

The unsettled status of FOI guidelines of the Australian Information Commissioner

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It is not unusual for guidelines to be prepared by agencies or other primary decision-makers with responsibility to administer particular legislation. Where such guidelines are not legislative instruments, they usually represent a statement of policy to guide the exercise of decision-making functions and powers set out in legislation.

Such policy guidelines have been said to have desirable features, including:

- promoting values of consistency and rationality in decision-making, and the principle that administrative decision-makers should treat like cases alike;¹
- helping to promote consistency in high-volume decision-making;²
- helping to assure the integrity of decision-making by reducing or avoiding individual predilections of decision-makers and inconsistency that might appear in a series of decisions.³

As guidelines are a statement of policy, what is also clear is that:

- They must be consistent with the relevant statute in the sense that:
 - they must allow the decision-maker to take into account relevant considerations;
 - they must not require the decision-maker to take into account irrelevant considerations; and
 - they must not serve a purpose foreign to the purpose for which the discretionary power was created.⁴
- They will be inconsistent with the relevant statute, and therefore invalid,⁵ if they seek to preclude consideration of relevant arguments running counter to the guidelines that might reasonably be advanced in particular cases.⁶

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1 *Plaintiff M64-2015 v Minister for Immigration and Border Protection* (2015) 258 CLR 173; [2015] HCA 50, [54] (French CJ; Bell, Keane and Gaudron JJ).

2 *Ibid.*

3 *Ibid*; *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634, 640 (Brennan J).

4 *Minister for Home Affairs v G* (2019) 367 ALR 49 [2019] FCAFC 79 [58]; *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277 [2003] HCA 35 [24] (Gleeson CJ).

5 *Ibid* [62]; *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634, 641 (Brennan J).

6 *Minister for Home Affairs v G* (2019) 367 ALR 49; [2019] FCAFC 79 [59]; *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634, 641 (Brennan J).

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- They cannot be seen in form or substance by decision-makers as operating as a rule of law.⁷ They must leave the decision-maker free to consider the unique circumstances of each case and cannot determine in advance what the decision will be in particular circumstances.⁸
 - They will be inconsistent with the statute and unlawful if they:⁹
 - control the exercise of the discretion given to a decision-maker;
 - determine in advance the decision to be made;
 - impose broad and binding rules on the exercise of discretion;
 - accord a determinative effect to any particular factor;
 - deny the ability of countervailing factors to lead the decision-maker in particular cases to decline to exercise the power in favour of a person;
 - do not leave the discretionary power intact.

Information Commissioner Guidelines

Section 93A of the *Freedom of Information Act 1982* (Cth) (FOI Act) provides:

93A Guidelines

- (1) The Information Commissioner may, by instrument in writing, issue guidelines for the purposes of this Act.

Note: For variation and revocation of the instrument, see subsection 33(3) of the *Acts Interpretation Act 1901*.

- (2) For the purposes of the performance of a function, or the exercise of a power, under this Act, regard must be had to any guidelines issued by the Information Commissioner under this section including, but not limited to, guidelines issued for the purposes of the following provisions:
- (a) paragraph 9A(b) (information publication scheme);
 - (b) subsection 11B(5) (public interest factors);
 - (c) subsection 15(5A) (decisions on requests).
- (3) Guidelines are not legislative instruments.

There has been some uncertainty about the effect of any guidelines (FOI guidelines) issued by the Information Commissioner under this provision. It is clear that they are not legislative instruments,¹⁰ but what is meant by the requirement to have regard to the guidelines?¹¹

⁷ *G v Minister for Immigration and Border Protection* [2018] FCA 1229 [210] (Mortimer J).

⁸ *Minister for Home Affairs v G* (2019) 367 ALR 49; [2019] FCAFC 79 [59]; *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634, 641 (Brennan J).

⁹ *G v Minister for Immigration and Border Protection* [2018] FCA 1229 [208] (Mortimer J) referring to *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634, 641–2 (Brennan J).

¹⁰ See, for example, *Mullen v Aged Care Quality and Safety Commissioner* [2019] FCA 1726 [44].

¹¹ The obligation to have regard to the FOI guidelines is also confirmed by other provisions in the FOI Act. See s 9A, s 11B(5) (in relation to public interest factors) and s 15(5A).

What is their effect on agencies making decisions at first instance? What is their effect on the second-tier review body, the Administrative Appeals Tribunal (AAT), given that they are made by a lower tier decision-maker, the Information Commissioner? In particular, what is the effect of the FOI guidelines, issued by the Information Commissioner under s 93A of the FOI Act, when being considered by the AAT in reviewing a decision of the Information Commissioner?

