

**Memorandum of Understanding
between
the Australian Information Commissioner
and
the Inspector-General of Intelligence and Security**

Parties

1. The parties to this Memorandum of Understanding (MOU) are the Australian Information Commissioner ('the Information Commissioner') and the Inspector-General of Intelligence and Security ('the Inspector-General').

Functions of the Office of the Information Commissioner

2. The Office of the Australian Information Commissioner (OAIC) has three statutory office holders, the Australian Information Commissioner, the Freedom of Information (FOI) Commissioner, the Privacy Commissioner and staff supporting these office holders. The Information Commissioner is head of the OAIC.
3. One of the primary functions of the OAIC is oversight of the *Freedom of Information Act 1982* (the '*FOI Act*'). Part VII of the *FOI Act* sets out the Information Commissioner's functions and powers in respect of Information Commissioner review ('IC review') of decisions made by agencies under the *FOI Act*. The Information Commissioner has issued relevant Guidelines under s 93A of the *FOI Act* that relate to IC review (Part 10).
4. Part VII, Division 8 of the *FOI Act* sets out the functions and powers of the Information Commissioner to gather evidence and inspect documents for the purposes of conducting an IC review. Where a document is claimed to be an exempt document under s 33 of the *FOI Act* (documents affecting national security, defence or international relations) and the Information Commissioner is not satisfied by an agency's claim that the document is exempt, then special procedures are available to request that the Inspector-General give evidence to the Information Commissioner.
5. Part VII, Division 9 of the *FOI Act* sets out the functions and powers of the Information Commissioner where evidence is to be given by the Inspector-General.

Functions of the Office of the Inspector-General of Intelligence and Security

6. The *Inspector-General of Intelligence and Security Act 1986* (the '*IGIS Act*') establishes the Office of the Inspector-General of Intelligence and Security (the '*OIGIS*') and appoints the Inspector-General of Intelligence and Security as an independent statutory office holder. In accordance with the *IGIS Act* the Inspector-General is empowered to oversight and review the six Australian intelligence and security agencies: the Australian Security Intelligence Organisation; the Australian Secret Intelligence Service; the Defence Signals Directorate; the Defence Imagery and Geospatial Organisation; the Defence Intelligence Organisation and the Office of National Assessments. The Inspector-General may also inquire into an intelligence or security matter relating to any Commonwealth agency at the request of the Prime Minister.

7. The Inspector-General may be requested to give evidence to the Information Commissioner on 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 a document, or whether giving access to a document would divulge information communicated in confidence by a foreign government, authority or international organisation. Similar provisions apply to the Inspector-General giving evidence to the Administrative Appeals Tribunal on appeals in relation to FOI and Archives decisions.

Purpose

8. This MOU is intended to:
 - facilitate the exercise of the Information Commissioner's information gathering powers where documents are claimed to be exempt under s 33 of the *FOI Act* (documents affecting national security, defence or international relations), and
 - ensure that clear and systematic procedures are in place to facilitate the giving of evidence by the Inspector-General to the Information Commissioner in these circumstances.
9. This MOU is not intended to fetter the powers conferred on the Information Commissioner or the Inspector-General by the *FOI Act* or other legislation.

Definitions

10. In this MOU a reference to an 'agency' means 'agency or Minister'.

Duration

11. This MOU operates until either party terminates it or both parties agree to replace it.

Contact officer

12. Both parties will nominate a designated contact officer.

Guiding principles

13. The guiding principles of this Memorandum of Understanding are:
 - a. both the OAIC and the OIGIS have important responsibilities in examining documents that relate to issues of national security, defence or international relations (s 33),
 - b. instances may arise under s 55U of the *FOI Act*, where the Information Commissioner will request the Inspector-General to appear personally and give evidence about documents that are claimed to be exempt under s 33, and
 - c. in such instances agreed and published procedures will facilitate the giving of evidence while protecting the interests of the Australian community.

Overview of steps under the *FOI Act* where documents are claimed to be exempt under s 33.

