Judicial Review in Australia

Submission to the Administrative Review Council

July 2011

Submission by Prof. John McMillan, Australian Information Commissioner
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Introduction

The Office of the Australian Information Commissioner (OAIC) welcomes the opportunity to comment on the Administrative Review Council’s Consultation Paper on Judicial Review in Australia¹.

The OAIC was established by the Australian Information Commissioner Act 2010 (Cth) (the AIC Act) and commenced operation on 1 November 2010.

The OAIC is an independent statutory agency headed by the Australian Information Commissioner. The Information Commissioner is supported by two other statutory officers: the Freedom of Information Commissioner and the Privacy Commissioner. The former Office of the Privacy Commissioner was integrated into the OAIC on 1 November 2010.

The OAIC brings together the functions of information policy and independent oversight of privacy protection and freedom of information (FOI) in one agency, to advance the development of consistent workable information policy across all Australian government agencies.

The Commissioners of the OAIC share two broad functions:

- the FOI functions, set out in s 8 of the AIC Act – providing access to information held by the Australian Government in accordance with the Freedom of Information Act 1982 (Cth) (the FOI Act) and
- the privacy functions, set out in s 9 of the AIC Act – protecting the privacy of individuals in accordance with the Privacy Act 1988 (Cth) (the Privacy Act) and other legislation.

The Information Commissioner also has the information commissioner functions, set out in s 7 of the AIC Act. Those comprise strategic functions relating to information management by the Australian Government.

FOI Functions

The Office’s FOI functions include:

- undertaking merit review of FOI decisions
- promoting awareness and understanding of the FOI Act
- overseeing the new information publication scheme, assisting agencies to proactively publish information and reviewing the operation of the scheme in each agency
- issuing guidelines for agencies

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- investigating complaints about FOI administration
- providing guidance, assistance and training on FOI matters
- monitoring agency compliance with the FOI Act.

**Review of FOI decisions by the Information Commissioner**

The Information Commissioner can review the following decisions by an agency or minister:

- an ‘access refusal decision’ (s 54L(2)(a))
- an ‘access grant decision’ (s 54M(2)(a))
- a refusal to extend the period for applying for internal review under s 54B (s 54L(2)(c))
- an agency internal review decision made under s 54C (ss 54L(2)(b) and 54M(2)(b)).

An ‘access refusal decision’ is defined in s 53A of the FOI Act to mean:

(a) a decision refusing to give access to a document in accordance with a request
(b) a decision giving access to a document, but not all the documents, to which the request relates
(c) a decision purporting to give access to all documents to which a request relates, but not actually giving that access
(d) a decision to defer access to a document for a specified period under s 21 (other than a document covered by s 21(1)(d), that is, where Parliament should be informed)
(e) a decision under s 29 relating to the imposition or amount of a charge
(f) a decision to give access to a document to a ‘qualified person’ under s 47F(5) (where disclosing the information to the applicant might be detrimental to the applicant’s physical or mental health or well-being)
(g) a decision refusing to amend a record of personal information in accordance with an application under s 48
(h) a decision refusing to annotate a record of personal information in accordance with an application under s 48.

An ‘access grant decision’ is defined in s 53B to mean a decision to grant access to a document where there is a requirement to consult with a third party under ss 26A, 27 or 27A. The agency or minister will have decided that either the document is not conditionally exempt under s 47B (Commonwealth-State relations), s 47G (business documents) or s 47F (personal privacy), or if the document is conditionally exempt, access would not be contrary to the public interest.
The Information Commissioner may also review decisions that are deemed to have been made by an agency or minister where the statutory timeframe was not met. This may happen:

- at first instance (following a request for access to information (s 15AC) or for amendment to a personal record (s 51DA)), or
- following an application for internal review (where the original decision is taken to have been affirmed under s 54D).

A decision that an applicant’s FOI request falls outside the FOI Act (for example, a decision that a document is not an ‘official document of a minister’) may be reviewed by the Information Commissioner.

**Review of FOI decisions by the Administrative Appeals Tribunal (AAT)**

A person can apply to the AAT for review of:

- the Information Commissioner’s decision to affirm, vary or set aside a decision after the Information Commissioner has undertaken a review (ss 55K and 57A(1)(a))
- the agency’s or minister’s decision where the Information Commissioner has decided not to undertake a review on the basis that it is desirable that the AAT undertakes the review (s 57A(1)(b))
- the Information Commissioner’s declaration of the person as a vexatious applicant (s 89N).