The conundrum is succinctly stated by Deputy President Forgie of the AAT:

Section 93A of the FOI Act has been understood to apply to the Tribunal as much as it does to the primary decision-maker and every decision-maker in between. I have also understood it in that way but have struggled with it because it does not seem appropriate that a body that is charged with reviewing a decision-maker's decisions and coming to a decision that is correct in law and on the evidence should be required to have regard to that decision-maker's view of the law. I have set out what I think are the limits of its application.¹²

It seems that there are two opposing views or camps, evident in decisions of the AAT, as to how the guidelines are to be treated. Both camps seem to recognise that the guidelines are not binding. But they differ on the extent to which consideration must be given to the guidelines.

Despite the polarised views in the AAT, there are many cases where the AAT decision merely refers to the obligation to have regard to the FOI guidelines, that they have been 'taken into account', or that the AAT will be 'mindful' of the guidelines, and the presiding member does not become embroiled in the debate as to the extent to which consideration must be given to the FOI guidelines.¹³

In some cases, the comments of the AAT make it unclear which view is taken by the Tribunal member and leaves open the question of the extent to which regard must be had to the FOI guidelines. For example, in one case the AAT stated about the FOI guidelines:

These are the guidelines which must guide the Tribunal in its present determination.¹⁴

We will now examine the differing views.

12 *Re Prinn and Department of Defence* [2016] AATA 445 [46] (Deputy President Forgie).

13 *Eg Re Xenophon and Secretary, Department of Defence* [2019] AATA 3667; *Re Thomas and Secretary, Department of Defence* [2018] AATA 604 [65]; *Re Kung Fu Wushu Australia Limited and Australian Sports Commission* [2018] AATA 157 [12]; *Re Brooks and Secretary, Department of Defence* [2017] AATA 258 [10] (Deputy President Constance); *Re Tate and Director, Australian War Memorial* [2015] AATA 107 [43] (Deputy President Tamberlin); *Re Sweeney and Australian Information Commissioner & Anor* [2014] AATA 539 [77] (Deputy President Constance); *Re Farrell and Secretary, Department of Immigration and Border Protection* [2017] AATA 409 [62] (Deputy President Cowdroy); *Re Yabsley and Australian Postal Corporation* [2018] AATA 1291 [10] (Deputy President Melick); *Re Spragg and Chief Executive Officer of Customs* [2014] AATA 667 [31] (Deputy President Hotop); *Re Tennant and Australian Broadcasting Corporation* [2014] AATA 452 [8], [16] (Senior Member Creyke); *Re Nikjoo and Minister for Immigration and Border Protection* [2013] AATA 921 [31] (Senior Member Britton).

14 *Re Gallagher and Secretary, Department of Immigration and Border Protection* [2016] AATA 1025 [12] (Deputy President Cowdroy).

First view

The first view is that, even though the guidelines are not binding, decision-makers, including the AAT, should apply the guidelines unless there are cogent reasons to the contrary.¹⁵ The ordinary meaning of ‘apply’ is ‘bring to bear, put into practical operation, as a principle, rule, law, etc’.¹⁶

This view has been stated in a number of ways, including the following:

- Although the FOI guidelines are not binding, they provide assistance to those who administer the FOI Act, and decision-makers, including the AAT, should apply the guidelines unless there is a cogent reason to do otherwise. A decision-maker must give weight to them as a fundamental element in making a determination, and there would be a failure to ‘have regard’ to nominated matters if the regard was not ‘adequate’ or not ‘sufficient’; and a decision-maker would not comply with its statutory obligations if it merely had ‘token’ regard or ‘nominal’ regard to those matters.¹⁷
- The AAT should apply the guidelines unless there are cogent reasons to the contrary.¹⁸ The FOI guidelines are made under legislation by an independent statutory office holder. They should be given appropriate weight.¹⁹
- The AAT must determine the application on its merits informed, but not bound, by the guidelines and the AAT should apply the guidelines unless there are cogent reasons to the contrary.²⁰

15 *Re Jones and Australian Federal Police* [2016] AATA 329 [19] (Senior Member Popple).

16 *Macquarie Dictionary* (revised 3rd edition, The Macquarie Library Pty Ltd, 2001), referred to in *Re Prinn and Department of Defence* [2016] AATA 445 [53].

17 *Re Francis and Minister for Immigration and Ethnic Affairs* (No 2) [2012] AATA 838 (Deputy President Jarvis).

