

**ATTACHMENT A**

**Terms of Reference to the Review of the *Freedom of Information Act 1982* and the  
*Australian Information Commissioner Act 2010*.**

**Response by the Department of Immigration and Citizenship**

(a) *the impact of reforms to freedom of information laws in 2009 and 2010, including the new structures and processes for review of decisions and investigations of complaints under the FOI Act, on the effectiveness of the FOI system;*

a. Consistency of spelling throughout Act

DIAC notes the inconsistency in the spelling of the words 'organisation' and 'organization' in the FOI Act.

b. 'deemed refusals' and s.15AC

DIAC would like the 'deemed refusal' provision and the application of s.15AC in the FOI Act to be clarified.

The FOI Act currently provides that where the initial time period to process the request has ended, a decision to refuse access is taken to have been made by the principal agency or Minister. Section 15AC allows for the Information Commissioner (IC) to grant additional time to make a decision, and where a decision is made during this period, the deemed decision is taken never to have applied.

Specifically, DIAC believes that the following situation should be clarified:

- i. Is an agency (or Minister) able to make a lawful decision while the request is in the 'deemed refusal' stage if the agency has not received (or does not seek) an extension from the IC?
- ii. Section 15AC, although providing a discretionary power for the IC to allow additional time, does not set any criteria to enable the IC to exercise the power to refuse to allow additional time. In order to provide agencies and applicants with a clear expectation of grounds, these should be identified in the FOI Act and further clarified in guidelines.

c. Extensions of time

Agencies such as DIAC often have documents on files that cannot be reasonably accessed within the 30 day timeframe allowed under the FOI Act. These include documents held overseas or which are in transit from overseas, or documents held by the National Archives of Australia.

In order to enable this, s.15AB should be amended to explicitly permit the inaccessibility of files to be a permitted reason for extension by the IC.

d. Requirements of a valid request

Following a change to the address requirements of a valid request for access to documents, there is a concern with the FOI Act that a similar change has not been made for requests for amendment or annotation.

Given that DIAC has a large number of clients who reside overseas and the intention of the Government is to extend rights under the FOI Act to applicants overseas, the Act should be amended to remove the requirement for an Australian postal address for amendment or annotation requests.

Similarly, a requirement for a request to state that it is a request for the purposes of the FOI Act should be added. This would ensure that applicants are not able to pick and choose that the request was actually under the FOI Act when it was assessed appropriately under the *Privacy Act 1988*.

Should an amendment be made to the FOI Act to require applicants to first seek access under an administrative access scheme, copying this requirement for amendment or annotation requests should also be made.

e. Combining Requests & Timeframe

The s.24(2) provision to enable an agency to combine requests where the subject of the request is substantially the same or for the same documents should be facilitated regardless of the overall size or scope of the request.

Regardless of whether the scope of this provision is extended, the legislation should make the due date clear for the combined requests. It is DIAC's view that the due date for the combined request should be the date of the later request. This would provide agencies with sufficient time to assess any documents which would fall within the scope of the first request following receipt of the second request.

f. Amendments and Annotations

The amendment and annotation provisions in the FOI Act were not adequately reviewed with the 2010 reforms; nor do the recent reforms to the Privacy Act alter the amendment and annotation provisions under the FOI Act.

It is DIAC's view that, in light of the changes to the Privacy Act due to come into force in March 2014, these provisions in the FOI Act should be amended.

As the agency that is the recipient of in excess of 99% of requests for amendment or annotation under the Commonwealth FOI Act, it is our view that it would be prudent to undertake significant consultation with DIAC to enable these sections to be updated.

(b) *the effectiveness of the Office of the Australian Information Commissioner (OAIC);*

a. Role of the OAIC

DIAC recognises that the OAIC has two distinct roles with regard to Freedom of Information: a role as champion of access to information as a national resource, and also a role as an enforcer of the FOI Act. Although we recognise that the dual role is important, we suggest that the role of champion has impacted upon the ability of OAIC to act as an adjudicator to enforce the FOI Act. DIAC considers that the most efficient way for the OAIC to handle reviews is to adjust its role as an adjudicator.

DIAC's view is that complaints about how an agency has handled an FOI request should be decided separately to any issues about how an agency has made a specific FOI decision. Similarly, any other issues that an applicant has raised with the OAIC regarding their treatment by an agency should result in the OAIC referring the applicant to the agency's complaints handling area (or to the Commonwealth Ombudsman, Australian Human Rights Commissioner, etc. as appropriate).

It is our view that such an approach would result in direct lines of inquiry from the OAIC relating to the material questions of fact which led to a decision, rather than peripheral issues. This approach should result in clients having access to quicker decisions on their FOI requests. It would also allow agencies to focus on the reasons for a decision, rather than deal with peripheral issues when responding to the OAIC.

