



TABLE OF CONTENTS

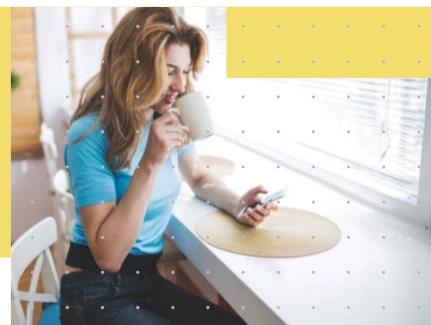
Additional Documents

1.	Conducting IC review: Assessments	D2019/002542
2.	Conducting an IC review: Identification of systemic and significant issues	D2019/001898
3.	IC review case categories	D2020/000377
4.	Conducting an IC review: Review Adviser preliminary steps checklist	D2018/016244
5.	General information about case management	D2018/016249
6.	Conducting an IC review: Submissions	D2018/016243
7.	Conducting an IC review: Intention to decline (s 54W) checklist	D2018/016246
8.	Conducting an IC review: Closure letter (s 54W) checklist	D2018/016247
9.	Conducting an IC review: Review of preliminary views/s 54W letters	D2018/016248
10.	Decision writing checklist	D2018/016241
11.	Decisions writing checklist	D2018/016240
12.	Conducting an IC review – Electronic Clearance using Resolve Checklist	D2020/005955

13.	IC review process	D2023/020118
14.	IC review process flowchart	D2023/020117
15.	Organisational Chart	D2023/018237
16.	References Committee membership and inquiry terms of reference	D2023/019003
17.	OAIC submission to Legal and Constitutional Affairs References Committee – Inquiry into operation of Commonwealth FOI laws	D2023/019004
18.	Summary of key points from submissions to FOI inquiry	D2023/019008
19.	Hansard	D2023/008589
20.	QoN	D2023/008341
21.	Joint statement – Statement of Principles to support proactive disclosure of government-held information – developed by all Australian Information Commissioners and Ombudsmen	D2023/019009
22.	Supporting information to joint statement – Table A – Legislative provisions and summary of proactive release information	D2023/019010
23.	Disclosure log desktop review report – September 2021	D2023/019011
24.	Second reading speech – Information Commissioner Bill 2009	D2023/019012
25.	FOI Guidelines – Part 10: Review by the Information Commissioner	D2023/019013

26.	Direction as to certain procedures to be followed in Information Commissioner reviews	D2023/019014
27.	Direction as to certain procedures to be followed by applicants in Information Commissioner reviews	D2023/019015
28.	Compendium of information access laws across Australian states and territories – May 2023	D2023/019016
29.	Key features of Right to Information Legislation	D2023/019017
30.	Outcomes and recommendations from FOI complaints investigations conducted between 1 July 2019 and 22 June 2022	D2023/019018
31.	CII into the Department of Home Affairs report	D2023/019019
32.	Joint statement of transparency and access to information during the COVID-19 outbreak – April 2020	D2023/019020
33.	Joint statement on COVID-19 and the duty to document – May 2020	D2023/019021
34.	ICIC endorses OAIC resolution on proactive publication	D2023/019022
35.	Global RTI ratings	D2023/019023
36.	Let the sunshine in – Review of culture and accountability in the QLD public sector – Final report (the Coaldrake Report)	D2023/019025
37.	Summary of key points from Coaldrake Report	D2023/019026
38.	How to let more sunshine in – Strategic review of the Office of the Information Commissioner – Final report	D2023/019027

39.	AAT Caseload Report – 1 July 2022 to 31 May 2023	<u>D2023/019028</u>
40.	AAT Caseload Report – 1 July 2021 to 30 June 2022	<u>D2023/019029</u>
41.	NSW IPC factsheet – Automated decision-making, digital government and preserving information access rights – for citizens	<u>D2023/019030</u>
42.	Submission to Senate Finance & Public Administration Legislation Committee inquiry – COAG Legislation Amendment Bill 2021 (Submission by OAIC supported by State and Territory Information Commissioners and Ombudsman)	<u>D2023/019339</u>
43.	List of other legislation related to privacy	<u>D2023/020281</u>
44.	Privacy statistics	<u>D2023/020284</u>



Updated June 2023

Conducting IC review: Assessments

This worksheet provides guidance to assist with assessing IC review applications. This worksheet should be read in conjunction with the FOI Guidelines and other guidance material, including the IC review case categories ([D2020/000377](#)) and Identification of Systemic and Significant Issues worksheets: [D2019/001898](#).

Preliminary assessments

Once an IC review application has been registered and assessed for validity, it proceeds to preliminary assessment ('FOI – Assessment' queue).

Preliminary assessment involves a review of:

- the FOI request
- the decision under review
- the applicant's reasons for review
- any responses to preliminary requests for information, including submissions
- assigning a case category.

The preliminary assessment will need to be included within the Summary field and the 'Decide Path' Action and summarised in the 'Assessor's note field'.

The preliminary assessment will typically address the following issues and/or include the following information:

- Assigning a case category
- Whether the application was out of time and a decision has been made to allow the applicant to make an application
- Whether internal review request was lodged following IC review application
- Whether there has been a request for expedition and/or a hearing
- Whether the application relates to an ongoing complaint or recommendation case
- Whether it relates to an existing vexatious applicant declaration or to an ongoing vexatious applicant declaration request
- Whether further information is required
- Whether agreement should be explored under s 55F
- Whether the application should be declined under s 54W(a)
- Whether the application should be declined under s 54W(b) in line with part [10.88] of the FOI Guidelines, in particular:
 - Where the application is linked to ongoing proceedings in the AAT or Federal Court and should be declined under s 54W(b)

- the FOI request or material at issue relate to specific functions exercised by the Information Commissioner under the Privacy Act
- Where the application is associated with cohorts which have previously been identified as desirable for the AAT to consider instead of the Commissioner continuing with the IC review
- Where the application is assessed as a category [cat 4] and [cat 5.4] under the IC review case categories worksheet at TRIM Link [D2020/000377](#).
- In an access refusal matter, whether the agency or minister has discharged onus of establishing that its decision is justified or that the Commissioner should give a decision adverse to the FOI applicant
- In access grant matter, whether the IC review applicant has discharged onus of establishing that a decision refusing the request is justified or that the Commissioner should give a decision adverse to the FOI applicant
- Whether to commence review as set out in paragraph [10.188] of the FOI Guidelines and if so,
 - what the letters to the parties should include:
 - The letter to the applicant ordinarily confirms the scope of the review and may also seek further information.
 - The letter to the respondent ordinarily requests the processing documentation, material at issue and submissions, and in some circumstances, a preliminary view on the issues/exemptions raised
 - relevant precedents for the Intake/Early Resolution team or the Review Adviser to consider
- Whether the matter raises significant or systemic issues
- Whether the matter relates to an existing or previous application for IC review
- The status of any related matter and a comment on how the IC review should be progressed in light of the related matter
- Whether guidance for review advisers can only be provided following receipt of documents at issue and whether scope of review can be narrowed
- The Assessor’s initials and date the assessment was undertaken.

Attachment A sets out particular guidance on specific issues under review.

Attachment B sets out sample summaries.

Attachment C sets out sample assessor notes for common issues.

Attachment A: Issues and considerations

The table below sets out specific issues in IC review applications and the considerations which should be undertaken in assessing how the case should be managed.

Issues	Considerations
<p>OAIC is the Respondent</p>	<ul style="list-style-type: none"> • Whether the application should be declined under s 54W(b) • Sample assessment: <i>It is the Information Commissioner’s view that it will usually not be in the interests of the administration of the FOI Act to conduct an IC review of a decision, or an internal review decision, made by the agency that the Information Commissioner heads: the OAIC.</i> <i>Please proceed to draft an intent to decline to the applicant under s 54W(b) and send a copy of the decline separately to the FOI decision maker at the OAIC copied to the Legal Services at legal@oaic.gov.au. Please invite a response from the Legal Services team to the s 54W(b) proposal within 2 weeks, noting that in the absence of a response we will assume it has no objections to the proposal.</i>
<p>Applicant requests expedition of IC review application</p>	<ul style="list-style-type: none"> • Sample assessment: <i>Applicant requests to have the application expedited. Contact Respondent to seek their comments, including whether the Respondent is able to make a revised decision under s 55G of the FOI Act and request a response by [insert 2 weeks],</i>
<p>Applicant requests matter to be finalised under s 54W(b)</p>	<ul style="list-style-type: none"> • Sample assessment: <i>Applicant seeks to have the matter finalised under s 54W(b). Contact Respondent to seek their comments and request a response by [insert 2 weeks].</i>

Attachment B

Case Summary field

**Current template

Summary

deemed refusal [or affirmed] on XX*. FOI request [or internal review request] made XX

Request:

Decision under review: original decision dated @.

[Exemptions use]: @ document/s found within scope of request, released/exempt in full/part under exemption/s @.

[Searches use]: No document/s found within scope of request. Access refused under s 24A (insert relevant subsection if known).

[Practical refusal use]: @ document/s found within scope of request. (Insert @ hours to process, decision making etc. any key points)

[Charges use]: \$@ (insert calculation)

Number of documents at issue: @ (delete if not applicable)

Scope of review: Applicant seeks review of [Practical refusal/Exemptions ss @/Searches]. Applicant states (insert any key statements that allude to applicant's scope of request. If not known request in acknowledgement).

Notes for assessor:

New Assessor notes:

All matters generally:

Post triage notes: Commence review & send opening letters:

Opening letter to A: Standard opening email.

Opening letter to R: Request information outlined in paragraph 10.100 of the Guidelines that relate to this review- [include issue, e.g. exemptions under xxx / searches etc].

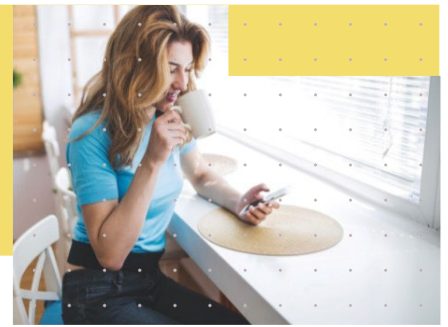
Practical refusal matters:

Post triage notes: Commence review & send opening letters:

Opening letter to A: Standard opening email.

Opening letter to R: Request information outlined in paragraph 10.100 of the Guidelines that relate to this review: Access refusal – Practical refusal (Part III, 24A). Please also include the following advice:

At any stage during an IC review, the Information Commissioner may resolve an application in whole or in part by giving effect to an agreement between the parties (s 55F). Therefore in your response, please notify the OAIC whether you wish to propose a revised scope for the applicant's consideration, for the purpose of attempting resolution under s 55F agreement.



Updated June 2023

Conducting an IC review: Identification of systemic and significant issues

The identification of systemic and significant issues can occur through 4 stages:

- Intake
- Senior assessment: pre-commencement of review
- Senior assessment: post-commencement of review, including review of documents at issue prior to allocation
- IC Review: Case management

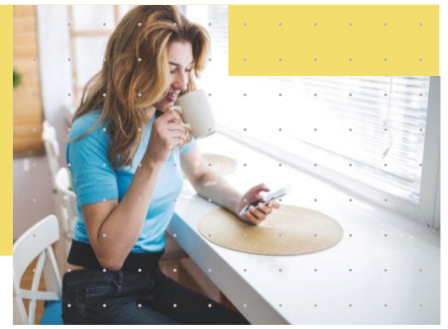
The table below sets out the considerations taken at each stage to enable identification of systemic and significant issues and the potential actions and next steps.

IC reviews involving systemic and significant issues are assigned case category 5.

This worksheet should be read in conjunction with IC Review Case Categories ([D2020/000377](#)) and Conducting an IC review: Assessments worksheets: [D2019/002542](#).

Stages	Considerations	Actions/next steps
<ul style="list-style-type: none"> • Intake 	<ul style="list-style-type: none"> • Applications made by parliamentarians • IC review applications relating to Ministers (Respondents or subject matter) • Exemptions: ss 4(1) (whether documents are official documents of a minister/party/political), 25 (Neither confirm nor deny), 33 (National Security), 34 (Cabinet), 46 (Contempt of Parliament), 47B (Commonwealth/State relations), 47D (Financial interests or property interests of the Commonwealth), 47H (Research), 47J (The Economy) • Whether request relate to official documents of a minister, senior officials' diaries, electronic communications, incoming government briefs • Whether request relates to ongoing public debate or highly publicised investigations • Whether exemptions relate to waiver of legal professional • Whether request relates to a <i>Public Interest Disclosure</i> 	<ul style="list-style-type: none"> • Identify appropriate category under 'sensitivity' • Identify relevant exemptions under 'Assessor note' • Add relevant cross-references • If deemed access refusal, proceed with preliminary inquiries process. • For all other matters, proceed to Mail Assessment.

Stages	Considerations	Actions/next steps
<ul style="list-style-type: none"> Senior assessment: pre-commencement of review 	<ul style="list-style-type: none"> In accordance with intake considerations Whether novel issues raised or whether it can be a lead case to address systemic issues Whether there is an application currently before the OAIC for a vexatious applicant declaration to be made in relation to the IC review applicant or an investigation into a complaint 	<ul style="list-style-type: none"> Note in assessment Insert relevant cross-references
<ul style="list-style-type: none"> Senior assessment: post-commencement of review, including review of documents at issue prior to allocation 	<ul style="list-style-type: none"> In accordance with senior assessment: pre-review of documents considerations Whether respondent's decision or ability to make a revised decision is affected by consultation with other government agencies 	<ul style="list-style-type: none"> Note in assessment Insert relevant cross-references
<ul style="list-style-type: none"> IC Review: Case management 	<ul style="list-style-type: none"> In accordance with intake considerations Whether respondent's decision or ability to make a revised decision is affected by consultation with other government agencies 	<ul style="list-style-type: none">



June 2023

IC review case categories

IC review case categories provide an indication of the complexity and range of issues to be determined in an IC review application.

IC review case categories are used to allocate IC reviews efficiently and equitably across all teams and assist in the implementation of strategies to address the backlog in IC reviews awaiting allocation.

The table below sets out the case categories and identifies the range of issues to be determined within each category.

In relation to matters assessed as a categories [cat 4] and [cat 5.4] (most complex and voluminous), consideration may be given as to whether the application should be declined under s 54W(b) in line with part [10.88] of the FOI Guidelines. This worksheet should be read in conjunction with the conducting IC review assessments worksheet: [D2019/002542](#)

Related guidance

These documents contain further guidance about the issues to be determined in IC reviews:

Conducting an IC review: Identification of systemic and significant issues: [D2019/001898](#).

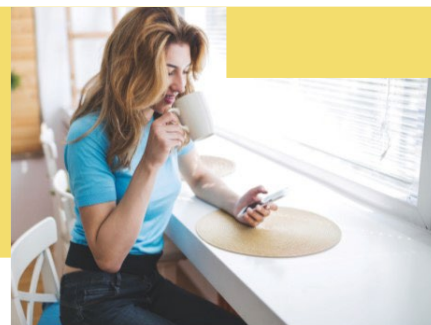
Conducting IC reviews: Assessments: [D2019/002542](#).

Category	Description	Issues
Category 0 [Cat 0]	Invalid applications	<p>Section 54N (Out of Jurisdiction)</p> <p>The IC review application does not meet the requirements of s54N (copy of decision not provided) – after a reasonable opportunity to provide one.</p> <p>The IC review application does not meet the requirements of s 54S and a s54T extension of time has been declined/or not been made following an invitation to make one (IC review application is out of time)</p> <p>The IC review application is intended for a state jurisdiction.</p> <p>Misdirected (Not FOI related)</p> <p>Misdirected (FOI request not yet made)</p> <p>No IC reviewable decision (e.g., in circumstances where an agency has issued a Practical refusal consultation notice)</p>

Category	Description	Issues
Category 0.5 [Cat 0.5]	Deemed access refusal	Access refusal reason: s15AC (decision not made on request within time) – deemed refusal.
Category 1 [Cat 1]	Less complex May be resolved by way of of ss 54W, 55F or 55K	Access refusal reason: charges Access refusal reason: searches (sole issue) Access refusal reason: material irrelevant to FOI request (s 22 only) Access refusal reason: exception to FOI Act (s 7 only) Access refusal reason: s 4 Access refusal reason: s 20 Access refusal reason: s 21
Category 2 [Cat 2]	Less complex May be resolved by way of of ss 54W, 55F or 55K	Access refusal reason: practical refusal Access refusal reason: searches and s 12 Access refusal reason: searches and s 17 Access refusal reason: s 25 Access refusal reason: single non-conditional exemption (may include s 22) (33, 34, 37, 38, 42, 45, 46, 47) Access refusal reason: searches and single non-conditional exemption (may include s 22) (ss 33, 34, 37, 38, 42, 45, 46, 47) Access refusal reason: single conditional exemption (may include s 22) (47B, 47C, 47D, 47E(b), 47E(c), 47E(d), 47F, 47G, 47H, 47J) Access refusal reason: searches and single conditional exemption (may include s 22) (47B, 47C, 47D, 47E(b), 47E(c), 47E(d), 47F, 47G, 47H, 47J)
Category 3 [Cat 3]	Complex May be resolved by way of of ss 54W, 55F or 55K	Access refusal reason: various exemptions (more than one) involving a small number (<50) of documents OR < 200 pages of exempt material Access refusal reason: searches and various exemptions (more than one) involving a small number (<50) documents OR < 200 pages of exempt material May involve third party issues
Category 4 [Cat 4]	Most complex and voluminous May be resolved by way of of ss 54W, 55F or 55K	Access refusal reason: amendment Access refusal reason: various exemptions (more than one) involving a large number (>50) of documents OR > 200 pages of exempt material Access refusal reason: searches and various exemptions (more than one) involving a large number (>50) of documents OR > 200 pages of exempt material May involve third party issues
Category 5 [Cat 5]	IC reviews with systemic and significant issues More likely to be resolved by way of s 55K decision	IC reviews with the following significant and systemic issues: <ul style="list-style-type: none"> - Access grant decisions - IC review applicant is a Parliamentarian - IC review applications relating to Ministers (Respondents or subject matter).

Category	Description	Issues
		<ul style="list-style-type: none"> - Access refusal reason includes following exemptions (4, 25, 33, 34, 46, 47B, 47D, 47H, 47J) - Request relates to official documents of a minister, senior officials' diaries, electronic communications, incoming government briefs - Requests relates to ongoing public debate or highly publicised investigations - Exemptions relate to waiver of privilege - Whether novel issues raised or whether it can be a lead case to address systemic issues - Request relates to PID complaint
Category 5.1	Category 5.1	Significant and systemic issues identified above and :
[Cat 5.1]	[Cat 5.1]	<p>Access refusal reason: charges</p> <p>Access refusal reason: searches (sole issue)</p> <p>Access refusal reason: material irrelevant to FOI request (s 22 only)</p> <p>Access refusal reason: exception to FOI Act (s 7 only)</p> <p>Access refusal reason: s 4</p> <p>Access refusal reason: s 20</p> <p>Access refusal reason: s 21</p>
Category 5.2	Category 5.2	Significant and systemic issues identified above and :
[Cat 5.2]	[Cat 5.2]	<p>Access grant decisions</p> <p>Access refusal reason: practical refusal</p> <p>Access refusal reason: searches and s 12</p> <p>Access refusal reason: searches and s 17</p> <p>Access refusal reason: s 25</p> <p>Access refusal reason: single non-conditional exemption (may include s 22) (33, 34, 37, 38, 42, 45, 46, 47)</p> <p>Access refusal reason: searches and single non-conditional exemption (may include s 22) (33, 34, 37, 38, 42, 45, 46, 47)</p> <p>Access refusal reason: single conditional exemption (may include s 22) (47B, 47C, 47D, 47E(b), 47E(c), 47E(d), 47F, 47G, 47H, 47J)</p> <p>Access refusal reason: searches and single conditional exemption (may include s 22) (47B, 47C, 47D, 47E(b), 47E(c), 47E(d), 47F, 47G, 47H, 47J)</p>
Category 5.3	Category 5.3	Significant and systemic issues identified above and :
[Cat 5.3]	[Cat 5.3]	<p>Access refusal reason: various exemptions (more than one) involving a small number (<50) of documents OR < 200 pages of exempt material</p> <p>Access refusal reason: searches and various exemptions (more than one) involving a small number (<50) documents OR < 200 pages of exempt material</p> <p>May involve third party issues</p>

Category	Description	Issues
Category 5.4 [Cat 5.4]		<p>Significant and systemic issues identified above and:</p> <p>Access refusal reason: amendment</p> <p>Access refusal reason: various exemptions (more than one) involving a large number (>50) of documents OR > 200 pages of exempt material</p> <p>Access refusal reason: searches and various exemptions (more than one) involving a large number (>50) of documents OR > 200 pages of exempt material</p> <p>May involve third party issues</p>



June 2023

Conducting an IC review: Review Adviser preliminary steps checklist

This checklist provides general guidance to review officers to assist with assessing next steps when a review officer is allocated a new IC review matter.

Upon completing this checklist a review officer should have developed a case plan and formed a view about how the matter might be progressed to a resolution and transferred to the Significant Decisions team where appropriate.

Review officer introduction to review parties

- Review officers should write to the parties in an IC review within 2 working days of allocation to introduce themselves as the review officer handling the matter and to provide their contact details. Any request for case updates should also be provided where appropriate.
- Where an applicant has agreed to being contacted by telephone, the review officer should contact the applicant by telephone to introduce themselves before writing to the applicant.** During the telephone call, the review officer should take the opportunity to:
 - provide an overview of the IC review process and the review officer’s role
 - provide an explanation of what has been done so far to progress the IC review application
 - seek clarification of the outcome sought in the IC review (if necessary)
 - explain that the review officer will form a view about the merits of the case and may invite the applicant to provide further information/submissions in response to that view
 - discuss possible outcomes in the IC review process, and
 - advise on next steps.

Reviewing the IC review file

After sending introductory emails/letters to the parties, an assessment of next steps in the IC review should be completed within 2 weeks of allocation by taking the following steps:

- Review 'Summary' box on Resolve Main page for mail assessor's assessment.
- Review any 'Actions' on Resolve Main page.
- Review 'Documents' and 'All Actions' tabs on Resolve to familiarise yourself with the correspondence on the file. In particular, consider:
 - Whether the parties have made any submissions by telephone
 - Whether the OAIC has received hard copy documents from the parties, and
 - Whether the parties have requested expedition.
- Update the 'Documents' tab on Resolve using 'Document properties' to label correspondence and identify key documents including:
 - The IC review application
 - The decision under review
 - The parties' submissions, including the agency/minister's response to the [s 54Z](#) notice, and
 - Any correspondence clarifying the scope/issues in the IC review.
- Identify the decision under review:
 - Has the applicant provided a copy of the decision under review?
 - Has there been a deemed refusal (see [s 15AC\(3\)](#) and [s 54D](#) of the FOI Act)?
 - Is it an access grant decision or an access refusal decision (see [s 53A/s 54L](#) and [s 53B/s 54M](#) of the FOI Act)? Who bears the onus in the IC review (see [s 55D](#) of the FOI Act)?
 - Has there been an internal review ([s 54C](#)) or revised decision ([s 55G](#)) during the course of the IC review? Note that revised decisions will only be relevant in IC reviews of access refusal decisions (see [FOI Guidelines \[10.107\]](#)).
- Identify the parties to the IC review (see [s 55A](#)):
 - Are any of the parties represented and if so, do we have appropriate authority?
 - Has the applicant requested to be contacted in a particular manner? (see IC review application)
 - Are there any third parties? If so, do we have a copy of the [s 54P](#) notice issued by the agency/minister to advise the third party of the IC review? Is the identity of the third party known to the applicant or should their identity be kept confidential?
- Identify the scope of the IC review:
 - Has the applicant clearly explained in the IC review application the outcome they seek in the IC review? Is this outcome available in the IC review process?
 - In access grant decisions, does the IC review applicant rely on exemptions which it was invited to make submissions about during the consultation process (see [FOI Guidelines \[6.209\]](#))?
 - Does the [s 54Z](#) notice issued to the agency identify all of the issues in the IC review?
 - What steps have been taken already, if any, to seek to resolve the issues in the IC review? For example, consider whether:
 - any attempt has been made to reach an agreement under [s 55F](#)

- the agency/minister has been invited to consider making a decision under [s 55G](#)
 - the scope or issues have been limited/clarified with the applicant/agency
 - submissions been shared between the parties or whether the OAIC has agreed to accept submissions in confidence
 - a view as to the merits of the case has been provided to either of the parties (either by way of a preliminary view or intention to decline letter).
- Does the applicant have any other matters that are being considered/have been considered by the Freedom of Information team (check for open or closed cases)? If so, do any of the issues overlap?
- Has the agency/minister provided all of the documents requested in the [s 54Z](#) notice?
- If there is exempt material at issue, consider:
- Has the agency provided a marked up copy of the documents at issue? If not, consider whether it may be appropriate to issue a notice to produce under [ss 55R](#) and/or [55U](#).
 - If the agency has provided marked up copies of exempt material, do the marked-up documents enable you to understand the exemptions applied and are they consistent with the decision under review (see [3.3] of the [IC review procedure direction](#))? Is there an ‘Exempt material’ action on Resolve? If not, create one.
- Read the relevant provisions of the FOI Act and relevant parts of the FOI Guidelines and form a view about how the matter could be progressed to a resolution. Develop a case strategy to discuss with your supervisor: complete the ‘Reviews plan’ (see **Appendix A**).

Review Case Plan – Reviews and Investigations

The purpose of the review case plan – Reviews and Investigations is to:

- *ensure that all relevant procedural fairness steps are taken in a timely manner at the appropriate stage of the IC review process*
- *prevent unnecessary delays by ensuring procedural issues are addressed when they arise*
- *increase efficiency and prevent replication by giving staff the tools to build on the work done and knowledge gained by their colleagues at each stage of the case management process and*
- *provide confidence to staff and the Executive that matters allocated to the Significant Decisions Team are ready for a decision.*

Review advisers in the Reviews and Investigations Team should complete the review case plan prior to transferring the matter to the Significant Decisions Team.

Use of the attachments for planning and review

The review case plan – Reviews and Investigations includes 2 attachments:

- *Attachment A – Documents at issue – is a list of the documents at issue and the exemptions that apply to each*
- *Attachment B – Further information required – is a matrix setting out what further information is required in relation to each issue.*
- *The purpose of these tools is to identify information gaps and plan the strategy for finalising the review. While the review case plan requires that Review Advisers ensure the attachments are completed prior to transfer, Review Advisers in the Reviews and Investigations Team should ideally ensure the attachments are completed upon allocation and updated over the course of the IC review.*

Overview/Application details		
Scope of IC review	<ul style="list-style-type: none"> <i>If the matter was transferred from the Intake and Early Resolution Team without a Review Case Plan – Intake and Early Resolution, please outline the scope of the review in full</i> <i>Otherwise please explain any modifications to scope that have occurred since the matter was transferred from the Intake and Early Resolution Team</i> 	
Comments [review adviser to complete - optional]	<ul style="list-style-type: none"> <i>Briefly, include any comments about matters you want to flag to the drafter, such as, for example, difficult issues, any preliminary views sent to the parties, related or relevant cases or IC review decisions, the names of any third parties, or your view on particular issues</i> 	
Actions	Action (to be completed before transfer)	Notes (optional)
1. Third parties have been given an opportunity to provide submissions and have had the opportunity to respond to any adverse information <i>If there are no third parties, please mark the action not applicable</i> <i>If there is a third party but you consider a procedural fairness step is not required because it appears sufficiently clear that the decision will not be adverse to the them, please mark the action complete and note this in the 'Notes' field</i>	Choose an item.	
2. Requests for <u>confidential submissions</u> have been addressed, and where relevant, a non-confidential version of the submission has been provided by the agency <i>If there have been no requests for confidential submissions, please mark the action not applicable</i>	Choose an item.	
3. Parties have been given sufficient opportunities to provide submissions	Choose an item.	

Actions	Action (to be completed before transfer)	Notes (optional)
<i>For completeness, this includes ensuring the applicant has been given an opportunity to advise whether they wish to proceed and if so, on what grounds, after a revised decision</i>		
4. All documents under review (marked up and with the relevant exemptions flagged) are on the Resolve file	Choose an item.	
5. The agency has provided the OAIC with an updated schedule of documents flagging which exemption applies to each document. <i>A schedule will not be required in all cases, for example, where there are only a small number of documents. If you consider a schedule is not required please note this in the 'Notes' column, and mark the action complete</i>	Choose an item.	
6. Complete Attachment A: Documents at issue	Choose an item.	
7. Attachment B: Further information required is complete and confirms that no further information is required from the parties. <i>Usually, a matter should only be transferred to the Significant Decisions Team if no further information is required, however, if you and your director agree that you have made reasonable attempts to seek the information from the party, please outline the efforts made, including the use of compulsory powers, in the 'Notes' column, and mark the action complete</i>	Choose an item.	
8. The OAIC has sought IGIS evidence if required (s 33) <i>If s 33 is not an issue in the IC review, please mark the action not applicable</i>	Choose an item.	

Actions	Action (to be completed before transfer)	Notes (optional)
9. Director of Reviews and Investigations consulted regarding referral to the Significant Decisions Team	Choose an item.	
10. Parties advised that the matter is to be transferred to the Significant Decisions Team	Choose an item.	

Completed by	[insert name and position]
Date of completion	

Attachment A: Documents at issue

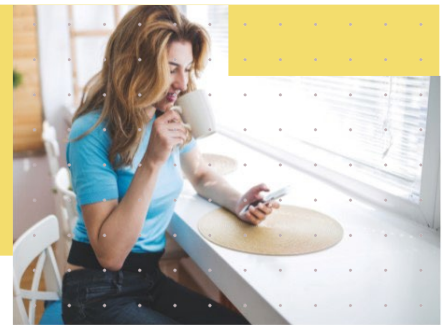
If an issue to be determined in this IC review is the application of exemptions to documents, this table should be completed to indicate which documents (or page numbers, if documents are not numbered) are in scope. Please only list the documents over which exemption issues need to be decided at IC review. The comment field can be used to record any observations on the strength of the exemption, issues to be considered, clarification of what parts of the document are exempt if necessary, etc. For example:

Doc #	Exemption	Comment
3, 7, 8	45	Query whether legal professional privilege waived. See applicant subs.
9	47G(1)(a) 45	Section 47G(1)(a) applies to part of covering document. Section 45 applies to attachment. Query whether privilege waived.
10-15	47G(1)(a)	

Attachment B: Further information required

The below table must be completed before allocating the matter to the Significant Decisions Team. Please complete the below table by including any relevant FOI Act requirements, any further information required to properly assess each requirement, and the source of the information. For example:

FOI Act requirement	Further information required and source
S 24AB – was the request consultation process followed?	Not under contention. No further information required
S 24AA – substantial diversion	<p>The agency has indicated processing the request would take more than 250 hours but has not provided any further details.</p> <p>Request the agency provide:</p> <ul style="list-style-type: none"> • a breakdown of the 250 hours processing time and information about how it calculated that figure. • whether sampling was undertaken and if so, copies of the sample documents • information about the relevance of the sample and how it relates to the calculation of processing time
S 24AA – unreasonable diversion	<p>The agency has not specifically addressed unreasonable diversion in its decision or submissions.</p> <p>Request the agency provide submissions as to why it considers the work involved in processing the request would unreasonably divert the resources from its other operations.</p>



June 2023

Conducting an IC review: General information about case management

This section includes general information and principles about case management, including in relation to using precedents and resources, record keeping, handling exempt material and managing a caseload.

Precedents and resources

The toolkit includes references to templates that have been developed to assist review officers and ensure consistency across the FOI Branch.

Every IC review application must be considered on a case by case basis and templates should only be used as a starting point to provide guidance on the type of information that should be included in a letter/document. If using a template, review officers must make sure it is appropriately updated or adapted to be accurate and relevant to the case at hand.

If there is no reference to a template in the toolkit, ask your supervisor if they are able to provide you with a precedent for the type of document you are drafting if you think this will assist you during the drafting process.

Templates will be updated from time to time. If you believe that a template needs to be updated or amended, or that new templates should be developed, please discuss this with your supervisor.

Handling exempt/sensitive material

Handling exempt material and confidential submissions

- Exempt material/confidential submissions received electronically should be saved on Resolve.
- Exempt material/confidential submissions received in hard copy should be stored in the safe.
 - Do **not** save an electronic copy of exempt material received in hard copy.
 - A copy of the confidential submissions should be saved in Resolve and labelled as 'Confidential'.

- If the exempt material/confidential submissions have a classification or caveat marking, review officers should discuss with their supervisor how to handle the material in accordance with the [Protective Security Policy Framework](#). Talk to the OAIC's Records Officer if you have any questions.
- Where exempt material/confidential submissions are received in hard copy, create a 'Correspondence from agency' action on Resolve and note where the exempt material/confidential submissions are stored.
- Upon receipt of exempt material, an 'Exempt material' action must be created on Resolve on the same day the exempt material is received. This item will remain on Resolve until the exempt material is destroyed/deleted.
- All hard copies of exempt material/confidential submissions must be stored in the safe and should only be taken out when the material is being reviewed.
- The content of exempt material/confidential submissions must not be disclosed. If this happens, you must immediately report it to your supervisor.

Deleting/destroying exempt material

- All exempt material (electronic and hard copies) must be destroyed/deleted once an IC review application has been finalised:
 - If exempt material received electronically, destroy by deleting the files from all locations (for example, Resolve, Outlook, H: Drive). There is no need to first check with the agency/minister whether the documents can be destroyed.
 - If exempt material received in hardcopy, ask the agency/minister whether it requires the documents to be returned. Note that the OAIC do not currently have a secure method of destroying USBs and therefore USBs should be returned.
 - If the agency/minister does not want the hard copy documents to be returned, destroy documents by shredding.
 - If the agency/minister wants the hard copy documents to be returned, arrange delivery either by safe hand or collection by the agency/minister.
- Update 'Exempt material' action on Resolve to record whether the exempt material has been destroyed or returned and the date that the action was completed.
 - Use the 'awaiting advice' option if you have contacted the agency/minister to confirm whether the documents should be returned/destroyed and are awaiting a response. It is the review officer's responsibility to diarise to follow up with the agency/minister if a response is not received.

Managing a caseload: efficient and timely action

General

- Complete the 'Review Plan' on Resolve to ensure that relevant case management actions are completed and to set up a plan for completing the IC review.
- Use the actions in Resolve to manage your workload by creating actions to manage deadlines and progress drafts through clearance.
- Review Resolve actions daily to check whether responses are overdue and whether any tasks have been allocated to you.

- Block out time to regularly update parties and to undertake close work.
- Where a party to an IC review requests an update, a response should generally be provided within 2-3 working days.
- Consider calling the parties to discuss a particular issue/action if you think this will more efficiently progress the IC review. If key issues/deadlines/particular actions have been discussed or agreed, confirm the conversation in writing on the same day.

Progressing matters efficiently

- Plan what you hope to achieve during a particular day/week, taking into account any non-casework related tasks that you are required to undertake that day/week (eg attending team meetings) and utilising 'FOI Branch' Focus times.
- Plan your time noting when responses are due in particular cases. Use Resolve and to monitor deadlines.
- Identify the scope and issues in the IC review early and confirm this in writing with the parties early in the case management process. Explore whether the applicant may wish to limit the scope of the IC review to particular issues/documents.
- Be comprehensive in your requests for information from the parties to avoid having to make multiple requests for information.
- Before sending a request for information/inviting submissions (other than a [s 54Z](#) notice), consider calling the applicant/agency to explain what information you are requesting and why. This will help the applicant/agency understand what is needed and how it will help progress the IC review. It will also provide an opportunity to discuss any immediate issues there may be in the applicant/agency providing a response within the requested timeframe.
- Consider whether you have multiple cases that deal with similar issues and try to work efficiently to progress these cases. For example, if you have multiple cases where searches ([s 24A](#)) are an issue, consider setting aside a day when you will aim to progress each of those cases.
- Be forward-thinking when deciding whether it is appropriate to request further information from the applicant/agency. Consider whether the information requested will mean the OAIC has all of the required information to progress the matter to a resolution.
- Progress matters bearing in mind that they may ultimately progress to a decision by the Information Commissioner and think about how the issues would be discussed in an IC review decision. Are the steps you are taking necessary to resolve those issues?
- If it appears that a matter will proceed to a decision by the FOI or Information Commissioner, raise the issue at an FOI Commissioner input meeting.
- Block out time to focus on matters with a complex history or issues so that you can fully familiarise yourself with the issues and material to form a strategy for how the matter should be progressed. Set up a meeting to discuss with your supervisor once you have formed a strategy.
- Where a case strategy has been agreed with your supervisor, note this strategy in the 'Review Plan' and set yourself a target for when you will have progressed the matter in line with this strategy.

- Every case is different. Analyse the issues and use your judgment to assess what steps you can take to progress the matter to a resolution as efficiently as possible. For example, if it appears that the parties are unlikely to come to an agreement under [s 55E](#), form your preliminary view so that the matter can be progressed to a decision/closure.
- Prioritise older matters. Often older matters involve complexities or sensitivities. If you are unsure how to progress a particular matter, block out time to focus on assessing next steps and set up a meeting with your supervisor to discuss. Consider the complexities and sensitivities and whether a meeting with the Commissioner would assist.
- When reviewing exempt material, think about the most efficient way to form your view about whether the document/material is exempt.
 - Familiarise yourself with the decision under review and the applicant’s submissions before looking at the documents at issue.
 - Consider whether the marked up documents are consistent with the decision under review and whether it is easy to understand which material has been found exempt/irrelevant to the request. If not, discuss with your supervisor whether an updated version of the documents at issue should be requested.
 - Where the agency has decided that the documents are exempt in full under a particular provisions and exempt in part under other provisions, form your view on whether you think that the documents are exempt in full as claimed. If so, it may be appropriate to provide a preliminary view/intention to decline letter on this basis without needing to consider whether it is also your view that the documents are exempt in part.
 - Where an agency has decided that the same material exempt under multiple exemptions, consider the non-conditional exemptions first (as there will be no need to consider the public interest if the exemption applies).
 - Where an agency has relied on a variety of exemptions in relation to a variety of material, consider which material has been found exempt under which provision and try to characterise the relevant material (for example, the names of third parties were found exempt under s 47F, material comprising the opinions of public servants was found exempt under s 47C, etc).

Clearance process

Pursuant to [s 25](#) of the *Australian Information Commissioner Act 2010*, the Information Commissioner has issued an instrument relating to the delegation of FOI powers by the Australian Information Commissioner which is available on the [OAIC's website](#).

Regard must be had to this instrument to determine whether a particular power or function under the FOI Act has been delegated and if so, to what level. For example, IC review decisions made under [s 55K](#) of the FOI Act are non-delegable and can only be made by the Information Commissioner, and the power to issue a notice to produce under [s 55U\(3\)](#) is delegated to Director level.

There is also a clearance process in the Freedom of Information Branch that sets out the level of clearance required for particular documents. The clearance process is updated periodically. The following table sets out the clearance process as at August 2023:

Document	Clearance is required		
	Assistant Director/Supervisor	Director	Assistant Commissioner
Notice to Produce (ss 55R and 55U) (Delegation: EL2)	Yes	Yes	Noting
Requests for extension of time to respond to s 54Z notice	Yes	-	-
Preliminary view/requests for further information (Delegation: Officer level)	Yes	-	-
Intent to decline (Delegation: Officer level)	Yes	-	-
Closure letters (Final clearance: Director level)	Yes	Yes	
Section 55F agreement: Draft (Delegation: Officer level)	Yes	-	-
Section 55F agreement: Closure (Delegation: Director level)	Yes	Yes	-
Section 55K decisions (Commissioner/Assistant Commissioner issued)	Yes	Yes	Yes
Intent to decline (s 54W)/Preliminary views (Delegation: Officer level)	Yes	Yes	-
Intent to decline (s 54W)/Preliminary views – Complex or significant or novel (Delegation: Officer level)	Yes	Yes	Noting

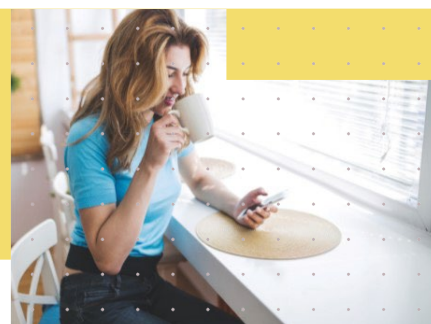
Generally, draft documents should be saved into Resolve for clearance. The draft document should be clearly labelled, and a clearance action should be allocated to the appropriate person for clearance with a brief description of the document to be cleared.

Please note the specific guidance regarding clearance in the *Intention to decline (s 54W) checklist*, *Closure letter (s 54W) checklist*, *Preliminary view checklist* and *Decision-writing checklist*.

Matters to escalate to supervisor

As a general guide, escalate the following matters to your supervisor:

- Material change from initial assessment noted on Resolve.
- Requests for extension of time (EOTs) to provide a response over two weeks or repeated requests for EOTs.
- Requests for expedition.
- Where parties are seeking to have matter finalised under [s 54W\(b\)](#) or request a hearing under [s 55B](#).
- High profile cases/media coverage.
- FOI requests made during the IC review process.
- Complaints about how an IC review application has been handled.
- Matters likely to proceed to a decision or decline under [s 54W\(a\)](#).
- Matters that may require a teleconference.
- Preliminary views and requests for further submissions to applicants/agencies.



June 2023

Conducting an IC review: Submissions

Contents

Submissions	1
Timeframes for responses	3
Requests for an extension of time to provide information/submissions	3

Submissions

General

Once the OAIC had decided to undertake an IC review, the OAIC will ordinarily give the agency/minister a copy of the application for IC review and will ask the agency/minister to provide information relevant to the IC review (see *FOI Guidelines* [10.100]).

The notices issued under [s 54Z](#) to the parties explain that the Information Commissioner will generally share the submissions provided during the IC review with the other party: see paragraph 10.103 of the *FOI Guidelines*.

In relation to submissions made during the course of an IC review in light of a review officer’s preliminary assessment of the matter, the *FOI Guidelines* at [10.113] explain that any submissions received during this process will generally be shared between the parties.

Request to provide confidential submissions: Respondents

Part 5 of the [IC review procedure direction](#) explains that if an agency/minister wishes to make a submission in confidence, a request for the submission to be treated in confidence must be made ahead of providing the submission.

Any request for confidentiality must be accompanied by reasons to support such a claim. Circumstances in which the OAIC may agree to accept submissions in confidence include:

- where the submissions would reveal the contents of the documents at issue
- where the OAIC is satisfied that the agency has made a prima facie case that the relevant submissions would likely be exempt under the FOI Act (for example where the

submissions include third party personal information and it seems that there is a prima facie case that the third party personal information would be exempt under s 47F).

Where the OAIC accepts a submission in confidence, agencies and ministers must provide a version of the submission that can be shared with the applicant (see [IC review procedure direction](#) [5.4]).

Provision of ‘confidential’ submissions by agencies without a request

If an agency/minister provides submissions marked as confidential without first requesting that the OAIC agrees to accept the submissions as confidential, the review officer should write to the agency/minister to explain:

Thank you for providing [agency/minister]’s submissions in this matter. I note that the submissions are marked as confidential. However, it does not appear that [agency/minister] made a request for the submission to be treated in confidence ahead of providing the submission in accordance with [5.3] of the [IC review procedure direction](#). In the absence of such a request, the OAIC does not agree to accept the submissions as confidential.

If the [agency/minister] wishes to make a request that the submissions are treated as confidential, please submit a request with reasons by **@ 3 working days** and provide a version of the submissions that can be shared with the applicant. The OAIC will then advise whether it agrees to treat the submissions as confidential.

If a response is not received within the timeframe provided or the agency/minister does not provide reasons for why it requests that the submissions are treated as confidential, discuss next steps with your supervisor.

Request to provide confidential submissions: Applicants

The provision of confidential submissions by an applicant is less common. If this situation arises, the review officer should discuss with their supervisor whether the applicant has provided sufficient reasons for the OAIC to agree to accept the submissions in confidence in the circumstances.

Examples of where the OAIC may agree to accept submissions from an applicant in confidence include:

- where a journalist’s submissions refer to a confidential source of information, and
- where there has been a Public Interest Disclosure.

Submissions from third parties

If the OAIC has received or has been provided with copies of submissions from a third party during the course of the IC review and you intend to share the submissions or cite the submissions in an IC review decision, discuss this with your supervisor. Consideration should be given to whether disclosure of the third party’s identity/submissions would disclose exempt material and/or result in a [breach of privacy](#).

If the OAIC invites a third party to provide submissions during the course of an IC review, the third party should be advised that their submissions may be cited or referred to in the IC review decision unless there are compelling reasons not to.

Timeframes for responses

Timeframes for responses from agencies

The timeframe that the Freedom of Information team generally allows agencies/ministers to provide a response to a request for information will vary depending on the circumstances. Generally, the following timeframes are set:

Action	Timeframe for response
Response to requests for information during the course of an IC review	Two weeks
Response to a simple request for clarification or for missing documents to be provided	Up to one week

Discuss with your supervisor if:

- you are considering allowing a timeframe different to those set out above
- you are considering granting an extension of time when an agency/applicant has provided no reasons for the extension (generally, this approach will not be appropriate)
- you are considering granting an extension of time of more than two weeks, or
- you have already granted an extension of time and the agency has requested a further extension of time.

Longer timeframes may be appropriate when:

- an agency has undertaken to make a revised decision and has provided reasons why an extension of time is required in the circumstances – generally, no more than two additional weeks will be given for the revised decision to be made.
- an agency has advised that it intends to undertake third party consultation during the course of the IC review.

Timeframes for responses from applicants and third parties

Generally, applicants and third parties are given two weeks to respond to a request for information or an invitation to provide submissions during the course of an IC review.

Discuss with your supervisor if you intend to allow the applicant/third party more than two weeks to provide a response.

Requests for an extension of time to provide information/submissions

If a party to the IC review (agency/minister/applicant/third party) is unable to respond within the specified timeframe, the OAIC expects the party to request an extension of time in advance of the deadline and provide reasons why additional time is required.

Generally, where a party requests an extension of two weeks or less and no extensions of time have been granted previously, the review officer can decide whether to grant the extension of time based on the reasons provided.

Circumstances where an extension of two weeks may be justified include:



- where an agency has been provided with a preliminary view and has advised that it will make a revised decision (consider contacting the agency to ask for details of the extent of the information it proposes to release under the revised decision to determine whether the revised decision is likely to resolve some/all of the issues in the IC review)
- where an agency has advised that it has commenced further third party consultation and is awaiting a response, and the review officer is satisfied that such consultation is appropriate to resolve the issues in the IC review
- where an applicant/third party has been invited to make submissions and has advised that due to illness or personal circumstances, they have been unable to prepare a response within the timeframe provided, or
- where an applicant/third party has expressed concerns about the complexity of the agency's decision/submissions/the OAIC's request for information/invitation to provide submissions and seeks further time to prepare a response (consider offering to call the applicant to talk through the decision/submissions/the OAIC's request for information/submissions).

Note: the OAIC cannot provide an extension of time in relation to an agency/minister's response to a notice to produce under [s 55R](#). If the OAIC receives a request for an extension of time to respond to a [s 55R](#) notice, discuss with your supervisor immediately.

Where a party requests an extension of more than two weeks, or is making a further request for an extension of time, the review officer should ask the party to provide reasons (if not already provided) and then discuss with your supervisor whether the extension of time should be granted in light of the following:

- the history of the matter
- whether any extensions of time have been granted previously
- whether the agency/minister/applicant/third party has previously had the opportunity to provide the documents/information requested
- whether the information sought is necessary to progress the IC review
- whether it might be appropriate to issue a notice to produce under [ss 55R](#) and/or [55U](#), and
- whether the other party is likely to object to the extension of time.

Requests for an extension of time from agencies

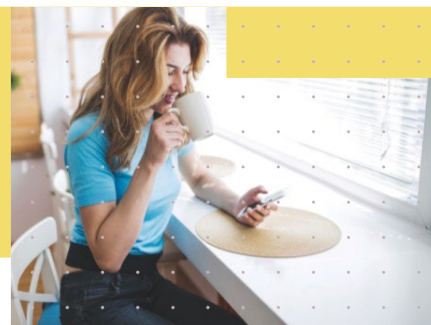
In an access refusal IC review, consider whether it is appropriate to remind the agency of its obligations in the IC review process:

- [Section 55D\(1\)](#) of the FOI Act provides that the agency or minister has the onus of establishing that a decision given in respect of the request or application is justified or the Information Commissioner should give a decision adverse to the IC review applicant.
- [Section 55DA](#) of the FOI Act requires agencies and ministers to assist the Information Commissioner in conducting an IC review.
- [Section 55Z](#) of the FOI Act authorises agencies and ministers to provide information for the purposes of an IC review and provides a protection from liability for doing so.

Requests for an extension of time from the applicant in an access grant
IC review

Consider whether it is appropriate to remind the applicant of its onus in the IC review
([s 55D\(2\)](#)).





June 2023

Conducting an IC review: Intention to decline (s 54W) checklist

Introduction

This checklist provides general guidance to review officers to assist with drafting intention to decline (ITD) letters where consideration is being given to finalising a matter under [s 54W](#) of the FOI Act and should be read alongside [Part 10 of the FOI Guidelines](#), in particular [10.85] – [10.90].

Under [s 54W](#) of the FOI Act, the Information Commissioner has the power to decide not to undertake an IC review, or not to continue to undertake an IC review, if:

- the IC review application is frivolous, vexatious, misconceived, lacking in substance or not made in good faith ([s 54W\(a\)\(i\)](#));
- the IC review applicant has failed to cooperate in progressing the IC review application, or the IC review, without reasonable excuse ([s 54W\(a\)\(ii\)](#));
- the Information Commissioner cannot contact the IC review applicant after making reasonable attempts ([s 54W\(a\)\(iii\)](#));
- the Information Commissioner is satisfied that the interests of the administration of the FOI Act make it desirable that the IC reviewable decision be considered by the AAT ([s 54W\(b\)](#)); or
- the IC review applicant fails to comply with a direction of the Information Commissioner ([s 54W\(c\)](#)).

Under the Information Commissioner's [instrument of delegation](#) and the Freedom of Information team's clearance process, the powers under [s 54W](#) of the FOI Act are delegated to the Director level. The Commissioner therefore does not have to personally decide whether a matter should be finalised under [s 54W](#).

Before drafting an ITD

- Before drafting an ITD, discuss with your supervisor why you think an ITD is appropriate in the circumstances and seek their approval that this course of action is appropriate. Bear in mind that where a matter is finalised under [ss 54W\(a\) or \(c\)](#), the applicant will have no further right to merit review of the agency/minister's decision.
- After an ITD has been provided, the delegate of the Information Commissioner will consider whether the applicant (and agency in the case of [s 54W\(b\)](#) ITDs) have been

given a reasonable opportunity to comment on the issues in the IC review before making a decision on whether to finalise the matter under [s 54W](#). It is therefore important that the ITD is accurate, evidence-based and covers all of the issues in the IC review. If you do not have enough information to provide an ITD on the merits of the IC review application under [s 54W\(a\)\(i\)](#), you should seek further submissions from the parties.

Drafting an ITD

General templates for intention to decline letters (ITD) are available on Resolve.

Important points to remember:

- References to the legislation and FOI Guidelines must be correct. Be very careful if paraphrasing legislation to ensure it is accurate: where possible, use the wording in the FOI Guidelines or previous IC review decisions if you want to simplify a concept or legal test.
- An ITD should use plain language. Refer to the [OAIC quick reference style guide](#) for citing cases and legislation, punctuation and grammar.
- An ITD should be easy to read and understand:
 - use appropriate headings to introduce topics
 - avoid long sentences/paragraphs
 - do not include irrelevant information
 - consider referring to an attachment of the FOI request/submissions if they are lengthy to quote.
- It is important to tailor the ITD to the level of FOI knowledge of the applicant (and agency in the case of a [s 54W\(b\)](#) ITD).
- Consider and refer to OAIC resources, including:
 - the relevant paragraphs of the FOI Guidelines, and
 - recent Federal Court, AAT and IC review decisions on relevant issues considered/cited/distinguished if necessary.
- Do not disclose confidential submissions or content of exempt material (except as described in the agency/minister's decision or in non-confidential submissions).

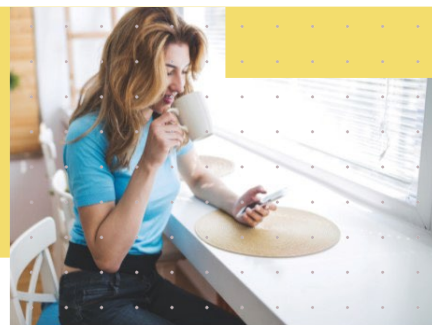
Clearance of ITD

- The draft ITD must be sent to your supervisor for clearance.
- The version you send up for clearance should be ready to send out subject to any comments about the content made by your supervisor. Carefully proofread the ITD for accuracy, spelling mistakes, formatting and relevance before sending it up for clearance.
- Save draft ITD on Resolve.
- Allocate a Resolve task to your supervisor for clearance, noting any particular issues for discussion.

Before sending the ITD

- Once the draft ITD has been approved, consider calling the applicant (and agency in the case of a s 54W(b) ITD) to discuss the steps you have taken to form your view on the IC review application, including review of the parties' submissions the relevant law and previous IC review decisions. Explain the purpose of the ITD letter and the timeframe for a response.





June 2023

Conducting an IC review: Closure letter (s 54W) checklist

Introduction

This checklist provides general guidance to review officers to assist with drafting a closure letter where an intention to decline letter has been sent under s 54W of the FOI Act.

This checklist follows on from the [Intention to decline \(s 54W\) checklist](#) and is relevant where a review officer wishes to recommend to the delegate of the Information Commissioner that a matter be declined under s 54W in light of any response received to the intention to decline letter.

Before drafting a closure letter

- Check whether a response has been received to the intention to decline letter.
- Consider whether the response to the intention to decline letter (if relevant) has changed your view about whether the matter should be declined under s 54W. Does the response raise issues that you need to clarify with the applicant/agency?
- Discuss with your supervisor whether you should proceed to draft a closure letter for the delegate's consideration.

Drafting a closure letter

General templates for closure letters are available on Resolve.

Important points to remember:

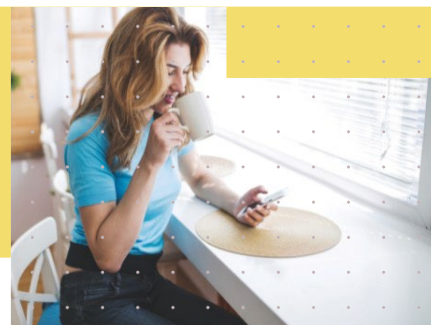
- References to the legislation and FOI Guidelines must be accurate. Be very careful if paraphrasing legislation to ensure it is accurate: where possible, use the wording in the FOI Guidelines or previous IC review decisions if you want to simplify a concept or legal test.
- If you have copied parts of the ITD into the closure letter, proofread to ensure that it is appropriately updated to reflect that the delegate is the author of the closure letter.
- If possible, cite the submissions made in response to the ITD rather than summarising. If it is necessary to summarise, consider attaching a copy of the relevant submissions.
- The delegate's reasons should be drafted using plain language to address any submissions made in response to the ITD.

Clearance of closure letter

- The draft closure letter must be sent to your supervisor for clearance.
- The version you send up for clearance should be ready to send out subject to any comments about the content made by your supervisor. Carefully proofread the closure letter for accuracy, spelling mistakes, formatting and relevance before sending it up for clearance.
- Check that the closure letter includes the reasons for decision.
- Check that the closure letter includes information on review rights.
- Save draft closure letter on Resolve.
- Allocate a Resolve task to your supervisor for clearance, noting any particular issues for discussion.
- Once the closure letter has been cleared by your supervisor, allocate a Resolve task to the delegate for clearance, noting any particular issues for discussion.

Sending the closure letter, notifying the Respondent and third parties and closing the Resolve file

- Once the closure letter has been approved by the delegate, add the delegate's signature and check that:
 - the letter is dated correctly
 - the letter is being sent to the correct email/postal address, and
 - the closure letter includes information on review rights.
- For closures under s 54W(a):
 - Send s 54X notification to the Respondent of a s 54W(a) closure - [D2020/011910](#). This notification can be signed by a case officer and not the delegate signing the closure.
 - Send s 54X notification to Third parties of a s 54W(a) closure - [D2020/011963](#). This notification can be signed by a case officer and not the delegate signing the closure.
- For closures under s 54W(b):
 - Save the closure letters to each of the parties to the IC review in .pdf format and send each letter to the relevant party to advise that the IC review has been finalised under s 54W(b).
 - Save copies of all correspondence to the parties advising of closure on Resolve.
- Close Resolve file.



June 2023

Conducting an IC review: Review of preliminary views/s 54W letters

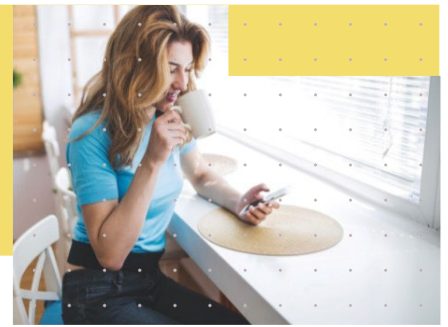
The purpose of this checklist is to assist in the review of

- draft preliminary views/case appraisals, and
- draft intention to decline/closure letters.

It is assumed that the review officer has already had a discussion with their supervisor in relation to the case management of the particular matter. This review checklist should be read alongside the preliminary view checklist, intention to decline (s 54W) checklist and closure letter (s 54W) checklist.

- Review accuracy of facts/background, including whether the all of the issues in the IC review have been appropriately identified and described.
- Review application of the law, that the submissions provided by the parties have been appropriately taken into account, and that onus under [s 55D](#) has been appropriately discussed.
- Review formatting, including font size, headings used, paragraph spacing, quotes, indenting in footnotes, etc.
- Review for typographical errors, including footnotes, quotes, document numbers and paragraph numbers of the FOI Guidelines.
- Check that the parties have been afforded procedural fairness, including any third parties if relevant.
- Check that all of the issues in the IC review have been appropriately discussed and addressed (generally, a preliminary view/ITD should be drafted on the basis that this will be the parties' final opportunity to provide submissions before the matter is finalised).
- Review whether the OAIC has agreed to receive submissions in confidence and if so, check that the draft letter does not reveal confidential material.
- Where the draft letter is to an applicant/third party, check that exempt material is not disclosed. Characterisation of the exempt material may be acceptable. For example, 'documents comprising emails and attachments exchanged between an internal lawyer of [agency] and officers of [agency]', or 'names of third party individuals'.

- Where unusual issues are identified, ensure that the matter is appropriately escalated to the Director and/or Assistant Commissioner.
- For preliminary review/intent to decline letters: ensure that there is a reference to the view being provided as a review officer/recommendation to the delegate.
- For closures under s 54W(a):
 - Save the closure letter in .pdf format and send the closure letter to the applicant.
 - Write to the agency to advise that the IC review has been finalised under s 54W(a) and that the matter will be closed.
 - Save copies of the correspondence to the applicant and agency/minister advising of closure on Resolve.
 - Send section 54X notification to the Respondent of a s 54W(a) closure - [D2020/011910](#). This notification can be signed by a case officer and not the delegate signing the closure.
 - Send section 54X notification to Third parties of a s 54W(a) closure - [D2020/011963](#). This notification can be signed by a case officer and not the delegate signing the closure.
- For closures under s 54W(b):
 - Save the closure letters to each of the parties to the IC review in .pdf format and send each letter to the relevant party to advise that the IC review has been finalised under s 54W(b).
 - Save copies of all correspondence to the parties advising of closure on Resolve.



June 2023

Conducting an IC review: Decision writing checklist

Contents

Introduction	2
Procedural issues to be addressed prior to drafting a decision.....	2
Pre-drafting meeting	3
Drafting a decision.....	3
Preparing the decision for clearance.....	5
Clearance of decision	6
Finalisation of decision	6
Closing the Resolve file.....	6
Attachment A – IC review decisions – Standard wording examples.....	8
Attachment B – IC review decisions proofreading checklist	18
Attachment C – Cover sheet template	22
Attachment C.1 – Instructions for assisting with electronic clearance using documents on Resolve	24
Attachment D – Template Snapshot	26
Attachment E – Finalisation/publication process	28
Attachment F – Template summaries of IC review decision	33

Introduction

This checklist provides general guidance to review officers on matters to consider in progressing a matter to an Information Commissioner decision under s 55K.

Procedural issues to be addressed prior to drafting a decision

- The s 54Z notice has been provided to the agency / minister as it is possible for an application for IC review to have progressed only on the basis of preliminary inquiries made under s 54V.
- The decision under review has been identified (original decision/internal review decision/revised decision).
- The scope of review is settled and that you have identified all of the relevant issues (that is the matters about which the parties are in disagreement) and that clarification has been sought by the applicant about the documents / outcome sought if necessary. The issues have been confirmed with the applicant in circumstances where an agency has made updated exemption contentions / a revised decision under s 55G.
- In access grant IC reviews, the FOI applicant has been notified of the IC review pursuant to s 54Z(b).
- It is clear who bears the onus in the IC review (see s 55D).
- Procedural fairness has been provided to parties – generally through exchange of submissions, use of case appraisal/preliminary views, or a description of the substance of (confidential) submissions. See s 55(4)(b): in conducting a review the Information Commissioner must ensure that each review party is given a reasonable opportunity to present his or her case (consider in particular whether each party has been given an opportunity to respond where the decision is likely to be adverse to them).
- All third parties have been identified (see s 55A for those who are automatically parties and those who can apply to join review) and invited to participate in review (see ss 54P and 54Z regarding notification of IC review).
- All parties (applicant, respondent and any participating third parties) have been advised that the matter is proceeding to a decision and that a preliminary view has been provided if required. Seek final submissions from the parties, in particular, relevant submissions in response to a case appraisal / preliminary view.
- An unredacted copy of the documents at issue has been obtained, where relevant (see s 55U, the Commissioner may potentially make a decision based on agency submissions). Any mark-up on the documents at issue clearly explain which exemptions have been applied to which material (see [3.3] of the [IC review procedure direction](#)) and consider whether updated marked-up copies are required if an agency has changed its exemption contentions / made a revised decision during the course of the IC review.
- If the reasons for decision are inadequate to demonstrate that the agency / minister has discharged its onus under s 55D, the agency / minister has had the opportunity to provide submissions in response to a case appraisal / preliminary view.

- If the agency / minister seeks to make confidential submissions: consider the requirements of the [IC review procedure direction](#) (paragraphs [5.1] – [5.7]; submissions are generally shared unless there are compelling reasons not to, provided ahead of time; if submissions are accepted in confidence, a version should be provided for the applicant). We should be able to explain why we have agreed to accept submissions as confidential in the circumstances.
- The applicant and any third parties have advised if they wish to be identified in the decision. Corporations may be invited to provide reasons as to whether they object to being identified but generally do not have the right to privacy of an individual. Discuss this with your supervisor. Consider whether identification of the third party in the IC review decision would disclose exempt material (under s 55K(5)(b) the Information Commissioner’s published decisions will not include any exempt material).
- If a decision is going to be set aside with respect to s 33, evidence has been sought from the Inspector-General of Intelligence and Security (see s 55ZB).

Pre-drafting meeting

- Where a preliminary view has been provided during the course of an IC review, this will usually be the starting point for drafting a decision. Consider any submissions received in response to the preliminary view and whether this changes the proposed recommendation to the Information Commissioner. If further submissions are required before the matter can be progressed to a decision, discuss with your supervisor.
- Where a draft decision finds documents/material exempt under one provision, it may not be necessary to consider whether the same document/material is exempt under other exemptions the agency/Minister has relied on in its decision. Form your view about whether it may not be necessary to discuss particular exemptions and discuss this with your supervisor.
- Arrange a meeting with your supervisor, the decision reviewer, the Principal Director and Commissioner to discuss the proposed draft decision and get approval to proceed to drafting a decision.

Drafting a decision

- The draft ‘Reasons for Decision’ template on Word should be used for drafting decisions.
- Read the relevant provisions of the FOI Act and parts of the FOI Guidelines before starting to draft the decision and think about how you will address the requirements of each provision.
- Ensure references to the legislation and FOI Guidelines are correct. If paraphrasing legislation, ensure it is accurate: where possible, use the wording in the FOI Guidelines or previous IC review decisions if you want to simplify a concept or legal test. For example:
 - Exemptions affirm: ‘OL’ and *Department of Home Affairs (Freedom of information)* [\[2018\] AICmr 36](#) (20 March 2018)
 - Exemptions vary: ‘OC’ and *Australian Building and Construction Commission (Freedom of information)* [\[2018\] AICmr 26](#) (28 February 2018)

- Exemptions set aside: *Australian Associated Press Pty Ltd and Department of Home Affairs (Freedom of information)* [[2018\] AICmr 23](#) (14 February 2018)
- Searches affirm: *David Kalman and Department of Veterans' Affairs (Freedom of information)* [[2017\] AICmr 86](#) (13 September 2017)
- Searches set aside: *The Australian and Minister for Foreign Affairs (Freedom of information)* [[2018\] AICmr 6](#) (9 January 2018)
- Practical refusal affirm: *'NX' and Australian Trade and Investment Commission (Freedom of information)* [[2018\] AICmr 18](#) (2 February 2018)
- Practical refusal set aside: *'NC' and Australian Building and Construction Commission (Freedom of information)* [[2017\] AICmr 118](#) (17 November 2017)
- Charges set aside: *Australian Associated Press Pty Ltd and Department of Foreign Affairs and Trade (Freedom of information)* [[2018\] AICmr 13](#) (19 January 2018)
- Access grant affirm: *Stryker Australia Pty Ltd and Department of Health (Freedom of information)* [[2017\] AICmr 69](#) (25 July 2017)
- Access grant set aside: *'HT' and the Australian Human Rights Commission* [[2015\] AICmr 82](#) (15 December 2015)
- Consider and refer to OAIC resources, including:
 - overviews of IC review decisions that have addressed the same exemption / issue (check with your supervisor if these are available)
 - draw from a cross section of the most recent published decisions that have addressed the same exemption / issue (use keyword searches in Austlii), and
 - the relevant section of the FOI Guidelines.
- Use the *IC review decisions – Standard wording samples* resource at **Attachment A** to consider what information should be included in the background, scope of IC review and issues sections of the draft decision.
- Check that style is consistent with recent decisions of the Australian Information Commissioner:
 - state whether the decision is being affirmed, set aside and substituted or varied (follow wording as used in previous decisions). Include whether decision varied by the agency / minister under s 55G of the FOI Act.
 - identify any third parties participating in the review, along with the applicant and respondent in the title block. Under the 'Scope of review' section, refer to any third party consultation and footnote the consultation requirements (ss 27, 27A).
 - review a recent decision relating to similar provisions to check what information has been included in the background and scope of review sections (for example, practical refusal cases will include different information in the background section than exemption cases)
 - follow recent cases when preparing the Catchwords.
- Consider and refer to recent Federal Court, AAT and IC review decisions on relevant issues considered/cited/distinguished if necessary.

- Refer to the [OAIC Style Guide](#) for citing cases and legislation, punctuation and grammar. See also the *IC review decisions proofreading checklist* at **Attachment B** for common issues.
- Do not disclose confidential submissions or content of exempt material, except as described in the agency / minister’s decision, provided to the applicant, or in non-confidential submissions (under s 55K(5)(b) the Information Commissioner’s published decisions will not include any exempt material). Consider including a general description of the confidential submissions and categorising exempt material.
- Review whether previous IC review decisions have considered similar documents / submissions and include a discussion of particularly relevant cases in the body of the decision.
 - For example, you could use the NoteUp function and/or a keyword search in the [Austlii](#) Australian Information Commissioner database to search for particular topics (for example, investigation + 47E(c) or “practical refusal” + “reasonable steps”).
 - The OAIC’s [website](#) provides a summary of IC review decisions by year and lists the legislative provisions considered and catchwords.

Preparing the decision for clearance

- Review the reasoning in the draft decision and check that:
 - The background and scope sections only include information that is relevant to the issues in the IC review. If you think that information is not relevant but you are unsure, please include the information and note the relevance of the information in a comment for the decision reviewer’s consideration.
 - The draft decision sets out the relevant legislative provisions and refers to relevant paragraphs of the FOI Guidelines.
 - There is appropriate analysis of the submissions put forward by the parties.
 - That the relevant provisions of the FOI Act and the FOI Guidelines have been properly applied.
 - There is reasoning between the facts and conclusion that set out why (with reference to the particular circumstances of the case) the relevant legislative requirements are / are not satisfied in this case.
 - The interpretation of the legislation is consistent with the wording of the FOI Act, the FOI Guidelines and precedent IC review / AAT / Federal Court decisions. If not, discuss with your supervisor.
 - Each paragraph is clear, concise, accurate and includes only information that is relevant to the reasons for decision.
- **Closely proof-read the decision:** print and read, read out aloud, read for accuracy then reasoning, then read again. Refer to the *IC review decisions proofreading checklist* at **Attachment B**. In summary, check:
 - References to document numbers and FOI Guidelines paragraph numbers are correct.
 - All quotes are accurate.

- The formatting with respect to font, font size, paragraph indents, spacing and footnotes are all consistent with the style guide.
- Prepare coversheet for the Commissioner using the template at [Attachment C](#). Prepare the hard copy folder with key documents for the Commissioner **or** follow the instruction at [Attachment C.1](#) for electronic clearance using documents on Resolve.
 - Adapt coversheet to type of matter and include only relevant detail and the documents at issue in the relevant case. In consultation with your supervisor, describe any contentious or unusual issues under ‘issues for the Commissioner’.
 - Identify the documents at issue with a different coloured tab in the hard copy folder and ensure that the documents are clearly marked up for Commissioner’s consideration.
- Draft snapshot and cover email using the template at [Attachment D](#).

Clearance of decision

- The draft you send to the reviewer should be decision ready, subject to any feedback from the reviewer. If you have not done so already, **closely proof-read the decision**. Refer to the *IC review decisions proofreading checklist* at [Attachment B](#).
- Label the draft document ‘Draft decision [surname of applicant] and [agency][IC review ref no.] [your initials][date of draft: DDMMYYYY]’ eg ‘[Draft decision] - Parker and DHA – MR18/00123 - CM02022019’.
- Draft decision and coversheet emailed to your supervisor for clearance. In the covering email please indicate the age of the matter.
- Check the ‘Decision to Executive’ field on Resolve (and add the date) when the decision has progressed to Principal Director. (If the decision is later returned to you for additional work, ‘uncheck’ this field in Resolve).
- Add the decision to the [FOI Regulatory Group Workbook](#) and continue to update as it progresses to the Director, Principal Director and the Commissioner.

Finalisation of decision

- Commissioner approval sent via email. Save a copy of the Commissioner’s email approving the decision to the ‘Documents’ tab on Resolve.
- Format and save the files by following the instructions in [Attachment E](#).
- Provide links to files in TRIM to your supervisor and the decision reviewer (sample at [Attachment F](#)). The decision reviewer will then prepare the files for distribution/publication (as set out in [Attachment E](#)).
- Circulate both summaries to FOI team with link to PDF in TRIM.
- Provide decision to parties (including affected third parties participating in the review and any joined parties). This should happen on the same day that the decision is approved by the Commissioner unless the decision is finalised after hours.

Closing the Resolve file

- Ensure copies of all correspondence to and from the parties is saved to the ‘Documents’ tab.

- Delete/destroy all exempt material (electronic and hard copies).
 - If documents received electronically, destroy.
 - If documents received in hardcopy, ask agency/minister whether it requires the documents to be returned. Note that we do not currently have a secure method of destroying USBs and therefore USBs should be returned.
 - Destroy electronic copies by deleting the files from all locations (for example, Resolve, Outlook, H: Drive).
 - Destroy hardcopy documents by shredding.
 - Return hardcopy documents as arranged with the agency.
- Update 'Exempt material' action on Resolve to record whether exempt material has been destroyed or returned and the date that the action was completed.
- Create 'Ad hoc' action to close file and complete necessary steps to update Resolve (see *IC reviews – Resolve user guide*).
- Close Resolve file.

Attachment A – IC review decisions – Standard wording examples

- Purpose** 9
- General** 9
 - Referring to sections of the FOI Act..... 9
 - Referring to the FOI Guidelines 9
 - Referring to the reasons for decision 9
 - Referring to the parties’ submissions 9
 - Referring to the information before the Commissioner 9
- Decision section** 10
 - Affirm decisions 10
 - Charges decision – set aside 10
 - Practical refusal decisions – set aside 10
 - Searches decision – set aside 10
 - Exemptions decision – vary 10
 - Exemptions decision – set aside 10
 - Irrelevant material – set aside 10
- Background section** 11
 - Extension of time under s 54T 11
 - Charges decisions 11
 - Practical refusal decisions..... 11
 - Searches decisions 11
 - Deemed decisions..... 12
 - Section 55F agreements 12
 - Third party consultation..... 12
 - Exemptions decisions..... 13
 - Irrelevant material..... 13
 - Revised decisions 13
 - Updated exemption contentions..... 13
- Scope of IC review section** 14
- Issues section** 15
 - Exemptions 15
 - Irrelevant material..... 16
 - Charges decisions 16
 - Practical refusal decisions..... 17
 - Searches decisions 17
- Reasoning – general statements**..... 17



Purpose

The purpose of this document is to provide examples of wording that is commonly used in IC review decisions. This resource should be read alongside recently published IC review decisions and in light of any recent feedback provided during the decision drafting process.

General

Referring to sections of the FOI Act

Section [x] of the FOI Act provides:

[insert]

Referring to the FOI Guidelines

The FOI Guidelines explain:

[insert]

Referring to the reasons for decision

In its [original/internal review/revised] reasons for decision, the [agency] said:

[insert]

Referring to the parties' submissions

In the IC review application, the applicant said:

[insert]

The applicant submits:

[insert]

The [agency] submits:

[insert]

Referring to the information before the Commissioner

Based on the information before me, ... [rather than 'Based on the information before the OAIC']

Decision section

Affirm decisions

I affirm the decision of [agency] of [date], [if relevant] as varied on [date].

Charges decision – set aside

I set aside the decision of the [agency] of [date]. I substitute my decision that the charge of \$ [x] be [reduced to \$ [x] / waived in full].

Practical refusal decisions – set aside

I set aside the decision of [agency] of [date]. I substitute my decision that a practical refusal reason does not exist.

The [agency] must now process the applicant’s request and notify the applicant of its decision no later than 30 days after it receives this decision.¹

Searches decision – set aside

I set aside the decision of [agency] of [date].

The [agency] must conduct further searches for documents falling within the scope of the applicant’s FOI request and provide a response to the applicant in accordance with s 26 of the FOI Act within 30 days of receipt of this decision.²

Exemptions decision – vary

I vary the decision of the [agency]. I consider that the document that the [agency] decided is exempt under s [x] is exempt under [x].

Exemptions decision – set aside

I set aside the decision of the [agency] of [date], [if relevant] as varied on [date(s)]. I substitute my decision that the material that the [agency] decided is exempt under s [x] is not exempt. [use bullet points if there are multiple exemptions].

The [agency] must now provide the applicant with a copy of the document[s], [if relevant] edited under s 22 of the FOI Act only to the extent necessary to delete [exempt and/or irrelevant] material, within 28 days of this decision.

Irrelevant material – set aside

I set aside the decision of the [agency] of [date], [if relevant] as varied on [date(s)]. The [material / documents] that the [agency] found to be irrelevant to the request is not irrelevant to the request.

¹ On the question of the processing deadlines that now apply, see *Fletcher and Prime Minister of Australia* [2013] AlCmr 11 [33] – [38].

² On the question of the processing deadlines that now apply, see *Fletcher and Prime Minister of Australia* [2013] AlCmr 11 [33] – [38].

Background section

Extension of time under s 54T

On [date], the applicant sought IC review of the [agency]'s decision under s 54L of the FOI Act.³

Charges decisions

On [date], the applicant applied to the [agency] for access to _____.

On [date], the [agency] gave notice to the applicant of its intention to impose a charge and provided a preliminary estimate of the amount of the charge of \$[insert], pursuant to s 29(1) of the FOI Act.

On [date], the applicant wrote to the [agency] and requested that the charge be waived or reduced on [insert grounds under [s 29(5)(a) and/or s 29(5)(b)] of the FOI Act.

On [date], the [agency] advised the applicant of its decision to impose a charge of \$[x] to process the request. [if relevant] The [agency] reduced the charge on the basis that [insert].

