

## **Administrative Review Tribunal (Freedom of Information) Practice Direction 2024**

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I, the Hon Justice Emiliios Kyrou AO, President of the Administrative Review Tribunal, make the following Practice Direction.

Dated                    14 October 2024

THE HON JUSTICE EMILIOS KYROU AO  
President, Administrative Review Tribunal

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This is a republication of the Practice Direction made on 14 October 2024 which addresses minor formatting issues in the original published version.

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## **Part 1. Preliminary**

- 1.1 This Practice Direction is made under section 36(1) of the *Administrative Review Tribunal Act 2024* (Act).
- 1.2 This Practice Direction is arranged in 5 Parts:
  - (a) Part 1 – Preliminary;
  - (b) Part 2 – General conduct and procedure of reviews of FOI Decisions;
  - (c) Part 3 – Procedures relating to documents in issue;
  - (d) Part 4– Confidential evidence and submissions, closed hearings and confidential reasons; and
  - (e) Part 5 – Inspector-General of Intelligence and Security to give evidence in certain proceedings.
- 1.3 This Practice Direction commences on 14 October 2024 and has effect from that date. This Practice Direction applies to all applications for review of FOI Decisions whether lodged before, on or after this date, and remains in effect until it is superseded or revoked.
- 1.4 The purpose of this Practice Direction is to make directions about the practice and procedures relating to applications for review of FOI Decisions and the conduct of proceedings that apply to the review of FOI Decisions.
- 1.5 This Practice Direction should be read together with the *Administrative Review Tribunal (Common Procedures) Practice Direction 2024*.
- 1.6 To the extent that this Practice Direction is inconsistent with the *Administrative Review Tribunal (Common Procedures) Practice Direction 2024* in relation to applications for review of FOI Decisions, the provisions of this Practice Direction prevail. However, where this Practice Direction is silent in respect of any matter, the provisions of the *Administrative Review Tribunal (Common Procedures) Practice Direction 2024* shall apply.
- 1.7 This Practice Direction does not apply to the extent that it is inconsistent with:
  - (a) a provision of the Act or another Act or instrument under which the Tribunal has powers to review decisions;
  - (b) a provision of a regulation made under the Act or another Act; or
  - (c) a provision of a rule made under the Act.

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- 1.8 If the Tribunal makes a direction in relation to a proceeding that is inconsistent with this Practice Direction, the Tribunal’s direction applies to that proceeding and this Practice Direction does not apply, to the extent of the inconsistency.
- 1.9 A failure by the Tribunal to comply with this Practice Direction does not affect the validity of anything done by the Tribunal.
- 1.10 A failure by a party or any other person to comply with this Practice Direction may have consequences for the progress of the application or the person’s participation in the review, including dismissal of the application, in accordance with the provisions of the Act or any other applicable statutory instrument.

### ***Definitions***

- 1.11 In this Practice Direction:

***access applicant*** means the person who made the request for access to documents in respect of which the decision under review was made.

***Act*** means the *Administrative Review Tribunal Act 2024*.

***affected third parties*** has the same [meaning as under the FOI Act](#).

***closed hearing*** means a hearing that proceeds in the absence of the access applicant and the access applicant’s representatives.

***closed submissions*** means written submissions which are lodged with the Tribunal but not disclosed to the access applicant or the access applicant’s representatives.

***decision-maker*** means the principal officer of the agency, or the Minister, to whom the request for access to documents under the FOI Act was made.

***documents in issue*** means the documents subject to the decision under review that are claimed to be exempt.

***exempt document*** has the same meaning as in the FOI Act.

***FOI Act*** means the *Freedom of Information Act 1982*.

***FOI Decisions*** means those decisions identified at 1.12 below.

***Guidance and Appeals Panel*** has the same meaning as in the Act.

***IC Review*** means a review undertaken by the Information Commissioner.

***IC Reviewable Decision*** has the same meaning as in section 54K of the FOI Act.

***Information Commissioner*** has the meaning given by the *Australian Information Commissioner Act 2010*.

***Member*** means a member of the Tribunal.

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***open submissions*** means submissions relating to confidential evidence or a closed hearing which can be provided to the access applicant or the access applicant's representative.

***redact*** means to obscure or remove sensitive information from a document so that the sensitive information is no longer visible.

***representative*** means a person who is authorised to represent a party.

***Rules*** means the Rules made under the Act.

***Tribunal*** means the Administrative Review Tribunal.

### ***Decisions covered by this Practice Direction***

1.12 This Practice Direction applies to:

- (a) decisions made by the Information Commissioner on an IC Review; and
- (b) IC Reviewable Decisions if the Information Commissioner makes a decision under section 54W(b) of the FOI Act that it is desirable that the review of the IC Reviewable Decision be undertaken by the Tribunal.