Although this has a potential in some cases for the OAIC to duplicate responses on specific clients, it would have the benefit of re-allocating resources to give clients quicker responses to enforce their legal rights.

This could be achieved through a statement in the *Australian Information Commissioner Act 2010* (AIC Act) or through guidelines issued by the OAIC to clearly differentiate the roles and to provide applicants with a set of expectations around these roles.

DIAC notes that the number of requests that have led to review by, or complaints to, the OAIC has been higher than was originally anticipated. This has led to a situation where the OAIC has not been resourced to adequately respond to some of these matters. DIAC would support additional resources being provided to the OAIC to fulfil its role under the FOI Act.

b. OAIC timeframes

Currently there are no set timeframes for an applicant to receive a decision on a review from the OAIC or to receive a response to a complaint.

As there is no timeframe and the OAIC is experiencing delays in resolving reviews and complaints, applicants have little understanding of when to expect a decision. This can cause applicants concern as the information that they are seeking access to or amendment of may be time-critical. In such cases it is difficult for DIAC to advise applicants who have received adverse decisions to allow us to manage their expectations. It may also result in duplicate requests for access or amendment to the agency as applicants become unsure of a date for resolution by the OAIC.

Delays in resolving reviews and complaints increase the chances of those officers involved in the agency's initial FOI decision no longer being with the section or the agency, or for the officers involved not remembering the request in question. Without access to knowledge of the request, apart from the records kept, it is difficult for agencies to answer questions from the OAIC about the requests. This may add to the burden on agencies responding to the OAIC when multiple officers and/or senior officers are required to review the information to respond to the OAIC.

c. OAIC Decisions

DIAC has received seven (as at 28 November 2012) decisions from the OAIC - two access decisions and five amendment decisions. It appears that the decisions were prepared by different officers in the OAIC as the different decisions have different standards of information included in the body of the decision.

Our concern with these decisions, particularly those with less information in the amendment caseload, is threefold:

- i. These decisions do not provide optimal customer service to the applicant. As the decisions have minimal detail, clients are unaware of any of the information considered by the OAIC; there is no additional insight for the client apart from that provided in DIAC's decision letters.
- ii. In cases where clients are not provided with any other information to help them understand why a decision has been made by the OAIC, a risk is created that an Administrative Appeals Tribunal (AAT) review will be sought as they are not satisfied that the correct decision has been made. As the OAIC is not a party to such AAT proceedings, there is no incentive for the OAIC to craft comprehensive decisions. However DIAC acknowledges that in some cases, the OAIC has provided detailed and instructive decisions.
- iii. As many of the OAIC's decisions have not been comprehensive, we are unable to rely on the decisions as instructive to guide our decisions. As the amendment provisions in the FOI Act are not used by most agencies (given that DIAC receives over 99% of amendment requests across the Commonwealth), that issue received little attention from the OAIC in publishing their guidelines. As the OAIC has not been providing this guidance through guidelines or decisions, DIAC is concerned that our interpretation of the FOI Act may not be consistent with their interpretation.

DIAC does not believe that it is necessary for the OAIC to provide decisions of the length provided by the AAT. However we consider that the balance should be redressed by providing further and detailed reasoning than is currently the case.

d. IC Guidelines

The FOI Guidelines issued by the IC under s.93A of the FOI Act should be updated on a quarterly basis, rather than in the current ad-hoc fashion.

A regular update would give agencies and applicants a clear expectation of when new guidance is to be issued. This would enable simpler updating of internal documentation and procedures for agencies.

DIAC recognises that there will, on occasion, need to be 'out of cycle' updates to the guidelines, as impacted by significant review decisions from the IC, AAT or through the court process. However we expect that these should be the exception rather than the rule.

(c) *the effectiveness of the new two-tier system of merits review of decisions to refuse access to documents and related matters;*

DIAC is unable to comment on the review structure as no decisions by this agency have yet been appealed to the AAT. We do, however, agree with the OAIC that internal review should be the first step given approximately two thirds of DIAC's internal review matters do not flow through to Information Commissioner review (IC review). DIAC supports the measures recommended in the Information Commissioner's 'Review of charges under the *Freedom of Information Act 1982*' that an application fee be imposed for applicants seeking IC review without first seeking internal review from the agency. This measure balances the applicant's right to review with the efficient use of resources across the Commonwealth.

(d) *the reformulation of the exemptions in the FOI Act, including the application of the new public interest test, taking into account;*

- (i) the requirement to ensure the legitimate protection of sensitive government documents including Cabinet documents; and
- (ii) the necessity for the government to continue to obtain frank and fearless advice from agencies and from third parties who deal with government;

a. Personal Information

*Removal of the status of the personal information exemption as conditional*

It is DIAC's view that it is unnecessary for the personal information exemption in the FOI Act to be subject to a public interest test in addition to the 'unreasonableness' test currently embodied in s.47F of the FOI Act.