[if relevant] On [date], the applicant sought internal review of the [agency]'s decision to impose the charge.

On [date], the [agency] advised the applicant of its decision [to reduce the charge to \$[x] on the basis that [insert] / not to further reduce or waive the charge].

On [date], the applicant sought IC review of the [agency]'s decision to impose a charge under s 54L of the FOI Act.

Practical refusal decisions

On [date], the [agency] issued the applicant with a request consultation notice under s 24AB of the FOI Act. In that notice, the [agency] informed the applicant that the request [insert details of practical refusal reason].⁴

On [date], the applicant responded to the request consultation notice to [insert details of response]. [if relevant] This ended the request consultation period.⁵

Searches decisions

On [date], the applicant applied to the [agency] for access to _____.

On [date], the [agency] made a decision to refuse the request under s 24A of the FOI Act on the basis that the document[s] could not be located or do[es] no exist.

³ The applicant sought and was granted an extension of time under s 54T of the FOI Act.

⁴ This started a request consultation period. Under s 24AB(3), if the applicant contacts the contact person specified in the notice during the consultation period in accordance with the notice, the agency must take reasonable steps to assist the applicant to revise the request so that a practical refusal reason no longer exists.

⁵ Under s 24AB(8), the consultation period starts on the day an applicant is given notice under s 24AB(2) and continues until the applicant either, makes a revised request, or indicates that they do not wish to revise the request.

Deemed decisions

Pursuant to s 54Y of the FOI Act, where a substantive decision is made by an agency after the commencement of an IC review of a deemed refusal decision, the substantive decision becomes the decision under review.

Section 55F agreements

During the course of this IC review, the possibility of finalising this IC review by way of an agreement under s 55F was considered.⁶ However, as the parties have been unable to reach an agreement under s 55F, I will proceed to make a decision under s 55K.

Third party consultation

Section 26A – Commonwealth-State relations

On [date], [agency] undertook consultation with [insert] under s 26A of the FOI Act.⁷

On [date], [insert] responded to [agency] submitting that it objected to the disclosure of [certain material / the documents].

OR On [date], [insert] responded to [agency] submitting that it has no objection to disclosure.

OR, Based on the information before the OAIC, [insert] did not respond to the [agency]'s consultation.

Section 27 – business affairs

On [date], [agency] undertook third party consultation with [name of third party business [unless we have decided to de-identify the business] under s 27 of the FOI Act.⁸

On [date], [name of third party business] responded to [agency] submitting that it objected to the disclosure of [certain material / the documents].

OR On [date], [name of third party business] responded to [agency] submitting that it has no objection to disclosure.

OR, Based on the information before the OAIC, the third party did not respond to the [agency]'s consultation.

Section 27A – personal privacy

⁶ Section s 55F provides that I may, if satisfied that the terms of an agreement are appropriate, make a decision in accordance with the terms without completing an IC review (s 55F(2)).

⁷ If arrangements have been entered into between the Commonwealth and a State under s 26A, agencies and ministers are required to consult the State in accordance with the arrangements, before deciding to release a document where the State or the Commonwealth may reasonably contend that the document is conditionally exempt and that disclosure of the document would be contrary to the public interest.

⁸ Under s 27 of the FOI Act, where it appears to the agency that the organisation concerned might wish to make an exemption contention that the document is exempt under s 47; or the document is conditionally exempt under s 47G and access to the document would, on balance, be contrary to the public interest, the agency must not decide to give access to the document without giving the organisation a reasonable opportunity to make submissions in support of the exemption contention, and without having regard to any submissions so made.

On [date], [agency] undertook third party consultation with [number] individual(s) under s 27A of the FOI Act (documents affecting personal privacy) in relation to documents it had identified within the scope of the request.⁹

On [date], the third party responded to [agency] submitting that it objected to the disclosure of [certain material / the documents].

OR On [date], the third party responded to [agency] submitting that it has no objection to disclosure.

OR, Based on the information before the OAIC, the third party did not respond to the [agency]'s consultation.

Exemptions decisions

On [date], the [agency] advised the applicant that it had identified [x] documents within the scope of the request. The [agency] decided to give the applicant access to [x] documents in full, [x] documents in part and refused access to the remaining [x] documents.¹⁰ In making its decision, the [agency] relied on the [name of exemption] exemption (s [x]) and the [name of exemption] exemption (s [x]).

Irrelevant material

The [agency] also deleted some material from the documents that it considers irrelevant to the request.

Revised decisions

On [date], [agency] made a revised decision under s 55G of the FOI Act.¹¹ The [agency] decided [insert].

Updated exemption contentions

During the course of this IC review, the [agency] advised that it no longer relies on s [x] in relation to [insert]. However, the [agency] introduced new contentions under the [name of exemption] exemption (s [x]) in relation to [insert].

⁹ Under s 27A of the FOI Act, where it appears to the agency that a person might wish to make a contention that a document is conditionally exempt under s 47F, and access to the document would, on balance, be contrary to the public interest, the agency must not decide to give access to the document without giving the person a reasonable opportunity to make submissions in support of the exemption contention, and without having regard to any submissions so made.

¹⁰ Identified in the schedule to the [agency]'s [original/internal review/revised] reasons for decision

¹¹ Section 55G(1)(a) of the FOI Act provides that at any time during an IC review, an agency or Minister may vary (or set aside and substitute) an access refusal decision in relation to a request, if the variation would have an effect of giving access to a document in accordance with the request.

Scope of IC review section

The issues to be decided in this IC review are:

- whether the documents/material that the [agency] found to be exempt under s [non-conditional exemption] are exempt under this provision
- whether the documents/material that the [agency] found to be exempt under s [conditional exemption] are exempt under this provision, and if so, whether giving the applicant access to conditionally exempt documents at this time would, on balance, be contrary to the public interest.
- [where new exemption contention] whether material the [agency] contends is exempt under s x is exempt under this provision.
- [where agency has conceded certain material not exempt] whether material the [agency] maintains is exempt under s x is exempt under this provision.
- whether the material the [agency] found to be irrelevant to the terms of the applicant's request is irrelevant to the request (s 22)
- whether a practical refusal reason exists (s 24 of the FOI Act)
- whether the [agency] has taken all reasonable steps to find documents within the scope of the request (s 24A of the FOI Act)
- the Department's decision to impose a charge and not to waive the charge under s 29 of the FOI Act.

Issues section

Exemptions

The [agency] decided that [x] documents are exempt in full and [x] documents are exempt in part under s [x] of the FOI Act.

[if relevant] As I discussed above at [x – use cross-referencing tool **Error! Reference source not found.**], I have found [x] documents to be irrelevant to the request¹² and five documents exempt under s [x] of the FOI Act.¹³ Accordingly, I need only consider the application of s [x] to the remaining [x] documents.

The material/documents that the [agency] found exempt under this provision comprise [insert] OR

The material/documents that the [agency] found exempt under this provision can be characterised as:

- [insert]

As discussed in the FOI Guidelines and previous IC review cases, [insert with reference to most recent IC review decision that discusses this exemption].

The FOI Guidelines explain:

[insert]

For these reasons, I am satisfied that the disclosure of the material/documents that the [agency] decided is exempt under s [x] would [insert wording of relevant provision – for example ‘would be an unreasonable disclosure of personal information’]. The documents are exempt under s [x].

[if the agency has not discharged its onus] For these reasons, I am not satisfied that the [agency] has discharged its onus of establishing that its decision under s [x] is justified.

The documents that the [agency] decided are exempt under s [x] of the FOI Act are not exempt under this provision.

Where the Information Commissioner decides that a different exemption applies

Under s 55K(2) of the FOI Act, for the purposes of implementing a decision on an IC review, I may perform the functions, and exercise the powers, of the person who made the IC reviewable decision. It is therefore open to me to consider any exemption that was available to the person who made the IC reviewable decision.

In this case, the [agency] has found material in [x] documents exempt under s [x] of the FOI Act. In my view, it is more appropriate to consider whether this material/document is exempt under s [x].

Where public interest considerations are irrelevant because the documents are not conditionally exempt

As I have found that the document is not conditionally exempt under s [x], I do not need to consider whether giving access to a conditionally exempt document is contrary to the public interest for the purposes of s 11A(5) of the FOI Act.

¹² [refer to document numbers in schedule of documents]

¹³ [refer to document numbers in schedule of documents]

Where public interest considerations must be considered after finding a document conditionally exempt

As I have found that the documents are conditionally exempt, I must consider whether, on balance, it would be contrary to the public interest to give access to conditionally exempt documents at this time.

Where public interest considerations are irrelevant because it is a non-conditional exemption

The applicant submits that disclosure of the material/documents is in the public interest. However, as s [x] of the FOI Act is not a conditional exemption, submissions relating to the public interest are not relevant when considering whether s [x] applies.

Irrelevant material

Section 22 of the FOI Act provides that an agency may prepare an edited copy of a document by deleting information that is exempt or that could reasonably be regarded as irrelevant to the request.¹⁴

The [agency] decided that [x] documents contain material that is irrelevant to the request.¹⁵

[insert reasoning]

Accordingly, I am [satisfied / not satisfied] that the [description of material] that the [agency] decided is irrelevant to the request is irrelevant to the request.

Charges decisions

Assessment of the amount of the charge

The FOI Guidelines explain that the decision to impose a charge is discretionary. A charge must be as fair and accurate as possible to reflect the work involved in providing access to the documents requested and must not be used to unnecessarily delay access or discourage an applicant from exercising the right of access conferred by the FOI Act.¹⁶

The FOI Guidelines further explain that in exercising the discretion to impose a charge, an agency should take into account the ‘lowest reasonable cost objective’ in s 3(4) of the FOI Act, which provides that ‘functions and powers given by this Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost’. The FOI Guidelines relevantly explain:

Agencies and ministers should interpret the ‘lowest reasonable cost’ objective broadly in imposing any charges under the FOI Act. That is, an agency or minister should have regard to the lowest reasonable cost to the applicant, to the agency or minister, and the Commonwealth as a whole. Where the cost of calculating and collecting a charge might exceed the cost to the agency to process the request, it would generally be more appropriate not to impose a charge ...¹⁷

[refer to recently published practical refusal decisions for guidance on the structure and content of the draft decision]

¹⁴ Section 22(1)(b)(ii) of the FOI Act.

¹⁵ [refer to document numbers in schedule of documents]

¹⁶ FOI Guidelines [4.5] and [4.54].

¹⁷ FOI Guidelines [4.4].

Practical refusal decisions

Section 24 of the FOI Act allows an agency or minister to refuse access to a document if satisfied that a ‘practical refusal reason’ exists in relation to the request, following a ‘request consultation process’ in accordance with s 24AB.¹⁸

[refer to recently published practical refusal decisions for guidance on the structure and content of the draft decision]

Searches decisions

Section 24A requires an agency to take ‘all reasonable steps’ to find a requested document before refusing access to it on the basis that it cannot be found or does not exist. Whether ‘all reasonable steps’ have been taken is a question of fact in the individual case to be decided having regard to matters such as the terms of an applicant’s request, the document creation and retention practices in an agency, and the steps taken by the agency to identify and locate documents requested by the applicant.¹⁹

[refer to recently published searches decisions for guidance on the structure and content of the draft decision]

Reasoning – general statements

Onus

In an IC review of an access refusal decision, the agency bears the onus of establishing that its decision is justified, or that I should give a decision adverse to the IC review applicant (s 55D(1)).

In an IC review of an access grant decision, it is the IC review applicant that bears the onus of establishing that a decision refusing the request is justified, or that I should give a decision adverse to the FOI applicant (s 55D(2)).

¹⁸ ‘Practical refusal reason’ is defined in s 24AA of the FOI Act; ‘request consultation process’ is defined in s 24AB.

¹⁹ *FOI Guidelines* [3.85] – [3.94].

Attachment B – IC review decisions proofreading checklist

Quotes

Tip	Example	Check
Quotes should be verbatim (exactly the same words used originally): cut and paste and then proofread (if text in PDF can't be copied, open in Adobe Pro – Go to Tools – Click on Text Recognition – Select In This File – Click OK to recognise text).		
If names or details that require de-identification appear in quote text, you can replace with square brackets and a formal description.	The applicant sought access to 'all document relating to a complaint made by [a named individual] about him'	
Use single quotation marks '...' unless it's a quote within a quote, then use double "..."	The applicant submits 'the respondent's contention that "the documents would cause significant harm" is misconceived.'	
Place quotation mark after full stop or comma (unless the punctuation is not within the quote).	See above.	
Use ellipses to indicate the omission of words; the format is as space on each side of the '...'	Section 3(2) of the FOI Act provides '[t]he Parliament intends ... to promote Australia's representative democracy by ... increasing scrutiny, discussion, comment and review of the Government's activities'	
Block quotes shouldn't run across multiple documents; ellipses indicates text missing from same document. Sentences should be in the order they appear in the document.		
Use square brackets at the end of a quote to indicate where emphasis added.	Section 24AB states: If the applicant contacts the contact person during the consultation period in accordance with the notice, the agency or Minister must take reasonable steps to assist the applicant to revise the request so that the practical refusal reason no longer exists [emphasis added].	
Keep quotes and the introductory sentence on the same page by selecting 'Paragraph', 'Line and page breaks' and 'Keep with next' (e.g. to keep 'The applicant submits:' and the quote on the same page).		

Footnotes

Tip	Example	Check
Footnotes generally go after punctuation mark.	The FOI Guidelines explain that an agency should have regard to the lowest reasonable cost objective in imposing charges under the FOI Act. ¹	
Follow previous decisions for citing FOI Guidelines and decisions in the body of decisions and footnotes.	The first reference to the FOI Guidelines should always include the full name of the FOI Guidelines. See a recently published decision as an example.	
Check that case citations and references to the FOI Guidelines are correct, particularly where you have referred to a previous published decision in preparing your draft.		
Check that footnotes are accurate where you have referred to document numbers with reference to the schedule of documents attached to an agency's decision. Check that the number of documents listed is consistent with the number in the body of the decision.		

Formatting

Tip	Example	Check
Follow the formatting on the Word template reasons for decision. Use the 'OAIC' tab at the top left hand corner for headings and bullet points.		
When listing items, use only a comma and 'and' after the second last bullet point (not a series of semi-colons) (this list is an example). Spacing before bullets should be 6pt, and 10pt after the last bullet.	The issues I have considered are: <ul style="list-style-type: none"> • issue x • issue y, and • issue z. 	
Check the numbering of your paragraphs once decision is drafted.		
Spell out numbers in words from zero to nine (except for references to sections in	The Department identified 12 documents as falling within the scope of the request and gave the applicant access to four documents in full, four documents in part	

Tip	Example	Check
legislation); use numerals for all numbers from 10 on.	and refused access to the remaining two documents.	
Use one space after a full stop (not two). Use the 'Show/Hide' function by clicking ¶ on the Home toolbar to assist you to check whether spacing throughout the document is correct.		
Use a non-breaking space (Ctrl+Shift+space bar) to prevent breaking titles or section references across lines (eg this should be used when writing s 47F to prevent the 's' from appearing on one line and the '47F' on the next line).		
Department (capital D)	The Department submits ...	
departmental (lower case D)	The Department submits that the names of departmental officers are exempt under s 47F.	
First mention of our office, say 'Office of the Australian Information Commissioner (OAIC)' then use OAIC throughout.	The Office of the Australian Information Commissioner (OAIC) requested that the Department provide documents. The Department provided the OAIC with the documents on 3 March 2018.	
In setting out catchwords make sure they are evenly spaced and use the same length em dash — ; use capital letter after each '—'	Freedom of Information — Whether disclosure would cause damage to the security of the Commonwealth — (CTH) Freedom of Information Act 1982 s 33(a)(i)	
Check references to documents/document/material throughout decision.	The issue in this IC review is whether the document that the Department found exempt under s 47F is conditionally exempt, and if so, whether giving the applicant access to a conditionally exempt document [not conditionally exempt documents] at this time would be contrary to the public interest.	

Tip	Example	Check
Check for consistency in terminology used throughout the decision (e.g. consistently use staff / officers / employees / personnel in a decision relating to s 47E(c)).		
For a specific minister use capital M but references to obligations of a minister under the FOI Act is lower case m (even if capitalised in the legislation)	The issue in this IC review is whether the document was brought into existence for the dominant purpose of briefing a minister on a document to which s 34(1)(a) applies. In this case, the relevant minister is the Minister for Foreign Affairs (the Minister).	
Title of 'the Honourable' or 'the Hon' applies to ministers and some ex ministers, not to senators/members generally.		
Do not use a full stop after short forms, for example 'p 7' not 'p. 7' and 'APPA', not 'A.P.P.A.'.	<ul style="list-style-type: none"> • 's 47' not 's.47' or 's. 47' • 'ss 47 and 47F' not 'ss.47 and 47F' • 'p 7' not 'p. 7' • 'APPA' not 'A.P.P.A.' • 'Mr Smith' not 'Mr. Smith' 	

Attachment C – Cover sheet template

Header: Review officer – [review officer name]

[OAIC reference number] [Parties' names]

- Parties**
- The parties are [name] (the applicant) and [agency/minister].
 - The applicant has requested to be [named / de-identified] in the decision.
- Scope**
- The decision under review is the decision of [date].
 - [insert any particularly relevant information about scope or the issues – for example, the number of documents at issue or whether the applicant has limited the scope to particular issues]
- Exemptions**
- [For example: Personal privacy exemption (s 47F) – documents 3 and 5]
- Third parties**
- [insert details of consultation and summary of third party's views]
- Background**
- On [date], the applicant made an FOI request.
 - [insert details of procedural background if relevant – for example, if there was a s 24AB notice or if a third party was consulted]
 - On [date], the [agency/minister] refused the request relying on [insert].
 - [insert details of internal review if relevant]
 - On [date], the applicant sought IC review.
 - [insert details of revised decision or any updates to exemption contentions / scope of review if relevant]
- Key documents between parties**
1. * Tab 0. Cover sheet
 2. ***Tab 1. Draft decision**
 3. *Tab 2. FOI request
 4. *Tab 3. FOI decision
 5. *Tab 4. Internal review decision
 6. *Tab 5. IC review application
 7. *Tab 6. Revised decision
 8. *Tab 7
 - a. *Tab 7(a). A's submissions (delivered to Reception 5.02.2018)
 - b. *Tab 7(b). A's submissions
 - c. *Tab 7(c). A's submissions
 - d. *Tab 7(d). A's submissions (evidence only - 30 January 2014 email and attachments)
 9. *Tab 8
 - a. *Tab 8(a). R's submissions
 - b. *Tab 8(b). R's submissions (evidence only)
 - c. *Tab 8(c). R's submissions
 10. *Tab 9. IGIS

11. *Tab 10. Document in issue – [short form name of document]

Draft decision

- [summarise whether the decision is to affirm / vary / set aside and include particulars if relevant (for example: Document @ is not exempt under @)]

Issues for Commissioner

- [This should be consistent with the issues set out in the draft reasons for decision]

Other considerations

- [For example: if there are linked IC reviews; if draft decision considers novel issues or departs from precedent decisions]

Attachment C.1 – Instructions for assisting with electronic clearance using documents on Resolve

Once the cover sheet is prepared, the case officer tabs the key documents in the Resolve file and saves the draft decision for Executive clearance onto Resolve.

- The draft decision that the Information Commissioner will review is the draft decision on Resolve.
- Ensure that each document in the coversheet is in the 'Documents' tab on the Resolve case file and can be easily identified. For example:
 1. verbal submissions from a party recorded in a file note of a telephone conversation in the 'Actions' tab can be printed to pdf and saved onto the 'Documents' tab
 2. if a large number of *different* key documents are attached to one email, one or more attachment(s) can be separately saved onto the 'Documents' tab.
 3. if a single email and multiple attachments comprise the *same* key document, the attachments do not have to be separately saved but can be identified in the name on the 'Documents' tab. For instance: *Tab 6(d). A's submissions (30 January 2014 email and attachments B and C)
 4. where the key document is located in the middle of an attachment, note the page numbers. For instance: *Tab 4. Internal review decision (pp 61-73)
 5. where the key document is embedded in a Word document, these individual embedded document(s) can be separately saved onto the Documents tab.
- On the 'Documents' tab in Resolve, categorise each document in the coversheet as a 'Key Document' or 'Exempt Material' if the document includes exempt matter. Number the documents between 1 and 9. If there are more than 9 key documents, use alphabets to identify documents that can be grouped together.
- Use the following naming convention as a guide to name each key document in the 'Documents' tab:
 - *Tab 0. Cover sheet
 - ***Tab 1. Draft decision**
 - *Tab 2. FOI request
 - *Tab 3. FOI decision(s)
 - *Tab 3(a). Primary decision
 - *Tab 3(b). Internal review decision
 - *Tab 4. IC review application
 - *Tab 5. Revised decision
 - *Tab 6
 - *Tab 6(a). A's submissions (delivered to Reception 5.02.2018)
 - *Tab 6(b). A's submissions
 - *Tab 6(c). A's submissions
 - *Tab 6(d). A's submissions (evidence only - 30 January 2014 email and attachments)
 - *Tab 7
 - *Tab 7(a). R's submissions
 - *Tab 7(b). R's submissions (evidence only)
 - *Tab 7(c). R's submissions
 - *Tab 8. IGIS

- *Tab 9. Document in issue – [short form name of document]

Only documents that are key documents in the IC review will be:

1. listed or numbered in the coversheet, and
2. categorised as a **'Key Document'** or **'Exempt Material'** on the Resolve case file.

For instance, if there is no internal review decision, '*Tab @. Internal review decision' will not be listed on the cover sheet.

Check that the relevant files are categorised and organised appropriately by sorting the 'Comments' column then sorting the 'Categories' Column. The documents relevant to the draft decision should appear at the top of the page in numerical order.

Attachment D – Template Snapshot

Subject: [IC review decision] [insert parties' names] (OAIC ref no [insert])

The Director/Principal Director will use the following Snapshot template provided by Executive at the top of the email.

Subject: [IC review decision] [insert parties' names] (OAIC ref no [insert])

[copy case officer and relevant officers who have cleared the decision]

Snapshot	
Due date	[1 week]
Fixed or flexible	Flexible
If fixed, why?	N/A
Topic for clearance	[insert parties' names] (OAIC ref no [insert])
Product	Draft IC Review decision
Length / no. of pages*	<p>Draft decision – [insert] pages.</p> <p>Relevant documents in hardcopy folder [insert] pages (approx.).</p> <p>Key documents on Resolve record [reference no]</p> <ul style="list-style-type: none"> • *Tab 0. Cover sheet • *Tab 1. Draft decision • *Tab 2. FOI request • *Tab 3. FOI decision(s) <ul style="list-style-type: none"> ○ *Tab 3(a). Primary decision ○ *Tab 3(b). Internal review decision • *Tab 4. IC review application • *Tab 5. Revised decision • *Tab 6 <ul style="list-style-type: none"> ○ *Tab 6(a). A's submissions (delivered to Reception 5.02.2018) ○ *Tab 6(b). A's submissions ○ *Tab 6(c). A's submissions ○ *Tab 6(d). A's submissions (evidence only - 30 January 2014 email and attachments) • *Tab 7 <ul style="list-style-type: none"> ○ *Tab 7(a). R's submissions ○ *Tab 7(b). R's submissions (evidence only) ○ *Tab 7(c). R's submissions • *Tab 8. IGIS • *Tab 9. Document in issue – [short form name of document]

External party?	Yes – see above
Review officer	[insert]
Consultation	[insert e.g. Legal]
Clearance	[insert e.g. Director, Principal Director, Commissioner]
Final clearance	FOI Commissioner / Information Commissioner

** it may be appropriate to include an additional row below called 'For noting / For consideration', for example if we have discussed a particular AAT decision in the draft IC review decision, or the matter relates to a novel issue, or there are linked cases.*

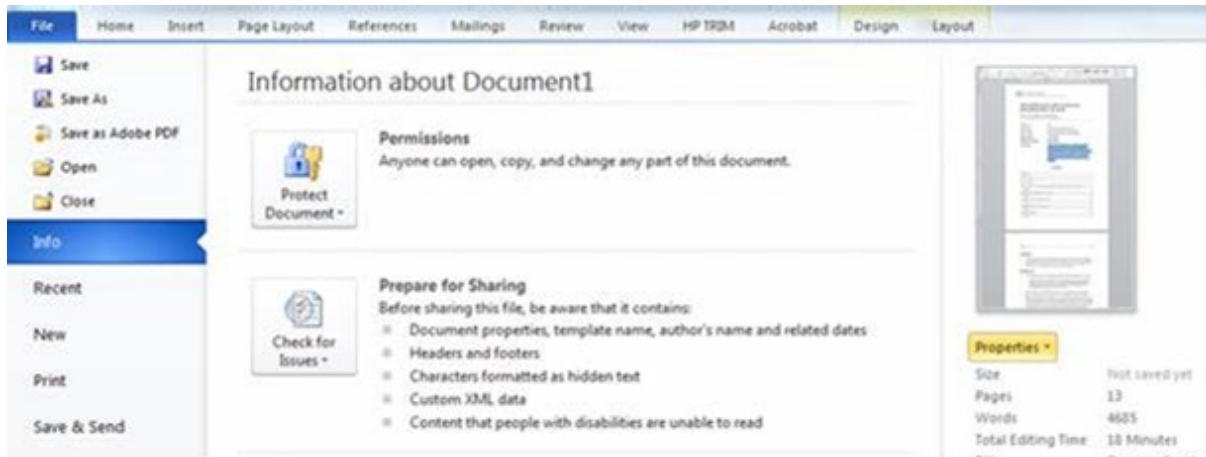
Attachment E – Finalisation/publication process

Once Commissioner approval is received, the case officer saves the approval to the Resolve file and prepares the decision for delivery to the parties/publication.

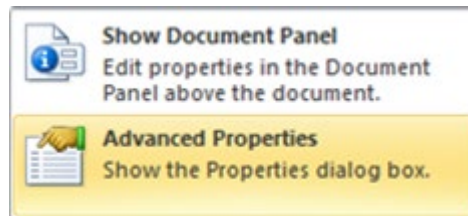
- Check that the Director and Publications Officer are copied into the approval from the Commissioner ('I approve this decision' etc), if not, forward them the approval.
 - The Publications Officer will then register the decision in the master list ([D2018/003448](#)) and send the citation to the case officer.
- Update the decision with the date and citation (the date is the date of the approval).
- Fix up the metadata. See below instructions on saving files.
- Create three files: docx, rtf and pdf. The file name should be '2016-AICmr59' for example). See below for instructions on saving files.
- Save the three versions to TRIM [14/000082-13](#).
- Send TRIM links to the three files to the Director/Publications Officer together with a case summary and short summary.
 - The Director/Publications Officer will acknowledge receipt of the files and identify any relevant issues/changes to be made.
 - The Director/Publications Officer will send the rtf version to AustLII 1-2 days after the decision has been sent to the parties (instructions set out below).
- Send the pdf version to the parties on the same day as the decision. The covering email should note that the decision will be published on AustLII shortly.
- Prepare the s 55K compliance letter to be sent with the decision ([D2020/012832](#)). This letter is to be signed by offices EL2 level and above.
- Send the case summary and short summary to the FOI team with a [link](#) to the PDF (file is not attached) and CC to the following teams around the office:
 - Legal: Legal@oaic.gov.au
 - Enquiries: jake.barry@oaic.gov.au
 - SCAC: media@oaic.gov.au

Saving files

When saving the decision as different files, please make sure the properties are as per the steps below.



When you click on 'Properties' a drop down box like this will appear. Click on 'Advanced Properties'.



Once you do this, the following will appear:



The only tab you need to be concerned with is the summary tab. Click on that tab and when you do, it should now look like this:

Document5 Properties

General Summary Statistics Contents Custom

Title:

Subject:

Author:

Manager:

Company:

Category:

Keywords:

Comments:

Hyperlink base:

Template: Reasons for Decision.dotm

Save Thumbnails for All Word Documents

OK Cancel

You need to fill in each of the following sections, which is duplicating information from the body of the decision. The end result should look like this:

Document5 Properties

General Summary Statistics Contents Custom

Title:

Subject:

Author:

Manager:

Company:

Category:

Keywords:

Comments:

Hyperlink base:

Template: Reasons for Decision.dotm

Save Thumbnails for All Word Documents

OK Cancel

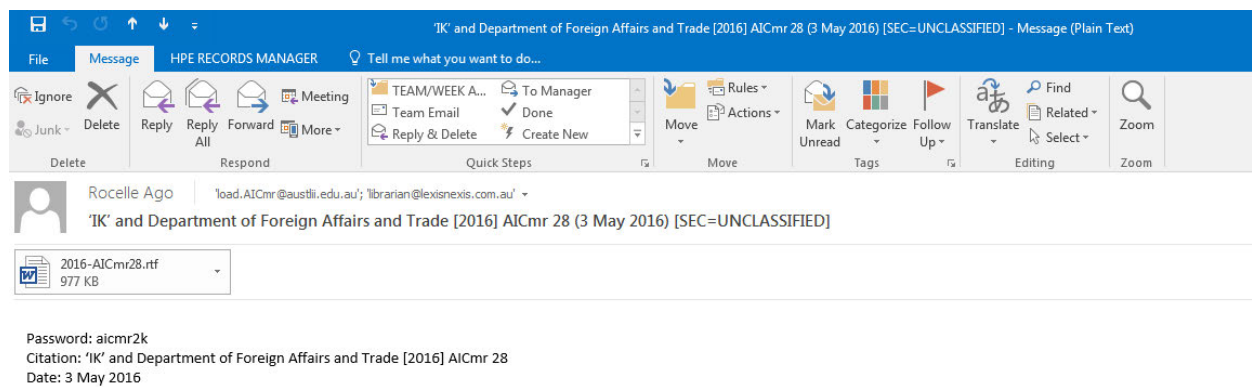
Publication of decision on AustLII

The decision will be sent to AustLII for publication.

To send a decision:

- New email – set the email to plain text. AustLII does not recognise any other email formats.
- Attach rtf file.
- Subject: Decision name/citation [Sec = UNCLASSIFIED]
- To: 'load.AICmr@austlii.edu.au' and 'librarian@lexisnexis.com.au'
- Email content:
 - o Password: aicmr2k
 - o Citation: [citation]
 - o Date: [insert]

Example



* Each decision must be sent separately. AustLII cannot process bulk decisions in a single email.

* Where a decision needs to be re-issued (e.g due to errors in the decision):

1. Create a new email and follow the steps above
2. Attach the updated rtf decision file
3. Keep the same details (such as citation in the subject and body of the email) as the original email. AustLII will automatically recognise the entry and overwrite the original entry with the updated decision.

Publication of decision on OAIC website

The OAIC also publishes a table of IC review decisions that also link to AustLII. To update the table:

Send an email to Website@oaic.gov.au that contains the following content:

- Decision*
- Legislative provision
- Catchword summary (from the decision)
- Decision under review
- IC review decision

Example

RE: 2016 IC review decisions 23-26 [DLM=For-Official-Use-Only] - Message (Rich Text)

Hi Amanda

Could you please publish the following entries? The decisions will be available on AUSTLII tomorrow.

Decision	Legislative provision/s	Catchword summary	Decision under review	IC review decision
David Watts and Department of Veterans' Affairs [2016] AICmr 26 [22 April 2016]	ss 11A(5), 47G, 55D	Freedom of Information — Whether disclosure would unreasonably affect an organisation's business affairs — Whether disclosure would unreasonably affect a person's professional affairs — Whether contrary to the public interest to release conditionally exempt documents — Whether the agency has discharged its onus of establishing that its decision is justified	Access refusal	Set aside and substituted
Australian Associated Press Pty Ltd and Department of Immigration and Border Protection [2016] AICmr 25 [22 April 2016]	ss 11A, 42, 47E(d), 47F, 55G	Freedom of Information — Whether document subject to legal professional privilege — Whether disclosure would have a substantial adverse effect on the proper and efficient conduct of the operations of an agency — Whether disclosure of personal information is unreasonable — Whether contrary to public interest to release conditionally exempt documents	Access refusal	Varied
TJ and Department of Immigration and Border Protection [2016] AICmr 24 [21 April 2016]	s 24A	Freedom of Information — Whether reasonable steps were taken to locate documents	Access refusal	Affirmed
Patrick Healy and Australia Post [2016] AICmr 23 [20 April 2016]	ss 11A, 22, 47F	Freedom of Information — Whether disclosure of personal information is unreasonable — Whether contrary to public interest to release conditionally exempt documents — Whether reasonably practicable to prepare edited copy of video	Access refusal	Set aside and substituted

Many thanks
Rocelle Ago | Director | FOI Dispute Resolution
 Office of the Australian Information Commissioner
 Level 5, 175 Pitt Street, SYDNEY NSW 2000
 GPO Box 5128 SYDNEY NSW 2001 | www.oaic.gov.au
 Phone: +61 2 9285 9621 | E-mail: rocelle.ago@oaic.gov.au

* The decision will need to be hyperlinked to AustLII – You can copy and paste the link to the most recent decision on AustLII and manually update the citation number to the corresponding citation number in the decision to be published (ie. <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AICmr/2019/19.html>)



Attachment F – Template summaries of IC review decision

Review officers need to prepare two summaries when a decision has been finalised by the Information Commissioner:

Sample 1

Nick Xenophon and Department of Defence [2016] AICmr 14 (16 March 2016)

The Acting Australian Information Commissioner affirmed the decision of the Department of Defence, deciding that the document in issue was exempt in full under s 34(1)(a) of the FOI Act. The document in issue was an attachment to a Cabinet submission and the Commissioner was satisfied based on the submissions of the Department that it was actually submitted to Cabinet. On the question of whether the document was brought into existence for the dominant purpose of submission for consideration by Cabinet, the Commissioner examined the document, considered two public announcements and took into account the submissions received from both parties. The Commissioner considered the terms of reference of the document were consistent with the dominant purpose being submission of the document for consideration by Cabinet.

Sample 2

‘OE’ and Australian Taxation Office (Freedom of information) [2018] AICmr 29 (8 March 2018)

Access refusal — Request for unedited version of specified email chain — Question of form of access or document format raised by applicant during IC review — Whether all reasonable steps taken to locate documents — Whether disclosure of personal information is unreasonable — Whether contrary to public interest to release conditionally exempt documents — ss 11A(5), 20, 24A and 47F — Decision under review affirmed

Jon Patty and Attorney-General's Department (Freedom of information) [2018] AICmr 28 (2 March 2018)

Charges — Request for waiver of \$1013.75 charge — Calculation of charge for processing 60 documents or 204 pages — Lowest reasonable cost not demonstrated — Whether giving of access to documents is in the general public interest or in the interest of a substantial section of the public — Access to documents concerning how a decision is made under the *Customs (Prohibited Imports) Regulations 1956* — Significant public interest to licensed firearms owners — Documents would contribute to the public record on an issue that is at the forefront of public debate and is regularly in the media — ss 29, 55D — Decision under review set aside and substituted — Charge waived in full

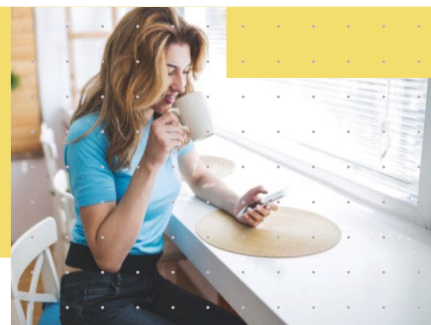
Paul Farrell and Department of Home Affairs (Freedom of information) [2018] AICmr 27 (28 February 2018)

Access refusal — Request for access to disclosures made under s 19 of the *Australian Border Force Act 2015* (Cth) — Information as to the existence of certain documents — Whether the Department is authorised to neither confirm nor deny the existence of the documents —

Documents affecting enforcement of law — Whether documents would be exempt under s 37(1) — ss 25 and 37 — Decision under review set aside and substituted

'OC' and Australian Building and Construction Commission (Freedom of information) [2018] AICmr 26 (28 February 2018)

Access refusal — Request for access to emails sent by or to a particular Australian Building and Construction Commission (ABCC) officer referring to the applicant — Documents relating to the investigation of a workplace incident — Whether documents subject to legal professional privilege — Whether disclosure would have a substantial adverse effect on the management or assessment of personnel — Whether disclosure of personal information unreasonable — Whether disclosure of conditionally exempt documents contrary to the public interest — ss 11A(5), 42 and 47E(c) — Decision under review varied — Three documents that the ABCC had found exempt under ss 47C or 47F are exempt under s 47E(c)



June 2023

Decisions review checklists

The purpose of the decisions review checklists is to assist in the first and second review of draft decisions, prior to the draft decision being progressed to the Director and/or Assistant Commissioner, Freedom of Information for further clearance.

It is assumed that the review officer has already had a pre-decision drafting meeting with their supervisor, the decision reviewer and/or the Assistant Commissioner, Freedom of Information in relation to the direction of the draft decision.

First review

This checklist provides a list of considerations to consider in undertaking the first review of a decision:

- Check that all matters in the *Decision writing checklist* have been addressed.
- Check that all parties (including any third parties that have been joined) have been appropriately advised that the matter is progressing to a decision by the Information Commissioner.
- Ensure that the draft decision identifies and discusses all of the relevant issues (that is the matters about which the parties are in disagreement) and does not include irrelevant information.
- Ensure that all parties in the IC review have been appropriately identified (or de-identified) in the IC review decision, including any third parties.
- Ensure that the review officer has thoroughly proofread the draft before undertaking first review. If it appears that the draft decision has not been proofread, ask the review officer to do this before you undertake any further review.
- Ensure that the parties have been afforded procedural fairness, including any third parties if relevant: This could be in the form of a preliminary view, or where submissions provided by a party are relevant and we are seeking to rely on them in the decision, that they have been appropriately shared with the other party.
- Submissions received in confidence: confirm that the OAIC has agreed to accept the submissions as confidential. If so, ensure that the decision does not reveal the confidential material.
- Exempt material: Ensure that the material the agency / minister claims is exempt is not revealed. Characterisation of the exempt material may be acceptable. For example, 'documents comprising emails and attachments exchanged between an internal lawyer of [agency] and officers of [agency]', or 'names of third party individuals'.

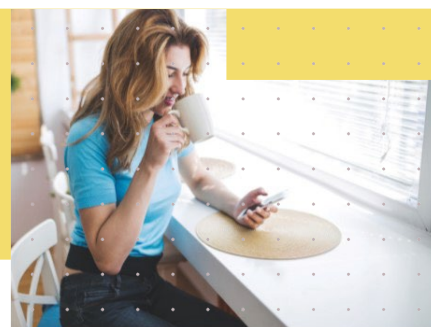
- Review application of the law, that the submissions provided by the parties have been appropriately taken into account, and whether the agency has discharged its onus under s 55D in establishing that the relevant legislative requirements have been satisfied (or in the case of access grant decisions, whether the IC review applicant has discharged its onus).
- Review accuracy of facts / background and that the reasoning is clearly and concisely set out.
- Where unusual or novel issues are identified, or the decision seeks to depart from the interpretation of the FOI Act set out in the FOI Guidelines or precedent decisions, ensure that the matter is appropriately escalated to the Director and/or Assistant Commissioner, Freedom of Information.
- Review for typographical errors, including footnotes, quotes, document numbers, reference to provisions of the FOI Act and paragraph numbers of the FOI Guidelines.
- Review formatting, including font size, headings used, paragraph spacing, quotes, indenting in footnotes, etc. Review officers should have had regard to the Proofreading Checklist at **Attachment B** to the *Decision writing checklist D2018/016241*.
- Proofread the folder cover sheet to ensure that it reflects the decision.
- Proofread snapshot to ensure that details are correct. Ensure it is consistent with the sample snapshot in **Attachment C** to the *Decision writing checklist D2018/016241*.
- Review folder of documents to ensure that it is complete with all relevant information and that the documents are properly marked-up and tagged.

Second review

Once first review of the draft decision has been completed and the review officer has properly addressed the comments and suggestions, the draft decision should be progressed to second review.

The second review should focus on:

- Undertaking a thorough environmental and jurisdictional scan of the issues raised. In particular, ensuring that the draft decision follows precedents (IC review, AAT, Federal Court decisions).
- Assessing the draft decision for precedential value with respect to similar matters on hand or in the future.
- Ensuring that the draft decision has been proofread for legal and factual accuracy and readability.
- Ensuring that procedural fairness issues have been addressed.



June 2023

Conducting an IC review – Electronic Clearance using Resolve Checklist

Introduction

The purpose of this checklist is to assist in the clearance of matters using documents on Resolve.

Clearance using documents on Resolve

Once the draft decision is ready for Executive clearance, the Assistant Commissioner or responsible Director will email the draft decision for clearance to the relevant member of Executive using the snapshot at Attachment A.

Finding the case file on Resolve

- Identify the file number of the case from the subject of the email or the ‘Topic for clearance’ in the snapshot.
- Using the file number, search for the file on Resolve using the ‘Find case’ button.

Finding the key documents referred to in the cover sheet

- Open the case file and click on the ‘Documents’ tab.
- In the ‘Documents’ tab, click on the ‘Comments’ button and then the ‘Category’ button to order the documents. It is important to click on these buttons in that sequence so that the documents are correctly ordered.
- Scroll down the documents until you find the documents that have been categorised as a ‘Key document’. These are the documents that are identified in the coversheet. These documents will be named on the Documents tab in Resolve using the following naming convention:
 1. * Tab 0. Cover sheet
 2. ***Tab 1. Draft decision**
 3. *Tab 2. FOI request
 4. *Tab 3. FOI decision
 5. *Tab 4. Internal review decision
 6. *Tab 5. IC review application

7. *Tab 6. Revised decision
8. *Tab 7
 - a. *Tab 7(a). A's submissions (delivered to Reception 5.02.2018)
 - b. *Tab 7(b). A's submissions
 - c. *Tab 7(c). A's submissions
 - d. *Tab 7(d). A's submissions (evidence only - 30 January 2014 email and attachments)
9. *Tab 8
 - a. *Tab 8(a). R's submissions
 - b. *Tab 8(b). R's submissions (evidence only)
 - c. *Tab 8(c). R's submissions
10. *Tab 9. IGIS
11. *Tab 10. Document in issue – [short form name of document]

Editing the draft IC decision on Resolve

- Select the draft decision by clicking on it once. Right click to access the list of options. Select the option 'CheckOut and Edit Document'.
- Edit the draft decision.
- Ensure all edits to the draft decision have been saved before closing the document.
- Select the draft decision by clicking on it once. Right click to access the list of options. Select the option 'Check In'.

Identifying the material at issue in the document(s) at issue.

- The last tab will identify the document(s) at issue.
- The draft decision will precisely identify the location of the material at issue in footnote(s) and the exemption applied.

Notes:

- If the decision is left checked out, the document cannot be modified by anyone else until it is checked in.
- The 'Status' column on Resolve records whether a document is checked in or checked out.
- Detailed instructions available in OAIC, *Resolve User Guide*.

Attachment A – Template Snapshot

The Director/Assistant Commissioner will use the following Snapshot template provided by Executive at the top of the email. **[TIP: The list of documents can be copied using the ‘snip’ function’]**.

Subject: [IC review decision] [insert parties’ names] (OAIC ref no [insert])

[copy case officer and relevant officers who have cleared the decision]

Snapshot	
Due date	[2 weeks]
Fixed or flexible	Flexible
If fixed, why?	N/A
Topic for clearance	[insert parties’ names] (OAIC ref no [insert])
Product	Draft IC Review decision
Length / no. of pages*	<p>Draft decision – [insert] pages.</p> <p>Relevant documents in hardcopy folder [insert] pages (approx.).</p> <p>Key documents on Resolve record [reference no]</p> <ul style="list-style-type: none"> • *Tab 0. Cover sheet • *Tab 1. Draft decision • *Tab 2. FOI request • *Tab 3. FOI decision(s) <ul style="list-style-type: none"> ○ *Tab 3(a). Primary decision ○ *Tab 3(b). Internal review decision • *Tab 4. IC review application • *Tab 5. Revised decision • *Tab 6 <ul style="list-style-type: none"> ○ *Tab 6(a). A’s submissions (delivered to Reception 5.02.2018) ○ *Tab 6(b). A’s submissions ○ *Tab 6(c). A’s submissions ○ *Tab 6(d). A’s submissions (evidence only - 30 January 2014 email and attachments) • *Tab 7 <ul style="list-style-type: none"> ○ *Tab 7(a). R’s submissions ○ *Tab 7(b). R’s submissions (evidence only) ○ *Tab 7(c). R’s submissions • *Tab 8. IGIS • *Tab 9. Document in issue – [short form name of document]
External party?	Yes – see above
Review officer	[insert]
Consultation	[insert e.g. Legal]
Clearance	[insert e.g. Director, Assistant Commissioner]
Final clearance	FOI/Information Commissioner

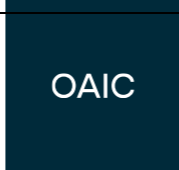
* it may be appropriate to include an additional row below called ‘For noting / For consideration’, for example if we have discussed a particular AAT decision in the draft IC review decision, or the matter relates to a novel issue, or there are linked cases.



Information Commissioner (IC) review process

Stage	Process	Guidelines	Sample letters / guidance	Notes
Stage 1: Intake and Early Resolution / Production of documents	1. Triage: a) Review and acknowledge application (received via email, fax or smartform) for validity a. Invalid applications to be finalised under s 54N b. Valid applications – deemed – proceed to ‘Deemed process’ below and invite s 54T application (extension of time to make IC review application) c. Valid applications within time proceed to ‘Assessment’- see below	10.28 – 10.32 (Application for IC review) 10.41 – 10.44 (extension of time for applying) 10.81 – 10.82 (Preliminary inquiries)	<ul style="list-style-type: none"> Acknowledgement letter D2022/011173 Acknowledgement letter where OAIC is respondent D2022/026515 	
	2. Deemed access refusals a) Conduct preliminary inquiries with Respondent and invite the applicant to lodge an application to make an IC review application under s 54T if required. b) If Respondent advises that the FOI request is not deemed to have been refused as the statutory processing time has not expired, the application is invalid and the application will be finalised under s 54N. c) If Respondent advises that the FOI request is deemed to have been refused as the statutory processing time has expired: a. Grant the applicant’s s 54T application if required b. Commence review, issue s 54Z/54T letter to the respondent and request relevant documentation d) If the Respondent makes a revised decision, confirm with the applicant whether they wish to proceed e) If the Respondent provides the processing documentation, proceed to ‘Review s 54Z response’ below	10.4 – 10.5 (Deemed decisions) 10.82 (Preliminary inquiries) 10.67 – 10.74 (Revising the decision in the course of an IC review) 10.100 (Steps in the Information Commissioner review process) 10.105 – 10.107 (Deemed refusal or deemed affirmation of original decision)	<ul style="list-style-type: none"> Notice to commence review (DHA): D2022/019558 Deemed email templates (proceeds, withdrawals, ITDs) D2022/002690 	<i>Proposed amendments to the procedure directions if implemented will impact on these matters.</i>
	3. Assessment a) Review IC review application and statement of reasons and decide whether to: a. Commence review - see below b. Decline under s 54W - see below c. Conduct further enquiries	10.81 – 10.82 (Preliminary inquiries)	<ul style="list-style-type: none"> Conducting IC reviews - assessments D2019/002542 Conducting IC reviews – case categorisation D2020/000377 Conducting IC reviews: Identification of systemic and significant issues worksheet D2019/001898 	
	4. Notice of commencement of IC review / Request for information (s 54Z) a) Issue notice of commencement of review and request for information, including notifying relevant parties	10.55 (Obtaining information) 10.91 – 10.93 (The Information Commissioner’s powers to gather information) 10.100 (Steps in the Information Commissioner review process) 10.114 – 10.115 (Methods of providing documents to the Information Commissioner)	<ul style="list-style-type: none"> 54Z notice of IC review D2022/002669 Opening letter to applicant and 54Z cover email to respondent D2022/026520 55A notice of added party to proceeding D2019/009911 	<i>We have previously considered adopting a similar approach to the AAT in relation to the production of submissions – for a copy to be provided to the applicant as well, and then the applicant to have x weeks to provide submissions in response. I</i>
	5. Decline a) Issue intent to decline the applicant if under s 54W(a)(i) and to both applicant and respondent if under s 54W(b)	10.85 – 10.90 (When the Information Commissioner will not review a matter)	<ul style="list-style-type: none"> Intention to decline (s 54W checklist) D2018/016246 Closure letter (s 54W checklist) D2018/016247 Conducting an IC review: Review of preliminary views/s 54W letters D2018/016248 54W (b) Intent to decline notice - D2022/011204 	

Stage	Process	Guidelines	Sample letters / guidance	Notes
	<ul style="list-style-type: none"> a. s 54W(a)(i): if the applicant responds, consider the response and determine whether to proceed to close under s 54W or whether further information is required. If the applicant does not respond, proceed to close under s 54W. b. s 54W(b): If the parties do not respond, proceed to close. If the parties respond, consider the response and determine whether to proceed to close under s 54W or whether to re-assess. 		<ul style="list-style-type: none"> • 54W(b) Decision notice D2022/026476 • 54W (a) Decline advice letter to applicant (i) (ii) (iii) D2022/011179 D2022/011181 D2022/011189 • 54W (a) Close letter to Applicant (i) (ii) (iii) D2022/011182 D2022/011183 D2022/011184 	
2: Case Management	<p>8. Review of s 54Z response</p> <ul style="list-style-type: none"> a) If scope of IC review involves ss 33/34 exemptions and the OAIC does not hold the material at issue <ul style="list-style-type: none"> a. Consider whether to issue s 55U notice b. If a s 55U notice has been issued and the Respondent has provided the material at issue, consider whether on further review, more information is required from the applicant or respondent b) For all other reviews, consider: <ul style="list-style-type: none"> a. requests to provide confidential submissions b. whether more information is required from the applicant or respondent, including where a notice to compel the document at issue is required c. whether the request for information should be in the form of an intent to decline to the applicant or a preliminary view to the applicant or respondent <p>7. Informal resolution and procedural fairness steps</p> <ul style="list-style-type: none"> a) Ensure procedural fairness steps have been undertaken and where possible, facilitate resolution through the use of preliminary views/inviting s 55G decisions b) If the application proceeds to a decline under s 54W – see ‘Decline’ process above c) If the application proceeds to a decision under s 55K – see ‘Decision and finalisation’ stage below 	<p>10.13 – 10.14 (Onus)</p> <p>10.67 – 10.74 (Revising the decision in the course of an IC review)</p> <p>10.77 – 10.80 Evidence by the Inspector-General of Intelligence and Security</p> <p>10.91 – 10.99 (The Information Commissioner’s powers to gather information)</p> <p>10.108 – 10.113 (Preliminary assessment and view)</p>	<ul style="list-style-type: none"> • Reviews and Investigations case plan: D2023/002296 • Preliminary steps checklist D2018/016244 • Conducting an IC review – general information about case management D2018/016249 • Submissions D2018/016243 • Conducting an IC review: Preliminary view checklist D2018/016245 • IC review case plan D2021/017910 • 55T notice to produce exempt documents - D2019/003535 • 55R notice to produce to agency - D2016/006882 	<p><i>Review advisers are encouraged to complete the case plan to assist with planning review, identifying and addressing procedural fairness issues and providing a brief document that sets out the history of the case</i></p>
3: Decision and finalisation	<p>8. Draft decision for clearance</p> <ul style="list-style-type: none"> a) Decision drafted for Director and Assistant Commissioner clearance b) IC review applications involving searches, charges, practical refusals will proceed to the Assistant Commissioner for decision c) All other decisions will proceed to the FOI Commissioner or Information Commissioner for clearance d) At any time during the clearance stage, the matter may need to return to the case management stage. <p>9. Finalisation of Decision</p> <ul style="list-style-type: none"> a) Once the decision has been approved, the decision is assigned a citation and is then sent to the relevant parties. b) For matters that are set aside or varied, a letter seeking confirmation of compliance/appeal is also sent to the Respondent. <p>10. Return/destruction of exempt material</p> <p>11. Publication of decision</p> <ul style="list-style-type: none"> a) The decision is sent to AUSTLII for overnight publication. <p>12. Summary</p>	<p>10.118 (Written reasons to be given)</p> <p>10.125 – 10.26 (Compliance with the Information Commissioner’s decision)</p> <p>10.125 – 10.126 (Compliance with the Information Commissioner’s decision)</p> <p>10.94 (Producing documents claimed to be exempt: general)</p> <p>10.118 (Written reasons to be given)</p>	<ul style="list-style-type: none"> • Decision writing checklist D2018/016241 • Conducting an IC review- clearance using documents on Resolve check list D2020/005955 • Snapshot for clearance of IC review decisions D2022/001851 • Section 55K decision – s47C D2021/003889 • Section 55K decision – s 47 F D2021/003888 • Attachment E of Decision writing checklist D2018/016241 • Section: 55K compliance letter template D2020/012832 • Conducting an IC review – general information about case management D2018/016249 	

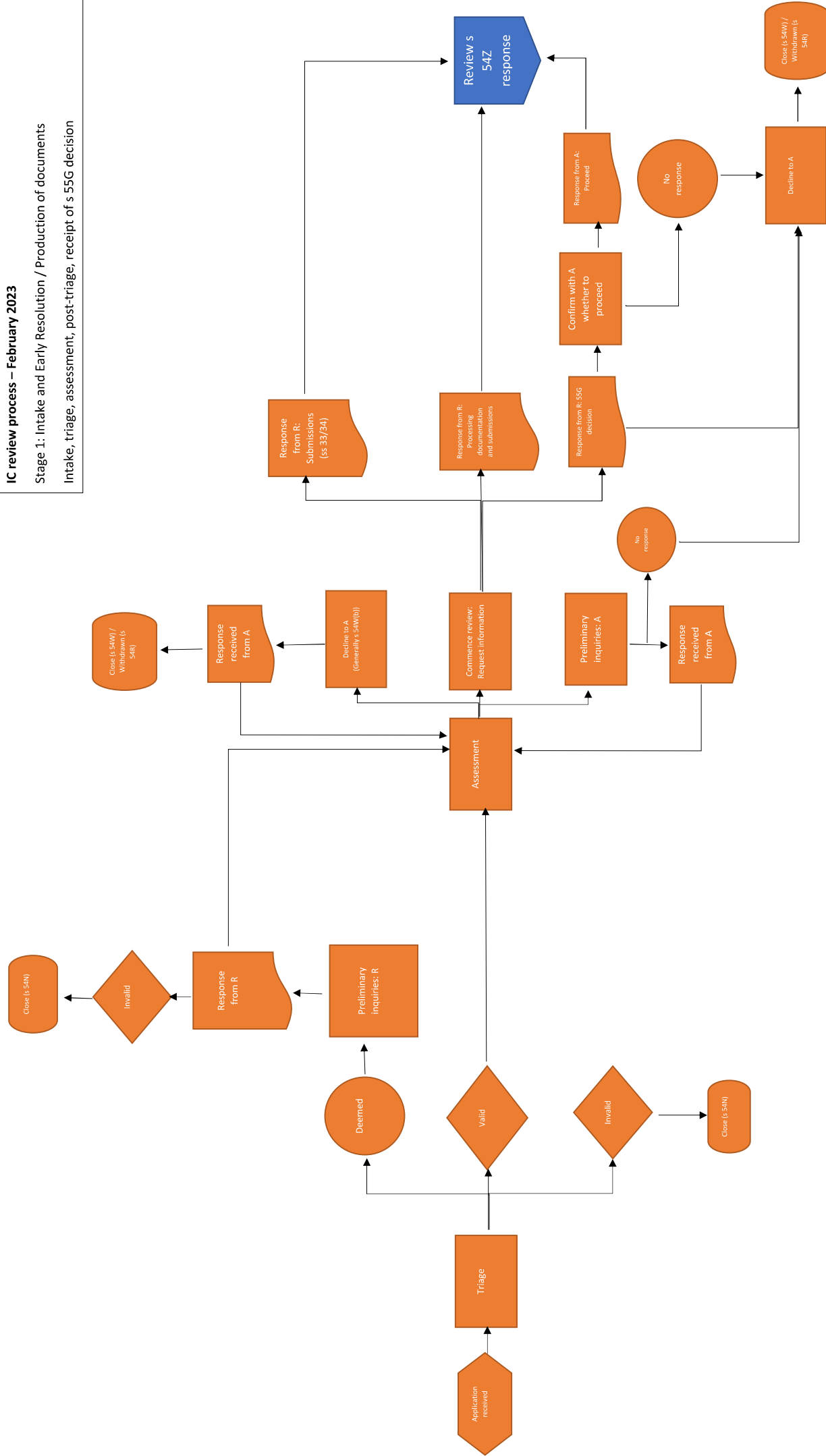


Stage	Process	Guidelines	Sample letters / guidance	Notes
	a) A summary of the decision, noting key points and whether any changes are required to the FOI Guidelines or IC review process, is circulated to the Commissioners, media, legal and FOI Branch.			

IC review process – February 2023

Stage 1: Intake and Early Resolution / Production of documents

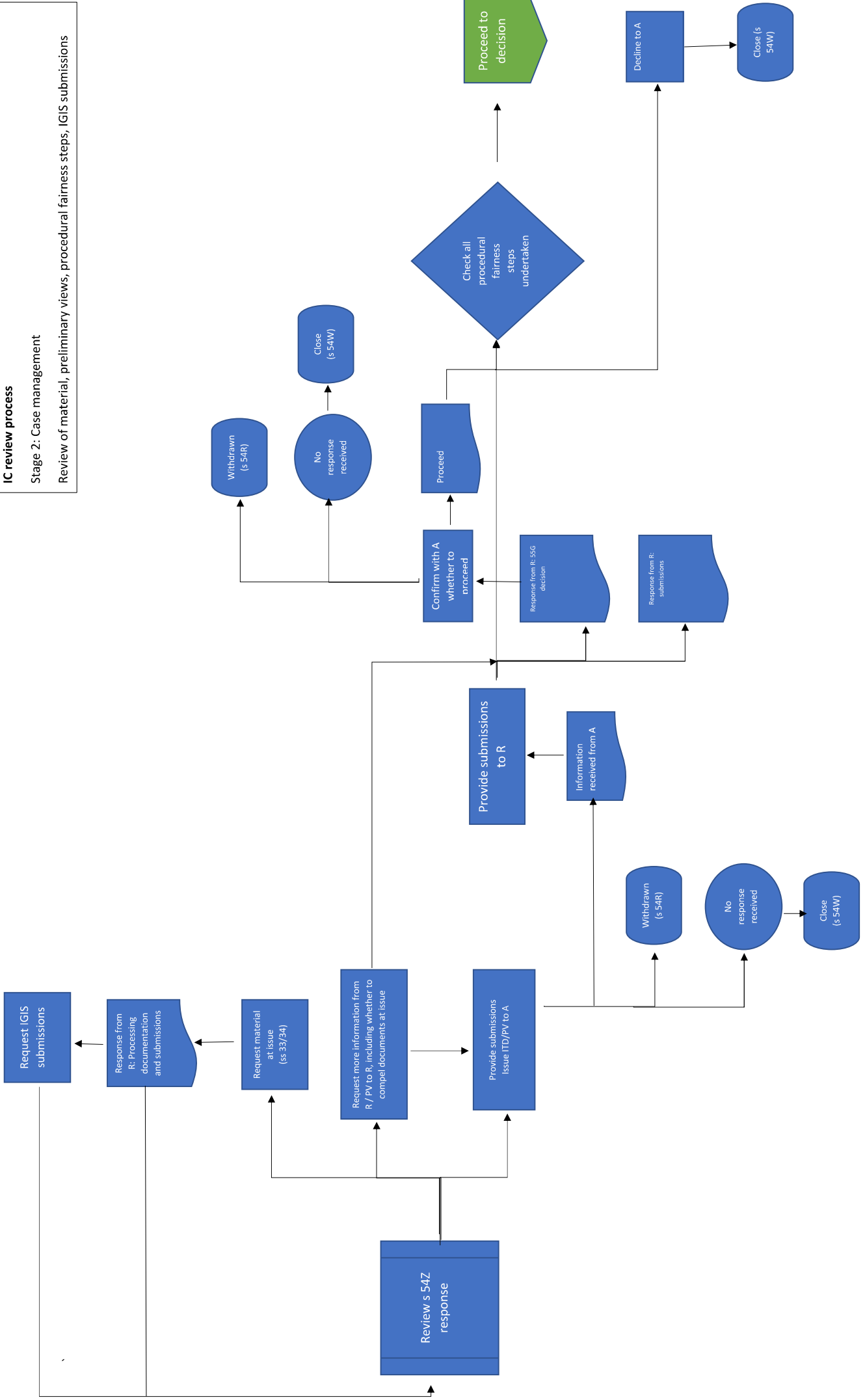
Intake, triage, assessment, post-triage, receipt of s 55G decision



IC review process

Stage 2: Case management

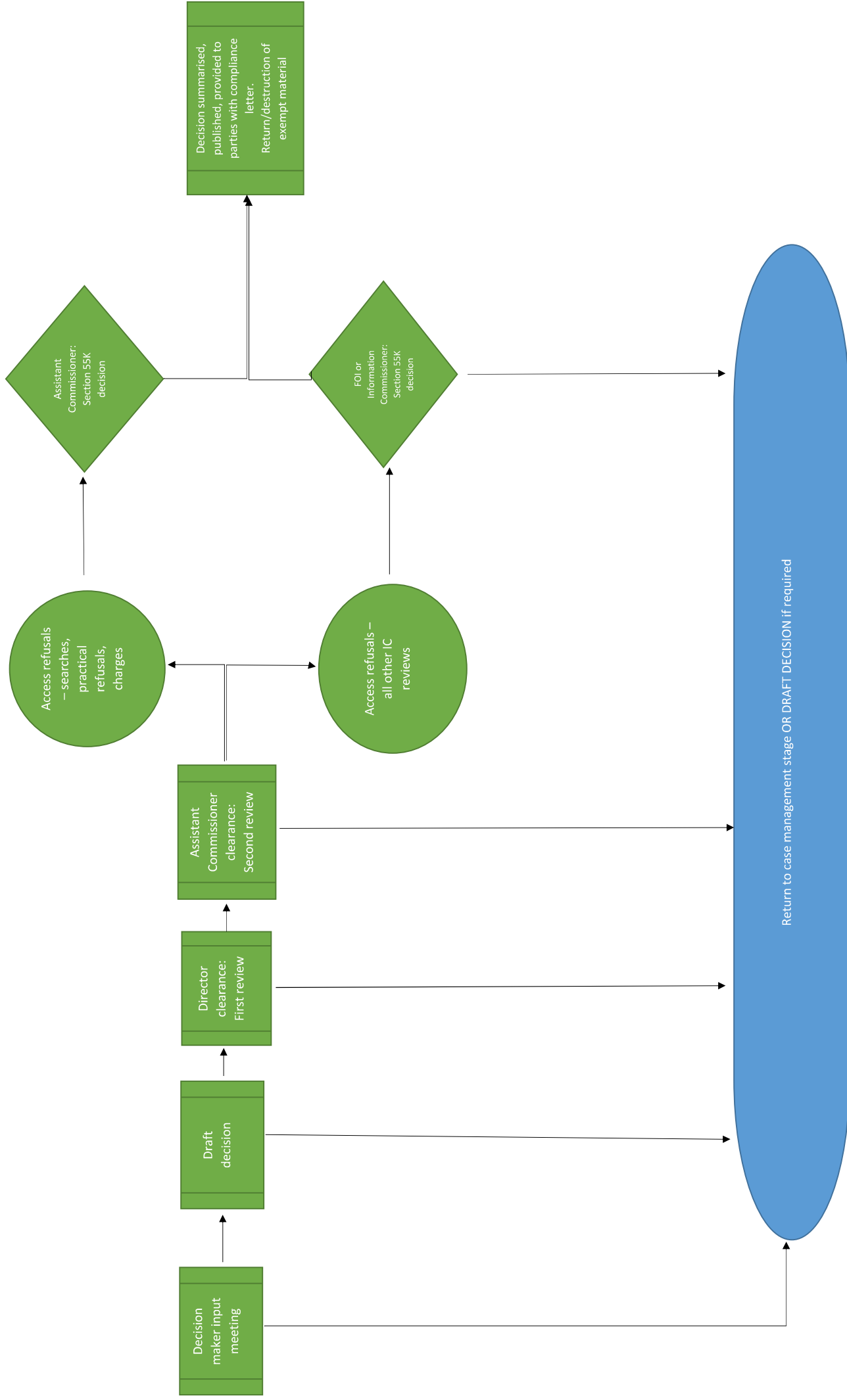
Review of material, preliminary views, procedural fairness steps, IGIS submissions



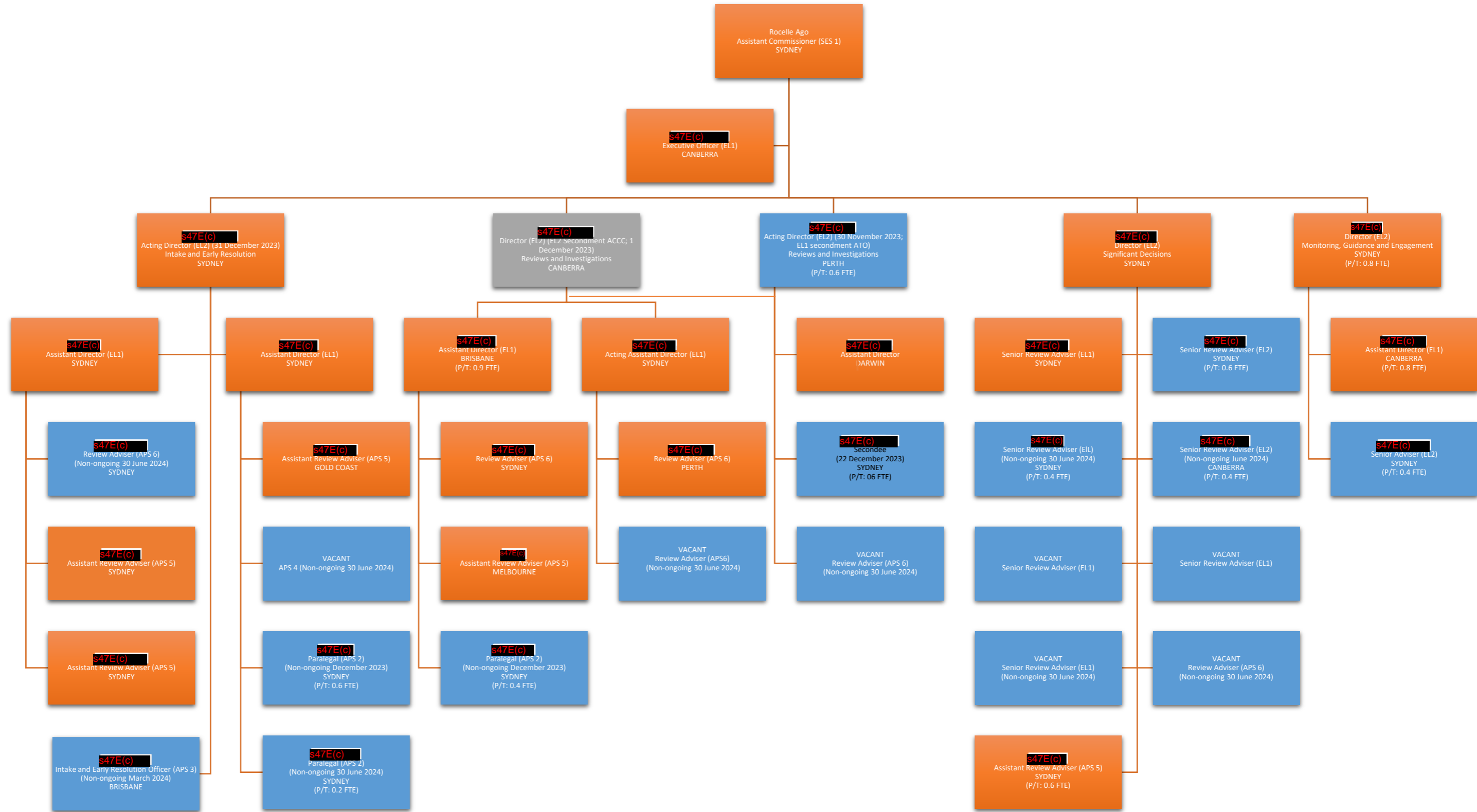
IC review process

Stage 3: Decision and finalisation

Draft decision, clearance and finalisation



Freedom of Information Branch (at 11 August 2023)



Key: Ongoing staff Additional 2023-24 budget Secondment



Summary of submissions to inquiry into the operation of Commonwealth FOI laws – as of 24 August 2023

No	Stakeholder	Stakeholder type	Key issues
1	Department of Home Affairs	Government	<p>Resignation of FOI Commissioner</p> <ul style="list-style-type: none">It is vital the FOI Commissioner appointment is filled as the leadership provided by the position adds significant value to Commonwealth agencies and would reassure the public that the government values and seeks to uphold the objectives of the FOI Act. <p>Delays in the review of FOI appeals</p> <ul style="list-style-type: none">Acknowledges that ‘a number’ of IC reviews currently making up the backlog of matters the OAIC stems from the rise in FOI applications received by the Department. <i>RA comments: For DHA Statistics, see Commissioner Brief – IC review of deemed access refusals and Commissioner Brief – Department of Home Affairs – Compliance with processing timeframes.</i>Noted that extended delays in assessment of IC reviews can result in adverse consequences for FOI applicants, agencies and the community. <i>RA comments: This may be referring to previous backlog of assessment of IC reviews; some of the limited resources across the FOI Branch within the Intake and Early Resolution team needed to be diverted to manage the significant increase in IC reviews of deemed access refusal decisions relating to the Department.</i>

No	Stakeholder	Stakeholder type	Key issues
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- In its current form, the FOI Act drives demand for IC reviews and limits the FOI Commissioner’s ability to respond to IC review requests.
 - Section 54E requires that review of all s 15AC ‘deemed refusal’ requests be undertaken by the FOI Commissioner. The Department seeks to process the majority of access requests in chronological order, unless compelling or compassionate circumstances exist.
 - When 54V and 54Z notices are issued by the OAIC in relation to 15AC deemed refusal requests, the Department is required to reallocate resources away from operational teams processing in-time or on-hand 15AC deemed refusal requests to process IC reviews.
 - In practice, this means the Department may be required to prioritise 35 day-old IC review requests over on-hand 100 day-old requests. This delays other FOI applicants’ access to documents, encourages applicants to seek IC review as a means of expediting their request, and results in flow-on adverse impacts on the Department’s service delivery and statutory compliance – which drives further IC review requests and increases the age of the backlog.

RA comments: We have previously explained to the Department the right of review enlivened by a deemed access refusal, which allows for the intervention of the Information Commissioner to ensure timely decision making.

Resourcing for responding to FOI applications and reviews

- The Department’s FOI program competes with law enforcement, national and transport security, criminal justice, emergency management, multicultural affairs, settlement services, immigration and border-related programs for funding. The Department submits that the additional capacity and practices required to drive service improvement in its FOI caseload can be found via legislative reform of the FOI Act. For example, it may be appropriate to consider alternate funding models for Commonwealth FOI programs.

RA comments: Reform of the Migration Act may also assist in providing a right of access to an applicant's own personal information without resorting to the FOI Act. In relation to FOI Act reform, it may be worth considering requiring administrative access requests for personal information prior to a formal request under the FOI Act (see for example, s 15A).

Creation of a statutory timeframe for IC reviews

No	Stakeholder	Stakeholder type	Key issues
			<ul style="list-style-type: none"> Does not support the creation of a statutory timeframe. It will require agencies to respond to IC notices under tighter timeframes, which will require FOI agencies to re-allocate more resources away from in-time caseloads. A combination of funding, resources, and process and system improvements is required to improve FOI processing efficiency. <p>Recommendations</p> <ol style="list-style-type: none"> Review of the current agency-led funding model for Commonwealth FOI programs <ul style="list-style-type: none"> The Department submits that the drafters of the FOI Act in 1982 could not have envisaged the volume of information sought by the Act in 2023, and that it may now be appropriate to consider alternate funding models which ensure the viability of FOI programs. This review could consider whether agency-led funding models continue to meet the needs of applicants and agencies, and whether cost recovery mechanisms should be introduced to offset the significant resourcing and administration required to process FOI access requests and reviews. Amendment of section 55K of the FOI Act to enable the FOI Commissioner to delegate IC decision-making powers to nominated OAIC officers [<i>note: these amendments were introduced by the Privacy Legislation Amendment (Enforcement and Other Measures) Act 2022.</i>] Amendment of sections 54B and 54N to enable a registration fee to be charged for all substantive internal review and IC review requests. <p><i>RA comments: I would not recommend supporting the introduction of application fees: factors to consider include:</i></p> <ul style="list-style-type: none"> <i>- application fees potentially being a deterrent for seeking review and balancing against the objects of the Act</i> <i>- whether the fees would apply to all requests or only those involving non-personal requests,</i> <i>- whether the matter is subsequently declined to allow the applicant to apply directly to the AAT (attracting a further fee).</i>

No	Stakeholder	Stakeholder type	Key issues
4.			<p>Amendment of section 54L(2) of the FOI Act to require agencies to undertake internal review of all substantive access refusal decisions prior to IC review rights being activated.</p> <p><i>RA comments: Amendments to the internal/external review mechanisms under the Act need to be considered in the context of the broader review of the AAT review. We could support an amendment that would prevent concurrent internal review and IC review applications to be made as an efficiency measure.</i></p>
5.			<p>The proposed change to 54L could be supported by enhanced oversight including:</p> <ul style="list-style-type: none"> <li data-bbox="797 552 1906 751">○ A requirement that each Commonwealth agency report any substantive internal review request more than 30 days over its statutory timeframe to OAIC. <i>RA comments: This may assist in identifying further non-compliance with statutory processing timeframes, however it should be expanded to include all requests over the processing timeframe.</i> <li data-bbox="797 775 1906 967">○ A requirement that any substantive internal reviews that exceeds its statutory timeframe by more than 60 days be transferred to OAIC for assessment. <i>RA comments: The reference to 'assessment' suggests that the OAIC would be reviewing the material and making, rather than reviewing a decision, which I would not recommend supporting in the absence of submissions.</i>
6.			<p>Amendment of section 54E of the FOI Act to require agencies to undertake internal review of all 15AC deemed refused decisions prior to IC review rights being activated.</p> <p><i>RA comments: This may not incentivise agencies from making decisions within time, noting it will have an opportunity to make an internal review later. Consideration should also be given to how this will interact with the complaints jurisdiction.</i></p> <p>The proposed change could be supported by enhanced regulatory oversight including:</p> <ul style="list-style-type: none"> <li data-bbox="797 1262 1906 1366">○ A requirement for each Commonwealth agency to submit a Case Management Plan to the OAIC explaining how it intends to prioritise and allocate 15AC deemed refused review requests.