Comments on the Consultation Paper

The Office makes its submission in relation to ‘Judicial review and reasons for decisions’, particularly in relation to the Administrative Decisions (Judicial Review) Act 1977 (the AD(JR) Act). The Office’s submission focuses on its functions under the FOI Act, particularly with reference to the statutory obligation to provide reasons under the FOI Act.

Question 15

Question 15: Should we have a generalised right to reasons, or is it more appropriate for the right to be included only in specific pieces of legislation? Where should the right be located? At what stage of the decision-making process should a right to reasons for administrative decisions be available and in relation to what range of decisions?

Generalised right to reasons

A general obligation to provide reasons for decisions promotes fairness, transparency and accountability as well as providing the affected person an opportunity to understand the decision that was made and an opportunity to decide whether they should seek review.

Where should the right be located?

Paragraph 4.120 of the Consultation Paper suggests that a right to reasons could be incorporated with the record-keeping requirements and access to information rights of the Archives Act 1983 or the FOI Act. The right to reasons goes beyond record-keeping requirements under the Archives Act. A right to reasons already exist under the FOI Act as set out in s 26 (see our response to Question 16 below) but we note that the FOI Act does not apply to particular bodies including intelligence agencies and the requirement under s 26 is limited to particular decisions. The bodies exempt from the operation of the FOI Act are set out in Appendix A. The decisions which require a statement of reasons under s 26 are also set out in Appendix A.

We submit that the requirement to provide reasons under s 26 of the FOI Act should be retained in the FOI Act as its requirements go beyond what is required under the AD(JR) Act. A copy of s 26 of the FOI Act is set out in Appendix B.

In the absence of a generalised right to reasons, we submit setting out a right to reasons in the enactment or instrument which provides authority for the decision to be made.

When to provide reasons

As a matter of good administrative practice, a statement of reasons should be provided at the time the decision is made.

Whether a decision is entirely drafted by the decision maker or whether it is drafted with assistance (for example, from an in house or external lawyer), a statement of reasons should meet the critical requirements of being factually and legally accurate.
A decision maker should retain an accurate record of the reasons for their decision even where there is no statutory obligation to provide reasons at the time the decision is made. This will assist providing an accurate statement of reasons if reasons are requested at a later period.

**Question 16**

*Question 16: One of the objectives of this examination of judicial review is to identify all examples of legislation or subordinate legislation that include a specific right to reasons. Are there examples of provisions giving a right to reasons which provide useful illustrations of effective content, timing and form of reasons?*

**Requirement to provide reasons under s 26 of the FOI Act**

Section 26 of the FOI Act requires a statement of reasons to be provided if any aspect of an FOI request is refused or if access is deferred. Section 26 requires the following elements to be included in a statement of reasons:

- the decision
- findings on material questions of fact
- evidence on which those findings are based
- reasons for decision
- name and designation of person giving the decision
- applicant’s review and complaint rights.

**Notices to third parties**

Some other decisions made under the FOI Act are required to be notified to third parties. The Act does not require that the notice include all the elements of s 26 statement of reasons, but the Information Commissioner is of the view that it would be good administrative practice for a decision maker to do so. Such notices to third parties include:

- a decision to give access to documents affecting Commonwealth-State relations, where consultation has occurred (s 26A(3))
- decision to give access to documents that contain business information, where consultation has occurred and a submission was made in support of the exemption contention (s 27(6))
- a decision to give access to documents containing personal information, where consultation has occurred and a submission was made in support of the exemption contention (s 27A(5)).
Question 17

Question 17: What, if any, exemptions should there be from any obligation to provide reasons?

Exemption from obligation to provide reasons

Section 25(1) of the FOI Act restricts the general right to reasons by emphasising that the Act does not require disclosure of information relating to the existence or non-existence of a document if the inclusion of that information would make a document an exempt document under ss 33 (documents affecting national security, defence or international relations) or s 37(1) (documents affecting law enforcement and protection of public safety).

Section 25(2) allows an agency or minister dealing with the request to give notice in writing that the agency or minister neither confirms nor denies the existence of the document but that if the document existed, then the document would be exempt under ss 33 and 37(1). Section 25 is set out in Appendix B.

Only where an agency or minister elects to provide a notice to the applicant neither denying nor confirming the existence of the document would the requirements of s 26 apply.

Exemption of non-government bodies from providing reasons

We query the intention and meaning behind paragraph 4.125 of the Consultation Paper which provides that ‘if the jurisdiction of a general statutory review mechanism extended to decisions made by non-government bodies, it may not be appropriate for these bodies to have an obligation to provide reasons’. We submit that if a general statutory review mechanism extends to decisions made by non-government bodies, the framework of the obligation to provide reasons should also apply.