There is an inherent tension in the FOI Act between the presumption that information held by agencies concerning individuals will be disclosed upon request and the expectation that agencies will protect the privacy of individuals. This expectation has recently been further enhanced with the passage of the *Privacy Amendment (Enhancing Privacy Protection) Bill 2012* through both Houses of Parliament.

As an agency, we consider it is important for us to protect the personal information relating to our clients. Consequently, when an FOI decision maker finds that the disclosure of a document is unreasonable, these same arguments are also pertinent to the application of the public interest test. As the protection of the privacy of individuals is a significantly weighted factor in a public interest test, it will be a rare circumstance when a decision maker could come to a decision where the disclosure of a document would simultaneously be both unreasonable and in the public interest.

To remove this situation and to relieve the administrative burden upon FOI decision makers, DIAC proposes that the personal information exemption be removed from the category of 'conditional exemptions' and to allow the modified public interest test (the 'unreasonableness' test) which is explicit in s.47F to be the single determinative factor in the disclosure of personal information.

DIAC recognises that there are circumstances where there will be a disclosure of personal information to a third party (such as a journalist) under the FOI Act. Our view is that the 'unreasonableness test' adequately addresses the public interest in disclosure (as it did prior to the 2010 reforms).

#### *Adding the personal information exemption to section 25*

Regardless of whether DIAC's recommendation that the personal information exemption be removed from the category of conditional exemptions, DIAC considers that there are conditions under which, an agency should have the capacity to neither confirm nor deny the existence of personal information.

DIAC has experienced an increased level of requests from applicants which ask leading questions. These requests have been made with the intent of confirming the existence of information about a specific individual, as involved with a specific activity or process. The fact that agencies are required to identify information falling within the scope of these requests in itself provides notice to the applicant that the information exists and can result in the unreasonable disclosure of personal information.

As an example, such a request occurs following the breakdown of a relationship. The *Migration Act 1958* enables a partner visa to be granted following the breakdown of a relationship if family violence has occurred. Individuals who believe that a visa has been granted on these grounds may seek information about their former partner and any allegations concerning themselves. Any decision other than exempting the information as an unreasonable disclosure of personal information (such as using the breach of confidence exemption) allows a direct inference to be drawn that there have been allegations of family violence against them. Consequently it is inappropriate to use and it would in effect cause the unreasonable disclosure of information about the third party.

We recognise that section 26 ensures that a notice is not required to contain any matter that is of such a nature that its inclusion would cause that document to be exempt. However this is not an ideal situation and does not assist applicants. If we are able to inform applicants that the type of information that they are seeking, should it exist, would be exempt, we would then be able to both help the applicants understand why we cannot provide such information to them, but also to appropriately protect the personal information of the individuals to whom the information relates.

- (e) *the appropriateness of the range of agencies covered, either in part or in whole, by the FOI Act;*

DIAC does not have any comments on the range of agencies currently covered by the FOI Act. DIAC however, would support an amendment to the FOI Act to enable the provision of documents to applicants, where these have been previously provided to the applicant without conditions. DIAC does not consider it desirable to extend this to all documents to which the client has had access, recognising the difference between providing discovery access or similar conditional access, to the unconditional access provided by the FOI Act.

- (f) *the role of fees and charges on FOI, taking into account the recommendations of the IC's review of the current charging regime;*

DIAC broadly supports the recommendations made by the IC in his 'Review of Charges under the FOI Act'.

In addition to Recommendation 5 regarding fee reduction and waiver, an agency should be given an explicit power, either through legislation or by guidelines, to not require application fees for requests for access to certain classes of documents under FOI.



In DIAC's case, we would consider using the power to inform applicants that we would not require an application fee to be paid when applying to access their own information. The power to make such an explicit declaration would enable agencies to reduce the costs associated with collection of public monies. It would also enable agencies the flexibility to impose fees to other classes of applications.

In addition to his Review on Charges under the FOI Act, the IC incorporated a view on the 'unreasonable diversion of resources' provision in the FOI Act, putting forward a position that a request requiring more than 40 hours to process would be an unreasonable diversion of the agency's resources.

DIAC supports a legislated cap on processing time. The current situation where agencies are positing a virtual cap based on their understanding of the OAIC's position on what constitutes an 'unreasonable diversion of resources' is unsatisfactory in the longer term and promotes inconsistency and uncertainty. As this section of the FOI Act has not seen revision with the 2010 changes, DIAC had no reason to expect that the interpretation would vary significantly from the AAT's decisions on this provision. Given that the AAT has taken the position that different agencies have a different 'bar' to clear in terms of what would be a diversion of that specific agency's resources, affirming a position in legislation would remove the capacity for this position to be challenged. This would in turn open the way for voluminous requests upon large agencies to be refused where there was the expectation that significant resources would be diverted from the agency's other duties.