No	Stakeholder	Stakeholder type	Key issues
			<ul style="list-style-type: none"> ○ A requirement for agencies to regularly report the processing age and reasons for 15AC 'deemed refused' requests falling more than 30 days overdue to the OAIC.
			<p>7. Amend section 54C(3) of the FOI Act to allow an additional 30 days for external consultations to be undertaken for internal reviews, similar to provisions contained in sections 26A, 27 and 27A. <i>RA comments: This may be appropriate particularly where there are third parties identified during the internal review stage but were not identified during the initial processing stage; however this may result in a more prolonged process, and may allow agencies to continue to add 30 days to undertake multiple consultations.</i></p>
			<p>8. Review section 3 of the FOI Act to ensure the objects of the Act are fit-for-purpose and represent a modern and forward-thinking approach to information access.</p>
			<p>9. Amend section 12 of the FOI Act to promote the Privacy Act 1988 as the primary channel for personal information access requests.</p> <p><i>RA comments: Reform of the Migration Act may also assist in providing a right of access to an applicant's own personal information without resorting to the FOI Act. In relation to FOI Act reform, it may be worth considering requiring administrative access requests for personal information prior to a formal request under the FOI Act (see for example, s 15A).</i></p>
			<p>10. Amend section 15AC(3) of the FOI Act to enable agencies to appropriately process 15AC deemed refusal requests</p> <p><i>RA comments: I understand this to refer to being able to keep making decisions outside of the processing timeframe: see for example s 39(3) of the ACT Freedom of Information Act 2016. s 39 (3) However, the respondent may continue to deal with the application and give notice of a decision on the application. A similar provision would further support the position set out in the FOI Guidelines.</i></p>
			<p>11. Amend section 15(5)(b) to exclude weekends and/or public holidays from statutory timeframes. <i>RA comment: There have been previous feedback from agencies to amend the reference to calendar days to business days, to reduce the complexity around the calculation of statutory processing timeframes, particularly when they fall on a weekend or public holiday.</i></p>

No	Stakeholder	Stakeholder type	Key issues
12.			<p>Review section 15(5)(b) to consider graded statutory timeframes which consider the disparate work effort required to process requests.</p> <p><i>RA comments: This appears quite complex and appears to suggest that there would be complexity ratings assigned.</i></p>
13.			<p>Introduce a subsection of section 15 (similar to 15(6) and 15(7)) which provides a 14 day extension of time to consult with other government agencies and/or contractors.</p> <p><i>RA comments: Hawke Review Recommendation 9 provided that agencies are allowed up to 30 working days to consult PMC on cabinet related material and it is unclear whether the reference to contractors are in the context of third party business contractors (of which there are already third party consultation provisions that apply) or contractors working in agencies.</i></p>
14.			<p>Amend section 15AA(b) to remove the requirement for an agency to notify the OAIC of a client's agreement to a 15AA EOT.</p> <p>RA comments: Recommendation 7 of the Hawke review supports this:</p> <p><i>Recommendation 7 – Extensions of Time The Review recommends the FOI Act be amended to:</i></p> <ul style="list-style-type: none"> • <i>remove the requirement to notify the OAIC of extensions of time by agreement; and</i> • <i>restrict the OAIC's role in approving extensions of time to situations where an FOI applicant has sought an Information Commissioner review or made a complaint about delay in processing a request. .</i>
15.			<p>Amend sections 15AB and 15AC to include timeframes for the OAIC to either respond to an agency on EOT requests or allow the EOT to be deemed approved.</p> <p><i>RA comments: EOT decision timeframes are not set out in the PBS at the moment - consider against Recommendation 7 of the Hawke Review:</i></p> <p><i>Recommendation 7 – Extensions of Time The Review recommends the FOI Act be amended to:</i></p> <ul style="list-style-type: none"> • <i>remove the requirement to notify the OAIC of extensions of time by agreement; and</i>

No	Stakeholder	Stakeholder type	Key issues
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• restrict the OAIC’s role in approving extensions of time to situations where an FOI applicant has sought an Information Commissioner review or made a complaint about delay in processing a request.

16. Amend section 24AB(8) to remove the time required to assess whether a request consultation response resolves a practical refusal reason from statutory timeframes.

17. Amend section 15(2) of the FOI Act to require personal identifiers to be provided for all FOI access requests. Subsequently amend section 24AA(1) to include a lack of personal identifiers as a practical refusal reason.

RA comments: To be considered in the context of the objects of the Act and identity not being relevant in seeking non-personal information. See also Part 3 of the FOI Guidelines:

The applicant’s identity

3.38 The FOI Act does not require an applicant who is a natural person to disclose or provide proof of their identity, nor require a body corporate or politic to establish that it is a legal entity. The Act does not prevent a natural person using a pseudonym.^[18]

3.39 An applicant’s identity can nevertheless be relevant in deciding if requested documents are exempt. Where a person has submitted an FOI request for their own personal information or documents relating to their business affairs, an agency or minister’s office should be satisfied of the applicant’s identity before giving the applicant access to the documents, particularly where the applicant purports to seek access to their own personal or business information. The protections under ss 90–92 of the FOI Act for officers disclosing documents in good faith may not apply if an agency or minister’s office has been negligent in failing to make appropriate enquiries (see [3.213]–[3.214]).

3.40 If a need arises to establish an FOI applicant’s identity, an agency should seek only the minimum amount of personal information required (consistent with APP 3 in the Privacy Act). The minimum amount of personal information required will vary depending on the nature of the documents sought by the applicant and whether the documents contain sensitive material. An applicant’s identity should not be provided to any third party without prior consultation and agreement by the applicant. This also applies if there is a request consultation process under ss 26A, 27 or 27A or if another agency is consulted. Nevertheless, knowing an applicant’s identity may help a third party decide more easily whether to object to disclosure and to frame any specific objections, and this issue can be raised with an applicant in consultation.

18. Amend 15(2A) of the FOI Act to enable agencies to determine channels for lodgement of FOI requests.

No	Stakeholder	Stakeholder type	Key issues
			<p><i>RA comments: This may assist to minimise duplication of requests and allow for integration of requests into agencies' case management systems; however it may need to be balanced with accessibility requirements.</i></p>
			<p>19. Review the FOI Act to ensure it appropriately considers digital documents, information and records.</p>
			<p>20. Amend section 37 of the FOI Act to introduce a new exemption to protect information that would or could reasonably be expected to expose government systems to cybercrime.</p>
			<p>21. Amend section 22 of the FOI Act to expressly permit non-SES staff names to be redacted as irrelevant information.</p> <p><i>RA comments: Alternatively, in considering other jurisdictions' treatment of public servants' personal information:</i></p> <p><i>personal information—</i></p> <p><i>(a) means information or an opinion (including information forming part of a database), whether true or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion; but</i></p> <p><i>(b) for an individual who is or has been an officer of an agency or staff member of a Minister, does not include information about—</i></p> <p><i>(i) the individual's position or functions as an officer or staff member; or</i></p> <p><i>(ii) things done by the individual in exercising functions as an officer or staff member.</i></p>
			<p>22. Amend Part V of the FOI Act to require all personal amendments to be processed under the Privacy Act, as the function more closely aligns to APP 13 and having two systems for personal identity amendments creates unnecessary risk and duplication.</p> <p><i>RA comments: This is consistent with the OAIC's submissions to the Hawke review.</i></p>
			<p>23. Review the FOI Act to consider whether cost recovery mechanisms should be introduced for personal access requests. <i>RA comments: It may be useful to seek clarification regarding the basis for re-introduction.</i></p>

No	Stakeholder	Stakeholder type	Key issues
2	Australian Financial Security Authority	Government	<p>Suggests there is insufficient guidance and support available from the OAIC for small to medium agencies with limited FOI resources to manage resource-intensive and potentially vexatious applicants. <i>RA comments: AFSA currently has 1 active vexatious applicant declaration.</i></p> <p><i>The guidance on vexatious applicant declaration application was last revised October 2021. It includes guidance on the following topics:</i></p> <ul style="list-style-type: none"> <i>- alternatives to seeking a declaration (including consultation, seeking EOT agreements or making EOT applications, engaging in a practical refusal process or notifying of the imposition of a charge (see para 12.11))</i> <i>- factors that may be considered in deciding whether there is a pattern of repeated access actions that unreasonably interfere with an agency's operations, including the size of the agency and its resources it can allocate (see para 12.27)</i> <i>- in relation to abuse of process - circumventing court-imposed access restrictions, see para 12.29:</i> <p><i>It will be a question of fact in the individual case whether a person has made an FOI access request or requests that are 'seeking to use the [FOI Act for the purpose of circumventing restrictions on access to a document (or documents) imposed by a court' (s 89L(4)(c)).^[28] It will be necessary to compare the terms of a person's request with the terms of a court order.</i></p> <p>Recommendations:</p> <ul style="list-style-type: none"> • OAIC guidance relating to s 89L should provide greater emphasis on the size and resources of an agency and refer to applicants who display particular communication patterns and litigious characteristics, in considering the “burden on the agency or a burden that is excessive and disproportionate”. • OAIC guidance should expressly recognise the size of an agency as an element in the OAIC structured framework for determining applications as to whether the applicant is a vexatious applicant under the FOI Act. • OAIC guidance should expressly recognise the public interest issues raised by applicants seeking to use the FOI Act for the purpose of circumventing restrictions on access to a document (or documents) imposed by a court.
3	Mr Rex Patrick	Former senator	FOI Commissioner Resignation

No	Stakeholder	Stakeholder type	Key issues
			<ul style="list-style-type: none"> • Suggests he was put into an impossible situation – being asked to take responsibility and accountability for the IC review regime without requisite resources and authority to deal with the situation. • Suggests that contrary to the statements of the Information Commissioner at the most recent Estimates, the FOI Commissioner had worked on proposed changes to the FOI Act prior to his departure (provides image of email obtained through FOI request to OAIC). • Recommendation – It is recommended the inquiry calls the Mr Hardiman PSM KC to provide evidence relevant to the terms of reference of the inquiry. <p>Poor original decision making</p> <ul style="list-style-type: none"> • Provides case studies of erroneous first instance FOI decisions (National Cabinet, Albanese’s Diaries). • Causes are lack of training, internal pressures within Agencies, political pressure (direct or cultural). • Recommendations – <ul style="list-style-type: none"> ○ The inquiry should call a selection of decision makers and hear from them as to the challenges and pressures they face at the FOI front line. ○ All FOI officers receive training from a properly resourced OAIC. <i>RA comments: As supported by s 8(d) of the AIC Act: providing information, advice, assistance and training to any person or agency on matters relevant to the operation of the Freedom of Information Act 1982</i> ○ Successful appeals against an FOI decision be recorded on a decision maker’s personal [note: we assume Mr Patrick is referring to a decision-maker’s ‘personnel file’ here. and considered as part of future performance assessments. <i>RA comments: Alternatively, consider option of professional standards issued by OVIC: see Com brief – Information Laws Across States and Territories.</i> <p>Delays in IC reviews</p> <ul style="list-style-type: none"> • The problems at the OAIC are not just ones related to resources. • There is a common law obligation for the IC to come to the correct or preferable decision when conducting reviews, but there is statutory requirement to do so in a timely fashion (as per 55(4)(c) FOI Act).

No	Stakeholder	Stakeholder type	Key issues
			<ul style="list-style-type: none"> • The IC seems to adopt an almost ‘High Court’ view in decision making rather than properly balancing the common law and statutory requirements, recognising it is the first level of independent review. • Recommendations – <ul style="list-style-type: none"> ○ The inquiry should call the South Australian Ombudsman to hear of his process to deal with FOI reviews in a timely fashion. ○ The IC should engage in a triage process (as per diagram provided in the submission). ○ Where a strong precedent exists, a quick decision should be made in accordance with the decision. ○ Where a simple matter is received, the IC should adopt a ‘quick and brutal’ South Australian Ombudsman style review. ○ Where a matter is complex, it should be referred to the AAT using section 54W(b) of the FOI Act. <p><i>RA comments: See Com brief – Information Laws Across States and Territories</i> <i>In seeking to benchmark the OAIC’s performance results with other regulators, consideration should be given to the various legislative frameworks that other jurisdictions operate within, some of which do not feature a push model (a model which mandates the publication of categories of documents), nor include a mandatory consideration of a public interest test in deciding whether to refuse or grant access (see for example, Freedom of Information Act 1991 (SA) and Freedom of Information Act 1982 (Vic)) nor have the full merits review power that the OAIC has (see for example Government Information (Public Access) Act 2009 (NSW)).</i> <i>SA also does not offer an option between internal review and SA Ombudsman review, but appears to offer an option between SA Ombudsman review and SACAT review: see Freedom of information Ombudsman SA.</i></p> <p>OAIC resourcing</p> <ul style="list-style-type: none"> • The OAIC has had a dramatic increase in the number of IC review applications with no funding increases. • One can only conclude that the present deplorable situation has arisen as a consequence of the deliberate policy choices of successive governments.

No	Stakeholder	Stakeholder type	Key issues
			<ul style="list-style-type: none"> • Recommendation – The FOI function of the OAIC should receive a significant funding boost. <p>Creation of a statutory timeframe for IC reviews</p> <ul style="list-style-type: none"> • Recommendation – A statutory time frame should be established for conducting an IC review (that is not referred to the AAT under s 54W(b) of the FOI Act). An approach, as is the case for the Information Commissioner in NSW, should be to place a three month time limit for decision making after the OAIC has received all the necessary information to conduct the review <p><i>RA comments: Consider the NSW Information Commissioner jurisdiction (which does not allow for full merits review), where the time limit commences when all the material for decision making has been received. Note that in the IC review space, there may be instances where a matters appears ready for decision but further material is required.</i></p>
4	Public Interest Advocacy Centre	Civil society	<p>Submission discusses delays in processing of FOI requests and IC reviews, a pro-transparency culture and the application of FOI Act exemptions. Suggests better OAIC resourcing is the single most important step the Government can take to address the crippling FOI backlogs.</p> <p>Recommendations</p> <ol style="list-style-type: none"> 1. OAIC to publish guidelines to set required ratios of departmental FOI officers to FOI requests. <i>RA comments: In the context of complaint investigation recommendations, we have asked agencies to identify the resources required to assist with ensuring decisions are made within set timeframes but we have not undertaken modelling to determine the number of officers per requests. It may be worth asking agencies how they benchmark their ratios, and to what extent they have administrative access schemes and whether these schemes are administered within the branches processing FOI requests or within the business areas.</i> 2. Increased resourcing to agency FOI processing functions. 3. FOI Act be amended to require the OAIC to investigate agencies with processing delays above a certain threshold. 4. Limit powers in the FOI Act for agencies to extend processing time. 5. Time limits for IC reviews – simplified and truncate the IC review process, with timeframes legislated for each stage of the process. 6. Establish a joint parliamentary committee to oversee the FOI system, including departmental FOI processes and the OAIC.

No	Stakeholder	Stakeholder type	Key issues
			<p><i>RA comment: This may be consistent with the oversight of other regulatory bodies: see Com brief – Information Laws Across States and Territories.</i></p>
			<p>7. Greater resourcing for the OAIC’s FOI training, guidance, and investigation functions (particularly for CIIs).</p>
			<p>8. APS Value 4 should be amended to make specific reference to the FOI Act and its role in promoting open government.</p>
			<p>9. Additional FOI policies and training in government agencies.</p>
			<p>10. Adopt interagency processes for responding to FOI requests and establishing clear responsibilities and timeframes.</p>
			<p>11. Amend the FOI Act to require that agencies comply with OAIC Guidelines in relation to disclosure logs.</p>
			<p><i>RA comment: This raises the issue of whether the status of the Guidelines needs to be strengthened: s 93A currently requires agencies to have regard rather than to comply.</i></p>
			<p>12. Amend OAIC Guidelines to require inclusion of decision records in disclosure logs.</p>
			<p><i>RA comment: FOI Guidelines Part 14 - Disclosure Log was reissued in March 2022. In the absence of decision records, see 14.47:</i></p>
			<p><i>14.47 It is also open to an agency or minister to supplement the information they are required to make available under s 11C, in particular by publishing the following additional information:</i></p>
			<ul style="list-style-type: none"> <i>o the terms of the FOI request that prompted release of the information (this can be provided in a summary form, rather than as a copy of the FOI request)</i> <i>o whether the FOI applicant was given access to all documents requested, and if not, the exemption or other basis on which partial access was granted (this information can be provided in a summary form), and</i> <i>o whether all the information provided to the FOI applicant has been made publicly available under s 11C and, if not, the nature of the information that has not been made available.</i>
			<p>13. Review of the exemptions in the FOI Act – consider whether in the public interest and whether between distinction between exemptions and conditional exemptions should be maintained.</p>
			<p><i>RA comment : See Hawke Review Recommendation 13 – Ministerial Briefings. The Review recommends that the FOI Act be amended to include a conditional exemption for incoming government and incoming minister briefs, question time briefings and estimates hearings briefings.</i></p>
			<p>14. Additional OAIC guidance on FOI Act exemptions.</p>
			<p><i>RA comments: FOI Guidelines update:</i></p>

No	Stakeholder	Stakeholder type	Key issues
			<ul style="list-style-type: none"> • <i>Part 5 - Exemptions - Consultation closed 31 July 2023. Submissions under review, revised chapter to be finalised and reissued.</i> • <i>Part 6 - Conditional exemptions - Revisions subject to external consultation - closing 7 September 2023.</i> <p>15. Require agencies to consult with the applicant when considering if public interest factors in favour of disclosure apply. <i>RA comment: This appears to reference s 37 of the ACT FOI Act 2016.</i></p> <p>16. List additional public interest factors for disclosure in s 11B of FOI Act. <i>RA comment: See Com brief – Information Laws Across States and Territories; Appendix B. ACT FOI Act 2016 contains further public interest factors.</i></p> <p>17. Remove exemptions for trade secrets and commercially valuable info.</p> <p>18. FOI requests to apply to Ministerial docs as at the time of the request. <i>RA comment: See Com brief - FOI Change of government and official ministerial documents of a Minister.</i></p> <p>19. Require ministers to transfer docs subject to FOI requests to the OAIC. <i>RA comment [Com brief - FOI Change of government and official ministerial documents of a Minister.</i></p> <p>20. OAIC to gather and publish agency data on the forms of access that agencies grant in annual report.</p> <p>21. Review methods for providing view-only access to footage.</p> <p>22. Amend the FOI Act to remove all fees and charges in respect of FOI applications. <i>RA comment: Consider in the context of the Review of charges (2012) report and the Hawke Review.</i></p>
5	Grata Fund	Civil society	<p>Submission discusses delays in processing of FOI requests and IC reviews and the overuse of FOI Act exemptions.</p> <p>Recommendations</p> <ol style="list-style-type: none"> 1. Agencies should be limited to 30 days to review an FOI request, with a 14-day extension only for specific matters. 2. OAIC to publish guidelines to set required ratios of departmental FOI officers to FOI requests. <i>RA comment as per response to PIAC recommendation 1: In the context of complaint investigation recommendations, we have asked agencies to identify the resources required to assist with ensuring decisions are made within set timeframes but we have not undertaken modelling to determine the number of officers per requests. It may be worth asking agencies how they benchmark their ratios, and to what extent they have administrative access</i>

No	Stakeholder	Stakeholder type	Key issues
			<p><i>schemes and whether these schemes are administered within the branches processing FOI requests or within the business areas.</i></p> <p>3. Increased resourcing to agency FOI functions to implement recommendations 1 and 2, above.</p> <p>4. Simplify and truncate the IC review process, with timeframes legislated for each stage of the process (NB: Detailed process provided at Page 4 of the submission with diagram at Appendix 1). <i>RA comments: The proposed timeframe proposes a maximum of 95 days (approximately 3 months) In Comm Brief Com brief - FOI IC review table -numbers, finalisation times, outcomes, we set out proposed ideal timeframes/ranges for cohorts of matters, including searches, charges, practical refusal and single issue exemptions/limited documents. The time range for those matters are approximately 2-6 months on the basis that:</i></p> <ul style="list-style-type: none"> • <i>the decision under review is not a 'deemed access refusal'</i> • <i>the process is based on the current IC review procedure direction,</i> • <i>each matter is proceeding through the process with little delay, including where the parties are providing responses within the set timeframes and responses are provided through informal requests rather than compulsive powers</i> • <i>the preliminary views may be issued with a s 54Z notice</i> • <i>there are no matters awaiting allocation</i> • <i>there are sufficient resources allocated to the IC reviews function, including:</i> • <i>multiple sub-teams to specialise in cohorts of matters, and</i> • <i>there are sufficient decision makers to issue s 55K decisions.</i> <p><i>The proposed truncated review process does not account for:</i></p> <ul style="list-style-type: none"> • <i>whether the decision under review is a deemed access refusal</i> • <i>whether it involves national security/cabinet exemptions and the procedural steps set out in the FOI Act, including the pre-condition to seek affidavits/submissions prior to requesting copies of the documents and seeking evidence from IGIS on particular matters</i> • <i>third party notification/involvement</i> • <i>procedural fairness requirements</i> • <i>dispute resolution/revised decisions</i> <p><i>There also appears to be a reference to allowing 14 days for complex/voluminous requests, which appears to have conflated IC reviews and extension of time applications.</i></p>

No	Stakeholder	Stakeholder type	Key issues
			<p>5. The OAIC and incoming FOI Commissioner should be resourced to implement the IC Review process as per Recommendation 4. <i>RA comment: This recommendation does not only require resourcing but would require amendments to the FOI Act in relation to the IC review process and the AIC Act regarding delegations.</i></p> <p>6. Additional FOI training for departmental and ministerial officers.</p> <p>7. Performance assessments of FOI officers and their managers should be tied to the quality of their decision-making on FOI applications. <i>RA comment: Alternatively, consider option of professional standards issued by OVIC: see Com brief – Information Laws Across States and Territories.</i></p> <p>8. The Government should conduct a review of the exemptions available in the FOI Act.</p> <p>9. FOI requests to apply to Ministerial docs as at the time of the request.</p> <p>10. Require ministers to transfer docs subject to FOI requests prior to leaving office to the OAIC. <i>RA comment: Com brief - FOI Change of government and official ministerial documents of a Minister.</i></p> <p>11. Amend the FOI Act to remove all fees and charges in respect of FOI applications.</p> <p>12. Establish a joint parliamentary committee to oversee the FOI system, including departmental FOI processes and the OAIC. <i>RA comment: This may be consistent with the oversight of other regulatory bodies: see Com brief – Information Laws Across States and Territories.</i></p>
			<p>IC review delays</p> <ul style="list-style-type: none"> • Submission notes that in the <i>Patrick</i> decision, the Court found that in some cases, the OAIC had not allocated an IC Review to an adviser/officer in over 2.5 years due to severe under-resourcing. • Outlines delays at ‘preliminary inquiries and consultation stage’, ‘information gathering stage’, ‘preliminary assessment’ and decision stages. • Suggests this process is ‘inefficient and leisurely’ and that despite having powers to compel the production of documents, the OAIC prefers to informally request and wait for documents from agencies and ministers.
6	Centre for Public Integrity	Civil society	<p>Performance of the FOI regime</p> <ul style="list-style-type: none"> • Notes that the introduction of the OAIC in 2010 was supposed to speed up and cheapen the FOI appeal process by providing a flexible clearing house antecedent to the AAT. Suggests that according to Geoffrey Watson SC, it has in fact ‘had the opposite effect’ on cost and speed.

No	Stakeholder	Stakeholder type	Key issues
			<ul style="list-style-type: none"> • Suggests that the yearly number of total Govt FOI requests seems to have changed little since the FOI regime was introduced in 1982 (provides data on total FOI requests). • Information Commissioner appeals have steadily increased since 2012- 13 (provides data on OIAC reviews received and finalised). • The significant delays in IC reviews is partly attributable to the lack of sufficient staff to manage the increasing number of claims. <p>Culture of secrecy</p> <ul style="list-style-type: none"> • Suggests that FOI exemptions are prone to abuse. • Since 2011-12 the proportion of FOI requests granted in full has fallen by over 30 per cent. This has been accompanied by a more than 60 per cent increase in the proportion of claims refused in full. <p>Recommendations ('Blueprint for reform')</p> <ol style="list-style-type: none"> 1. FOI requests to apply to Ministerial docs as at the time of the request. Require ministers to transfer docs subject to FOI requests prior to leaving office to the OIAC. <i>RA comment: See Com brief - FOI Change of government and official ministerial documents of a Minister.</i> 2. Disciplinary action must be available to be used against FOI officers who repeatedly make decisions determined by the Information Commissioner, AAT-replacement or Court to be contrary to the FOI Act (as per comparable legislation in NSW). <i>RA comment: Alternatively, consider option of professional standards issued by OVIC: see Com brief - Information Laws Across States and Territories.</i> 3. Department should inform the applicant of any obligation to consult within first 10 days of the making of an application, and the obligation to consult should only extend the 30-day time limit by 14 days. <i>RA comment: We consider it better practice to include in acknowledgment letters that the timeframe may be extended where third party consultation is required.</i> 4. The IC review process must be expedited (60 day time limit). Where failure to determine within 90 days, the applicant may appeal directly to the AAT. <i>RA comment: In Comm Brief Com brief - FOI IC review table - numbers, finalisation times, outcomes, we set out proposed ideal timeframes/ranges for cohorts of matters, including searches, charges, practical</i>

No	Stakeholder	Stakeholder type	Key issues
			<p><i>refusal and single issue exemptions/limited documents. The time range for those matters are approximately 2-6 months on the basis that:</i></p> <ul style="list-style-type: none"> • <i>the decision under review is not a 'deemed access refusal'</i> • <i>the process is based on the current IC review procedure direction,</i> • <i>each matter is proceeding through the process with little delay, including where the parties are providing responses within the set timeframes and responses are provided through informal requests rather than compulsive powers</i> • <i>the preliminary views may be issued with a s 54Z notice</i> • <i>there are no matters awaiting allocation</i> • <i>there are sufficient resources allocated to the IC reviews function, including:</i> <ul style="list-style-type: none"> • <i>multiple sub-teams to specialise in cohorts of matters, and</i> • <i>there are sufficient decision makers to issue s 55K decisions.</i> <p>5. Departmental FOI officers must be senior staff (APS4 or higher).</p> <p>6. Departmental FOI Officers must be provided with ongoing training by the OAIC. <i>RA comment: Alternatively, consider option of professional standards issued by OVIC: see Com brief – Information Laws Across States and Territories.</i></p> <p>7. OAIC to set ratios of departmental FOI officers to FOI requests. <i>RA comment: As per response to PIAC recommendation 1:</i> <i>In the context of complaint investigation recommendations, we have asked agencies to identify the resources required to assist with ensuring decisions are made within set timeframes but we have not undertaken modelling to determine the number of officers per requests. It may be worth asking agencies how they benchmark their ratios, and to what extent they have administrative access schemes and whether these schemes are administered within the branches processing FOI requests or within the business areas.</i></p> <p>8. The IC to conduct annual audits of the FOI decisions made by government agencies. <i>RA comment: This may fall within the current monitoring, investigating and reporting on compliance under s 8(f) of the AIC Act; however a specific audit/assessment power would also assist.</i></p> <p>9. Establish a joint parliamentary committee to oversee the FOI system, including departmental FOI processes and the OAIC. <i>RA comment: This may be consistent with the oversight of other regulatory bodies: see Com brief – Information Laws Across States and Territories.</i></p>

No	Stakeholder	Stakeholder type	Key issues
7	Professor John McMillan AO	Academic/former Commissioner	<p>History of the FOI Act and of ‘FOI tumult’</p> <ul style="list-style-type: none"> • Submission provides an overview of the history of the FOI Act, creation of the OAIC and position of FOI Commissioner in 2010, near abolishment of OAIC in 2014. • FOI will encounter turbulence and conflict in every age. Political parties champion FOI when in opposition and quickly lose heart when in government. <p>Unrealised reforms</p> <ul style="list-style-type: none"> • Submission notes reviews in 2012/2013 and lack of Government response. <p>Building a pro-disclosure culture in government</p> <ul style="list-style-type: none"> • Discusses proactive disclosure through Information Publication Scheme (IPS) and Disclosure Log. • Suggests that proactive disclosure (e.g. for ministerial diaries) and time limit on the operation of some exemptions could reduce the FOI Commissioner’s caseload – as is done in New Zealand. <p>Revising/rethinking the FOI review and appeal process</p> <ul style="list-style-type: none"> • Lists the proposals in the OAIC submission to the Hawke Review and notes that only one has been implemented so far (delegation of IC reviews to senior OAIC officers). • One option for modifying this process may be to allow an IC review process to be concluded by a ruling that goes no further than recording whether the IC review application is upheld and, for example, whether particular documents in dispute are assessed as exempt or non-exempt (i.e. a ‘brief statement of findings’). A party that did not accept the statement could apply for a more formal IC review decision for a fee, or apply for AAT review. <p>The OAIC philosophy and structure</p> <ul style="list-style-type: none"> • Notes he was a strong advocate for the three commissioner model. • Notes that the inquiry was prompted by an apparent breakdown in FOI administration and outcomes and claims that it is “disturbing that the FOI Commissioner reportedly resigned after dissatisfaction with lack of support for his position within the OAIC.” • Suggests it is appropriate to ask whether the OAIC structure provides the best home for the FOI function and offers the following observations (stressing they are not criticisms of the OAIC): <ul style="list-style-type: none"> ○ In its foundation years the OAIC paid great attention to exploring and articulating the broad concept of information policy as well as to the FOI function.

No	Stakeholder	Stakeholder type	Key issues
			<ul style="list-style-type: none"> ○ Notes that the attempt to disband the OAIC in 2014 has cast a long shadow. ○ OAIC work is principally dominated nowadays by its privacy function. Information policy is no longer mentioned on the OAIC’s homepage. It is a minor sub-heading under the homepage link, ‘About the OAIC’. ○ The FOI resources on the website have been updated but seem largely to be the same publications from the early years. ○ The fortieth anniversary of the FOI Act in 2022 was marked by a seminar hosted by the Australian Government Solicitor rather than the OAIC. Nearly all items in the OAIC ‘Newsroom’ deal with privacy or OAIC corporate developments. ○ ‘While I still believe strongly in the original OAIC concept, I accept that it may be time to rethink whether the administration of the FOI Act (including the role of FOI Commissioner) should be moved to a different platform. FOI reform was the impetus for the creation of the OAIC. If this is no longer working a different model should be considered.’ ○ Notes that an option floated in earlier reports was to constitute a separate office of Deputy Commonwealth Ombudsman (FOI). ○ Suggests it is hard any more to justify a three commissioner model for the OAIC, particularly when that office does not herald its separate information policy function.
8	Refugee Advice and Casework Service	Civil society	<p>Submission discusses the delays in processing FOI requests by the Department of Home Affairs and the impact of these delays on clients. Provides case studies.</p> <p>Recommends a systemic review into the Department of Home Affairs’ process of fulfilling FOI requests to identify the cause of delays and additional OAIC resourcing to reduce delays.</p> <p><i>RA comments: Issues regarding the need to seek access to documents through FOI for migration related records were raised as part of consultations with the Administrative Review Taskforce as well as with DHA.</i></p> <p><i>As noted above (DHA submission): Reform of the Migration Act may also assist in providing a right of access to an applicant's own personal information without resorting to the FOI Act.</i></p> <p><i>In relation to FOI Act reform, it may be worth considering requiring administrative access requests for personal information prior to a formal request under the FOI Act (see for example, s 15A).</i></p>

No	Stakeholder	Stakeholder type	Key issues
9	Public Interest Journalism Initiative and Centre for Advancing Journalism, University of Melbourne	Academics	<p>Submission discusses application and appeal delays, lack of OAIC resourcing and department FOI culture.</p> <p>Recommendations</p> <ol style="list-style-type: none"> 1. Necessary resources should be provided to the OAIC to enable timely resolution of applications and appeals. 2. Introduce a statutory timeframe but do so alongside more efficient review processes, more resourcing to the OAIC, and improved FOI culture within the APS. 3. Additional resources should be committed to FOI agencies and the Information Commissioner. 4. Efforts should be taken to provide education and training opportunities for FOI staff, as well as those in government agency management and leadership positions, to promote awareness of the FOI Act and proactively foster a positive FOI culture
10	Australian Press Council	Civil society	<p>Discusses the importance of access to information for a free and open press, current issues of concern with the FOI system and makes the following recommendations:</p> <ul style="list-style-type: none"> • Government should properly resource Departments and Agencies to manage and respond to FOI requests. • There should be increased transparency around the performance of the FOI regime, including auditing and reporting the performance of Departments and Agencies (individually and in aggregate) <p><i>RA comments: The Freedom of Information Act 1982 (Cth) (FOI Act) requires all agencies subject to the FOI Act to provide statistical information to the Office of the Australian Information Commissioner (OAIC) for inclusion in the Annual Report. Agencies subject to the FOI Act must provide quarterly and annual statistical returns within the statutory prescribed timeframes set out in the Freedom of Information (Prescribed Authorities, Principal Offices and Annual Report) Regulations 2017. The data submitted are published on data.gov.au: Freedom of information statistics Datasets data.gov.au - beta Analysis and commentary are included in Appendix E of the Annual Report, including trends for increases/decreases in applications received, finalised, exemptions applied, practical refusal notices issued, IC review applications made.</i></p> <p><i>The ANAO has also undertaken audits of the administration of the FOI Act: see Administration of the Freedom of Information Act 1982 Australian National Audit Office (ANAO) (September 2017). The</i></p>

No	Stakeholder	Stakeholder type	Key issues
			<p><i>entities audited included the OAIC, Attorney-General's Department, Department of Social Services and the Department of Veterans' Affairs.</i></p> <ul style="list-style-type: none"> The FOI regime should be subject to a comprehensive independent review, including representatives of the media industry on the panel. <p><i>RA comments: Part 4 of the AIC Act provides for the establishment and functions of the Information Advisory Committee. It would consist of the Information Commissioner as Chair, senior officers of agencies nominated in writing by the Minister and any such other persons as the Minister thinks fit and who, in the Minister's opinion hold suitable qualifications or experience.</i></p> <p><i>There are no current appointments to the Information Advisory Committee.</i></p> <ul style="list-style-type: none"> Steps should also be taken to create a culture that is supportive of a proactive approach to information release.
11	Office of the Information Commissioner (Qld)	Government	<p>Dedicated FOI commissioner; IC review delays; resourcing</p> <ul style="list-style-type: none"> A broadly similar situation existed in Queensland. From 1992 until 2005 the IC role was performed by the Queensland Ombudsman who had a discrete and substantial remit of work. During this time, Qld OIC accumulated a backlog of external review applications. The appointment of a dedicated Information Commissioner in 2005, coupled with appropriate resourcing, allowed Qld OIC to make significant inroads into that backlog. By 30 June 2007, Qld OIC had fully cleared the backlog. Qld OIC's experience suggests that a stand-alone information access commissioner, adequately resourced, is important to appeal resolution timeliness and to avoiding backlog accrual. <p>Creation of a statutory timeframe for IC reviews</p> <ul style="list-style-type: none"> Requiring a review body to resolve complex FOI matters (e.g. 'missing documents'/adequacy of search for documents) within an arbitrary timeframe may prejudice the quality of the analysis and lead to hurried, compromised decision-making; to the prejudice of review participants and public confidence in the FOI framework. Practical questions exist about the consequence of a time limit not being met. Deemed refusals or deemed granting of access would either foreclose an applicant's right of access without the merits of their case being heard, or lead to the potential disclosure of information contrary to the public interest.

No	Stakeholder	Stakeholder type	Key issues
			<p>Proactive disclosure</p> <ul style="list-style-type: none"> Proactive disclosure approach not only increases accountability and transparency but also mitigates the need for formal applications under the FOI Act.
12	NSW Council for Civil Liberties	Civil society	<p>Resignation of FOI Commissioner</p> <ul style="list-style-type: none"> A permanent replacement must be appointed urgently. Measures should be implemented to ensure the next FOI Commissioner can properly fulfil their role, including provision of adequate resources. <p>OAIC Delays and Resourcing</p> <ul style="list-style-type: none"> Delays should be addressed by: <ul style="list-style-type: none"> allocating additional resources to the OAIC specifically to fulfil its mandate under the FOI Act in respect of IC Reviews; and allowing IC Review applicants to elect to bypass the OAIC and go to the AAT, either at the start of the process or if the OAIC takes—or expects to take—more than 90 days. <p><i>RA comments: See also SA model which appears to allow for alternative between SA Ombudsman and SACAT : see Com brief – Information Laws Across States and Territories.</i></p> Commissioner Falk noted in 2019 Estimates that a gap remains between volume of work and resourcing, and requested funding for 50 per cent more staff for IC review workload. OAIC continues to request for resources to deal with its increasing IC Review workload.¹ <i>Patrick</i> decision acknowledged ‘unquestionable shortage of resources’. Recent funding for OAIC is not specifically designated for use in respect of the OAIC's FOI functions. Since 2016, OAIC has only received one FOI specific funding allocation. <p>Departmental Delays and Culture</p> <ul style="list-style-type: none"> Government agencies allocate insufficient resources to resolve FOI requests promptly at first instance.

¹ Recent FOI disclosures by the OAIC have shown Ms Falk has warned the Attorney-General Mark Dreyfus at least eight times in meetings and letters since May last year of the "significant funding pressure" placed on the OAIC, saying it could not keep up with the incoming work. Deputy commissioner Elizabeth Hampton has described the situation as a "funding cliff" and that the "most critical" issue is in regards FOI resources.

No	Stakeholder	Stakeholder type	Key issues
			<ul style="list-style-type: none"> • There are cultural issues in departments regarding FOI (e.g. initial refusals to provide information, partial responses with heavy redactions, application of time extension as standard practice). • Recommendations – OAIC should be empowered to: <ul style="list-style-type: none"> ○ set a ratio of FOI officers to FOI requests and mandate minimum staff numbers within government departments; <i>RA comments: As per response to PIAC recommendation 1: In the context of complaint investigation recommendations, we have asked agencies to identify the resources required to assist with ensuring decisions are made within set timeframes but we have not undertaken modelling to determine the number of officers per requests. It may be worth asking agencies how they benchmark their ratios, and to what extent they have administrative access schemes and whether these schemes are administered within the branches processing FOI requests or within the business areas.</i> ○ conduct investigations into government departments that fail to meet their disclosure duties under the FOI Act; and <i>RA comments: This may fall within the current monitoring, investigating and reporting on compliance under s 8(f) of the AIC Act.</i> ○ impose disciplinary sanctions on departmental officers who repeatedly make decisions subsequently determined to be contrary to the requirements of the FOI Act, as well as for persons who direct or influence them to make such decisions. <i>RA comments: Alternatively, consider option of professional standards issued by OVIC: see Com brief – Information Laws Across States and Territories.</i> <p>Creation of a statutory timeframe for IC reviews</p> <ul style="list-style-type: none"> • NSWCCCL prefers allowing individuals to elect to bypass the OAIC and go to the AAT either at commencement of IC review or if review is likely to take more than 90 days. <i>RA comments: See also SA model which appears to allow for alternative between SA Ombudsman and SACAT : see Com brief – Information Laws Across States and Territories.</i> <p>Other matters</p> <ul style="list-style-type: none"> • The following issues must also be addressed: <ul style="list-style-type: none"> ○ closing the former minister's documents loophole;

No	Stakeholder	Stakeholder type	Key issues
			<p><i>RA comments: see Com brief - FOI Change of government and official ministerial documents of a Minister.</i></p> <ul style="list-style-type: none"> ○ applying a single overarching public interest test to a greater number of exemptions in the FOI Act; and refining the Cabinet Documents Exemption
13	Country Press Australia	Media	<p>Recommendations</p> <ul style="list-style-type: none"> ● Any review of FOI framework should be undertaken by an independent and external body. ● The Federal Government must adequately staff and fund its respective agencies and departments to facilitate FOI requests. ● A statutory time frame should be established for FOI requests. ● A quick and simple FOI hotline or point of contact should be established. <p><i>RA comments: Note: OAIC Enquiries line.</i></p>
14	Australian Conservation Foundation	Civil society	<p>Referenced publication of Access Denied report, which reviewed 109 applications and found at the Department level one third of decisions were significantly overdue, almost half of the overdue decisions were more than eight weeks out of time.</p> <p>Delays, Culture and Resourcing</p> <ul style="list-style-type: none"> ● Notes delays at departmental level and with IC Reviews – provides two case studies which reduces the transparency of the EPBC assessment and approval process. ● Recommendations - <ul style="list-style-type: none"> ○ Resourcing of FOI must be at a level that will ensure statutory timeframes are met. ○ All agency heads should make AGS training compulsory in order to receive delegate status to process FOI requests. ○ All staff with delegate status to process FOI requests should receive regular training targeted at in the matters of public interest that are relevant to FOI requests. ○ Decision-makers should lose delegation either permanently or temporarily (pending training) if they are responsible for repeated adverse findings or unexplained delays. <p><i>RA comment: Note: Department of Defence provides accreditation for decision makers - training run by AGS.</i></p> <p>Creation of a statutory timeframe for IC reviews</p> <ul style="list-style-type: none"> ● The FOI Act should be amended to include statutory timeframes to determine IC reviews.

No	Stakeholder	Stakeholder type	Key issues
			<ul style="list-style-type: none"> Consequences must be attached to the failure to meet the statutory deadline – deemed decision to disclose. <i>RA comment: As the submission notes, the key challenge will be ensuring deemed disclosure does not prejudice “person(s) or organisations concerned” (section 27 & 27A) from being consulted and having the opportunity to exercise review and appeal rights. Another issue to consider the impact of 'deemed' disclose decisions on documents which would affect national security, defence or international relations or are Cabinet documents - documents which at IC review would be subject to certain procedural requirements (for example, seeking IGIS evidence).</i> ACF submits that deemed disclosure could only occur where a person or organisation concerned has been given notice of the deemed decision and is given an opportunity to seek review.
15	Crikey	Media	<p>The importance of the FOI framework and current problems</p> <ul style="list-style-type: none"> Crikey has published a series on challenges with Australia’s FOI system titled <u>REDACTED</u>. Journalists describe lodging FOI requests only to have them rejected outright, delayed, accepted at a prohibitive cost, or returned to them so heavily redacted that the endeavour was rendered pointless. It is a culture of at worst, obfuscation and, at best, cumbersome and under-resourced bureaucracy. In September 2022, the Centre for Public Integrity said the number of FOI requests responded to late (past the statutory 30-day period) had doubled in the decade to 2022 to 22.5%. Addressing the delays in the review of FOI appeals, increasing the resources to respond to FOI requests, and potentially creating a statutory time frame for the completion of reviews are all worthy considerations for the inquiry.
16	Ms Megan Carter (Information Consultants Pty Ltd)	Consultant	<p>Resourcing</p> <ul style="list-style-type: none"> Under-resourcing Information Commissioner Offices is infamous as a method for governments to delay the release of information which may be unflattering to the Government. On the question of resources, the functions of training and advice to public service agencies should not be forgotten. Improving the skills and knowledge of agency staff will improve the quality of decisions, thereby reducing the number of appeals. <p>Creation of a statutory timeframe for IC reviews</p>

No	Stakeholder	Stakeholder type	Key issues
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- Placing a statutory deadline on Information Commissioners to complete reviews has a benefit in reducing delays, but in the absence of adequate resources, a statutory deadline becomes merely a stick to beat the OAIC with.
- For appeals by applicants for information which has been refused on procedural grounds (such as section 24AA – unreasonable diversion of resources) or relating to charges, these should be able to be resolved within a period of 30 days, although if protracted negotiations with an applicant occur, this could extend to say 60 days.

RA comment: In Comm Brief Com brief - FOI IC review table -numbers, finalisation times, outcomes, we set out proposed ideal timeframes/ranges for cohorts of matters, including searches, charges, practical refusal and single issue exemptions/limited documents.

Categories	Ideal time range
Single issue: Adequacy of searches	2 – 3 months
Single issue: Practical refusal	3 – 6 months
Single issue: Charges	2 – 6 months
Single issue: Exemptions (Single issue/Limited documents)	3 - 6 months
Multiple issues: Exemptions (s 33/34) <i>* May depend on IGIS response time</i>	6 - 9 months
Multiple issues: Exemptions (Multiple issues/Multiple documents/Third party consultation)	6 - 12 months

- For appeals by applicants for information which has been exempted, or for deemed refusals, the time to resolve is affected by the volume of material. For smaller matters (say, under 250 pages) 30 days should be sufficient; 60 days for under 1,000 pages; and 90 days for larger matters.

RA comments: The timeframe for resolving IC reviews depends on various factors, including:

- *whether an extension of time is required for the applicant to lodge an application (s 54T)*
- *the nature of the access refusal reason, including whether it was originally a deemed access refusal and/or it involves consideration of exemption claims*
- *the nature of the exemption claims (non-conditional/conditional exemptions) and whether any third party consultation is required*
- *the number of exemptions/issues under consideration*

No	Stakeholder	Stakeholder type	Key issues
			<ul style="list-style-type: none"> the number of documents at issue and the manner in which exemptions are applied (if any) the classification of the documents at issue and whether the OAIC possesses a copy of the documents or must inspect the documents whether the application is finalised by agreement (s 55F), withdrawal (s 54R), discontinued/declined (s 54W), or a Commissioner decision (s 55K) whether it requires specific procedural steps to be undertaken during the IC review process prior to proceeding to a decision (seeking evidence from the Inspector-General of Intelligence and Security (ss 55ZA–55ZD)) the resourcing available to undertake the IC review function. <p>See Com Brief - IC reviews.</p> <p>Involvement of the AAT</p> <ul style="list-style-type: none"> The introduction of the OAIC model as part of the 2010 reforms was to bring back the concept of quick, accessible, affordable justice as the AAT no longer provided that. Any changes which are proposed should be towards achieving those aims. <p>Fees for appeals</p> <ul style="list-style-type: none"> Does not support charging a fee for appeals to the OAIC, as experience with the AAT has shown that it can become a matter of justice only for the wealthy. <p>OAIC approvals of extensions of time</p> <ul style="list-style-type: none"> The role of the OAIC to be notified of and approve extensions of time under s.15AA and s.15AB appears to waste considerable resources. <i>RA comment: Hawke Review: Recommendation 7 – Extensions of Time. The Review recommends the FOI Act be amended to:</i> <ul style="list-style-type: none"> remove the requirement to notify the OAIC of extensions of time by agreement; and restrict the OAIC’s role in approving extensions of time to situations where an FOI applicant has sought an Information Commissioner review or made a complaint about delay in processing a request. In other jurisdictions, similar extensions are available without approval / notification of their OICs. <p>Remit to Govt departments</p>

No	Stakeholder	Stakeholder type	Key issues
			<ul style="list-style-type: none"> The OAIC should be given power to remit matters to agencies, similar to that available to the AAT. <i>RA comment: Hawke Review: Recommendation 4 – Power to Remit Matters to Decision-maker for Further Consideration. The Review recommends the FOI Act be amended to provide an express power for the Information Commissioner to remit a matter for further consideration by the original decision-maker.</i> In matters such as deemed refusals, it is a better use of resources to require the agency to undertake work such as searches, consultation and redacting, with some direction/guidance from the Office.
17	Dr Amanda-Jane George and Dr Julie-Anne Tarr	Academics	<p>Resourcing</p> <ul style="list-style-type: none"> Funds in the May 2023-24 Budget ‘are tagged for privacy activities’ – including for the substantial workload of NDBs. Absent a formal trigger point being established in the Act which in turn attracts penalties for non-compliance (i.e. statutory time frame), continuation of the ‘unreasonable delay’ standard (as discussed in <i>Patrick FCA</i> decision) will ensure the Office remains subject to productivity constraints through ‘starving’ of FOI resources. <p>Recommendations</p> <ul style="list-style-type: none"> Consider what resources will be necessary across the next decade, and Establish at a minimum a statutory time frame for completion of reviews to ensure financial resourcing needs are provided to support FOI requirements and that accountability in real terms is established for non-compliance.
18	Mr Robert Herron	Individual	<p>NDIS and FOI</p> <ul style="list-style-type: none"> Recommends priority access to FOI for NDIS participants and more intensive interrogation of reasoning for refusal of documents. The use of FOI legislation as the sole point by which NDIS participants can access information recorded about them poses a safety risk.
19	Mr Paul Hayes	Individual	<p>Personal experience with IC Review</p> <p><i>RA comment: The applicant sought an update 8 August 2023; update provided on 15 August 2023. Application received 19 April 2021; matter does not involve issues that fall within the focus cohorts.</i></p>

No	Stakeholder	Stakeholder type	Key issues
			<ul style="list-style-type: none"> • Submitter outlined experience with an IC review, where there has been no outcome over two years. <p>Recommendations</p> <ul style="list-style-type: none"> • The FOI Act should prescribe clear time frames for the OAIC to perform its statutory review functions. • The OAIC should be appropriately staffed and resourced so that it can readily meet such time frames. • If the OAIC does not meet its statutory time frames without good reason, then there should be a statutory deeming of a decision in favour of release of the documents to the FOI Applicant. • The OAIC should be staffed with competent, proactive and diligent officers. • The OAIC should be obliged to communicate with each review applicant proactively and in any event at least once a month on the progress of the review application (even if nothing has happened). • The OAIC should answer phone calls on Fridays, a practice they do not currently undertake. <i>RA comment: The availability of the enquiries line has also been raised by agencies, noting that for extension of time applications and matters awaiting allocation, there are no designated review advisers.</i>
20	Law Council of Australia	Civil society	<p>Recommendations</p> <ul style="list-style-type: none"> • The OAIC must be properly resourced to finalise IC reviews in a timely way, and to assist agencies to build a culture of disclosure. • The Government and its agencies must be properly supported to carry out their obligations lawfully under the FOI Act, and to implement the administrative access scheme more extensively. • Consideration should be given to removing, or otherwise amending, paragraph 11C(3)(c) of the FOI Act in relation to publication of released information so that agencies do not have the option of providing an email address in place of ensuring documents are available to download and view online or alternatively, amending it so to narrow the circumstances in which it is permissible for an agency to publish ‘details of how the information may be obtained’, to limit the scope for agencies to rely upon this paragraph for all documents listed in their FOI Disclosure Logs. <i>RA comment: This recommendation may address the ongoing issues raised by agencies (limitations on being able to make documents available for download). Part 14 of the FOI Guidelines (Disclosure Log) was reissued in March 2022 to emphasise that documents should be available for download:</i>

No	Stakeholder	Stakeholder type	Key issues
			<p><i>See 14.7 The Information Commissioner is of the view that consistent with better practice, agencies and ministers should seek to make all documents released in response to FOI requests available for download from the disclosure log or another website (s 11C(3)(a) or (b)) subject to applicable exceptions, unless it is not possible to upload documents due to a technical impediment, such as file size, the requirement for specialist software to view the information, or for any other reason of this nature. This approach is consistent with the objects of the FOI Act.</i></p> <ul style="list-style-type: none"> • Consideration should be given to relocating the IC’s review function, potentially to the new body replacing the Administrative Appeals Tribunal (AAT). <p>Resignation of FOI Commissioner</p> <ul style="list-style-type: none"> • The Law Council is concerned that Mr Hardiman’s resignation, after less than one year in the role, is a symptom of an FOI regime that is unable to properly give effect to its legislative objectives. • The FOI scheme’s functionality has been undermined by systemic issues, in which the under-resourcing of the OAIC and delays at the agency level are heavily contributing factors. <p>Departmental delays and quality of first instance decision making</p> <ul style="list-style-type: none"> • Current wait times can exceed one year, and released material is often highly redacted. • It is common to receive a response from an agency to an FOI request outside the statutory 30-day period. This is a breach of the Act. • The Law Council has received reports that section 15AA of the FOI Act is also routinely breached by agencies, such as the Department of Home Affairs, by failing to notify an applicant of a request to extend the period of time to respond to an FOI request by 30 days. <i>RA comment: We do not appear to collect FOI statistical data that would give us insight into this issue.</i> • Concerns about the quality of decisions in first instance – OAIC 2021-22 Annual Report showed that IC set aside 35% of initial decisions. <i>RA comment: 2022-2023: IC review decisions</i> <i>Eleven of these decisions affirmed the decision under review (16%), 48 set aside the reviewable decision (71%) and 13 decisions were varied (13%). All 11 decisions that affirmed the decision under review were access refusals. Three of the decisions affirmed (27%) were revised by the agency or minister under s 55G of the FOI Act during the IC review to give greater access to the documents sought. This was also the case with 21 of the 48 decisions set aside (44%) and 2 of the 9 decisions that were varied (22%).</i>

No	Stakeholder	Stakeholder type	Key issues
			<ul style="list-style-type: none"> • The Australian National Audit Office (ANAO) reported that the number of FOI Act exemptions being claimed across all entities across the Cth had increased by almost 70% between 2012 and 2017. <i>RA comment: 2022-23: Overall, there was very little change in the application of exemptions in 2022–23, when compared with previous years.</i> • Recommendations – <ul style="list-style-type: none"> ○ Consideration might be given to better supporting first-instance decision makers within each agency, including by locating them within, or adjacent to—and reporting to—the in-house legal function. <i>RA comment: We understand that many FOI areas are located within the Legal Services Branch.</i> ○ To assist in fostering a ‘pro-disclosure culture’ among agencies, the Law Council recommends that consideration be given to removing paragraph 11C(3)(c) of the FOI Act, so that agencies do not have the option of providing an email address in place of ensuring documents are available to download and view online. <i>RA comment: This recommendation may address the ongoing issues raised by agencies (limitations on being able to make documents available for download). Part 14 of the FOI Guidelines (Disclosure Log) was reissued in March 2022 to emphasise that documents should be available for download: See 14.7 The Information Commissioner is of the view that consistent with better practice, agencies and ministers should seek to make all documents released in response to FOI requests available for download from the disclosure log or another website (s 11C(3)(a) or (b)) subject to applicable exceptions, unless it is not possible to upload documents due to a technical impediment, such as file size, the requirement for specialist software to view the information, or for any other reason of this nature. This approach is consistent with the objects of the FOI Act.</i> <p>IC Review delays</p> <ul style="list-style-type: none"> • The OAIC’s 2021–22 Annual Report reports that 83 per cent of applications for IC review had been finalised within 12 months, and that the average time taken to finalise an IC review was 6.3 months. <i>RA comment: Methodology: 80% of IC reviews finalised are finalised within 12 months. See Comm Brief - IC reviews.</i>

No	Stakeholder	Stakeholder type	Key issues
			<ul style="list-style-type: none"> • However, the Law Council is aware that these figures do not tell the full story, and is concerned that these figures give the impression that contested IC reviews are determined within a similar timeframe. • The average timeframe, as reported by the OAIC in its Annual Report, includes reviews that have been withdrawn. In this respect, IC reviews that require an ultimate determination and reasons are reportedly taking much longer—as long as five years. • The OAIC continues to experience a significant legacy workload of IC reviews which have accrued due to under-resourcing and increased demand for review. • The Law Council holds significant concerns over a four-and-half-year delay in the finalisation of an IC review process in relation to just one document. Such delays are unacceptable. They make a mockery of the transparency objectives in subsections 3(2) and (4) of the FOI Act. • The root cause appears to lie in the lack of time and assistance to dispose of IC reviews – more resources are clearly required if the Commissioners—especially the FOI Commissioner—are to perform their review function in a proper and timely manner. • As Ms Falk stated in Senate Estimates on 23 May 2023, ‘I share the view that additional resources are needed for FOI. I have sought to enable that to the extent that I can within my control.’ She further explained that, in the context of the 2023–24 Federal Budget, she put to the Attorney-General’s Department the need for additional resources and funding for the FOI functions of the OAIC, in addition to its privacy functions. While the 2023–24 Budget contained dedicated funding for the OAIC to progress investigations and enforcement action in response to privacy and data breaches and enhance data and analytics capability, there does not appear to be similar funding to support its FOI responsibilities.
			<p>Creation of a statutory timeframe for IC reviews</p>
			<ul style="list-style-type: none"> • Queries how this would work in practice – deemed decisions at the end of the time frame would impact third parties whose information is contained in the documents that are the subject of IC review. • To be effective, a statutory timeframe for completion of reviews must be supported by commensurate and appropriate funding for the OAIC.
			<p>Location of IC review function</p>

No	Stakeholder	Stakeholder type	Key issues
21	Attorney-General's Department	Government	<ul style="list-style-type: none"> • The Law Council considers that relocating the IC review function to the new administrative review body (i.e. AAT replacement) ought to provide the OAIC additional capacity to focus on its systemic functions, which should continue to include the right to make submissions on any FOI or privacy matter on foot in the new body, and to receive the submissions of all parties. <p>Culture</p> <ul style="list-style-type: none"> • The FOI Act framework is pro-disclosure. • The OAIC has undertaken work to develop a shared culture that encourages compliance with the FOI Act and proactive disclosure of information, including updates to Parts 3, 4, 10, 11 and 12 of the FOI Guidelines and consultation on a revised draft guideline relating to the Information Publication Scheme. • Initiatives to address culture could be supplemented through education about access to personal information under the Privacy Act (with consideration of statutory time frames for this regime). <p>Resourcing</p> <ul style="list-style-type: none"> • The department continues to work with the Information Commissioner and other agencies to understand resourcing requirements.. • The strategic review will assist to determine resourcing needs for privacy and FOI functions. <p>Developments in technology</p> <ul style="list-style-type: none"> • When the FOI Act was developed, the rate and volume of electronic records generated (in myriad forms) by public sector agencies and the impact of the internet on the ability to instantly share information with the public 'at large' would have been almost unimaginable. <p>Effective operation of FOI laws</p> <ul style="list-style-type: none"> • Public concern about the FOI system has centred on delays in responding to FOI requests, the backlog of Information Commissioner review decisions, and claims of underfunding. • There has been an increase in the number of IC reviews made since 2019-20. Increased complexity of matters and pandemic-related challenges may have exacerbated delays.

No	Stakeholder	Stakeholder type	Key issues
			<ul style="list-style-type: none"> • There have been a number of reviews of the FOI Act since 2010, which the Department continues to have regard to. • Any consideration of legislative challenges should occur alongside consideration of culture and resourcing matters.
22	Administrative Appeals Tribunal	Government	<p>Details the procedures for AAT reviews of IC review decisions, approach to case management, hearings and alternative dispute resolution and statistics on FOI Division performance.</p> <p>Suggests areas for potential clarification and harmonisation including the review of decisions made by the AAT as an agency under the Act and the disclosure of Cabinet deliberations.</p> <p><i>RA comments: This may be in response to:</i></p> <ul style="list-style-type: none"> • <i>IC reviews involving the AAT as the respondent and having a matter finalised under s 54W(b); we understand the previous structure of the AAT was to have FOI decisions made by Tribunal staff, which are separate to the membership from the tribunal members.</i> • <i>s 34(3) of the FOI Act, namely where the existence of any deliberation has been disclosed: see Secretary, Department of Prime Minister and Cabinet and Secretary, Department of Infrastructure and Regional Development and Sanderson (Party Joined) [2015] AATA 361 at [77. (Sanderson) and Services Australia and Warren [2022] AATA 4191.</i> <p><i>Note that Warren is currently under appeal, with the hearing held Friday 18 August 2023 (adjourned; part heard; confidentiality orders made).</i></p>
23	The Australia Institute	Research centre	<p>Delays</p> <ul style="list-style-type: none"> • The Australia Institute released a report in early 2023 on Australia’s FOI system that found considerable delays in initial decisions and reviews of FOI complaints and that the FOI review process is under-resourced. • Outlines delays at Departmental level (particularly Department of Home Affairs) <p>Flawed Departmental Decision-Making</p> <ul style="list-style-type: none"> • Suggests that in roughly half of all cases for which a review is requested, the original decision is either altered or set aside entirely.

No	Stakeholder	Stakeholder type	Key issues
			<p>The OAIC</p> <ul style="list-style-type: none"> Submits that the OAIC is ‘working poorly and slowly’, in part, because it was inadequately resourced from after it was established. Notes that the FOI branch is suffering high turnover and that ‘[g.iven the large caseload and lack of resources, such high turnover is not surprising.’ <p>South Australia FOI Reviews</p> <ul style="list-style-type: none"> Suggests the South Australian FOI review process as a model that could be adopted federally, and claims the South Australian FOI review process works much faster than the Commonwealth process. In South Australia, reviews are generally carried out by the Ombudsman SA. Outlines the process for external reviews of FOI decisions in South Australia. Provides statistics on average length of time to complete an FOI review by OAIC and Ombudsman SA. <p><i>RA comments: See Com brief – Information Laws Across States and Territories</i></p> <p><i>In seeking to benchmark the OAIC’s performance results with other regulators, consideration should be given to the various legislative frameworks that other jurisdictions operate within, some of which do not feature a push model (a model which mandates the publication of categories of documents), nor include a mandatory consideration of a public interest test in deciding whether to refuse or grant access (see for example, Freedom of Information Act 1991 (SA) and Freedom of Information Act 1982 (Vic)) nor have the full merits review power that the OAIC has (see for example Government Information (Public Access) Act 2009 (NSW).</i></p> <p><i>SA also does not offer an option between internal review and SA Ombudsman review, but appears to offer an option between SA Ombudsman review and SACAT review: see Freedom of information Ombudsman SA.</i></p> <p>Lessons for the federal system</p> <ul style="list-style-type: none"> The option for an applicant to go straight to administrative review (SACAT for South Australia, the AAT federally) rather than going through the OAIC/Ombudsman SA first. The use of an ombudsman, rather than a commissioner. The Ombudsman SA would already be used to providing quick reviews of government decisions in other areas.

No	Stakeholder	Stakeholder type	Key issues
			<ul style="list-style-type: none"> The Ombudsman SA proactively asks the agency to provide a report explaining their FOI decision. The issuing of a provisional determination, which presumably formalises but also limits the scope of the consultation process and makes it clearer to the parties where they stand ahead of the final determination. <p><i>RA comment: See also SA model which appears to allow for alternative between SA Ombudsman and SACAT : see Com brief – Information Laws Across States and Territories.</i></p> <p>Recommendations</p> <ul style="list-style-type: none"> Improve FOI culture amongst ministers/senior public servants Better resourcing for FOI reviews Proactive disclosure of Govt documents (e.g. ministerial diaries, documents prepared for Cabinet) <i>RA comment: See ACT FOI Act 2016 which mandates the publication of a minister's diary: see Com brief – Information Laws Across States and Territories.</i> Make a quick turnaround a focus of the FOI external review process (modelled on South Australia) A head start on public disclosure for applicants No exemptions due to departing Minister <i>RA comment: See Com brief - FOI Change of government and official ministerial documents of a Minister.</i> Quota for how many pages of documents targeted by FOI requests can be subject to exceptions before an external review of the decision is triggered <i>RA comment: This may prove challenging in practice, noting practical refusal mechanism.</i> Revisit Hawke review recommendations
24	Shooting Industry Foundation Australia	Civil society	Discusses refused and delayed FOI requests by Govt agencies. Suggests that there should be more proactive publication of material by agencies.
25	Mr Peter Timmins	Individual	<p>Resignation of FOI Commissioner</p> <ul style="list-style-type: none"> The reasons given by Mr Hardiman for his resignation raise the inadequacy of resources available during his time in office and his responsibility for the FOI functions of the office.

No	Stakeholder	Stakeholder type	Key issues
			<ul style="list-style-type: none"> • There may be other factors that throw light on the culture and operations of the Commission. Documents released in response to a Freedom of information application about Mr Hardiman’s time in office, as reported in The Guardian, raise other issues. • Mr Hardiman said changes were needed in relation to processing FOI appeals but he wasn't able to bring about the changes needed. It remains to be seen whether those changes are matters of administration or issues concerning the exercise of functions, and amendments to the Act that would address those issues. • As The Guardian reported and the Commissioner stated in her appearance before Senate Estimates on 23 May, Mr Hardiman had no discussions with her in relation to his resignation - at the very least an unusual way for a senior officer to announce a decision to resign. <p>IC Review delays</p> <ul style="list-style-type: none"> • The delay in completing reviews is incongruous with the objects of the FOI Act <p>Resourcing for FOI applications and reviews</p> <ul style="list-style-type: none"> • There is little information available on Govt agency allocation and adequacy of the resources to deal with FOI matters. Presumably resource issues contribute to delay in meeting the statutory deadline in some and possibly many cases. • As to OAIC resources, the public record indicates there has been no recovery from the reduction in resources allocated in the aftermath of the failed attempt in 2014 to abolish the Office. • The IC has indicated in Estimates hearings for some years that resources for FOI functions must be boosted significantly if satisfactory performance in dealing with the backlog and the increase in yearly review applications is to be achieved. • An increase in resources from totally inadequate to a level fit for current and future purposes may solve the delay problem. • Changes to systems and processes may help as well. Exactly what happened within the OAIC in dealing with the review applications in the Patrick case [93.-[199. is an eye opener to this outsider, they are hardly exemplars of efficiency. <p>Creation of a statutory timeframe for IC reviews: <i>RA comment: See Com brief - Information laws across states and territories.</i></p>

No	Stakeholder	Stakeholder type	Key issues
			<ul style="list-style-type: none"> NSW, Victoria and WA impose obligations to deal with a review application with varying exemptions, qualifications, and remedies. <p>Hawke Statutory Review</p> <ul style="list-style-type: none"> Notes the recommendations of the Hawke review and that no recommendations have been acted upon.
26	C Pope & Associates	Individual	Discusses personal challenges in navigating the FOI system, particularly for FOI requests to the ATO.
27	Australian Broadcasting Corporation	Media	<p>ABC's role as a responding agency</p> <ul style="list-style-type: none"> The number of FOI requests received by the ABC as an agency is variable and unpredictable. This changeable workload experienced by the agencies would no doubt have a flow on effect to the OAIC. <p>IC Review delays</p> <ul style="list-style-type: none"> In the ABC's experience as a responding agency there are delays in the review processes of the OAIC. As a responding agency, the ABC notes there are 3 key points in the review process where the ABC experiences delays: <ul style="list-style-type: none"> 1) initial notification from the OAIC to the ABC that the applicant has requested a review of the ABC's decision (Notification Delays); 2) time taken for parties to make submissions in response to a review, including the time taken by the OAIC to consider and circulate such submissions (Submission Delays); <i>RA comments: This may be in response to the current practice to seek submissions along with the processing documentation as part of the s 54Z notice. This issue may be remedied through the proposed amendment to the procedure direction where in notifying the respondent of the IC review under s 54Z, the OAIC will only seek the processing documentation and evidence of engagement with the applicant, and submissions will be sought following allocation to a review adviser. and</i> 3) time taken by the IC to issue a review decision after submissions have closed (Decision Delays).

No	Stakeholder	Stakeholder type	Key issues
			<p><i>RA comments: This may be in response to the current practice to seek submissions along with the processing documentation as part of the s 54Z notice.</i></p> <p><i>This issue may be remedied through the proposed amendment to the procedure direction where in notifying the respondent of the IC review under s 54Z, the OAIC will only seek the processing documentation and evidence of engagement with the applicant, and submissions will be sought following allocation to a review adviser.</i></p> <ul style="list-style-type: none"> ○ ● These delays cause lack of efficiency at the ABC: <ul style="list-style-type: none"> ○ the delay means a thorough file review is required to refresh memory and knowledge of the particulars of the matter (e.g. staff changes have since taken place). The longer the delay, the greater the work involved; and ○ review work requires further searches and re-assessment of exemptions. With the passing of time from original FOI decision date, the public interest assessment may alter due to a change in circumstances as the public interest test is being applied at the point in time at which the review occurs. <p>Creation of a statutory timeframe for IC reviews</p> <ul style="list-style-type: none"> ● The OAIC should be encouraged to provide more detailed reporting on the timelines for IC reviews, including specifics of the number of days taken for each step of the review process. ● The ABC would be supportive of a more structured approach to IC reviews. Noting the varying complexity of FOI matters, a one-size-fits-all timeline might not be appropriate. One approach would be for the OAIC to issue further guidelines under section 93A of the FOI Act providing a more defined timeline for the progress of each step matter, for example a specified time period for: <ul style="list-style-type: none"> ○ 1) OAIC to notify the agency of a request to review; ○ 2) the agency to respond to the request for review; ○ 3) the applicant to provide submissions; and ○ 4) final review decision, or to discontinue the review. <p><i>RA comments: The timeframe for resolving IC reviews depends on various factors, including:</i></p> <ul style="list-style-type: none"> ● <i>whether an extension of time is required for the applicant to lodge an application (s 54T)</i> ● <i>the nature of the access refusal reason, including whether it was originally a deemed access refusal and/or it involves consideration of exemption claims</i>

No	Stakeholder	Stakeholder type	Key issues
			<ul style="list-style-type: none"> • <i>the nature of the exemption claims (non-conditional/conditional exemptions) and whether any third party consultation is required</i> • <i>the number of exemptions/issues under consideration</i> • <i>the number of documents at issue and the manner in which exemptions are applied (if any)</i> • <i>the classification of the documents at issue and whether the OAIC possesses a copy of the documents or must inspect the documents</i> • <i>whether the application is finalised by agreement (s 55F), withdrawal (s 54R), discontinued/declined (s 54W), or a Commissioner decision (s 55K)</i> • <i>whether it requires specific procedural steps to be undertaken during the IC review process prior to proceeding to a decision (seeking evidence from the Inspector-General of Intelligence and Security (ss 55ZA–55ZD))</i> • <i>the resourcing available to undertake the IC review function.</i> <p><i>See Com Brief - IC reviews.</i></p> <ul style="list-style-type: none"> • Flexibility could be provided within the time periods to allow for complex or Large matters. Additional time could be added by mutual agreement of the parties, or on instruction of the OAIC and all parties should be notified if time periods are to be extended in a particular matter. <p>Additional suggestions for change</p> <ul style="list-style-type: none"> • Preliminary merits review by OAIC staff to enable the IC to decide not to undertake an IC review if the IC is satisfied that the IC review application is Lacking in substance as per s 54W. • Greater use of alternative dispute resolution and negotiated outcomes. • Where there is an alternate method to an FOI request to access the document such as via a court, access via FOI request should not be available. • Efficiencies for the IC if the IC takes an approach of reviewing a sample of documents where section 7(2) of the FOI Act is relied on, except for those which are so obvious on the face of them that the exemption applies that the review could be closed quickly.
28	Dr Douglas Quarry and Mr	Individuals	Details the refusal of FOI applications regarding electricity reticulation in the Daintree Coast as examples of the FOI process not functioning.

No	Stakeholder	Stakeholder type	Key issues
	Mike Berwick AM		
29	Name withheld	Public servant	<p>Pressure and punishment from Ministers</p> <ul style="list-style-type: none"> States they have seen examples of Ministers removing or threatening to remove responsibilities and projects from senior executives to punish them for releasing documents <p>There is a culture of evading FOI obligations</p> <ul style="list-style-type: none"> Delegated decision-makers should be required to undertake training and the OAIC should retain a function to issue public non-compliant notices and/or recommend to a Secretary that they remove delegation from a senior executive <p><i>RA comments: Alternatively, consider option of professional standards issued by OVIC: see Com brief – Information Laws Across States and Territories.</i></p> <p>Resourcing</p> <ul style="list-style-type: none"> Resourcing is required for timely decisions to enable scrutiny of poor decisions by senior executives
30	Name withheld	Public servant	<p>Changes are needed to processes and timeframes to prevent delays</p> <ul style="list-style-type: none"> An early assessment and triage process would decrease review time as the OAIC receives more information than is necessary due to generic requests. <p><i>RA comments: This may in response to the previous backlog awaiting assessment faced by the Intake team.</i></p> <ul style="list-style-type: none"> The increase in digital materials means that it takes longer to search for and process requests for personal information, resulting in more deemed refusals. This could be addressed through extending the processing time or triaging them to a monitoring process rather than full IC review. The increasing number of requests for information other than personal information has increased the proportion of complex requests, which take longer to consider. A standard statutory time frame for completion of reviews would not resolve delays without compromising quality, however, there should be a statutory period for triage and notification of IC review to decision-making agencies.

No	Stakeholder	Stakeholder type	Key issues
31	Australia's Right to Know	Media	<p>Delays in FOI requests and IC reviews</p> <ul style="list-style-type: none"> Some government agencies routinely ignore processing time limits and the correct applications of exemptions. Evidence shows the review and appeal process can take up to five years. There has been a growth in FOI requests denied in part or full, which leads to growth in FOI reviews (cites OAIC Annual Report statistics and case studies). There is often a misapplication of the public interest test and Cabinet exemption <p>Statutory timeframe for IC reviews and appeal avenues</p> <ul style="list-style-type: none"> ARTK provides the following recommendations: <ul style="list-style-type: none"> Within 21 calendar days of the FOI Commissioner receiving an application for review and notifying the relevant agency, the relevant agency will file a statement of facts and contentions with the FOI Commissioner. If after 28 calendar days the relevant agency has not filed a statement of facts and contentions with the FOI Commissioner, full access will be granted to the applicant. The FOI Commissioner will provide a review decision within 56 calendar days of review lodgement. Applicants can choose to request a review to either the FOI Commissioner or the Administrative Appeals Tribunal. Non-government review applicants can appeal a FOI Commissioner's decision to the Administrative Appeals Tribunal. A government agency's only appeal option (of FOI Commissioner's decision) is on a point of law to the Federal Court. The FOI Commissioner will be a party and defend their decision in any Federal Court appeal. If an appeal to the Federal Court is lost by a government agency, the agency will pay full legal costs to the FOI Commissioner and the original review applicant if legally represented as a party. <p>Results of IC reviews</p> <ul style="list-style-type: none"> Review decisions favour non-disclosure. <p><i>RA comment 2022-2023: IC review decisions</i></p>

No	Stakeholder	Stakeholder type	Key issues
			<p><i>Eleven of these decisions affirmed the decision under review (16%), 48 set aside the reviewable decision (71%) and 13 decisions were varied (13%). All 11 decisions that affirmed the decision under review were access refusals.</i></p> <p><i>Three of the decisions affirmed (27%) were revised by the agency or minister under s 55G of the FOI Act during the IC review to give greater access to the documents sought. This was also the case with 21 of the 48 decisions set aside (44%) and 2 of the 9 decisions that were varied (22%).</i></p> <ul style="list-style-type: none"> • It is difficult to see the OAIC as an FOI champion when in the majority of cases it is agreeing to deny access (55 percent of the time) with 35 percent of cases being returned to the original agency for yet another decision adding to further delay. • There is challenge to independence for a FOI Commissioner to make decisions against government secrecy while providing assistance, training and advice to government. <p>The FOI commissioner – Independence, budget and staffing</p> <ul style="list-style-type: none"> • The OAIC did not conduct any FOI CII in 2021-22 – this failure is a concern given the importance of CII. These investigations by the FOI Commissioner, if allowed by the Information Commissioner, have the authority to examine in depth problems with FOI and can act as a deterrent to government agencies opting for secrecy. • By comparison the OAIC website advises as at August 9, 2021, there had been five privacy-related CII opened since July 2021. • The growth in privacy-related matters has become the significant focus of the OAIC and means its FOI responsibilities are not prioritised. • The FOI Commissioner role needs to be independent and not subordinate to an Information Commissioner also managing an increasing demand from privacy-related issues. • The former FOI Commissioner Mr Hardiman can usefully advise the Senate Inquiry on whether the FOI Commissioner’s role is constrained by its inclusion within the OAIC and subordinate to an Information Commissioner coping with privacy related issues. • A recent FOI request by the media to the OAIC yielded some documents revealing problems with the relationship between the former Information Commissioner and with the former FOI Commissioner including concerns about being ignored and the deployment of staff to corporate functions. • In evidence to the Senate Estimates hearing on May 23, 2023, it was said there were 22.4 staff as well as a senior executive officer and the FOI Commissioner allocated to processing FOI reviews. This is

No	Stakeholder	Stakeholder type	Key issues
			<p>compared to 36.5 people in the OAIC's corporate area including finance, human resources, legal, communications, education, shared services and security.</p> <ul style="list-style-type: none"> Attachment A contains a FOI decision letter and heavily redacted documents, relevant to former FOI Commissioner Hardiman's resignation, that show the existence of information about "potential legislative amendments" and "a list of legislative amendments that may improve IC review procedures/processes". This information that exists at the OAIC is valuable given the nature of the Senate's inquiries and it is regrettable that the OAIC decided it was against the public interest to release. Recommendations – <ul style="list-style-type: none"> Separate the FOI Commissioner from the OAIC – The FOI Commissioner be established as an independent officer of Parliament focused on FOI reviews, inquiring into FOI complaints and undertaking investigations. The Office of the FOI Commissioner must be adequately resourced to enable it to undertake the full range of statutory roles and requirements of the FOI Act and measure and improve the performance of the Commonwealth FOI regime under new powers. <p>FOI Act exemptions</p> <ul style="list-style-type: none"> Recommendations – <ul style="list-style-type: none"> The FOI Act should be amended so there is a public interest test on all exemptions. The FOI Commissioner should investigate the use of the Section 24AA exemption by government agencies.
32	Confidential	Unknown	Submission not publicly available.
33	OAIC	Government	-
34	Name withheld	Individual	Details the refusal of an FOI application by the Department of Health and a 3 year IC review as examples of the FOI process not functioning.
35	Local Government Elected Members Association	Civil society	Supportive of the proactive disclosure of government-held information. Endorses recommendations of the Robodebt Royal Commission.

No	Stakeholder	Stakeholder type	Key issues
36	Mr Frank Pane	Individual	<p>Submission details the individual's personal experience with navigating FOI requests with Defence Housing Australia.</p> <ul style="list-style-type: none"> • Suggests that the 'CEO or equivalent' should be financially penalised for any contravention of the FOI Act by their department when it is clear that there is a deliberate attempt to avoid reputational damage or possible prosecution. • Submission in opposition to FOI request fees. <p>Suggests that Departments be required to maintain a publicly accessible register of that department's status in dealing with FOI requests, including number of requests satisfied, partly satisfied and not satisfied, as well as time frames and reasons for non-disclosure.</p>
37	Mr Bruce Francis	Individual	<p>Submission details the individual's personal experience with navigating FOI requests with Australian Sports Anti-Doping Authority (ASADA). Individual has a personal interest in ASADA's 2014 investigation of the Essendon Football Club.</p>
38	Professor Peter Tregear OAM	Academic	<p>Resignation of FOI Commissioner</p> <ul style="list-style-type: none"> • References Mr Hardiman's reasons for resignation as per LinkedIn post and considers that the FOI framework is in need of reform. <p>ANU Dispute</p> <ul style="list-style-type: none"> • Submitter has been in dispute with his former employer (Australian National University). • Provides two examples of his interaction with the FOI system and suggests that it was difficult to obtain relevant information and that the ANU 'provided incorrect responses' to FOI applications. • Considers that the system can all-too-easily be 'gamed' and that it is hard for an applicant under the Act to trust that an Agency will not attempt to use the fact that the system is largely self-regulated to dodge its responsibilities to release documents under the Act where that Agency has, or could be perceived to have, an interest in withholding that information. • Suggested that it felt like a one-sided game of FOI 'battleships' with FOI requests to the ANU and that when asked to provide specific text search terms to help locate a particular document, they were frequently either too broad or too narrow for their purposes. • Suggests that 'the ANU was fully aware of the existence and potential significance of the information I sought but was making it as difficult as humanly possible for me to access it.'