18 *Re Francis and Australian Sports Anti-Doping Authority* [2019] AATA 12 [91] (Deputy President Sosso); *Re Mullen and Aged Care Complaints Commissioner* [2017] AATA 2556 [42] (Deputy President Boyle); *Re Mullen and Chief Executive Officer, Australian Aged Care Quality Agency* [2017] AATA 1805 [45] (Deputy President Kendal); *Re Australian Fisheries Management Authority and Whish-Wilson & Ors* [2017] AATA 1098 [70] (Senior Member Popple); *Re Secretary, Department of Employment and Besser* [2017] AATA 835 [30] (Senior Member Popple); *Re Morris and Australian Information Commissioner* [2017] AATA 363 [15] (Senior Member Walsh); *Re Duncan and Secretary, Department of Human Services* [2017] AATA 52 [45] (Senior Member Popple); *Re Smith and Australian Federal Police* [2016] AATA 531 [25] (Senior Member Popple); *Re Bradford and Australian Federal Police* [2016] AATA 775 [20] (Senior Member Walsh); *Re Jones and Australian Federal Police* [2016] AATA 329 [19] (Senior Member Popple); *Re Leigh and Australian Federal Police* [2016] AATA 330 [31] (Senior Member Popple); *Re Duncan and Secretary, Department of Human Services* [2016] AATA 152 [25] (Senior Member Popple); *Re MacTiernan and Secretary, Department of Infrastructure and Regional Development* [2015] AATA 584 [16] (Senior Member Walsh); *Re Walker and Secretary, Department of Health* [2015] AATA 606 [15] (Deputy President Constance).

19 *Re Rovere and Department of Education and Training* [2015] AATA 462 [12] (Senior Member Popple).

20 *Re Dreyfus and Secretary, Attorney-General's Department* [2015] AATA 962 [33] (Bennett J), quoting the argument of the respondent.

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- ‘Whilst I am not bound to apply policy of the kind referred to in the Guidelines I may do so and, indeed, the Tribunal will usually apply the guidelines unless there are cogent reasons in a particular case for not doing so’.²¹

Second view

The opposing view disagrees that decision-makers, including the AAT, should apply the guidelines; rather the obligation is to have regard to them — that is, adopting the ordinary meaning of ‘regard’, which is to take them into account or consider them. Regard can only be had to them if they are lawfully made within the scope of the power of s 93A and consistent with the FOI Act.

Section 93A(2) only requires regard to be had to the FOI guidelines ‘for the purposes of the performance of a function or the exercise of a power under the FOI Act’. That means that decision-makers cannot be required to have regard to the guidelines if they relate to the interpretation of the FOI Act.

Parliament intended that the AAT should genuinely consider the guidelines. It did not require the AAT to go beyond that. In particular, Parliament did not require the AAT to give weight to the guidelines as a fundamental element in its review.²² Cases relied on in support of the first view refer to the importance of guidelines in assisting with consistency in decision-making where there is a discretion involved. However, the vast majority of decisions in the performance of functions or the exercise of powers under the FOI Act do not involve the exercise of discretion — including decisions about exemption.²³

Impact on agencies

Based on this second view, when it comes to a decision-maker at first instance in an agency, Parliament intended that a decision-maker would pay close regard to the FOI guidelines. This would be both in order to achieve consistency of outcome and because the FOI guidelines are likely to reflect the view taken by the Information Commissioner on review (as the author of the FOI guidelines).

It might even be expected that decision-makers at first instance in an agency should apply the FOI guidelines unless there were cogent reasons not to. This is because agencies are often making decisions quickly and it is important that they have guidance of the sort provided in the FOI guidelines.²⁴

21 *Re De Tarle and Australian Securities and Investments Commission* [2015] AATA 770 [16] (Senior Member Isenberg); *Re Lever and Australian Federal Police* [2017] AATA 1407 [55] — ‘They are matters to which regard must be had, and in this Tribunal matters to which consideration will ordinarily be given’ (Deputy President Rayment).

22 *Re Secretary, Department of Prime Minister and Cabinet and Secretary, Department of Infrastructure and Regional Development and Sanderson* [2015] AATA 361 [126] (Deputy President Forgie).

23 *Re Secretary, Department of Prime Minister and Cabinet and Wood* [2015] AATA 945 [27].

24 *Re Utopia Financial Services Pty Ltd and Australian Securities and Investments Commission* [2018] AATA 269 [140].

But, given the numerous different types of documents and scenarios, Parliament did not intend to go further and require a decision-maker at first instance to have regard to the guidelines as fundamental elements in the decision-making process. To do that would unnecessarily restrict a decision-maker in applying all relevant circumstances that might arise under the FOI Act in relation to a particular document.²⁵ In short, Parliament intended that a decision-maker would *have regard* to the guidelines in the sense of considering them in each case.