## **Part 2. General conduct and procedure of reviews of FOI Decisions**

- 2.1 A person making an application for review of an FOI Decision should follow the requirements in the *Administrative Review Tribunal (Common Procedures) Practice Direction 2024* except where expressly set out otherwise in this Practice Direction.
- 2.2 An application for review of decisions referred to at 1.12(b) above must be made within the period starting on the day the decision by the Information Commissioner is made and ending at the period prescribed by the Rules. For all other applications paragraphs 3.10 to 3.11 of the *Administrative Review Tribunal (Common Procedures) Practice Direction 2024* apply.
- 2.3 The access applicant will be a party to the review, even if they did not make the application to the Tribunal.
- 2.4 Agencies to which the request for access was made have an obligation to notify affected third parties that an application has been made to the Tribunal.
- 2.5 FOI Decisions cannot be referred to the Guidance and Appeals Panel.

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### **Part 3. Procedures relating to the documents in issue**

- 3.1 Where the decision-maker claims that a document is an exempt document, the decision-maker must not include that document with the documents lodged with the Tribunal under section 23 of the Act.

**Note:** The decision-maker must not lodge the documents that are claimed to be exempt and then request that the Tribunal make a confidentiality order under section 70 of the Act.

#### ***Provision of documents in issue***

- 3.2 The decision-maker may elect to lodge the documents in issue, or the Tribunal may require lodgement, under sections 58E or 64 of the FOI Act.
- 3.3 The decision-maker should ordinarily lodge the documents in issue, to which section 64 of the FOI Act applies, 28 days after the decision-maker was given notice of the application in accordance with section 64(4A) of the FOI Act.
- 3.4 Before requiring production under section 58E of the FOI Act of a document claimed to be exempt under section 33, 34 or 45A of the FOI Act, the Tribunal will advise the parties whether it is satisfied by evidence on affidavit or otherwise that the document is exempt.
- 3.5 If the documents in issue include documents that have a security marking and documents that do not have a security marking, the decision-maker must provide the documents to the Tribunal in separate bundles, one containing the documents without a security marking and one containing the documents with a security marking.
- 3.6 The bundle of documents in issue without a security marking should be provided to the Tribunal in accordance with 3.1 to 3.5 above. The bundle of documents in issue with a security marking should be provided to the Tribunal in accordance with 3.1 to 3.5 above and 3.7 to 3.8 below.
- 3.7 When a decision-maker or their representative provides material to the Tribunal that has a security marking, the decision-maker must:
- (a) contact the Tribunal prior to lodging any such material in accordance with this Practice Direction; and
  - (b) inform the Tribunal of the date, time and method the decision-maker is proposing to provide such material to the Tribunal (such as by courier) and confirm the Tribunal is available to receive it.
- 3.8 The decision-maker must not provide material to the Tribunal which has a security marking without complying with paragraph 3.7.

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### ***Provision of the schedule of documents in issue***

- 3.9 Except where to do so would disclose the matter claimed to be exempt, the decision-maker must, not later than 7 days prior to the hearing date or at such earlier time as directed by the Tribunal, lodge with the Tribunal and give to any other party a schedule (or schedules) of the documents in issue.
- 3.10 When preparing the schedule, each document in issue must be numbered sequentially and each page within a bundle of documents in issue given a page number.
- 3.11 The schedule must list the documents in issue sequentially by number and include the page numbers of the documents. The schedule must provide the following details in respect of each document, unless to do so would disclose the matter claimed to be exempt:
- (a) the date of the document;
  - (b) the person or persons by whom the document was created and, where applicable, the person or persons to whom it was directed;
  - (c) a description of the nature of the contents of the document so as to provide an indicative justification for the ground or grounds of exemption relied upon;
  - (d) where applicable, a statement as to the ground or grounds of public interest relied upon in support of the claim of exemption;
  - (e) where the claim of exemption relates only to part of the document, an indication of the part or parts involved; and
  - (f) where a document is a copy of another document for which exemption is claimed, it should be identified as a copy. The claim(s) of exemption do not need to be repeated in respect of the copy document.