No	Stakeholder	Stakeholder type	Key issues
			<p data-bbox="651 248 1126 280">OAIC funding and suggested reforms</p> <ul data-bbox="651 300 1924 520" style="list-style-type: none"> <li data-bbox="651 300 1827 368">• Suggests there is an apparent lack of capacity within the OAIC to enforce and that there is no obvious external incentive for agencies to ensure that they meet their statutory obligations. <li data-bbox="651 373 1924 480">• The OAIC should maintain a register of adverse findings against authorised officers and the Agencies for whom they work that are found to have failed to comply with their legal obligations under the Act. <li data-bbox="651 485 1565 520">• The OAIC should aim to minimise the time taken to review FOI appeals. <p data-bbox="651 541 1906 647">These suggestions require that the OAIC is adequately funded to investigate complaints in a timely and robust manner, and has a clear and firm legislative mandate from Parliament to hold recalcitrant authorised officers to account.</p>
39	Dr Joyce Noronha-Barrett	Academic	<p data-bbox="651 668 826 700">OAIC funding</p> <ul data-bbox="651 721 1928 900" style="list-style-type: none"> <li data-bbox="651 721 1928 900">• Submitter states they have respect for the work of the OAIC but based on personal experience, she believes the OAIC is understaffed and its officers limited in the actions they can take to hold agencies accountable for unacceptable delays in supplying information under the FOI Act and/or for using delay tactics by citing questionable sections of the FOI Act to deny the relevant documentation to clients. <p data-bbox="651 920 972 952">Impacts of FOI problems</p> <ul data-bbox="651 973 1917 1042" style="list-style-type: none"> <li data-bbox="651 973 1917 1042">• Delays in the review of FOI appeals can cause emotional toll (including trauma) as well as direct and indirect impact to the Government’s fiscal responsibility of protecting taxpayer dollars. <p data-bbox="651 1062 819 1094">ANU Dispute</p> <ul data-bbox="651 1115 1895 1414" style="list-style-type: none"> <li data-bbox="651 1115 1834 1262">• Submission provides an example of the individual’s personal experience with navigating FOI requests with the ANU/OAIC and that if the appeal had been handled expediently it may have provided better outcomes. FOI request was in relation to documents regarding submitter’s treatment and dismissal. <li data-bbox="651 1267 1895 1414">• Suggests that organizations are aware of the inadequate staffing issues at the OAIC and some choose to avoid supplying documents (and thereby avoid scrutiny) by simply using sections of the FOI Act in a haphazard manner. Suggests that the ANU mischaracterised the document in order to apply exemptions.

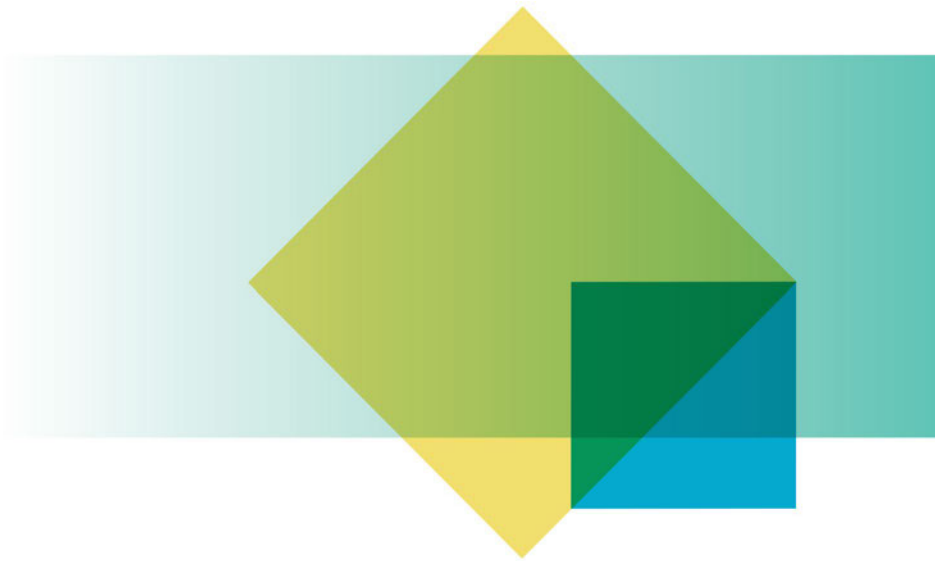
No	Stakeholder	Stakeholder type	Key issues
41	Dr Chris Lewis	Academic	<p>ANU Dispute</p> <ul style="list-style-type: none"> • Submission provides an example of the individual’s personal experience with navigating the FOI framework through the ANU, OAIC and Commonwealth Ombudsman. • Claims that the OAIC ignored his FOI concerns and the law from 2017 to 2022, always favouring the ANU. • Notes a 2 year period for an IC review to be concluded. • Disagrees with the findings in Chris Lewis and Australian National University (Freedom of information) [2018. AICmr 63 (3 September 2018)].



Australian Government

Office of the Australian Information Commissioner

FOI Hansard 2010-May 2023



Angelene Falk

Australian Information Commissioner and Privacy Commissioner

16 August 2023

OAIC

Contents

23 May 2023 TBA	3
13 February 2023	14
7 November 2022	16
5 April 2022	21
15 February 2022	22
26 October 2021	25
27 May 2021	35
23 March 2021	43
22 October 2020	45
3 March 2020	51
22 October 2019	55
9 April 2019	64
19 February 2019	66
16 November 2018	71
24 May 2018	79
27 February 2018	81
24 October 2017	81
18 August 2017	86
25 May 2017	86
18 October 2016	86
5 May 2016	87
9 February 2016	87
20 October 2015	92
28 May 2015	98
24 February 2015	104
20 November 2014	105
29 May 2014	105
24 February 2014	107
18 November 2013	109
29 May 2013	112
12 February 2013	114
16 October 2012	114
23 May 2012	117
14 February 2012	123
17 October 2011	124

24 May 2011	126
21 February 2011	126
19 October 2010	131
26 May 2010	131

23 May 2023

D2023/013116

Senator SHOEBRIDGE: Thanks for staying the course, Commissioner; I note it's 10 o'clock. It's lovely to see you. Can I ask you about an appeal to the Federal Court of a matter involving Rex Patrick and the Attorney-General? The reference I have here is [2023] AICmr 9 28 February 2023. It was a section 56 appeal under the FOI Act. Are you aware of the matter?

Ms Falk: Yes, I'm aware of the matter.

Senator SHOEBRIDGE: I understand you engaged Norton Rose Fulbright in relation to joining the proceedings?

Ms Falk: Yes, that's correct.

Senator SHOEBRIDGE: This was an appeal on a question of law from one of your decisions. What was the possible rationale of you being joined to it? There was an existing respondent to it—quite properly, the Attorney-General. What was the possible rationale for you joining the proceedings?

Ms Falk: I have not joined those proceedings.

Senator SHOEBRIDGE: But you sought to. You indicated you were intending to, and you engaged Norton Rose Fulbright for that purpose. Why did you do that?

Ms Falk: I did engage legal representation for the purposes of providing advice in relation to the matter, but I have not sought to join those proceedings.

Senator SHOEBRIDGE: What was the purpose of the advice?

Ms Falk: The purpose of the advice was to traverse issues around who the proper respondent might be and whether there were grounds for me to seek to join the proceedings.

Senator SHOEBRIDGE: I'm sorry, I thought you sought advice about joining the proceedings. I asked you questions, but you said you didn't, but now you say you did. So you did seek advice about joining the proceedings.

Ms Falk: One of the issues that arose in the advice was around the proper respondent. So it's a novel use of the provision. I'm not aware of that provision having been evoked in the history of the office and, accordingly, I sought advice.

Senator SHOEBRIDGE: What possible basis would you have had to join the Attorney-General in those proceedings? It was effectively an appeal from your decision. It's like a trial judge wanting to be heard on the appeal. It's totally irregular. What were you seeking to do?

Ms Falk: It wasn't irregular. I was seeking to be fully informed of the matter.

Senator SHOEBRIDGE: How much did it cost?

Ms Falk: I'd have to take that on notice.

Senator SHOEBRIDGE: You must have some idea. You must've come here knowing that you'd be asked questions about this. You're meant to prepare. You must've come knowing you'd be asked

questions about this. One of the obvious questions is how much it would cost. The guidelines that the Chair reads out at the beginning make it clear you're meant to come here prepared. Are you telling me you haven't come here prepared to answer that question?

Ms Falk: I don't have that information before me this evening, but I'll take it on notice and provide it to you.

Senator SHOEBRIDGE: The core issue in this case is that documents were sought of the former attorney-general about a letter that was sent involving the sports rorts scandal, and that while the matter was waiting nine months or so to be reviewed by your office the minister has changed, and now the legal argument is that the new minister technically doesn't have access to the document. It's a fresh minister and therefore the document can't be reviewed. That was one of the core issues in your decisions, wasn't it—the absence of that document in the new minister's hands?

Ms Falk: Yes. My decision was that the FOI act didn't apply because there was no document with the minister.

Senator SHOEBRIDGE: Even though the Prime Minister had unambiguously had it, by the time you got around to making a decision—and this is the effluxion time from June 2020 to March 2021—a new minister had come on board and therefore that legal defence was raised in relation to the matter. You formed the view that the new minister technically wasn't in possession of the document. That came about because of the effluxion of time, didn't it?

Ms Falk: There are a number of facts and circumstances in that matter, and they are all set out in my decision, including an annexure to the decision which sets out the steps that were taken by my office in relation to that particular document.

Senator SHOEBRIDGE: It comes back to this continual issue with your office—the inordinate delay in decision-making. In this case, the delay in decision-making in your office created this whole mess. If you'd made a decision promptly—within a month or two months of having the review brought—none of this would have happened, would it?

Ms Falk: The effluxion of time is an issue in the processing of IC reviews, and it's a matter that we have traversed at previous estimates hearings.

Senator SHOEBRIDGE: Do you accept that the delay in your office caused this problem? If you'd made a decision in a timely fashion—within a week or two months—none of this would have arisen. The costs would have been saved and none of this would have arisen.

Ms Falk: The premise of your question around making decisions within a number of weeks or a couple of months is one that's not realistic in any FOI processing regime. I accept that the effluxion of time has been operable in this case.

Senator SHOEBRIDGE: Did you ask for the new minister to provide you with a copy of the document?

Ms Falk: The steps that were taken by the office are set out in my decision, and there were a number of steps taken by the office.

Senator SHOEBRIDGE: My question was quite simple and bounded; could you answer it?

Ms Falk: Could you repeat it, please?

Senator SHOEBRIDGE: Did you ask the new minister to provide you with a copy of the document?

Ms Falk: May I ask you which minister you're referring to when you say 'the new minister'? There were a number of changes of ministers during that period.

Senator SHOEBRIDGE: Did you ask Senator Cash to provide you with a copy of the document when she was a minister?

Ms Falk: Yes.

Senator SHOEBRIDGE: Did you ask each of the ministers to provide you with a copy of the document?

Ms Falk: Yes.

Senator SHOEBRIDGE: Did they give you an explanation for why they wouldn't?

Ms Falk: That the document was not in their possession.

Senator SHOEBRIDGE: But now we know the document has been discovered.

Ms Falk: As I understand it.

Senator SHOEBRIDGE: Where was it?

Ms Falk: That's not a matter for me to answer.

Senator SHOEBRIDGE: Would it be fair to describe this whole sorry tale as a grand stuff-up from the FOI system from beginning to end? An application is made for one obvious document, it's refused by the minister's office, it comes to review for you and, because of the delay, there's a change in minister, and there's this argument that the fresh minister doesn't have the document. Then you seek to intervene, then you make a decision, you seek to intervene, you spend pointless costs on the intervention, we're months and months down the track and only in the Federal Court now does the document appear. It's almost like a test case of everything that's wrong with the FOI system, from resourcing to structured decision-making, isn't it?

Ms Falk: I agree that, of course, delays in the system are affecting applicants' ability to get timely access to information. I think there are a number of other factors at play in the particular matter that you raise, and one of them is the way in which documents are provided to national archives, for example, when there is a change of government. I have written to the head of the National Archives of Australia, bringing this decision to his attention.

Senator SHOEBRIDGE: To move to another matter, Mr Ronald Mizen of the *AFR* sought a hundred days worth of the current Prime Minister's diary, and the PM refused access to it on the basis that it was an unreasonable diversion of resources. Do you remember that?

Ms Falk: Yes.

Senator SHOEBRIDGE: Then a review was sought through your office, and, for reasons that are mysterious to me, you referred the matter to the AAT rather than undertake the review. Why did you do that?

Ms Falk: My recollection in that matter—but I will confirm this for you—is that one of the reasons it was referred under section 54W(b) of the Freedom of Information Act was that the applicant requested it be so referred.

Senator SHOEBRIDGE: But there's an existing full Federal Court decision that's completely on point, where then Attorney-General Brandis was asked for 237 days of his diary and, with a fraction of the resources that the Prime Minister has, was effectively ordered by the full Federal Court to produce it. It wasn't an unreasonable diversion of resources. You had a full Federal Court decision swear on point. Why didn't you just apply it?

Ms Falk: On the face of it, that might seem to be the case—

Senator SHOEBRIDGE: On the face of it, on the back of it, on the front of it, on the side of it, on the bottoms of the heels of it—it's obviously the case.

Ms Falk: It would take analysis to consider whether or not a matter is on all fours with another, and it would not be just as simple as the analysis that you've put forward. But, in any event, the applicant asked for the matter to be referred to the tribunal, and the delegate, considering all the facts and circumstances, exercised the discretion to so refer.

Senator SHOEBRIDGE: You had a full Federal Court decision squarely on point for a minister with fewer resources, for 2½ times the amount of diary coverage. You have an obligation in your office, if you can, to make the correct and preferable decision. There was a decision staring in the face of your office, and you dodged it and sent it to the Federal Court. Why?

Ms Falk: We didn't send it to the Federal Court.

Senator SHOEBRIDGE: You sent it to the AAT. I apologise.

Ms Falk: The matter was referred to the AAT. As I said, one of the operable factors was the request by the applicant.

Senator SHOEBRIDGE: You had an obligation to make the correct and preferable decision. You had a full Federal Court decision which was squarely on point. It would have been resolved by now if you had just applied binding full Federal Court authority to the matter. Was it because it was the Prime Minister's diary, and it was too hot for your office to handle? Is that why it went off to the AAT?

Ms Falk: Absolutely not, and, if you look at the decisions that are made by my office, you will see that there are many matters of controversy that come before us where decisions are made. That is not the case. I think that at the heart of what you're raising are issues around timely access to information and the kinds of resourcing constraints and workload that my office is facing. In your example, which seems a very meritorious one to move forward quickly and make a decision, there are hundreds if not a thousand or 2,000 matters where similar issues or matters of public importance could be raised. So it's a matter of looking at the issue that you've raised in that broader context.

Senator SHOEBRIDGE: Again we come to the point. Your office's failure to make a decision in reasonable time—and, in this case, where you had a full Federal Court decision that 100 per cent backed in the obvious solution to this—means that we're going to wait months or years to get access to the first hundred days of the current Prime Minister's diary, and, by the time we get it, it will have lost its currency; it will have lost its utility. Your office failing to apply the full Federal Court decision is undermining the utility of the FOI system, isn't it, because by the time we get this—maybe my kids will

have an interest in it. Your office's failure to apply a full Federal Court decision is undermining, in this case, the objects of the act.

Ms Falk: I can't accept the premise of the question around it being a simple matter of just applying that case. There will be additional complexities to that. But, even if I were to agree that it is on all fours, there are a number of matters that need to be considered in the context that you've raised. I go back to the resourcing constraints and the fact that we have over 2,000 matters currently on hand at the office and that we are working as much as we possibly can to ensure that we are moving through our backlog as quickly as possible.

Senator SHOEBRIDGE: Before I hand over the call, at this point I might just ask for details of the backlog. What's the longest outstanding review matter? Then, if you could give them year by year—the 1952 ones that are outstanding, the 2008 ones and the 2018 ones that are outstanding?

Ms Falk: I think you're aware that there are not matters back to that date that you raised.

Senator SHOEBRIDGE: Give me them as far back as they go.

Ms Falk: Thank you. For the oldest ongoing IC review, the date received was 19 February 2018. As at 22 May, there were 34 matters where the review was lodged with the OAIC in 2018; 172 matters from 2019; 310 matters from 2020; 451 matters from 2021; 702 matters from 2022; and 391 matters from 2023.

Senator SHOEBRIDGE: I can probably do the maths, but you've probably got it there in front of you. Can you tell me what that totals?

Ms Falk: It's 2,060 matters on hand.

Senator SCARR: Commissioner, we were all excited when Mr Hardiman was appointed FOI Commissioner. I say 'we'; I was. I know Senator Patrick was! His spirit still lives on here—

CHAIR: He's watching, I bet!

Senator SCARR: in this context. What reasons did Mr Hardiman give for resigning as FOI Commissioner less than 12 months into the role?

Ms Falk: The reasons given by the former commissioner are set out in his LinkedIn statement that was posted on 6 March this year.

Senator SCARR: What were those reasons?

Ms Falk: Those reasons are available on the public record.

Senator SCARR: Were any other reasons given to you in the lead-up to his resignation? For the record, for *Hansard*, as I understand it, on his LinkedIn page he noted that the FOI system was 'a small but important adjunct to the doctrine of responsible government' and that timely access to information was essential to the proper functioning of the FOI system. He noted that—and please feel free to interrupt if I'm misrepresenting anything—despite his efforts to speed up FOI appeal requests, he said he believed further changes were necessary to improve the timeliness of reviews and the consequent access to government held information. Is that correct in terms of his reasons?

Ms Falk: They sound like a summary of the reasons that were posted on LinkedIn, yes.

Senator SCARR: He also advised that the making of changes is not within the powers conferred on him as FOI commissioner. Therefore he had come to the view:

I will not be able, in the absence of those changes, to increase timeliness of IC reviews and access in a way which best promotes the objects of the FOI Act. I have accordingly decided the most appropriate course is to resign my appointment.

That statement reeks of frustration, of his having come into the position with the best of intention, of trying to be an agent for change, and then, after less than 12 months, he leaves the position terribly frustrated that he wasn't able to bring about the changes needed in relation to our FOI system. Is that a fair representation of why he resigned?

Ms Falk: Senator, they're matters for former commissioner Hardiman.

Senator SCARR: Presumably you had conversations with former commissioner Hardiman in relation to his concerns—is that correct?

Ms Falk: In relation to Commissioner Hardiman's resignation, you asked me a question as to whether matters had been raised with me prior—

Senator SCARR: Let me be more particular. Let me be more particular to assist, Commissioner. As I said, he believed—and this is from his LinkedIn statement—that further changes were needed to the process in relation to processing FOI appeals in order to improve the timeliness of reviews and the consequent access to government held information. Did former commissioner Hardiman have discussions with you with respect to what changes were required in order to promote greater efficiency and timeliness of reviews of FOI requests?

Ms Falk: Not in relation to the resignation.

Senator SCARR: Let's park the resignation, because the resignation is a culmination of frustration on the part of ex-commissioner Hardiman with respect to the process and his abilities to bring about change. Putting the resignation to one side, prior to the resignation, did former commissioner Hardiman raise with you his belief that further changes were necessary to improve the timeliness of FOI reviews—that changes were needed to the process?

Ms Falk: Not in those terms. I can say that I too was very enthusiastic about Commissioner Hardiman coming on to the OAIC. I sought to ensure support for the role, and there was professional and, I think, very productive engagement throughout his term. There were of course conversations between us. We meet regularly, usually each week, about how we could improve the efficiency and effectiveness of the FOI system. That was an ongoing dialogue.

Senator SCARR: Were there any particular suggestions he had with respect to improving the efficiency of review of FOI decisions and appeals? Did he put forward any particular suggestions to you that should be pursued?

Ms Falk: He made some proposals in November last year around the structure of the particular branch to increase efficiencies. They were worked through between us, and they were then implemented.

Senator SCARR: So you're saying there were a number of proposals he put forward in November 2022 with respect to the process that you worked through, and you implemented those proposals. What were those proposals?

Ms Falk: For example, to restructure the branch so that there was a separation between the review advisers who were carrying out both case management and also drafting reasons for commissioner consideration—to separate those out into two functions with a view to create additional efficiencies. One of the matters that he identified was that review advisers who had both tasks at hand could be distracted. Rather than having a single focus—on drafting reasons for decision—they were also dealing with applicants and agencies and managing the cases, which was potentially diverting the focus. It was about creating a focus of task, in an effort to increase efficiency. All of that engagement was very constructive.

Senator SCARR: I note in his LinkedIn statement he says:

The FOI Branch in the OAIC has shown enormous commitment to the implementation of these changes and the purpose of increasing timeliness of information access. I take this opportunity to express my sincere thanks to the members of the Branch.

Is that a reference to some of the changes that you were referring to then?

Ms Falk: I can't speak for the former commissioner, but I think that that is a reasonable inference to make.

Senator SCARR: He refers to changes having been made and he expresses his gratitude to staff within the OAIC, but then he says:

Further changes are, however, necessary in my view to ensure that the timeliness of IC reviews and, consequently, access to government-held information, is increased. The making of those changes is not within the powers conferred on me as FOI Commissioner.

Putting aside the changes which he proposed and which were implemented—which you outlined and which former commissioner Hardiman acknowledges in his LinkedIn statement—were there changes which he proposed which fall within that paragraph which were not implemented? If so, what were those changes that he proposed?

Ms Falk: Not that I'm aware of.

Senator SCARR: Let me just be clear. His statement says:

Further changes are, however, necessary in my view to ensure that the timeliness of IC reviews and, consequently, access to government-held information, is increased.

You're saying you're not aware of what those further changes are that he is referring to. In fact, as I understood your testimony, you're not aware of any changes he proposed which were adopted. Is that correct?

Ms Falk: My recollection is of a professional and productive engagement, where there was open dialogue around the need for changes, and agreement as to those changes to be put into play. I don't recall there being outstanding matters. There were always matters of the resourcing of the area, which was a matter that I had sought to pursue over a number of years. In relation to that, I had provided my full support to continue to pursue resources for the function. Commissioner Hardiman did not raise matters with me prior to his resignation, nor foreshadow his resignation.

Senator SCARR: In relation to those resourcing issues you've referred to, did ex-commissioner Hardiman raise issues regarding his lack of resourcing, or lack of resourcing for his function, in order to deal with the backlog of issues?

Ms Falk: Could you please repeat the question?

Senator SCARR: In relation to those resourcing issues you're referring to, as I understood your testimony, there were discussions between you and ex-commissioner Hardiman with respect to a lack of resourcing—that the resourcing wasn't there to the extent that he considered was required in order to deal with those issues. Is that correct?

Ms Falk: Certainly I share the view that additional resources are needed for FOI. I have sought to try to enable that to the extent that I can within my control.

Senator SCARR: How have you sought to enable that to the extent you can within your control?

Ms Falk: I have recommended that the branch overstaff, because we have a high level of turnover, as a small agency, as do many small agencies in the Commonwealth. I also undertook to undertake a midyear review of budget to see if there was any ability to assign additional resources to the area, and I did so. I also continued to pursue funding bids with government.

Senator SCARR: Who did you make those representations to?

Ms Falk: Which representations?

Senator SCARR: In relation to increasing funding, the ability to overstaff to take into account the need to have continuity with respect to people considering questions—who did you raise those issues with?

Ms Falk: I'm sorry, I don't understand your question in terms of continuity.

Senator SCARR: Let's go through the three issues you raised—and it's getting late; I appreciate that. The first issue you raised was the utility of overstaffing. That's the term you used. What did you mean by that?

Ms Falk: The budgets are set for each branch, and my advice to the FOI branch has been to seek to recruit staff additional to what were provided in the funding envelope, because I was of the view that we could manage some additional resources, given the fact that we do have turnover in the organisation, as do many agencies, particularly in the current market.

Senator SCARR: So that was a matter internal within the OAIC. Is that correct?

Ms Falk: Yes, that's correct.

Senator SCARR: The second point you raised was the mid-year review of budget. Was that also internal within OAIC?

Ms Falk: Yes.

Senator SCARR: Were there any initiatives, requests or recommendations you made to government, to the Attorney-General's Department, outside of OAIC—so, any requests to the secretary or the Attorney-General with respect to increase funding?

Ms Falk: I have put to the department the need for additional resources for the functions of the office and did so in the context of the recent budget. I also have spoken with the department around whether there's additional support that could be provided to assist us to source personnel in a tight labour market, and the department has indicated that they would assist to see if we could source appropriately qualified people from across the Commonwealth.

Senator SCARR: How much additional funding did you request?

Ms Falk: The funding happened in the context of the May budget and that was a matter that then was considered by the department as part of the funding process.

Senator SCARR: Sure, but how much additional funding did you request over and above what was provided in the budget?

Ms Falk: I requested funding across the privacy and FOI functions, and there was funding provided for the privacy functions of the office.

Senator SCARR: But in terms of the FOI function, did you request additional funding?

Senator Watt: Senator Scarr, Ms Falk has been very helpful, but you are getting into areas of advice and the deliberations of ministers, and that kind of content is not normally provided in answers to questions at estimates.

Senator SCARR: I'm trying to be quite particular with respect to the questions, not to go into the area which, as you've legitimately raised, I shouldn't be going into.

Senator Watt: I'd also point out that I remember asking questions very similar to the ones that you're asking, when we were in opposition, and it would be fair to say—in fact, I think Ms Falk was in the role answering those questions—that Ms Falk and others of her colleagues have raised issues around resourcing for quite some time now.

Senator SHOEBRIDGE: Once a decision has been made and advice has been acted upon, it's quite within our bounds to ask for that advice, and these decisions have obviously been acted upon, having been operationalised in the budget.

Senator Watt: Part of them have, is what I understood.

Senator SCARR: Ms Falk, maybe you could take on notice what information you can give me—and I'm not seeking to go into deliberations, but as a matter of fact—with respect to the resourcing gap from the OAIC's perspective, in terms of resourcing this important function of government, which I think's integral to transparency and integrity in terms of our system. Could you take that on notice?

Ms Falk: I'll take the question on notice, thank you Senator.

Senator SCARR: Thank you very much. You gave some commentary in relation to Mr Hardiman's resignation. Prior to receiving the notice of resignation, it wasn't foreshadowed with you? He didn't give you any warning that he was considering resigning? You didn't have any discussions with him about that?

Ms Falk: No.

Senator SCARR: Have you had any discussions directly with the Attorney-General with respect to the funding requirements of the FOI function?

Ms Falk: I have discussed the resourcing requirements of the office with the Attorney-General.

Senator SCARR: When did you have those discussions?

Ms Falk: I had a meeting with the Attorney-General in August of last year, following on from correspondence that I had provided to him. The correspondence is on the public record. It's been released under freedom of information. It set out the breadth of the jurisdiction of the OAIC across our privacy and freedom of information functions, drew to his attention the critical role that we play both in the digital economy and in terms of access to information, and pointed out the year-on-year increase that we've had of applications, particularly in FOI, for Information Commissioner reviews. If I go back to 2015-16, we were receiving about 510 applications and resolving about 454. Last year, we were closer to receiving 2,000 and resolving more than 1,300. But, because of that gap, backlogs have occurred, and those backlogs have been persisting for a number of years. So I brought those matters to the Attorney's attention.

Senator SCARR: Have you had any further discussion since August 2022?

Ms Falk: Not discussions on funding, no.

Senator SCARR: Any other correspondence sent to the Attorney in that respect since August 2022?

Ms Falk: Yes, I have sent correspondence.

Senator SCARR: Is that correspondence on the public record?

Ms Falk: Yes. It's been released under freedom of information.

Senator SCARR: Okay. I'm aware of the time, so I might put some further questions on notice in that respect.

CHAIR: Did Mr Hardiman raise any concerns regarding bullying, harassment or discrimination at the OAIC, and, if he did, what were the nature of those allegations?

Ms Falk: No, there were no allegations raised.

CHAIR: Before his resignation?

Ms Falk: Correct.

CHAIR: In terms of the allocation of staff, can I just understand how many staff are in the OAIC's corporate area as compared to the FOI area?

Ms Falk: The staffing in the FOI area—I'm sorry, it has decimal points; of course people are in whole numbers, but it's for budget purposes—is 22.4 allocated staff. In addition to that, there's an SES band 1 officer and also a commissioner. The corporate area includes our legal area of 12.6 people. It also includes our finance, HR, communications and education, shared services and security people, and that number is 36.5.

CHAIR: Did you decide how many staff were allocated to the FOI area, or was that a decision of Mr Hardiman?

Ms Falk: The allocation of resource is based on the budget appropriation provided by government.

Senator SHOEBRIDGE: Commissioner, in terms of the cost to date in the Patrick v Australian Information Commissioner matter where judgement is reserved, last time you anticipated the costs in the matter to hit \$700,000. Do you have an update?

Ms Falk: The cost of the proceedings was \$780,000.

Senator SHOEBRIDGE: I asked you questions about the Porter matter, if I can say that, involving the sports rorts scandal document. I asked you if you had sought that document from Senator Cash when she was the minister. Did you seek it from the then attorney-general Porter at any time between June 2020, when you obtained the review, and September, when he resigned?

Ms Falk: I'd need to check the dates. Certainly, the document was sought from Minister Porter at the time that the Information Commissioner review was commenced.

Senator SHOEBRIDGE: Well, I'm not sure about that.

Ms Falk: But, in terms of those other dates that you've provided, I would need to take that on notice.

Senator SHOEBRIDGE: Alright. If you could provide on notice whether or not you sought it from the then attorney-general Porter, too—I understand you've taken that on notice.

Ms Falk: Thank you.

Senator SHOEBRIDGE: In terms of funding, if I look to the budget, the estimated budget for this year for your total office is \$33 million. You get a surge in funding up to \$47 million, primarily to do with the privacy review, in the 2023 budget, but then the budget collapses back to \$31 million in 2024-25 and \$24 million in 2025-26. That's a 25 per cent reduction from this year's budget. Am I missing something?

Ms Falk: There is a reduction in budget after the next financial year.

Senator SHOEBRIDGE: A radical reduction in budget. In 2025-26, your budget is going to be 25 per cent less than what it was this year.

Ms Falk: Yes, that's the way the budget is currently framed.

Senator SHOEBRIDGE: That's going to produce catastrophic outcomes in FOI, won't it?

Ms Falk: The increased resources that were provided in the May budget were for specific initiatives in relation to funding for programs for privacy.

Senator SHOEBRIDGE: No, the budget for this financial year, which we're most of the way through, is \$33 million. This most recent budget is anticipating your budget in 2025-26 to fall back to \$24 million. The surge in funding that you're getting next year for the privacy—I'm not even putting that in as a factor. The budget that has been given to you by the government for 2025-26 is more than 25 per cent less than—it's late and I'm articulating that badly. It's a greater than 25 per cent cut to your current budget for this year. That's going to have catastrophic effects on and in your office, isn't it?

Ms Falk: There are a number of terminating measures, but one of the funding measures that we did receive in the May budget which was very welcome was a budget allocation to conduct a strategic review, and that will look at the requirements of the organisation, both now and into the future, to be a contemporary regulator.

Senator SHOEBRIDGE: Despite the notorious and damaging delays in FOI that are largely a resourcing problem, you didn't get an extra red cent in this budget for FOI, did you?

Ms Falk: There was no additional funding for FOI, no.

Senator SHOEBRIDGE: You must have asked for it and been refused. Were you told why?

Ms Falk: I provided to the department the resourcing context for the office, and I've taken a question on notice from Senator Scarr in relation to that.

13 February 2023

[D2023/004552](#)

Senator SHOEBRIDGE: I think last time we spoke there were more than 1,500 outstanding information reviews. There were 60 from 2018, 249 from 2019, 346 from 2020, 498 from 2021 and 889 from 2022. Do you have an update on those figures from 2018?

Ms Falk: I do have an update on the figures from 2018. We currently have on hand 47 IC reviews.

Senator SHOEBRIDGE: Do you want to take us through the years?

Ms Falk: 2019 is 238, 2020 is 329, 2021 is 464, 2022 is 808 and we currently have 124 from 2023.

Senator SHOEBRIDGE: There has been very minimal global movement in terms of outstanding—what are the outstanding numbers now?

Ms Falk: In terms of the matters that we have on hand, currently we have 2,010 matters on hand.

Senator SHOEBRIDGE: How many was it last time you reported to us?

Ms Falk: 1,055.

Mr Hardiman: I think that was over 12 months.

Senator SHOEBRIDGE: That can't be right.

Ms Falk: That can't be right. Sorry. I'll refer to Commissioner Hardiman.

Mr Hardiman: I think the total on hand was just slightly more than the 2,010 figure that we have on hand now.

Senator SHOEBRIDGE: Would it be fair to say that the dial has hardly moved?

Mr Hardiman: That's right.

Senator SHOEBRIDGE: Yet, when people are making current review applications—I have some extracts from some correspondence they've got. One piece of correspondence says: 'The OAIC is currently focusing on the case management and finalisation of aged matters, particularly the 305 IC review applications on hand received in 2018 and 2019. The OAIC reviewed your application on 19 July 2022, and I understand there are approximately 1,558 IC reviews on hand that were received prior to your application.' It then says that they'll be dealt with in order. Basically, when people apply to you now, they're told: 'Give up hope. We'll never get to you. This will be five years or more.' That's what they're being told, isn't it?

Ms Falk: We're endeavouring to deal with all the matters as quickly as we possibly can. We absolutely are of the view that the information access system needs to provide, as far as possible, timely access to information at the lowest reasonable cost. We do have a legacy case load, and we traversed this at the last estimates. It is regrettable. You'll recall that the history of the matter is that we have had year-on-year increases to the numbers of IC reviews without commensurate increase in resources. But that means that we need to work differently. The OAIC has always looked critically at the way that we've done our work and made changes as appropriate. We're continuing to do that, and Commissioner Hardiman has been leading a change to some of the structure in the FOI branch. We're also looking at how we can streamline the IC review process and our decision-making. We're providing some short-term resources to really focus on resolving that residual case load so that we can ensure that there's more proximate decision-making to the requests for IC review.

Senator SHOEBRIDGE: You accept, don't you, that, when it comes to freedom of information requests, the timeliness of the information can be absolutely critical? I think one of the applications was seeking to know what the plans were should the monarch die, and whilst they were waiting for the outcome of your review the monarch died. That killed the whole purpose of it, didn't it?

Ms Falk: I understand that the applicant in that matter is continuing with their IC review.

Senator SHOEBRIDGE: For historical purposes only.

Ms Falk: In terms of the focus of the office, we share your endeavour to ensure that IC reviews are processed as quickly as possible, and we are doing everything that we can from a process perspective, and also with some short-term resources, to be able to accelerate our ability to make those decisions.

Senator SHOEBRIDGE: Have you considered having more prompt and regular recourse to 54W(b) of the act, which allows you to refuse to continue to review a matter and then gives an avenue for applicants to go and get the matter decided in the AAT? Have you considered using that, as one avenue?

Ms Falk: We do have a process around that particular provision and the factors that are taken into account. One of those is, if one of the parties has evinced their desire that the matter go to the AAT, it's then open to the delegate to exercise that discretion. Of course, we have to have that subject to the agency's views, which also have to be taken into account.

Senator SHOEBRIDGE: Have you thought about proactively reviewing the use of that discretion to at least (a) get rid of some the backlog and (b) allow people to get a determination without having to wait two, three, four, five or six years?

Ms Falk: These are matters that are under active consideration. Yes.

Senator SHOEBRIDGE: How many decisions were made under 54W(b) in the last four years—if you can do them year by year—that refused to continue the review and permitted the pathway to the AAT?

Mr Hardiman: We would have to take that on notice.

CHAIR: I don't want to interrupt you, but you do have more questions for another agency.

Senator SHOEBRIDGE: You are right to interrupt me, Chair. I will pull up stumps on this.

CHAIR: Thank you, Commissioner. That is all the questions that we have for you tonight. Thank you for staying around a little bit later. We appreciate it.

7 November 2022

[D2022/025000](#)

Senator ROBERTS: We already have some pretty strong legislation oversight and we're having lots of hacks. If we amalgamate the data from many companies for each individual then it's going to be a hacker's paradise. That was my point.

Let's change the topic back to FOI. A constituent Mr Daniel Briggs lodged an FOI request to the ABC on 15 March 2021. He lodged an appeal against the decision with the Office of the Australian Information Commissioner on 2 June 2021. Why hasn't he received a reply from the OAIC when he inquired about progress after more than a year had passed?

Ms Falk: Our ordinary process would be that an individual who makes an application for review would receive an acknowledgement of that in a timely manner—ordinarily almost immediately but certainly within two business days. If that hasn't occurred in relation to your constituent, I heard the name you read out and I'll ensure a response is provided and an apology given.

Senator ROBERTS: So the average time would be up to two days?

Ms Falk: Ordinarily our early resolution and triage system would in fact generate an automated acknowledgement. If that hasn't occurred, I will need to look into it.

Senator ROBERTS: Can you tell me on notice please, when you've looked into this case, why the appeal has taken so long? Mr Briggs's OAIC reference is MR21/00524.

Ms Falk: If it's an issue around the time taken for an information commissioner review, currently we are resolving many matters in a timely manner, but there are a number of matters that have been unable to be allocated to case officers due to the incremental increase in the number of applications we've received and our resource constraints.

Senator ROBERTS: So you have got resource constraints?

Ms Falk: In relation to FOI, yes.

Senator SHOEBRIDGE: Commissioner, can I ask you about the number of outstanding FOI claims. What's your most recent data about outstanding FOI claims? When does it date back to?

Ms Falk: I'll commence providing some information, and our fairly recently appointed FOI Commissioner, Mr Hardiman, may also wish to add to this.

Senator SHOEBRIDGE: Yes. You know I'm going to ask about the numbers that are outstanding for at least one year, the numbers that are outstanding for at least two years and the longest outstanding one, as well.

Ms Falk: Thank you. Last financial year, we experienced a 60 per cent increase in the number of IC review applications made to the office, at 1,956. At the same time, we increased the numbers that we finalised last financial year by 35 per cent, at 1,377. At the end of the financial year we had 1,876 matters on hand. As at 30 September this year, we have around a thousand matters that are over 12 months old, and 567 of those matters are over two years old.

Senator SHOEBRIDGE: That's a fairly dramatic increase in delay. I think at the end of 2021 there were 670 FOI reviews more than a year old, and we're now over a thousand. Did you have a precise figure for 30 September?

Mr Hardiman: I have a figure as of this morning. Which figure were you looking for?

Senator SHOEBRIDGE: I think Commissioner Falk was giving a figure as at 30 September as being over a thousand. Do you have the actual figure as at 30 September of those that are more than a year old?

Ms Falk: My apologies; it's 957.

Senator SHOEBRIDGE: And there were 567 that were more than two years old?

Ms Falk: That's correct.

Senator SHOEBRIDGE: What was the longest outstanding matter?

Ms Falk: The oldest matter is from 2018, regrettably. **Senator SHOEBRIDGE:** That's more than four years. **Ms Falk:** It's four years.

Senator SHOEBRIDGE: Commissioner Hardiman, did you say you had more recent data—data as of today?

Mr Hardiman: As of this morning, yes.

Senator SHOEBRIDGE: Is it good news?

Mr Hardiman: No, sorry, Senator. The total on hand this morning was 2,042. The total over 12 months old was 1,055. I have a breakdown by year, if you would like that.

Senator SHOEBRIDGE: Yes, if you wouldn't mind.

Mr Hardiman: For 2018 there are 60 ongoing reviews; for 2019 there are 249; for 2020 there are 346; for 2021 there are 498; and for 2022 there are 889.

Senator SHOEBRIDGE: Thank you very much for that granular data. I've got to say it is distressing to see 60 matters from four years ago. Do you have a general explanation for that?

Ms Falk: The explanation is the exponential growth in the numbers of matters that we've received across both Information Commissioner review applications and complaints—and, indeed, at least throughout the pandemic, extension-of-time applications. At the same time, through our ability to make process improvements and to focus on early resolution, we have increased our throughput, but a gap has arisen, and it has compounded over time.

Senator SHOEBRIDGE: How does that explain 60 unresolved matters from four years ago—not one matter, as I'd understood initially, but 60 from 2018? How do you explain that?

Ms Falk: It's a matter of resources, regrettably—

Senator SHOEBRIDGE: There haven't been that resources in the last four years to deal with those 60 matters?

Ms Falk: It's a matter of having a large case load and a limited number of resources. It is our intention, through the efforts that we make every day, to resolve all matters as quickly as possible. It's regrettable that we have a legacy case load of this size.

Senator SHOEBRIDGE: But, you see, the purpose of freedom of information is to gain timely access to the workings of government and the information of government. When the review applications—we're not even talking about the initial application; it's about the review applications—in your office are taking four years, that defeats the purpose of FOI, doesn't it?

Ms Falk: The object of the act in terms of providing timely access to information is as you've put it. We seek to address this issue in a number of ways. There is the work that we've done internally over the last four years to increase that finalisation rate. At the same time, we have worked with agencies to encourage them to proactively release information and to make it available on their websites. So it's a combination of both that needs to happen. We've also provided resources to agencies to assist them to make good decisions.

Senator SHOEBRIDGE: This has been a matter of substantial public disquiet for a number of years now. I recall the shock about there being 667 matters that were a year or more outstanding when we first heard that in 2021, but now it's 1,055 that are more than 12 months old. That is—I put it to you, Commissioner—defeating the purpose of FOI. It's a disastrous outcome, isn't it?

Ms Falk: There are a number of factors that are contributing and, as I said, a number of strategies that we are employing. From my perspective, I would like us to be able to resolve all matters in a timely manner. We've increased our throughput. We have, over the last three years, resolved 58 per cent, then 68 per cent, then 72 percent of matters within 120 days. So our early resolution and triage give very good results. But matters that are voluminous or have multiple exemption claims, entrenched parties and added complexity are the ones that take additional time. We also have experienced an exponential increase in the number of deemed decisions from the Department of Home Affairs, where regrettably they're not meeting the statutory time frame. That then triggers the ability for an individual to come to the OAIC. We've been working with the Department of Home Affairs in an effort to resolve that issue, which will then decrease our case load.

Senator SHOEBRIDGE: I'm going to put it to you again because I don't think it was addressed in your answer. Waiting more than four years for an FOI determination by your office defeats the very purpose of FOI. Some of these might have been in relation to now extremely former Prime Minister Malcolm Turnbull. It defeats the purpose, doesn't it?

Ms Falk: I don't disagree with you that FOI should be about timely access to information.

Senator SHOEBRIDGE: But it has got dramatically worse.

Ms Falk: It has got worse because of the cumulative exponential increase in the number of matters before the office. But I must say the appointment of Commissioner Hardiman was welcomed. We also have an SES band 1 officer and two other support staff now. We will start to see results from that.

Senator SHOEBRIDGE: I suppose I'm equally troubled by the fact that, while we're seeing delay of this order, significant resources from your office are being spent defending against a case brought by a former senator who is simply trying to assert that you have an obligation to deal with these matters in a reasonable amount of time. Do you say you have no obligation to deal with matters in a reasonable amount of time?

Ms Falk: We seek to deal with all matters in as timely a manner as possible. It's regrettable that we have a legacy case load.

Senator SHOEBRIDGE: But you're out there opposing a case that is simply trying to say that your office has an obligation to decide matters in a reasonable amount of time, to which you're saying, 'No, we don't.' That's the case, isn't it? That's what's happening at the moment at public expense?

Ms Falk: I think that's an oversimplification, with respect.

Senator SHOEBRIDGE: Tell me how I'm wrong.

Ms Falk: The case has been brought by an applicant. That means I have to respond to that, and, as a model litigant and an officer of the Commonwealth, it's incumbent upon me to respond to the litigation that has been brought. It's—

Senator SHOEBRIDGE: Sorry, Commissioner; I thought you'd finished. You go.

Ms Falk: After you, Senator.

Senator SHOEBRIDGE: No, I genuinely thought you'd finished. I didn't mean to interrupt your answer.

Ms Falk: Given that the litigation has been brought, it is a matter that I have to respond to. I think there are three factors that have contributed to the cost of responding to this case. One is the breadth of the case and the fact that it's my office that holds the evidence of the way in which the matters have been processed. That has taken considerable resources of my office to compile that evidence and put it before the court so that they can make a decision. The second is that there's been a number of interlocutory proceedings. The third is that it is a novel case; it has raised novel legal issues, and, again, it is incumbent upon me to put before the court the proper construction of the statute.

Senator SHOEBRIDGE: But the core of the case—this is what I put to you, and I'm happy for you to correct me if I'm wrong—is that former senator Patrick is saying that your office has an obligation to decide matters within a reasonable amount of time, and you're going to all of that cost and all of that effort that you just articulated to defeat that claim. Why? Do you not—

CHAIR: Senator Shoebridge, you're asking the same question you've already put. I draw your attention to the previous answer.

Senator SHOEBRIDGE: Do you disagree with that characterisation of the case?

Ms Falk: I think that the matters that you're raising go to the essence of the case. It's a matter before the court. But what I can say, more generally, is that any delay as a result of the inability to allocate matters to case officers, staff shortages and the impact of the pandemic are all regrettable. What my office wants to do is to focus limited resources that we have on resolving the matters that we have before us as quickly as possible.

Senator SHOEBRIDGE: Well, how much have you now spent on opposing Senator Patrick's case, which is simply trying to establish that your office has an obligation to decide matters in a reasonable amount of time? How much has been spent to date in opposing that case?

Ms Falk: The costs in the case have been higher than anticipated. We've been invoiced for \$466,000, and there's work in progress of a further \$97,000, and I expect—with the hearing that's now set down for February, due to the judge's unavailability in November—that, potentially, to increase from there.

Senator SHOEBRIDGE: What's the estimate of costs that you've been given by your lawyers?

Ms Falk: The estimate would be in the \$700,000 range.

Senator SHOEBRIDGE: And this is to defend a case where the plaintiff is simply seeking to assert that you have an obligation to decide matters in a reasonable amount of time—that's how much public money is being spent?

Ms Falk: I'm responding to litigation that has been brought against the office, and it may be that you consider that I could simply consent to the proceedings—

Senator SHOEBRIDGE: Indeed—and spend \$700,000 on processing claims!

Ms Falk: It is my view that, if delay that has been attributable for the reasons that I have outlined is found by a court to be unreasonable, that is a matter for the court. It's not a matter for me to determine that, legally. And, in terms of the remedy that is sought, it would require me to prioritise this applicant's matter above hundreds of other applicants', merely because they have the means to bring the legal proceedings.

Senator SHOEBRIDGE: I understand that the legal costs are going to get to somewhere in the order of \$700,000. That's just the external costs. Do you have any estimate of how much the internal costs have been? You spoke about gathering evidence and the like, and I can imagine that that's quite a task.

Ms Falk: It has been a significant impost on the office.

Senator SHOEBRIDGE: How much?

Ms Falk: I can't quantify it today.

Senator SHOEBRIDGE: You rejected the alternative option of agreeing to the basic proposition that you should be deciding matters in a reasonable amount of time. That was a much cheaper and more direct option, wasn't it?

Ms Falk: That's not been an option in the case. Before the previous senator Patrick brought the litigation, my officers met with Mr Patrick and outlined to him when his matters would be resolved. He chose to conduct this litigation, and I've had to respond to it.

Senator PATERSON: But he chose to conduct the litigation because he might be, eventually, in the 2018 list, or the 2019 list, and it might be four, five or more years until he gets his matter decided. It's not unreasonable, is it, given the data you've given me?

Ms Falk: Individuals have the right to bring litigation. There are consequences of so doing. I'd prefer to be using the resources of my office to deal with the matters that are before us.

Senator SHOEBRIDGE: You wrote to the Attorney on 8 June indicating, amongst other things, that you frankly don't have the resources to do the FOI work. Have you had a response?

Ms Falk: I'd have to take that on notice. I have had correspondence from the Attorney, but I can't recall if I've had written correspondence on that matter.

Senator SHOEBRIDGE: Commissioner Hardiman, are there adequate resources now to address the case load on FOI matters?

Mr Hardiman: In my view, taking into account the current backlog and the rate of inflow of IC review applications to the office, no, there are not sufficient resources.

Senator SHOEBRIDGE: I do sympathise, Commissioner, with all of you, with the impossibility of your task given the resources you have to hand. I do sympathise with the impossibility of the task, but do you have some idea about what the resource gap is between what you'd need to get on top of the task in a timely fashion and what you've got now?

Ms Falk: I've put before this committee since 2018 the need to have a funding injection for the FOI function. In November 2019 I answered a question on notice where I estimated I would need an additional nine case officers. We were dealing with under 1,000 matters per year at that time. The number of matters that we're now dealing with is double that, so we're looking at double my estimate at that time. But I think we can also do with that, if we were to receive that resource, not only to deal with the legacy case load but also to do some educative work with agencies to ensure that we embed a pro-disclosure culture across government agencies.

Senator SHOEBRIDGE: I agree with you about that being the better outcome if we can get there, but there's a lot of water under the bridge before we get there.

CHAIR: Just with regard to the litigation brought by former senator Rex Patrick: when did Mr Patrick lodge those proceedings against your office?

Ms Falk: My recollection is that it was September 2021.

CHAIR: Did the claim relate to delays in conducting Information Commissioner reviews?

Ms Falk: Yes, Senator.

CHAIR: Did Mr Patrick request that the IC reviews be suspended—that is, that your office stop the progression of the reviews while the court proceedings were underway?

Ms Falk: During one of the interlocutory proceedings, counsel for Senator Patrick did make representations to the court that the matters that were the subject of the proceedings not be decided until the hearing.

CHAIR: Okay. And what was the decision of the Federal Court on the issue of suspension of reviews requested by former senator Patrick?

Ms Falk: My understanding is that was not granted.

5 April 2022

[D2022/006465](#)

Senator GROGAN: Good afternoon, Ms Falk. At Senate estimates in October last year, and again in February this year, you were asked about an FOI application by the Nine newspapers relating to a

letter from the AFP to Peter Dutton in relation to the police probe into George Christensen's frequent travel to the Philippines. Mr Christensen has objected to the release of that letter. Is that still the situation?

Ms Falk: That matter is still under active consideration. I advised the committee in a question on notice that I anticipate that it will be resolved by the end of this financial year. In relation to third parties and any submissions they may or may not have made, they are confidential at this stage.

Senator GROGAN: Are you still expecting that to be done by the end of the financial year?

Ms Falk: Yes, I am.

Senator GROGAN: We are almost at the end of the financial year—almost. Do you think it will be completed prior to the election, or will we be waiting until the actual end of the financial year?

Ms Falk: I'm not able to give you that level of detail today.

Senator GROGAN: Okay. It would be rotten timing if an issue like this were to languish on the eve of a federal election. Do you feel any sort of compunction to try and finish that review before the election is called?

Ms Falk: We've been progressing all matters that are within the office's remit as quickly as we can, and we continue to do so. We have completed more matters this year to date than we did to the end of the financial year last year. So we continue to progress matters, and to expedite them, as far as we possibly can.

Senator GROGAN: So we'll just wait and see. Hopefully, we will get to see the results of that review. That's it from me, Chair. Thank you.

15 February 2022

[D2022/002661](#)

Senator KIM CARR: I've got three matters. The first goes to that FOI application by the Nine papers, relating to a letter from the Australian Federal Police to Mr Peter Dutton in relation to a police probe into Mr George Christensen's frequent travel to the Philippines. On previous occasions, you said you thought you could have this matter resolved fairly quickly. I'm wondering what's taking so long.

Ms Falk: I took the question on notice in terms of the time to resolve the matter, and my response to that question on notice indicated that I anticipated that a decision would be made by the end of this financial year. That continues to be my view.

Senator KIM CARR: Why does it take so long? That's a long time. You've had this under review now for a considerable period of time.

Ms Falk: As I said in my brief remarks, we have had a continuing increase in the number of IC review applications received by the office. At the same time, this particular matter has had a number of procedural matters that needed to be worked through. At the conclusion of that, I will certainly be dealing with the factual and legal issues, and a decision will be made.

Senator KIM CARR: The second issue goes to a complaint about the Attorney-General's Department and the administration of the FOI Act. The shadow Attorney-General made this complaint on 1 March

2020. It's concerning the transfer of an application from former Attorney-General Mr Christian Porter to the department. This is to do with the appointment to the Administrative Appeals Tribunal. The request was transferred to the department. That was in breach of the act, which I think was acknowledged, because it failed the basic test in terms of the way in which the act should be properly administered. Given the department is legally responsible to administer the act, I'm going to ask the department: what have you actually learnt from this incident?

Ms Falk: I think it is fair to say that, as a consequence of that, we have reviewed our procedures, and particularly how we engage with ministerial offices around the issue of who is the appropriate entity in order to respond to FOI requests. I think this was some time ago now, but I was briefed about the matter when I first came into the role, and the fact that we had looked at strengthening our processes in that regard.

Senator KIM CARR: I see. Could I ask, Commissioner, why did it take you over 18 months to complete your investigation into the department on this matter? It seems an extraordinary amount of time to complete an investigation.

Ms Falk: As I've indicated, the numbers of matters being received by the OAIC continues to increase. We've had a significant increase in the number of complaints made to the office. We've made great progress in resolving some of those old complaints, but that is the time that this matter inevitably took.

Senator KIM CARR: 'It takes as long as it takes,' is that the answer?

Ms Falk: It's a matter of giving each matter the attention that it deserves, and considering the legal issues that are raised in the context of many other matters.

Senator KIM CARR: Minister, in the first half of last year the government announced that it would finally appoint a standalone freedom of information commissioner. I understand it's, what, six years or so, that proposition's been about. Has the position been filled?

Senator Cash: It is currently underway and I expect it to be completed in the next few weeks.

Senator KIM CARR: I see. I presume it's a cabinet appointment.

Senator Cash: It will be, yes.

Senator KIM CARR: Has it gone to cabinet yet?

Senator Cash: I don't believe so.

Senator KIM CARR: Do you have a date by which it will be going to cabinet?

Senator Cash: It should be completed in early 2022.

Senator KIM CARR: You don't have a date in which it's scheduled to be done?

Senator Cash: It should be completed in early 2022.

Senator KIM CARR: Did I hear right: you said in a few weeks you expected to be announced?

Senator Cash: In early 2022.

CHAIR: Senator Rice?

Senator RICE: Ms Falk, are you the right person to ask about FOI review decisions?

Ms Falk: Yes, Senator.

Senator RICE: I just want to ask in very general terms about a particular FOI review. Would you be able to outline in general terms where things are at with that review?

Ms Falk: Ordinarily I'd prefer not to talk about particular matters that are before the office. I can, of course, take you through the usual processes, if that would assist.

Senator RICE: Yes. This is a review that—again, I think it's because of the resource limitations on your office. We've been trying to get some information about the process of this review decision. We were told that we were going to have some information by January, and it's now February and my office has not been able to make contact with your office to get any information about it. So basically I was wanting to ask for a general sense of the time lines in relation to this review. It's MR2100353. As I said, my office has been trying to get some confirmation of the time lines with this review process. We were promised January, and here we are mid-February and basically there's no response—crickets.

Ms Falk: I will take that on notice, if I may, and come back to you very promptly with an answer to your question.

Senator RICE: Okay, thank you.

Senator PATRICK: I do, now that we've got through the niceties. I'm just looking at this list in relation to QON LCC-SBE21-016: As at 30 June 2018, there were 81 IC reviews on hand that were over 12 months old ... The next year it goes to 250. The next year 460. In June 2021 there were 667 reviews on hand that were over 12 months old. It seems like we're going nowhere. Are you able to provide any advice as to whether the appointment of a new FOI commissioner would help to remedy this particular situation?

Ms Falk: I acknowledge the kind remarks of both you and the assistant minister. In relation to the appointment FOI commissioner, as you're aware, in the last budget we received \$980,000 dollars for an FOI commissioner, an SES officer and two support officers. Whilst an appointment is yet to be made, there has been an acting arrangement in place with DFI Commissioner Ms Hampton, who joins me on the call this evening. We have also pointed the SES officer band 1 and the support staff. I do see that this is and will continue to make a difference. Perhaps I should say a couple of things about that. We have, as you have noted, continued to have a large number of matters on hand, and the age of the matters is increasing. In the last six months, we've had a 38 per cent increase in reviews received over the same period as the previous year, but we've also increased our throughput by 37 per cent in the last six months, so I do see that that additional capability has been assisted by the acting arrangements and the SES band 1. At the same time, there's a significant cohort of cases on hand, and currently the acting commissioner and I are working through the modelling, which I think you are familiar with, in terms of future funding requirements and case officers in order to address that backlog. But the parameters have shifted in terms of having the additional funding—and we're looking at how that is helping the office—but also an exponential additional increase in what's coming through the door. It is more than I had anticipated in that previous modelling.

Senator PATRICK: Thank you. I might take some responsibility. I think my national cabinet case made FOI sexy! Maybe I've increased demand.

CHAIR: I believe that's an unparliamentary term.

Senator PATRICK: That FOI is sexy? No; I'm trying to promote that idea!

CHAIR: Please continue.

Senator PATRICK: For my last question I'm going to be brief. This is a result of a personal experience in a matter, but it raised a concern in my mind in relation to, perhaps, other matters. I'm not seeking to adjudicate my FOI matter in any way, shape or form, but I have an FOI matter that's been with you for two years, and only just recently was I advised that you were considering exercising a discretion under 54W—basically, to discontinue the review such that I could take it to the AAT. That's normally helpful at the very start, where you look at a matter and go: 'This is complex. Let's get it to the AAT.' I know that you've done that, but is it common practice to have a matter that's a couple of years old and then say to the applicant, 'I'm going to stop now'?

Ms Falk: As you've said, ordinarily my delegate would look at exercising a discretion to refer a matter or to decline to continue with a matter and allow an applicant to go to the AAT early on in the proceedings, but there have been some cases where that issue has arisen later in the proceedings. For example, one of the factors that would be considered is the extent that the matter was going to be contested by either party, should a decision be made on appeal, or whether there is another cohort of matters that are in the AAT and it ought to be considered alongside that. Speaking generally, it can occur, but, ordinarily, it would happen earlier in the process.

Senator PATRICK: Can you provide some statistics on that—on the exercise of 54W discretion after, say, 12 months.

Ms Falk: I will take it on notice. I will need to have a look at our case management system in terms of the granularity of the information that I can give you.

Senator PATRICK: I will direct this question back to the Attorney-General's department. There is a matter that I have on foot that relates to a document that was produced by then Attorney-General Christian Porter. Somehow, in the transfer to a new Attorney-General, the document has been lost. How do you lose a Commonwealth record—a letter of advice from the Attorney to the Prime Minister?

Ms Falk: I'm sorry, the officers that I would draw upon to assist in answering that question are in the corporate area, and they have gone home. But I can take that on notice and provide you with whatever information I can get.

Senator PATRICK: Okay. The matter is subject to an FOI, and the commissioner is dealing with it, but I think I am still entitled to look and say, 'You've got a Commonwealth record and somehow it disappears.' That would be of concern to me. That's all.

Ms Falk: I'll take it on notice.

26 October 2021

[D2021/018798](#)

Senator WATT: Thank you, Ms Falk, and your colleagues. I want to begin with a report that appeared in the *Sydney Morning Herald* on 21 October, headlined, 'George Christensen says AFP letter falsely accuses him of "serious crime"', and it makes reference to an FOI application that, I believe, is being handled by your agency at the moment. Are you familiar with that report?

Ms Falk: I'm aware of the report, yes.

CHAIR: You don't need a copy of that report in order to answer this question?

Ms Falk: I'm happy to hear what the question is and then advise accordingly. I recall an article in general terms.

Senator WATT: According to this report, the Nine newspaper network has sought a copy of a letter from the Australian Federal Police to then Home Affairs minister, Peter Dutton, in relation to a police probe into Mr Christensen's frequent travel to the Philippines. Again, according to this report, Mr Christensen has objected to the release of the letter on the basis that it falsely accuses him of a serious crime. Is that correct?

Ms Falk: You will appreciate it is a current matter before my office. It is a matter in which I am yet to finalise my information commissioner review decision, so I feel limited in what is appropriate for me to say in this forum without the consent of the parties.

Senator WATT: For the matter to come before you and your agency, it obviously has passed through a few steps. People don't immediately bring a matter to the Information Commissioner. Are you able to confirm that the Nine newspaper network did attempt to FOI this letter from the Federal Police to Minister Dutton initially? Was that the original FOI request?

Ms Falk: I would need to check the facts and circumstances but it would inevitably follow that, for a matter to be before my office, there must've been an application made by a party to the relevant agency, either made or deemed and then, accordingly, an application made to my office.

Senator WATT: Yes, so presumably for it to have got to your office, an FOI request was made, was rejected, the internal appeal mechanisms were used, which didn't resolve it, and then it came to you. You're essentially the court of appeal in these sorts of processes?

Ms Falk: There is an internal review process, where applicants can ask for an agency to review their initial decision. Alternatively, a matter may come directly to my office without going through an internal review but, again, I can't comment on the particular facts and circumstances. There are matters that come to my office, for example, where no decision has been made but, rather, there has been failure to make a decision within the statutory timeframe, which renders it deemed and then triggers a right for review to my office.

Senator WATT: Have you and your officers seen this letter that has been sought under FOI?

Ms Falk: The matter is under active consideration by the office and it is practice for us to review any of the documents at issue.

Senator WATT: Again, according to this report, what the letter says is that the AFP advised Minister Dutton that it was closing the case into Mr Christensen, its investigation, but warned that he remained an ongoing risk of being compromised, according to sources who have seen the letter. Are you able to shed any light on that?

Ms Falk: No, and it would be inappropriate for me to do so at this stage of the proceedings.

Senator WATT: I thought that would be your response, so I won't push that aspect of this any further. Again, according to this article, the matter has been under extensive review by the Information Commissioner, who brought in the 'spy watchdog', the Inspector-General of Intelligence and Security,

to determine if there is a risk to national security. Without you saying what has been said about that, have you had to consult the Inspector-General of Intelligence and Security on this matter?

Ms Falk: I would need to take the matter on notice, but there are a number of cases where you would consult the Inspector-General of Intelligence and Security; indeed, it is a requirement under the act that I do so where exemptions are claimed by the agency or minister that raise issues of national security.

Senator WATT: Again, what this report says is that initially the AFP objected to releasing the letter that it sent to Mr Dutton on the grounds it could be, 'unreasonable disclosure of personal information about Mr Christensen'. Was that the original basis for refusing to release the letter?

Ms Falk: I'm unable to comment.

Senator WATT: Is that because you don't know or because it is under active consideration?

Ms Falk: On both bases.

Senator WATT: Well, is there anyone else here who might know the answer?

Ms Falk: No, I don't believe so.

Senator WATT: Let me put it this way: have the grounds that the AFP claimed to block the release of this letter changed along the way?

Ms Falk: I would have to take that on notice.

Senator WATT: Are you not sure of the answer?

Ms Falk: No. I'm unaware of the answer to the question. But I can say that in Information Commissioner reviews we would look at the original decision, we would seek submissions from parties and it is open to those to respond to the agency or minister, to challenge the basis upon which it seeks to claim that a document is exempt and that would be considered by my office, so that is not an unfamiliar practice.

Senator WATT: In what way could the release of a letter concerning a police investigation into a politician compromise national security? How is that possible?

Ms Falk: I do consider that it risks going into the facts and circumstances of an active matter upon which I'm yet to deliberate and make a final decision, so it would be inappropriate for me to answer the question.

Senator WATT: Have you or your officers ever previously had to consult national security agencies regarding requests to release documents concerning politicians?

Ms Falk: There are none that come to mind. My only qualification is to draw on evidence I gave previously around the need to consult the Inspector-General of Intelligence and Security in accordance with the legislation.

Senator WATT: I can well imagine that there would be some circumstances about particular documents, especially those about defence matters, that might invoke national security concerns, but I would have thought it would be pretty unusual for that to be raised in the context of a politician. Anyway, the point is: none that you can recall.

Ms Falk: That's correct.

Senator WATT: This article also says that Mr Christensen 'has made two secret submissions to the information watchdog in a bid to prevent the AFP's letter from being made public'. Are you able to confirm that?

Ms Falk: I'm not able to confirm that.

Senator WATT: Without going to the specifics, is it reasonable to assume that Mr Christensen has requested that this document not be released?

Ms Falk: That conclusion should not be drawn from my evidence.

Senator WATT: This has been going on for quite some time. Again, according to this report, the newspapers involved have been seeking to access this letter from the AFP to Minister Dutton about George Christensen for nearly two years. Is there a reason it's taking this long to finalise this matter?

Ms Falk: As I said in my opening statement, the office has had a significant increase in the number of applications for IC reviews that we've received. We have undertaken a number of improvements in our processes such that we have increased our finalisation rate. It is the case, however, that some cases are taking longer as a result of that. And the more complicated cases, including those that may raise national security issues or require consultation with third parties, such as the IGIS, are those that we would expect to take longer to resolve.

Senator WATT: When do you anticipate that you'll be able to make a decision about whether to provide access to this document?

Ms Falk: I'd need to take that on notice.

Senator WATT: You don't know whether it's going to be soon?

Ms Falk: I'd need to check the status of the case in order to be able to give you an accurate answer.

Senator WATT: Okay. And my last question: has Mr Christensen himself been given access to this document that he is seeking to block the release of?

Ms Falk: I'm not aware of the answer to that question.

Senator WATT: Is it usual practice to allow parties to this type of matter to have access to the documents involved?

Ms Falk: Not usual practice, no.

Senator WATT: But you don't know whether it's happened this time?

Ms Falk: That's correct.

Senator WATT: Could you take that on notice, though?

Ms Falk: I'll take it on notice.

Senator WATT: Thanks.

Senator WATERS: My first question is whether an FOI commissioner has been appointed yet.

Ms Falk: Thank you for the question. The government has not yet appointed an FOI commissioner to the ongoing role. However, the Attorney-General has appointed my colleague Ms Elizabeth Hampton, who is joining us today, as the Acting Freedom of Information Commissioner from 13 August this year for a period of three months or until a permanent appointment is made.

Senator Cash: On the appointment of the FOI commissioner: we're actually going through the recruitment process—the merit based selection process. So, whilst the appointment process is ongoing, as Ms Falk has just stated, I have appointed an interim FOI commissioner.

Senator WATERS: What is the date for the appointment of the permanent commissioner?

Senator Cash: The selection process is ongoing at this point in time. That's why we have appointed the interim FOI commissioner, so that this important work could commence, because it is a commitment that we made, as Senator Patrick knows. And, as such, when the appointment process is finalised we will make the announcement.

Senator WATERS: Ms Falk, in your report you said ongoing resourcing issues mean that a gap between incoming FOI work and finalisation work remains. Will the budget allocation for an FOI commissioner completely address this resources gap, or do you expect that there may still be a requirement for more resourcing to close that gap?

Ms Falk: Thank you. The appointment of an FOI commissioner together with an SES band 1 assistant commissioner for the area of FOI, plus some support staff, will be a welcome addition that will help to address the ongoing workload. However, as I pointed out in my opening statement, the increases that we are receiving are quite exponential, being a 140 per cent increase over the last five years. At the same time we have increased our finalisation of those matters by about 124 per cent, but a gap does remain. So what we are doing at present is looking at workflows and systems in light of having another FOI commissioner on board, and then also considering whether additional resources might be needed for case officers. That is a matter that is under active consideration. Once I have formed some conclusions in light of that I will raise these issues with government.

Senator WATERS: Thanks very much. Have your key performance indicators changed as a result of the additional funding for the new interim permanent FOI commissioner?

Ms Falk: They have not changed. Our key performance indicator for information commissioner reviews, which is the area which we are currently talking about, is that we seek to resolve 80 per cent of matters within 12 months. In the last couple of years we've achieved about 72 or 73 per cent compliance with that KPI. What we would be looking to do is to meet the KPI of 80 per cent with the additional resource.

Senator WATERS: Your annual report shows that complaints about the government's handling of FOI requests rose by 40 per cent last year and that refusal rates and delays have also worsened. Have you analysed any particular trends in what data has been withheld?

Ms Falk: The statistics that are provided by agencies give us a snapshot of a number of factors. It tells us the number of requests that agencies are receiving, the numbers that they are granting in full or in part, and also the refusal rate. It also gives us some information on timeliness. It does not give us the next layer of information which your question might be going to, which is the information itself that is at issue.

Senator WATERS: Will the new FOI commissioner, whether it is the interim person or the permanent person, have a role in improving departmental compliance?

Ms Falk: Thank you for that question. One of the roles of both the Information Commissioner and the FOI commissioner is to undertake education and also monitoring and to ensure that agencies are enabled to comply with statutory time frames. We have been doing work on this on two fronts. One is, as you mentioned, complaints that are made to the Oaic. Delay and timeliness is the key area of complaint. I have undertaken a number of investigations where I have made recommendations that seek to address the cause of those delays, and they are published on our website. The second is that we have analysed the agency statistics, and we have corresponded with agencies where we think there is a need for improvement in their timeliness and asked them to consider the causes and to put in place a rectification plan. So I consider that this kind of work is already in train and that it will be built upon by the FOI commissioner.

Senator WATERS: Could you let me know which agencies you have written to seeking improvement in their response statistics?

Ms Falk: Yes, Senator. I can take that on notice.

Senator WATERS: Thank you. Your report notes that the Prime Minister's office is one of the agencies with the worst track record, with more than half of FOI requests not being decided within time frames. Has your office undertaken any targeted training with the PMO or spoken with the officers responsible about why they're falling so far behind?

Ms Falk: No, we have not undertaken targeted training with the PMO, but what we have done is that as part of our International Access to Information Day, which occurred on 28 September this year, we released a suite of resources, including an FOI essentials toolkit, to assist decision-makers to make timely and good FOI decisions. That is available to all agencies and also to ministers.

Senator WATERS: Have you checked to see whether agencies have used that new resource?

Ms Falk: Anecdotally, and also from our website, we know that the resources are being downloaded and used. We also run sessions with our information contact officer network twice a year, which we did a month or so ago, when we ensure that these resources are brought to their attention. My staff receive feedback about the implementation of those resources, so I am confident that they're well known across the APS.

Senator WATERS: Thanks, Ms Falk. You told the recent Senate inquiry into the COAG bill that you were not consulted on the bill and that you didn't believe changes to give cabinet confidentiality to the national cabinet were justified. Have you had discussions with the PMO on that issue since the Senate inquiry?

Ms Falk: Senator, would you remind repeating the last part of your question?

Senator WATERS: Have you had discussions with the PMO on that issue since the Senate inquiry?

Ms Falk: I'll just repeat what I understood the question to be. It was whether I've had discussions with the Prime Minister's office subsequent to the committee hearing on the COAG bill.

Senator WATERS: Yes.

Ms Falk: No, I have not.

Senator WATERS: Have you had any discussions with your state or territory counterparts about any amendments that might need to be made for their FOI laws to be consistent with an amended national FOI Act?

Ms Falk: Not since the hearing. I would say that I have not had such discussions in those terms, so I have not been advised by my counterparts of any proposals in relation to state and territory laws. My interactions with my state and territory counterparts were in relation to the bill itself and the submission that I provided to the committee.

Senator PATRICK: Some of my questions have been answered in the proceeding. I might firstly declare that I am litigating against the commissioner in the Federal Court, so I will just lay that on the table. It is friendly litigation, I think, but, if you are uncomfortable with anything I ask, Commissioner, or you think it's unusual or it might be related to the court case, please just indicate that and I will respect that. I want to go to some of the numbers that you provided this committee. There is an answer LCC-BE20-71 where you dealt with an estimate of the number of matters you thought you could resolve versus the number of matters that you predicted would arrive. In that answer you basically said that you were in a position to be able to deal with about 829 reviews per annum. Do you recall that?

Ms Falk: Yes, I do.

Senator PATRICK: You also indicated a growing number of cases. It's very interesting—you predicted 1,226 reviews for the last financial year and you were out by two, so you did very well! But the number was rising. I just wonder how the Information Commissioner appointment will affect that estimate of 829 that you made.

Ms Falk: Do I take the question to be around the proposed appointment of a FOI commissioner?

Senator PATRICK: I'm just looking at the number you predicted—the 829 reviews per annum. What difference do you think the appointment of a FOI commissioner will make to that number?

Ms Falk: As you've pointed out, our estimation of the number of matters we could deal with turned out, in fact, to be a slight underestimation. We have, in fact, resolved higher numbers; last financial year we resolved 1,018. That's for a number of reasons, not least of which is the dedication of my team and their commitment to continual innovation and efficiency. I think it's too early to give you a sound answer in terms of the impact that that will make. At present, we have Ms Hampton acting as the FOI Commissioner. Ms Hampton is focusing her attention on some of the very complex matters we have on hand. What I envisage will happen is: as we are able to resolve some of those complex matters and some of our older matters, that will enhance our efficiencies moving forward. I think, though, it needs to be said that we have nearly 1,400 matters on hand, and a significant proportion of the caseload is over 12 months old, so I think it will take some time to come out with an even throughput.

Senator PATRICK: You indicated in an answer to a question on notice provided in the Senate that, in terms of matters finalised over 12 months, that number has been rising for some time. Four years ago it was 97 matters; in 2018-19 it was 177 matters; then it was 237; then it was 281 last financial year; and it is already 54 this year. If I'm right, in that answer to the question on notice you provided to the Senate, that number of matters finalised over 12 months doesn't indicate how many are outstanding; is that right?

Ms Falk: That's correct; it does not.

Senator PATRICK: How many are outstanding for more than 12 months? You've answered how many have been dealt with that are over 12 months old. As it currently stands, how many FOI matters do you have before you that are more than 12 months old?

Ms Falk: The figure that I have before me, which will be valid as at 30 September, is: 667 matters are over 12 months old.

Senator PATRICK: Wow! Can you provide on notice how that's changed over the last three or four years?

Ms Falk: Yes. I can tell you that it's up 10 per cent on last financial year. I would also like to point out that we have increased the number of cases that we have resolved within 120 days; that is up from 48 per cent in the previous financial year to 57 per cent at the conclusion of this financial year.

Senator PATRICK: Yes. I actually like the work that you do; I have no issue with it, but still there's 667 applicants who have been waiting more than a year. How many more than two years? We know of at least one, that Senator Watts was referring to before.

Ms Falk: Of those 667 matters that are over 12 months, 261 of them are over two years.

Senator PATRICK: What's the longest one that you have outstanding?

Ms Falk: I might just refer to my colleague Ms Hampton to see if she has that figure to hand. Otherwise, I can take it on notice for you.

Ms Hampton: As at the end of the financial year, the oldest matter we had on hand was dated 27 March 2017.

Senator PATRICK: So it's four years—just over four years. Is that a matter which is after personal information or policy, government-style information?

Ms Hampton: I can't tell you with any specificity about the particular request for that application. What I can tell you, though, is that there has been a significant review of all our oldest matters, and all of those matters that are on foot from around this period have been substantially progressed and are moving to completion.

Senator PATRICK: What's the problem with this particular matter? Without going into the details of the matter itself—in general terms—why has it taken four years?

Ms Hampton: It's generally the case with those matters that are still on hand after such a period of time, that there are complexities around either the nature of the material sought; the number and complexity of the exemptions that have been claimed by the agency in the matter; and the complexity of the submissions on both sides.

Senator PATRICK: Many matters would go to the Federal Court that wouldn't last that long and, in some sense, you sit not as the final merit review—there's another opportunity thereafter. You might have someone who sits and waits for four years and who gets a favourable decision from you. So you might grant access, then the government appeals it and that adds another year or two, and by that time half a decade has gone by when seeking access to information. It just seems incredible to me that you can get a matter that takes longer than almost any other court case in what is a merit review and where there's another avenue of review that follows. One might think you'd be able to get to a

point where you resolve the matter to a reasonable level and then there might be a further fight in the AAT, but often that's narrowed down to a particular point.

