Law Council
OF AUSTRALIA

Federal Dispute Resolution Section

29 September 2023

Office of the Australian Information Commissioner
GPO Box 5218
Sydney NSW 2001

By email: foidr@oaic.gov.au

Dear Sir/Madam

Consultation on updates to Part 6 (v 1.4) of the FOI Guidelines: conditional exemptions

This submission has been prepared by the Administrative Law Committee of the Law Council of Australia's Federal Dispute Resolution Section. The Committee welcomes the opportunity to make a submission to the Office of the Australian Information Commissioner in relation to the Consultation on updates to Part 6 (v 1.4) of the FOI Guidelines: conditional exemptions.

The following are comments limited to three aspects of Chapter 6.

"Harm threshold"

1. The expression "harm threshold" features throughout Chapter 6. That expression is not found in the FOI Act. It appears first in [6.4], features twice as an important element of the flow chart in [6.5], and appears again in [6.7], [6.8] and thereafter. Here and elsewhere in Chapter 6 it is used to refer generally to the statutory conditions for the application of each of sections 47B, 47C, 47D, 47E, 47F, 47G, 47H and 47J ("conditional exemptions sections"), as distinct from the public interest test in subsection 11A(5) coupled with section 11B).

2. The Committee considers that use of the expression "harm threshold" does not give appropriate guidance. None of the conditional exemption sections contains the word "harm". The only conditional exemption sections containing words close to meaning "harm" are section 47B, (referring to "damage" to Commonwealth-State relations) and section 47J (referring to a substantial adverse effect on Australia's economy).

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Sections 47D, 47E and 47J refer to a "substantial adverse effect" on an interest or an activity, but that need not be assumed to be a harm. Section 47H refers to disadvantage", but that is not a harm. Sections 47F, 47G and 47H refer to "unreasonable" disclosure, but that is different from, and need not amount to, a harm.

3. The use of "harm threshold" in the Guidelines could tend to encourage FOI decision-makers seeking to follow the Guidelines to place a gloss on the statutory language. The use of the word "harm" could suggest that, if the statutory condition is met, release is known to result in harm, thereby distorting the decision-maker's approach to the public interest test. A recent case illustrating the problems that can occur in placing a gloss on statutory language is *Ceerose Pty Ltd v A-Civil Aust Pty Ltd* [2023] NSWCA 215.

4. In any particular case, it is a mixed question of fact and law as to whether a document falls within one of the statutory conditions. If it does, then the public interest test is applied. The conditions are complex and varied. There is no general "harm threshold".

The Committee considers that the expression "harm threshold" should be removed from the flow chart and throughout Chapter 6. In the flow chart, and possibly elsewhere, the expression "statutory criterion for the conditional exemption" could be used.

Public interest test within a statutory test for a conditional exemption

5. Prior to the 2010 amendments to the FOI Act, there were public interest tests within a number of the exemptions, expressed in slightly different words. For each section there developed a body of case-law on the application of that section's public interest test. The 2010 amendments aimed to provide one discrete public interest test that would apply across all these exemptions, which became the "conditional exemptions".

6. Whilst the draft Chapter recognises this, it states in [6.8]–[6.10] that some of the conditional exemptions embed an additional public interest test. That is hidden in the use of the word "unreasonable" in ss 47G and 47F (at [6.8]-[[6.11]). It is said to involve balancing public interests against non-public interests, in contrast to the public interest balancing under subsection 11A(5).

7. The Committee considers that the introduction of this preliminary "public non-public interest" balancing test (to be followed by the "public public" balancing test under subsection 11A(5) coupled with section 11B) is confusing and misconceived. There are some pre-2010 cases that discuss a public interest element captured by the word "unreasonable" in the predecessor to section 47G. Those cases do not support this approach in the Guidelines to the conditional exemptions. The only AAT case relied upon as authority is *Re Bell and Secretary, Department of Health (Freedom of Information)* [2015] AATA 494 at [44] (see Chapter 6 [6.10] n12). In *Re Bell* at [39] Forgie DP asked the question whether that old understanding survived the introduction of the general public interest test. Then at [48]–[49] of *Re Bell* having considered the existing FOI Guidelines, Version 1.3, October 2014 at [6.26], [6.165], which she was bound to take into account, Forgie DP applied the old balancing test, of public and non-public interests, that the old cases held were embedded in the concept of reasonableness in paragraph 47G(1)(a).

8. Guidance in applying a statutory test of reasonableness or unreasonableness can be found in the majority judgments in *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423. That case concerned the test under former section 58C of the unamended FOI Act as to whether the AAT had "reasonable grounds" for finding an exemption subject to a ministerial certificate was made out. *McKinnon* nonetheless gives guidance on how a statutory test of reasonableness is to be applied. That is not a public interest balancing test. Rather it is a question of whether the relevant conclusion can be supported by logical arguments which, taken together, are reasonable ones to be adopted: at [56] per Hayne J. In *McKinnon* at [61]–[63], Hayne J approved an earlier Full Federal Court judgment dealing with the phrase "could reasonably be expected to prejudice" in former section 43 of the unamended FOI Act (operations of agency exemption, now the conditional exemption in section 47E). The Full Federal Court said that it is undesirable to paraphrase those words or place a gloss on them. Hayne J agreed. Callinan and Heydon JJ said at [131] that the test is as stated in the statutory language. The reasonableness test is not in itself a public interest balancing test: *McKinnon* at [65] per Hayne J, [129], [131] per Callinan and Heydon JJ.

Section 47B and the meaning of "consultations"

9. As part of the discussion of the operation and application of section 47B (at [6.22]–[6.44]), reference is made to section 26A (at [6.39]–[6.44]). Section 26A is concerned with consultation under the FOI Act, where a document sought originates from a State, and applies regardless of any exemption that might be claimed. It is confusing to refer to this process under the FOI Act here, as the scope of paragraph 47B(a) is not confined by reference to the scope of the duty imposed by section 26A.

Incoming Government Brief ("IGB")

10. There is a detailed discussion (at [6.248]-6.254]) as to whether an IGB can be claimed to be exempt. It is not clear why that particular kind of document deserves special mention. It is properly acknowledged at [6.11] that no "class claims" can be made that certain types of documents are exempt under certain sections. The Committee considers that the discussion of IGBs could probably be removed.

11. In an event, the discussion seems a little unbalanced, in failing to give attention to *Re Dreyfus and Secretary Attorney-General's Department* [2015] AATA 962 decided by Bennett J, a judicial presidential member of the AAT (the case is referred to at n 209, but in relation to a different discussion).

The Committee would welcome the opportunity to discuss this submission with the OAIC. In the first instance, please contact Ms Margaret Allars SC, the Committee Chair, on allars@elevenwentworth.com.

Yours sincerely

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Chair, Federal Dispute Resolution Section