Question 18

Question 18: What form should a statement of reasons take when provided on request under a general statutory scheme? What other forms do statements of reasons take?

Form of statement of reasons

Please see our response to question 16 regarding the content of a statement of reasons under s 26.
Question 19

Question 19: What other consequences, if any, should there be for a failure to provide adequate reasons, particularly if there was a general obligation to provide reasons?

Consequences for providing inadequate reasons

We submit that the consequence for failing to provide adequate reasons should be that the decision maker could be required within a specified period to provide adequate or better reasons for their decision.

Section 55E of the FOI Act provides that if an Information Commissioner review application has been made and the Information Commissioner believes that the agency or minister did not provide a statement of reasons under s 26 or failed to provide adequate reasons, the Information Commissioner can require the agency or minister to provide an adequate statement of reasons as per s 26 within a specified period or within 28 days after the day the notice was given to the agency or minister. Section 55E is set out in Appendix B.

Section 28(5) of the Administrative Appeals Tribunal Act 1975 (the AAT Act) provides the AAT a similar power: if the AAT considers that the statement does not contain adequate particulars of findings, evidence or reasons, the AAT can make a declaration that the decision maker provide additional statements containing further and better particulars within 28 days after the AAT makes a declaration. Section 28 of the AAT Act is set out in Appendix C.
App\ndex A  Notes

(i) Restricted application of the Freedom of Information Act 1982

The FOI Act has a restricted application to courts, the Australian Industrial Relations Commission, the Australian Fair Pay Commission, and the Industrial Registrar and Deputy Industrial Registrars (ss 5, 6). Specifically, the Act only applies in respect of those bodies to requests for access to documents that relate to ‘matters of an administrative nature’, a phrase that is not defined in the Act. It is implicit in that phrase that the Act does not apply to documents that relate to the judicial or adjudicative functions of those bodies. For example, the FOI Act does not apply to documents relating to the proceedings or decision of a court, nor to the exercise of the court’s judicial functions by an officer such as the registrar. The FOI Act provides in similar terms that it only applies to the Official Secretary to the Governor-General in respect of requests for access to documents that relate to ‘matters of an administrative nature’ (s 6A). Implicitly, the Act does not apply to requests for access to documents that relate to the Governor-General’s discharge of official functions conferred by the Constitution or an enactment.

Sections 7(1) and 7(1A) of the FOI Act (supplemented by Schedule 2, Part 1) designate other bodies that are not agencies for the purposes of the FOI Act:

- Aboriginal Land Councils and Land Trusts
- Auditor-General
- Australian Government Solicitor
- Australian Industry Development Corporation
- Australian Secret Intelligence Service (ASIS)
- Australian Security Intelligence Organisation (ASIO)
- Inspector-General of Intelligence and Security (IGIS)
- National Workplace Relations Consultative Council
- Office of National Assessments (ONA)

and the following defence intelligence agencies:

- Defence Imagery and Geospatial Organisation (DIGO)
- Defence Intelligence Organisation (DIO)
- Defence Signals Directorate (DSD).

Section 7(2) (supplemented by Schedule 2, Part II) lists agencies that are exempt from the operation of the FOI Act in relation to particular types of documents. The list includes: the Australian Broadcasting Corporation and Special Broadcasting Service in relation to program material and datacasting content; the Reserve Bank of Australia in relation to its banking operations and exchange control matters; the Australian Statistician, in relation to documents containing information collected under the Census and Statistics Act 1905; and various bodies (such as Australia Post, Comcare, Commonwealth Scientific and Industrial Research Organisation (CSIRO) and Medicare) in relation to documents in respect of commercial activities. The term ‘commercial activities’ is defined as meaning a body’s current or proposed commercial activities that are carried on in competition with persons other than government agencies (s 7(3)). For a complete list of bodies exempt under s 7(2), see Schedule 2, Part II, of the FOI Act.

All Australian Government agencies are exempt from the operation of the Act in relation to ‘intelligence agency documents’ (for example, a document that originated with or was received from ASIO or ONA) (s 7(2A)) and ‘defence intelligence documents’ (for example, a document that originated with or was received from the Department of Defence and relates to the collection, reporting or analysis of operational intelligence (s 7(2C)). These exemptions also apply to documents in the possession of ministers (s 7(2B)).

