion of DFAT's resources. In this context, it is difficult to see what benefit could arise from requiring further engagement at the IC review stage.

It is DFAT's experience that, where it is possible for an applicant to submit further, more manageable requests, this will occur through the initial consultation and engagement with applicants. DFAT also uses its decision letters relating to s24 refusals to include additional information and guidance to assist applicants to refine the scope of their request and make a new request. DFAT quite often receives follow-up requests in circumstances where we make a decision under section 24, and our procedures for processing them are well-established and involve engagement with the applicant in the same way as any other request.

DFAT is also of the view that requiring engagement in the form of telephone or video conference may place our staff at risk, especially where there is no other agency, such as the OAIC, involved in the role of a mediator. While in the overwhelming majority of cases, applicants are courteous and respectful, unfortunately this has not always been our experience. DFAT FOI staff do not have training to deal with difficult applicants in this context, and we consider exposing staff to abusive or intimidating applicants would be a work health and safety issue, contrary to recent changes to the work health and safety regulations relating to psychological safety in the workplace. In some cases, depending on the applicant, there may also be a significant power imbalance.

At present, DFAT FOI staff do not typically use their names in correspondence with applicants and use a generic FOI email address to communicate with applicants to avoid this risk. Requiring DFAT FOI staff to meet with applicants in teleconferences or video conferences would remove our ability to use anonymity to protect our staff.

Any new procedure should leave agencies discretion to no longer engage with an individual where it believes this would place staff at risk or not be productive to do so.

Mandatory engagement with applicants would significantly increase the burden on agencies resources with no corresponding benefit

We are also concerned that agencies would need to record, prepare and provide evidence of the following to the IC (clause 4.6):

- the steps taken to contact the IC review applicant, including any written correspondence and any telephone call file notes
- evidence of communications and any correspondence with the IC review applicant showing efforts to resolve the issues in dispute
- evidence of the outcome of the engagement between the agency and the applicant.

For these reasons, we anticipate that the requirement for compulsory engagement with applicants, in a specified form, will add additional burdens on agencies with limited resources without any corresponding benefit. DFAT would support the IC encouraging engagement where an agency considers that it would be appropriate, but not making this engagement mandatory and not prescribing the form which the engagement should take.

Finally, it is unclear how the proposed requirement for engagement interacts with the Direction's treatment of deemed refusals (set out at part 3 of the Direction). It is not clear whether the requirement to make one of the decision types set out at 3.3 of the Directions sits alongside the requirement to engage with an applicant or supersedes it.

Suggestions for engagement

At present, DFAT does not always receive all of the material created by applicants in OAIC reviews. When we receive notice of a review, it is usually in the form of a notice under section 54Z of the FOI Act, together with a copy of the online form submitted by the applicant to the OAIC. This form does not always contain the applicant's reasons for review. We would be more able to respond to applicants' concerns if, where they make submissions as part of the process of lodging the request for review, those submissions were given to the department as part of the section 54Z process.

Other matters:

Additionally, we have several other concerns about specific elements of the Direction.

- The way the Direction treats deemed refusals (at part 3) is problematic. When a matter is deemed to be refused, this will typically be because there is a high level of complexity or unresolved issues in the matter (for example, a hostile applicant not providing agreement to requests for available extensions of time) and to require that the complexity be resolved within three weeks of the IC issuing a notice is likely to be impractical.

- Where an agency decides not to make a section 55G revised decision giving full access (i.e. in the vast majority of cases), in addition to the marked up copies of the exempt documents at issue, they will have to provide the IC with the FOI request processing documents. This will be extremely time-consuming, particularly in the case of deemed refusals where it will be necessary (per 3.3 of the Directions) to pull this material together in three weeks. In our experience, matters that deem are

usually complex and may involve a significant volume of documents that have been generated in the processing of the request.

- In IC reviews involving a charge or a practical refusal reason, the IC may require the agency to provide a representative sample of documents within the scope of the request (clause 5.5). DFAT is of the view that this proposal is inconsistent with the purpose of the practical refusal process, as the reasoning behind the process is that processing the request would constitute an unreasonable diversion of the Department's resources. As such, processing a representative sample of the documents will also constitute an unreasonable diversion.

- The Direction does not make clear what will constitute a representative sample. Practical refusal refers to the difficulties of processing documents, not simply the difficulties of locating them. If the IC expects DFAT to fully process a sample of documents, this may require significant internal and external consultations, as well as consideration of the documents by senior officials. If, ultimately, the IC finds that the practical refusal decision at issue was correct, this will all be wasted work.

- It is also not clear what will happen to these sample documents once they are provided to the IC. It is not unreasonable to expect that the samples may attract exemptions, which would not be applied at the time they are provided to the OAIC. Representative samples may also include documents that would be subject to exemptions under s33 of the FOI Act and would not routinely be provided in unredacted form to the OAIC.

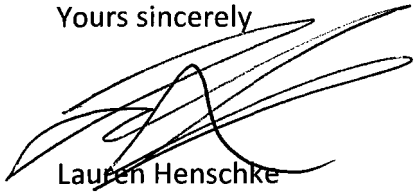
- The Direction proposes a completely separate process for obtaining approval for confidential submissions. This will add not only to agencies' burden but also to that of the IC. Presumably the request to provide confidential submissions will need to be made in the 4 week submission-making period but agencies may not be able to meet this timeframe and may not be able to obtain extensions of time which will only be provided in extenuating circumstances.

- It is also unclear what happens if the IC refuses a request to make confidential submissions. Can departments make further submissions as to their requirement for confidential submissions, or is their only recourse to refuse to provide the confidential information, wait for an adverse decision and seek AAT review.

- Finally, we note that clauses 6.3 and 6.4 of the Directions appear to give the applicant two chances to argue their case, while only affording one chance to agencies. We understand that applicants frequently make submissions as part of their application for IC review; the effect of these clauses appears to be that the applicant can make initial submissions, then the Department responds, then the applicant responds to the Department's submissions. We question whether this is fair. Furthermore, there is no requirement for an applicant to outline their reasons for seeking a review, other than stating they are seeking one which often makes it difficult for agencies to engage with applicants on the issues they are seeking to have resolved.

I would be happy to discuss these comments further with you or provide additional examples if helpful.

Yours sincerely



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