### ***Non-disclosure of certain matters***

- 3.12 The Tribunal will have regard to the need to avoid disclosing to an access applicant or their representative exempt documents or exempt matter contained in a document when considering whether to make orders:
- (a) directing that a hearing or a part of a hearing take place in private;
  - (b) directing that a hearing or part of a hearing take place as a closed hearing; and/or
  - (c) restricting the publication or disclosure of:

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- (i) information tending to reveal the identity of a party to or witness in a proceeding in the Tribunal or any person related to or otherwise associated with any party to or witness in the proceeding; and/or
  - (ii) information relating to a proceeding in the Tribunal and comprising of evidence or information about evidence or other information given to the Tribunal.
- 3.13 If an order is made restricting the publication or disclosure of information, the Tribunal will not refer to any of the restricted information in any published decision.
- 3.14 If the Tribunal is considering whether it is practicable for a decision-maker to grant access to a document if redactions are applied, it will invite the decision-maker to propose relevant redactions and submissions in support.

#### ***Return of documents in issue***

- 3.15 Where the Tribunal is satisfied that a document is an exempt document:
- (a) it will not require the decision-maker to produce the document to any other party to the review; and
  - (b) the document will be returned to the decision-maker as soon as practicable.

#### ***Transfer of request for access to documents between agencies***

- 3.16 Where any part of a request for access to documents has been transferred to another agency pursuant to the provisions of section 16 of the FOI Act, the referring agency must identify in its statement under section 24(2)(a) of the Act:
- (a) which aspects of the request for access have been transferred;
  - (b) the name of the transferee agency; and
  - (c) the date on which each such transfer was made.

### **Part 4. Confidential evidence and submissions, closed hearings and confidential reasons**

- 4.1 A closed hearing may be convened to receive confidential submissions or adduce confidential evidence.



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- 4.2 Where a decision-maker determines that a confidential affidavit and/or a closed hearing is necessary to avoid disclosing documents in issue, the decision-maker must inform the Tribunal and any other party as soon as possible.
  - 4.3 Parties should ensure confidential affidavits or submissions are drafted narrowly and limited to evidence that would disclose or tend to disclose information claimed to be exempt so as not to give rise to procedural fairness issues in circumstances where the access applicant is prevented from accessing this material.
  - 4.4 The Tribunal may require that the decision-maker provide open and closed written submissions as to why a confidential affidavit and/or closed hearing is necessary. If such submissions are ordered, the closed submissions will not be provided to the access applicant or the access applicant's representatives.
  - 4.5 When the Tribunal determines that a closed hearing is necessary, that hearing will be conducted in the absence of the access applicant and the access applicant's representatives.
  - 4.6 Whether the Tribunal's decision is published will be determined in accordance with the Tribunal's publication policy. However, the Tribunal will not publish its statement of reasons where to do so would disclose information, the disclosure of which is prohibited under the Act or another Act or instrument. In those circumstances, the Tribunal may make an order restricting the publication, in full or in part, of the statement of reasons to the Tribunal and the decision-maker.
  - 4.7 The Tribunal may make a temporary order restricting publication, in full or in part, of the statement of reasons to the Tribunal and the decision-maker to enable the decision-maker's representatives to confirm the statement of reasons does not disclose information, the disclosure of which is prohibited under the Act or another Act or instrument.

## **Part 5. Inspector-General of Intelligence and Security to give evidence in certain proceedings**

- 5.1 Under section 50A of the *Archives Act 1983* and section 60A of the FOI Act, the Tribunal, before determining that a document is not an exempt document under section 33 of the *Archives Act 1983* or section 33 of the FOI Act, must request the Inspector-General of Intelligence and Security to appear personally and give evidence on:
  - (a) the damage that would, or could reasonably be expected to, be caused to the security, defence or international relations of the Commonwealth if access is given to the document; or

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- (b) whether giving access to the document would divulge information communicated in confidence by a foreign government, authority or international organisation.

5.2 In considering whether to make a request under section 50A of the *Archives Act 1983* or section 60A of the FOI Act prior to, or at the time of, the decision-maker giving evidence or making submissions, the Tribunal will have regard to:

- (a) the number and nature of the documents that are claimed to be exempt under section 33 of the *Archives Act 1983* or the FOI Act;
- (b) the extent to which the Tribunal is able to limit the number of documents in relation to which the Inspector-General will be requested to give evidence;
- (c) the likely time required by the Inspector-General to:
  - (i) advise whether they are qualified to give the evidence; and
  - (ii) if qualified, to prepare the requested evidence;

**Note:** The current Inspector-General has indicated that in determining whether they are ‘qualified’ to give evidence they will have regard to their functions under the *Inspector-General of Intelligence and Security Act 1986*. Generally, those functions pertain to the oversight of the Australian Secret Intelligence Service, the Australian Security Intelligence Organisation, the Defence Signals Directorate, the Defence Imagery and Geospatial Organisation, the Defence Intelligence Organisation and the Office of National Assessments.

- (d) the procedural rights of the parties; and
- (e) whether directions for the management of the hearing can be made consistently with those rights so as to limit the time and resource demands on the Inspector-General and their office.