The exemption extends to a part of a document that contains an extract from or a summary of an intelligence agency document or a defence intelligence document. The remainder of the document is not exempt on the same basis, and access may have to be given after deletion of the exempt material under s 22.
(ii) Decisions which require a statement of reasons

A statement of reasons is required to be provided under s 26 to the applicant, in writing, for decisions where:

(a) access to a requested document is refused, including because:
   - a requested document is exempt from release
   - the document is not a document of the agency or an official document of a minister
   - the document has not been sufficiently identified in the request
   - the document does not exist or cannot be found
   - a practical refusal reason exists, or
   - the access provisions do not apply to the document (e.g. it is a document to which ss 12 or 13 apply, or the requested document is not an official document of a minister)

(b) access to the requested document is deferred (s 26)

(c) access will be given in a different form (ss 20 and 26)

(d) a request to amend or annotate a record is refused (s 51D)

(e) any of the above decisions is made on internal review.
Appendix B   Extracts from the *Freedom of Information Act 1982*

25  *Information as to existence of certain documents*

(1) Nothing in this Act shall be taken to require an agency or Minister to give information as to the existence or non-existence of a document where information as to the existence or non-existence of that document, if included in a document of an agency, would cause the last-mentioned document to be an exempt document by virtue of section 33 or subsection 37(1).

(2) Where a request relates to a document that is, or if it existed would be, of a kind referred to in subsection (1), the agency or Minister dealing with the request may give notice in writing to the applicant that the agency or the Minister, as the case may be, neither confirms nor denies the existence, as a document of the agency or an official document of the Minister, of such a document but that, assuming the existence of such a document, it would be an exempt document under section 33 or subsection 37(1) and, where such a notice is given:

(a) section 26 applies as if the decision to give such a notice were a decision referred to in that section; and

(b) the decision shall, for the purposes of Part VI, be deemed to be a decision refusing to grant access to the document in accordance with the request for the reason that the document would, if it existed, be an exempt document under section 33 or subsection 37(1), as the case may be.

26  *Reasons and other particulars of decisions to be given*

(1) Where, in relation to a request, a decision is made relating to a refusal to grant access to a document in accordance with the request or deferring provision of access to a document, the decision-maker shall cause the applicant to be given notice in writing of the decision, and the notice shall:

(a) state the findings on any material questions of fact, referring to the material on which those findings were based, and state the reasons for the decision; and

(aa) in the case of a decision to refuse to give access to a conditionally exempt document—include in those reasons the public interest factors taken into account in making the decision; and

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).

(b) where the decision relates to a document of an agency, state the name and designation of the person giving the decision; and

(c) give to the applicant appropriate information concerning:

(i) his or her rights with respect to review of the decision;

(ii) his or her rights to make a complaint to the Information Commissioner in relation to the decision; and

(iii) the procedure for the exercise of the rights referred to in subparagraphs (i) and (ii); including (where applicable) particulars of the manner in which an application for internal review (Part VI) and IC review (Part VII) may be made.

(1A) Section 13 of the *Administrative Decisions (Judicial Review) Act 1977* does not apply to a decision referred to in subsection (1).

(2) A notice under this section is not required to contain any matter that is of such a nature that its inclusion in a document of an agency would cause that document to be an exempt document.
55E Procedure in IC review—inadequate reasons from decision maker

(1) This section applies if:

(a) an IC review application is made in relation to an IC reviewable decision made by an agency or a Minister; and

(b) the agency or Minister was required to provide a statement of reasons under section 26 for the decision to the person who made the request; and

(c) the Information Commissioner believes that:

(i) no statement has been provided; or

(ii) the statement that has been provided is inadequate.

(2) The Information Commissioner may, by notice in writing, require the agency or Minister to provide an adequate statement of reasons as mentioned in subsection 26(1).

(3) If the Information Commissioner gives notice under subsection (2), the agency or Minister must provide the adequate statement of reasons to the IC review applicant and the Information Commissioner within:

(a) the period specified in the notice; or

(b) if no period is specified in the notice—28 days after the day the notice was given to the agency or Minister.
Appendix C    Extract from the *Administrative Appeals Tribunal Act 1975*

28  *Person affected by decision may obtain reasons for decision*

*Request for statement of reasons*

(1) Subject to subsection (1AAA), if a person makes a decision in respect of which an application may be made to the Tribunal for a review, any person (in this section referred to as the *applicant*) who is entitled to apply to the Tribunal for a review of the decision may, by notice in writing given to the person who made the decision, request that person to give to the applicant a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision, and the person who made the decision shall, as soon as practicable but in any case within 28 days after receiving the request, prepare, and give to the applicant, such a statement.