Ms Hampton: That's the nature of the review process in many cases. The nature of our internal process is such that in receiving submissions from both parties there's often a reduction in the scope or the number of the exemptions claimed and a refinement of the scope, materials and issues. Sometimes more materials are released during the process as well, so the refinement of the matter is often part of the process of reaching a conclusion in an IC review.

Senator PATRICK: But would you accept that having another next stage of review could also be a refinement? I just feel for people. I've been in the situation where you've had my matter for two years, you've granted me access and then we end up with the government appealing. Then a year, or three years, later you still don't have the information. I just wonder whether or not you think about that in the context of the way in which you make decisions—that in fact there's another step after your own process?

Ms Hampton: Yes of course, Senator.

CHAIR: Senator Patrick, we're over time so I'm going to have to share the call. Senator Grogan.

Senator GROGAN: I might just follow on from Senator Waters, regarding the annual report and the Office of the Prime Minister having fewer than 50 per cent of FOI requests within the statutory time frames. Can you tell me: does that constitute a breach of the FOI act?

Ms Falk: The FOI Act has within it statutory processing times. Ordinarily, an FOI request should be processed within 30 days, but that time may be extended by agreement with the applicant or, in other cases, through making an application to my office and granting an extension of time. Those circumstances might be, for example, where a case is particularly complex or voluminous. If those extension-of-time provisions haven't been invoked and the matter is not decided within 30 days, then there's non-compliance with the statutory time frames. The consequence of that is that the agency or the minister is deemed to have refused access to the documents, and the applicant then has a right to request review from my office.

Senator GROGAN: You say that the Prime Minister's office has decided fewer than 50 per cent of the FOI requests within the time frames, but there's no further detail on whether that might be 40 per cent, 30 per cent, 20 per cent. Do you have more detailed figures on that?

Ms Falk: Yes, Senator. I will have a further breakdown that I can provide. The Prime Minister's office, in 2020-21, received 61 applications. Of those, 14 were processed within the statutory time frame, which is 38.9 per cent.

Senator GROGAN: That's pretty low. That is very low! I have one example of a letter sent to the Prime Minister's office, and it related to documents concerning Mr Angus Taylor's use of a forged document in a juvenile and unsuccessful attempt to embarrass the Lord Mayor of Sydney. I can table that letter if you like.

Senator Cash: With all due respect, Senator Grogan, that is your characterisation of what occurred. Minister Taylor is not here to provide a response to that, so if we could just be clear that's your characterisation of what occurred.

Senator GROGAN: Indeed.

CHAIR: Senator Grogan, I just remind all senators that it is not appropriate, and a breach of the standing orders, to reflect on other members or senators.

Senator GROGAN: The letter in question was sent to the applicant 140 days after it was received—which, again, seems like a lengthy period of time. It refers to the usual standard text about it being too onerous to undertake the request. The request is actually quite limited in that it is only specifying four or five days that are in question. Is that the typical approach we are seeing—at 38.9 per cent, it would indicate it might be—of this contemptuous sort of approach to FOI?

Ms Falk: The statistics indicate that the Prime Minister's office has not complied with the statutory time frames on a number of occasions. In relation to any minister or agency where that is the case, firstly, we would advise them—as we do with all of our FOI decision-makers—to ensure they are looking at whether they can proactively release information that's in the interest of the citizens without the need for an FOI request. Secondly, if there is a matter that's going to take longer than 30 days, we would advise them to make sure they're consulting early in the piece with the applicant and seeking an agreement. And, thirdly, if that's unsuccessful and they consider it's a complex or voluminous matter, we would advise them to seek an extension of time from my office

in accordance with the statute. We do encourage those processes to be used to ensure the statutory processing time frames are complied with. And the objects of the FOI Act are to promote public access to information promptly and at the lowest reasonable cost.

Senator GROGAN: Does the Prime Minister's office respond promptly to your requests, so the notion of 30 days and then seeking an extension? Are you getting that sort of engagement from the Prime Minister's office? In addition to that, the content—again, the letter I have here refers to one event that happened on one day and the capture was a five-day period, which does seem to be quite narrow.

Ms Falk: I can't comment on the specific facts and circumstances. In terms of the cooperation of the Prime Minister's office, my staff have not raised any issues with me. So, my assumption is that they're cooperative, in the absence of such advice. I should also point out that there is perhaps more limited information available to the office around the conduct of ministers' offices in relation to FOI than government agencies, and that's because the statute does not allow individuals to make complaints about delays, for example, in relation to ministers. They can only make complaints in relation to agencies.

Senator GROGAN: Okay. With these further statistics, we might put a few more questions on notice for you relating to the specifics of that. Thank you very much.

Senator PATRICK: Yes, this is to the Information Commissioner, and I might ask the Attorney something afterwards as well. In other committee meetings we've been talking with PM&C in relation to Justice White's decision in the AAT about national cabinet. They've sort of said that all FOI matters with PM&C go on the facts of the matter and the circumstances, and that's not in question. But there seemed to be some reluctance that claims of section 34 for national cabinet documents may still be advanced. I'm wondering if you're considering putting anything into your FOI guidelines in relation to Justice White's decision.

Ms Falk: Yes, we have got that matter under active consideration. We will look to update relevant parts of the guidelines. We usually do that on a schedule, and we've anticipated doing that in this quarter.

Senator PATRICK: Are you contacting other agencies that may be requested to provide NCCC documents that were prepared in the industry department, for example, that went to national cabinet? Has there been any guidance issued by your office in relation to that? It seems to me that if the issue of national cabinet is raised, PM&C are of the view that that matter must then be referred to the cabinet office because it touches on what they say is still cabinet.

Ms Falk: In the FOI guidelines there is reference to FOI decision-makers referring to the *Cabinet Handbook* if they're dealing with information that could invoke cabinet exemption, and also conferring with Prime Minister and Cabinet in that regard. That is a longstanding practice. It's often the case that Prime Minister and Cabinet provide evidence to decision-makers, and indeed to my office, around whether a document ultimately proceeded to cabinet or if it's a document of cabinet and the relevant minute et cetera. So that practice is a longstanding one. In terms of specific guidance, we haven't issued specific guidance. I anticipate that when we update the relevant parts of the guidance, we'll make reference to Justice White's decision.

27 May 2021

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Senator SCARR: Commissioner, in terms of the timing of processing of FOI Act applications, could you give us an update with respect to the current time that's taken on average? I appreciate that different claims under the act can have different levels of difficulty in terms of assessing them, but can you give us a general overview in terms of how long it is taking to process an application from the time you receive it to the decision?

Ms Falk: I take the question to be specifically about the handling of Information Commissioner reviews by my office.

Senator SCARR: Correct. So, from the point in time when you receive the application for the review to when you actually make the decision, what's the typical time frame that it's taken? I appreciate there are different levels of difficulty in different cases when you're making a review.

Ms Falk: Of course, yes. The average time taken is 8.1 months, and that's consistent with last year. But, as you say, there is obviously variation in that time frame. If I can just give you a little bit of a snapshot of what that looks like, we have seen a significant increase in the number of applications to the office over the last four years—a 109 per cent increase—and at the same time we have increased our closure rate by 83 per cent through efficiencies and structural changes that we've made in the office. Notwithstanding that, there does remain a gap between the number of IC review applications that my office receives and those that we're able to resolve each year.

What that means is that at present we have a large number of matters on hand. We have put focus on early resolution of applications, and that has borne some considerable success. In the year to date, we have processed and closed 58 per cent of applications within four months, and that's a 10 per cent increase on the full financial year from last year. That success is very welcome with the office. Where we're finding the challenge is on matters that are more complicated. We are seeing an increased complexity in the case load, with exemptions being claimed around complex issues like cabinet exemptions and national security. The volume of documents that are being requested has also increased. So those kinds of matters inevitably lead to the need for a decision on my part, and they take longer, with more senior input.

If I can give you a sense of what the case load looks like now, whilst I've said we've had great success, with 58 per cent of matters being resolved within four months, we do have half the case load, of over 600 matters, that are over 12 months old.

Senator SCARR: Sorry, just walk me through that again: half the caseload—half of 600 or 600?

Ms Falk: Over 600.

Senator SCARR: Over 600 are over 12 months old?

Ms Falk: That's right. So we are seeing an increase in the age of matters. Last financial year, we had 460 matters over 12 months old, and in the year to date we have 644 matters.

Senator SCARR: It might be a bit of an iterative process, but, of those over 600 matters over 12 months old, what would be the longest outstanding? Of the 600 over 12 months old, how many are between 12 months and 24 months, how many are 24 to 36 and how many beyond 36?

Ms Falk: Of those 644 matters that are over 12 months old, 254 are more than two years old, and that figure has increased from the end of the last financial year, when we had 117 matters that were over two years old. So that's an issue that's been of concern to the office, and we are implementing a number of strategies to try and address that. One of the welcome announcements with the budget was some additional resources for the FOI function: the appointment of an FOI commissioner and also some funding for three further positions, one of which will be a senior SES position in the organisation and two of which will be support positions.

Senator SCARR: Okay. So 254 are more than two years old. How many are, say, more than three years old? Do you have statistics that go down to that granularity?

Ms Falk: I don't have that to hand, but I can take that on notice and provide it.

Senator SCARR: I'd be interested to know if there are any longstanding legacy issues. Over two years is a reasonable period of time, but 'over two years' can cover a long period, obviously, so it would be interesting to know, if you can take it on notice, just how many are over, say, three years or what the period of time is. Can you give any flavour, in terms of how long the issues might be outstanding? I'm really trying to get a general appreciation, rather than actual numbers for each time period.

Ms Falk: I'm not able to give you any more detail on that on this occasion, but I can certainly give you that on notice.

Senator SCARR: In terms of achieving the 58 per cent resolution within four months, which I really commend you and your team on, presumably that means you have some sort of triage process where a review application comes in and you do an initial triage to determine the complexity and prospects of success.

Ms Falk: That's right, and the deputy commissioner, Ms Hampton, who's with me this evening, has been working with our FOI regulatory group and the staff there to implement the early resolution procedures. I'll just hand over to the deputy commissioner, who will give you some more information on those processes.

Senator SCARR: I congratulate you and your team on the work you're doing. Obviously I'm so pleased you're getting the benefit of additional resources to help you get through this backlog, but I commend you and your team for everything you've been doing.

Ms Falk: Thank you.

Senator KIM CARR: You've indicated that you have additional resources in the budget. Can you indicate to me what that means in terms of your FOI function? Does it mean that you'll continue as Information Commissioner and Privacy Commissioner, or do you think there will be a new division of responsibilities?

Ms Falk: As I understand it, my position remains as Australian Information Commissioner and Privacy Commissioner. There'll be an additional appointment of an FOI commissioner, which will form part of the structure of the organisation.

Senator KIM CARR: So we now have two positions, do we, in terms of the Information Commissioner and an FOI commissioner? What's the overlap? How does that work?

Ms Falk: The FOI commissioner will exercise the FOI functions which are set out in the Australian Information Commissioner Act, and my role as Australian Information Commissioner is as the agency head and also as the Privacy Commissioner. I also exercise all of the functions available to me under the Australian Information Commissioner Act, which are the Information Commissioner functions, the privacy functions and also the FOI functions.

Senator KIM CARR: It was previously indicated that you needed an additional nine FOI officers, in terms of the increase in existing numbers. Is that still the case?

Ms Falk: Now that we have the budget announcement of \$980,000 for the next financial year for the FOI commissioner and for three additional staff, we are preparing to welcome the new commissioner and to look at what that will look like in terms of our future projections for the work of the office. However, I've outlined for the committee that we have a significant number of matters on hand at present—over 1,200—and that we have a significant number—over 600—that are over 12 months old. I am currently recalibrating and looking at what staffing levels are needed into the future, and I will provide advice to government about that in coming weeks.

Senator KIM CARR: You say you will provide advice to government. Do you anticipate that the additional resource will cover that backlog?

Ms Falk: I think that the appointment of the commissioner and the additional three staff will go some way to assist in the workload management issues. But I think that we will require some additional staffing if we are to resolve those older cases in a more timely manner.

Senator KIM CARR: Were you consulted about the appointment of the standalone commissioner?

Ms Falk: I was advised that government was considering that, and then advised of its decision to do so.

Senator KIM CARR: 'Advised' means 'no, you weren't consulted'. That would be right, wouldn't it?

Ms Falk: I have engaged with government on issues around the structure of the office and I have made clear that I think it's time to look at the senior capability required in the office, particularly given the Privacy Act review. I think there will be opportunities during that process to ensure we have an Oaic that is calibrated in a way that can best protect both personal information and access to information over the next decade.

Senator KIM CARR: So it wasn't a specific recommendation that you made to have a standalone commissioner?

Ms Falk: I gave advice to government around the need for additional resources for the OAIC, and a number of options for how that might be achieved.

Senator KIM CARR: That's not the question I asked. Did you specifically recommend a standalone commissioner? I presume, given you said you were advised, the answer would be no.

Ms Falk: I'm not sure I'd put it in terms of recommendation. I raised the need for more senior capability and suggested that that could be achieved in a number of ways, one of which was to appoint a commissioner. Another was to look at a series of additional deputy commissioners.

Senator KIM CARR: Is this a case where you should be careful what you wish for?

Ms Falk: Not at all. I welcome the decision.

Senator KIM CARR: Of course you do. In terms of complaints about the Attorney-General's Department, under section 70 of the Freedom of Information Act a person may complain to the Information Commissioner about an agency's performance; have I got that correct?

Ms Falk: Yes, that's right.

Senator KIM CARR: How many complaints did you have in relation to the A-G's Department in 2019-20?

Ms Falk: I'd have to take that on notice.

Senator KIM CARR: While you are there, can you tell me how many complaints you decided to investigate?

Ms Falk: In relation to that department?

Senator KIM CARR: Yes.

Ms Falk: I can take that on notice.

Senator KIM CARR: And how many complaints in 2019-20 in relation to the A-G's Department did you uphold?

Ms Falk: There are none that come to mind in relation to these questions, but I will go back and check the statistics. The complaints that are made under section 70 of the FOI Act primarily relate to the two government agencies that receive the most applications for FOI—that is, the Department of Home Affairs and Services Australia.

Senator KIM CARR: I'll come to Home Affairs in a moment. I just want to be clear: in terms of the current financial year, 2020-21, how many complaints have you had so far?

Ms Falk: The figure I have in mind is 117, but I'm just going to check that. We currently have on hand 119 complaints and 122 received year-to-date, this financial year.

Senator KIM CARR: How many of those have you decided to investigate?

Ms Falk: Under the act, I have a legislative obligation to look into all complaints unless I decline to do so on specific grounds, such as they lack substance.

Senator KIM CARR: Have you found that any lack substance?

Ms Falk: Yes, we have found that some lack substance, but I would need to take on notice if you would like that breakdown.

Senator KIM CARR: Yes, thank you. In terms of this current financial year, how many have you upheld?

Ms Falk: Again, I would need to take that on notice. But, Senator, if it assists the committee, I could refer you to the OAIC's website where I publish the outcomes of complaint investigations. Under the act, I can make recommendations to agencies to address the issues in complaints. Those recommendations are public, and they also serve as an educative tool for other agencies.

Senator KIM CARR: You've already mentioned waiting times. There's been a growth in those. In terms of the review of freedom of information decisions, how many did you receive in 2019-20—the previous financial year—and how many of those reviews were finalised?

Ms Falk: In the previous financial year, we received 1,066, and we closed 829.

Senator KIM CARR: How many individual freedom of information case officers do you have right now assisting you to conduct these reviews?

Ms Falk: There are 19 officers who handle FOI matters. That includes Information Commissioner reviews, complaints and also developing our guidance.

Senator KIM CARR: That's why you need the additional resource, is it?

Ms Falk: As I said, now that we know that we've got a commissioner and three extra positions, we're looking at the caseload and at what we think we can resolve during that year, but my preliminary assessment is that, in order to resolve those older matters, we will need additional case officers.

Senator KIM CARR: If we look at the Home Affairs department, you've said that was one of your major areas of activity. In January of this year, you concluded:

... Home Affairs does not have adequate governance and systems of accountability in place to comply with statutory time frames for processing FOI requests for non-personal information.

Have I understood that correctly?

Ms Falk: Yes. I opened a commissioner initiated investigation after receiving a series of complaints about delay by the department in handling requests for non-personal information and also having regard to the fact that, in more than 50 per cent of cases over a number of years, they had not met those statutory processing time frames.

Senator KIM CARR: You found evidence that not all staff within the freedom of information section of the department were available to assist in the process of requests for non-personal information.

Ms Falk: Yes, that's right. I made four recommendations to the department, and they were aimed at ensuring that the factors that I found were contributing to delay could be mitigated in the future. One of those contributing factors was what we found to be inadequate processes for addressing the

escalation and finalisation of decisions and also inadequate training of non-FOI staff that have to be engaged in those requests.

Senator KIM CARR: I have this little problem I'm hoping to have resolved by you. In November 2019, the Secretary of the Department of Home Affairs, Mr Pezzullo, told a Senate environment and communications committee that they had 80 full-time equivalent resources devoted to dealing with the freedom of information requests. He said he was very sure of the evidence and that, actually, he had taken steps to ensure that his understanding of the figure was correct. It's available on *Hansard* if anyone needs to check that. At paragraph 4.23 of the report of your investigation, you say there are only 75 full-time equivalent employees. So which is it: 75 or 80?

Ms Falk: The figure that I would have quoted would have been a point-in-time figure that was obtained during the course of my investigation.

Senator KIM CARR: Was the secretary of the department inaccurate when he said 80? How do you account for the discrepancy?

Ms Falk: I'm not able to fully account for it, except to say that the secretary may have been making that remark at a particular point in time, and then the figure that I've quoted in the report may have been at a different point in time.

Senator KIM CARR: I see. So it's just an accounting error?

Ms Falk: I'm not sure. I can only attest to the information that I was provided in the course of my investigation that appears in the report.

Senator KIM CARR: There is one figure on 15 November; on 22 September, a year later, we've got five less. That's really what you're saying. That's the nub of it, is it?

Ms Falk: Senator, you're presenting two figures. One is higher than the other by five, and I can't account for the differential.

Senator KIM CARR: You recommend that the department provide a report to the Information Commissioner within three months dealing with a number of matters, including the inadequacy of the department's FOI resources, the delay in allocating routine FOI requests to decision-makers and numerous other matters. You completed that report on 11 December 2020, so it's been three months. What has happened? Have you had a report?

Ms Falk: There were four recommendations made, and there were different time frames for each of those recommendations to be actioned by the department. The first two have been actioned. The first was to appoint an FOI champion; that was done in January. The second was to create and implement an operational manual, and we saw that that was important to ensure that those escalation processes were very clear. That was provided to my office on 3 May. There are two that remain. One is to complete FOI training, which I understand is ongoing for the department, but it's due to be complete by 8 July. Then the final recommendation, which is due on 8 October, is an audit to be conducted on the implementation of these recommendations and that report provided to my office.

Senator KIM CARR: What sort of assessment can you give us as to how well the department has implemented your recommendations?

Ms Falk: I can say that they have appointed an information champion. I had the benefit of hearing the evidence that was provided by the department's information champion on, I think, yesterday or the day before.

Senator PATRICK: On Monday.

Ms Falk: Yes—in answer, I think, to Senator Patrick's questions. The engagement that I've had with my office is that, certainly, their minds are focused on these issues, and I would be expecting to see some improvements in the agency's statistic report that will come to me in July this year which all government agencies need to provide.

Senator KIM CARR: So we have to wait until July to establish whether or not there has actually been an improvement?

Ms Falk: The improvement is that we now have an information champion, so we have a clear senior leader who is responsible for this work. We also have the operational manual in place, which we saw as a deficiency with ensuring that matters were appropriately finalised and escalated within time. So they are two significant changes. The FOI training has been commenced, as I understand it, and is ongoing and will be completed by 8 July.

Senator KIM CARR: Thank you very much. That concludes my questions.

CHAIR: Senator Patrick.

Senator PATRICK: Thank you very much. If these questions have been covered, just say so. Regarding the timing of the appointment of the new Freedom of Information Commissioner, when might we expect an advertisement—however you go about doing that? What do you think, typically, the process will be in terms of engaging someone, having their feet under the desk and signing off on FOI reviews?

Ms Falk: The question has not been asked. The appointment will be a matter for the department, so I will refer that to the secretary.

Mr Anderson: We'll proceed with expedition. It will be a merit process. There'll be an advertisement. There'll be a panel convened. We try and do these things as quickly as possible. Then it will be a question of the person who's appointed to the position. There might be a question as to how quickly they can actually take up the role or whether they need any period to separate themselves from whatever they were doing beforehand.

Senator PATRICK: It will be an advertised role?

Mr Anderson: That's indeed true.

Senator PATRICK: And not a politician? I can't apply?

Mr Anderson: If it's advertised, I think anyone can apply.

Senator Cash: Senator Patrick, you are baiting us. Even Senator Carr laughed at that.

Mr Anderson: Senator, I should say that there is a requirement in the legislation that you be legally qualified.

Senator PATRICK: I've only got a bush ticket. I do have a score of Rex 10-government zero in appeal matters on freedom of information, so someone does owe me a—

CHAIR: This is a senator who's known by his first name.

Senator PATRICK: When that person comes to your office, commissioner, what is the arrangement going to be? Are they going to focus on FOI? I note that under the legislation they can actually be involved in other functions.

Ms Falk: As you say, the FOI commissioner can also exercise the privacy functions. My intention would be that the FOI commissioner would be primarily, if not 100 per cent, focused on the FOI functions. I can see from time to time that there might be desirability to have some intersection with privacy matters, particularly given that one of the exemptions under the FOI Act is personal privacy, and also issues around data handling, data sharing, raise both access to information issues and privacy. But primarily my intention is that the FOI commissioner is primarily dealing with IC reviews and complaints and also undertaking those education and awareness activities.

Senator PATRICK: Noting that that person would perform those functions, do you have any measure as to how that might deal with the backlog?

Ms Falk: Yes. The Deputy Commissioner and I are currently giving thought to a work program and what it would look like to have an FOI commissioner. Also, we will be recruiting for, hopefully, an SES Band 1 position—we have money in the budget for that—so more senior capacity, and two support positions. We need to look at that. Then we also need to look at what has been our increasing caseload and our backlog. I will provide advice to government around whether additional staffing resources may be needed to address that in a more timely manner.

Senator PATRICK: I will take the opportunity to thank the Attorney for agreeing to the appointment. I think she's done it to stop my badgering. I have advocated for that position. I am grateful that you've listened in that regard, Attorney. In relation to the standing questions I typically ask about numbers of FOIs that have been with the Information Commissioner for more than six, 12, 24, 36—whichever bracket works for you. I don't want to have you change your answers, but just to give a spread—

Ms Falk: Those questions have been asked but I'm very happy to reiterate them.

Senator PATRICK: Have they been asked?

Ms Falk: In terms of the numbers, we have 1,291 matters on hand as of 30 April. Our average handling time is 8.1 months. In terms of the numbers we've received up to 30 April it's 1,018 and that is a 17 per cent increase on the same period last year.

Senator PATRICK: You were predicting that as well. So that ties in with your predictions?

Ms Falk: Yes. It's almost right on point in terms of the prediction. Then for those numbers closed, we have closed 815 as at 30 April, so, again, that's 29 per cent more than the number we closed the same period last year. We are on track to close a little more this financial year. In terms of the time taken, I advised the committee that we've had some considerable success with our early resolution program and that has resulted in 58 per cent of the cases, year to date, being resolved within four months. We're pleased about that and that's a 10 per cent increase on that figure from the full financial year last year. The area of challenge, which I appreciate the senator is well aware of, is the age of matters that has occurred because of the 109 per cent increase that we've received over the last four years—notwithstanding the 83 per cent increase in our closure rate during that same period. We've had a gap that has created that delay on those cases. In terms of the age of the cases, there are 644 matters that

are over 12 months, and that's up from 460 at the end of last financial year. Of those, 254 are over two years old, and that's up from 117 at the end of last financial year.

Senator PATRICK: I probably should declare that I have had some correspondence with the Information Commissioner, basically proposing there may be litigation between the two parties—as friendly as litigation can be. But nothing I ask you is at odds with what I've previously asked or that I couldn't ask by way of interrogatories. In terms of delays in getting a case officer, do you have an average delay for that? Having a matter assigned to a case officer, the time taken to get to the point at which you are provided with a decision, brief and then the decision time frames—do you have averages for those?

Ms Falk: In terms delay to allocation, the early resolution process is such that the matters are dealt with and triaged upon receipt. We do seek to receive document submissions and attempt some early resolution—alternative dispute resolution. I think your question probably goes to where that is unsuccessful and it is required to go through to a full decision—the time taken. I will refer to Deputy Commissioner Hampton on that matter.

Ms Hampton: The AIC has a range of processes that it employs to deal with the caseload in a number of different ways. As matters come in they're triaged. We look for like cases that can be taken through the process in a comprehensive and cohesive way. We engage early with applicants to see whether or not the scope is clearly understood. We engage early with agencies. Then a matter might be in a queue waiting to be assigned to a case officer. But while the matters are in that queue we continually look over that body of outstanding AIC review matters to see whether or not there have been any shifts or movements in either of the parties. We touch base with people from time to time. We also continue to almost triage them through that process as well, looking for like cases, looking for precedents that we can apply from a decision that's taken by the commissioner at this point in time that might apply to some that are in that caseload and be used as a way of demonstrating the way the commissioner is thinking about similar cases and putting that to the parties. So it's not a stagnant waiting list, if you like.

Senator PATRICK: You don't have average times from those different stages at all? You don't track to see where the most time is taken?

Ms Hampton: I think we can certainly get them, but I think that it's not as meaningful now as it might once have been when matters went into a queue and weren't touched again until such time they were assigned to a case officer. There's a very active engagement by the staff in relation to that.

Senator PATRICK: Maybe just have a look at that, because you have provided the answers on that in the past and they have been the subject of some of those changes to the way in which you do things, which in my view is very positive. I will close off by saying that delay is the enemy of FOI. I will leave it at that.

23 March 2021

[D2021/004496](#)

Senator PATRICK: Ms Falk, going back to my questions on notice from the last estimates—and thank you for your answers—there were some statistics given in relation to journalists and some of their late requests. Some journalists were waiting between one and two years for responses to IC reviews, 55 of them, and more than two years, 31. I know you can't give priority to journalists because the FOI Act

treats everyone equally, including me as a senator, and that's proper, but can you understand how that sort of time frame is extremely unhelpful for journalists who are trying to report? They have a very important function in a democracy to report on issues not historically but currently.

Ms Falk: I appreciate the issue that you are raising. It's to do with the timeliness of the IC review function of my office. If I can, I will make a couple of points. You're aware that many of our matters are handled in a timely way. We strive to have 80 per cent of the IC reviews handled within 12 months of receipt. Last year we didn't reach that target; it was 72 per cent. This year we've increase our target a little, to 73 per cent year to date, but we're still falling short of it. We have put in place a number of different pilot programs—conferencing programs—to try to be as efficient as possible, and I can see from our statistics that we're on track to finalising even more matters than we had the previous year. But, notwithstanding that, there is a considerable number of matters that are over one year old and, indeed, over two years old, and a number of those are, I appreciate, from journalists or politicians who consider they have public interest matters that they wish to put before me.

Senator PATRICK: I saw the numbers on politicians. Eleven are for one to two years and I think six are for more than two years. That tells me I'm the only politician doing FOIs, I think!

Senator SCARR: That was a joke!

Ms Falk: I did smile. It was late, but I did smile.

Senator PATRICK: Well, it might not have been a joke, but it might have been humorous. Perhaps more disturbingly, you gave some answers on your capacity to deal with reviews and you said that last year it was 829 and that you expected a similar number this year, next year and the year after. But you then showed projections on the number of requests that you're likely to deal with. Last year you had 1,066 reviews but only 829 were completed. This year, you're expecting 1,226, with only 829 as a capacity. It just keeps going up: 1,410, with the same capacity; 1,622 for 2022-23 with capacity to conduct only 829. So you're just going to be in a situation where you have twice the number of applications that you can actually handle. I think I might have characterised it—

CHAIR: Do you have a question, Senator Patrick?

Senator PATRICK: I think I might have characterised it as a train smash. What are we going to do here? It's getting out of control.

Ms Falk: Your question is: what are we to do? From my statutory office's perspective, we seek to deal with each and every matter as efficiently and effectively as possible, of course also paying regard to proper administrative law-making and taking the time that's needed on each matter. I've mentioned a number of the strategies that we've put in place. We have seen those work. I have only projected finalising 829 in the out years in that question on notice; however, I can see that we are already on track to finalising more than that this financial year. So we continue to do better; however, I do hold the view that, without some additional resources, it will be difficult for the office. We'll continue to be challenged in terms of having that backlog and having those older matters, despite our best efforts.

Senator PATRICK: It's an important function. Minister, I just wonder whether you could comment on the huge difference between the number of applications and the resources available?

Senator Stoker: Look, it's something I'm prepared to work with you on some more, because I know you are very passionate about this, Senator Patrick. There is a tension between the policy work of the commission and the review work. There's always a tension between the amount of resources one

wants and the limits that exist for us in the real world. I can see that the commissioner is working very hard to get that balance right. The government is giving her as much support as we can to do that important role.

Senator PATRICK: Were you offering to have a conversation with me about FOI?

Senator Stoker: Yes, absolutely.

Senator PATRICK: Alright. I will take you up on that. You may regret that, minister!

Senator Stoker: That's alright.

Senator PATRICK: I can talk about it a lot. But thank you very much.

Senator Stoker: If that's the only regret I live with, I'm doing okay.

Senator PATRICK: Thank you very much, Minister, Commissioner and Chair.

22 October 2020

[D2023/008454](#)

Senator KIM CARR: Back in October you indicated that you were short-staffed—in fact, you suggested that you may need an additional nine FOI case officers, a 50 per cent increase, to meet existing demands. Does that remain the case?

Ms Falk: We've not received any additional funding in relation to FOI since that occasion.

Senator KIM CARR: Do you still maintain the view that an additional nine officers are required?

Ms Falk: If I might give some perhaps useful context. I think I mentioned, on the last occasion, that we had had some success in increasing our efficiency with FOI throughput, and that continues to be the case. Whilst over the last five years we've had over a 100 per cent increase in the number of reviews to my office, we've also increased our finalisation rate by around 83 per cent. Last financial year we had a 15 per cent increase on the number of IC reviews to my office and we finalised an increase of 26 per cent on the year before. Notwithstanding that, there does remain a gap between the volume of work coming into the office on FOI and that which we can finalise within our key performance indicator of 80 per cent of IC reviews finalised within 12 months.

Senator KIM CARR: Is there a problem in meeting your statutory responsibilities?

Ms Falk: The area where I think that there's a need for additional consideration is the issue that I've raised on previous occasions as to how we can address the growing case load of work. There's a two-pronged approach to that that my office has been implementing. The first is to work constructively with government agencies to provide them with the resources that they need to make good decisions under the FOI Act. This year we've released a new toolkit for FOI officers, aimed at that objective. The second is that we encourage proactive publication of information held by government, and a number of government agencies have well-developed administrative access schemes which do not require recourse to the FOI Act. At the same time, as I said, we work each day to continue to look at our processes and the efficiency in the way in which we deal with FOI matters.

Senator KIM CARR: It's just that, if you were saying to this committee last October that you needed an additional nine, I took it to mean that you were having trouble with meeting your statutory responsibilities at that point—that is, before you were given additional responsibilities in relation to the COVIDSafe app. How are you coping at the moment?

Ms Falk: The two functions that I'm administering are as you set out. One is under the Privacy Act, which includes the COVIDSafe work. The other is under the FOI Act, and we haven't received additional funding for the FOI functions. This is a matter that I continue to keep government appraised of in terms of the workload of the office.

Senator KIM CARR: In fact, the way I read it, if you look at the portfolio budget statement, it would appear that across the forward estimates there is a drop from \$23.5 million this financial year to \$21.1 million in 2021-22 and then to \$13.3 million in 2022-23. Have I read the PBS correctly?

Ms Falk: There is a change in the funding over the forward estimates, if I can perhaps just step it through for the committee. The office has been given additional funding in the 2018-19 budget of \$12.91 million over the forward estimates for our role in the very important new consumer data right that's recently been rolled out in the banking sector. In addition, in the 2019-20 budget, we were provided \$25.1 million over three years including \$2 million for capital for enhancing our privacy complaint resolution and also undertaking strengthened enforcement action in relation to the online environment and social media. In the forward estimates, what you'll see is that that appropriation for the privacy functions is a terminating measure, hence you will see a diminution in the appropriation proffered.

Senator KIM CARR: So your responsibilities have grown but your resourcing has declined?

Ms Falk: The resourcing has been increased on the privacy functions, in relation to the consumer data right that I mentioned, of \$12.9 million. And also—

Senator KIM CARR: Sorry—what you've just said is that for 2019-20 it's \$25 million, but from 2021-22 it goes to \$21 million and then to \$13 million. Is that correct?

Ms Falk: Yes. In terms of the figures that you're referring to in 2021-22, the change there is that we—sorry, I'm going to start again and ensure that I've got the right figures in front of me while I'm answering this question.

Senator PATRICK: Are we on page 298 of the PBS, Senator Carr?

Senator KIM CARR: This was on page 293.

Ms Falk: In terms of the forward estimates and the decrease that I think you've called out for the 2021-22 year, that's as a result of funding that we received for carrying out my functions under the My Health Records legislation. That money comes to me through an MOU arrangement with the Australian digital health authority of around \$2.07 million. That's a 12-month arrangement. Therefore, you see that part of the funding diminish over 2021-22. In the next year, for 2022-23, that's when the \$25.1 million over the three years that I referred to—for privacy complaints and the online environment—terminates.

Senator KIM CARR: Therefore you have a figure of \$13 million as a result of the termination, as you put it. That's actually less money in the forward estimates, is it not?

Ms Falk: It is, and I certainly would be making representations to government about the need for funding to continue.

Senator KIM CARR: Absolutely no doubt about that. It is a remarkable drop. And, given the amount of money in this budget, I'm surprised that you have to wait to have that funding renewed in the period presumably out to 2022-23. Is that a fair reading of the budget statement? It's a terminating program. Presumably you'll go to the ERC and ask for additional support, given that you've got extra responsibilities. I imagine the case you'll put is: 'I'm not able to meet my statutory responsibilities.' Would that be correct?

Ms Falk: The issue is yet to arise. It will be a matter that I will continue to work through with the government, and I can perhaps draw the committee's attention also to the proposed review of the Privacy Act, which is to be undertaken by the Attorney-General's Department. As part of that, it will be looking at the legislative framework and also my functions and powers in relation to the Privacy Act, and I would envisage that the resourcing that's required to deliver on any reforms would be part of the discussions that would need to occur at that time.

Senator PATRICK: Minister, may I suggest that your level be alive to that possibility, particularly in the circumstances where we know there are more FOIs, for example, and no additional funding, which I will now come to. I just ask the minister to at least be aware of that. Commissioner, in an answer to a question on notice given in February 2019—I don't expect you to necessarily have it there—you estimated that the number of IC reviews in 2019-20 would be 1,322. What did you end up having?

Ms Falk: The number of IC reviews that we had last financial year was 1,066.

Senator PATRICK: There was a prediction this financial year of the number rising to 1,703. On the basis of what you have just told me, have you modified those predictions?

Ms Falk: Yes. The projections that we envisaged at the time have not quite come to fruition. Nonetheless, as I said, we continue to have year-on-year increases. At the end of quarter 1, so at the end of September this year, we had on hand 1,124 IC reviews.

Senator PATRICK: Okay, but that includes obviously ones from previous years. I direct you to a question at estimates, AE19-11 on resourcing levels, and ask that you might update that on notice. You provided some forward estimates on the number of IC reviews you thought you might be undertaking.

Ms Falk: Yes, I'm familiar with the matter. It was based on the modelling that I think we have discussed previously. I will take that on notice.

Senator PATRICK: Thank you. At the last estimates you told me that the number of IC reviews that you have had on hand that are more than a year old was 443. For those that were more than two years old, it was 59. Can you provide an update on those two numbers.

Ms Falk: At the end of the first quarter of this financial year, we had 479 matters that were over 12 months old and, of those, 161 were more than 24 months.

Senator PATRICK: This is blowing out isn't it? I say that in the context, particularly, for two years, that it has more than doubled and almost trebled.

Ms Falk: It's an area of concern. Last financial year we focused on resolving some of the older matters and, as I said, we improved our finalisation rate by 26 per cent. But, notwithstanding that, with the

volume of matters that we are handling we're unable, unfortunately, to fully keep on top of our 12-month benchmark of 80 per cent matters resolved within that time frame.

Senator PATRICK: Can I now go, Commissioner, to an understanding of those longer-term FOIs. Are they matters related to personal requests—that is, people seeking information about themselves—or are they about more complex access to information about government departments and what they're doing?

Ms Falk: There'll be a range—I might refer to them as a mix of matters. I don't have before me a full analysis of what you've just outlined vis-a-vis personal information versus access to what we call other information—non-personal information. But what I can say is that those matters that have been on hand for longer are often more complex matters which raise multiple exemption applications and complex issues of fact and law. One of the things that is unfortunate is that the longer matters are with the office, then sometimes parties can become more entrenched. What we're seeking to do is to try to front-load our process, to focus on our early resolution whilst matters are fresh in the door, and to ensure that we are working with parties accordingly. I'm accompanied today by Ms Hampton, the deputy commissioner, who's also on the call. She's been working with the team around a series of pilot projects that we're about to kick off for this financial year which pertain specifically to the matter that you raised.

Senator PATRICK: I might just congratulate you. As you know, I am a user of your review services. The processes you've implemented just recently, on some of the IC reviews that I've been involved in, are very, very helpful. I just make that point. Could you tell me—maybe on notice, or maybe you have a feel for it now—how many of those are delayed? I am interested in the ones of more than a year and more than two years. Could you provide information on notice as to how many of those applications are from journalists and/or politicians? I'm not after names; I would like information by category of the nature or the characteristic of the applicant.

Ms Falk: I'm just pausing to think about my secrecy provisions and the extent to which that would be acceptable. I think if you're after de-identified information, just around category of applicant, I can take that on notice and provide it to you.

Senator PATRICK: Yes—aggregates of journalists and aggregates of politicians.

Ms Falk: I'll take it on notice.

Senator PATRICK: Thank you. The other thing, noting there's been some controversy about the national cabinet and some frustration in the community, is: how many applications have you got on foot at the moment, or have had, that involve requests for documents from the national cabinet?

Ms Falk: There have been, in total, six matters.

Senator PATRICK: Sorry, can you repeat that?

Ms Falk: Six.

Senator PATRICK: Thank you. Commissioner, last year you indicated you were going to conduct a review of FOI relating to the Department of Home Affairs. Can you please provide an update on what the status of that review is.

Ms Falk: Yes, I opened an investigation on my own initiative into compliance by the Department of Home Affairs with the statutory processing time frames under the FOI Act for applications for non-

personal information. That investigation is ongoing. I think I indicated on the last occasion that I had hoped to have it concluded by the end of the financial year, but I had a caveat to that, on the basis that it would depend upon the nature of the information that I was provided with and the work that was required in accordance with that. The investigation is nearing completion, and we are intending to have it finalised with a report by the end of this calendar year.

Senator PATRICK: Any hints on what it might say?

Ms Falk: Sorry, Senator. Not at this stage. The report will analyse the reasons for the noncompliance with the statutory time frames for the processing of non-personal information on a number of occasions by the department—and that's information publicly available through my annual report—and seek to make recommendations to assist the department to address that issue.

Senator PATRICK: Thank you very much.

Senator WATERS: Thank you very much, Chair. Hi there. Thanks for joining us today remotely. Speaking of your annual report, it mentioned a few interesting things. The number of FOI requests made to Australian government agencies in 2019-20 is the largest number of FOI requests received since 2005, yet the percentage of requests refused has increased to 15 per cent. There was a significant increase in the number of FOI requests decided more than 90 days past the statutory deadline. The PMO was the office with the highest rate of decisions subject to Information Commissioner reviews. Of those 50 reviewed, more than 50 per cent overturned or varied the original decision, and that goal of 80 per cent of reviews being completed within 12 months was not met. Could you please confirm what percentage of review applications made to the Information Commissioner in 2019-20 were finalised?

Ms Falk: The percentage of review applications made to the Office of the Australian Information Commissioner that were finalised?

Senator WATERS: Yes, in 2019-20.

Ms Falk: In 2019-20, we finalised 829 Information Commissioner reviews.

Senator WATERS: What was the percentage of outstanding matters?

Ms Falk: It was around 80 per cent of all matters.

Senator WATERS: It was around 80 per cent. What was the average time taken to finalise a matter?

Ms Falk: It was 8.1 months.

Senator WATERS: Despite the rise in FOI requests and review requests and the failure to meet the 80 per cent target, the budget papers, as we've discussed already today, show a decline in appropriations over the forwards—in fact, a significant drop. What does that funding drop mean for your capacity?

Ms Falk: The funding in relevance to FOI has remained fairly stable in recent years. The additional funding that I was referring to is in relation to the privacy function. There's not been additional funding given in relation to the FOI functions in the most recent budget.

Senator WATERS: Yes. I was speaking about the drop from 2020-22 onwards. What will that reduction do for your capacity?

Ms Falk: It will have an impact on the office's capacity across both functions of the office.

Senator WATERS: It looks to me like it's a 50 per cent funding drop; correct me if I'm wrong. Does that mean it will have a significant impact on your functions, on your capacity?

Ms Falk: It has a significant impact on the functions of the agency. Accordingly, I will be in discussions with government well ahead of that time with efforts to ensure that the increased funding that was received in recent years is continued, and, as I foreshadowed, there's a review of the Privacy Act, which is imminent. I think this is an opportunity for us to be looking at the kind of regulator that's required in the digital age and across both functions of the office.

Senator WATERS: The portfolio budget papers state that a major focus for the office in 2020-21 will be promoting the proactive release of government held information. Have you done any calculations on the savings to government that could be made through increasing proactive release? I'm just noting that \$63.9 million was spent by agencies in processing FOI requests. So that's the context in which I ask the question. What sort of quantum of potential savings could there be?

Ms Falk: Yes. We are starting to do some work in relation to this. The first aspect of that, as I mentioned, is that many agencies already have administrative access processes that are well developed; they provide information to individuals without the need for an FOI request. At present, that information is not captured by my office, and that's because my statutory remit to require information from agencies pertains to their FOI applications and not those that are made outside. But we have been talking to some of the bigger agencies, who are obviously the largest data holders, to understand that a little more. Our own internal thinking around this is such that we consider that savings can be made. We saw a couple of years ago that the Department of Home Affairs introduced an online visa system which had a considerable impact on the number of FOI requests that they received. It decreased them by a few thousand. As part of the Open Government Partnership, of which Australia is a member—and we sit on that committee—we're currently looking at a commitment under the third national action plan for government to consider, which would go to the heart of this issue. It would be a commitment for all government agencies to look at their data holdings and, with input from civil society, determine what information is of most value to the citizenry and how it can be made more proactively available.

Senator WATERS: Have you had any sense of whether the government will accept your recommendation to propose that commitment?

Ms Falk: To be clear, it's a recommendation that would come from the national Open Government Partnership committee, and those commitments for the third national action plan are developed through that process of consultation, which includes representatives of government and civil society. There's been consultation that's occurring. For International Access to Information Day, on 28 September, I participated in a webinar with commissioners from around the country and civil society to get input in relation to the commitments. But it's still being developed. It will be refined and then put to government.

Senator WATERS: Thank you. There was a 10 per cent increase in reliance on exemptions to FOI between 2015-16 and 2018-19. This year's annual report says there's little change, so that's effectively a 10 per cent increase in exemptions over the last five years. Does the office have any plans to review the use of exemptions across agencies, perhaps with a view to more uniform application and consistency with the transparency objectives of the act?

Ms Falk: The way we approach that is twofold. The first is our educative remit with government agencies. As part of International Access to Information Day, we released a new toolkit for FOI practitioners, and we seek to ensure that they have the right information to understand the application of the act and to make decisions. The second is that, in terms of the IC review, decisions that I make are publicly available, which goes to the way in which the exemptions need to be applied in particular circumstances.

Senator WATERS: Would you mind providing me, on notice, with a little more detail on the second aspect of that process, please? I note we've got limited time here. I have just a couple more questions. Data reported to the office shows that fees notified for FOI requests are often substantial, but there are also often significant discrepancies between estimated fees and actual fees charged, particularly by different agencies. Since your review of the charges in 2011-12, have all of the recommendations been fully implemented? If not, which ones remain outstanding?

Ms Falk: I'd need to go back and refresh my memory on the charges review. I can provide that answer to you on notice.

3 March 2020

[D2023/008453](#)

Senator PATRICK: Thank you for coming along tonight, Ms Falk. I just want to know whether you could provide the committee with some information in relation to an investigation you conducted into the Prime Minister's office in respect of FOI performance. There was an article in the *Guardian* that talked about you having conducted a review or an examination into the Prime Minister's office. I don't want to rely on the media. I just would like a summary of your findings in relation to that.

Ms Falk: Under the FOI Act I have a statutory requirement to investigate complaints that are made to my office regarding the processing of FOI matters. This complaint was lodged with my office in 2018. The complaint progressed. It contained allegations of delay in relation to that particular department in relation to the complainant. There's a process that's undertaken in terms of receiving submissions and analysing the information. Then it falls to me to make investigation findings. In this matter, I concluded that there had been a delay without authorisation under the FOI Act. I can then make remedial recommendations to the agency.

Senator PATRICK: This was only related to one FOI?

Ms Falk: It was. In relation to the matter, I made recommendations. In relation to that particular department, they had been experiencing delays overall with their processing of FOI matters. In the 2018-19 financial year 72.6 per cent of all requests determined by the department were in time, which was a considerable improvement on the year before, at 35.5 per cent. I made four recommendations to the department and they were accepted by the department. I also asked for a report to be provided to me in relation to the implementation of the recommendations. I received that just last week and it is under consideration by my office.

Senator Payne: Just to be clear, Ms Falk: we're talking about the Department of the Prime Minister and Cabinet, aren't we?

Ms Falk: Yes, we are.

Senator Payne: So it's not the Prime Minister's Office, but the department.

Senator PATRICK: Okay, I apologise for my clumsiness.

Senator Payne: No, just clarifying.

Senator PATRICK: Thank you, Minister. I will say that I did ask questions about this and they indicated that they are now at 100 per cent compliance. So it looks like you may have done some good work on that, Commissioner.

Ms Falk: It's a very pleasing result.

Senator PATRICK: Can you provide an update on your investigation into Home Affairs?

Ms Falk: That matter remains ongoing. We have been working with the Department of Home Affairs, who have been very cooperative with the investigation. We have requested information from them and considered it, and we will be requesting further information. The matter is under active consideration by the office.

Senator PATRICK: I was involved in a discussion with a constituent last week who said they had not received a response in over a year in relation to an FOI request. I'm not raising a complaint with you; I'm just wondering whether the scope of your current inquiry is likely to capture that sort of circumstance.

Ms Falk: The current investigation is in relation to the Department of Home Affairs' processing of nonpersonal information requests—so, other information—which is a much smaller cohort of the overall 17,000-plus requests that Home Affairs receives each year. But it is the area where timeliness seemed to be most acute. So whether the matter would be raised within its scope would depend on the particular nature of your constituent's issues. The scope of the investigation will be looking at issues of timeliness for non-personal information and the processes in place to deal with those requests. At the conclusion of the investigation it is open to me to make recommendations to the agency head.

Senator PATRICK: You might find a couple of my FOI requests in there that weren't answered within the time frame!

Senator Payne: Surely not!

Senator PATRICK: In relation to my constituent, what's your recommended course of action in relation to an FOI that hasn't been responded to in over a year? Is it best to simply contact your office to make a complaint, make the claim of a deemed refusal and ask you to review it, or both?

Ms Falk: There are the two options available. My view is that we are at the heart of the matter for the individual. Where they are requesting access to documents, the matter is ordinarily better dealt with as an Information Commissioner review of a deemed refusal of those documents. In many of those cases the issues of process can be considered within the ambit of the Information Commissioner review. There are some cases where that is not the case, where really the heart of the matter is a complaint around service or a complaint around delay, in which case a complaint application is more appropriate. So it is a little circumstantial, but my guidelines issued do say that where I see review is available that would be the preferred course of action of my office.

Senator PATRICK: Thank you. I'll pass that on. As of 25 October 2019, according to an answer you

provided, there were 361 open Information Commissioner reviews that had been on hand for more than 12 months. What's the figure as it stands today—how many reviews have been with you for more than a year?

Ms Falk: I might, if I may, make a couple of contextual remarks around that. You'd be aware that, since 2015, the numbers of Information Commissioner review requests to my office have increased by 82 percent. During that same period of time, due to the best efforts of my staff and process improvements, we've managed to increase our closure rates by 45 percent. But, unfortunately, the gap between the work coming through the door and that which we can process is there. That does mean that the time to resolve matters is more extended than would be certainly ideal. We currently have 991 IC, Information Commissioner, reviews on hand. Of those, 443 are more than 12 months old and 59 are more than two years old.

Senator PATRICK: So the situation isn't getting better. I know you'd had some consultants come in and you were looking for efficiencies.

Ms Falk: Senator, we have managed to—

Senator PATRICK: Where do you go from here? We know you're doing the work of three commissioners. There are three commissioners named in the act—an FOI Commissioner, a Privacy Commissioner and an Information Commissioner and—so please don't take this as a criticism of the office. But, at an inquiry in relation to an FOI bill that I had before the Senate, the department conceded there was a close-to-crisis situation. How do we resolve this?

Ms Falk: Senator, you've mentioned that we have been successful in terms of process refinements and we continue to do so. We have finalised last financial year more IC reviews than in the history of the office, so we continue to increase our productivity. We also are working within the resources that we have to look at issues that might be able to be of broader application throughout agencies that would then impact the system more broadly. So to give an example: I encourage agencies to look at opportunities to give access to information administratively but also to look at opportunities for proactively publishing information that's often requested by citizens. So in that way people don't have to use the FOI Act to find the information. We're looking at those aspects to try and ensure the overall efficiency of the system for everyone. But you have raised the challenge that arises with a considerable increase in the workload of the office and the issues that that raises.

Senator PATRICK: Have you looked at the number of reviews that you've done that lead to—in the case management phase, you might reach a negotiated settlement or indeed when you finally make a decision as to how many of those involved decisions where the department should have released the information. That is: if there's a culture of restraint in terms of providing information under FOI, a feeling of a tendency to release less than more, if across government that attitude was adjusted, would mean there would be fewer reviews. Have you looked to see if the number of reviews results from an increase in secrecy by departments?

Ms Falk: I can make a couple of remarks in relation to that. The first is to reiterate the pro-disclosure tenets of the FOI Act. My messaging to government agencies is to take a proactive approach where that's appropriate. But, if I look at the agency's statistics that have to be provided to my office each year, that is really where I can see at least one indicator of the health of the system. If we look at last financial year, the percentage of matters where documents were provided, either in full or in part, is broadly consistent across the years from 2011-12. Thirteen per cent were refused last financial year, and that compares to 12 per cent back when the office was established. Similarly, the numbers where

access was provided in full last financial year were at 52 per cent, and that compared to 59 per cent back in 2011-12, and those provided in part last year were 35 per cent compare to 29 per cent. You also raised the issue of my IC reviews and the extent to which—this is perhaps one way of looking at it—the number of matters where I'm affirming agencies' decisions or varying those decisions. I'd say that they're fairly even. A number of the decisions, however, that come to me have already been the subject of negotiation with my case officers and departments, and that may have enabled the agency to make a varied decision and release further documents. So it might be that the scope of what I'm looking at is much narrower than the original decision-maker's.

Senator PATRICK: I'm just thinking of that *Utopia* clip on FOI. I'm sure you've seen it a few times?

Ms Falk: What would make you think that I watch *Utopia*, Senator?

Senator PATRICK: It's mandatory if you want to understand government. But anyway—

Senator PAYNE: It's a documentary, isn't it?

Senator PATRICK: That's correct. I refer to question on notice AE19-011 from 19 February 2019, so about a year ago. You provided a range of statistics in relation to disposal rates and so forth. One of the tables in there—I don't know if you have that question available, because I don't want to—

Ms Falk: Would you provide the number again please.

Senator PATRICK: It is AE19-011 of additional estimates 2018-19. It was in relation to a question I asked on 19 February 2019.

Ms Falk: I don't have it in front of me, sorry.

Senator PATRICK: Okay. I'll read this out. There was a table that you provided that said: This table provides the forecast future pending-to-disposal rate (PDR) at the end of each year. The PDR can be used as a proxy for gauging future timeliness of matters to be disposed. For example, a PDR of 0.5 equates to an approximate average finalisation time of six months. You indicated for Information Commissioner reviews that for 2019-20 you expected 0.5 and for 2020-21 you expected 0.5, getting to 0.4 in 2021-22 and 0.4 in 2022-23. Clearly, you're not hitting that, unless I misunderstand what you were referring to.

Ms Falk: That's a particular formula and I'd need to look at the data in relation to that particular construct. The information that I have in front of me this evening is around the length of time for allocation, average completion time of those that are finalised—around eight months—and that's remained fairly consistent. We have had an 11 per cent decrease in IC reviews in the first six months of this financial year. I would need to look at all of that.

Senator PATRICK: Is that decisions made?

Ms Falk: No, applications to my office.

Senator PATRICK: Of applications?

Ms Falk: Yes.

Senator PATRICK: So you had made a prediction for 2019-20 of 1,322 applications?

Ms Falk: Yes, that's correct.

Senator PATRICK: You've got fewer?

Ms Falk: Currently on hand we've got around 991.

Senator PATRICK: You said that's what you've got on hand. That might be different to those that apply—

Ms Falk: Applications received were 461 for six months.

Senator PATRICK: Okay. So that's down quite a lot. That's a good thing.

Ms Falk: It is 11 per cent.

Senator PATRICK: I will leave it at that. I might put the rest of my questions on notice.

22 October 2019

[D2019/012369](#)

Senator KIM CARR: Your opening statement said that the percentage of FOI requests granted in full was 52 per cent.

Ms Falk: That's correct.

Senator KIM CARR: Do you regard that as satisfactory?

Ms Falk: As I said, there's a legally enforceable right to access government-held information, subject to the operation of exemptions. What the statistics indicate is that, in a number of cases, agencies are applying exemptions in relation to the requests that are made.

Senator KIM CARR: That's not the question I asked you. Do you think 52 per cent is satisfactory?

Ms Falk: It's difficult to answer the question in a binary way, because of the qualifications that I've set out.

Senator KIM CARR: You've made the statement. You put out a press statement saying that government agencies could do more to make information available for the benefit of citizens. I've asked you if you think we've got a problem, and I didn't hear an answer to that question. So I then asked you if you thought the figure of 52 per cent of FOI requests was good enough, and I don't think I heard an answer there. You said you couldn't answer in a binary way. What's the point of your office?

Ms Falk: In terms of your question around the statement that I put out, it was to encourage the pro-disclosure approach to providing information. You've also asked me whether or not there's a problem with the FOI system. There's always room for improvement and, indeed, they're the messages that I also put out around the Right to Know day. The areas that I have drawn to agencies' attention are the ones that I've outlined; in particular is assisting applicants and ensuring that agencies don't take an overly technical approach to the scope of FOI requests. Also there's room for improvement in terms of timeliness, and I've asked agencies to give that particular focus. The other aspect of that is for agencies to look at what information is being requested and to look at whether or not that could be made available through administrative access systems—for instance, self-service online portals. Also there's the kind of information that's being requested: can that be grouped and then proactively

provided? So we're looking at ways in which the resourcing that's required for FOI processing across government can be mitigated through those proactive mechanisms.

Senator KIM CARR: Let's have a look at this. Do you have any sense in which some departments were better than others in responding to FOI requests?

Ms Falk: The issue around timeliness does vary amongst departments. There are a number of departments, if you take the issue of timeliness, that are 100 per cent compliant. There are processing times that are set out in the FOI Act that must be adhered to. Some of the agencies are not adhering to those time frames, and that's of concern. The POI Act also sets out mechanisms whereby, if delay is going to be experienced, an applicant can be asked for their agreement to extend time. Alternatively, an application can be made to my office to determine an extension of time request where it's particularly complex or voluminous.

Senator KIM CARR: Which is the worst department for compliance with the FOI Act?

Ms Falk: In terms of all of the departments, the top 20 departments are listed in my annual report. Each of those agencies reports a number of statistics in terms of its FOI processing. The Department of Home Affairs receives the most requests for FOI across the whole of the Commonwealth, currently at around 17,725. So that's a significant number. Timeliness has been an issue with that department. In 2016-17, only 25 per cent of requests were processed within the statutory time frame. That has been significantly improved over the last two years to 74 per cent processed within time. One of the key factors in relation to that, as I reported last financial year, was that the Department of Home Affairs instituted an administrative access program. So it shows you the value of those proactive administrative access programs, but more work needs to be done in relation to timeliness with that particular department.

Senator KIM CARR: I've been advised that in the 2018-19 period there were 4,274 occasions of FOI requests for the Department of Home Affairs and there was a failure to make decisions within the 30-day statutory period on all occasions. Is that the case?

Ms Falk: I'm not familiar with that particular statistic. The statistics that are set out in my annual report refer to financial year, and at the conclusion of the financial year the Department of Home Affairs provided decisions in relation to FOI requests in 74 per cent of matters.

Senator KIM CARR: According to the department's own statistics, in 2013-14 there were 160 failures—that's one per cent of the total number. But according, as I say, to their own figures this has now risen to 98,000 requests, and the failure to make decisions in the 30-day statutory period had increased to some 24,358 occasions, 25 per cent of all requests over that same period. So it's gone from one per cent in 2013 to 25 per cent over the five-year period. That strikes me as a very substantial deterioration.

Ms Falk: The statistics that I have provided today are drawn from the annual reports from my office, and those statistics are required to be provided by agencies under the FOI Act.

Senator KIM CARR: It's not just a guidance matter, though, is it? These provisions that you're referring to are not just there as a bit of a guide; they're actually a requirement at law.

Ms Falk: They're statutory requirements.

Senator KIM CARR: Yes, so in fact it could be said that there have been breaches of the law in at least 25 per cent of cases.

Ms Falk: In relation to how the FOI Act works, where there is going to be a delay in a matter, I've set out the process that needs to be followed. Where that's not followed, an individual can make a complaint to my office.

Senator KIM CARR: Could it be the case that it's a question not just of a culture of secrecy but of a culture of lawlessness in that department?

Ms Falk: That's not a question that I feel I'm able to answer.

Senator KIM CARR: Yes, that's what I believe, but it'll depend on the answers, Madam Chair. As you know, I say this again and again. I just want to be clear about this: the culture of openness across departments and Commonwealth agencies is an expectation, of your office, isn't it, Commissioner? You would expect that?

Ms Falk: The FOI Act has a prodisclosure approach embedded in it, and the objects of the act are to provide access to government-held information in a timely manner at the lowest reasonable cost.

Senator KIM CARR: The Australian Information Commissioner Act 2010 did provide for three separate information officers: Information Commissioner, Freedom of Information Commissioner and Privacy Commissioner. You've actually got to do all of that, don't you? Is that still the way it works, or has it changed?

Ms Falk: I exercise all of the functions that you've outlined.

Senator KIM CARR: Yes. But there was a requirement under the act for there to be three separate officers undertaking that work; is that correct? Certainly that's what the explanatory memorandum set out when the bill was dealt with in 2010.

Ms Falk: The act makes provision for the appointment of up to three commissioners.

Senator KIM CARR: So what's happened? Why has there been a refusal to appoint a Freedom of Information Commissioner? Can you help me understand that?

Ms Falk: I think that's a question for government.

Senator KIM CARR: In terms of the review of FOI decisions, you'll notice that there's been an increase in the number of direct requests to you. How many concern the Minister for Home Affairs?

Ms Falk: In relation to Information Commissioner reviews and the requests for those reviews that involve the Minister for Home Affairs, I don't have that information to hand. I'd need to take that information on notice.

Senator KIM CARR: I take it that these were matters in regard to what's termed deemed refusals? Is that right?

Ms Falk: In relation to deemed refusals, what that is referring to is that where an agency does not meet the statutory time frame they are deemed to have made a decision refusing access to documents. Some of those decisions come to my office for Information Commissioner review, but they are one part of the matters that come to my office for Information Commissioner review.

Senator KIM CARR: So you can't tell me how many have come before you relating to the failure to meet the 30-day statutory period? Do you have that figure with you?

Mr Solomon: No.

Ms Falk: I don't have that to hand. I'd need to take that on notice.

Senator KIM CARR: So you don't have a ballpark figure on you?

Ms Falk: I don't. I'm sorry.

Senator KIM CARR: You'll be able to tell me if there's been any occasion where the minister has actually met his 30-day statutory obligation?

Ms Falk: My annual report reports statistics in terms of the Department of Home Affairs. I don't have specific statistics in relation to the minister. I'd need to look at whether we could provide you with those statistics under notice.

Senator KIM CARR: You deal with ministerial offices all the time, don't you? That's part of your role?

Ms Falk: In what regard?

Senator KIM CARR: I take it that before you have to make decisions, wouldn't it be the case you engage with ministerial officers to find out what's happening with an FOI request?

Ms Falk: Staff of my office would engage with whoever the decision-maker was in relation to FOI requests.

Senator KIM CARR: Is the Minister for Home Affairs' office cooperative?

Ms Falk: I don't have information to hand in relation to that. I don't engage with ministers or government agencies specifically in relation to matters. I'm the independent decision-maker.

Senator KIM CARR: How do you gather information, then?

Ms Falk: Staff of my office would issue information requests from the decision-maker, and that would be provided.

Senator KIM CARR: So they'd gather information for you to make an independent decision?

Ms Falk: That's right.

Senator KIM CARR: Did I hear you correctly in your opening statement? Did you actually say that you're

under-funded?

Ms Falk: I did raise the issue of resourcing in terms of FOI. It's a matter that's been discussed before this committee on a number of occasions, where I've indicated that really where the stresses in the system lie, from the OIC's perspective, are with the need for more staffing. I've set out the fact that we've had an 80 per cent increase in Information Commissioner reviews and I have worked very purposefully since being in the role on looking at how we can increase our efficiency. Over that same period of time—the four-year period—we have increased our efficiency by 45 per cent. But I've formed

the view, having conducted a number of reviews of the way in which we're carrying out our work, that the only way in which the gap is to be bridged is for additional staffing resources to be provided.

Senator KIM CARR: I see. I was just trying to reconcile the line of questioning from Senator Henderson with your statement, that's all. When was the first time you requested additional funding?

Ms Falk: I'd need to take that on notice.

Senator KIM CARR: Are you sure you need to? Most officers in your position would be able to tell very quickly when they first sought additional resources, given the growth in the workload.

CHAIR: The question's asked and answered. She's taken it on notice.

Senator KIM CARR: I'm just surprised that you need to take that on notice. Because what—

Ms Falk: It's been a matter of discussion with this committee and also, of course, with government during my term. I'm just unable to recall, with accuracy, the first occasion on which that occurred.

Senator KIM CARR: I see what you mean. I do apologise. In my experience, officers in your position are able to identify at least the year in which they asked for additional resources.

Ms Falk: I have asked for additional resources since being appointed to the position in August last year but, in terms of the first occasion subsequent to that date, I would need to check.

Senator KIM CARR: I see. That's where the confusion lies. So, since August last year, you've been seeking additional support?

Ms Falk: Sometime after that date, Senator.

Senator KIM CARR: And what was the government's response?

Ms Falk: The government has acknowledged my request and is working through it in terms of normal budget processes.

Senator KIM CARR: I appreciate that agencies will ask for additional resources and it won't necessarily be the same amount as the ERC thinks you're entitled to, but what is, in your assessment, the requirement? How much do you need to do your job in terms of the report that you've given to us today about the additional demand on your agency?

Ms Falk: The amount of additional resources depends on the objective which is sought to be achieved. Of course, the more staffing resources that you have for processing Information Commissioner reviews and complaints, the quicker they can be processed.

Senator KIM CARR: So you don't have a figure?

Ms Falk: I think that there needs to be an increase in the staffing resources, and the quantum of that does depend on the time in which the backlog is sought to be addressed and also the ultimate goal in terms of how quickly Information Commissioner reviews should be handled.

Senator KIM CARR: So how much did you ask for?

Ms Falk: Senator, you appreciate that the information I've provided to government is through budget processes. I can give you an indication that, at present, my funding envelope allows for around 19 case officers to work on FOI reviews—there are additional staff who work on the FOI function more

broadly—but just looking at FOI reviews, there'd need to be at least a half increase in the number of those staff.

Senator KIM CARR: What you mean by 'a half'?

Ms Falk: A half again.

Senator KIM CARR: So—

Ms Falk: Another nine staff.

Senator KIM CARR: What will that cost in terms of your normal profile?

Ms Falk: I'd need to see if we've got any figures to hand in relation to that, but it would be the cost of those staff.

Senator KIM CARR: It depends on what they're paid, doesn't it? Those nine staff are not all SES staff, are they?

Ms Falk: No, they're case officers.

Senator KIM CARR: So you'd be able to indicate roughly what it would cost to fund nine staff.

Ms Falk: I've put forward to government the cost of that and also any capital costs that might be needed to accommodate those staff.

Senator KIM CARR: Can you take that on notice, please?

Ms Falk: Thank you.

Senator PATRICK: Just to get an idea in terms of performance or delays in terms of IC reviews, do you have the numbers there for IC reviews that have taken more than 12 months? Just the outstanding ones at this point in time? The number of IC reviews that are currently on your books that have taken longer than 12 months?

Ms Falk: The statistics that I have at hand will tell me the 2018-19 financial year statistics in terms of the numbers that were more than 12 months that we finalised, which was 177 matters and 27 per cent.

Senator PATRICK: I'm interested in the ones that haven't been finalised. You might recall that at one time I asked for statistics on those that were still outstanding after a year, still outstanding after two years, and I remember there was one that was really quite lengthy in that you'd had the matter for a number of years.

Ms Falk: May I take the specific question on notice? I might be able to provide you with some other information that goes partway to answering that question.

Senator PATRICK: Okay.

Ms Falk: At the end of quarter 1 we had 850 matters on hand. In terms of the numbers awaiting allocation, you'll recall that when we receive a matter, it's triaged and we seek to resolve the matter through earlier resolution. For those matters that are unsuccessful and require a deeper analysis through to potentially a decision by myself, we have 330 matters awaiting allocation.

Senator PATRICK: I might put some questions on notice to get the exact statistics that I'm after. It'll be consistent with the previous question on notice that I asked. In a previous estimates you talked about a company called Synergy coming in to do a review. Can you tell the committee about the output of that review and what's happened?

Ms Falk: There have been a number of endeavours undertaken by my office to review processing times and the way in which we handle IC reviews and complaints in order to increase efficiencies. One of the things that we've done—and I will certainly come to your question specifically about the Synergy report—is to conduct some modelling so that we're very clear around case management times. The second thing that we have done is some internal restructuring. The third thing that we have done is have an external consultant come in to give an external view of our processes. We've mapped those processes, looked for areas for efficiencies, and instituted some changes as a result. The report has been finalised and the team has undertaken a three-month trial. The focus of the trial has been to focus our efforts on both the early resolution but also the older matters that you mentioned. We sought to resolve as many of the older matters as possible within that three-month time period.

Senator PATRICK: And how did you go?

Ms Falk: We didn't quite meet our goal. My deputy would describe it as an ambitious or stretch goal. We wished to seek to resolve 50 per cent of the older matters within three months, and we managed to resolve 25 per cent of those matters.

Senator PATRICK: I think it's fair to say that the statistics show there are improvements, but your case load is increasing and that's led in some sense to the call for greater resources?

Ms Falk: Yes. Over the past four years, there's been the 80 per cent increase in Information Commissioner review applications to my office. If I compare that same period of time in terms of increasing efficiencies, we've increased efficiencies by 45 per cent. But notwithstanding our very best efforts and the very best efforts of my staff, to whom I'm very grateful and appreciative, a gap remains between the volume of the work coming into the office and the staff that's needed in order to process those matters.

Senator PATRICK: Ms Chidgey, you mentioned that all was fine and dandy before in response to Senator Carr's question about three commissioners.

CHAIR: I don't remember that language, but I like it!

Senator PATRICK: It was along those lines. That seems inconsistent with some evidence that was taken by the Legal and Constitutional Affairs References Committee in relation to a proposed bill, where Mr Walter said that there are undoubtedly stresses in the system. You seem to have an optimistic view about the situation.

Ms Chidgey: I'm not sure what Mr Walter was referring to. My evidence was that the Australian Information Commissioner Act allows the Information Commissioner to perform the functions of the other commissioner roles and that that was working.

Mr Moraitis: I think Mr Walter was correctly alluding to what are stresses, as Ms Falk has pointed out. She's been in consultations with us about her budget pressures. We're cognisant of those and aware of the parameters of her needs. Ultimately it's a matter for government to deal with resources. That's the best I can say at this stage.

Senator PATRICK: Sure. I was just querying the comment that had been made.

Mr Moraitis: We didn't say it was 'fine and dandy'.

Senator PATRICK: It was working.

Ms Chidgey: It was very specifically about the ability of the Information Commissioner to perform the functions of the FOI Commissioner.

Senator PATRICK: So you don't think that if you had additional resources to make independent decisions—like an FOI Commissioner—that, indeed, some of the backlog that we've just discussed wouldn't be resolved?

Ms Chidgey: There's a question about the resources for the office as a whole, whether that's an extra commissioner or other staff.

Mr Moraitis: Conversely, you could argue that you could have nine extra FTE and you have a single person doing all three functions, and that achieves the objective. That's an alternative.

Senator PATRICK: I think I FOled the commissioner's diary at some stage. She looked pretty busy and didn't seem to have a lot of time to do independent decisions, actually. Going back to the matter that was raised by Senator Carr in respect of Home Affairs, Home Affairs did provide statistics that said they had received applications in 2017-18 and had—I'm just rounding here—15,000 applications; and closer to 19,000 applications in 2019-20. And they were running, in both those years, 3,721 and 3,746 deemed refusals. That goes to the question Senator Carr was asking. In some respects it isn't a breach of law in the context that there's a statutory provision that says it is a deemed refusal. It's at that point that people are now entitled to come to you, to conduct a review, with an understanding that they've been denied access. Is that the correct interpretation of the act?

Ms Falk: If the FOI request is not processed within the statutory time frame, the agency or minister is deemed to have refused access, and that triggers the ability for my office to conduct a review for—

Senator PATRICK: So, in some sense, the statute cleans up the mess from Home Affairs. However, in many instances, the person FOling Home Affairs wouldn't necessarily be privy to or understand their rights, in relation to a deemed refusal, or wouldn't understand the concept. They'd just say, 'It's late. They're not responding and they are really hard to get hold of. For me to get access to the status of an FOI I've had to ring the minister's office for them to get in contact with us, because they only have an FOI email address.' Is there anything you can do, by way of training or other mechanisms, particularly in relation to Home Affairs, to either encourage extensions of

time, for which everyone is informed, and/or some intervention that allows, in the case of a 30-day deemed refusal, a letter to go out to advise people of their rights?

Ms Falk: Thank you, and I'll give close consideration to the matters you have raised. I had a recent meeting of information contact officers in September, which was all of the FOI practitioners across the Commonwealth. A number of the issues that you've raised we've sought to lay out to practitioners, in terms of the importance of communication to the public around where their application is up to and ensuring that individuals do understand their rights. In terms of issues of training, I'll take those matters on notice and give it close thought.

Senator PATRICK: It goes to my next round of questions, which relate to the activities of Professor McMillan, the first Information Commissioner, who had a program of training for FOI officers across

each of the agencies. Would it be fair to say that the effort that he put in, at the time, is not being replicated by your office, perhaps on account of a lack of resources?

Ms Falk: I mentioned the information contact officers network. We meet twice a year. My staff, then, convene a round of meetings with all of the 20 top agencies, individually, discussing their issues and making clear the expectations of my office. That has proved to be very effective. In between those times, we use our online mechanisms to ensure that IC reviews, updates to the guidelines and other guidance is provided to information officers. We do think that there's more that can be done from a proactive, educative position of the office. We are particularly looking at the kind of induction that's provided to new recruits across the APS, in terms of their FOI responsibilities. One of the things that's important, I think, to remember is that FOI is a whole-of-agency obligation, including line areas who have to provide the documents. It's not just the FOI practitioners who are responsible for ensuring the timeliness issue, in particular, is addressed. These are matters we are moving forward with, and we're doing that in the best way we can on the resources we have.

Senator PATRICK: Once again, this is not a criticism; I'm just trying to understand the situation. You'd be aware of a couple of media reports. I'll just go to two of them. One was in relation to an SBS journalist who sought application to the Department of Defence on some costs associated with Minister Price's travel. They got a response back, saying: 'We'll give you that answer if you front up \$21/2 thousand.' That sort of thing, I would have thought, would disturb you. They weren't asking for invoices, just an adding of the total cost. I think section 15 allows someone to go in and add up a number and send that number to an FOI applicant.

Ms Falk: Charges do not need to be levied. They are a discretionary matter for government agencies and ministers to consider. My guidelines set out the kinds of factors that should be considered when deciding whether to levy a charge—for instance, the information that's sought and the public interest, the nature of the request and so on. When I look at the agency statistics in terms of charges overall across government agencies, there has been a decrease, if you look at the holistic scale, in the amount of charges that have been levied by government agencies. However, there has been an increase in the collection of those charges by agencies.

Senator PATRICK: I just wonder, if you see a media article like that, whether it doesn't raise your eyebrow and make you think, 'Right: I'd better go and have a bit of a look at that.'

Ms Falk: I was concerned about the matters that were raised, and I was pleased to see that they were rectified. I should say, in terms of broader messages to the APS, that we are updating our FOI guidelines in relation to charges, in relation to drawing out those matters that I've particularly raised in terms of the discretionary nature of charges and how they should be used.

Senator PATRICK: Finally, you will have seen an article about a whistleblower inside PM&C who had basically initiated a PID stating that across 25 FOIs there was basically flagrant disregard for the law in responding to FOI applicants and that had caused the department to conduct a review. Are you privy to the outcome of that review? Have you looked at what happened, noting that it is a PID and there are secrecy provisions around PIDs? But, once again, it is an alarming allegation, and I'm just wondering whether or not you pick up the phone, whether you execute a power of some sort to go and also examine what might be going on.

Ms Falk: I've not had any personal involvement in relation to the matter you raise.

Senator PATRICK: But you're aware of it?

Ms Falk: There's been a lot of media in recent times. I have some recollection of the matters you're talking about, but I'd need to consider it more carefully.

Senator PATRICK: All right. Thank you.

9 April 2019

[D2019/008932](#)

Ms Falk: Since the last occasion that I appeared before the committee the government has announced a proposed provisions to strengthen privacy protections under the Privacy Act, including increased penalties and a new system of infringement notices. Importantly, my office will receive \$25 million over three years to deliver new work, as well as to enhance the office's ability to prevent, detect, deter and remedy interferences with privacy. It is also intended that there will be an enforceable code to introduce additional safeguards across social media and online platforms that trade in personal information. The code will require greater transparency about data-sharing and requirements for the consent, collection, use and disclosure of personal information. This will incorporate stronger protections for children and other vulnerable Australians within the online environment. Accordingly, the OAIC will be focused on working collaboratively and constructively with all parties to enhance privacy protections both online and offline and to give Australians greater control over their personal information, ensuring that it is handled in a way that is transparent, secure and accountable.

Senator PATRICK: Does that new function have new employees attached to it?

Ms Falk: It does. At present we have an ASL cap of 93 staff, and that will be increased to 124. That takes account of this new measure. It also includes some additional staff for the consumer data right, a measure which was introduced in the last budget.

Senator PATRICK: Do I also detect an increase in capital expenditure?

Ms Falk: There is an increase of \$2 million for capital. At present the OAIC requires additional accommodation, particularly with this new investment and increased staffing.

Senator PATRICK: You operate out of Sydney?

Ms Falk: That's right

Senator PATRICK: Is that a lease of a building or something?

Ms Falk: It will be. We are making inquiries in relation to that at this time.

Senator PATRICK: We didn't really get much in the way of increased funding for FOI, I presume, based on that previous statement?

Ms Falk: There was no specific funding for FOI.

Senator PATRICK: Last time we had a bit of a chat about FOIs that had not been assigned case officers. We had 18 cases that had not been assigned an officer within 11 months—almost not starting the review—although I accept that there is some preliminary work done in that circumstance. Has that situation changed at all?