Impact on Administrative Appeals Tribunal

But when it comes to the AAT, s 93A requires that the AAT have regard to the guidelines in considering them in each case, but does not go beyond that. It cannot be that the AAT, as the ultimate merits review body engaged in the review of FOI decisions, can regard the FOI guidelines as binding. That would be to act contrary to the law which requires the AAT to ascertain the scope of its functions and powers. The process of ascertaining their scope requires the AAT to look not only to the terms of the FOI Act itself but also to any interpretations given by the Federal Court and the High Court. Only if the FOI guidelines are consistent with those functions and powers is the AAT required to have regard to them.²⁶

If the AAT treated the FOI guidelines as binding, there would exist a risk of introducing a doctrine of deference. This is where the views of the Information Commissioner as to the law would be given priority. According to this second view, this cannot be intended in the merits review setting of the AAT where decisions of the Information Commissioner are reviewed by the AAT and the AAT is required to reach decisions that are correct in law and on the evidence:

The regard that [the AAT] has to the Guidelines must be tempered by its obligation to make correct decisions under the FOI Act. Its obligation to do so must necessarily outweigh the regard it is required to have to the Guidelines issued under s 93A.²⁷

Regardless of the level of decision-making, the second view is that no decision-maker can be required to have regard to the guidelines if to do so would be to act in a manner inconsistent with the FOI Act or with a judgment of the High Court or the Federal Court interpreting it.²⁸

25 *Re Secretary, Department of Prime Minister and Cabinet and Wood* [2015] AATA 945 [27] (Deputy President Forgie); *Re Bell and Secretary, Department of Health* [2015] AATA 494 [45]–[46] (Deputy President Forgie); *Re Parker and Australian Securities and Investments Commission* [2016] AATA 767 [23] (Deputy President Cowdroy).

26 *Re Utopia Financial Services Pty Ltd and Australian Securities and Investments Commission* [2018] AATA 269 [140]; *Re HFNB and Secretary of Immigration and Border Protection* [2017] AATA 870 [32] (Member Hughes).

27 *Re Secretary, Department of Prime Minister and Cabinet and Secretary, Department of Infrastructure and Regional Development and Sanderson* [2015] AATA 361.

28 *Re Secretary, Department of Prime Minister and Cabinet and Wood* [2015] AATA 945 [27] (Deputy President Forgie).

This second view was succinctly summarised by Deputy President Forgie of the AAT in the following terms²⁹ — namely, that the FOI guidelines:

- are not binding upon decision-makers, including the AAT;
- are matters to which decision-makers, including the AAT, must have ‘regard’ — that is, they must take them into account but they are not bound to apply them;
- are made for the purposes of the ‘performance of a function, or the exercise of a power, under this Act’;
- are made on particular assumptions regarding the scope of those functions and powers but those assumptions:
 - cannot be inconsistent with the scope of those functions and powers as conferred by the FOI Act;
 - cannot, and cannot be allowed to, dissuade the AAT from carrying out its statutory obligations on review which include ascertaining the scope of the decision-maker’s powers; and
 - cannot be applied by the AAT if it were to conclude that they are inconsistent with the functions and powers as it has ascertained them to be.

The way forward

One AAT decision concluded that the FOI guidelines are just that: they are not binding, definitive or determinative. This is consistent with both views. It further stated that, while the FOI guidelines may, in the words of Deputy President Forgie, ‘have no role to play in the interpretation of the FOI Act’,³⁰ they nevertheless assist in helping the AAT to deal with matters which cannot be resolved by direct reference to the terms of the FOI Act itself.³¹

This stance seems to take a conciliatory approach to the two divergent views.

Similarly, referring to Deputy President Forgie in *Prinn and Department of Defence*,³² one Tribunal member stated:

Those guidelines are important and I must have regard to them but they are simply guidelines. There is no suggestion that they should not be applied in the present matter.³³

In light of the opposed views and express statements in AAT decisions where members respectfully disagree with each other as to the correctness of the approach to be taken

29 *Re Kazakhstan Potash Corporation Limited and Australian Securities and Investments Commission* [2019] AATA 5035 [77]; *Re Utopia Financial Services Pty Ltd and Australian Securities and Investments Commission* [2018] AATA 269 [138].

30 *Re Prinn and Department of Defence* [2016] AATA 445 [49].

31 *Re VMQD and Commissioner of Taxation* [2018] AATA 4619 [59] (Senior Member Puplick).

32 [2016] AATA 445.

33 *Re Burgess and Secretary Department of Veterans Affairs* [2018] AATA 2897 [10] (Deputy President Hanger).

when it comes to the FOI guidelines, it is unlikely that the correctness of either view will be resolved without determination by the Federal Court or High Court.

In most cases the extent of application of the FOI guidelines may not have any real impact on the ultimate decision to be made. But there may come a time where, for example, due to legal developments arising from a court decision or change in the FOI Act, the FOI guidelines no longer accurately reflect the true legal position and their effect and the extent to which regard must be had to them may need to be challenged and determined in a more authoritative forum.