*Exception—Security Appeals Division*

(1AAA) Subsection (1) does not apply to a decision if the powers of the Tribunal in respect of an application for review of the decision are required by subsection 19(6) to be exercised in the Security Appeals Division.

*What happens if decision-maker contests applicant’s entitlement to statement of reasons*

(1AA) Where a person to whom a request for a statement in relation to a decision is made by an applicant under subsection (1) is of the opinion that the applicant is not entitled to be given the statement, that person shall, as soon as practicable but in any case within 28 days after receiving the request, give to the applicant notice in writing of his or her opinion.

(1AB) A person who gives a notice under subsection (1A) with respect to a request for a statement in relation to a decision is not required to comply with the request unless the Tribunal, on application under subsection (1AC), decides that the applicant was entitled to be given the statement, and, if the Tribunal so decides, the first-mentioned person shall prepare the statement and give it to the applicant within 28 days after the decision of the Tribunal is given.

(1AC) The Tribunal shall, on an application being made, as prescribed, by an applicant who has received a notice under subsection (1AA) with respect to a request for a statement in relation to a decision, decide whether the applicant was, or was not, entitled to be given the statement.

*When decision-maker may refuse to give statement of reasons*

(1A) A person to whom a request for a statement in relation to a decision is made under subsection (1) may refuse to prepare and give the statement if:

(a) in the case of a decision the terms of which were recorded in writing and set out in a document that was given to the applicant—the request was not made on or before the twenty-eighth day after the day on which that document was given to the applicant; or

(b) in any other case—the request was not made within a reasonable time after the decision was made;

and in any such case the person to whom the request was made shall give to the applicant, as soon as practicable but in any case within 28 days after receiving the request, notice in writing stating that the statement will not be given to him or her and giving the reason why the statement will not be so given.

(1B) For the purposes of paragraph (1A)(b), a request for a statement in relation to a decision shall be deemed to have been made within a reasonable time after the decision was made if the Tribunal, on application by the person who made the request, declares that the request was made within a reasonable time after the decision was made.
Public interest certificate

(2) If the Attorney-General certifies, by writing signed by him or her, that the disclosure of any matter contained in a statement prepared in accordance with subsection (1) would be contrary to the public interest:

(a) by reason that it would prejudice the security, defence or international relations of Australia;
(b) by reason that it would involve the disclosure of deliberations of the Cabinet or of a Committee of the Cabinet; or
(c) for any other reason specified in the certificate that could form the basis for a claim by the Crown in right of the Commonwealth in a judicial proceeding that the matter should not be disclosed;

subsections (3) and (3A) have effect.

(3) A person to whom a request for a statement in relation to a decision is made under subsection (1):

(a) is not required to include in the statement any matter in relation to which the Attorney-General has given a certificate under subsection (2); and
(b) where the statement would be false or misleading if it did not include such matter—is not required by subsection (1) to give the statement to the applicant.

(3A) Where a certificate is given under subsection (2) in relation to matter contained in a statement prepared in accordance with subsection (1) in relation to a decision:

(a) the person who made the decision shall notify the applicant in writing:
   (i) in a case where the matter is not included in the statement—that the matter is not so included and giving the reason for not including the matter; or
   (ii) in a case where the statement is not given—that the statement will not be given and giving the reason for not giving the statement; and

(b) subsections 36(2), (3), (3A) and (4) and 36D(1) to (6), inclusive, apply in relation to any statement referred to in paragraph 37(1)(a) in relation to that decision that is lodged with the Tribunal under section 37 as if the certificate were a certificate given under subsection 36(1) in relation to any such matter that is contained in the last-mentioned statement.

When applicant not entitled to request statement of reasons

(4) The applicant is not entitled to make a request under subsection (1) if:

(a) the decision sets out the findings on material questions of fact, refers to the evidence or other material on which those findings were based and gives the reasons for the decision, and a document setting out the terms of the decision has been given to him or her; or

(b) a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision has already been given to him or her.

Inadequate statement of reasons

(5) If the Tribunal, upon application, as prescribed, for a declaration under this subsection made to it by an applicant to whom a statement has been given in pursuance of a request under subsection (1), considers that the statement does not contain adequate particulars of findings on material questions of fact, an adequate reference to the evidence or other material on which those findings were based or adequate particulars of the reasons for the decision, the Tribunal may make a declaration accordingly, and, where the Tribunal makes such a declaration, the person to whom the request for the statement was made shall, as soon as practicable but in any case within 28 days after the Tribunal makes the declaration, give to the applicant an additional statement or additional statements containing further and better particulars in relation to matters specified in the declaration with respect to those findings, that evidence or other material or those reasons.