Ms Falk: At present the allocation time in the circumstances you have described—that is, where the matter has not been able to be resolved through our alternative dispute resolution interventions—is approximately 11.9 months for the oldest matter awaiting allocation.

Senator PATRICK: The question goes to whether we are starting to clear that backlog. Is it getting worse, is there a status quo situation or are we actually cutting our way into some of those delays?

Ms Falk: In the last quarter we received slightly fewer Information Commissioner reviews than we had in the previous quarter. In the quarter to December 2018 we received 241 IC reviews. In the last quarter we received 210. So that does provide us with an opportunity to not only look at the matters that are coming to us each quarter but also seek to resolve some that continue to await allocation. I would say, though, that the situation at present remains much as it was when I appeared before the committee on 19 February this year. I might ask my deputy, Ms Hampton, to provide you with some information in terms of the continuing work that we are doing within the office in terms of seeking to address the reallocation and wait times.

Ms Hampton: We have a really fabulous FOI team. They're really smart, they're really well educated, they're really well trained and they're really well led, and they are working really hard to address some of the backlogs that we've got in the FOI space. More importantly perhaps than all of those criteria, our FOI team are in this space because they have a deep belief in the objectives of the FOI Act and they are working very hard to ensure that those objectives are met. So we have a really great team. But in addition to that we've been doing a lot of work looking at the processes that are in place within the office. We've done a lot of modelling and a lot of planning. Just this week, we've got consultants working with us to go through all our processes, to see if there is any way we can streamline them, make them more efficient and effective—and produce more timely results for those individuals who have made applications under the FOI act and provide more timely guidance to the agencies that are involved in those. With the resources that we have and the initiative that they're showing, we are absolutely doing our best to get through the backlog. However, the volume—and the increasing volume, over some years—is such that we aren't able to make the inroads that we'd all like to be making into those—

Senator PATRICK: I have no problem with the quality of your team. My sense is that it is due to a lack of resources, that you continue to not get through these FOIs that people rely on to get access to information that they are lawfully entitled to. You mentioned some modelling. I thank the Information Commissioner. I got an FOI back from you on some modelling. I haven't gone through that in great detail yet—it was quite voluminous—but I appreciate you being a model supplier of information under request. You mentioned consultants. Who are the consultants and how much have they been paid, and over what period have they been tasked to look at how to improve the processes?

Ms Hampton: We have some consultants in this week, in fact, from Synergy. I will have to take what we are paying them on notice, if that's all right.

Senator PATRICK: Yes.

Ms Hampton: They're working through a new model with us and spending a lot of time with our team, over the course of this week, to unpack and unpick each of the processes that are involved in our key functions, just to see if there is any repetition, if there is anything else that we can do to streamline those processes.

Senator PATRICK: When is that body of work due to be completed; what's the estimate?

Ms Hampton: I expect a report back on Friday and there might be a little bit of—

Senator PATRICK: So it's a really short consultancy.

Ms Hampton: Yes, it's one week, and it's really quite intensive.

Senator PATRICK: Thank you. I just want to go to, finally, my hobbyhorse of three commissioners. Currently, we've got one commissioner filling the three roles. You'll be aware, Ms Falk, that there have been motions in the Senate agreed to by the Labor Party that we need to restore that to three. I'm hoping that will be an election commitment, at some stage, for those in the front seats. In the event that that were to occur or this government were to decide to make a change, to go to the three positions that are required by statute, you fill two positions at the moment, don't you?

Ms Falk: Yes, I do: the Australian Information Commissioner and the Privacy Commissioner positions.

Senator PATRICK: So someone could just appoint a new FOI commissioner?

Ms Falk: That would be a matter for the government.

Senator PATRICK: I understand that. It's about, if the government decided to do that, what the arrangements would be. They could simply appoint a new FOI commissioner. In terms of the Privacy Commissioner, if they wanted an additional resource what's involved in that, noting that you fill that role?

Ms Falk: I hold that position for a three-year term, which expires on 16 August 2021.

Senator PATRICK: So you'd either have to stand aside or some other arrangement would have to be made to fill that spot, to get an extra resource in as a third commissioner.

Ms Falk: They would be matters that would need to be considered should such a proposition be put.

19 February 2019

[D2019/008933](#)

Senator PRATT: Defence and Home Affairs, thank you. Ms Falk, is it correct to say—and we've discussed this before—you're currently fulfilling all three lead roles carried out by the Office of the Australian Information Commissioner?

Ms Falk: I've been appointed as the Australian Information Commissioner and also the Privacy Commissioner, and both of those positions are able to exercise the freedom of information functions.

Senator PRATT: Yes. Noting that the legislation does have the capacity to support three separate commissioners, how do you find that workload, in general terms?

Ms Falk: I've previously given evidence—I think to this committee and others—that the position that I'm appointed to is able to exercise those three functional areas, and that that's effective; and that if that were to change, that would be advice that I would give to government. I've pointed out to the committee, however, that in terms of the resourcing of the OAIC, the issues lie in terms of the staffing and case officers to assist to progress the increased workload that we've experienced over the last three years.

Senator PRATT: So you have experienced an increase in workload over the last three years. How would you characterise that? Where are the increases?

Ms Falk: In terms of the workload over previous years, in the last 12 months there was an 18 per cent increase on privacy complaints. For freedom of information access review requests, that increased by 27 per cent. Those kinds of percentage increases are fairly consistent over the last three years; however, in the past six months, from July to December, we've seen further increases. In relation to privacy, we have received a 22 per cent increase compared to the same time last year. In relation to FOI, in the last six months we have again seen an increase of 42 per cent of the numbers that we have received.

Senator PRATT: In which areas are the extended areas of delay blowing out? are freedom of information requests one such area?

Ms Falk: I should caveat to say that every freedom of information request that is made to the office, or privacy complaint, is triaged and actioned in a timely way to determine the risk to the individual and also whether there are other factors that would warrant it being expedited. We resolve more than 50 per cent of the privacy complaints through an early resolution model; similarly, we have seen a success on the freedom of information side of the work in increasing the numbers that we're resolving. There was an increase of 20 per cent in the last six months of FOI IC reviews resolved. Having said that, those matters, both in privacy and FOI, that need to go to a full investigation are experiencing a delay to be allocated to an officer.

Senator PRATT: How long is that delay?

Ms Falk: It will vary from case to case, depending on whether there are particular factors that would warrant expedition, as I've said. The oldest matter waiting for resolution for privacy is at nine months at present. For freedom of information, the allocation time is 8.5 months.

Senator PRATT: Do you have statistics on that that we can compare over time?

Ms Falk: I can give you some comparisons as at October last year. For instance, for privacy the allocation time was around 7.5 months, and that's moved to nine months. For FOI, at October last year it was 8.5 months. It's moved to 11 months. In terms of addressing that very real issue, we're working proactively in terms of the causes of the increase in matters, working to seek to ensure that there's good FOI decision-making happening in the first place, and, in terms of privacy, that there's good awareness across government and business around responsibilities. At the same time that we're looking at our internal processes, we are putting more focus and resources on our early

resolution, which is bearing fruit. As well as that, we are looking at what our resourcing needs might be moving forward, should that workload be sustained.

Senator PRATT: Can I ask how many FOI requests are currently before your office?

Ms Falk: Yes, currently on hand we have 784 FOI IC reviews.

Senator PRATT: And you said the longest case still waiting for allocation, I think, was—

Ms Falk: 11 months.

Senator PRATT: 11 months?

Ms Falk: Yes.

Senator PRATT: What is the average time it takes for your office to complete a whole FOI decision, on average—for the whole case load?

Ms Falk: I would have figures for average completion times for last financial year. I think I should take that on notice to make sure I'm accurate.

Senator PRATT: Do you have any statistics at all that you can share with us today? You can frame them in a way you're comfortable with reporting, if there is something you can tell us.

Senator Reynolds: I think Ms Falk said she will take that on notice to make sure she can provide accurate information for you, Senator Pratt.

Ms Falk: Unfortunately, I don't have those figures in front of me.

Senator PRATT: So you don't have the average completion time? Do you have some figures with you in relation to completion times, not averages, but other—for example, you were able to tell us the longest time. Are you able to tell us how many cases are waiting for a similar length of time?

Ms Falk: We have a KPI of resolving 80 per cent of matters within 12 months, and we've consistently met that KPI over recent financial years.

Senator PRATT: Okay.

Senator PATRICK: I might help you, Senator Pratt. I have an FOI that shows that there are 18 matters that have been waiting 11 months to get to a case officer.

Senator PRATT: Journalists have been refused access to documents and are therefore raising concerns about the delays and the time it takes to have a government refusal of a decision reviewed by the Office of the Australian Information Commissioner. A key concern given to us is that, by the time a review is completed, the subject matter of the news story may no longer be current. This means that the government of the day may refuse an application entirely on spurious grounds, knowing that, even if the decision is ultimately overturned, the delay caused will ensure the information does not reach the Australian public in a timely and meaningful way. Would additional resources assist you in dealing with applications for the review of FOI decisions in a more timely manner?

Ms Falk: It's my responsibility to prioritise the appropriation that has been given to the office. I've talked through some of the strategies that we've put in place, including early resolution. We've tripled the number of matters for IC reviews that have been varied by agreement. There are early resolution processes that result in changed decisions, that result in further documents being provided to applicants. So we are seeing results. The figures that I've given you are a number of matters which are more complex in nature and have further exemption applications that may be applied to them.

Senator PATRICK: That answer doesn't go to the burden of the senator's question. She was asking whether or not more resources would assist you. That's a yes or no answer. You cannot, as a statutory officer, with responsibilities—

Senator PRATT: You are independent. You could actually give us—

Senator Reynolds: Senator Macdonald—

Senator PRATT: Chair, I would just like to record that I don't mean any particular offence attached to the words that I said, which underscored that Ms Falk has an independent statutory position and she's entitled to express her views at this committee, which she has done. I'm very grateful for the opportunity to have that engagement with you across the table, so thank you very much, Ms Falk.

Senator PATRICK: Thank you, Chair. Ms Falk, I know you do a lot with the resources that you have, and I'm not critical of what you do with the resources that you have, but you, of course, are aware there's a statutory requirement for FOIs to be dealt with in a timely fashion, and you are at the heart of that when it comes to IC reviews. Would you accept that?

Ms Falk: My office has an obligation to seek to provide access and Information Commissioner reviews in the most efficient manner possible, and that's what we strive to do.

Senator PATRICK: And indeed timely. There is a requirement in section 3 of the act for the prompt release of information?

Ms Falk: Certainly.

Senator PATRICK: Okay. You have, as I mentioned before, 18 cases—and this may have been updated since this information has been provided to me—that are 11 months old. When I say '11 months old', I mean cases that haven't even been assigned a case officer. How do you deal with people when they're after information—some of it would be related to professional interests and some of it would be personal—and are in a situation where, for 11 months, they haven't even been assigned a case officer?

Ms Falk: Thank you, Senator. In terms of the matters that may have been with the office for 11 months, may I point out that those matters would not have lain idle during that time, so they would have been triaged. We would have sought the relevant documentation on the decision from the agency; we would have sought submissions from the parties; and we would have attempted to resolve the matter, either by providing a view as to the relative merits of the matter or by inviting the agency to make a revised decision if we considered that they had erred in their original decision-making. The matters that you refer to would then have been placed in an allocation queue awaiting a case officer to conduct a more in-depth analysis of the matter and to prepare an Information Commissioner review decision should one be required. Even at that point, they would still liaise with the parties and seek to get a resolution in the interests of providing access to information in the most cost-effective and efficient manner.

Senator PATRICK: As you know, I have a number of IC reviews. I don't want to go to them; it would be inappropriate to go to them. But just in terms of the experience I have, with a number of them, when you send something to the Information Commissioner's office you end up with almost no contact, and in many cases no contact until such time as you have been assigned a case officer. So, I accept that you're saying that in the background things may be getting done, but I struggle to understand why you can't, in 11 months, get a submission from a department, why you can't elicit from them a revised decision, if that's possible. How does it take 11 months? That's longer than court matters in getting first submissions.

Ms Falk: I don't wish to obfuscate in relation to the issue you've identified in terms of the length of time. Ideally, these matters would be resolved in a more timely manner. What I seek to point out is that it is a smaller number of matters that require that length of time. They might relate to more-complex matters. And many matters are resolved in a much more timely way. I have managed to find

some of the statistics Senator Pratt sought earlier. The average time taken to resolve in Information Commissioner review over the past three years has been between six and seven months. Many were resolved in a much more timely way, because that's an average amount. Some, regrettably, as you pointed out, are taking longer.

Senator PATRICK: There was a shutdown of your office back in 2014, I think it was—or a squeezing of resources—followed by a decision by Prime Minister Turnbull to re-establish that. Prior to that point, when we had three commissioners—an Information Commissioner, a Privacy Commissioner and a Freedom of Information Commissioner—as required by the statute, there was a lot of work being done by your office to train officials in the correct making of decisions so that hopefully they won't get to the point where someone has to make an IC review. What progress has there been, or what work are you doing in that space right now?

Ms Falk: In terms of our proactive work, it's very important that we're engaging with agencies to ensure that they're given the resources they need to make good decisions in the first instance. Of the kinds of engagement that we have, the first is the guidelines that my office issues, which are updated from time to time and that agencies must have regard to. We convene information contact officer network meetings. Towards the end of last year I spoke at one of those as part of Right to Know Week. Those are opportunities for all FOI practitioners across the Commonwealth to come together to hear from me, to hear from senior staff and also to hear from practitioners from across the Commonwealth to share their experiences. Those meetings run twice a year, and in between times we have a newsletter that's provided to FOI officers. And we've commenced providing, if you like, guidance and tips in those newsletters that are based on the kinds of issues we're seeing through IC reviews, to help elevate the decision-making and to draw agencies' attention to areas that we're seeing in IC reviews warrant more attention.

Senator PATRICK: So, you don't have dedicated training courses. I think you used to, didn't you?

Ms Falk: In 2010 some training occurred, which was around a whole new act coming into being. That was for a period of time, to establish the new jurisdiction.

Senator PATRICK: We'll go back once again to the burden of Senator Pratt's question. I'll just read the testimony of Mr Walter from the Attorney-General's Department. At a recent hearing he conceded, 'There are undoubtedly stresses in the system.' You're conceding that there are stresses in the system inherently by the fact that you have all these delays running through the system. I say this in the context that ASIC used to say: 'No, we've got enough resources. No, we've got enough resources.' When the whole system breaks the reality pops out. I cannot understand how you could be sitting in your position as a statutory officer with obligations, knowing that there are stresses and knowing that you're falling behind—notwithstanding that you are working as efficiently as you possibly can with the resources you have—and not be able to form the view that you require additional resources.

Ms Falk: I've not said today that I don't require additional resources—in fact, the contrary. I was asked a question earlier around the three-commissioner model and my answer went to the fact that I thought that that was working well at this time—if that were to change, I would advise government—but what is required is additional resources at the staffing level. I understand that that may not have been clear at the time. But I have been on record a number of times in terms of the increased workload and the fact that the ability of the office to keep up with that workload is being challenged. However, I don't think it's acceptable as a statutory officeholder to simply say that the office requires more resources with nothing else added to that. I think that would be simplistic.

It's incumbent on me to look at prioritisation across the office but also to understand the causes of the increased work, to work in terms of the proactive educative strategies that I've outlined and to ensure that we are taking a holistic approach to looking at our processes and that we are doing the best that we can. We can see over the last few years that we have continued to increase our throughput, and that's through trialling different pilots and different methodologies and looking very critically at our processes. I will continue to do that. There would be no regulator in the country, I'm sure, who wouldn't say that, inevitably, time frames couldn't be improved with additional resources, and I'm no exception to that.

Senator PATRICK: The budget is approaching. Have you made submissions in relation to the budget in terms of resources?

Ms Falk: I'm on the record as having said that I'm in discussions with government, and, of course, they're confidential budget discussions.

Senator PATRICK: Confidential in the context of what? I have a constitutional obligation to make sure from an oversight perspective that statutory officers are doing their job properly and so it's quite reasonable for me to question you on matters of resource, where the shortfalls are and so forth. It's quite a reasonable proposition. Can you give me some idea of the magnitude of resources you might require in the FOI space to enable you to clear the backlog that you currently have and to deal with the increasing numbers, notwithstanding you are working on efficiencies—that's one side of solving the problem? What magnitude do you think would get some of these decisions down to, say, six months?

Ms Falk: I'd need to take that on notice. I said earlier that in previous committee hearings we have undertaken some modelling in terms of what I project the current workload at and how it might play out over the forward years.

We have done that work. I have been in discussion with government around what future resources might be required for the office.

Senator PATRICK: Can you make that modelling available to the committee, please?

Ms Falk: I would need to consider that and take some advice on that. Certainly I will consider that.

16 November 2018

[D2019/013122](#)

I refer to the submission that I've previously made to the committee. I've also got some updates to the statistics referred to in that submission to include the last financial year, which we've had handed up to the secretariat—so I apologise to Senator Pratt, who's not present in the room. It might be helpful, as a starting point, for me to take you through those statistics and what they show. You'll see that at table 1 there's an overview of the Information Commissioner review applications that we received and finalised and that 801 were received last financial year and 610 were finalised.

CHAIR: Sorry?

Ms Falk: On the right-hand side, in the 2017-18 column of table 1, the IC reviews received are 801.

CHAIR: Okay, this is an update of your table 1 in your submission. I'm with you now.

Ms Falk: Excellent. The number of Information Commissioner reviews finalised was 610. In terms of the numbers received, that is a 27 per cent increase, and that follows on from similar levels of increases over the last three years. In terms of the resolution rate of 610, that's an 18 per cent increase. Again, that follows on from efficiencies that we've created in our processes and is a result of taking an early resolution approach to our work to increase the numbers that we are resolving. Notwithstanding that, you'll see that there is a gap between what has been received and what has been finalised. I think the evidence that's been given by others today perhaps is borne out by that. It is evident that, from a resourcing perspective, the OAIC is experiencing some challenges there. In relation to that, our objective is to focus on and achieve the object of the FOI Act to facilitate public access to government information promptly and at the lowest reasonable cost, and, accordingly, increase citizens' public participation in government decision-making and increase scrutiny, discussion, comment and review. In achieving that objective, we have the resourcing challenge that's been mentioned and is the subject of discussions with government. But there are also other aspects of the work that I'm focusing on. I've had the appointment for three months, and during that time we've done a review of the workload of the office and the forward requirements of what we envisage is required. We've also looked, though, in terms of our processes. We will be focusing on our early resolution process, and I can come back and explain a little bit more about the IC review process, if that assists. We've also been focusing on the proactive 'push' model of releasing information that is fundamental to the reforms to the FOI Act that occurred in 2010—that is, there is an obligation on government agencies to be proactively publishing information, where that's appropriate. To that end, we've undertaken a survey of the Information Publication Scheme, which is a proactive release model, and the results of that will be provided shortly. We've also worked to provide additional guidance to agencies in terms of facilitating administrative access outside of the FOI Act. And other activities that we have planned in our corporate plan include reviewing the application, or the administration, of the disclosure log provisions, whereby agencies and ministers are required to publish information that they have provided under FOI on their websites within 10 days of providing the information to the applicant. So it is a multifaceted approach to dealing with what is an ever-increasing workload. There were questions, I think, in the previous evidence and questions to the department around the extent of Information Commissioner involvement and pressures in the system. The committee's well aware that I've been appointed to the Information Commissioner and Privacy Commissioner roles and that I'm carrying out all three of those statutory functions. I consider that, from the perspective of the one-commissioner model, that's functioning effectively at this time, and that's something that I will continue to review and, if necessary, advise government on. In making that statement and forming that view in the first three months of my appointment, I've had regard to a number of factors. In particular, in terms of the statistics, the numbers that we are resolving have not been adversely affected by a one-commissioner model. Table 1 in front of you gives you the numbers over the years of Information Commissioner reviews that have been finalised, with numbers in the early days, when the office was establishing its processes and procedures, through to the position that we're in now, with 610 matters being finalised. The other indicator in terms of statistics is our key performance indicator, which is that we finalise 80 per cent of matters within 12 months of receipt. If you turn to table 2 of the document that I've provided, you'll see that there's a breakdown of the numbers that are finalised within particular time frames. Towards the bottom of the table, the third-last row, the number finalised within 12 months as a percentage of all finalised, you'll see that for 2017-18 we finalised 84 per cent. And that finalisation rate of greater than 80 per cent has been consistent since 2015-16. In addition to that, I think it's also important to look at where there are pressures in the system. In terms of actually conducting Information Commissioner reviews, the process is focused on an informal resolution at the lowest reasonable cost. The Act itself has a strong focus on alternative dispute resolution and the OAIC using a range of techniques and powers in the

Act to facilitate access to documents in the most efficient and effective way. So the case officers at the OAIC are focused on triaging matters, working proactively with applicants and agencies in terms of identifying the issues in contention and inviting agencies to consider whether or not they'll make a revised decision in favour of the applicant and a number of other options, which can result in an agreement between the parties. Where we're seeing more difficulty in terms of the progression of the matters is where those that aren't resolved in that particular process need to be allocated to a case officer for more considered submissions to be sought. I should note that those submissions are exchanged, as a general principle, between the parties, unless they have been provided in confidence and have been accepted by us as confidential submissions in accordance with the practice direction that was issued earlier this year. Those matters will require further consideration. The case officer, experienced practitioners in this area, relying on the precedent of IC reviews that we've built up since 2010, may give a case appraisal or preliminary view to the parties and invite them to make a revised decision as a result of that. A number will then be resolved at that point. Those that do not resolve at that point—around 20 per cent—formally require a decision by the commissioner. Those decisions come to me. They come to me with the full suite of documents. I go through every document that is in contention as well as the arguments and submissions put by the applicant and the agency, and also seek any other information that I consider is appropriate at that time to reach the correct and preferable decision in all of the circumstances. I'll stop there and see if there are other, more pertinent, questions you'd like me to address.

CHAIR: I'm sure there will be a couple. Just for my benefit, Ms Falk, what is the section 55K decision?

Ms Falk: That is the decision that I would make if the alternative dispute resolution or other mechanisms for resolving the review have not been satisfactory and the individual still wishes to pursue seeking access to the documents. That's the formal decision that I would make, and that's published on AustLII.

CHAIR: So 487 of the 610 were resolved without you having to make a decision.

Ms Falk: That's right.

CHAIR: So, over the years—and obviously since you have been there—the number of reviews received has increased reasonably dramatically, and you've had more resolved, particularly where you've had to make the decision rather than the department reviewing it. Am I reading that correctly?

Ms Falk: Table 1, third row down, sets out the number of IC reviews where section 55K decisions were made.

CHAIR: That is, decisions made by you?

Ms Falk: That's correct. These are formal decisions that are then reviewable to the AAT and from there through to the Federal Court. Last financial year, 123 decisions were made.

CHAIR: And that's up on every other year except 2014-15.

Ms Falk: That's correct.

CHAIR: Can you briefly run through what table 2 is.

Ms Falk: Table 2 provides the committee with some information on the numbers of matters finalised within certain periods of time. I thought that that might be useful, in light of the proposition in the bill that matters be referred to the AAT after 120 days. In relation to that matter, that would result in a

large number of matters on current resourcing being transferred to the AAT. I'm aware, from the AAT's opening statement at estimates and also their annual report, that they also have some resourcing matters that they are looking to address. So, I suppose there are a couple of issues in relation to that proposition that I would like to speak to.

CHAIR: Looking at your table, the first line is those finalised within 120 days—which you've done more than anyone previously, apart from the very first year in your table. The others just indicate the time it has taken. Is that reading it correctly? So, if this became law, you would only deal with 39 per cent of the cases, and the other 61 per cent would go to the AAT?

Ms Falk: That's correct. Based on the 2017-18 figures, that would mean a transfer of 375 matters to the AAT, which would be a tenfold increase for the AAT. In terms of the AAT's jurisdiction in FOI, last financial year they received 38 lodgements, which would have been appeals from our decisions. Forty-six were finalised. In terms of the resolution rates, 65 per cent were finalised within 12 months. From a pragmatic perspective, I understand that the bill seeks to address some of the timeliness issues. I do have a concern that it transfers the issue from one jurisdiction to the other, but my bigger point on this matter is around the purpose of the Oaic. The department spoke a little bit about this in terms of why we were set up: to be an informal, low-cost mechanism to deal with these matters without the need to have legal representation, and also to engage agencies on the objects of the act Act in terms of proactive disclosure. The people in my office who work on FOI matters are working every day with agencies; they're educating through their engagements and they're influencing in terms of improving decision-making and timeliness across the APS, and I think that our expertise as a specialised regulator would potentially be undermined. Also, there are the issues that come through in the Information Commissioner reviews and we also deal with complaints—complaints about delays or processes by agencies. These form a systemic picture that I'm able to look at, to see what educative and proactive strategies we need to implement to elevate practice across the APS.

CHAIR: This question is probably a silly one, but we'll just get this on the record—briefly, if you can. Only 39 per cent are dealt with in 120 days. Why is that?

Ms Falk: It's around a couple of factors. I think the first factor is resources. If we were able to put more resources to early resolution in the very early stages, there's a likelihood that that figure would increase. Parties are more likely to engage with an alternative dispute resolution process, where it occurs early in a process, rather than later, when perhaps parties become more entrenched. The other is that, inevitably, there will be matters that are of greater complexity, or where there are exemptions that are claimed by agencies and they rightly wish to continue to prosecute those exemption claims. So there is always going to be a graduated level in terms of those that you can resolve more quickly and those that require a more considered approach.

CHAIR: Are you able to tell me, either on notice or off the cuff, the subject matter of the complaints made to you?

Ms Falk: I can give you a sense of them. In general, they're complaints about delay—timeliness of agencies processing FOI matters. There might also be complaints generally around the methodology used in that process. But delay is the overriding matter.

CHAIR: Are you able to say what they're related to—pick a department: say, Department of Defence or Department of Human Services? Are there any discernible figures on which area they come from?

Ms Falk: I can take that on notice and give you some information in relation to that.

CHAIR: Okay. Can you very briefly tell me what table 3 is?

Ms Falk: When an application is made for Information Commissioner review, as I have outlined it may be resolved in a number of ways using various powers under the Act. This table sets out the various powers that might be used to finalise an Information Commissioner review. It may be that the matter is withdrawn upon an applicant receiving information that they had requested or that they have decided they no longer wish to continue with the matter. It may be that we exercise discretion to decline the matter as lacking in substance. There's also a power to refer matters to the AAT, where it's in the interests of the administration of the Act to do so. In certain circumstances you'll see that last financial year we invoked that power on 16 occasions.

CHAIR: So 81 weren't valid? That's the first line.

Ms Falk: Yes.

CHAIR: And 131 were withdrawn, but that could either be because the applicant lost interest or, alternatively, the applicant got what they were after?

Ms Falk: That's right.

CHAIR: Can you separate those for us, on notice perhaps?

Ms Falk: I'm not sure if we're able to do that, in terms of the way the case management system is set up. But I can look into it for you.

CHAIR: And 79—almost the third-biggest column—is 'conceived lacking of substance'. What does that mean?

Ms Falk: The test for 'lacking in substance' is that there's no more than a mere hint of a just claim. It may be that an applicant has sought information and an agency has decided not to provide that information on the basis of claiming an exemption. It may be very clearly covered and on all fours with previous precedents in an Information Commissioner review that I, or my predecessors, may have made, in which case it would be open to us to use that power to no longer proceed with the matter.

CHAIR: Okay, 160—joining together the fifth line and the first line—suggests to me that there was no substantiation in the claim in the reference to you in any case. Is that putting it too broadly?

Ms Falk: In relation to the 'misconceived, lacking in substance', then that does indicate that we've formed a view that the matter doesn't have sufficient substance to continue.

CHAIR: So what I'm saying is: if you add those two together, the biggest number of your resolutions are things that shouldn't have come to you in the first place—my words, not yours. But perhaps it might be a reason why you need to charge for these things. What about 'failure to cooperate'? What's that mean?

Ms Falk: I might have to get more information in relation to that to give you a specific example.

CHAIR: I assume that's from the applicant, not from the respondent?

Ms Falk: In the sense that the applicant has made the application for an Information Commissioner review, we're exercising the discretion not to proceed with it, so it would be with the cooperation of the applicant.

CHAIR: Because the applicant has failed to cooperate or to give you other information you've asked for?

Ms Falk: That might be an example.

CHAIR: Yes. And then I see 'lost contact'. I guess that's the same sort of thing—they made the application and then you've never heard from them again? The next line refers to the AAT, which we have been to—'failure to comply'. What does 'set aside by agreement' mean? These statistics are very interesting, though, which actually indicate that we do spend, what, \$55 million, was it? What's your total budget in round figures?

Mr Walter: Sorry, that's not the actual OAIC's budget; although I can give you that number. The cost of the entire FOI system, which includes the costs on agencies and departments, is \$52.2 million.

CHAIR: Oh, that's on the department—

Mr Walter: That's the cost of the other commissioner.

CHAIR: What's the round figure?

Mr Walter: Have you got your figures?

Ms Falk: I do have some figures here. I have got approximate figures of the current budget, \$13.5 million, and then there are some memorandums of understanding on top.

CHAIR: That's okay. Let's say \$13 million, \$15 million. But of those, there's a number of complaints which aren't proceeded with.

Ms Falk: In any oversight organisation, there's a process whether it's privacy or FOI.

CHAIR: Yes, but I'm not here to make a point; I'm here to ask questions. The point is we do spend a lot of money on people who think that they have been badly dealt with, and it turns out that a lot of them, apparently, are from those. I take Senator Patrick's point: I won't ask you about the fourth. It is still part of table 3, but I won't go through that any further.

Senator PATRICK: What's the average time it takes to get from an application to a case officer being assigned?

Ms Falk: I'll have to take that on notice. It changes, depending on the circumstances. And can I just be clear that we're talking along the same terms. When the matter arrives at the OAIC, it will be assessed and contact will be made. It will be triaged. There might be initial information sought, so there are time periods for that. And there will be also attempts at early resolution. If the matter is more complex and early resolution doesn't seem viable in the situation then what we're experiencing at present is a delay in allocating to a case officer for that. Perhaps I would call it more complex work that needs to be handled on the case.

Senator PATRICK: That's my own personal experience, and it seems to be quite a long time before you get assigned a case officer. Is it three months?

Ms Falk: That period of time has increased.

Senator PATRICK: Can you provide that on notice? The 120 days, in my view, is probably mostly taken up just even getting to a case officer—which I find totally unacceptable, I might point out.

Ms Falk: In the 120 days, as I said, there is active work done on the matters as soon as they're received. In the early resolution process, where we're experiencing the greatest delays are those matters that then need to go to more formal submissions. I can come back to you on notice with time periods there.

Senator PATRICK: Sure. I understand you approach this from the perspective that you have a certain amount of resources and some KPIs and you achieve what you can. I'm not suggesting for a moment that you waste any opportunities or are wasting your resources at all.

Ms Falk: Thank you.

Senator PATRICK: I approach this from the perspective of constituents, who have an expectation that you meet the timeliness obligation, or the 'prompt' obligation, from the Act. That's what the parliament requires and that's what constituents would expect. In that triage stage, when matters are referred directly to the AAT, what's the threshold to hit that? I note that that relates directly to the bill. Is it a case where you just look at a matter and go, 'This is too complex for us to handle'?

Ms Falk: That's section 54W(b), which provides a discretion to conclude a matter. That would then trigger an ability for an applicant to go to the AAT. The test under the Act is where it's in the interests of the administration of the Act. The Freedom of Information Guidelines then set out a number of factors, and they might include issues like there being a related matter at the AAT. It might be that the matter itself is of sufficient voluminous complexity that it is better dealt with in a hearing setting, particularly if there are multiple third parties involved. There are a number of factors set out in the guidelines that go towards exercising that discretion.

Senator PATRICK: I'll relate back to my own experience, because, as you know, I do use the system quite regularly.

Ms Falk: Yes.

Senator PATRICK: Is it a case where you get something like mine and you go, 'That's way too complex'? I always seem to get the ones that last more than a year.

Ms Falk: Many, many of our matters are complex. An example may be one that was recently referred, there were over 15 related matters in relation to something that was going to involve extensive third-party submissions and be highly contended. The other factor in the FOI guidelines is whether it's highly likely that matters of fact will be taken on appeal to the AAT. If that's discernible at the outset, that would be a factor weighing in favour of referral.

Senator PATRICK: If, for example, someone's after some personal information, are they generally some of the ones that are dealt with relatively quickly? Are there almost categories where you could say, 'This one we'll be able to take care of in that efficient manner,' and others where you look and say, 'It's not complex enough to go to the AAT but I can just tell this is going to take a long time'?

Ms Falk: The referral to the AAT I'd see as the exception rather than the rule. That goes back to what I said earlier in terms of our function vis-a-vis the AAT's function. But I think it is a provision that does allow sufficient flexibility where the nature of the matter is such that it is more appropriate for it to be dealt with in that context.

Senator PRATT: Ms Falk, can I ask you how much time you spend in each of your separate statutory roles?

Ms Falk: As the Australian Information Commissioner, I'm focused on all of my statutory roles. One of the advantages of my appointment is that I can bring to bear on all of my work the relationship between those roles. For instance, one of the purposes of the OAIC is to promote transparent and accountable personal information handling and also transparent and accountable government through access to information, and one of the objectives of the FOI Act is to promote government held information as a national resource. In order to have greater access to information and more government information shared, personal information needs to be protected. So I bring those functions to bear in ways that I think assist the community to have an integrated perspective. Examples are in the Open Government Partnership, my work with the National Data Commissioner and in relation to the privacy code that supports privacy capability across government, which then enables greater sharing of information through identification of privacy risks. In terms of how much time I spend on each role, I wouldn't be able to discern that. But I bring to bear the lens, particularly in relation to FOI, as and when it's required in the work that I do with my executive and the staff, in terms of understanding the matters that are coming through to the OAIC, the work that I do in dealing with complaints—and that's a non-delegable decision-making requirement—the work that I do requesting evidence from the IGIS in national security matters, and also the work in Information Commissioner reviews. From one week to the next, it will be proportionate to the work that's coming through. In the week that we had the Right To Know campaign, my focus was very much on FOI. My team had 13 meetings with stakeholders on FOI during that time.

Senator PRATT: I can understand from the point of view of promoting these principles within, as you work with departments—that there's some benefit in doing that in an integrated way—but you've got separate statutory roles and principles on how these cases are managed. In terms of decision-making for cases and the caseload attached to information, privacy and FOI, how do you go about dividing your time and triaging those decisions?

Ms Falk: The FOI work at present accounts for around 25 per cent of the work of the office and the rest of the work, privacy, is very broad-brush analysis based on the volume of work across both jurisdictions. I would be hesitant to say that any day or week, from my perspective, is apportioned in that way, for the reasons that I have set out.

Senator PRATT: Yes, and that I understand. But, if you're sitting down reading and making decisions on the files that are presented to you, as the decision-maker for FOI et cetera, how do you apportion that time and triage what's at the top of the decision-making pile?

Ms Falk: I bring to bear my focus as it's required on these matters. As anyone who's an agency head does, you're constantly prioritising your time and the requirements. The Information Commissioner reviews, which are a non-delegable decision-making power, are something that I prioritise amongst my other work.

Senator PRATT: If, for example, you could spend all your time as FOI Commissioner, clearly you could still have a role prosecuting issues across the departments and coordinating the other interests, but you could spend more time making FOI decisions. Would that not be correct?

Ms Falk: At present, the way in which the process works is that only 20 per cent of matters that come to the Information Commissioner are resolved through Information Commissioner review. Eighty per cent of the work is done by case officers and members of the executive team.

Senator PRATT: I understand that, but, if you had a full-time officer, then the proportion of the work that is done by the executive team or other officers would decrease, would it not?

Ms Falk: I suppose that would logically follow, but I would not necessarily agree that that would be the best use of the commissioner's time. There's a very high level of expertise through the office and it's appropriate that matters are dealt with through a delegated decision-making function, and, of course, it has to be that way. Even if there were a full-time FOI commissioner, they could not get through 800 matters and all that's required in the liaison with parties on their own. But, again, I would question whether that would be the right approach in any event. I think that the non-delegable decision-making power is where the Information Commissioner's or the FOI Commissioner's primary function lies, together with setting the strategic priorities in relation to those matters and also the guidance that then informs the way in which all agencies need to undertake FOI matters.

Senator PRATT: You said in your evidence that the delays in the process are both at the triaging or resourcing end, in terms of early resolution, and at the more pointy end. Does there not need to be more resources at both ends of the spectrum, therefore, to see the gap in finalisation of matters narrowed?

Ms Falk: At this point in time, that's not what I'm seeing. I'm seeing that where I need to focus is on working with government to increase the office's resources to increase the capacity at the case-officer level and, potentially, the executive level. If that were to be increased and then have a flow-on effect to more Information Commissioner reviews being required of the commissioner and that being something that's not manageable within other functions then that would be something that I would bring to the attention of government.

Senator PRATT: In terms of the limit at which you can be the actual decision-maker who reviews each case, there has to be a limit at some point at which a single person can adequately fulfil the statutory role, based on an expansion of the workload, in the same way that that would be the case for any other judicial officer or AAT officer, for example. It can't entirely be a matter of administration in the way that the decisions are made, can it?

Ms Falk: That's why I say that, at this time, I consider that it's working in a way that's effective and, should that change, then that would be something that I would bring to the attention of government. The increased work of the OAIC right across all our functions is something that, as I say, we're very closely monitoring. In the three months since my appointment to the commission it has been a key focus of my tenure.

Senator PRATT: Do you have a view on the manner in which the Act provides for three separate commissioners? In fact, you might have a view, but you won't be able to tell me. I guess I'm interested in the fact that parliament made it fairly clear that there are three distinct roles here. You talk about the importance of integrating those roles in working with the departments. But, surely, there's also a role for individual commissioners to be able to drill down in a really focused way on information or privacy or freedom of information.

Ms Falk: I think that they are questions that are appropriate for the department, in terms of decisions around filling the roles. What I can say is that I witnessed and experienced the one-commissioner role working effectively for three years with Mr Pilgrim and I've been appointed to carry out the three roles, and, at this time, my assessment is that that is working efficiently.

24 May 2018

[D2019/013123](#)

Senator PRATT: I'd like to begin by asking the government about the current arrangements for the commissioners. I note that Mr Timothy Pilgrim had been performing the roles of both the Australian Information Commissioner and the Privacy Commissioner at the time of his retirement. That is correct, isn't it?

Mr Anderson: That's correct.

Senator PRATT: As there has been no Freedom of Information Commissioner since January 2015, are there any plans for the government to appoint one?

Mr Anderson: There are no current plans. The recruitment exercise that's currently underway is to fill the roles of Information Commissioner and Privacy Commissioner.

Senator PRATT: So the government is under a recruitment process that combines those two roles?

Mr Anderson: That's the intention, Senator.

Senator PATRICK: Ms Falk, with respect to the question that Senator Steele-John was asking, how many overall staff do you have at the Office of the Australian Information Commissioner?

Ms Falk: We have 75 FTE at present.

Senator PATRICK: Split between privacy and FOI?

Ms Falk: Yes, that's right.

Senator PATRICK: Is there a mud map in your annual report, as to the positions and what functions people perform?

Ms Falk: There is information in the annual report in terms of the way in which the organisation is structured into two branches. We have our dispute resolution branch that deals with both privacy and dispute resolution, and also Information Commissioner reviews and complaints. Then we have a regulation strategy branch, which is around our guidance, advice, monitoring and also conducting assessments.

Senator PATRICK: When you said that five people have been transferred or are now looking at the NDB complaints, what were those people previously doing?

Ms Falk: They've not been transferred. They're people who were dealing with the voluntary data breaches in the scheme that we ran before the mandatory scheme. They also deal with commissioner initiated investigations and inquiries, and they would also have a privacy caseload.

Senator PATRICK: How does that gel in terms of workload, now that they've got a new function?

Ms Falk: In terms of the workload there has been an increase in that workload. We have had to put in place different systems and processes, and use our IT environment in new ways to try and create some efficiencies there. There's definitely a workload increase across the office. I'm very grateful to the staff for their very flexible approach that they're taking to manage the work. There's a commitment to look at what our ongoing needs are going to be into the future, and I've certainly been in discussion with the department in relation to that.

27 February 2018

[D2023/008471](#)

Senator PRATT: Mr Moraitis, Mr Pilgrim has announced his retirement. The position of FOI commissioner is also vacant. When was the Attorney-General first made aware of Mr Pilgrim's upcoming retirement?

Mr Moraitis : My recollection is that Mr Pilgrim may have written to the Attorney about this.

Mr Pilgrim : The first conversation I had about my retirement with the department was in early January, when I met with the then acting secretary and advised him of my intention to retire.

Senator PRATT: I want to ask if you, Mr Pilgrim, think there is sufficient workload to justify three different people for these three different positions. Are they all being advertised together? I understand that you've been fulfilling two roles and there are indeed three. Is it the government's intention to fill all three positions?

Mr Moraitis : My understanding is that Mr Pilgrim's position will be advertised shortly, to be filled by one person—obviously a successful candidate. That process is due to be launched in the next week or so.

Senator PATRICK: Mr Pilgrim, you provided some statistics to former Senator Xenophon in relation to FOIs. Some of the statistics you weren't keeping. One of the ones that Senator Xenophon asked for was related to the number of times you extend an FOI review. Is it correct to say you don't grant an extension of time?

Mr Pilgrim : No, we don't keep those.

Senator PATRICK: Is it possible to understand if there are any circumstances where you refuse to grant an extension of time? Is it a tick-and-flick—how does it work?

Mr Pilgrim : We would take submissions from the relevant department, taking into account the comments from the applicant about why there is perhaps an urgency for a matter to be resolved. We certainly take those into account as part of that process.

Senator PATRICK: But you don't have any statistics on when you don't?

Mr Pilgrim : I will double-check, but I believe we don't have statistics on that.

Senator PATRICK: That would be a lot rarer than situations where you do grant, I imagine.

Mr Pilgrim : I would suggest, yes, it would be rarer.

24 October 2017

[D2023/008478](#)

Senator XENOPHON: Thank you for appearing before estimates, Mr Pilgrim. The ANAO reports that the elapsed time for Information Commissioner decisions varies from 81 days to 1,228 days, with an average of 372 days. Do you think that's a satisfactory benchmark?

Mr Pilgrim : No, I don't think it's a satisfactory benchmark. We have been aiming to improve that quite significantly.

Senator XENOPHON: What do you think a reasonable bench mark would be?

Mr Pilgrim : At the moment we're aiming to make sure we complete over 80 per cent of our FOI IC review applications within a 12-month time frame, and we have managed to achieve that in the last financial year. In fact we have closed 86 per cent of the matters before us within 12 months.

Senator XENOPHON: Can I go to the issue of how decisions are made. My colleague, Senator Kakoschke-Moore asked questions of you back in February this year about the fact that there is only one commissioner—you—that fills two of the three commissioner roles—Information Commissioner and Privacy Commissioner. Is that correct?

Mr Pilgrim : That is correct.

Senator XENOPHON: And that the FOI commissioner has been left vacant because there is a requirement in the act they must have certain legal qualifications—is that correct?

Mr Pilgrim : I'm not sure that is the reason for the decision not to fill the FOI commissioner's position. As I mentioned at the previous hearings, you are correct that the FOI commissioner does require legal qualifications for that position. The powers in the FOI Act are vested in the Australian Information Commissioner, and in that role I am able to exercise all the functions under the FOI Act and make decisions. Similarly under the Privacy Act, the powers within the Privacy Act are actually vested in the Information Commissioner.

Senator XENOPHON: That resolves that. I want to make it clear that I declare that I have a number of matters before your office, before the Information Commissioner. I don't want to ask you questions that go to the substance of those matters, but I do want to ask a few general questions that flow from my experience with Information Commissioner reviews and, in particular, the review that you conducted on the submarine CEP. It's concluded, so I don't think there's any question of it being prejudiced by this discussion. You refused access to all documents. On appeal to the AAT the Department of Defence immediately released documents to me and advised that the Japanese government—that their hope was that by releasing material that is not sensitive we will persuade the tribunal we are only seeking to protect truly sensitive documents. Then the correspondence went on to say to tell the Japanese government, 'It is our belief that there is no harm to you or the other parties in releasing this material, as it is all standard Defence contracting material of a very general nature.'

I want to understand this: can you explain their approach—that is, of Defence—making representations to you that all the documents were sensitive; as soon as it's put to the test by an appeal to the AAT, or in the face of an AAT review, Defence releases it and indicates it was not truly sensitive. You accepted the Defence submission, it seems, unequivocally initially, but as soon as Defence was put to the test of a review process they made all these concessions. Is it a resourcing issue? There is an issue there. It's been a frustrating process from my office's point of view. Is there a resourcing issue? There seems to be such a difference in terms of your approach and the approach of Defence, who basically capitulated on a whole range of issues, saying that they weren't really that sensitive.

Mr Pilgrim : I would first of all say that I can't remember all the detail of that matter. One of the matters I would have taken into account at the time would have been the submissions from Defence—

Senator XENOPHON: I was hoping you found it was unforgettable!

Mr Pilgrim : No, I wouldn't say that. I would have taken into account at the time, apart from myself going through and examining the documents, which I did, the submissions from Defence, and they would have been at a point in time which, I could suggest, might have had some impact on the sensitivity of those documents, at a point in time, as opposed to the process when it reached the AAT. I can only assume that. I think that's a question best put to Defence, though, as to why they changed their position to release it.

Senator XENOPHON: Can I put this to you: the defence department also wrote to the Japanese government, stating: 'Our experience of the Administrative Appeals Tribunal is that it is more exacting than the Information Commissioner and will look more closely at the contents of the documents.' Does that sort of comment concern you? It's almost as though they won't release documents and, as soon as they're put under any pressure, not only do they release documents but they then have a swipe at your office.

Mr Pilgrim : They're entitled to their opinion about how they think we approach our process of the IC review. As I said, I personally went through all the documents that were in question. I looked at them and I took into account the submissions from both parties and made my decision on the documents as they were before me. How Defence want to categorise or put a view forward on how that was undertaken is entirely up to them.

Senator XENOPHON: I guess what I don't understand is this: in that review, the defence department advised your office that even the act of consulting with the Japanese government about the documents under review would be harmful to international relations but immediately proceeded to do exactly that—that is, consult with the Japanese government—when the AAT proceedings commenced. I'm trying to understand why they took one approach with you and another when it was before the AAT.

Mr Pilgrim : And I'm sorry, I don't know why they took that approach.

Senator XENOPHON: The department made a claim to you that the release of any information under FOI relating to the tender documentation would provide a framework for people to draw unsubstantiated assumptions as to the merits or otherwise of the competitive evaluation process, participants and proposals, and, as previously stated, would be extremely damaging to the continuing strategic relationships and trust between Australia and the governments of both Japan and Germany. But then Defence gave a completely contrary view, saying: 'We've raised no objection for the release of the material we are consulting on.' If you have a history of a department saying one thing to you and then taking a completely different approach—some would say an insulting approach to your office—does that change the way you look at things? Obviously you look at them objectively, but do you then change the approach in which you look at these assertions, given the way Defence has treated your office and the, I think, quite dismissive assertions they've made?

Mr Pilgrim : We would look at each case—and I don't mean this to come across glibly—on a case-by-case basis and would look at each matter based on the submissions from the parties, the exemptions they may be claiming and my examination of those documents, and make a decision based on the particular matter before me. I don't know why Defence took the approach they did before the AAT. I'm not sure; they might be in a better place to respond to those particular comments they made about my office.

Senator XENOPHON: I want to go to the issue of the time it takes for decisions to be made—and I have to note my great frustration and the frustration of those who work with me in relation to that. The AAT makes orders in respect of time frames for submissions and the departments adhere to the time frames. In contrast, is it the case that the Information Commissioner's office agrees time frames for submissions and the departments regularly seek extensions?

Mr Pilgrim : They can seek extensions, that's correct.

Senator XENOPHON: Can you provide me on notice the number of times extensions have been sought in the past 12 months in the context of the total number of reviews conducted?

Mr Pilgrim : I'll take that on notice and see if we can provide that.

Senator XENOPHON: The AAT also makes orders in respect of time frames for submissions and does not permit a change of the exemptions claimed after submissions have been made. In two of my recent Information Commissioner reviews, the department has made submissions switching exemptions, which means you start from scratch, effectively, taking an even longer period of time. The AAT's approach seems to be mindful of the need to have a quick process in place. Do you consider that your office's approach seems inconsistent with the timely access to information objective, which is the wording in the Freedom of Information Act?

Mr Pilgrim : I'm sorry, I didn't pick up on the question.

Senator XENOPHON: The act basically talks about the timely access to information. The AAT takes a pretty dim view about changing exemptions, but your office seems to allow for exemptions to be changed, or the grounds to change, which means you go back to square one, which means you start from scratch again. Are you concerned about the fact that that can delay the process even further, which goes against the intent of the act, which is to have timely access to information?

Mr Pilgrim : Yes, I am concerned about that. That's one of the practices we are examining and looking at as part of the process of trying to improve our efficiency around that process.

Senator XENOPHON: When will that process be completed? By the time we get some of this information, it will no longer have any currency. That's what concerns me.

Mr Pilgrim : We're certainly looking at trying to expedite a number of these key matters at the moment. One of the considerations we're taking into account is how agencies approach us in terms of wanting to change exemptions, which I would say does not happen on a regular basis. It's something that we look at very closely.

Senator XENOPHON: In a couple of reviews—one past and one on foot—that I have been a party to, your office, Commissioner, has held confidential from me departmental submissions. In the matter that's being appealed at the AAT, documents not provided to me by the information commissioner were made available to me as part of the T document set. This week the same thing happened to me. Normally all cards are laid face-up on the table in this process. Only in exceptional circumstances—if it's a highly sensitive issue or a matter of national security—would that information be withheld. What is your view on this, because I'm finding it incredibly frustrating?

Mr Pilgrim : Again, we look very closely at when agencies do make claims for information to be kept confidential. We would usually expect it to be in those more sensitive matters which are deemed matters of national security—

Senator XENOPHON: But that hasn't been the practice, though, of your office in that I can get them in the T documents when it goes on appeal to the AAT. I can't see that you can allow them to be withheld. Can you provide me on notice the number of times submissions have been withheld from the applicant in the past 12 months in the context of the total number of reviews conducted?

Mr Pilgrim : I'll take that on notice.

Senator XENOPHON: And can you take on notice what specific areas for improvement in the way reviews are conducted are being proposed and when they may be implemented? That would be useful.

Mr Pilgrim : Yes, I'm happy to provide that.

Senator XENOPHON: In the Auditor-General's report on FOI released recently, the number of exemptions—that is, grounds to deny access—claimed over the last five years has increased by 68.4 per cent. Noting that an individual FOI claim can be subject to multiple categories of exemption, over the same period the number of applications increased by 53.4 per cent. The use of the 'certain operations' and 'national security' exemptions has increased by 318 per cent and 240 per cent respectively. My final question is: what is your view in respect of this statement, and what, if anything, is your office doing in response to those findings of the Auditor-General? In other words, are you providing the same sort of training to departments that I believe was conducted by the Office of the Australian Information Commissioner when Professor McMillan had that role, where there was continuing education of government departments as to what the parameters of a reasonable request under FOI were?

Mr Pilgrim : We'll certainly take some of that on notice. In terms of the training, there has been continuing training going on over the past few years, during the period of which we were in a position of not being sure whether we were going to maintain the function—when there was a bill before the Senate. The functions for undertaking training have been carried out mainly by AGS, and we support them in that. Officers from my office will attend to provide information on cases I've handled to help supplement those training sessions from AGS. Since we have been advised in the last 12 months that we will be continuing on those functions, we're now looking at recommencing our own network for training purposes as well.

Senator PRATT: Do you think the resources you have been provided, as set out in the budget, are sufficient for you to properly discharge your statutory functions?

Mr Pilgrim : At the moment, we're undertaking the functions under both the FOI Act and the Privacy Act within the resources we have been provided. We do have some delay in allocation of those resources in terms of our privacy complaints. There is a four-month wait between receipt to allocation to a staff person to handle that. In terms of FOI matters, there are some similar delays, as we have been discussing, in terms of handling that. On the FOI side, I'm pleased to be able to say that I've been advised this week by the Attorney-General that we will be receiving some additional funding this year and into the out years to help with the workload—the increased workload we are receiving on IC reviews. In fact, as I mentioned at the spill over hearing in August, we received a 24 per cent increase in the number of IC review applications—

Senator PRATT: Of which applications? Could you not use acronyms.

Mr Pilgrim : Sorry, I apologise. Information Commissioner review applications—we received a 24 per cent increase in numbers in the last financial year. And, as I was saying, I've just been advised that we will be receiving some additional funding that will go towards our work in that area.

18 August 2017

[D2023/008491](#)

CHAIR: You've given evidence before about functioning without the presence of an FOI commissioner. Is that correct?

Mr Pilgrim : That is correct.

CHAIR: Do you know the practice in other jurisdictions? Do they have multi-commissioner models, like yourself?

Mr Pilgrim : It varies across jurisdictions. For example, in the United Kingdom the Office of the Information Commissioner has, as you would imagine, a commissioner heading up the agency, and then the commissioner has two deputies, one responsible for freedom of information and one responsible for privacy. That's one particular model. And in other jurisdictions you will have the model where there is just one commissioner sitting over both functions. I'm not familiar, outside of Australia, with where there are jurisdictions that have a model where there are three commissioners. I may be missing one there, but I'm not entirely familiar with that.

CHAIR: I'm breaching my own rules here; I shouldn't really ask you for an opinion. But if you feel you can give one, do you think it would be a useful reform to have a the Australian Information Commissioner just be a single-commissioner model? Do you have a view on that—that you're prepared to share?

Mr Pilgrim : I think I'm on the record as having said that the office is working quite well at the moment with a one-commissioner model. Obviously we're seeing an increase in workload, as I've touched on. But I think that with the model that we've established at the moment, and as I mentioned to the committee before, having advised the government that it would be my preference at this point in time, I appointed a deputy to support me in that role as well as having two other assistant commissioners.

25 May 2017

OAIC witnesses not called.

18 October 2016

[D2023/008493](#)

Mr Pilgrim : For the sake of not wanting to alienate my colleagues at the back of the room, I would like to make a short opening statement.

Turning now to our FOI responsibilities, the OAIC has continued to implement efficiencies in our administration of FOI, particularly in the area of Information Commissioner or IC reviews of government agency decisions. In the financial year just concluded, the OAIC received 510 applications

for an IC review, which is up 36 per cent from the previous year. In that same period, we finalised 454 IC reviews, with 87 per cent finalised within 12 months of receipt. This continues to exceed our 80 per cent benchmark. Indeed, 84 per cent, or 212, were finalised within six months. However, in saying that I do note, of course, that there are some complex matters that have taken significantly longer to resolve. Importantly, of the 454 IC review matters finalised, only 18 per cent required a formal decision to be made by me as commissioner. This reflects our approach to work with government agencies, to build the knowledge and approaches required to resolve FOI requests efficiently and, where a dispute arises, to attempt to reach a mutually satisfactory agreement without the need for a formal decision. To further assist in this area our office is currently working to update the FOI guidelines to assist agencies and individuals alike. Providing clear plain English advice as to the scopes and limits of the FOI rights, as well as clear guidance to agencies as to how to best manage those rights in the first instance, is the priority. This focus on guidance, education and public information is important because, while privacy and FOI formal decisions are occasionally more complex or precedent setting, the vast majority of inquiries to our office revolve around individuals seeking to have rights upheld in circumstances in which the law is clear and well established. What is important in that context then is that there is clear and accessible advice as to what individuals' privacy and FOI rights are and quick and effective mechanisms to uphold those rights. I am confident that the focus that the OAIC is placing on advice, education and conciliation, as well as our achievements in improving the access and efficiency of privacy and FOI systems, will continue to provide effective delivery of our responsibilities to uphold both the FOI and the Privacy Act.

Mr Pilgrim : I will give you a brief outline of the Information Commissioner reviews that we have received to date. As I said, for the previous financial year, 2015-16, we received 510, that being an increase on the previous financial year, which was 373. The year before that, 2013-14, we received 524. If you would like, I can continue back to the establishment of the office, which was in 2010. I am not sure how far you would like me to go back.

Senator FAWCETT: No, that is fine, thank you.

Senator FAWCETT: So you are across the areas you are responsible for, including freedom of information, and you are happy that the management and government arrangements for that are adequate to deliver that oversight service to the Australian public?

Mr Pilgrim : I am confident that the office as we are currently undertaking our functions under both privacy and FOI are delivering some efficiency, certainly, in the area of our regulatory responsibilities.

5 May 2016

OAIC did not appear.

9 February 2016

[D2023/008494](#)

Mr Pilgrim : I would like to make a brief statement outlining the current work of the Office of the Australian Information Commissioner and touch on some of our priority areas.

Turning briefly now to our FOI function, in the 2014-15 financial year we received 373 applications for information commissioner reviews of agency decisions. In the current financial year to 31 December

we have received 249 and finalised 236. I am also pleased to advise the committee that our average time taken to close an information commissioner review has reduced from approximately 10 months in 2013, just prior to the announcement of the disbanding of the OAIC, to three months by the end of 2015. By way of some further breakdown, of the 236 IC review applications are finalised, 31 per cent were conciliated or withdrawn, 24 per cent were finalised as being misconceived, frivolous or vexatious, 18 per cent went to the Commissioner, myself, for decision, 10 per cent were referred to the AAT, 10 per cent were out of jurisdiction, three per cent were substituted with a different decision by the agency, and two per cent are subject to an IC review having reached an agreement between both parties.

Senator RHIANNON: The act requires the OAIC to independently review refusals of freedom of information applications and complaints about the handling of those applications. We often read that emphasis is given to the need for the independence. Under the current system, with the new role of the Attorney-General's Department, is that independence still in place?

Mr Pilgrim : It certainly is, Senator. For example, it is only the position of the Australian Information Commissioner that can make Information Commissioner decisions under the act. As I was outlining through some of the statistics, that is primarily the work we have been undertaking over the last 12 to 18 months since the announcement. In terms of complaints, the act allows for the Office of the Australian Information Commissioner or the Ombudsman to undertake the handling of the more administrative complaints under the FOI Act. As part of the arrangements that were being put in place, the proposed arrangements, the complaints process was handed over to the Ombudsman's office, who has been handling those since late 2014. I would add that I do not have the exact numbers of the complaints that the Ombudsman has handled at the moment, but at the time when we were handling them they were not a very large proportion of our work.

Senator RHIANNON: What arrangements are in place for the continued exercise of the Information Commissioner's functions and what additional resources have been provided to the OAIC for the continuing exercise of its FOI functions in 2015-16?

Mr Pilgrim : I think, as Senator Brandis has mentioned, the OAIC received additional funding of \$1.7 million to allow us to undertake a streamlined process in terms of our FOI functions, those being primarily the ones around handling Information Commissioner reviews. As I said, it is a particular statutory power that only the commissioner can exercise, and that has been our primary function in terms of our responsibilities under the FOI Act for the last 12 months. In terms of the broader Information Commissioner powers coming from the Australian Information Commissioner Act, we have not been exercising those powers, and that was a decision the former commissioner and I took in terms of looking at the resources that were available to us and also in terms of the proposal to disband the OAIC.

Senator RHIANNON: So is any Commonwealth entity other than the OAIC currently providing reviews of FOI applications or complaints about the handling of those applications that are independent reviews?

Mr Pilgrim : If I have understood your question correctly, my primary function is to handle Information Commissioner reviews. If I can just go back to the statistics I mentioned in my overview, I will remind you of the numbers we have had. In the year to date—that is, up until 31 December 2015—we have received some 249 applications for Information Commissioner reviews, and we have finalised some 236. We are doing that on a streamlined model, in part to reflect the proposal for disbanding the OAIC. So, in some particular cases, we will close a matter because we believe it can best be dealt with by

going through the AAT, for example. As I was mentioning earlier in terms of the proposal and the break-up of funding, the AAT, as part of the decision around the disbanding of the OAIC, received additional funding to allow it to undertake additional amounts of hearings in terms of the FOI Act.

Senator RHIANNON: With this new system, is the new way of doing it a greater cost to an applicant than would be charged were the function in question to be under the OAIC?

Mr Pilgrim : As I said, out of the 249 applications we received for Information Commissioner review, we finalised some 236. Of those, there is no application fee to lodge a request or an application for an IC review with our office. Of those 236 that we finalised, 10 per cent were closed by our office, as we formed a decision that they would be best dealt with by going to the AAT—and, yes, there is a lodgement fee with the AAT.

Senator RHIANNON: Can you expand on the lodgement fee?

Mr Pilgrim : I might need to have this corrected, but I believe it is \$861 at the moment.

Senator RHIANNON: That is why I wanted you to expand on it—that is a lot of money. Wouldn't that be prohibitive for many people?

Mr Pilgrim : That would be a matter of circumstance for individuals. It depends on the applicant. A number of the applicants we get are coming from organisations, such as journalists, who are applying for access to documents and they have had a decision refused. Certainly there will be situations where it may be an individual. When we do look at exercising the power under the act to close a matter because we believe in the best interests of the administration of the act it could go to the AAT, we certainly do take submissions from the parties to ascertain their willingness for it to go to the AAT and take matters such as their ability to pay into account.

Senator RHIANNON: Aren't by far the majority of your applicants individuals—they are not journalists, they are not organisations but individuals trying to sort out their circumstances with some government department?

Mr Pilgrim : Certainly the majority of applications that come in under the FOI Act—I am happy to be corrected by my colleagues—do come in from individuals, and a lot of those are individuals seeking access to their personal information under the FOI Act. They are not necessarily, though, the ones we think need to be closed so that the matter can go to the AAT. I do not have those figures to hand.

Senator RHIANNON: In terms of when those people are thinking about where their application is going, when they see that they could face a bill of more than \$800, they may not know about various possibilities. Surely that could be a deterrent—for ordinary people this is a lot of money.

Mr Pilgrim : It is a lot of money. As I was saying, before we make the final decision about whether we are going to close the matter under the particular provision we seek submissions from the individuals and we would take those sorts of issues into account when we receive those submissions.

Senator RHIANNON: Have you done any assessment of whether this could be a deterrent? Have you made any assessment of the impact the changes are having at various stages on people's willingness to proceed?

Mr Pilgrim : I do not think we have done any particular study into that but one thing I would suggest is that the number of Information Commissioner reviews that the office is receiving is starting to trend up at the moment, so we are getting more applications coming in under the current circumstances.

Senator JACINTA COLLINS: Thank you for the update in your opening statement—it has probably eliminated many of the questions I would have asked, given previous discussions which I do not propose to revisit. Accepting, as in part Senator Brandis said, the position we are in in relation to the government's endeavours to use the Office of the Information Commissioner for savings purposes and the will of others not to cooperate, can I ask you a bit more about your streamlined process and the figures you have provided us with today. You mentioned the 236 finalised matters. How many finalised matters were there in the previous period?

Mr Pilgrim : In the 2014-15 financial year we received 373 matters and we finalised 482.

Senator JACINTA COLLINS: So the finalised figure in part reflects what has gone on in previous periods per head, although less so now that your response time is down from 10 months to three?

Mr Pilgrim : That is correct.

Senator JACINTA COLLINS: Some of the decline in the response time was, if I recall, anticipated given the establishment of the office and the process to get processes working. Was that the case?

Mr Pilgrim : I believe that may have been some evidence given at previous hearings.

Senator JACINTA COLLINS: So it was anticipated quite aside from anything that might pertain to your streamlined process?

Mr Pilgrim : We have undertaken over the last 12 months internal reviews to further streamline how we process within the organisation the work, including focusing more on up-front conciliation so that we can try to bring the parties together to work out what is, for want of a better description, the sticking point on an issue rather than try and go through some of the more adversarial processes.

Senator JACINTA COLLINS: I think you mentioned a 10 per cent referral to the AAT. How does that compare to previous hearings?

Mr Pilgrim : That 10 per cent represented 25 matters that were referred to the AAT out of the 236 that we finalised. In the 2014-15 financial year, where we finalised 482, we closed 61 matters so that they could go to the AAT. I just cannot quickly work out what the percentage might be.

Senator JACINTA COLLINS: Sorry; how many was it out of the total?

Mr Pilgrim : It was 61 out of 482.

Senator JACINTA COLLINS: Okay; slightly higher. Do you have a sense of what FOI matters may not be coming to you because of the streamlining, as opposed to those that you are simply referring?

Mr Pilgrim : No, I would not have an idea of what is not coming to us. If an individual or an applicant wants to challenge the decision of an agency under the FOI Act they would need to apply to our office for an Information Commissioner review. As I mentioned, on the figures we have, the matters are slightly going up at the moment. So I do not see that there is any way that I can gauge what people may not be bringing to us.

Senator JACINTA COLLINS: Are you dealing with any FOI complaints, or are they now dealt with by the Ombudsman exclusively.

Mr Pilgrim : They are being dealt with by the Ombudsman exclusively—since about the end of 2014.

Senator JACINTA COLLINS: Have you stopped any of your FOI policy development work, or is that all now being undertaken by the Attorney-General's Department?

Mr Pilgrim : We have not undertaken any specific policy development work or done any work on the guidelines. They were functions that were to be transferred, and have been transferred, to the Attorney-General's Department.

Senator RHIANNON: Commissioner, I was interested in the case with the Department of Immigration and Border Control. This was the issue where they said that they would need to consult with 600 employees before releasing documents. Could you provide some brief about that decision and if this is a trend that is coming with departments to argue that they need to consult with large numbers of employees before information can be released?

Mr Pilgrim : Without going through the decision, which was published entirely, I think it is an issue that I would prefer to take on notice because I would like to remind myself of some of the other trends we may be seeing in that area. We do believe that we encourage all agencies to publish all charts as part of their publication scheme to try to reduce the number of issues or inquiries people may have about staffing levels and particular positions within agencies. As to the broader question you are asking, I would like to take that on notice.

Senator RHIANNON: I noticed in some of the findings that it was suggested or reported that some of the departments were overestimating the amount of time it would take for the information to be found and to be released. Is that also a trend?

Mr Pilgrim : Again, I want to be careful of my words and not say it is a particular trend. It is an issue we are seeing, and one of the things we hope to do through the decisions we make is to use them also as an educative process so that they can understand the views of our office in terms of some of the time frames we think should be taken in terms of being able to identify and locate documents.

Senator RHIANNON: Are you just accepting that the departments will make a fair judgement on the time that will be required? Is it just a matter of trust or are there guidelines with regard to this matter? Because it seems as though that becomes quite influential in deciding where some of these cases go.

Mr Pilgrim : We certainly do monitor the IC reviews that are coming through to us to understand what some of the challenges may be for agencies. We try to use some of the decisions we make as the educative tool. Ms Toohey might want to make some observations in terms of sampling.

Ms Toohey : One of the things that we certainly encourage agencies to do is this idea of sampling so they can justify a decision if they have made a decision—

Senator RHIANNON: You used the word 'sampling'; could you define that.

Ms Toohey : If a matter comes to us and it has been a practical refusal, we generally ask the agency to produce a small sample of the documents so that we can then test their calculation versus our own. The commissioner has made a number of decisions looking at those sorts of processes and has certainly provided guidance in those decisions to the agencies about that approach.

Senator RHIANNON: Is there a trend that there is often considerable disparity between your estimations and other departments' estimations?

Mr Pilgrim : I think what I was saying is that I do not want to try to use the word 'trend' because it can be taken in a way to say that there is a major issue. It is certainly something we are looking at and it is

something that I think we can provide more guidance to agencies on, and, as I said, our primary way of doing that is using the IC review process as part of that educative process to let agencies have an understanding about what we think in certain circumstances. Looking at each case individually would be a reasonable period of time.

Senator RHIANNON: So you said you are looking at it in time. Will you be able to share with us what these trends are?

Mr Pilgrim : I can certainly take that back and see whether it is something we can produce any useful information on. I cannot guarantee what we may be able to produce, but I certainly will take it on board.

20 October 2015

[D2023/008497](#)

Senator JACINTA COLLINS: I am interested particularly in relation to your FOI education functions with regard to Commonwealth agencies. What has happened there?

Mr Pilgrim : In terms of Commonwealth agencies, we have not undertaken any specific programs of education work. We rely on the current guidelines that were developed by the office some time ago to provide guidance to government agencies in terms of the application of the FOI Act. We look to decisions that we make and publish to provide, again, guidance about how I—and the commissioners before me—interpret matters in terms of IC reviews. We have on occasion, I think, participated—and I might look to one of my colleagues here—in some of the work that has been undertaken through AGS in educating the broader public sector.

Senator JACINTA COLLINS: Yes, I would like you to expand on that, please.

Ms Toohey : We participate in a number of forums with the Australian Government Solicitor, both in Sydney and in Canberra. AGS run the forums, but we certainly participate and generally have a standing part of the session there. We also issue a newsletter on a regular basis, which outlines new decisions that we have made under the FOI Act, and obviously we have regular publication material about the OAIC review decisions that we put out.

Senator JACINTA COLLINS: I will come back to this point, because my time is finishing at the moment, particularly on some of the staffing issues. With respect to these AGS forums, are they broad forums or are they forums specifically dealing with the handling of FOI matters?

Ms Toohey : They are generally FOI and privacy forums, so they are specifically for staff that work in agencies that handle FOI requests and privacy matters.

Senator JACINTA COLLINS: How many of those have occurred?

Ms Toohey : Recently? Certainly this year we have attended at least three. They are generally quarterly.

Senator JACINTA COLLINS: And you would be attending each one? Would that be your understanding?

Ms Toohey : I and/or my staff attend those.

Senator JACINTA COLLINS: Would I need to ask the AGS which agencies are participating?

Ms Toohey : Yes, I do not have attendance lists. Sorry.

decisions which is not characterised by an adversarial style of dispute resolution.

Senator XENOPHON: Mr Pilgrim, are there more matters going to the AAT? Are you aware of a trend where an increasing number of matters are going to the AAT?

Mr Pilgrim : If we are talking about appeals to the AAT over decisions made by my office, I would need to check those figures—or perhaps we would have to approach the AAT for those exact figures. I can give you the figures on how our office has been going in resolving FOI matters that have come to us. Would you like some of those?

Senator XENOPHON: Please provide them on notice.

Mr Pilgrim : I am happy to either provide them on notice or provide them now.

Senator XENOPHON: If it will take less than a minute, that would be okay—I just want to sneak one more question to the Attorney in before the lunch break.

Mr Pilgrim : I will give you a brief idea. We finalised 482 Information Commissioner reviews in the financial year just finished. Of those, 61 were closed so that the applicant could go to the AAT. But the figure I would like to mention is that there were 119 matters that were conciliated with agencies through the work of our officers. So we are seeing an increase in the matters that we are able to conciliate with agencies without them having to go to formal decisions.

that sentence, but I will ask.

Senator JACINTA COLLINS: Going back to questions in relation to how the Office of the Information Commissioner is currently functioning, Mr Pilgrim, what is the current caseload?

Mr Pilgrim : Are you focusing mainly on FOI or the privacy caseload or both?

Senator JACINTA COLLINS: Both, thanks.

Mr Pilgrim : Currently, on hand, on the FOI side, we have 211 matters. Currently, on the privacy side, we have 3,000 matters.

Senator JACINTA COLLINS: How is that tracking with past caseloads?

Mr Pilgrim : For the privacy caseload, our caseload has been going up over a number of years—I will just give you some figures and make one explanation in terms of the privacy caseload. In the 2014-15 financial year, we received 2,840 privacy complaints. That was down on the previous year, which was 4,239. However, in that previous year we did have quite a number of complaints coming in from one major data breach matter so that did increase the figures quite significantly. However, overall the privacy complaints have been trending up for quite a number of years now.

For the FOI matters: in the 2013-14 financial year, which was the one prior to the announcement about the changes for the office, we had received 524 applications for an Information Commissioner review. In the 2014-15 financial year just finished, we received 373 applications for Information Commissioner reviews.

Senator JACINTA COLLINS: Sorry, 373 applications.

Mr Pilgrim : For Information Commissioner reviews under the FOI act.

Senator JACINTA COLLINS: And your caseload is currently 211.

Mr Pilgrim : That is correct: 211 on hand, yes.

Senator JACINTA COLLINS: Is it true that the Information Commissioner is unable to deal with all the appeals which come before him and is referring many on to the AAT?

Mr Pilgrim : We get applications in, not appeals as such, under the legislation, so there are applications for the Information Commissioner to undertake a review of a decision by an agency. I mentioned some of these figures just before the break to Senator Xenophon and I can go through them again. We finalised in the 2014-15 financial 482 matters that were applications for an Information Commissioner review. Of those, 128 were the subject of an Information Commissioner decision—that is, either the former commissioner or me making a formal decision. Of those matters, 61 were closed.

Senator JACINTA COLLINS: Yes, I remember that figure.

Mr Pilgrim : Sixty-one were closed under section 54WB, which then provides for the applicant to go off to the AAT for review. So 61 matters were closed under that particular section of the act.

Senator JACINTA COLLINS: What I am dealing here then is with the assertion that some of these 61 may be being closed earlier than they might otherwise, because of limited resourcing.

Mr Pilgrim : The section that allows us to do that is where there is a decision taken that is in the good administration of the act that we think those matters can be best resolved if they go off to the AAT.

Senator JACINTA COLLINS: Has there been a change in practice with respect to those provisions since your resourcing has been streamlined?

Mr Pilgrim : I think that what we have been doing has been, as I said earlier, taking some new processes to handle the IC reviews. We have been conciliating, as I said before the break, quite a number of those. We had some 115 that we have managed to conciliate an outcome in without having to go to a formal decision. In terms of the matters where they have been closed so that applicant can go to the AAT, we have looked on issues in terms of whether or not there is a likelihood that we can reach a decision that will not be appealed. Where it looks like there would be an appeal to the AAT, we have talked to the parties about closing it under that provision so that it can go to the AAT. I might ask Ms Toohey if she wants to expand on any of the other reasons we do those closures.

Ms Toohey : I note that, in last year's statistics, the first half of the year were also in light of the fact that we were expecting to close in December.

Senator JACINTA COLLINS: I recall past discussions, I think, where that process has been described as a means of managing the quota.

Ms Toohey : It was also a case of potentially adding months on to someone's application when they were going to end up in the AAT anyway. You will see certainly from more recent stats that the number has stabilised around 12 to 14 per cent. As the commissioner has just mentioned, it is generally matters where we think the matter will not be finalised by our process where the parties are

interested in litigating the matter. They are the matters that we generally refer to the AAT, after consulting with both parties.

Senator JACINTA COLLINS: So, prior to the current government's policy decision, what was the percentage rate?

Ms Toohey : I have not got it in front of me. It was smaller; I certainly can affirm that.

Senator JACINTA COLLINS: Could you take that on notice for me, please. When you say 'it stabilised to between 12 and 14 per cent', how high did it get?

Ms Toohey : They would have been the highest stats we have had.

Senator JACINTA COLLINS: So it has not swung back?

Ms Toohey : No. Essentially it has been around the 12 per cent mark since we started looking at matters on the basis of their complexity—how large they were, whether they were going to be resolved and dealt with by the process that we provided.

Senator JACINTA COLLINS: Going to my earlier questions about education and best practice guidelines on managing FOI, has the AGD already taken responsibility for FOI policy?

Mr Pilgrim : The functions for FOI policy as part of the planned disbanding of the OIAC did see those functions going to the Attorney-General's Department.

Senator JACINTA COLLINS: So that still has occurred?

Mr Pilgrim : That still has occurred, yes.

Senator JACINTA COLLINS: To what extent does that also relate to the functions around educating decision makers on FOI matters?

Mr Pilgrim : I think, in terms of the role of the commissioner, prior to that decision, that was certainly the role of the information commissioner. As I said before the break, there were a number of ways in which we had undertaken that, and some of those functions would have gone over to the Attorney-General's Department with the resourcing.

Senator JACINTA COLLINS: Can you describe those for me?

Mr Pilgrim : I think it might be best to ask the department if they would like to talk about some of the functions they see themselves undertaking.

Senator JACINTA COLLINS: No, Mr Pilgrim, with respect, what I am asking you is: what was it that the information commissioner did in the past that you now believe resides with AGD?

Mr Pilgrim : In the past we did have a role of providing education. As I said, we did run an information contact officer's network, where we brought together representatives from the various government agencies that were responsible for both FOI and privacy. We met a few times during the year, when we would have a half-day seminar to brief them on decisions, guidelines and policy decisions we were taking. That is a role we are no longer undertaking, and I am not in a position to say whether the Attorney-General's Department sees themselves taking that on.

Senator JACINTA COLLINS: I am not asking you that side of the question. I will come to that with them later.

