



Administrative Appeals Tribunal

8 June 2023

Office of the Australian Information Commissioner
GPO Box 5288
SYDNEY NSW 2001

By email: foidr@oaic.gov.au

Dear Sir/Madam,

Consultation on draft 'Direction as to certain procedures to be followed in Information Commissioner reviews' (for agencies) and 'Direction as to certain procedures to be followed by applicants in Information Commissioner reviews'

I refer to the Office of the Australian Information Commissioner's (OAIC's) request for comments on the draft *Direction as to certain procedures to be followed in IC reviews* and the draft *Direction as to certain procedures to be followed by applicants in Information Commissioner reviews*.

The Administrative Appeals Tribunal's Legal and Policy Section coordinates the Tribunal's response to IC reviews in respect of decisions made by the Tribunal under the *Freedom of Information Act 1982* (FOI Act) on FOI requests for documents we hold. We provide the comments below for your consideration.

DIRECTION AS TO CERTAIN PROCEDURES TO BE FOLLOWED IN IC REVIEWS

General comments

The proposed IC review process has a number of components and it would be helpful if the direction could identify more clearly how it is proposed that they and the related time frames fit together. For example, it would be helpful to understand:

- whether the outcome of any engagement with the applicant would be reviewed by the OAIC before an agency is required to produce the documents relating to the issues to be considered in the review
- at what stage of the process the initial triage and early resolution process referred to in paragraph 6.2 will occur and what that comprises.

A flow chart would assist readers.

If we understand them correctly, the time frames are generally too short, particularly given the growth in complexity of digital information collection and storage and the resulting increasing breadth and volume of requests.

In general, we consider the efficiency of the review process will be enhanced if the issues in the review are determined by the OAIC as early as possible and conveyed to the parties, enabling the parties to focus their resources on the real issues in dispute and for expectations to be managed. Consistent language should be used when referring to the issues.

The engagement process should only occur where there has been no internal review and the manner in which it should be conducted should be left to the agency, which will have a better understanding of the best way to communicate with the applicant.

We also consider that, given the significant variation in the complexity of requests and IC reviews, the setting of time periods for the provision of material should be done in consultation with the agency rather than relying on standard time frames as proposed, some of which are short. It is usual for a court or tribunal to ask parties how long they need to undertake certain tasks in setting a timetable for dealing with a matter. This will help ensure time frames can be met and avoid the need to commit resources to administering extension of time requests rather than dealing with the substantive issues in the review.

Paragraph 3.3(b) – “to provide all relevant processing documents and the documents remaining at issue to the Information Commissioner”

The requirement to provide the processing documents and remaining documents at this stage of a review based on a deemed refusal seems premature. A check should be made with the applicant as to whether or not they want a review of material exempted under the decision before the material is unnecessarily collected and submitted to the OAIC.

Paragraph 3.3(c) – “to make submissions in support of the access refusal if the agency or minister intends refusing access to the requested documents”

We query whether, rather than providing submissions at this stage, it would be preferable to provide a statement of reasons for the decision. In relation to the requirement to provide all relevant processing documents and exempt documents at this stage of the review, we make the same comment as in relation to paragraph 3.3(b).

Paragraph 3.4 – “3 weeks to respond to the Information Commissioner’s written direction”

The period of 3 weeks may be too short depending on the particular request and cause of the original deemed refusal. Subject to how this paragraph relates to any application by an agency or minister for further time to deal with a request that may be made under subsection 15AC(4) or 54D(3) of the FOI Act, it could refer to the possibility of seeking an extension of the time frame by way of consultation.

Paragraph 4.2 – “require the agency or minister to engage”

We consider that the requirement to engage with the applicant should apply only to cases in which there has been no internal review. Engagement usually takes place in the internal review context and this step may simply cause delay (or even annoy the applicant) where engagement has already occurred.

Paragraph 4.3 – “Engagement ... will comprise a telephone or video conference “

The manner of any engagement should be left to agencies to determine. Some applicants prefer dealing with agencies in writing because they can consider correspondence in their own time and are not required to take time out to engage with the agency during their working day.

A small number of applicants have engaged in abusive or other unreasonable behaviour and may be subject to contact restriction protocols within agencies. It would be unreasonable to undermine these arrangements or to require agency staff to manage potential psychological hazards.

Paragraph 4.5 – “the issues identified in the IC review application”

It is not clear how and when identification of the issues in the IC review application occurs. Some applications identify issues very clearly but in others the issues may be voluminous, unreasonable or difficult to discern. In our view, the OAIC should identify the issues at the point of notifying the agency of the application and also inform the applicant of the issues that the OAIC is considering. This will manage the scope and expectations of any further engagement with the applicant.

