Reply to: GPO Box 4889 SYDNEY NSW 2001

Australian Government
Australian Taxation Office

Sent by email only to: foidr@oaic.gov.au

Date: 30 June 2023

Dear OAIC

The Australian Taxation Office (ATO) welcomes the opportunity to provide submissions in response to OAIC's draft revisions 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'.

We have reviewed the draft revisions to the Directions and our submissions are set out below.

A – Direction to be followed by agencies

General procedure in relation to IC review of deemed refusal decisions

Commencement of review

Paragraphs 3.3 and 3.4 state that a notice to an agency will be accompanied by a direction requiring an agency to do one of three things. It seems that those three things encompass intended decisions to release documents in full, release documents in part, or refuse access to documents in full. Paragraph 3.5 states that agencies will have 3 weeks to comply with the direction.

There may be circumstances where the three options in paragraph 3.3 do not cover all eventualities. For instance, in a complex matter, it may be it is still unclear what or how many documents might be caught by a request, and an agency may be considering the need to rely on an unreasonable diversion of resources argument.

It may also be agencies will not be able to comply with a direction within three weeks, including because of the number of documents, the sensitivities of the documents or the time lapsed since the decision was made. Therefore, it might be appropriate to include softening language, to indicate that the three options will generally be applicable, and that extensions might be appropriate in some cases.

General procedure in relation to review of other access refusal and access grant decisions

Requirement to engage with the applicant

Paragraphs 4.2 and 4.3 state that upon being notified of an IC review, an agency will need to 'engage [via telephone or video conference], or make reasonable attempts to engage with, the IC review applicant during the IC review, for the purpose of genuinely attempting to resolve or narrow the issues in dispute in the IC review'. Paragraphs 4.5 and 4.6 discuss the 'evidence' an agency needs to provide of its actions in this regard, including about 'any proposals made by the agency or minister to resolve the IC review informally, and any response from the applicant'. Paragraph 4.7 states that if not all issues in dispute in the IC review are resolved through the process, an agency should consider whether to make a revised decision.

A general or aspirational statement of principle, to the effect that agencies must make reasonable attempts to engage with and genuinely attempt to resolve/narrow issues in dispute, is consistent with the ATO's approach to IC reviews and importantly, the approach to the management of FOI more broadly. Notably:

- Provide alternatives to the FOI Act to access information. The ATO can receive as many as 100,000 information requests per year, the majority of these are managed as a part of the ATO's 'business as usual' approach (or administrative requests outside of the FOI Act) including our 'copies of tax documents' process.
- As a result, most requests processed under the FOI Act (approximately 1,000 per annum) are linked to an underlying dispute or grievance and can be complicated. All FOIs are managed in the ATO's Office of General Counsel, with lawyers focusing on resolving or narrowing disputes where possible. With minimal exception, this includes engagement with the applicant at appropriate stages. Importantly, while the method of engagement may include a telephone call or video conference, this is not always the most effective form of engagement/It does not follow that the absence of a telephone call means that there has been a failure to engage.

Unless a direction would have prospects of utility in the majority of cases, the direction may be counterintuitive, especially if it leads to a 'tick box' exercise without delivering meaningful results in the majority of cases. In the present circumstances we consider the direction may have utility in any given case if it leads to the resolution of an issue that was capable of being resolved earlier, but for some reason was not.

In the case of the ATO, wherever possible routine requests for information (such as for copies of tax returns etc) are dealt with outside of FOI. This means most matters managed under FOI have a level of complexity or relate to an underlying dispute or grievance. It is already part of the FOI decision making process to consider issues such as size and scope of the request and engage with applicants about their requests. If disagreements about discretionary issues like this cannot be resolved either at initial decision or internal review stages, it is unlikely further intervention by the agency will progress the matter. In the case of 'non-discretionary' issues such as the application of the tax law confidentiality issues, there is little utility in the ATO setting out the same reasoning which has not been accepted by the applicant at initial decision or internal review stages.

In the ATO context, we consider a blanket direction would merely require us to reconsider what we have already considered. We appreciate that footnote 4 (see paragraph 4.5) indicates that an agency may not be required to engage in the conciliation process if it is able to provide evidence of having engaged 'in a similar process' at an earlier stage (noting that a request consultation process is not considered sufficient). However, the only 'process' discernible from the draft direction is the documentation of 'genuine and reasonable steps to contact the IC review applicant', and 'attempts made by the parties to resolve the issues in dispute, including any proposals made by the agency to minister to resolve the IC review informally'. In our view, meaningful consideration of potential avenues to resolve issues in dispute will frequently occur outside of this process (i.e. outside of direct contact with an applicant), such as by investigating issues or exploring options for resolution with other agency officers or with third parties, noting that in some circumstances an agency may make an assessment that engaging with an applicant is not likely to result in resolution of issues. Presumably an agency's attempts to resolve issues that do not involve engaging directly with an applicant will not be taken into consideration by the direction, and we will need to engage with the applicant when notified of an IC review in any event.