14. Subject to the provisions of the *FOI Act* and the Guidelines issued under s 93A of the *FOI Act*:

- (i) When an IC review is sought for documents that are claimed to be exempt under s 33 of the *FOI Act* the Information Commissioner will consider the agency's reasoning in the original decision, and any other submissions, in support of a claim that the documents are exempt under s 33.
- (ii) If, having considered the agency's reasoning in the original decision, and any other submissions, the Information Commissioner determines that a document is an exempt document, either under s 33 or under another provision of the *FOI Act*, then the Information Commissioner will not require the document(s) to be produced and will not request that the Inspector-General appear and give evidence about the document(s).
- (iii) If, having considered the agency's reasoning in the original decision, and any other submissions, the Information Commissioner is not satisfied that the document is exempt under s 33, the Information Commissioner will then require the document(s) to be produced in accordance with ss 55R and 55U of the *FOI Act*.
- (iv) If, after examining the documents and taking into account the submissions from the parties, the Information Commissioner is still not satisfied by the agency's claim that a document is exempt under s 33, then Part VII, Division 9 provisions will apply, and a request will be made in accordance with s 55ZB of the *FOI Act* for the Inspector-General to appear and to give evidence on the damage that would or could reasonably be expected to result from the release of the document(s), or whether giving access to the document(s) would disclose information that had been communicated in confidence by a foreign government, authority or international organisation.
- (v) Before hearing the evidence of the Inspector-General the Information Commissioner must hear any evidence or further submissions to be made by the agency to whom the request for access was made (s 55ZB(3)).
- (vi) The Information Commissioner is not bound by the opinion of the Inspector-General (s 55ZB(4)).

Access for the Inspector-General to inspect submissions and documents

15. If the Information Commissioner determines that evidence by the Inspector-General will be requested, the Information Commissioner will write to the Inspector-General to arrange for access by the Inspector-General and appropriate staff of the OIGIS to documents and submissions received by the OAIC and any other relevant matters.

16. The Information Commissioner will allow the Inspector-General to take possession, make copies of, or take extracts from any document given to the Information Commissioner for the purposes of a proceeding under s55ZD(2).
17. However, where practicable the Inspector-General will inspect documents either at the premises of the OAIC or at the premises of the agency that is claiming the exemption.
18. The Inspector-General may require that the agency produce, or provide access to, related documents under s 55ZD(3).
19. As soon as reasonably practicable after receiving written notice of the request by the Information Commissioner to give evidence, the Inspector-General will conduct a preliminary examination of the documents and provide an estimate of the length of time it will take the Inspector-General to properly consider the documents and prepare the requested evidence. Having regard to s 55ZD(8), the Information Commissioner will allow a reasonable period for the Inspector-General to consider documents and submissions.
20. The OAIC will inform the FOI applicant about the relevant time periods for the consideration of documents by the Inspector-General for the purposes of giving evidence to the Information Commissioner under Part VII, Division 9. However, if giving such information to the FOI applicant would disclose the existence of certain documents in contravention of s 25 of the *FOI Act*, then such information about the time-frame will not be provided to the applicant.

Circumstances when the Inspector-General may decline to give evidence to the Information Commissioner

21. If, consistent with s 55ZC of the *FOI Act*, the Inspector-General considers, that he or she is not appropriately qualified to give evidence, then the Inspector-General may decline to give evidence.
22. In determining whether he or she is appropriately qualified to give evidence the Inspector-General will have regard to the functions of the Inspector-General set out in the *IGIS Act*.
23. If the Inspector-General determines that he or she is not appropriately qualified to give evidence this will be communicated to the Information Commissioner in writing as soon as practicable.

Conduct of hearings by the Information Commissioner

24. Recognising that the content of the documents claimed to be exempt under s 33 will potentially affect national security, defence or international relations, all hearings held by the Information Commissioner to obtain evidence from the Inspector-General will ordinarily be closed hearings.
25. Closed hearings conducted by the Information Commissioner will be conducted as the Information Commissioner sees fit. Generally closed hearings will be conducted informally and will not be governed by the rules of evidence.

Confidentiality

26. Information provided in accordance with this MOU will only be used or disclosed for the purpose for which it was provided or as required or authorised by or under law.

Termination and review

27. Any party may terminate this MOU by giving written notice to the other of its intention to terminate this MOU.

28. Any party may initiate a review of this MOU at any time by giving written notice to the other party.



Dr. Vivienne Thom
Inspector-General of Intelligence and Security

Signed 2 / May /2012



Prof. John McMillan
Australian Information Commissioner

Signed 2 / May /2012