Mr Pilgrim : Also there is the role we see as being educative, through the publishing of our decisions, my decisions, and that is ongoing for me.

Senator JACINTA COLLINS: That is still occurring.

Mr Pilgrim : We also have a continuing role working with agencies to the degree that we can. In that regard, we do have one to one meetings with agencies ourselves, still, to work through some of the issues we are finding with their particular agencies. There is the guideline process, which is a function of the information commissioner. That function had transferred over to the Attorney-General's Department; however, under the current act, which is still in place, the information commissioner is required to handle the development and the publishing of those guidelines. That is something I am talking to the Attorney-General's Department about at the moment, about how we can best work to review those guidelines.

Senator JACINTA COLLINS: Okay. So with the guidelines, who takes responsibility for them now—AGD or you?

Mr Pilgrim : I think we will be working together about reviewing the guidelines, for the reason, in part, that some of the responsibility was to transfer to the Attorney-General's Department—some of the resourcing was to transfer to the Attorney-General's Department—but I, under the Freedom of Information Act, hold the power to actually publish guidelines. So it will be a joint exercise.

Senator JACINTA COLLINS: So the publishing of them still resides with you?

Mr Pilgrim : The issuing of them still resides with me, yes.

Senator RHIANNON: I would like to move on to clarifying some information that was supplied in questions on notice from earlier this year—this is question number AE15/078. In response to a question at an earlier estimates—this is December 2013—I noted in my question that we had heard that the FOI workload was increasing by 10 to 15 per cent per year. I asked in February-March this year: was there anticipation that the workload would decrease? The answer that I received was:

Yes. It is anticipated that the number of applications to the Administrative Appeals Tribunal (AAT) will be less than the number of applications for external review received by the Office of the Australian Information Commissioner.

It goes on to say:

This is due to two major reasons—

and this is where my question goes to—

(1) the requirement for internal review will improve the quality of decision making ...

What evidence do you base that response on? I will say it again:

...the requirement for internal review will improve the quality of decision making ...

How did you determine that that would occur before it had happened?

Senator Brandis: To whom is your question directed, Senator?

Senator RHIANNON: As you often come in, Attorney-General, and take over the questioning, I thought that you would be very capable of giving direction on this matter and assisting the committee.

Senator Brandis: I think the conclusion is made on a judgement about the best governance arrangements.

Senator RHIANNON: Surely, Attorney-General, even for you that is not an answer. An assumption has been made there. It is implied that there is evidence.

Senator Brandis: No, it is not.

Senator RHIANNON: It says:

... the requirement for internal review will improve the quality of decision making ...

Senator Brandis: That is a judgement.

Senator RHIANNON: Yes, and I am asking what the judgement is based on. That is quite a straightforward question.

Senator Brandis: I will take that on notice, because that judgement was, no doubt, contributed to by the thinking of a number of people, which, I venture to imagine, was based on their experience of governance arrangements.

Senator RHIANNON: There were two major reasons stating why the assumption is made that there will be a decrease. The second one is: 'The application fee for external merits—

Senator Brandis: It is not an assumption; it is a prediction, or an expectation.

Senator RHIANNON: The English language is very delightful, Senator Brandis.

Senator Brandis: No, it is a very important difference. That was not an input into the decision. That was an expectation of the outcome of the decision.

Senator RHIANNON: If you dispute that this is an assumption, I will look forward to hearing your answer. The second reason given is:

... the application fee for external merits review is an appropriate mechanism to ensure that genuine applications are able to be pursued.

What is the evidence for coming to that assumption?

Senator Brandis: It is not an assumption and nor does it say there is evidence. I would characterise the proposition stated in the sentence you have read aloud as a judgement.

Senator RHIANNON: But what is it based on?

Senator Brandis: I will take it on notice, but I dare say it is based on the experienc

Senator RHIANNON: Finally, there is question No. AE15/077. This was about gaining some data on the number of FOI requests for 2014. The last quarter, from 1 October to the end of the year, was

3,042. But it was noted that some agencies had not reported their figures for this quarter, so I was just after the total figure for that year, if that could also be taken on notice, please.

Senator Brandis: Yes.

Senator RHIANNON: Thank you.

Senator JACINTA COLLINS: Can I ask Mr Pilgrim some questions around FOI and ministers using—I want to use the right word here—non-official means of communication. Are you aware of the advice that was tabled in the Senate Finance and Public Administration Committee yesterday by Mr Allan McKinnon with respect to non-official communication systems?

Mr Pilgrim : No, I am not aware of that advice.

Senator JACINTA COLLINS: Mr Pilgrim, this has been an issue, as I understand it, in the UK and in the United States. Have you addressed this issue at all?

Mr Pilgrim : No, I have not considered that issue at this point.

Senator JACINTA COLLINS: Would you see it as a concern if the use of non-official means of communication, which involves the destruction of documents, were being used to the effect that future searches under the FOI Act would not be possible?

Mr Pilgrim : I think there are couple of overlapping issues there, and one would be relating to the Archives Act for which I do not have responsibility.

Senator JACINTA COLLINS: You don't?

Mr Pilgrim : Not for the Archives Act, no.

Senator JACINTA COLLINS: Who does?

Mr Pilgrim : The National Archives office has responsibility for the Archives Act. To try to not prolong the conversation, it is not a matter that I have actually turned my mind to at this point in time, so I do not know that I would be in a position to be able to answer your question directly at this stage.

Senator JACINTA COLLINS: Have you got a copy of that advice yet?

Mr Pilgrim : It has just been provided to me, yes.

Senator JACINTA COLLINS: It might be easier for me to ask you on notice to consider that advice with respect to FOI matters. I will ask my following question on notice as well, which is: will you consider conducting an own motion investigation into this issue?

Mr Pilgrim : I will certainly look at the advice and see what response we can provide. In terms of an own motion investigation, I will take that on notice and have a look at the advice in the first instance.

28 May 2015

[D2023/008501](#)

Prof. McMillan : With the indulgence of the committee, I would like to make a brief opening statement which will touch on issues of budget planning and current work. It may feed into the questions. I will

make an opening statement about OAIC developments since the OAIC last appeared before of the committee in 2015. The committee will be aware that there is a bill currently before the parliament to disband the OAIC and introduce new arrangements for review and oversight of FOI administration—that is, the Freedom of Information Amendment (New Arrangements) Bill 2014. The budget for 2015-16 recently announced by the government provides funding directly to the OAIC for the forthcoming financial year, including transitional funding for FOI review and oversight functions. Specifically, the budget for next year will provide roughly \$1.7 million for the FOI function and \$6.8 million for the privacy function. The OAIC receives additional funding through privacy related MOU arrangements with other government departments. Specifically, as to FOI work, The OAIC has continued to discharge a reduced and streamlined FOI review and oversight function. I will just give some statistics: since 1 January, that is in a five-month period, the Privacy Commissioner and myself have together published 34 IC review decisions and made one vexatious applicant declaration. In the first 10 months of this financial year, we have received and resolved a much larger number of IC review matters. Indeed, we have resolved 433 IC review matters, many of those on an early resolution basis after analysing applications and talking to the parties and, in some instances, discontinuing a matter so that it can be recommenced by the IC review applicant before the Administrative Appeals Tribunal. We also continue to deal with telephone and written inquiries on FOI matters. There were 569 in the January-March quarter this year, and also extension of time requests and notifications, of which there were 523 in the same quarter. We no longer deal with FOI complaints. We have been referring any we receive to the Commonwealth Ombudsman since 1 November last year and the Attorney-General's Department has taken over statistical reporting advice and guidelines.

Senator JACINTA COLLINS: Okay. I am just going to start on the funding arrangements that you have appraised us of. The transitional FOI funding of 1.7—how does that compare to what would have been allocated for the functions to FOI prior to the government's policy change?

Prof. McMillan : Commissioner Pilgrim will deal with the budgetary comparisons.

Mr Pilgrim : If I put it in terms of staffing levels, it might be useful in that regard. In the current staffing levels, we have nine people who are working on FOI, and that is in comparison to 12 months ago when we would have had approximately 23. The funding levels we have received should allow us to have an ongoing staffing level for FOI of approximately 11-12 people for the next 12 months.

Senator JACINTA COLLINS: So you will go from nine up to 12?

Mr Pilgrim : That is correct.

Senator JACINTA COLLINS: Which is about half of the capacity that previously existed?

Mr Pilgrim : Less than half that originally existed within the office.

Senator JACINTA COLLINS: All of this occurring whilst there has been no change to the legislation?

Prof. McMillan : Correct.

Mr Pilgrim : Yes.

Senator JACINTA COLLINS: So, despite the government's inability to progress this legislation during the last parliament, the transitional funding does not provide funding adequate to meet the provisions of the current act?

Prof. McMillan : I will comment initially on that. The figures that I have provided indicate that there is quite a dynamic output from the commission at the moment. Indeed, over the last four years there has been a steady improvement in output at a time of diminishing resources. For example, in the IC review—

Senator JACINTA COLLINS: Well, this is the diminishing resources, which is exactly the point I am getting to.

Prof. McMillan : Yes, and I will comment on that in one moment. In the IC review space, for example, on average we receive 30 applications per month and resolve 40 per month. So, we have eaten substantially into a backlog that we had and reduced it nearly by half, and we are continuing to deal with IC review matters in an efficient way. But let me add that it is not an ideal context—

Senator JACINTA COLLINS: No, it is not ideal.

Prof. McMillan : in which to be discharging that function, and it is correct, as you say, that there was a higher staffing at an earlier time. And that certainly enabled the office to discharge a broader range of liaison functions with government, the publication of guidelines and other materials and an occasional own motion investigation, although we did complete one in December last year—in record time, I might add. It is an awkward environment, but the office is highly productive nevertheless in the FOI space.

Prof. McMillan : Yes, departments frequently ring the advice service to ask for advice. Roughly 75 per cent of the IC review applications we receive are resolved on an early resolution basis, and in quite a number of cases that is after consultation with an agency and an applicant in which, in an informal fashion, there is OAIC staff commentary on the decision of an agency and its handling of an FOI request. Commissioner Pilgrim and I also take the opportunity in our IC review decisions to comment on agency handling of FOI requests. In a couple of recent decisions, for example, I have given advice on when deletions can appropriately be made, when agencies should get on the front foot and discuss a matter with an applicant before it gets to the stage of needing a formal review decision.

Senator JACINTA COLLINS: It would be helpful for us to understand—particularly if the government does actually ever get close to re-presenting its legislation to the Senate, which they have been loath to give an indication on for quite some time now, but perhaps when Senator Brandis returns it can be a direct question I ask him, again—when you describe the continued streamlined FOI process, what that streamlining now means in terms of your continued operations as opposed to how you were previously operating. What has transitioned to A-G's and indeed what has gone over to the Ombudsman?

Prof. McMillan : If the committee would like, I would be quite happy on an uncontentious basis to outline the way the office has discharged the function. Let me say, we have undertaken some quite innovative steps to streamline matters and these will be of lasting significance for FOI review, whatever model is adopted by the parliament, and this is reflected in recent IC review decisions in which we have adopted a template model that enables easier resolution, drawing attention to the issues and quicker disposition of cases. So I would be happy to prepare something which explains our work.

Senator XENOPHON: The fact that the Freedom of Information Commissioner has not yet been appointed, there is not a replacement, does that impede you in any way in terms of the exercise of your work?

Prof. McMillan : Formerly, there were three commissioners who could make IC review decisions—and only a commissioner can make an IC review decision. Since Dr Popple's departure, it has meant there are only two commissioners, Commissioner Pilgrim and myself, who can make IC review decisions. Since Dr Popple's departure, we have published 34 decisions and been involved in disposing of a much larger number.

Senator XENOPHON: Would it be fair to say that in the absence of another commissioner that does axiomatically mean that there is, all things being equal, a greater workload for the two of you?

Prof. McMillan : Yes. More hands on deck means greater distribution of work among those who are available.

Senator XENOPHON: Does that in itself lead to an increased backlog or a more cursory approach? I am not in any way being critical. Does that mean that you need to cut your cloth accordingly to try and deal with the workload?

Prof. McMillan : We have addressed the staff reduction by exploring other options for earlier resolution of cases and indeed have been successful in reducing the backlog. The backlog of unresolved matters was standing at around 350, 18 months ago. It is down to under 200 at the moment. As I indicated earlier, we receive 30 IC review applications per month and resolve 40; so there is a steady and efficient handling of cases. Of course, there is some reduced work as well. We now refer all FOI complaints to the Commonwealth Ombudsman. And, as indicated, the department has picked up the tasks of statistical reporting and preparing for further amendments to the guidelines.

Senator XENOPHON: Professor McMillan, there is a processing backlog, isn't there?

Prof. McMillan : Currently we have just under 200 applications on hand. Honestly, the backlog is nowhere near as serious as it once was. For example, all new applications are now opened and allocated within between 30 to 60 days. A large number of matters are resolved quite quickly and efficiently by all the different early resolution techniques, but matters that are disputed will often take up to a year to resolve.

Senator XENOPHON: This question has been put to me by some frustrated journalists, by one in particular who was concerned about this: is there anything to suggest that politicians, departments or agencies are taking advantage of the relative lack of resources and any processing backlog to either refuse or delay FOI requests knowing that your office does not have the resources it hitherto had in order to conduct timely assessments and appeals? This is not a criticism of your office at all but what has been put to me is that there might be some who are playing the system knowing that there is a backlog there.

Prof. McMillan : I will make two points in response. Firstly, there has in my view been a general improvement in FOI administration, across government agencies over the last four years. There is much greater consistency in FOI administration across government. The second point is we certainly see instances in our IC review matters of exemption claims that are not strong.

Senator XENOPHON: Made at the last minute?

Prof. McMillan : They are exemption claims that are explained in statement of reasons as the act requires, but we go back to agencies on an informal basis and often question and test those claims. In many instances, agencies withdraw them; in other instances, they persist with the claim. Sometimes

those claims are upheld on IC review matters and sometimes they are not. There is certainly room for improvement in more astute decision making by agencies. Whether that reflects a considered view to game the system and claim an exemption and let time run, I have no direct evidence of that. Certainly, I have said on other occasions that when there are delays in FOI review, it does provide an opportunity for an agency to make a decision that is rather flimsy but will survive until the external review body has the opportunity to look closely at it.

Senator BILYK: That is a good point, Chair. I might look at changing the standing orders in regard to how chairs are allowed to interpret questions asked by senators. What is the present caseload of the OAIC?

Prof. McMillan : It is better to give the statistics for the first 10 months of this reporting year, and referring only to applications—

Senator BILYK: I just have a point of clarification, Professor. Regarding the first 10 months of the year, are you talking about the calendar year?

Prof. McMillan : No, the financial year—the reporting year. I will speak only of applications for IC review, that is, for review generally of refusals of access. In that 10-month period, the OAIC has received 304 applications for IC review. It has finalised 433 and it currently, as at the end of April, had 199 matters on hand.

Senator BILYK: Is it correct that you, as the IC, are unable to deal with all the appeals which come before you, and so are referring many on to the AAT?

Prof. McMillan : There will always be a list of matters that still require resolution. But certainly we now use more actively that power in the FOI Act to discontinue a matter so that it may be the applicant has the option of recommencing proceedings in the AAT. Just to give figures on that, in the 2013-14 reporting year, that power was exercised on 41 occasions. In the 10 months of this reporting year, it has been exercised on 56 occasions. So there has been an increase. Let me say, we always invite submissions from the parties before we make a decision to discontinue a matter, and we sometimes do not go ahead with an initial intention or proposal to discontinue a matter. We place the matter back in the IC review stream.

Senator BILYK: After having spoken to the various parties, in consultation with the parties?

Prof. McMillan : In consultation with the parties. Ultimately it is the decision of the office, but we take account of the submissions of the parties.

Senator BILYK: Has the OAIC been referring complaints to the Ombudsman?

Prof. McMillan : Yes.

Senator BILYK: Is there a legal basis for making such a referral?

Prof. McMillan : Yes. The Ombudsman has a jurisdiction to handle FOI matters—as part of its general jurisdiction, I might say—and the FOI Act provides that the OAIC may transfer a complaint to the Ombudsman, and that matter has been well notified on our website since late last year.

Senator BILYK: How many complaints have been referred to the Ombudsman?

Prof. McMillan : I will have to take that on notice.

Senator RHIANNON: You have replied to a couple of senators who have asked issues about the backlog and I just wanted to clarify some matters. I understood that the backlog of review applications—you said 200 at one point and then 199.

Prof. McMillan : Yes, sorry, I was rounding up at one stage.

Senator RHIANNON: Understandable. What I have in my notes, which said, 'appears to be a contradiction,' so I just want to clarify it. This was in your opening statement so I may have got it wrong. Earlier on you said you no longer deal with FOI complaints, they are referred to the Ombudsman.

Prof. McMillan : Correct.

Senator RHIANNON: Then later I had that you were principally on FOI matters. So, could you clarify, please?

Prof. McMillan : As Information Commissioner I have responsibilities under the FOI Act, the Privacy Act, and in relation to information policy advice to government. But I concentrate on my responsibilities under the FOI Act at the moment, though I am still in consultation with Commissioner Pilgrim and other staff members about other matters and we still hold weekly executive meetings. I participate in the work but I concentrate on FOI review functions, but they are being discharged differently to the way they were being discharged, for example, a year ago.

Senator RHIANNON: Just going back to the numbers. At one point when you were talking about the numbers—I think it was when you said the 200 figure and you said of the 200 applications, 'it is not as serious as it was'. It still sounds like a lot. It still sounds like to the person who is waiting that there are a lot of people waiting.

Prof. McMillan : The number in the queue at the moment, 199, has to be seen in context of a steady workload into the office of, on average, 30 IC review applications per month. It has to be seen in the context of a backlog that was close to around 350 at one stage. Also, in the legislative context, it will necessarily take a matter of weeks to resolve any new matter. It will quite often take many months to resolve a disputed matter. I have said on other occasions that there is no doubt that, since the amendments to the FOI Act in 2010, there has been a substantial increase in applications for IC review and also for FOI requests that we classify as more complex. For example, they relate to a request for policy advisings in government. This is partly a response to the removal of application and review fees in the 2010 amendments.

I have said on other occasions and in submissions to government that, whatever transpires in the future, the FOI scheme needs amendment so that it better adjusts the tension and the pressures that government agencies feel, and the expectations and aspirations of applicants, and reflects also other measures available to people to obtain information from government other than through FOI requests. I agree that circumstances are not ideal at the moment, but, independently of legislation before this parliament, I have advocated the need to review quite a number of features of the FOI arrangements.

Senator RHIANNON: Professor, how many matters have you passed to the AAT in the last 12 months?

Prof. McMillan : In the last 10 months of this reporting year, we have discontinued 56 under a provision of the act that says I can discontinue the matter and the applicant can then commence the

proceedings afresh in the AAT. We do not refer the matter to the AAT; we simply discontinue. The short answer is 56 in the last 10 months.

Senator RHIANNON: Is it possible, out of those 199, to inform the committee how many are from individuals trying to ascertain information about their own circumstances and how many are from organisations?

Prof. McMillan : I do not have those figures at hand, and my guess is that we do not have those.

Mr Pilgrim : No. We will take on notice whether we can do that.

24 February 2015

D2023/008502

Mr Pilgrim : Yes, thank you. I would like to make a very short opening statement.

In summary, FOI complaints are being transferred to the Ombudsman's office; Information Commissioner reviews are being triaged by our office so that where we can expedite a matter we do so; and, for the more complex or voluminous ones, we work with the applicants for these to be referred to the AAT.

Mr Minogue : The moneys that the government decided, in the budget, were to be made available to the office of the information commissioner for its ongoing functions were in the order of \$19 million over four years. Because of the government's decision that the OAIC would be restructured and the Privacy Commissioner would move as an independent statutory officer to the Human Rights Commission, those moneys were appropriated not to the OAIC, but to the Human Rights Commission. Given that the bill has not passed, those monies are still in the appropriation of the Human Rights Commission, but only for OAIC purposes. The mechanics that I was talking about was that, if the bill passes, that remains a proper reflection of the government decision. If the bill does not pass, then a decision will need to be made by the government not to find new money for the OAIC, but to recognise the fact that under the first proposition the OAIC would no longer continue. Under the second alternative, if the bill is defeated, the OAIC does continue, so those monies would need to be re-appropriated back to the entity that will continue, whereas the decision of government was that it be initially appropriated to an organisation called the Human Rights Commission because the OAIC, in its current form, would not continue.

Senator JACINTA COLLINS: But are there other funds, other than the cash reserves, currently available to the office of the information commissioner?

Mr Minogue : Yes. The money that is made available to the OAIC for this financial year, which is probably in the order of some \$5 million, remains available to the OAIC.

Senator LEYONHJELM: Mr Pilgrim, what is the staffing situation in relation to the OAIC resources? How many people are working on FOI in the office?

Mr Pilgrim : We have approximately nine staff working on FOI matters.

Senator LEYONHJELM: How does that compare with 12 months ago?

Mr Pilgrim : Twelve months ago we had approximately 20.

Senator LEYONHJELM: And the decline is attributable to the anticipated restructure and abolition of the function?

Mr Pilgrim : That is correct. We took steps last year, on the basis that the government's intention was for the office to wind up by 31 December, and worked with our staff to make sure that we could place those staff in other positions where we could assist them in that process.

20 November 2014

The OAIC's witnesses did not appear.

29 May 2014

[D2023/008506](#)

Senator SINGH: Budget paper No. 2, page 64, outlines the new arrangements, which includes the Information Commissioner and the FOI Commissioner being abolished. FOI complaints will now be handled by the Commonwealth Ombudsman; is that correct?

Prof. McMillan : Yes. A person currently has the right to make an FOI complaint to the Commonwealth Ombudsman and it is expected that that right will continue under new arrangements.

Senator SESELJA: This is just a quick question for Professor McMillan. Does your organisation keep stats on the cost to government of processing FOI requests? Do you have any of them handy in order to perhaps give me a bit of a picture of what is the annual cost, say, over the last two or three financial years? Is that something that you are able to provide here?

Prof. McMillan : The OAIC annual report contains detailed statistics on those matters. The costs are estimated in returns by agencies. From memory, the estimated cost for 2012-13 was \$45.2 million.

Senator SESELJA: Is that for the last financial year?

Prof. McMillan : Correct.

Senator SESELJA: Do you have the figures to hand for the previous two financial years?

Prof. McMillan : Again, those statistics are there. All I can say is that there has been an increase, from memory, over the last three years. I think the cost estimated by agencies has risen about 60 per cent from, I think, roughly \$24 million to the \$45 million or something in that region. I can get the exact figures and provide them later, if that is okay.

Senator SESELJA: So a 60 per cent increase; that is very large. Over what period did you say there has been that 60 per cent increase?

Prof. McMillan : Over a three-year period there was a 60—

Senator SESELJA: Over a three-year period.

Prof. McMillan : Yes. We have just located the figures here. The estimated cost in 2011-12 was \$41.7 million; in the last financial year, 2012-13, it was \$45.2 million. Earlier in 2010-11, it was \$36.3 million. Over that two-year period, on those figures there, the cost has increased—as estimated by agencies—from \$36 million to \$45 million.

Senator SESELJA: You think there has been a 60 per cent increase or thereabouts in recent years and you just need to go back another financial year or two; is that right?

Prof. McMillan : There has certainly been an increase, partly because of the added responsibilities cast upon agencies by Freedom of Information Act amendments in 2010, for example, to engage in an information publication scheme to publish documents on the disclosure log. There has been an increase in FOI requests, particularly an increase in non-personal information requests that agencies anecdotally say are among their more expensive requests.

Senator SESELJA: The legislative changes have led to more FOI requests, so there is a volume issue. What is the average cost, roughly, of processing an FOI request? Do you keep stats on that?

Prof. McMillan : The FOI commissioner, who is an expert in the procedures, is just rifling through for the estimated annual cost per request.

Dr Popple : I am just reading from our annual report. The average cost per FOI request determined in the financial year 2012-13 was \$2,078; in the preceding year, it was \$1,876; and, in the year before that, it was \$1,799.

Senator SESELJA: Are they net costs or gross costs? Obviously there is cost recovery to some degree, so is that the gross or net cost to government?

Dr Popple : That is the gross cost. We also report on the amount of money recovered by agencies through charges under the FOI Act. Over the years—in fact, over more than 30 years—that has averaged at around two per cent of that cost.

Senator SESELJA: Two per cent of the total cost.

Dr Popple : Yes. So the cost has never been anything like cost recovery.

Senator SESELJA: So, of the \$46 million, it might be around \$1 million in—

Prof. McMillan : No. It was under \$200,000 last year.

Senator SESELJA: Under \$200,000.

Prof. McMillan : Yes.

Senator SESELJA: So that would be far less than two per cent, on my quick—

Prof. McMillan : From memory, I think it was about 1.79 per cent last year.

Senator SESELJA: So \$200,000, though, was the number out of \$46 million.

Prof. McMillan : Under \$200,000, yes.

Dr Popple : I am sorry to correct you; \$236,000 was recovered in charges under the FOI Act last financial year.

Senator SESELJA: Thank you very much for that. That is all from me, Chair.

Senator RHIANNON: I am just trying to get the exact number of full-time equivalent staff.

Prof. McMillan : Yes. The budget-funded positions in the office at the moment are 63.3 staff. The budget papers estimate a saving of 23 positions. Of course, it is proposed that there will be a new

office of the information commissioner and the staff numbers for that, as I understand it, have not yet been completely clarified. Also, there will be a transfer of an estimated six staff positions to the Attorney-General's Department for functions that will be discharged there and one staff position to the Administrative Appeals Tribunal.

24 February 2014

D2023/008508

Senator RHIANNON: Yes, thank you. This is for the Information Commissioner. I notice that section 3 of your act requires prompt action, and that word 'prompt' is obviously very important, but when you look at the annual report there are those worrying figures about how some things are taking so long. Could you indicate how you are working to ensure that you can undertake your work in a prompt manner.

Prof. McMillan : Thank you, Senator. It is a concern to the office that there is a delay in dealing with some of the applications for IC or merit review of FOI decisions, FOI complaints and privacy complaints. Our figures on the delays and on the workload are published quarterly on the web and we have drawn attention to them quite often. But I must say that, while it is a genuine concern to the office, we continually strive for better, more efficient performance. For example, the figures published on the web in December indicate that the rate of completion of cases has risen in IC review cases to 1.4 cases per day, compared to 0.7 in the previous annual report. Similarly, the completion of privacy complaints has risen to six per day, compared to 3.79 in the previous annual report. In the last three years, we have published 163 IC review decisions and closed probably over 900. So the office battles gamely to deal with a growing workload and, as far as possible, to meet the stated objectives of the FOI Act, which—as you have indicated, senator—emphasises a prompt dispatch of FOI matters.

Senator RHIANNON: I did notice your comments recently about the departments gaming the system. Could you explain what you meant by that, particularly in the context of what you are suggesting is that some departments may know that they can get away with not actually responding in a timely and proper fashion.

Prof. McMillan : My comment was made in a speech I gave last year and it has been repeated a number of times since, in which I said:

A related concern is that agencies may seek to game the system by denying access in the expectation that review applications will sit in an OAIC queue.

I then added a comment that is not as often reported, that it is:

... a perception that we counter by active management of cases from the date of receipt.

But clearly it is a concern to the office that, if there is a perception that a denial of access will take some time independently to review, a denial may sit in a queue until the sensitivity is taken out of the issue.

But, that said, the reason I am public about it is to discourage behaviour of that kind. Our experience is that, for the large part, agencies and ministerial offices do strive to meet the objectives of the FOI Act. As I have also said on a number of occasions, my view is that the changes over the last three years have caused quite a significant cultural change in government. It is apparent that considerably more

is released not just in terms of volume but also in terms of the range of documents. A quick glance at FOI disclosure logs on agency websites indicates that.

Senator RHIANNON: That is very welcome news to hear about a change of culture. With the gaming or the possible 'let us just deny it' attitude, are we just talking about a couple of agencies or 20 per cent? I imagine why that is being quoted widely, because people were concerned to read that. So we just trying to understand where it is at now.

Prof. McMillan : As I said, our figures indicate that we receive upward of 500 IC review applications per year and 150 or so FOI complaints. In addition to that, there is a much larger number of FOI requests to agencies. It is difficult in numbers of that kind and where things are shifting around and, as I said, we are closing equivalent numbers each year. It is difficult to quantify or put a metric around what is good behaviour, what is bad behaviour and what is acceptable or mediocre behaviour.

Equally, whenever I have been asked about the gaming comment, I have always said, 'Look, I am not naming individual agencies, because it would require an individual process involving procedural fairness before anybody was known.' But it is a concern I have and there are instances in which the office works hard to ensure that FOI matters are resolved and documents are released without the need for a published IC review decision. Eighty per cent of our cases are resolved on that basis. So, as I say, it is as much a perception or a worry issue that we are addressing there.

CHAIR: We might have to leave it there. Could I just ask a question. You mentioned that reviews were requested in denial of access cases. Also, there are reviews from where access is given but the party involved appeals. Is that right?

Prof. McMillan : Yes.

CHAIR: What is the percentage?

Prof. McMillan : That is sometimes called third party review. That is one area, I might say, where we have a distinct concern that if an agency has made a considered decision to release documents and then a person or a company who was consulted during the process objects, they have the right under the FOI Act to lodge an application for an IC review. That prevents the release of any documents until the review process has run out, which can include a right of appeal to the AAT. That is one area. It is not necessarily government agencies that could take advantage of that—what I have called gaming the system.

CHAIR: There may be legitimate claims—

Prof. McMillan : There may be.

CHAIR: why the release of information by the department is wrong and legitimate reasons why there are requests for reviews. I understand from a recent involvement that I had that it was something like a year before a matter could be heard. Is that correct?

Prof. McMillan : Yes, there are cases in which there are delays in excess of that. At the moment, many cases that are coming in go through an early resolution triage process and are resolved quite early, but once we decide that a case has to move to the IC review queue—in which a decision under the act can be made only by one of the three commissioners—there can be a delay in excess of a year, but not always.

CHAIR: Do you have statistics to quantify how many of the review requests are in relation to denials and how many are in relation to agreement given, but with a third party objecting?

Prof. McMillan : Yes, there are detailed statistics on all of those matters in the annual report. I do not have them at hand, but I am happy to independently draw attention to some of those statistics.

18 November 2013

D2023/008511

Senator LUDWIG: If I can, then, just cut to the chase: regarding recent FOI requests, have you provided any advice to government about current requests?

Prof. McMillan : About—

Senator LUDWIG: Things like incoming government briefs.

Prof. McMillan : Yes. I have had some discussions generally with government and with the Attorney just about the work and the functions of the office. I have had a meeting with the secretary and with the Attorney. Certainly in briefings that I have provided the workload generally has been mentioned. On the specific issue of incoming government briefs, I had one informal contact, I recall, from a senior officer of a department. I informed the officer of the decision I had made in the Crowe matter. This was before there had been any decision announced in the media. And, equally, I might say I have had contacts from journalists and have spoken informally with members on the opposition side who have rung me, and I have essentially given the same answer to everybody: that, if this matter comes before us, this is how it will be determined. There is a decision already published and it deals with some aspects of the issue but not all.

Senator LUDWIG: That is the Crowe decision?

Prof. McMillan : The Crowe decision—that is correct.

Senator LUDWIG: Have you been asked specifically by government to comment on the Hawke review, now that the recommendations have been made?

Prof. McMillan : As part of our briefing to the new government, the Freedom of Information Commissioner, Dr Popple, and I sent a letter to the Attorney with three attachments that contained the views of the office in response to the 40 recommendations in the Hawke report. I foreshadowed in that letter that the attachments would be provided also to the members of the Information Advisory Committee and the Privacy Advisory Committee, which were scheduled to have a joint meeting, which was held last week. The normal practice is that papers presented to those committees are then published on the web. So the three attachments that contain our response to each of the recommendations of Dr Hawke have been published on the OAIC web today.

Senator LUDWIG: Have you been advised as to whether the recommendations emanating from the Hawke review are government policy?

Prof. McMillan : No, I have not been given any official advice.

Senator RHIANNON: I was interested if staff numbers in any of the FOI units across government agencies have been reduced since the new government came in.

Prof. McMillan : Is that a question about the staff numbers across the Australian Public Service generally?

Senator RHIANNON: I was going to ask Mr Wilkins one right across his responsibilities but I was also interested in narrowing it down to FOI units.

Prof. McMillan : We have never collected statistics—in the three years of this office we have not collected statistics on staff numbers in agencies. We collect statistics on requests to agencies and there has been a slight increase over the last year. We collect statistics on the estimated cost to agencies of administering the FOI Act and there was a noticeable increase in that last year. Beyond that, we do not have figures on the actual staff numbers in agencies. I think in many agencies people would be discharging a mixture of functions, including FOI.

Prof. McMillan : I have taken the time to clarify the last answer I gave. Can I just say that there is a breakdown on page 141 of the OAIC's 2012-13 report of the information provided to our office by agencies concerning total staff hours spent on FOI matters. That shows an increase over the last three years, but of course it will be nine months before we have figures for this year.

Senator RHIANNON: Nine months before we will have figures?

Prof. McMillan : Yes, because it is an annual financial year reporting exercise.

Senator RHIANNON: Mr Wilkins, I was interested in staff numbers in FOI units, if that is possible, if you could inform us whether they have been reduced since the new government took office or, if that is not possible, across your whole department?

Mr Wilkins : There has been no diminution in the department.

Senator RHIANNON: Okay, I am sorry, I was not here then. So we will come back to that this evening. Thank you. Commissioner Popple, I note that in your annual report the reported cost attributable to agency compliance with the FOI Act had gone up. You identified an 8.4 per cent increase. It was interesting to read in the report about the changes that will occur on 12 March next year, when there will be the additional enforcement powers for resolving the various investigations. I am interested in how you anticipate that will impact on costs and how you are managing that.

Dr Popple : I think that question is best answered by my colleagues, because the changes that you refer to that are happening in March next year are changes to the Privacy Act, and they will impact on our office's involvement in that area.

Senator RHIANNON: I apologise; I still get confused.

Dr Popple : Not at all.

Prof. McMillan : I will commence, and Mr Pilgrim might elaborate. In the annual report and in statistics that we publish quarterly on the web, the indication is that the workload within our office is increasing. As a general rule the number of complaints about freedom of information administration and about Information Commissioner reviews, which are merit reviews, are going up by about 10 to 15 per cent a year. That is the trend line in front of us. Privacy complaints, which extend to private sector bodies as much as government agencies, increased last year by about 16 per cent; in the last three months they have increased by close to 35 per cent. As we have also elaborated in the annual report, there is considerable work being undertaken in the office to prepare for the implementation of the privacy reforms on 12 March next year. The office will be required to publish in excess of 50

legislative instruments, codes, guideline notes and other documents. In summary, there is a general increase in workload. There has been no increase, obviously, in the staffing.

Senator RHIANNON: I note that in your annual report you make that very point that you have just made, that you have received no additional resourcing. Are you getting to breaking point? Your annual report says that you are managing it, but we are seeing that the trend is upwards for the amount of work. Are you making an assessment of how long this can continue?

Prof. McMillan : We have been quite public now in Senate estimates questioning and in the annual report and occasionally in speeches about the workload pressures faced by the office. The way that that is most immediately obvious—or the main downside—is that the delays in resolving matters extend. Particularly the delay in opening new matters—that is, assigning a matter that comes in the door to a case office—is extending. For example, with applications for Information Commissioner review on the latest statistics published on the web, it is about 228 days—that is close to eight months—before a new matter is allocated to an officer. There are exceptions—we have a triaging process with which we analyse matters as they come in. So that is the most observable consequence of the situation we are in.

Senator RHIANNON: So, in summary of that, is it correct to say that the work is being compromised because of the lack of resources?

Prof. McMillan : We do not think the quality of the work has been compromised. The way we have put it is that we are unable to meet the performance standards that we set for ourselves. I have certainly indicated very publicly that I would be anxious for the government to consider change to the Freedom of Information Act because we believe some of the recommended proposals for change that we and the Hawke review have made in the past could affect the workload of both agencies and our office. I made those comments in relation to the previous government, and the importance is such that I have made them in the context of a new government.

Senator RHIANNON: Thank you. Are there plans for a more comprehensive review of the FOI Act following the Hawke review?

Dr Popple : You might be aware that the first recommendation of the Hawke review was that there should be a more comprehensive review. Dr Hawke identified some aspects of the system that he thought would be appropriately dealt with by that review. He also made some other recommendations about things that he thought could change without having to wait for that review. We have already, as Professor McMillan mentioned a few minutes ago, provided our response to that review to government. It is available on our website. We have a slightly different view from Dr Hawke about some of the matters that we think do not need to wait for a comprehensive review—things that we think could change sooner than that and which we think might actually work to improve the system and maybe also improve our capacity to perform our role within that system without further resourcing and just changing some of the framework.

Senator RHIANNON: If I understood that, there are some things that you see could happen in a shorter time frame. To go to back to that recommendation with regard to a more comprehensive review, as the Hawke review identified: do you support that more comprehensive review?

Dr Popple : Yes. There are certainly some aspects that we think are quite large issues that would require further review before they are implemented if the government decided to implement them. Dr Hawke also pointed out that there would be some benefit if the act were rewritten in plainer English

than it is now, so at the very least that would be an achievement. But there are some other issues. For example, Dr Hawke identified a question that has been around for a long time about whether or not the act should apply as it does now to documents as opposed to information more broadly defined. For example, you might make an application, and the response would be a newly generated piece of information. That is a significant change if it were to be made and it would clearly require some considerable thought before it were implemented.

Senator RHIANNON: And are there any other areas? You said some aspects. I was just wondering if there are other aspects as well as that one.

Dr Popple : Yes, there are a number of others. We have separated these as an attachment which you will find on our website. Dr Hawke proposed a comprehensive review, and we agreed with him that some of those matters that could be sensibly dealt with in a comprehensive review include whether the act should include provisions to protect decision makers from interference in the decision-making process; whether the FOI act should provide a right of access to information rather than a right of access to documents, as I have just mentioned; whether the act should be amended to allow for representative complaints made on behalf of a group against the same agency where the same common issue of law or fact arises; and whether the same protections against civil and criminal actions that apply to a release of documents under the FOI Act should apply to documents provided under an administrative access scheme. Those are four that we identified that we thought would indeed benefit from some further review. We have gone on to list in that attachment some of the other matters that we thought could perhaps be dealt with more quickly than that. I am happy to take you to those if you like; but, as I said, they are available on our website.

29 May 2013

[D2023/008513](#)

Senator RHIANNON: What will be the process after the Hawke review of FOI laws is tabled? Will there be further consultation on the recommendations of this review in the context of the Open Government Partnership plan development process?

Senator Ludwig: I am sorry, Senator. We are not sure who that was directed at.

Senator RHIANNON: I am not sure myself—whoever picks it up. The question was: what will the process be after the Hawke review of FOI laws is tabled? Will there be further consultation on the recommendations of this review in the context of the Open Government Partnership plan development process?

Senator Ludwig: I suspect that would be for the Attorney-General to decide once he receives it.

Senator RHIANNON: I apologise if there has been confusion about that. I do have a question of the Office of the Australian Information Commissioner. Has any additional funding been provided to the office in response to the continuing budget shortfall?

Prof. McMillan : The answer is no. The departmental appropriations for 2013-14 is, as you indicated, roughly \$10.6 million. It includes a deduction for the efficiency dividend applied to all agencies.

Senator RHIANNON: Could you specify how this impacts on the work of the Oaic.

Prof. McMillan : We publish quarterly statistics on the web now that indicate the work being received by the office and also our completion rates. We have been very public about this. The statistics on the web indicate that we are encountering significant workflow issues. The work coming into the office—for example, privacy complaints, FOI complaints and Information Commissioner reviews—has been increasing by at least 10 per cent a year and though we have made a determined effort over the last nine months to reduce the backlogs there are still significant workflow backlogs. In particular, it takes roughly seven months to allocate a new Information Commissioner review application to an officer and a lesser period, but still a substantial period, to allocate FOI and privacy complaints. We have also written to government expressing concern that we have additional work to implement the substantial privacy reforms that commence on 12 March next year. We have written, drawing attention to the extra workload that that is imposing.

In summary, we are proceeding as best, as gamely and in as focused a way as we can. We are achieving results, but we are not able to complete all the work in the time frames that we would like.

Senator RHIANNON: Is the backlog becoming bigger and is it taking longer to get the work done?

Prof. McMillan : In terms of total numbers the backlog is reasonably steady at the moment. For example, we have on hand just over 400 Information Commissioner reviews that are unresolved. As a result of a determined effort we made towards the end of last year and allocating staff specifically to complaint handling and Information Commissioner reviews, we managed to increase the completion rate of individual staff officers quite considerably. If you look at the web you will see there is a substantial outflow of work, but there is still a large backlog that is not reducing in number, even though we are roughly completing the same work that is coming into the office, but we are not able to reduce the existing backlog.

Senator RHIANNON: Did I hear you correctly, that you said it takes on average about seven months to—

Prof. McMillan : To allocate. If we receive an application for Information Commissioner review it can take roughly seven months to allocate that to an officer for work. We do an initial review of the application, for example, to see whether it is in jurisdiction and to do initial acknowledgement letters, but to do substantive work on a review will take at least seven months.

Senator RHIANNON: Once it is allocated how long on average does it then take to complete it?

Prof. McMillan : It varies. It depends very much on the individual case, but the longest unresolved cases in office are now over two years old—that is, we have some applications for Information Commissioner review lodged over two years ago. All these statistics are on the web.

Senator RHIANNON: What would be your ideal practice? What do you think would be good practice?

Prof. McMillan : In the budget papers there are projected completion rates. The objective is to complete 80 per cent of Information Commissioner reviews within 12 months of receipt and, equally, to complete 80 per cent of privacy and FOI complaints within 12 months of receipt. We are not currently meeting that objective, but that is what we will be focused on in the forthcoming year.

Senator RHIANNON: How many additional staff would you need to achieve that objective?

Prof. McMillan : We have not calculated an exact figure. We have obviously had discussions around budget. The Privacy Commissioner wrote to the Attorney-General drawing attention to the workload

pressures imposed by the privacy reforms, but we have been well aware of government announcements and government measures, including the efficiency dividend, so we have not done scenario modelling. When the proposals for FOI reform and the creation of the office were going through the parliament it was projected that the office would have 100 staff under the departmental appropriation. That is a figure we have been comfortable to accept as a projected number. The numbers go up and down, but they will probably stabilise. They are currently down, under departmental appropriation, to around 64; it will probably stabilise in the next financial year at around 70.

12 February 2013

[D2023/008519](#)

Senator RHIANNON: Do you anticipate receiving additional staff and resources to help drive whatever level of involvement the government decides to bring forward for the OGP?

Prof. McMillan : The proposal I have put to government was that my office would be willing to take a leadership role and provide what support it could to the process of public consultation, preparation of an action plan, coordination of discussion between other agencies, but that on current resources we simply could not do that. I explained in the letter that we indeed had had to shed staff by different processes, to downsize some other activities within the office and that I could not see any way forward for us to take on extra work without some supplementary funding or assistance.

Senator RHIANNON: Have you had a response to that yet?

Prof. McMillan : No, I have not had a response. I might say that the letter we are talking about was gone within the month and there has been a change of Attorney-General in the period. That question is obviously better addressed to the department.

16 October 2012

[D2023/008522](#)

Senator RHIANNON: Your guideline in May, that parliamentary departments are now subject to FOI requests, has had an impact. It came up for some discussion yesterday. We were told by the Clerk of the Senate and the head of the Department of Parliamentary Services that there have been discussions with the Attorney-General's Department about how to manage this change, which may result in legislative amendments to revert to the prior situation where these departments were not covered. Have you been involved in discussions with the Attorney-General and/or her department about this particular issue?

Prof. McMillan : Our office has not been a central player in those discussions but we are aware of the discussions occurring. I have been consulted individually by officers from the parliament about the application of the FOI Act to the parliament and I have been kept abreast of discussions by the Attorney-General's Department. But, as I said, I have not been a central player and it is quite possible that there have been threads in the discussion that I have not been a party to.

Senator RHIANNON: Do you have a view on whether these departments should remain subject to the act you administer?

Prof. McMillan : I do not have a fixed view at this stage, bearing in mind that a review of the FOI Act will commence in November, as required by section 93A of the FOI Act. I can say that the FOI Act was framed on the assumption that it would apply to executive agencies. The application of the act to parliamentary departments, on one view, was inadvertent—at least it did not follow any announcement by government that the consequence of some legislative changes would be the application of the act to the parliament. If the act is to continue to apply to the parliamentary departments, there are some special issues that will need to be considered. For example, one issue on which I have held discussions with officers of the parliament is the application of the act to the Parliamentary Library that provides a special service to members of parliament. To give another example, there are special questions about the fact that the parliamentary departments provide the infrastructure for electronic communications and other support services to members of parliament. These raise special issues that have never been squarely addressed in the operation of the FOI Act.

Senator RHIANNON: Rather than have the blanket exclusion of these departments, would a way to go be to look at where there is sensitive information and have exemptions? There are already exemptions, so we would look at extending the exemptions and then all the departments are effectively under the same FOI regime.

Prof. McMillan : That would certainly be an option and it would not be an uncharacteristic option. For example, the FOI Act applies to government business enterprises but not to all of their records. The act also applies to the office of the Governor-General and to courts and tribunals but not to all of their records. There are many precedents for a partial application of the act in which certain categories of documents and certain activities are carved out from the operation. That would be an option that could be considered.

Senator RHIANNON: Do you think that would be more favourable than the blanket exclusion?

Prof. McMillan : Before expressing a final view, I would prefer to hear more of the debate, particularly bearing in mind that a review, possibly an independent review, of the act will commence within the next month.

I expect we will consider this issue and come forward with a considered report. I would be very happy to express a more definite view after considering those matters.

Senator RHIANNON: You released the report in February, reviewing the structure of fees for freedom of information requests. Your report, in part, said, 'The report is currently under consideration by the Attorney-General.' Have you had any further discussions with the A-G's Department and are you aware of any planning taking place on implementing reforms on that specific issue?

Prof. McMillan : I have had some informal discussions and my understanding now is that there will be no formal response to the recommendations in that report prior to the commencement of this general review of the FOI Act. It is possible that the recommendations that I made in this earlier report will be rolled into this general review.

Senator RHIANNON: Do you know when the time line is for the general review?

Prof. McMillan : Section 93A of the FOI Act requires that it commence by 1 November and be completed within six months. I expect there will be an announcement by government. It is for government to decide by whom the review is to be undertaken and the terms of reference for the review.

Senator RHIANNON: This is a quote from your annual report:

There is a growing workload across most activities that is not accompanied by any staff increase.

You give some interesting figures:

... a 3 % increase in telephone enquiries to the office; a 47 % increase in written enquiries; and an 11% increase in privacy complaints.

Do you have adequate resources to properly implement your functions?

Prof. McMillan : My view is that at the moment we do not have adequate resources to discharge all the functions, as required by the act, in an efficient way. I did address this issue in the previous estimates round. I said that the area of particular difficulty was information commissioner reviews under the FOI Act because there was less discretionary room for the office to resolve those matters in different ways, but that we would explore different options before reaching any opinion about the funding of the office. In the last five or so months we have implemented different measures that have been successful in reducing the backlog of FOI review cases. However, there is still a large backlog. There is an increase in work coming into the office. Certainly, one of the views that I will be putting during the review of the act in my own office that is forthcoming is that, under the current model in the act with the current funding and the current workload, it is not possible to meet the objectives that the office has set for itself.

Senator RHIANNON: It is quite disappointing to hear those challenges you face because, reflecting back on the answer you gave to an earlier question about the review, 'Yes, it will be done in six months time,' but obviously one could conclude that recommendations being acted on will take quite a long time. Your office sounds as though it could well continue as it is at the present with your staff being on overload. Have you considered putting in any special requests to deal with the current situation, because this is such an important area, with a commitment from the government that it wishes to open up and for departments and minister's offices to be more readily open to the public?

Prof. McMillan : I certainly raised my concerns about the funding of the office to discharge the functions under the legislative model on a number of occasions informally and also more formally in a letter to the Secretary of Finance, which was tabled at an earlier estimates committee round.

Senator RHIANNON: Who did you raise it with? Was it just within Finance or with A-Gs?

Prof. McMillan : In a letter to the Secretary of the department of finance about a year ago, at the time of one of the efficiency dividend rounds I expressed my concern and I drew attention to the fact that the original funding estimate was that the office would have 100 staff, but it was operating at a full-time equivalent level of about 80 staff. However, I am well aware that there are tight budgetary restrictions on all agencies and that the only formal avenue open to an agency to seek extra funding is to put forward a new policy proposal. My office has put forward some new policy proposals within the confidential setting of a budgetary round and so it is for government to respond.

The office is doing the best it can to cope with the workload, with the staff—and, I might say, with some success. For example, since we have opened, in the space of nearly two years we have received 794 applications for information commissioner review and have resolved over half of those, 402. Equally, we have received 273 complaints just in the FOI area alone and resolved 206. The office is certainly achieving some success. But there is a large backlog that is still unresolved and that is a matter of genuine concern.

Senator BRANDIS: Professor McMillan, what is the average length of time from filing to final decision of FOI applications? Do you deal with this by calendar years or financial years?

Prof. McMillan : There is a table that is set out in the annual report that was tabled last week. It shows that 88 per cent of FOI requests to government agencies, or 24½ thousand requests, are decided within the applicable statutory time frame, which can be—

Senator BRANDIS: That is not what I am asking you, though. I am asking what the average length of time was from the filing of the request to the final determination of the request for FOI applications in each of the financial years, assuming you do it on a financial year basis, 2011-12, 2010-11 and 2009-10. Can you tell me that?

Prof. McMillan : I will take that on notice. I think the answer might be that those figures are not available. That sort of figure has not been prepared. At the moment, the reporting framework for agencies to report is whether they have dealt with a request within the applicable statutory time period, which is presumptively 30 days but can be more with authorised extensions, or whether the request is taken as being decided more than 30 days outside the applicable time frame, more than 60 days outside or more than 90 days outside.

Senator BRANDIS: That is fine, though the request I made of you is an elementary statistic: the average length of time it takes to deal with a request.

Prof. McMillan : It requires computation across 250 government agencies, Senator.

Senator BRANDIS: You are in the freedom of information business, Professor McMillan. So, if we cannot trust you to provide us with information about how free information is, who can we trust?

Prof. McMillan : The annual report contains a substantial amount of information, Senator, but, as you would be aware, to existing documents the act does not require the preparation of information that is not currently available—

Senator BRANDIS: Well, that is the information that I am requesting and you have taken that on notice.

Prof. McMillan : I have taken it on notice.

23 May 2012

[D2023/008524](#)

Senator BRANDIS: Professor McMillan, on 27 March you are quoted as saying that the government's:

... commitment to open government is being undermined by its refusal to adequately fund the oversight of Freedom of Information and privacy laws.

You drew attention to the fact that the Office of the Information Commissioner had only three-quarters of the staff that government had foreshadowed, when it was established in late 2010. The government is now enforcing additional budgetary cuts.

In a letter to the Department of Finance and Administration you wrote about the 2.5 per cent additional efficiency dividend and why it should be applied to such a small agency as yours, with a budget of only \$11.943 million. You said to Mr Tune from DOFA:

If we are forced to reduce further Office of the Australian Information Commissioner staff numbers I hold a genuine concern that we will not be able to discharge our functions effectively.

Shortly thereafter, it was reported in the Fairfax newspapers that the Labor government was spending 13 times more money on high-performance shredding machines than on training public servants to handle freedom of information requests. Would you like to take the opportunity to elaborate on your remarks and to apprise the Senate of the challenges your agency is facing?

Prof. McMillan : The only comment I have made that is on the public record is the letter that I wrote to the Secretary of the Department of Finance and Deregulation and in similar terms to the Secretary of the Attorney-General's Department. That letter was tabled at a meeting of the Senate estimates committee in February this year. I have not made any other public statement. But the comments I made in that letter, one of which you quoted—that I hold a genuine concern that we cannot discharge our functions effectively—have been on the public record.

I essentially made two points in that letter. The first was that the staffing levels for the office were lower than were projected at the time the office was being established. It was projected at the time that to combine the various functions in relation to privacy, freedom of information and information policy the office would have a staff of 100. The average staffing level for the past year has been about 80, but it has dropped at times to 75, which explains the comment of 'three-quarters'. The occasion for writing the letter was concern at the impact that the extra efficiency dividend of 2.5 per cent would have on the capacity of the office to discharge its functions. As I said in the letter, I held a genuine concern. The office has many functions. There is a high expectation within government and in the public that those functions will be discharged properly. It has been handling a large and growing caseload, particularly in relation to privacy complaints and freedom of information complaints.

Senator BRANDIS: A large and growing caseload with a small and diminishing budget.

Prof. McMillan : Yes, and there are new challenges on the horizon—changes to the privacy legislation, a review of the FOI Act later this year and a review of the FOI changes earlier this year. There are some exciting opportunities we would like to address—for example, playing a major role in the public debate about a national government information policy. As I said, that is the only statement I have made that has gone on the public record. Otherwise, we are doing our best at the moment to address each of those challenges. We are trialling different opportunities to achieve as best we can in each of those areas with the staffing that is available.

Senator BRANDIS: I am just looking at the portfolio budget statements. Page 406 deals with your agency. It tells us that the appropriation available to you in the last financial year was \$17,275,000. The appropriation available to you in this budget is \$14,871,000. That is a cut of about \$2.5 million. If you look at table 1.2, you will see that there are cuts between \$250,000 and \$300,000 in each of the four years across the forward estimates. You have said you have a large and growing case load. Your budget has been reduced by a very substantial proportion relative to the total budget this year, and you are going to have further reductions across all of the forward estimates. How are you going to manage?

Prof. McMillan : The figures that you quoted include a number of items. For example, there was an allocation for capital. Probably the more realistic figure, from which we have been working, is the item that is at page 412, in item 3.23 of the budget statements, and it is a line called 'Revenue from government'. The estimated revenue in 2011-12 is just over \$11 million and the estimate for 2012-13 is \$10.8 million. The impact of the efficiency dividend, a couple of pages back, is estimated to be

\$278,000 in the next financial year and similar amounts in the out years. That is really the figure we have to grapple with. There are other amounts. As I say, there is a capital amount; there are amounts we obtain under memoranda with agencies to play a role in particular areas and there is a defined task there. The real challenge is in relation to that reduction in the next year of close to \$300,000. As I say, we have projects underway. Obviously we focus firstly on the essential statutory functions, work which involves handling privacy and freedom of information complaints and inquiries and reviews. We have a number of strategies that we are currently working through. One of the most publicised issues about the office has been the backlog in relation to Information Commissioner reviews, a backlog currently over 300. The latest figure, as at 16 May, was a backlog of 356.

Senator BRANDIS: How far does that backlog stretch? What is the longest outstanding case?

Prof. McMillan : The longest outstanding case is 15 months. The strategy we have underway at the moment is to dedicate quite a substantial proportion of the resources to addressing that backlog. For example, we have got on secondment, under our budget, a senior officer from the Attorney-General's Department for six months to lead both a review and a strike force. This is a common problem the tribunal face in the early years. It is not uncommon that they get a large case load and they have to find their way in how best to grapple with it. We are going through that. Whether that will be a successful strategy and whether we can discharge all our functions effectively and professionally within the reduced budget that we have is clearly an issue that is discussed anxiously within the office, but we will have a better view probably at the better end of this year.

Senator WATERS: I am aware that currently some departments publish online documents that have been released under FOI. I think Treasury and PMC do and SEWPaC certainly, amongst other examples, does not. I understand that there is a requirement under 11C of the FOI Act to publish a disclosure log. Is that the extent of the statutory obligations or is there anything else that requires broader public disclosure of those released documents?

Prof. McMillan : One theme of the reformed Freedom of Information Act that commenced in November 2010 was a new philosophy of proactive publication of government information. There are essentially three mechanisms in the FOI Act for that. One is the disclosure log, and I will come back to that. The second is through the information publication scheme, which defines information that must be published by agencies about their structure and functions. The third is an exhortation to agencies on a discretionary basis to publish additional information in the information publication scheme.

As to the disclosure log, section 11C requires an agency to publish on the disclosure log details of information that has been released under the Freedom of Information Act, subject to a couple of exceptions for personal and business privacy. The agency must publish those details within 10 days of releasing the information to an applicant. The agency has the option of either publishing the actual documents online—and, as you say, some agencies do that—or publishing a description of the information and how it can be obtained, usually by letter or email to the agency. In the guidelines that I have published under the act, to which agencies must have regard, I have stated my preference for publishing the documents online. I recognise that there can be reasons for not doing so. One reason is that the documents may be quite extensive and the agency may feel that they would clutter their site and that there will not be a great deal of public interest. Another is a concern that some agencies have about whether publication would be consistent with web content accessibility guidelines, which essentially require publication in multiple forms. It is certainly easy for agencies to publish documents in PDF form, particularly if they are in the form of hard copy documents—receipts and vouchers—but there are issues for agencies about whether that complies with web content

accessibility guidelines. I urge agencies where I can to publish the actual documents online so that they can be downloaded free of charge. We have received some complaints where agencies have failed to do so. We have investigated those but have said that the act gives the agency discretion. It is something we will monitor over the coming months.

Senator RHIANNON: I understand that you have the power to investigate systemic problems with agencies. I was interested to ascertain how many of these you have conducted. Also, if you had additional resources, would you conduct more?

Prof. McMillan : This is in relation to freedom of information? We have similar powers in relation to privacy. In the freedom of information space we have only initiated one own-motion investigation, and that was an investigation into an aspect of freedom of information processing by the Department of Immigration. The Department of Immigration receives the largest number of requests of any agency, over 11,000 requests in the last reporting year. Over 80 per cent of those requests are handled within the statutory deadlines but there was a particular problem in the larger and more complex requests that are handled by the department in Canberra, so we have initiated an own-motion investigation on that aspect of departmental operation. We have not initiated any other own-motion investigations at this stage. We do have active discussion involvement with agencies where there is regular consultation between our office and agencies about individual problems and systemic issues, but no other formal investigations have been commenced at this stage.

Senator RHIANNON: If you had additional resources, would you conduct more?

Prof. McMillan : There is no other topic that is prominent at the moment. We have an integrated office and, for example, in the last year we conducted I think nine own-motion investigations in the privacy area. Our resources are spread across a range of different functions. There is no other freedom of information topic that we have identified at this stage for an own-motion investigation.

Senator RHIANNON: Thank you. I would like to move on to the review of charges that you have undertaken. I understand that you have proposed that an agency or minister would have the discretion to refuse to process an FOI request for personal or non-personal information that is estimated to take more than 40 hours to process. I imagine you are aware that there has been some controversy around the 40 hours.

Prof. McMillan : Yes. I was well aware when I published the report that there were a couple of controversial recommendations. I knew that was one of them, and I knew it would attract quite a lot of the debate. Let me explain it, I suppose, in two ways. One is that it was an attempt to make workable a mechanism that is already in the act, called the practical refusal mechanism, whereby an agency can decline to handle a request that would have a substantial and unreasonable impact on the agency and divert it from other functions. It is a very elastic standard which is very difficult to apply across government. So nominating a figure of 40 hours was an attempt to make that reasonable. Secondly, a strong theme in the charges report, in this and in our other work is that the world is changing in relation to transparency practices by governments. The best results are had a by a product of publication by agencies of information on the web. That is where you get the greatest public benefit and access and it is an area where resources can be devoted. In terms of the limited budget in agencies for making information available, I think some priority should be given to that area. At the end of the day, the critical thing is to retain this individual right that people have to go to an agency, nominate the document they want to see and say, 'That is the document I want.' My own view is that allowing somebody to go to an agency and say, 'I want to see these documents,' and for the agency to take 40 hours, which is more than one week of a staff member's time, to handle that

individual request, was a reasonable balance between the exercise of a democratic right and the other competing ways that agencies can make information available. But not all commentators agree with that value judgment I have just expressed.

Senator RHIANNON: It would be possible, wouldn't it, that some very important FOI applications may well require more than 40 hours?

Prof. McMillan : Yes, it is. There is nothing to prevent a person then making a subsequent request. The focus of my recommendation—that one and many others—is to develop an FOI process that will focus on the documents a person needs, bearing in mind that quite a lot of information in agencies is no longer held in documentary form. But the focus is to try and narrow that process. Then it is open to a person to come back with another request. But it seems to me from my previous experience that some of the requests I see from individuals that take more than 40 hours to progress are really using FOI as the battleground for another dispute between the person and the agency. That dispute is probably better handled by the Ombudsman or in some other way rather than using an unlimited FOI request as the battleground.

Senator RHIANNON: I want to explore how it could go in the other direction. Some agencies may use this provision to frustrate access to important government information.

Prof. McMillan : That is one of the fears that people have raised, that it is for the agency to initially estimate the 40 hours. That is not a new problem in FOI, that agencies always make the estimate of the charges. But one of our distinct roles is to review the agency estimate of the time it will take to handle a request. We have all the powers we need to require further information from the agency and to go in and inspect its records system if necessary. So I believe that we can perform a genuine oversight role in ensuring that this estimate of 40 hours is a realistic one and not a device for subverting the FOI Act.

Senator RHIANNON: To pick up on some of the themes we were talking about before the break, I was interested in hearing your views on whether the FOI legislation is inadequate. I sometimes hear suggestions that the government's commitment to open government may in fact be frustrated because there are missed opportunities and gaps identified in the new FOI legislation that may need to be fixed. What do you see as the biggest problems that need to be addressed and how do they impact on your work, if you judge the legislation is inadequate?

Prof. McMillan : Let me note firstly that the act does require a review to be commenced by the end of the year. Most of the problems that we have identified are technical problems to do with the processing of requests. For example, what position is an agency in once the time for deciding a request is beyond the statutory time frame? To what extent should it continue work or have discussions with my agency? There are also technical problems when there are multiple parties involved. To this point we have not identified any major structural problems in the balance of the act between giving a right of access and requiring agencies to publish—nor in the exemption provisions, nor in review. Later in the year we will be proposing some amendments to give us a more flexible range of powers for disposing of applications.

I will ask the Freedom of Information Commissioner, James Popple, if he has comments, but I will make a final comment and it is something that we often have to remind applicants about. If you go down the path of framing a freedom of information act request, it will not necessarily be as straightforward or as easy as you want. The act necessarily requires you to identify the document that you are seeking and you are probably unaware of the exact title of the document. It is commonplace

and not surprising that many requests are framed too broadly or in terms that are difficult for agencies to comprehend. Consequently, there often is a need for discussion between applicants and agencies to clarify exactly what it is they are after or what documents record that information. That explains why one of the chief themes in the report I did on charges is that freedom of information will work better if it is formally supplemented by schemes of administrative access that will be used firstly by an applicant before they decide it is necessary to exercise their formal legal rights under the FOI act. I will just see if James Popple has any other lists of particular problems with the act.

Dr Popple : The only thing I would add to Professor McMillan's answer is around the issue of charges. As he says, those have been dealt with in the recently released charges review, but there is also the systemic issue about the exercise of the discretion that agencies and ministers have to reduce or waive charges. That is an important thing. It is important that it is in the act. But the way it works is that frequently we need to do an IC review, as it is called in the act, which is a merits review of decisions that are really preparatory decisions about whether or not someone should pay or how much, even before you get to the substantive question of whether or not the documents can be released or whether they can only be released after having been edited. So a disproportionate amount of our time is spent dealing with issues that are important but still do not go to the substantive question about whether or not the documents should be released. That is something I think we will be taking up in the context of the review later this year that Professor McMillan referred to.

Senator RHIANNON: You said that most of the problems are of a technical nature and not structural. Should I conclude from that that you do not think the legislation itself has to change but more the management of some aspects? Is that a fair summary?

Prof. McMillan : Certainly I do see the need for legislative amendment of some provisions. I have made recommendations to that effect in the charges report. For example, one recommendation is that the provision that deals with waiver of fees on public interest grounds could be better framed. But the essential structure of the act is good—that a person can make a request and an agency has a legal obligation to assist the person, to decide within a certain time and can only withhold if the document falls within one of a number of exemptions, and there are rights of appeal internally to my office and then the Administrative Appeals Tribunal and there are also disclosure obligations. I think it is a good act and that it embeds the legal right of access quite well.

Senator RHIANNON: That will be interesting to explore. I just want to finish up on the KPIs. It has been raised with us that they have been quite modest. 'Unambitious' was one word given to me. I understand that 80 per cent of the reviews are to be completed in six months and 80 per cent of FOI and privacy complaints are to be finalised within 12 months. Would you describe them as unambitious?

Prof. McMillan : In terms of the present performance of the office, those are ambitious targets. For example, in relation to IC reviews, we have at the moment around 200 that are beyond the 150-day mark for reasons that I addressed earlier. So a target of doing 80 per cent within six months is ambitious and will give us great satisfaction if we do that. In the following year, it may be appropriate then to have a much tighter target. But, again, everybody wants these processes to go quicker, but the reality is that they almost inevitably take longer than everybody involved in the process would like. You get an application from a person, who takes a few days or a week to clarify it, and then you send it to an agency and get their comments and before you know it two or three months can have passed. If there is a disagreement, two or three months can zip before your eyes. I think they are

realistic targets at the moment, and the real challenge for us is to meet them by the next budget round.

Senator RHIANNON: So the challenge is to meet them within the budget—is that what you said?

Prof. McMillan : These KPIs are defined in the budget papers, so I am putting it in the terms that the challenge for us is to meet those targets by the time the next round of budget papers is prepared. But yes, you are right: budget is relevant in another sense; we have to meet them within a tight budget as well.

Senator RHIANNON: That is what I wanted to understand. Did you mean by that that if there were more resources those percentages could be different?

Prof. McMillan : We are realistic, looking at all the government announcements and the firm commitment to efficiency dividends and to reducing the deficit, that there will be no extra money in this budget. But, as I foreshadowed, we have a number of projects underway in-house to try to tackle the backlog and to develop different ways of doing our work. If those projects do not achieve these targets then certainly we will have something to say to this committee, or elsewhere, about our budget level.

14 February 2012

[D2023/008525](#)

Senator BOYCE: From your report, in relation to the questions that Senator McKenzie just asked, you are getting an increase in FOI requests because of the very accelerating development of the internet and in other ways. Your work in the cybersafety space and in privacy related to computers is increasing all the time. Is that correct?

Mr Pilgrim : There are two issues there. I might let Dr Popple answer the issues relating to the increase in the workload in FOI. But certainly in the privacy side of our jurisdiction we are seeing increases in most of the contact we have with the community. We have increasing complaint numbers coming in, we are having increasing numbers of investigations that I open of my own volition as a result of data breaches and also, clearly, there is a growing need for us to be able to provide advice to the broader community on issues relating to the use of the online environment. Certainly there is overall an increase in activity in the privacy area, and much of that is being driven by technology.

Senator BOYCE: There is an increase in areas of activity and actual quantity of activity within those areas?

Mr Pilgrim : Correct.

Dr Popple : Perhaps I can add that in relation to the FOI case workload it is not so much an increase in relation to the office because of course the office was created with a new FOI workload.

Senator BOYCE: I beg your pardon?

Dr Popple : When the office was established, on 1 November 2010, one of the significant changes was that we would perform a function called the IC review, the Information Commissioner review, of decisions made under the FOI Act. We also deal with complaints made to us under the FOI Act—that is, complaints about actions taken under the FOI Act—which would previously have been dealt with

by the Ombudsman. We also have a function in relation to extensions of time under the act. Our workload, if you like, was brand-new when the office started. There were obviously some estimates of the likely level of those activities. Some of them involved some guesswork and the point about the workload is that we are finding it difficult to maintain the appropriate levels of activity in that space.

Senator BOYCE: So you are having difficulty with your current levels of staffing. Is that what you are saying?

Dr Popple : I am not talking about the staffing. I am talking about the way the act has been structured. For example, an IC review application comes to us. We have hundreds of those every year and what we have to do under the act to deal with those requires a certain level of work. We are finding it difficult to maintain that level of activity.

Senator BOYCE: Is there a way of being more efficient in that area?

Dr Popple : We can certainly look at many ways. We have had some success in that. We have increased our throughput in the review area in the last six months, compared to the preceding six months, by almost a factor of three. We are doing that by being as intelligent as we can be about which applications we process and how we process them. We take a conciliatory approach to the IC review applications, which can be time intensive but we have found it has been quite successful—that is, finding agreement between an applicant and an agency or a minister who has made a particular decision. We are looking at ways to further improve that so that we can do what we need to do within the resources we have.

17 October 2011

[D2023/008552](#)

CHAIR: I welcome Professor John McMillan, Australian Information Commissioner, and officers. Professor McMillan, do you wish to make an opening statement?

Prof. McMillan: No, thank you.

Senator RHIANNON: Professor, you have not got to your first year in the job yet; I think your anniversary is coming up in November?

Prof. McMillan: Yes, that is correct.

Senator RHIANNON: I would be interested to hear how you have seen the first year; any positives and negatives, any disappointments. Anecdotally, I hear that more significant disclosures have occurred in this first year than previously. I would be interested to hear how you would sum it up, considering we do not have a report yet.

Senator Chris Evans: That sounds a bit like a Dorothy Dixier.

Senator RHIANNON: I am just getting ready.

Prof. McMillan: You can judge by my answer. There are really three aspects of the reform with which I have been engaged. One is the merging of privacy, freedom of information and information policy in a single scheme. The second has been the substantial reform of the Freedom of Information Act. The third has been the introduction of independent advice to government on information policy as a distinct and independent function. My office has been busily engaged in all three areas. We are very

pleased at the integration of those three areas. We think Australia has an excellent model for dealing comprehensively with information management policy. As to the reforms on freedom of information, there is no doubt that the reforms of the Freedom of Information Act have had a substantial impact on government. It is fairly obvious, I think, from stories in the press, that there is quite an increase in applications for policy related material. Indeed, our statistics indicate an increase of 48.6 per cent in that area. Another aspect of the open government reforms was to add an additional and distinct shift towards a proactive publication stance on behalf of government, and my impression is that that is going very well. You can visit, for example, most agency websites and see icons for the information publication scheme disclosure log there. That is a brief summary of how it is going. Our annual report on FOI and a separate one on the OAIC will be out in the next couple of weeks.

Senator RHIANNON: Thanks for that run-down. I notice how positive you were, so I will be interested in your comments on that report that came out last week in which the Commonwealth Freedom of Information Act has been rated in an international survey as 39th out of 89, putting Australia in an embarrassing position. To what do you attribute that, and is it changing?

Prof. McMillan: I was not involved at all in that review. I was not consulted. My comments were not sought by the group that was doing it. It was an independent non government civil society group, as I understand it. There is not a lot of information available, from my initial search on the website, about how the evaluation was done. It looks only at the design of the law and not at the implementation of the law, so it does not look at transparency practice in government. As to the design of the law, there are aspects of it in which Australia scored very low which I would not have thought were weaknesses in our law, for example, the fact that the FOI Act does not apply to the parliament or the judiciary. We have a clear, constitutional separation of functions in Australia which I think makes this inappropriate. Some other nations do not have that clear separation and so they do go down that path. We have a stable, constitutional democracy in which we can essentially rely on the public service to uphold the law, so we do not have penalties in our FOI Act. Some other countries, against a backdrop of corruption and maladministration, do have penalties in the FOI Act, and they have scored higher on this analysis. My comment, and I have commented at international fora, is that I think these analyses are valuable and useful—we get some advantage from them—but there is some bias by reason of the fact that it is essentially designed by civil society organisations working primarily with developing countries in designing a new integrity framework. I do not think Australia's ranking really reflects where we are—

Senator RHIANNON: So you do not think that ranking was fair?

Prof. McMillan: It only evaluates the law, and it is the opinion of those who designed it, but if one was after an evaluation of transparency practice in government and a commitment to open government then I do not think this is at all indicative. There are issues in Australia and there are challenges, but we have a good system and a strong commitment.

Senator RHIANNON: Which leads onto my next question about the design of the law. You will be aware that there was a Senate inquiry into the draft FOI bill that left it to the commissioner to make decisions about what was in and what was out. It sounds like you have come to the conclusion that the balance is right. Is it correct that you think that parliament, ASIO and parliamentarians should not be covered by FOI?

Prof. McMillan: No, I have not come to a conclusion on any of those issues. Indeed, one of the features of the reform program is that my office would, starting in the first year, undertake a review of FOI charges. That review has just commenced. I have an open mind and will invite submissions from

within government, from the parliament, from journalists and from the community about the role of charges in FOI. Another feature, which is stated in the act, is that the government, in consultation with me, is to undertake a review of the FOI Act, commencing within the first two years. It is certain that one of the issues in that review will be whether the act should apply to security intelligence agencies. It does, for example, in the United States with the CIA and in the United Kingdom with MI5, but it does not apply in Australia. Clearly it is an important policy issue. I expect it will be one of the issues that we will examine and on which we will get many submissions, and I have an open mind.

Senator RHIANNON: We have just seen the launch, by President Obama, of the Open Government Partnership in New York, at which Australia was a notable absentee. I was surprised about this, considering the Open Government Partnership is quite an impressive multilateral initiative that aims to secure some commitments from governments to promote transparency and all of the fine aspects of FOI, including all the spin-offs that go with it in fighting corruption and particularly harnessing new technologies to strengthen governance. Given your comments, I am interested in why Australia passed up the opportunity to be part of this partnership with 46 other countries. Will we be participating in 2012? Do you have any recommendations?

Prof. McMillan: A criterion for membership of the open government partnership is that the decision is made at the highest levels of executive government. So, clearly, it is not for me to make any decision on that, or really to express an opinion. I did attend an initial meeting in Washington in July prior to the launch of the open government partnership in September. I have made a submission to government analysing all of the issues. Government will make a decision on whether to join but I must say that we did not have a lot of advance notice of this issue. The meeting in July was really the first that my office and many others knew about it. Certainly, I came back with a lot of questions in my mind about the way the partnership would be conducted. There had been a steering committee forming it but we were not part of that. For example, the open government declaration that was made by the foundation partners was only released about two to three weeks before the open government partnership was formally launched. So at this stage I think all one can fairly say is that there is an issue of timing. Many other countries have not joined at this stage. I suspect government will address that issue.

CHAIR: I am very sorry, Senator Rhiannon. Because of the lateness of the hour you will have to put any further questions on notice.

24 May 2011

OAIC did not appear.

21 February 2011

[D2023/008549](#)

Senator CORMANN—You would be aware of an agreement between the minority government and some Independents and separately the Greens referring issues of public interest disclosure when the Senate or the House votes on the floor against a decision of a minister not to release information to be assessed by the Information Commissioner, who will report to the parliament. Are you aware of this?

Prof. McMillan—Yes, I am aware of that clause in the agreement.

Senator CORMANN—Were you consulted on that clause in that agreement before it was put into the agreement?

Prof. McMillan—No.

Senator CORMANN—You first became aware of the role that was envisaged in that agreement after it was made public, like everybody else?

Prof. McMillan—Yes, I first became aware when I read of it publicly.

Senator CORMANN—Since then the Senate has sought to take advantage of the provision in that particular agreement. You have taken the view that you do not have the authority to do so. Do you still hold that view?

Prof. McMillan—Yes, I still hold to that view as outlined in a letter that I sent to the President of the Senate.

Senator CORMANN—I read that letter and of course it was subject to a detailed debate in the Senate after it was tabled. Did you read the Hansard of that debate?

Prof. McMillan—Yes, I have consulted the Hansard.

Senator CORMANN—None of these issues which were discussed in the debate caused you to change your mind?

Prof. McMillan—No, I have not changed my mind.

Senator CORMANN—The key issue that is raised by the Clerk is that the Commonwealth parliament has powers under the Constitution that exist independently of the individual statute that governs your statutory agency. Do you disagree with that proposition?

Prof. McMillan—Yes. My view is that one cannot look at it solely from the perspective of the powers that the parliament may assert or exercise to require production of documents or information. It is necessary in our constitutional and legal context to take account of the legislation establishing an office such as mine to see, firstly, whether I do have the function to respond and, secondly, whether it would cause any inconsistency with the legislation establishing my office.

Senator CORMANN—The power that has been given to the Senate and the House of Representatives by section 49 of the Constitution may only be modified by express statutory declaration. That is a requirement of section 49 of the Constitution. There is of course no such limitation in the Australian Information Commissioner Act 2010. What then causes you to take the view that you are not bound to respect the Senate's powers under the Constitution?