Paragraph 4.6 – “evidence to be provided to the Information Commissioner”

We query whether the requirement to inform the Information Commissioner that genuine and reasonable steps have been taken by an agency to engage with the IC review applicant could be satisfied by the provision of a statement similar to the genuine steps statement required in the federal courts by section 6 of the *Civil Dispute Resolution Act 2011*. If the OAIC were not satisfied with the content of such a statement, it could request the provision of primary evidence of the kind outlined. This would appear to be a more proportionate approach.

Paragraph 4.8 – “in accordance with the applicant’s FOI request”

It may be more appropriate for the reference to the “applicant’s FOI request” to be a reference to the applicant’s IC review request. The requirement to provide documents appears to assume that the applicant’s position on their IC review remains unchanged. The requirement could be changed to requiring documents relating only to issues that remain in dispute. This would be consistent with an approach where the OAIC clarifies the issues early on in the process.

Paragraph 5.3 – marking up and schedule requirements

These requirements can be resource intensive in requests involving large numbers of documents. To enhance reasonable flexibility, we suggest this paragraph refer to the Information Commissioner's ability to specify alternative requirements. These could be determined in consultation with the agency or minister where appropriate. The resource implications underscore the importance of this step generally being undertaken once the issues in dispute have been confirmed.

Paragraph 5.6 – “within the timeframe set out in the notice”

It is not entirely clear in the direction as currently drafted how the time frame in the notice is determined. If this step is to be undertaken within the usual 8-week period referred to in paragraph 4.4, it would not appear to provide the opportunity for the outcome of any engagement with the applicant to be considered by the OAIC and taken into account in narrowing the scope of what is provided to the issues in dispute. As noted above, we suggest this time frame be determined in consultation with the agency after the issues to be considered are identified.

Paragraphs 6.2 and 6.5 – “written submissions will be sought from parties” and 4 weeks to make their submissions

The stage of the process at which submissions will be requested is not clear. Paragraph 6.2 refers to submissions being requested following the completion of “the initial triage and early resolution process and once the matter has been assigned to a review adviser for substantive review/case management”. Whether these are separate events and the stage at which they will generally occur has not been identified in the draft direction.

Paragraph 6.9 – last sentence

The expression in the last sentence is not clear to us.

Paragraph 6.12 – “put forward all relevant contentions and supporting reasons in response to the notice of review”

Is the “notice of review” the same as the notice under s 54Z of the FOI Act? If so, this could be clarified.

Annexure 1 Paragraph 1.2 – “at least 2 weeks”

Given that the preparation of information and/or documents required by a Notice to Produce may be resource intensive and that failure to comply is an offence, we suggest this time period be set following consultation with the agency.

***DIRECTION AS TO CERTAIN PROCEDURES TO BE FOLLOWED BY APPLICANTS
IN INFORMATION COMMISSIONER REVIEWS***

Paragraph 1.13 - “the OAIC will consider any notices as received when sent to an applicant’s preferred contact”

The OAIC may wish to consider referring to an exception where there is evidence of non-receipt, such as a returned letter or email non delivery message.

Paragraph 1.15 – who may make an application for IC review

This paragraph refers only to applications made by, or on behalf of, the person who made the original FOI request. It does not refer to applications made by affected third parties for review of access grant decisions. It is not clear whether there may be any differences in relation to the application requirements set out in subsequent paragraphs for such applications.

Paragraph 1.17(b) – “date of the FOI decision”

The OAIC may wish to consider whether the date of receipt of the decision is also relevant.

Paragraph 1.18(a) – “identify the aspect(s) of the agency’s or Minister’s decision about which the IC review is sought”

This wording may be confusing for some readers. One option for consideration, assuming the applicant is the reader, is “identify the parts of the decision you want the Information Commissioner to review”.

If the OAIC and the respondent may rely on what is set out in the IC review application about the matters referred to in paragraph 1.18 to help define the scope of the review and what is required to be provided by the respondent during the review, this could be stated in the direction to help manage expectations.

Paragraph 1.23 – “OAIC requires agencies and Ministers to engage with the IC review applicant at the commencement of an IC review”

As noted above in relation to other direction, we consider the requirement to engage with the applicant should only apply where there has been no internal review of the decision.

The third sentence states that agencies are required to contact applicants for IC review shortly after the IC review application is lodged to arrange a suitable time for the engagement process. We query whether the reference to the IC review application being lodged should be a reference to the agency or minister being notified of the IC review application. As noted above, the preferable way in which engagement is undertaken should be a matter for the agency or minister to determine.

Paragraph 1.31 – “preliminary view”

If there is an opportunity for the parties to provide information in response to the preliminary view, it may be useful to state this. Such a view may raise a fact or issue that can be addressed.

Thank you for the opportunity to make comments on the draft Directions. Please contact me if you have any questions about the comments.

Yours sincerely,

Sandra Koller

Sandra Koller
Director, Legal and Policy