Law Council
OF AUSTRALIA

25 May 2026

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

By email: guidanceandpublications@oaic.gov.au

Dear Sir / Madam

Consultation on Part 13 of the FOI Guidelines

The Law Council welcomes the opportunity to provide input to the Office of the Australian Information Commissioner (**OAIC**) in response to its consultation on Part 13 of the Freedom of Information Guidelines (**FOI Guidelines**). This feedback is informed by contributions from the Law Institute of Victoria and the Administrative Law Committee of the Law Council's Federal Dispute Resolution Section.

Part 13 of the FOI Guidelines sets out, and provides guidance in relation to, the Information Publication Scheme (**IPS**) requirements for Australian Government agencies subject to the *Freedom of Information Act 1982* (Cth). Under the IPS, regulated agencies must publish on their website a range of information that is of value to the public, in addition to being required to publish a plan that explains how they intend to implement and administer the IPS.

Given that the IPS performs an important role in Australia's FOI regime, and that many people who access the FOI system are members of the public, it is important to ensure that the system is accessible and user friendly. With this in mind, the Law Council generally supports the content and accessibility of the proposed updates to the FOI Guidelines.

Automated decision making

While certain proposed changes to the FOI Guidelines are more related to form than substance (including updated references and resources, and inclusion of an IPS information register), other proposed changes are substantive, including additional guidance relating to an agency's use of artificial intelligence (**AI**) and automated decision making (**ADM**).[1]

[1] Office of the Australian Information Commissioner, *FOI Guidelines, Part 13 Information Publication Scheme Version 1.6* (Consultation Draft, (April 2026), paragraphs [13.118] to [13.120].

Telephone +61 2 6246 3788 • *Email* mail@lawcouncil.au
PO Box 5350, Braddon ACT 2612 • Level 1, MODE3, 24 Lonsdale Street, Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.au

The new guidance clarifies that, while agencies may use generative AI to support the performance or exercise of their powers or functions, the ways in which this technology is used to support the agency should be published on its IPS.[2] The Law Council agrees with this approach, noting that AI is a type of ADM, and disclosure on its use will be covered by the additions to the FOI Guidelines describes below.

For use of ADM (including AI), the draft FOI Guidelines refer to the recommendations contained in the OAIC's January 2026 report titled *Automated decision-making and public reporting under the Freedom of Information Act* (**OAIC Report**)[3] on the need for agencies to publish policies and procedures as part of their IPS to foster transparency and promote open government.

Importantly, the OAIC Report noted that:

> *This requirement for transparency around how agencies come to decisions and recommendations that affect the public is critical to facilitate public understanding and trust in the government. Without the background knowledge of how decisions are being made, the results can only be taken at face value and cannot be fully interrogated for fairness and accuracy, ultimately the results are not contestable.*[4]

In seeking to align the IPS with the findings of the OAIC Report, the draft FOI Guidelines state at [13.120]:

- *All agencies authorised under legislation to use ADM should publish this information as part of their IPS because the fact that it is authorised is itself information captured under the IPS. This should include the legislation that grants them this power and whether they use ADM to provide information and services to the public.*

- *Agencies should clearly state the types of ADM they use to make automated decisions, not just AI (for example, from simple calculators to machine learning).*

- *Agencies that use ADM should also publish both a list of decisions they use ADM for, as well as relevant and easy to understand examples, so the public can better understand how ADM is being used to make decisions that affect them.*

- *As part of their IPS, agencies using ADM should publish any policies that clearly set out the principles for when and how they use ADM to make decisions and recommendations affecting members of the public.*

The Law Council welcomes these additions to the FOI Guidelines as a positive step towards greater transparency on the use of ADM in administrative decision making. As one area for improvement, we suggest that a further paragraph could be inserted after

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2 Ibid, paragraph [13.119].

3 Office of the Australian Information Commissioner, *'Automated decision-making and public reporting under the Freedom of Information Act'* (21 January 2026).

4 Ibid,

the penultimate bullet point relating to the publishing of a list of decisions in which ADM is used. Suggested text is as follows:

> *That list should specify which decisions contain highly discretionary powers which are excluded from inclusion in an ADM program, and any criteria or restrictions limiting less discretionary powers which may be included.*

In supporting the proposed additions, we further note their broad alignment with Recommendation 17.1 of the Robodebt Royal Commission Report that, where ADM is implemented, business rules and algorithms should be made available, to enable independent expert scrutiny.[5]

Importantly, the OAIC Report described the above proposed additions to the FOI Guidelines as forming only a 'baseline' for agencies. Once in effect, it will be critical for the OAIC to take positive steps to adequately educate agencies on their responsibilities, as well as to monitor compliance to ensure the additions to the FOI Guidelines are met and wherever possible exceeded. For example, one area that the OAIC may be required to take further steps is the provision of further guidance to agencies about what will be appropriate levels of disclosure (for example, algorithms used) that will allow for adequate transparency on the application of ADM to decisions.

Transparency is critical for the responsible use of ADM by agencies. Individuals engaging with public authorities should know when and how ADM is being used in any way that significantly affects:

- their human rights and legal interests;
- their ability to understand how an agency's reliance on an automated decision may subject them to differential treatment when compared with other individuals; and
- the reasonableness of an automated decision, having regard to the circumstances in which it is made, and the impact that this automated decision might reasonably be expected to have on affected humans and the environment.

The FOI regime is aligned with the principles of accountability in public agency decision-making and conduct, and to our shared national values of transparency, democracy, and the rule of law. We regard the proposed changes to the FOI Guidelines to, on the whole, assist the implementation of these fundamental principles.

However, there is more to do in this area. It has been the consistent position of the Law Council[6] that all legislation that authorises the use of ADM and AI to exercise, or assist in the exercise of, statutory powers should:

- be consistent with regard to the types of powers that may be exercised by ADM or AI, and employ standard statutory language for expressing the power to use ADM or AI;

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5 Catherine Holmes AC SC, *Royal Commission into the Robodebt Scheme* (Report, July 2023) xvi, 488 [Recommendation 17.1].

6 Law Council of Australia, *Use of automated decision-making by government: Consultation Paper* (Submission to Attorney-General's Department, 24 January 2025).

- require an assessment be undertaken of the suitability of the proposed automated system to exercise the statutory power, as a precondition to making arrangements for use of AI or ADM;
- require that all arrangements for the use of ADM be subject to ongoing governance requirements by a multidisciplinary team to ensure they remain lawful and up to date, including auditing, testing and reporting obligations;
- require that officials publish all arrangements for the use of ADM and any suitability assessment which underpins it, including sufficient information to enable a broad understanding of how AI or ADM operates to produce lawful administrative decisions;
- require that any affected individual must be notified where there is significant use of automation, including AI, in making an administrative decision;
- require that an automated decision must be capable of being reduced to a statement of reasons explicable by a human, produced by a full audit trail of the decision-making path, for the purpose of enabling it to be reviewed by a tribunal or court, and the person affected by the decision should have a right to request such reasons; and
- provide for the automated decision to be subject to review, preferably review by a human internal to the agency, and the person affected by the decision must be informed of that review avenue.

The Law Council continues to strongly support improvements to legislation and agency practices to achieve these ends, including in the FOI context.

If you wish to discuss this input further, please contact Leonie Campbell, General Manager of Policy, [redacted]

Yours sincerely

Elizabeth Shearer
President-Elect