Aside from the duplication of resources, there will be circumstances where it will be appropriate for FOI officers to decide not to actively engage with applicants over and above what is necessary to perform their statutory functions (i.e. in acknowledging requests and providing notices/decisions/documents), for various reasons. Whilst perhaps rare, it is not necessarily uncommon for agencies to take steps to minimise interaction between an applicant and agency officers for WH&S reasons. Sometimes an agency may wish to control interaction with an applicant for other, but equally valid reasons. Sometimes an applicant will repetitively seek access to a document or information in circumstances where: an agency has (often on numerous occasions) clearly explained why they should not or cannot be given access (sometimes under an offence provision); it is clear that further engagement or reasoning is unlikely to resolve the impasse; and an agency has no ground to give in terms of compromise (i.e. be providing access to documents where it would be

inappropriate to do so). Presumably an agency's or an agency officer's decision process and actions taken in clearly explaining the situation to an applicant will not be regarded as sufficient by the direction.

Noting that there are other aspects of the direction that are aspirational and not directional, we consider either an aspirational or matter specific approach to direct contact with an applicant at the beginning of an IC review would be preferable.

General procedure for production and inspection of documents

Production of documents

Paragraph 5.2 states that 'in relation to IC reviews involving the application of exempts under the FOI Act, **the Information Commissioner will require the agency or minister to provide a marked up and unredacted copy of the documents at issue** in electronic format and the documents setting out any relevant consultations'. We take it that the requirement to provide documents will apply in every given case. We consider that the requirement should not exist in *every* case, and therefore submit that the Direction could be reworded to the effect that the Information Commissioner will *generally* (or *usually*) require . . .

The ATO appreciates, as is stated in paragraph 2.5, that agencies (and ministers) have the onus of establishing that a decision refusing access is justified, or that the Information Commissioner should give a decision that is adverse to the IC review applicant, and that the onus must be satisfied by providing 'complete and appropriate evidence'. We also agree that in most cases, the matters in the documents within the scope of an FOI request will be relevant to the exemption status of those documents. In some cases, however, complete and appropriate evidence in justification of an exemption claim can exist without having to have regard to the documents in question. In such cases we should not be obligated to provide the documents for the purposes of the IC review. When appropriate, we make such exemption decisions at first instance without first searching for and collating the documents, as doing so uses resources and having access to the relevant documents will not alter our decisions. Accordingly, if such a decision proceeds to IC review, we would be searching for and collating documents solely for the purposes of the IC review.

An example scenario in the ATO context is when a person or other entity (the first entity) asks for a document containing protected information about another entity (the second entity) and we are clearly not able as a matter of law to provide information about the second entity to the first entity. A simple example of this is if Person A request a copy of Person B's tax return and they are not appointed as an authorised contact. It would be an offence (relevant to section 38 of the FOI Act) to provide to the first entity protected information about the second entity, and no exceptions to the offence provision arises in the circumstances of the request.

The ATO submits that in such circumstances the wording of the FOI request itself constitutes the evidence that shows that a document covered by a request is exempt. If an FOI applicant specifically asks (by the wording of their request) for protected information about another entity, in circumstances where no 'exceptions' are apparent, we know that we cannot disclose any such information to the applicant. This is the case regardless of the size of the request (and for completeness, even disclosing information tending to show the number of documents the ATO holds about an entity will constitute information about the affairs (and therefore protected information) of the entity). Searching for a document covered by such a request can do no more than confirm that it is covered by the request (in which case it cannot be disclosed), or that it is not covered by the request. In neither case will the applicant receive the document. Searching for and collating documents however does use resources.

In these cases, and other cases where similar issues arise (because an offence provision is not the only circumstance in which this scenario will arise), we consider we should not be required to provide documents covered by a request where there is other evidence (including the wording of an FOI request itself) capable of justifying a claim that a document is exempt. We add that this will usually be the case where whole documents are exempt on this basis, albeit this may not always be the case (for instance, there may be cases where we know that parts of documents will be exempt from disclosure without having accessed them, whereas the remainders of the documents are irrelevant). We do not make this

contention (that we should not need to provide documents to the Information Commissioner) where, even in part, access to the information in a document is necessary to conclude that it is exempt.