(g) *the desirability of minimising the regulatory and administrative burden, including costs, on government agencies.*

a. Release of draft research/evaluation reports

In order to minimise the administrative burden on agencies where requests are received for research or evaluation reports and/or drafts of research or evaluation reports, it should be possible to refuse requests where the applicant's intended outcome is publication.

The current situation where we are required to make a decision on draft reports is not ideal. Where reports have not been finalised and reviewed, there is a risk that findings/conclusions may be in the public domain when the data contained in them has not been properly substantiated, or they may be incorrect or incomplete. We consider that having this type of information, sourced from a public agency and in the public domain, is not in the public interest. Although it is possible to caveat the information, it undermines the integrity of the research/evaluation process to release reports prior to them being finalised. Although we recognise that misinterpretations or misunderstandings are stated in s.11B as irrelevant factors, given that the agency is going to publish a final version of the report once all relevant review processes are complete, there is no public interest served in a draft report being made available to an applicant.

This outcome could be achieved either through a re-working of s.47H and Schedule 4, or ideally through guidance from the OAIC regarding the use of s.47C. As these exemptions have a public interest test, the fact that a report will be published can be used as a factor against disclosure. Where a report will not be published, the public interest factor will not apply, and this would not disadvantage applicants for such a request.

b. Publicly available information – not requiring a decision

The FOI Act explicitly allows for the refusal of a request in certain circumstances outlined in s.12. It is DIAC's view that this should be extended to requests for information that is publicly available without any qualifiers in addition to the categories currently outlined in s.12.

Currently DIAC receives requests from applicants for information that is publicly available, for example, on our website or in our Annual Reports. Such requests currently have to be addressed under the FOI Act.

Although we can ask an applicant to withdraw their request, there is no obligation on the applicant to take this course of action. If the applicant wishes to continue with their FOI request, we are obliged to make a decision to release the information in full, with accompanying 'disclosure log' requirements. This places an unnecessary administrative burden on the agency.

This situation would be improved by requiring an applicant to first seek information under an administrative access scheme outside of the FOI Act. This would prevent applicants making unnecessary FOI requests.

In our view, the way forward would be to enact an additional refusal provision for publicly available information. DIAC would not object to the OAIC putting in the guidelines a requirement for agencies to either provide a copy of the information sought, or to specify where the applicant could retrieve the information.

c. Creation of documents/statistics

Agencies are able to provide statistical information either through an administrative access scheme where requested on an ad-hoc basis (with the possibility of charging the applicant), or where information is regularly requested, free of charge. However this situation does not sit comfortably in the FOI Act.

Although s.17 provides a mechanism for agencies to retrieve or collate information, it is unclear if this is intended to extend to the ad-hoc creation of tables or documents/statistics under the FOI Act. If s.17 does not extend to such a creation of a document, then a request can reasonably be refused as the request is not a request for "a document of the agency".

DIAC proposes that the intention on this issue should be clarified legislatively. In order to minimise administrative burden on agencies, it should be made clear that there is no intention for the FOI Act to be used in this way. If the OAIC's intention is that the FOI Act can be used to make requests for statistical information reliant on s.17, this should be made explicit in the legislation.

d. Release of staff names

Although this provision has not changed since the reforms to the FOI Act in 2010, the publicity surrounding the FOI Act has led to an increased level of interest from staff regarding the disclosure of information about them in documents created as part of their job.

DIAC would prefer that the position be made explicit, either in legislation or through clear guidance from the OAIC, as to what information is reasonable and not reasonable to release regarding staff and sets of conditions or job roles where the release of the information about staff would be unreasonable.

e. Deeming requests withdrawn

Currently the FOI Act does not provide agencies with the capacity to 'deem' a request to be withdrawn, except where a s.24AB notice has been provided to an applicant.

DIAC seeks the formal capacity to deem a request to have been withdrawn if no correspondence has been entered into by an applicant after an elapsed period of time regardless of there being a practical refusal reason. This could work by giving agencies the power to deem a request withdrawn 14 days after an applicant is provided a notice of the agencies intent to deem the request withdrawn.

f. Interaction between the FOI Act and the Privacy Act

The recent changes to the Privacy Act further blur the line between the most appropriate avenue for an individual to access information about themselves or to amend their personal information held by an agency.

Although DIAC does not see a difficulty in using either piece of legislation as a primary avenue for individuals to access and amend their personal information, our preference is that there should be clear guidance of which is the more appropriate avenue and that individuals have a set of rights to allow review of an unfavourable decision.