We suggest that the wording of the direction be changed to acknowledge that the provision of documents may not be necessary in every given case.

Production of a schedule

At paragraph 5.3 it is stated that a 'Schedule of marked up documents must also be included'.

The ATO considers that this requirement should not be necessary in every given case. As an example in the ATO context, we may be processing numerous documents requiring discrete redactions, for instance we may mainly be removing user IDs (as a security precaution) from simple processing or tax documents. In cases such as these, the logic of the redaction (which is clearly explained in the decision letter) will be the same in each instance, what is being removed is clearly signposted by the redaction marking, and otherwise the nature of the document will still be self-evident from the remainder of the document that is being released. In these cases, the usual utility in providing descriptions of documents in a schedule will not exist. Further, we now provide documents in electronic bundles so a particular exemption can be located in seconds. Given that the production of a schedule requires resources, we consider that this requirement might be limited to 'where appropriate'.

For completeness, we add that in some circumstances and as envisaged by section 26(2), and as an example, even giving an applicant an idea of what types of documents (including by providing a schedule of documents) the ATO will hold about an entity, or how many, will constitute exempt information which should not be disclosed.

Timeframes for providing responses

At paragraph 5.6 it is stated that agencies must provide their responses within the timeframe set out in the notice, and that further time will only be granted in extenuating circumstances. We suggest that the use of the word 'extenuating' overstates the gravity of an agency not being able to provide a response within the time set by an OAIC officer, noting that the circumstances underlying FOI requests can be wildly different and as noted in relation to paragraph 3.5 above, there are issues such as the number of documents, the sensitivities of the documents and the time which has lapsed since the original decision was made which will all contribute to the work involved in responding to an IC review. We suggest that extensions of time should be available where appropriate. It is also quite possible it may be difficult or impracticable to seek extensions prior to the date ending, and the requirement to make an extension request in writing and with supporting evidence prior to the due date in every case overlooks the fact that agency officers will often be doing their utmost to comply with deadlines amongst competing possibilities, only to run out of time (for varying reasons, often outside of their or their agency's control) at the last minute.

General procedure in relation to submissions made during an IC review

No further submissions

Paragraph 6.4 states that subject to paragraph 6.6, the Information Commissioner will not accept any further submissions from either party to the IC review. Paragraph 6.6 is about procedural fairness requirements and instances where a preliminary view might result in a revised decision being made by an agency. We suggest that the two circumstances envisaged in paragraph 6.6 are not the only types of occasion where it might be appropriate to allow a party to make further submissions, so we suggest less prescriptive wording be adopted.

Request to make submissions in confidence

Paragraph 6.7 states that a request to make a submission in confidence must be made before providing the submission. We do not understand why this needs to be the case, or why such a request could not be received at the same time the submission is made. The actions in paragraph 6.9 could still take place if the request for confidentiality and the submission itself were received at the same time.

B - Direction to be followed by applicants

Making an application for IC review

Requirement to seek internal review

At paragraph 1.17a, it notes the OAIC considers it is 'usually' better for an applicant to seek an internal review. It is unclear from this statement whether there will be any requirement on the applicant to either seek the review or provide details on why they did not consider it appropriate in the circumstances.

Timeliness of Applications

Noting the strict timeframe which are proposed for agencies – see for example the discussion in paragraph 5.6 of the proposed directions for Agencies – consideration should be given to whether a delay in seeking a review by an applicant will be a ground for providing an agency with additional time to respond; noting that it is generally more difficult and time consuming to respond to aged matters.

Applicants' contentions

In paragraph 1.18, there is a reference to what an IC review application 'should' contain. In the context of the mandatory consultation requirement proposed to be put on agencies it would appear appropriate for applicants to be required to provide the information set out in this paragraph prior to any consultation occurring.

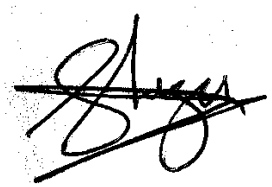
Participation in the review

Failure to engage

Further information is required for applicants on what is constitutes failing to engage. Noting the requirements of an IC review application in paragraph 1.18, would a failure to provide this information be considered a 'failure to engage'. It would also be helpful to provide applicants with further details about what is expected of them in terms of participating in agency engagement and that simply attending a meeting with no intention to attempt to resolve the review application would be not considered appropriate 'engagement'. Noting the resources required to be expended by agencies as part of the proposed mandatory consultation process, clear enforceable requirements on applicants will assist in making such consultations meaningful and productive.

Please do not hesitate to contact us should you have any queries or require further information.

Yours sincerely



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