Prof. McMillan—With respect, my view is that it is an erroneous view of the scope of the Senate's powers to assume that it can issue an order of a kind such as that to an independent statutory officer. Taken to its logical conclusion, the Senate could issue that order not only to me but to any other statutory authority or indeed to a private citizen—

Senator CORMANN—If I may just interrupt you there: you are quite right that the Senate may, and indeed it has, issued this sort of order to other statutory agencies which have been established at the end of the day by the parliament. You are a statutory agency, as you have mentioned, established by an act of parliament, funded by taxpayers. Of course, under both the Keating and Howard

governments there is a long history of statutory agencies like yours complying with very valid orders of the Senate like this one. This is quite a new precedent, with respect, that you are establishing. All of these orders of the Senate in the past were initiated either by opposition or crossbench senators at the time but got the support of a majority in the Senate. Statutory agencies like the ACCC, the Auditor-General and others—the Productivity Commission—have complied with these sorts of orders of the Senate. It is quite unusual—in fact, I am not sure whether it has happened before—for a statutory agency like yours to disregard the constitutional authority of the Senate to issue these sorts of orders and expect a report back to the Senate within the time frame that is prescribed.

Prof. McMillan—I have not done an exhaustive analysis of all the instances in which orders have been issued to independent statutory authorities, but the only examples of which I am aware in the Commonwealth parliament are orders issued to statutory authorities to prepare a report when it fell within their statutory function to prepare that report. That is my simple but important legal point: that I can only comply with the order of the Senate if it otherwise falls within my statutory function to prepare a report. If the scope of my statutory function is not a relevant consideration then the order issued to me could be issued to any other statutory authority or person to prepare the very report that I have been asked to prepare.

Senator CORMANN—I assume you do agree that the agreement the minority Labor government entered with Independents and the Greens envisaged for you to fulfil exactly the role that the Senate sought to have you exercise in the orders that were passed?

Prof. McMillan—I acknowledge that point, but of course that agreement cannot confer legal authority upon me as a statutory officer to discharge a function that I do not otherwise have.

Senator CORMANN—For your benefit I will table all of the precedents over the last 20-odd years under both Labor and coalition administrations where statutory agencies like yours have complied with orders of the Senate to provide reports on all sorts of issues outside of the responsibilities conferred on these agencies by the relevant statutes, as we can. That is for your benefit. But I guess I would just make the general point that it is very unsatisfactory from the Senate's point of view in relation specifically of the mining tax issues that we, as a Senate, raised with you. The Senate has sought to get access for seven or eight months now to information from the government about how much of the mining tax revenue was to come from iron ore production versus coal production. It is information the government has refused to provide to the Senate without a proper explanation in the public interest. Of course last week it was released to a media outlet under freedom of information legislation. It is completely unacceptable to the parliament to be in a lesser position to get access to information from government than the media, given our constitutional responsibilities to hold the government to account. I would just urge and invite you to reflect on that and have another look at it. Prof.

McMillan—I have no comment to make on those points, but can I say that my letter to the President did spell out in some detail the legal and practical difficulties that I would face in preparing a report for the Senate without a statutory function of doing so, not least because I did not have copies of or access to any of the documents on which the Senate asked me to prepare a report as to whether those should be released on public interest grounds.

Senator CORMANN—Neither do you in relation to freedom of information requests on which you arbitrate. You do not have access to the documents in question.

Prof. McMillan—Yes, I do. The Freedom of Information Act provides that I can exercise enforceable statutory powers to require an agency to provide me with the documents that are claimed to be

exempt. As a standard practice I would not reach a determination as to whether a document is exempt—

Senator CORMANN—I need to be very quick. Essentially you are dealing with documents in your freedom of information function, yet at the time when you need to go about your process of making a decision as to whether appropriate decisions are made you do not hold—

Prof. McMillan—I do obtain access to those documents before I make a decision on whether they meet exemption criteria.

Senator CORMANN—You obtain access to them.

Prof. McMillan—Yes.

Senator CORMANN—I put it to you that what is envisaged in the agreement between the government, the Independents and the Greens is that you would equally obtain access.

Prof. McMillan—But on what legal basis would I obtain access?

Senator CORMANN—On the legal basis of the Senate.

Prof. McMillan—The Freedom of Information Act is quite clear that the powers of access that I have are conferred for the purposes of an IC review, that is the phrase used in that act. I have no legal power to obtain access to the documents that the minister has declined to give to the Senate.

CHAIR—Final question.

Senator CORMANN—And, of course, the Clerk of the Senate, again, even after your detailed letter respectfully disagrees with that proposal. The Clerk of the Senate has argued that by virtue of section 49 of the Constitution we have the power to empower you to obtain access to the information you require to make these reports to the Senate. This is obviously an issue that we will continue to pursue.

Prof. McMillan—With respect, I would find that to be a novel proposition because it assumes that the Senate can require a minister to provide me with documents that the minister has declined to provide to the Senate.

CHAIR—Your time has come to an end.

Senator CORMANN—I will leave it here, but I note that this aspect of the agreement between the government, the Greens and Independents continues to be completely ineffective and that is not satisfactory from the Senate's point of view.

Senator BOYCE—My questions relate to NEHTA, the National E-Health Transition Authority. NEHTA appeared in the 2009-10 annual report appendix as one of the organisations that was covered by the Freedom of Information Act 1982. Is that correct?

Prof. McMillan—Yes. I have seen a statement to that effect.

Senator BOYCE—Subsequently, when I have sought to access information from them, either through estimates or through a freedom of information request, I have been advised that they are exempt from the Freedom of Information Act.

Prof. McMillan—Yes.

Senator BOYCE—How do you reconcile these two?

Prof. McMillan—I will ask my colleague, Dr James Popple, the Freedom of Information Commissioner, to address that as Dr Popple has been looking at it, but in summary, the act spells out agencies which are subject to it and agencies which are not, and it does not fall within the category.

Senator BOYCE—It was in the category of being the subject of freedom of information on the list that came out in an annual report.

Prof. McMillan—That is right. The statement in the annual report was erroneous.

Dr Popple—As Professor McMillan stated, the Freedom of Information Act applies to ministers and agencies. Agencies are defined as departments and prescribed authorities. Prescribed authorities are defined in paragraph 4.1 of the act, crucially to mean a body corporate or an unincorporated body established for a public purpose. There is an exception and one of those exceptions is an incorporated company or association. I understand that the National E-Health Transition Authority is a public company limited by guarantee, so Professor McMillan is correct that NEHTA is not covered by the FOI Act. I understand the report to which you refer lists a number of agencies and has a footnote down the bottom that says that this is a disclaimer as to the completeness of the list. It is our view that NEHTA is not covered by the FOI Act.

Senator BOYCE—How did they get on the list?

Dr Popple—That report was prepared by the Department of the Prime Minister and Cabinet. My understanding is that they sought advice from the relevant departments and agencies. At some stage someone decided that NEHTA was covered by the FOI Act, but in our view it is not. I should say that it has never been. This is not a consequence of any amendments that commenced on 1 November.

Senator BOYCE—How does the general public, who have contributed over \$200 million in the last five years to NEHTA, access information about the activities of NEHTA?

Dr Popple—I do not know anything about NEHTA except what it is called. I have no idea how it deals with the public. All I can tell you is that it is not covered by the FOI Act.

Senator BOYCE—The shareholders are the federal and state health departments, or government. Dr Popple—That could be right; I really do not know.

Senator BOYCE—That is right. Do you have any concerns about organisations such as this being structured so that they cannot be subject to FOI requests?

Dr Popple—I do not know that it is for me to say anything about the policy behind that. You say that it has been structured so that it not subject to FOI. The reason it is not subject to FOI is that it has been incorporated. There are, of course, many government and intra government bodies which are incorporated and unless they are listed in the regulations as being subject to the act, they would not be.

Senator BOYCE—Do you have a list of the government bodies that are not subject to FOI?

Dr Popple—The department of finance maintains a list, which is thought to be the canonical list of all agencies within the Commonwealth, and it indicates whether or not they are incorporated or how they might have been set up.

Senator BOYCE—Should I be seeking that here or should I ask the department of finance for that list?

Dr Popple—It is a public document. They publish it once every year or so.

Prof. McMillan—We worked off the same list that you worked off when we first commenced operation and assumed that it was an accurate list. We now know that it is not a completely accurate list.

Senator BOYCE—How many others are wrong?

Prof. McMillan—We hope there are no other errors in the list. Certainly, that is one of the challenges that we face. Ultimately, these issues are determined from case to case, just because of the large number of bodies out there. Any documents of the authority that are held by the Commonwealth in its capacity, for example, as a shareholder, are subject to the FOI Act. Any document in the possession of a government agency or government minister, from wherever that document came, is a document that is subject to the FOI Act. That is a partial answer to your earlier question, but it clearly does not address the concern that you raised in full. I can add that one of the requirements of the FOI Act is that my office is to do a review of the FOI Act within two years. Clearly, the issues of inclusion and exclusion will arise in the meantime. It is really policy responsibility of the Department of the Prime Minister and Cabinet to decide whether amendments should be sponsored to move agencies under the act.

Senator BOYCE—I have just one clarification. When you say ‘within two years’, do you mean by 2013?

Prof. McMillan—Yes, by 2013.

Senator BOYCE—Thank you.

19 October 2010

No appearance by OPC.

26 May 2010

No appearance by OPC.

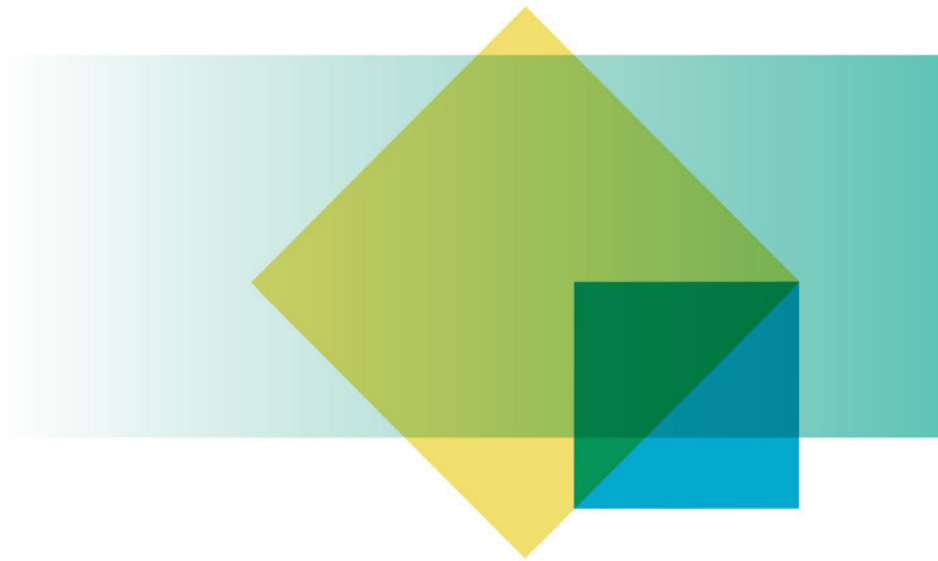


Australian Government

Office of the Australian Information Commissioner

Consolidated Responses to FOI related Questions on Notice (relating to funding, staff resourcing and backlogs) 2010-2023

May 2023



Angelene Falk

Australian Information Commissioner and Privacy Commissioner

16 August 2023

OAIC

Contents

QoNs summary table	2
BE-23-008 - Cost of seeking advice from Norton Rose Fulbright in relation to joining Rex Patrick - Attorney-General proceedings	5
BE-23-010 - OAIC FOI function resourcing gap	6
BE-23-0013 - FOI function resourcing	7
FOI appeal process	8
SQoN 2074 - Internal reviews of Freedom of Information requests	11
LCC-SBE23-10 - Decisions made under 54W(b) in the last four years	12
LCC-SBE23-106 - Re AAT case is MDCT v NDIA and IC review MR22/01029	13
LCC-OBE22-190 - Report by Centre for Public Integrity FOI requests	14
LCC-OBE22-61 Resources for FOI work - correspondence with Attorney-General	15
LCC-AE22-050 - Confirmation of timelines with review MR2100353	16
LCC-AE22-051 - Statistics on the exercise of 54W discretion	18
LCC-SBE21-016 - Three or four year comparison of number of FOI matters that are more than 12 months old	19
LCC-BE21-104 FOI Act applications	20
PQ21-000123 FOI Statistics PQ Number	21
LCC-BE20-71 IC Reviews and Resourcing levels	25
LCC-BE20-72 IC Review Delays and Types of Applicants	27
SQoN 1345- AG FOI Legal Costs	28
LCC-SBE19-46 - Request for additional resources	29
LCC-SBE19-47 - Additional staffing resources	31
LCC-SBE19-153 - OAIC funding	32
AE19-011 Resourcing levels	33
AE19-010 Average completion times for FOI decisions	35
SBE18-002 Average number of appeals handled every quarter	36
SBE18-003 Staffing numbers	37
SBE18-004 Financial year figures on the number of finalised reviews	38
SBE18-005 Key Performance Indicators	40
SBE17-050 - Number of FOI extensions sought over the past 12 months	42
SBE17-059 Reason for an increase in the number of FOI applications	43
BE17-184 - Resources	45
BE17-135 - Resourcing of the OAIC	48
AE17/074 - FOI matters	50
SBE016-091 - OAIC operations	51
AE16-015 FOI resourcing trends	55
BE15-102 FOI budget	57
BE15-103 FOI appeals	58

AE14-70 Freedom of information applications	60
SE13-70 FOI (case and AAT) & Privacy (NSA)	62
Question 39 FOI Applications	64

QoNs summary table

QoN No.	QoNs Subject	Date Received	Senator	CM link
BE-23-008	Cost of seeking advice from Norton Rose Fulbright in relation to joining Rex Patrick - Attorney-General proceedings	06/06/23	Shoebridge (hearing)	D2023/012964
BE-23-010	OAIC FOI function resourcing gap	06/06/23	Scarr (hearing)	D2023/012965
BE-23-013	FOI function resourcing	06/06/23	Shoebridge (hearing)	D2023/012967
APH Committee QoN	FOI appeal process	06/06/23	Committee	D2023/012969
SQoN2074	Internal reviews of FOI requests	05/05/23	Shoebridge (written)	D2023/009601
LCC-SBE23-10	Decisions made under 54W(b) in the last four years	23/2/23	Shoebridge (hearing)	D2023/004257
LCC-SBE23-106	Re AAT case is MDCT v NDIA and IC review MR22/01029	28/2/23	Shoebridge (written)	D2023/004641
LCC-OBE22-190	Report by Centre for Public Integrity FOI requests	13/12/22	Scarr (written)	D2022/027313
LCC-OBE22-61	Resources for FOI work - correspondence with Attorney-General	17/11/22	Shoebridge (hearing)	D2022/025320
LCC-AE22-050	Confirmation of timelines with review MR2100353	25/2/22	Rice (hearing)	D2022/002943
LCC-AE22-051	Statistics on the exercise of 54W discretion	25/2/22	Patrick (hearing)	D2022/002944
LCC-SBE21-016	Three or four year	23/11/21	Patrick (hearing)	D2021/020206

	comparison of number of FOI matters that are more than 12 months old			
LCC-BE21-104	FOI Act applications	9/06/21	Scarr (hearing)	D2021/009235
PQ21-000123	FOI Statistics	23/9/21	Patrick (written)	D2021/015789
SQoN 3355 - FOI reviews	Number of FOI reviews	15/4/21	Patrick (hearing)	D2021/005203
LCC-BE20-71	IC Reviews and Resourcing Levels	5/11/20	Patrick (hearing)	D2020/021250
LCC-BE20-72	IC Review Delayed and Types of Applicants	5/11/20	Patrick (hearing)	D2020/021252
SQoN 1345- AG	FOI legal costs	30/04/20	Patrick (written)	D2020/009307
LCC-SBE-46	Request for additional resources (FOI)	30/10/19	Carr (hearing)	D2019/012376
LCC-SBE-47	Additional staffing resources (FOI)	30/10/19	Carr (hearing)	D2019/012375
LCC-SBE-153	OAIC funding	5/11/19	Carr (written)	D2019/012833
AE19-011	Resourcing levels	22/02/19	Patrick (hearing)	D2019/001772
AE19-010	Average completion times for FOI decisions	22/02/19	Patrick (hearing)	D2019/001773
SBE18-002	Average number of appeals handled every quarter	30/10/18	Pratt (hearing)	D2018/014213
SBE18-003	Staffing numbers	30/10/18	Pratt (hearing)	D2018/014214
SBE18-004	Financial year figures on the number of finalised reviews	30/10/18	Patrick (hearing)	D2018/014215
SBE18-005	Key Performance Indicators	30/10/18	Patrick (hearing)	D2018/014216
SBE17-050	Number of FOI extensions sought over the past 12 months	8/11/17	Xenophon (hearing)	D2017/009006

SBE17-059	Reason for an increase in the number of FOI applications	8/11/17	Pratt (hearing)	D2017/009187
BE17-184	Resources	5/9/17	Pratt (hearing)	D2017/007420
BE17-135	Resourcing of the OAIC	14/6/17	Rhiannon (written)	D2017/004510
AE17-074	FOI matters	15/3/17	Pratt (written)	D2017/002042
SBE016-091	OAIC Operations	18/11/16	Xenophon (written)	D2016/008916
AE16-015	FOI resourcing trends	17/2/16	Rhiannon (hearing)	D2016/001240
BE15-102	FOI budget	11/6/15	Collins (written)	D2015/003632
BE15-103	FOI appeals	11/6/15	Collins (written)	D2015/003633
AE14-70	Freedom of Information applications	5/3/14	Rhiannon (hearing)	D2014/002159
SE13-70	FOI (case and AAT) & Privacy (NSA)	28/11/13	Rhiannon (hearing)	D2014/000242
39	FOI applications	17/10/12	Brandis (hearing)	D2023/008559

BE-23-008 - Cost of seeking advice from Norton Rose Fulbright in relation to joining Rex Patrick - Attorney-General proceedings

Senator David Shoebridge asked the following question on 23 May 2023:

Senator SHOEBRIDGE: What possible basis would you have had to join the Attorney-General in those proceedings? It was effectively an appeal from your decision. It's like a trial judge wanting to be heard on the appeal. It's totally irregular. What were you seeking to do?

Ms Falk: It wasn't irregular. I was seeking to be fully informed of the matter.

Senator SHOEBRIDGE: How much did it cost?

Ms Falk: I'd have to take that on notice.

Senator SHOEBRIDGE: You must have some idea. You must've come here knowing that you'd be asked questions about this. You're meant to prepare. You must've come knowing you'd be asked questions about this. One of the obvious questions is how much it would cost. The guidelines that the Chair reads out at the beginning make it clear you're meant to come here prepared. Are you telling me you haven't come here prepared to answer that question?

Ms Falk: I don't have that information before me this evening, but I'll take it on notice and provide it to you.

The response to the senator's question is as follows:

On 29 March 2023 the applicant's solicitors in the Federal Court matter of Rex Lyall Patrick v Attorney-General of the Commonwealth of Australia provided initiating documents to the Office of the Australian Information Commissioner (OAIC) 'by way of service'.

The OAIC engaged Norton Rose Fulbright to provide assistance in the matter.

On 31 May 2023 Norton Rose Fulbright invoiced the OAIC \$15,313.13 (excluding GST).

BE-23-010 - OAIC FOI function resourcing gap

Senator Paul Scarr asked the following question on 23 May 2023:

Senator SCARR: Ms Falk, maybe you could take on notice what information you can give me—and I'm not seeking to go into deliberations, but as a matter of fact—with respect to the resourcing gap from the OAIC's perspective, in terms of resourcing this important function of government, which I think's integral to transparency and integrity in terms of our system. Could you take that on notice?

Ms Falk: I'll take the question on notice, thank you Senator.

Senator SCARR: Thank you very much.

The response to the senator's question is as follows:

The Office of the Australian Information Commissioner (OAIC) considered in 2022 that an additional 16.6 ASL over three years would reduce the number of Information Commissioner reviews over 12 months old, allow the OAIC to undertake other freedom of information regulatory work in a timely manner and to undertake an education program focused on pro-disclosure across government. The OAIC continues to review the resourcing requirements of its FOI function.

BE-23-0013 - FOI function resourcing

Senator David Shoebridge asked the following question on 23 May 2023:

Senator SHOEBRIDGE: Despite the notorious and damaging delays in FOI that are largely a resourcing problem, you didn't get an extra red cent in this budget for FOI, did you?

Ms Falk: There was no additional funding for FOI, no.

Senator SHOEBRIDGE: You must have asked for it and been refused. Were you told why?

Ms Falk: I provided to the department the resourcing context for the office, and I've taken a question on notice from Senator Scarr in relation to that.

The response to the senator's question is as follows:

Budget and funding decisions are a matter for Government. The Office of the Australian Information Commissioner was not advised of the reasons for resourcing decisions.

FOI appeal process

Question:

Please provide a flowchart to illustrate the process for an appeal to the Information Commissioner to review a Freedom of Information decision of an agency or minister, inclusive of statutory timeframes, where relevant.

Response:

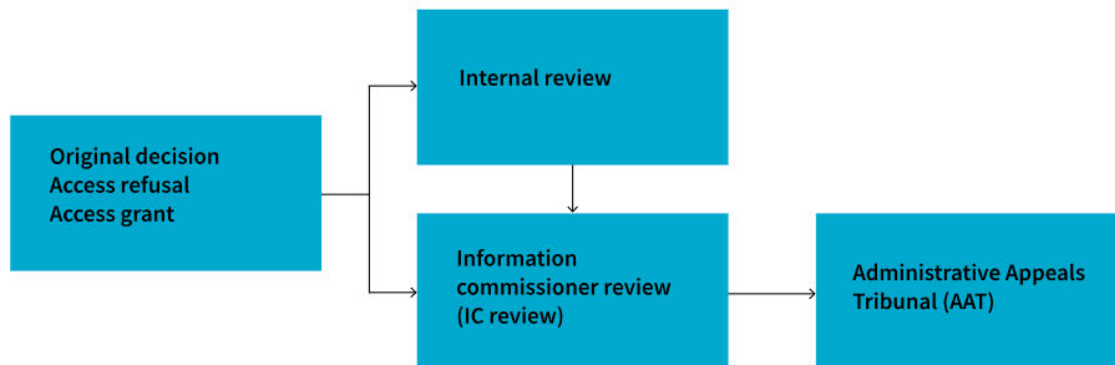
The Office of the Australian Information Commissioner has published guidance on its website that sets out the merit review framework for access refusal and access grant decisions made under the *Freedom of Information Act 1982*. A flow chart and further information about each step is available at <https://www.oaic.gov.au/freedom-of-information/freedom-of-information-guidance-for-government-agencies/freedom-of-information-reviews/summary-of-the-freedom-of-information-review-process> and at Attachment A, below.

Attachment A

Summary of freedom of information review process

This guidance material sets out the merit review framework for access refusal and access grant decisions made under the *Freedom of Information Act 1982* (FOI Act). You should refer to the FOI Guidelines for full details: [Part 3](#) (Processing and deciding on requests for access), [Part 9](#) (Internal agency review of decisions) and [Part 10](#) (Review by the Information Commissioner).

Key principles — flowchart



Original decision

An access refusal decision is a decision:

- to refuse, defer or not actually give access or to give access to a qualified person (s 53A(a)–(d)(f))
- regarding charges (s 53A(e))
- to refuse to amend or annotate a personal record (s 53A(g) and (h)).

The person who made the FOI request (the FOI applicant) may apply for review of an access refusal decision (s 54(2)).

An access grant decision is a decision to grant access to a document where there is a requirement to consult with a State under s 26A, a person or organisation under s 27, or an individual or the legal personal representative of a deceased person under s 27A. An affected third party (defined in s 53C) may apply for review of an access grant decision (s 54A(2)).

Internal review or Information Commissioner review

A person can apply for either internal review or Information Commissioner review (IC review) of an agency's access refusal or access grant decision, or IC review of a minister's access refusal or access grant decision. There is no fee or charge applying to either internal or IC review. The Information Commissioner considers that it is usually better for a person to seek internal review before applying for IC review, so that the agency can take a fresh look at its original decision.

Internal review

An application for internal review must be in writing (which includes an email or fax), and must be made within 30 calendar days after the person was notified of an agency's decision. Internal review is not available if the decision was made by a minister or personally by the principal officer of an agency. In

both situations, a person can apply directly for IC review. If dissatisfied with an internal review decision, the person can then apply for IC review of that decision.

IC review

The Information Commissioner can review:

- an ‘access refusal decision’ (s 54L(2)(a))
- an ‘access grant decision’ (s 54M(2)(a))
- a refusal to extend the period for applying for internal review under s 54B (s 54L(2)(c))
- an agency internal review decision made under s 54C (ss 54L(2)(b) and 54M(2)(b)).

The Information Commissioner may also review decisions that are deemed to have been made by an agency or minister where the statutory timeframe was not met. This may happen at first instance (following a request for access to information (s 15AC) or for amendment to a personal record (s 51DA)), or following an application for internal review (where the original decision is taken to have been affirmed under s 54D).

An application for IC review must be made within 60 days of notice being given of an access refusal decision (s 54S(1)) or 30 days of notice being given of an access grant decision (s 54S(2)). A person may apply to the Information Commissioner for an extension of time for making an IC review application (s 54T(1)).

Administrative Appeals Tribunal

A person can apply to the Administrative Appeals Tribunal (AAT) for review of:

- the Information Commissioner’s decision to affirm, vary or set aside a decision after the Information Commissioner has undertaken a review (s 57A(1)(a))
- the agency’s or minister’s decision where the Information Commissioner has decided not to undertake a review on the basis that it is desirable that the AAT undertakes the review (s 57A(1)(b))
- the Information Commissioner’s declaration of the person as a vexatious applicant (s 89N).

A person cannot apply to the AAT for review of the Information Commissioner’s decision not to undertake or continue an IC review.

An application to the AAT must be made within 28 days after the day on which the person is given the Information Commissioner’s decision (s 29(2) of the *Administrative Appeals Tribunal Act 1975*).

SQoN 2074 - Internal reviews of Freedom of Information requests

David Shoebridge asked the following question, upon notice, on 03 May 2023.

With reference to the Office of the Information Commissioner, how long, on average, did it take each government department to complete internal reviews of Freedom of Information requests in:

- a. 2022-23;
- b. 2021-22; and
- c. 2020-21..

Senator Shoebridge – The Hon Mark Dreyfus KC MP has provided the following answer to the senator’s question:

The Office of the Australian Information Commissioner (OAIC) does not collect or hold information in relation to the length of time it takes for agencies or ministers to complete internal reviews of requests made under the *Freedom of Information Act 1982*.

LCC-SBE23-10 - Decisions made under 54W(b) in the last four years

Senator David Shoebridge asked the following question on 14 February 2023:

Senator SHOEBRIDGE: How many decisions were made under 54W(b) in the last four years—if you can do them year by year—that refused to continue the review and permitted the pathway to the AAT? Mr Hardiman: We would have to take that on notice.

The response to the Honourable Senator’s question is as follows:

The table below sets out the number of IC reviews finalised under s 54W(b) for 2018-2019, 2019-20, 2020-21 and 2022-23 as at 28 February 2023. That is, it reflects the number of times, during each period, the exercise of the discretion conferred on the Information Commissioner by s 54W (as it relates to s 54W(b)) resulted in a decision not to continue to undertake an IC review.

Section 54W(b) provides that the Information Commissioner may decline to undertake a review if satisfied ‘that the interests of the administration of the FOI Act make it desirable’ that the Administrative Appeals Tribunal (AAT) consider the IC reviewable decision. An inclusive list of factors considered by the Information Commissioner, or their delegate, in exercising the discretion conferred by s 54W(b) is set out in paragraph 10.88 of the Guidelines issued under s 93A of the FOI Act. The decision-maker also consults the parties to the IC review (see paragraph 10.89 of the Guidelines).

	2018–19	2019–20	2020–21	2021–22	2022–23
IC reviews finalised under s 54W(b)	31	83	138	69	59

LCC-SBE23-106 - Re AAT case is MDCT v NDIA and IC review MR22/01029

Senator David Shoebridge asked the following question on 28 February 2023:

1. Why has the IC review of this matter not been expedited given the serious systemic issues raised in it?
2. When will a case officer be appointed for this case?
3. When will the complainant be contacted by the early resolution team?
4. What is the usual time for a case to have a case officer appointed?

The response to the honourable senator's question is as follows:

1. An FOI complaint associated with this matter has been expedited and this IC review is being progressed along side the FOI complaint. This was communicated to the FOI applicant/complainant on 7 February 2023.
2. A case officer has been appointed for both the FOI complaint and the IC review and this was communicated to the FOI applicant/complainant on 22 February 2023.
3. The FOI complaint and IC review have progressed beyond the OAIC's Intake and Early Resolution team and are being actioned by the OAIC's FOI Review and Investigations team. The relevant case officer has been in contact with the FOI applicant/complainant, most recently on 3 March 2023.
4. The OAIC's [annual report](#) provides statistics on the average time to resolve IC reviews and FOI complaints, which includes less complex matters resolved by our Intake and Early Resolution Team. Given resourcing limitations, the significant increase in the number of IC reviews received by the OAIC year on year, and the consequent growth in the backlog of more complex IC reviews, it takes time for complex matters to be allocated. We are presently prioritising outstanding IC reviews received in 2018/19.

LCC-OBE22-190 - Report by Centre for Public Integrity FOI requests

Senator Paul Scarr asked the following question on 21 November 2022:

3. A report by the Centre for Public Integrity released in September indicates that the number of FOIs considered each year has doubled in the last decade. What impact will the lack of additional funding for the Office of the Australian Information Commissioner have on the agency's ability to promptly respond to FOI requests?

The response to the honourable senator's question is as follows:

The Office of the Australian Information Commissioner (OAIC) understands the honorable senator's question to relate to the ability of the OAIC to make decisions on Information Commissioner (IC) review applications in the event the office does not receive additional funding for its FOI functions.

The number of FOI Information Commissioner (IC) Review applications made to the OAIC has increased by 209% since 2016-17 (from 632 received in 2016-17 to 1,956 received in 2021-22). At the same time, the OAIC finalised 1,377 IC reviews in 2021-22, compared to 515 in 2016-17.

The OAIC continues to look for and implement opportunities to increase productivity in relation to its freedom of information functions. However in the absence of supplementary FOI funding, the ability of the OAIC to promptly respond to all IC review applications will continue to be impacted.

LCC-OBE22-61 Resources for FOI work - correspondence with Attorney-General

Senator David Shoebridge asked the following question on 07 November 2022:

Senator SHOEBRIDGE: You wrote to the Attorney on 8 June indicating, amongst other things, that you frankly don't have the resources to do the FOI work. Have you had a response?

Ms Falk: I'd have to take that on notice. I have had correspondence from the Attorney, but I can't recall if I've had written correspondence on that matter.

The response to the honourable senator's question is as follows:

The Australian Information Commissioner and Privacy Commissioner proposed a meeting with the Attorney-General following her letter dated 8 June 2022, to discuss the matters raised in the correspondence. The subsequent meeting took place on 8 August 2022.

LCC-AE22-050 - Confirmation of timelines with review MR2100353

Senator Janet Rice asked the following question on 15 February 2022:

Senator RICE: Yes. This is a review that—again, I think it's because of the resource limitations on your office. We've been trying to get some information about the process of this review decision. We were told that we were going to have some information by January, and it's now February and my office has not been able to make contact with your office to get any information about it. So basically I was wanting to ask for a general sense of the time lines in relation to this review. It's MR2100353. As I said, my office has been trying to get some confirmation of the time lines with this review process. We were promised January, and here we are mid-February and basically there's no response—crickets.

Ms Falk: I will take that on notice, if I may, and come back to you very promptly with an answer to your question.

The response to the honourable senator's question is as follows:

On 14 December 2021, the OAIC notified the parties it was commencing an Information Commissioner (IC) review, and requested relevant information and submissions from the Department of Health (the Department).

On 22 December 2021, the Department provided a submission, advising that it was considering issuing Senator Rice with a revised decision under s 55G of the *Freedom of Information Act 1982* (the FOI Act), and that if the Department decided to proceed, it anticipated being in a position to make a revised decision by 31 January 2022.

On 28 January 2022, Senator Rice's office requested a further update.

On 31 January 2022, the Department advised the OAIC the Department's decision maker has considered the relevant document and considers it is exempt in its entirety. As such, the Department considered it was not open to it to make a decision under s 55G.

The Department advised it was preparing submissions to support its exemption contentions, and it anticipated being in a position to provide these to the OAIC by no later than Friday 18 February 2022.

On 16 February 2022, the OAIC provided Senator Rice's office with an update.

On 24 February 2022, the OAIC issued a direction to the Department under s 55(2)(e)(ii) of the FOI Act to provide submissions in support of its exemption contentions, with respect to the document identified as relevant to the applicant's request, by close of business 10 March 2022.

Once a submission has been received from the Department, the OAIC intends to exchange the Department's response with the applicant and give the applicant 2 weeks to provide submissions in response.

After receiving the applicant's response, the OAIIC will consider next steps, which may include requesting further information from the Department or progressing the matter to a section 55K decision. At that stage, timeframes will depend on the OAIIC's assessment of next steps in the IC review.

LCC-AE22-051 - Statistics on the exercise of 54W discretion

Senator Rex Patrick asked the following question on 15 February 2022:

Senator PATRICK: Can you provide some statistics on that—on the exercise of 54W discretion after, say, 12 months.

Ms Falk: I will take it on notice. I will need to have a look at our case management system in terms of the granularity of the information that I can give you.

The response to the honourable senator's question is as follows:

The OAIC understands that Senator Patrick is seeking statistics on the OAIC's exercise of the discretion to finalise an IC review under s 54W(b) of the *Freedom of Information Act 1982*.

Section 54W(b) provides that the Information Commissioner may decline to undertake a review if satisfied 'that the interests of the administration of the FOI Act make it desirable' that the Administrative Appeals Tribunal (AAT) consider the IC reviewable decision. The factors considered by the Information Commissioner, or their delegate, is set out in paragraph 10.88 of the *Guidelines issued under s 93A* of the FOI Act.

Between 1 July 2021- 28 February 2022, the OAIC finalised 56 IC reviews under s 54W(b) of the FOI Act. Of the 56 IC reviews finalised under s 54W(b) of the FOI Act:

- 35 (63%) IC reviews were finalised within 365 days.
- 21 (38%) IC reviews were finalised after 365 days.

LCC-SBE21-016 - Three or four year comparison of number of FOI matters that are more than 12 months old

Senator Rex Patrick asked the following question on 26 October 2021:

Senator PATRICK: How many are outstanding for more than 12 months? You've answered how many have been dealt with that are over 12 months old. As it currently stands, how many FOI matters do you have before you that are more than 12 months old?

Ms Falk: The figure that I have before me, which will be valid as at 30 September, is: 667 matters are over 12 months old.

Senator PATRICK: Wow! Can you provide on notice how that's changed over the last three or four years?

Ms Falk: Yes. I can tell you that it's up 10 per cent on last financial year. I would also like to point out that we have increased the number of cases that we have resolved within 120 days; that is up from 48 per cent in the previous financial year to 57 per cent at the conclusion of this financial year.

The response to the honourable senator's question is as follows:

As at 30 June 2018, there were 81 IC reviews on hand that were over 12 months old (14% of total open cases).

As at 30 June 2019, there were 250 IC reviews on hand that were over 12 months old (30% of total open cases).

As at 30 June 2020, there were 460 IC reviews on hand that were over 12 months old (42% of total open cases).

As at 30 June 2021, there were 667 IC reviews on hand that were over 12 months old, (52% of total open cases).

LCC-BE21-104 FOI Act applications

LCC-BE21-104 - FOI Act applications

Senator Paul Scarr asked the following question on 27 May 2021:

Senator SCARR: It might be a bit of an iterative process, but, of those over 600 matters over 12 months old, what would be the longest outstanding? Of the 600 over 12 months old, how many are between 12 months and 24 months, how many are 24 to 36 and how many beyond 36?

Ms Falk: Of those 644 matters that are over 12 months old, 254 are more than two years old, and that figure has increased from the end of the last financial year, when we had 117 matters that were over two years old. So that's an issue that's been of concern to the office, and we are implementing a number of strategies to try and address that. One of the welcome announcements with the budget was some additional resources for the FOI function: the appointment of an FOI commissioner and also some funding for three further positions, one of which will be a senior SES position in the organisation and two of which will be support positions.

Senator SCARR: Okay. So 254 are more than two years old. How many are, say, more than three years old? Do you have statistics that go down to that granularity?

Ms Falk: I don't have that to hand, but I can take that on notice and provide it.

Senator SCARR: I'd be interested to know if there are any longstanding legacy issues. Over two years is a reasonable period of time, but 'over two years' can cover a long period, obviously, so it would be interesting to know, if you can take it on notice, just how many are over, say, three years or what the period of time is. Can you give any flavour, in terms of how long the issues might be outstanding? I'm really trying to get a general appreciation, rather than actual numbers for each time period.

Ms Falk: I'm not able to give you any more detail on that on this occasion, but I can certainly give you that on notice.

The response to the honourable senator's question is as follows:

As at 27 May 2021, the oldest open IC review application was received by the OAIC on 27 March 2017.

As at 27 May 2021, there were 59 IC review applications on hand that were lodged between 36 and 48 months previously, and 4 IC review applications that were lodged more than 48 months previously.

PQ21-000123 FOI Statistics PQ Number

Rex Patrick asked the following question, upon notice, on 23 September 2021.

1. In documents tabled by the Information Commissioner [IC] for the inquiry into the Freedom of Information Legislation Amendment (Improving Access and Transparency) Bill 2018, there was a table [1] entitled “Overview of IC Review Applications received and finalised” and please update this table to include Financial Years beyond 2017-18.

2. In documents tabled by the Information Commissioner for the inquiry into the Freedom of Information Legislation Amendment (Improving Access and Transparency) Bill 2018 there was a table [2] entitled “Overview of IC Review finalisation times”, and please update this table to include Financial Years beyond 2017-18.

Senator the Hon Michaelia Cash has provided the following answer to the senator’s question:

1. In documents tabled by the Information Commissioner [IC] for the inquiry into the Freedom of Information Legislation Amendment (Improving Access and Transparency) Bill 2018, there was a table [1] entitled “Overview of IC Review Applications received and finalised” and please update this table to include Financial Years beyond 2017-18.

The update to this Table is set out at Attachment A.

2. In documents tabled by the Information Commissioner for the inquiry into the Freedom of Information Legislation Amendment (Improving Access and Transparency) Bill 2018 there was a table [2] entitled “Overview of IC Review finalisation times”, and please update this table to include Financial Years beyond 2017-18.

The update to this Table is set out at Attachment B.

Attachment A

Table 1: Overview of IC review applications received and finalised

Type	2011-2012	2012-2013	2013-2014	2014-2015	2015-2016	2016-2017	2017-2018	2018-2019	2019-2020	2020-2021	2021-2022*
IC reviews received	456	507	524	373	510	632	801	928	1066	1224	381
IC reviews finalised	253	419	646	482	454	515	610	659	829	1018	284

IC reviews where s 55K decision made	25	89	98	128	80	104	123	60	50	54	15
IC reviews finalised without s 55K decision being made	238 (90.5%)	330 (78.8%)	548 (84.8%)	354 (73.4%)	374 (82.4%)	411 (79.8%)	487 (79.84%)	599 (91%)	779 (94%)	964 (95%)	269 (95%)

*Data as at 30 September 2021

Attachment B

Table 2: Overview of IC review finalisation times

Note: The first four rows are cumulative.

Finalised	2011-2012	2012-2013	2013-2014	2014-2015	2015-2016	2016-2017	2017-2018	2018-2019	2019-2020	2020-2021	2021-2022*
Number finalised within 120 days (percentage of all IC reviews finalised)	100 (39%)	124 (30%)	191 (30%)	165 (34%)	196 (43%)	198 (38%)	235 (39%)	266 (40%)	395 (48%)	578 (57%)	193 (68%)
Number finalised within 6 months (percentage of all IC reviews finalised)	145 (57%)	167 (40%)	270 (42%)	247 (51%)	274 (60%)	291 (57%)	285 (47%)	332 (50%)	452 (55%)	627 (62%)	207 (73%)
Number finalised within 9 months (percentage of all IC reviews finalised)	203 (80%)	242 (58%)	359 (56%)	301 (62%)	347 (76%)	392 (76%)	418 (69%)	407 (62%)	527 (64%)	686 (67%)	213 (75%)

Number finalised within 12 months (percentage of all IC reviews finalised)	232 (92%)	289 (69%)	462 (72%)	343 (71%)	395 (87%)	445 (86%)	513 (84%)	482 (73%)	592 (71%)	737 (73%)	230 (81%)
Number finalised over 12 months (percentage of all IC reviews finalised)	21 (8%)	130 (31%)	184 (28%)	139 (29%)	59 (13%)	70 (14%)	97 (16%)	177 (27%)	237 (29%)	281 (28%)	54 (19%)
TOTAL Finalised	253	419	646	482	454	515	610	659	829	1018	284

*Data as at 30 September 2021

SQoN 3355 - FOI reviews

Rex Patrick asked the following question, upon notice, on 14 April 2021.

1. How many Information Commissioner Freedom of Information (FOI) reviews are on foot that involve at least one exemption claim of s34 - Cabinet documents, where that exemption claim relates to National Cabinet.
2. How many Information Commissioner FOI reviews that involved at least one exemption claim of s34 - Cabinet documents, where that exemption claim related to National Cabinet, have been closed off under s54W of the FOI Act.

Senator the Hon Michaela Cash has provided the following answer to the senator's question:

- 1) As at 20 April 2021 there are 2 active Information Commissioner reviews which involve the exemption in s 34 of the *Freedom of Information Act 1982* and the material at issue relates to National Cabinet. These IC reviews are currently being considered by a delegate of the Information Commissioner as to whether the discretion in s 54W(b) of the *Freedom of Information Act 1982* ought to be exercised.
- 2) Between 25 September 2020 and 9 February 2021, 4 Information Commissioner reviews were finalised under s 54W(b) of the *Freedom of Information Act 1982* which involved the exemption in s 34 of that Act and the material at issue relates to National Cabinet.

LCC-BE20-71 IC Reviews and Resourcing levels

Senator Rex Patrick asked the following question on 22 October 2020:

Senator PATRICK: Okay, but that includes obviously ones from previous years. I direct you to a question at estimates, AE19-11 on resourcing levels, and ask that you might update that on notice. You provided some forward estimates on the number of IC reviews you thought you might be undertaking.

Ms Falk: Yes, I'm familiar with the matter. It was based on the modelling that I think we have discussed previously. I will take that on notice.

The response to the honourable senator's question is as follows:

Table 1: Total Information Commissioner reviews received

This table forecasts the total Information Commissioner reviews received based on a growth rate of approximately 15%, which represents the growth rate between the 2018-19 and 2019-20 financial years.

	2019/20 (actual)	2020/21	2021/22	2022/23
Information Commissioner reviews	1,066	1,226	1,410	1,622

Table 2: Total Information Commissioner reviews completed

This table forecasts the total completed Information Commissioner reviews per year based on current staffing and efficiency levels. The Office of the Australian Information Commissioner has implemented a range of initiatives to maximise the efficiency and output of the office and anticipates that further substantial efficiencies are unlikely to be realised over the forward estimates.

	2019/20 (actual)	2020/21	2021/22	2022/23
Information Commissioner reviews	829	829	829	829

Table 3: Total forecast freedom of information average staffing levels

This table forecasts the total number of freedom of information review officers required to undertake the work in Table 1 and to abolish the backlog of Information Commissioner reviews and freedom of information complaints within 12 months, calculated as average staffing level (ASL).

As at 12 November 2020, there were 1,176 Information Commissioner reviews on hand.

	2019/20	2020/21	2021/22	2022/23

	(actual)			
FOI ASL	18	35	35	28

LCC-BE20-72 IC Review Delays and Types of Applicants

Senator Rex Patrick asked the following question on 22 October 2020:

Senator PATRICK: I might just congratulate you. As you know, I am a user of your review services. The processes you've implemented just recently, on some of the IC reviews that I've been involved in, are very, very helpful. I just make that point. Could you tell me—maybe on notice, or maybe you have a feel for it now—how many of those are delayed? I am interested in the ones of more than a year and more than two years. Could you provide information on notice as to how many of those applications are from journalists and/or politicians? I'm not after names; I would like information by category of the nature or the characteristic of the applicant.

Ms Falk: I'm just pausing to think about my secrecy provisions and the extent to which that would be acceptable. I think if you're after de-identified information, just around category of applicant, I can take that on notice and provide it to you.

Senator PATRICK: Yes—aggregates of journalists and aggregates of politicians.

Ms Falk: I'll take it on notice.

The response to the honourable senator's question is as follows:

Group	Between 1 and 2 years	More than 2 years	Total
Journalists or individuals associated with media outlets	55	31	86
Politicians	11	6	17
Total	66	37	103

This table reports the number of Information Commissioner reviews on hand as at 23 October 2020. The length of time on hand is measured from the date of lodgement until 23 October 2020.

SQoN 1345- AG FOI Legal Costs

With reference to Freedom of Information (FOI) requests:

For each Department and agency within the Attorney-General's portfolio, excluding those listed in Schedule 2 Part I of the FOI Act, can the following information be provided: the total **external** legal costs associated with all stages of FOI requests (ie FOI requests, internal reviews of FOI requests, Information Commissioner FOI reviews, Administrative Appeals Tribunal FOI reviews and FOI related Federal and High Court appeal proceedings) for the financial years 2018-19, and 2019-20 to date. For clarity, can a single figure be provided for each Department and each agency for each of the financial years specified, not a breakdown of costs across each FOI stage.

Please find below the Office of the Australian Information Commissioner's response to SQoN 1345-AG

Office of the Australian Information Commissioner	
2018/19	2019/20
\$2,061.95	\$5,869.61

LCC-SBE19-46 - Request for additional resources

Senator Kim Carr asked the following question on 22 October 2019:

Ms Falk: I did raise the issue of resourcing in terms of FOI. It's a matter that's been discussed before this committee on a number of occasions, where I've indicated that really where the stresses in the system lie, from the OIC's perspective, are with the need for more staffing. I've set out the fact that we've had an 80 per cent increase in Information Commissioner reviews and I have worked very purposefully since being in the role on looking at how we can increase our efficiency. Over that same period of time—the four-year period—we have increased our efficiency by 45 per cent. But I've formed the view, having conducted a number of reviews of the way in which we're carrying out our work, that the only way in which the gap is to be bridged is for additional staffing resources to be provided.

Senator KIM CARR: I see. I was just trying to reconcile the line of questioning from Senator Henderson with your statement, that's all. When was the first time you requested additional funding?

Ms Falk: I'd need to take that on notice.

Senator KIM CARR: Are you sure you need to? Most officers in your position would be able to tell very quickly when they first sought additional resources, given the growth in the workload.

CHAIR: The question's asked and answered. She's taken it on notice.

Senator KIM CARR: I'm just surprised that you need to take that on notice. Because what—

Ms Falk: It's been a matter of discussion with this committee and also, of course, with government during my term. I'm just unable to recall, with accuracy, the first occasion on which that occurred.

Senator KIM CARR: I see what you mean. I do apologise. In my experience, officers in your position are able to identify at least the year in which they asked for additional resources.

Ms Falk: I have asked for additional resources since being appointed to the position in August last year but, in terms of the first occasion subsequent to that date, I would need to check.

Senator KIM CARR: I see. That's where the confusion lies. So, since August last year, you've been seeking additional support?

Ms Falk: Sometime after that date, Senator.

Senator KIM CARR: And what was the government's response?

Ms Falk: The government has acknowledged my request and is working through it in terms of normal budget processes.

The response to the honourable senator's question is as follows:

The OAIC provided a submission to government in relation to additional resourcing, including for its FOI functions, in November 2018. An updated submission in relation to the OAIC's FOI function was provided to government in September 2019.

LCC-SBE19-47 - Additional staffing resources

Senator Kim Carr asked the following question on 22 October 2019:

Ms Falk: I think that there needs to be an increase in the staffing resources, and the quantum of that does depend on the time in which the backlog is sought to be addressed and also the ultimate goal in terms of how quickly Information Commissioner reviews should be handled.

Senator KIM CARR: So how much did you ask for?

Ms Falk: Senator, you appreciate that the information I've provided to government is through budget processes. I can give you an indication that, at present, my funding envelope allows for around 19 case officers to work on FOI reviews—there are additional staff who work on the FOI function more broadly—but just looking at FOI reviews, there'd need to be at least a half increase in the number of those staff.

Senator KIM CARR: What you mean by 'a half'?

Ms Falk: A half again.

Senator KIM CARR: So—

Ms Falk: Another nine staff.

Senator KIM CARR: What will that cost in terms of your normal profile?

Ms Falk: I'd need to see if we've got any figures to hand in relation to that, but it would be the cost of those staff.

Senator KIM CARR: It depends on what they're paid, doesn't it? Those nine staff are not all SES staff, are they?

Ms Falk: No, they're case officers.

Senator KIM CARR: So you'd be able to indicate roughly what it would cost to fund nine staff.

Ms Falk: I've put forward to government the cost of that and also any capital costs that might be needed to accommodate those staff.

Senator KIM CARR: Can you take that on notice, please?

Ms Falk: Thank you.

The response to the honourable senator's question is as follows:

The Office of the Australian Information Commissioner has estimated that the annual cost to fund nine (9) additional staff to undertake FOI regulatory work, including processing IC review applications, would be approximately A\$1.65 million with an additional capital amount of approximately A\$0.3 million for accommodation in the first year.

LCC-SBE19-153 – OAIC funding

Senator Carr asked the following written question on 4 November 2019:

1. When was the first time the Australian Information Commissioner requested additional funding?
2. How much funding does the Australian Information Commissioner need to meet the additional demand on the agency?

The response to the honourable senator's question is as follows:

The Office of the Australian Information Commissioner (OAIC) understands these questions relate to the freedom of information (FOI) functions of the office, since Commissioner Falk's appointment in August 2018.

1. The OAIC provided a submission to government in relation to additional resourcing, including for its FOI functions in November 2018. An updated submission in relation to the OAIC's FOI function was provided to government in September 2019.
2. The Office of the Australian Information Commissioner has estimated that at a minimum the office requires nine (9) additional staff to undertake FOI regulatory work, including processing IC review applications. The cost would be approximately A\$1.65 million per year together with capital amount of approximately A\$0.3 million for additional accommodation.

AE19-011 Resourcing levels

Senator PATRICK asked the following question on 19 February 2019:

Senator PATRICK: The budget is approaching. Have you made submissions in relation to the budget in terms of resources?

Ms Falk: I'm on the record as having said that I'm in discussions with government, and, of course, they're confidential budget discussions.

Senator PATRICK: Confidential in the context of what? I have a constitutional obligation to make sure from an oversight perspective that statutory officers are doing their job properly and so it's quite reasonable for me to question you on matters of resource, where the shortfalls are and so forth. It's quite a reasonable proposition. Can you give me some idea of the magnitude of resources you might require in the FOI space to enable you to clear the backlog that you currently have and to deal with the increasing numbers, notwithstanding you are working on efficiencies—that's one side of solving the problem? What magnitude do you think would get some of these decisions down to, say, six months?

Ms Falk: I'd need to take that on notice. I said earlier that in previous committee hearings we have undertaken some modelling in terms of what I project the current workload at and how it might play out over the forward years. We have done that work. I have been in discussion with government around what future resources might be required for the office.

Senator PATRICK: Can you make that modelling available to the committee, please?

Ms Falk: I would need to consider that and take some advice on that. Certainly I will consider that.

The response to the honourable senator's question is as follows:

The Office of the Australian Information Commissioner (OAIC) engaged a consultant to develop a workload and forecasting model. The model is based on historic trends and future assumptions as at October 2018.

The OAIC considers the below scenario to reasonably reflect the anticipated future workload trends of the Office in relation to freedom of information (FOI). This scenario is based on a number of parameters and forecasts the following:

- Table 1: total Information Commissioner reviews received
- Table 2: total Information Commissioner reviews completed
- Table 3: pending to disposal rate
- Table 4: anticipated FOI average staffing level.

Table 1: total Information Commissioner reviews received

This table forecasts the total Information Commissioner reviews received based on combined average growth rate of approximately 28.8%.

	2019/20	2020/21	2021/22	2022/23

Information Commissioner reviews	1322	1703	2193	2825
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Table 2: total Information Commissioner reviews completed

This table forecasts the total completed information Commissioner reviews per year.

	2019/20	2020/21	2021/22	2022/23
Information Commissioner reviews	1223	1533	1974	2331

Table 3: pending to disposal rate

This table provides the forecast future pending-to-disposal rate (PDR) at the end of each year. The PDR can be used as a proxy for gauging future timeliness of matters to be disposed. For example, a PDR of 0.5 equates to an approximate average finalisation time of six months.

	2019/20	2020/21	2021/22	2022/23
Information Commissioner reviews	0.50	0.5	0.4	0.40

Table 4: total forecast FOI ASL

This table forecasts the total required FOI case officers to undertake the work in Table 2 and other FOI work of the OAIC, calculated as average staffing level (ASL).

	2019/20	2020/21	2021/22	2022/23
FOI ASL	25.6	30.4	33.0	35.9

The OAIC forecasts that there will be 1016 Information Commissioner reviews on hand at 30 June 2019. To clear this backlog during the 2019-20 financial year the OAIC forecasts that an additional 13.7 FOI case officers would be required.

AE19-010 Average completion times for FOI decisions

Senator PRATT asked the following question on 19 February 2019:

Senator PRATT: What is the average time it takes for your office to complete a whole FOI decision, on average—for the whole case load?

Ms Falk: I would have figures for average completion times for last financial year. I think I should take that on notice to make sure I'm accurate.

Senator PRATT: Do you have any statistics at all that you can share with us today? You can frame them in a way you're comfortable with reporting, if there is something you can tell us.

Senator Reynolds: I think Ms Falk said she will take that on notice to make sure she can provide accurate information for you, Senator Pratt.

Ms Falk: Unfortunately, I don't have those figures in front of me.

Senator PRATT: So you don't have the average completion time? Do you have some figures with you in relation to completion times, not averages, but other—for example, you were able to tell us the longest time. Are you able to tell us how many cases are waiting for a similar length of time?

Ms Falk: We have a KPI of resolving 80 per cent of matters within 12 months, and we've consistently met that KPI over recent financial years.

Senator PRATT: Okay.

Senator PATRICK: I might help you, Senator Pratt. I have an FOI that shows that there are 18 matters that have been waiting 11 months to get to a case officer.

The response to the honourable senator's question is as follows:

The average time taken to finalise an Information Commissioner review is:

- 2016-17: 6.2 months
- 2017-18: 6.7 months
- 2018-19: 7.1 months (based on the period of 1 July to 31 December 2018).

SBE18-002 Average number of appeals handled every quarter

Senator PRATT asked the following question on 22 October 2018:

1. **Senator PRATT:** How many appeals do you handle on average every quarter?
2. **Senator Reynolds:** Senator Pratt, while the commissioner is getting that information for you, I note that you asked the commissioner about whether she trusted. I think the trust, in the policy sense, is the other way. The policy and the legislation are designed to engender trust in companies that they can come forward with information. So I think, in a policy sense, the trust balance is actually the other way.
3. **Senator PRATT:** Thank you.
4. **Ms Falk:** In relation to the quarterly statistic that you have asked for—did you ask for monthly or quarterly? I have a quarterly one in front of me if that's helpful.
5. **Senator PRATT:** Quarterly or monthly. I'm keen to see what the pattern in the number of appeals is.
6. **Ms Falk:** Yes. For freedom of Information Commissioner reviews, in the first quarter of this financial year we received 281 Information Commissioner reviews. That's a significant increase when compared to the same period last year.
7. **Senator PRATT:** What was that number for this period last year?
8. **Ms Falk:** One hundred and sixty-eight.
9. **Senator PRATT:** Thank you. If you could take on notice the statistics for each quarter over the last couple of years, that would be great. Clearly the workload is increasing. How many staff do you have handling FOI matters?

The response to the honourable senator's question is as follows:

The table below shows the number of IC reviews received by the OAIC for each quarter from 1 July 2015 and the percentage (%) change from the same period in the previous year. Staffing numbers are provided in the OAIC's response to 2018-19 QON SBE-003.

Year	Q1	+/- %	Q2	+/- %	Q3	+/- %	Q4	+/- %	Total	+/- %
2015-16	125	-	124	-	130	-	131	-	510	-
2016-17	138	+10%	156	+26%	169	+30%	170	+23%	633	+24%
2017-18	168	+22%	199	+28%	222	+31%	212	+25%	801	+27%
2018-19	281	+67%	-	-	-	-	-	-	-	-

SBE18-003 Staffing numbers

Senator PRATT asked the following question on 22 October 2018:

Senator PRATT: Have you increased the number of staff handling FOI matters from the point last year where you had 168 to the point now where you have 281 matters?

Ms Falk: Yes, we have. There was a return of some funding from the AAT and, as a result of the return of that funding, we've increased the FOI staff. In August of this year, we implemented a new structure in our FOI area to give greater capacity.

Senator PRATT: You've currently got 22 staff.

Ms Falk: Yes.

Senator PRATT: What was it at the time when you had 168 matters?

10. **Ms Falk:** I would have to take that on notice.

11.

The response to the honourable senator's question is as follows:

The 22 staff represent the contribution to delivering FOI functions from across the Office of the Australian Information Commissioner.

Following the reallocation of FOI funding from the Administrative Appeals Tribunal the Office of the Australian Information Commissioner assigned an additional three staff to handle FOI matters.

SBE18-004 Financial year figures on the number of finalised reviews

Senator PATRICK asked the following question on 22 October 2018:

Senator PATRICK: Ms Falk, can you delegate the decision-making responsibilities for FOI under the act?

Ms Falk: There are a number of provisions that allow delegation, but the Information Commissioner review power is non-delegable.

Senator PATRICK: That is a section 55K decision, I think.

Ms Falk: Yes. That is correct.

Senator PATRICK: In that sense, you become a bottleneck, because you're required to exercise a range of powers, whereas in the past there were three commissioners that could do that.

Ms Falk: I haven't become a bottleneck. Every Information Commissioner review that comes to me for consideration I make in a timely way. The numbers of Information Commissioner reviews are perhaps not as high as they were in previous years, and that's because of where we're at in terms of the development of the jurisdiction and the jurisprudence. We now have some very well-established precedent in terms of FOI. That also allows for the staff of the OAIC to engage in a number of techniques in terms of assisting agencies to provide a revised decision and provide further information to applicants and also for the staff of the OAIC to provide preliminary reviews to agencies and parties as to prospects of the matter. That has enabled a much higher proportion of matters to be resolved without going to Information Commissioner review. Over the last three years, we've tripled the number of matters that have been, if you like, settled by agreement between the agency and the applicant.

Senator PATRICK: That's inconsistent with the data you provided as a submission to the FOI bill that's currently going through the parliament. I see reviews finalised without a 55K decision being made. In 2012 it was 90 per cent. It has ranged around the 70s, 80s and 90s.

Senator Reynolds: I think Ms Falk was quite clear in her opening statement, which is obviously her latest statement. Would you like Ms Falk to table her statement with those figures in it?

Senator PATRICK: Yes. That would be helpful. But, just in terms of patterns, Ms Falk is describing a pattern whereby she says that it's not required that all decisions get made by the Information Commissioner, because some agreement is reached, the matter's resolved or the department makes a decision. I'm just trying to get to the consistency of those numbers. I've got 73 per cent in 2015. In 2016-17 it was 79 per cent. In 2015-16 it was 82 per cent. It bumps up and down a bit.

Ms Falk: The submission goes to 2016-17 figures. I can update you with the next financial year figures on notice.

Senator PATRICK: Thank you. I'd ask that you do that.

The response to the honourable senator's question is as follows:

[Source: OAIC Annual Report 2017-18 p 179.]

In 2017-18, 79.84% of IC reviews were finalised without a formal decision being made under s 55K of the FOI Act.

SBE18-005 Key Performance Indicators

Senator PATRICK asked the following question on 22 October 2018:

Senator PATRICK: I'm interested in the KPI of 80 per cent within 12 months. Who set that?

Ms Falk: It was set by the Information Commissioner at the time.

Senator PATRICK: That was Professor McMillan, was it?

Ms Falk: Yes, that's correct.

Senator PATRICK: In some sense, you've set your own KPI. I wonder how that got determined. Noting the act has a requirement for timely decisions, how was that number chosen? Could you go back through the records and provide the committee with that? Do you see what I'm saying? If you set the standard and then you meet it, the expectation may be different for the community. I'd be interested if you could provide some reasoning behind that 80 per cent KPI. I understand you'd have to take that on notice.

12. **Ms Falk:** I will take it on notice. All of the KPIs that are set by the organisation are done through analysis of the workflow and setting benchmarks, and also looking at counterparts. My recollection is that the KPI of 80 per cent completed within 12 months started at looking to try to achieve 80 per cent within six months. That was not seen to be achievable in the early years, and the KPI was adjusted based on the workload modelling at that time. The office has very recently done workload modelling right across the office on the time taken and also the number of staff that we need to deal with the workload increases that have occurred in the office. That's some context, but I'll take on notice your specific question and come back to you.

13.

The response to the honourable senator's question is as follows:

The *Freedom of Information Act 1982* does not prescribe a statutory timeframe for the finalisation of Information Commissioner reviews (IC reviews). The timeframes for completing IC reviews has been an internally set key performance indicator (KPI) since the commencement of the OAIC on 1 November 2010.

The table below shows the OAIC's reported performance against its KPI target.

Annual Report	KPI for IC reviews	Target %	Result %
2011–12	Reviews completed within 6 months	80	32.8
2012–13	Reviews completed within 6 months	80	25.2
2013–14	Reviews completed within 12 months	80	71.2
2014–15	Reviews completed within 12 months	80	71.1

Annual Report	KPI for IC reviews	Target %	Result %
2015–16	Reviews completed within 12 months	80	87.0
2016-17	Reviews completed within 12 months	80	86.0
2017-18	Reviews completed within 12 months	80	84.0

In 2011-12 and 2012-13 the KPI was to complete 80% of IC reviews within 6 months.

The 2011-12 Annual Report explains that IC reviews that were treated as being finalised within six months were those received before or after 1 July 2011 and finalised within six months of receipt. IC reviews received after 1 July 2011 and not finalised within six months were counted in this analysis as cases that did not meet the six month finalisation target.

The 2012-13 Annual Report explains that IC reviews that were treated as being finalised within six months were those received before or after 1 July 2012 and finalised within six months of receipt during the 2012–13 reporting year. IC reviews received after 1 July 2012 and not finalised within six months were counted in this analysis as cases that did not meet the six month finalisation target.

From 2013-14 the KPI target was to complete 80% of IC reviews within 12 months. This continues to be the KPI for IC reviews.

SBE17-050 - Number of FOI extensions sought over the past 12 months

Senator Xenophon asked the following question at the hearing on 24 October 2017:

Senator XENOPHON: I want to go to the issue of the time it takes for decisions to be made—and I have to note my great frustration and the frustration of those who work with me in relation to that. The AAT makes orders in respect of time frames for submissions and the departments adhere to the time frames. In contrast, is it the case that the Information Commissioner's office agrees time frames for submissions and the departments regularly seek extensions?

Mr Pilgrim: They can seek extensions, that's correct.

Senator XENOPHON: Can you provide me on notice the number of times extensions have been sought in the past 12 months in the context of the total number of reviews conducted?

Mr Pilgrim: I'll take that on notice and see if we can provide that.

The answer to the honourable senator's question is as follows:

The Office of the Australian Information Commissioner (OAIC) does not collect statistical data in relation to the number of extensions sought by applicants or agencies during the IC review process. The OAIC generally receives requests for extensions to provide responses in the following circumstances:

- to provide submissions in response to a s 54Z notice or to requests for further information
- to provide further submissions in response to preliminary views issued by the case officer
- to provide a revised decision under s 55G of the FOI Act.

In deciding whether to grant the request for extension, the OAIC would take into account the circumstances of the matter, such as the reasons for requesting the extension, whether previous requests for extensions had already been granted and whether there was enough information before the OAIC for the Information Commissioner to make the correct or preferable decision.

The OAIC is currently in the process of finalising a practice direction under s 55(2)(e)(i) of the FOI Act. The practice direction will explain that multiple requests for extensions of time will not be granted by the Information Commissioner and where an agency or minister fails to provide information and/or documents within the initial or extended timeframe, the Information Commissioner may require provision of the information or production of documents under s 55R of the FOI Act. The OAIC anticipates that this will help to address the issue of requests for extensions and will further facilitate timely review of IC review matters.

SBE17-059 Reason for an increase in the number of FOI applications

Senator Pratt asked the following question at the hearing on 24 October 2017:

Senator PRATT: I was somewhat alarmed, in the process of robo-debt with DSS, at the number of people that needed to undertake FOI applications just so that they could respond to the very questions that the DSS had put to them about their own circumstances. Is that something that you're familiar with?

Mr Pilgrim: Not referring specifically to the robo-debt issue, but I think, as I said in my opening statement in the annual report, one of the issues you'll note from the statistics that have come out from the broader range of applications to government agencies is that approximately 83 per cent of the requests under the FOI Act are for access to personal information. Now, I don't have the figure to hand, of that 83 per cent, how many are individuals seeking their own information, but I would suggest that would be the majority. In those circumstances, I strongly encourage agencies to be giving people access to their own personal information without having to go through often very complex processes to access their own personal information.

Senator PRATT: Is that why there has been an increase in the number of FOI applications over the last five years? Is that the source of the driving up of the data?

Mr Pilgrim: I would need to check the statistics over the last few years, but I do know that that has been a consistent feature, that the majority of those requests are for personal information.

The answer to the honourable senator's question is as follows:

The *Freedom of Information Act 1982* (Cth) (FOI Act) requires the provision of information from all agencies subject to the FOI Act for inclusion in the Annual Report of the Office of the Australian Information Commissioner (OAIC). Separate returns need be completed for each Minister, Assistant Minister (or Parliamentary Secretary), Department and other government agency.

Agencies are asked to classify a request as being for 'Predominantly Personal Information' where personal information is the predominant kind of information sought. For this purpose, 'Personal Information' includes both an applicant's own information and information about other individuals. 'Personal information' is defined in subsection 4(1) of the FOI Act by reference to the definition in the *Privacy Act 1988* (Cth). In summary, 'personal Information' means information or opinion about an identified individual or an individual who is reasonably identifiable.

The following table has been extracted from FOI processing statistics received from agencies and Ministers.

The table provides the total FOI requests received between 2010-11 and 2016-17 and the percentage of requests where 'personal information' is the predominant kind of information sought.

	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17
Personal	19,504	19,988	19,827	22,690	30,297	32,884	32,383
% of total	83	81	80	80	85	87	82
Other	4,101	4,776	5,117	5,773	5,253	5,112	7,136
% of total	17	19	20	20	15	13	18
Total	23,605	24,764	24,944	28,463	35,550	37,996	39,519
% change y/y		5	1	14	25	7	4

The full dataset is published at: <http://data.gov.au/dataset/freedom-of-information-statistics>

BE17-184 - Resources

Senator Pratt asked the following question at the hearing on 18 August 2017:

1. What provisions have been made in the Budget or elsewhere for resourcing sufficient to:
 - a) discharge the statutory functions of the OAIC, and
 - b) implement the Open Government Partnership National Action Plan commitments?
If so, what are they?
2. Is the OAIC able to discharge its statutory functions under the current funding levels?
3. Will the Government be appointing an individual to each of the three independent Statutory Commissioner roles – Information Commissioner, Privacy Commissioner and FOI Commissioner?
4. If not, how does that not breach the Open Government Partnership National Action Plan and the Government’s commitment to ‘ensure the adequate resourcing of the OAIC to discharge its statutory functions’?
5. In the 2017-18 Budget, how much funding was provided for the OAIC to perform its privacy functions?
6. How much funding was provided for the OAIC to perform its FOI functions?
7. How much funding was provided for implementing the Open Government Partnership National Action Plan commitments?
8. How many staff are employed to perform the OAIC’s privacy functions?
9. How many staff are employed to perform OAIC’s FOI functions?
10. How many staff are employed to implement the Government commitments under the Open Government Partnership National Action Plan?
11. What additional functions were given to the OAIC under the Open Government Partnership National Action Plan?
12. Will additional funding or staffing be provided to the OAIC to perform those functions?
13. In the past 12 months, how many agencies received requests for documents that have been already released under FOI?
14. Is this an efficient use of agencies’ time? Would it be more efficient to require Government agencies to publish on their websites documents released under FOI?
15. In the past 12 months, how many agencies received FOI requests that were substantively the same as other FOI requests already received and responded to?
16. Is this an efficient use of agencies’ time? Would it be more efficient to require Government agencies to publish on their websites the reasons for decisions on all requests, including requests which are denied?
17. Would requiring Government agencies to publish on their websites documents released under FOI and the reasons for decisions on all requests improve transparency, expose inconsistent or arbitrary decision-making or improve public understanding of the FOI process?
18. What would be the benefits of reinstating the independent statutory role of FOI Commissioner, as distinct from the Privacy or Information commissioner?

The answer to the honourable senator’s questions are as follows:

- 1 – 4) The resources allocated to the Office of the Australian Information Commissioner (OAIC) are set out in the Portfolio Budget Statements 2017-18 Budget related Paper No. 12 for the Attorney-General’s Portfolio. The remaining questions 1–4 should be directed to the Attorney-General’s Department.

5 – 7) The annual Budget appropriations to the OAIC generally does not provide a breakdown between functions. As well the OAIC operates as an integrated agency in relation to all its statutory responsibilities and as such its internal budget is not separated by function.

8 – 9) The OAIC allocates staff from within existing resources proportionate to the workload requirements of each function and priority setting. As at 11 September 2017 the staff allocated to these core functions was approximately:

- Privacy: 47
- FOI: 15

In addition to the above, a further 11 staff provide support across all the OAIC's statutory responsibilities in areas such as education and awareness, legal services, corporate governance. A further six staff are in the Executive Branch.

- 10) While no staff have been solely dedicated to the implementation of Australia's Open Government Partnership National Action Plan (NAP), staff will be drawn, as required, from various areas of the OAIC based on the skills and subject matter expertise required for particular NAP projects. This allocation will be done as part of the OAIC's priority setting and overall workload requirements.
- 11) In the NAP the OAIC is specifically named as a joint lead agency in relation to Commitments 2.2 and 3.2 and as an 'Other government actor involved' in relation to Commitment 3.1. In addition all Commonwealth entities, of which the OAIC is one, are named as 'Other government actors involved' in relation to Commitments 3.3, 4.3 and 5.2.
- 12) The OAIC operates from within existing resources to achieve its required outcomes based on priority setting and workload requirements. The provision of additional funding is a matter for Government.
- 13) The OAIC does not have information about how many agencies have received requests for documents that have already been released under the FOI Act. Generally, individual agencies are best placed to know whether requested documents have already been released in response to an FOI request. In those cases, agencies will usually direct the applicant to publically available documents, or their disclosure log, thereby avoiding the need to process the request.
- 14) The *Freedom of Information Act 1982* (FOI Act) currently requires agencies to publish documents released under the FOI Act on their disclosure log, except if the documents contain personal or business information that it would be unreasonable to publish (see s 11C of the FOI Act).
- 15) The OAIC does not have information about how many agencies have received requests for documents that are substantively the same as other FOI requests already received and responded to. Generally agencies are best placed to know whether the same or similar requests have been made and responded to. In those cases, agencies can direct an applicant to publically available documents, or their disclosure log, to see whether

what is already publicly available satisfies the request. If it does, there will be no need to process the FOI request.

- 16) Given that documents released in response to FOI requests are already required to be published, it is not apparent that publishing all FOI decisions will reduce the number of FOI requests made to agencies or make it easier for members of the public to identify whether similar FOI requests have been made (and refused).

The Guidelines issued by the Information Commissioner under s 93A of the FOI Act recommend that agencies provide a short summary of the FOI request in their disclosure log when publishing documents that are released in response to an FOI request.

FOI decisions would need to be carefully reviewed and redacted before publishing to ensure that personal information that might identify the applicant or other individuals has been removed.

- 17) Australian Government agencies are already required to publish documents released under the FOI Act on their websites (see s 11C of the FOI Act).
- 18) The appointment of an FOI commissioner under the *Australian Information Commissioner Act 2010* is a matter for the Government. The OAIC is currently operating with one person who is appointed as both Australian Information Commissioner and Privacy Commissioner. That person is supported by three (3) SES staff, a Deputy Commissioner and two Assistant Commissioners. It is the view of the current Commissioner that this arrangement is working effectively.

BE17-135 - Resourcing of the OAIC

Senator Rhiannon asked the following the following written question

1. What provisions have been made in the budget or elsewhere to adequately resource the OAIC so it can:
 - a) discharge its statutory functions?
 - b) implement the OGP NAP commitments?
2. If provisions have been made to adequately resource the OAIC please detail them.
3. Is it proposed to appoint an individual to each of the three independent statutory Commissioner roles in 2017-8?
 - a) If not, why not?
 - b) If not when do you anticipate the appointments will be made?
4. If no appointment is made is that a breach of:
 - a) commitment made in the NAP?
 - b) Australia's commitment as a participating nation of the OGP?
5. For the financial year 2017-8:
 - a) how much of the OAIC budget will be spent on
 - its privacy functions
 - Its FOI functions
 - b) How many OAIC staff will be employed in its
 - privacy functions
 - FOI functions
 - Implementing NAP commitments
 - c) How many FOI staff and how many Privacy staff will be engaged in Implementing NAP commitments
 - d) What additional funding and other resourcing will be provided for Implementing NAP commitments in 2017-8 and what will be its source(s)?
6. Will the government be able to honour the commitment made in the E NAP that "The Government is committed to ensuring the adequate resourcing of the OAIC to discharge its statutory functions"?

- a) Considering that under the E NAP the government has given the OAIC some five additional functions, how are these to be funded and staffed without withdrawing money and staff from the FOI and/or Privacy statutory functions?
- b) If money and/or staff are withdrawn from the FOI and/or privacy statutory functions would that be a breach of the commitment made in the E NAP ?

The answer to the honourable senator's question is as follows:

1 – 4) The resources allocated to the Office of the Australian Information Commissioner (OAIC) are set out in the Portfolio Budget Statements 2017-18 Budget related Paper No. 12 for the Attorney-General's Portfolio. The remaining questions 1–4 should be directed to the Attorney-General's Department.

6)

- a. The OAIC operates as an integrated agency in relation to all its functions and as such its budget is not separated by function.
- b. The OAIC broadly allocates staff from within existing resources proportionate to the workload requirements of each function and priority setting. As at 3 July 2017 the staff allocated to these core functions was approximately:
 - Privacy: 47
 - FOI: 15
 - NAP: (refer (c) below)

In addition to the above, a further 11 staff provide support across both functions in areas such as education and awareness, legal services, corporate governance. A further six staff are in the Executive Branch.

- c. While no staff have been solely dedicated to the implementation of the NAP, staff will be drawn, as required, from various areas of the OAIC based on the skills and subject matter expertise required for particular NAP projects. This allocation will be done as part of the OAIC's priority setting and overall workload requirements.
 - d. The OAIC operates from within existing resources to achieve its required outcomes based on priority setting and workload requirements. Staff allocated to the implementation of the NAP will come from existing resources.
- 7) This question should be directed to the Attorney-General's Department
- a. See above
 - b. See above

AE17/074 – FOI matters

Senator Pratt asked the following the following written question

- 1) How many FOI request reviews is your office working on at today's date?
- 2) How many of these are overdue?
- 3) What is your current backlog of FOI reviews?
- 4) How long, on average, does it take your office to process a review?
- 5) How many appeals of FOI requests sent to Government Ministers is your office currently working on?
- 6) How many reviews of FOI requests sent to Government Ministers are because of a 'deemed refusal' because the Minister hadn't bothered to respond at all?
- 7) In your opinion, do Government Ministers tend to rely on a 'practical refusal reason' as an excuse not to process requests?
- 8) In your opinion, do Government Ministers display contempt of the FOI Act?
- 9) In your opinion, does the Attorney-General display contempt of the FOI Act?
- 10) Does your office have sufficient resources to handle FOI requests efficiently?
- 11) How important are FOI requests to a functioning democracy and to ensure that the Government is held accountable?

The answer to the honourable senator's question is as follows:

- 1) At 28 February 2017 the Office of the Australian Information Commissioner (OAIC) had 345 IC Review applications open.
- 2) There is no statutory time limit on finalising an IC Review. The OAIC aims to finalise 80% of IC Review applications within 12 months. In the 2015-16 financial year, the OAIC finalised 87% of IC Reviews within 12 months.
- 3) As per question one, there are 345 applications open. However, these will be in different stages of the OAIC's processes.

SBE016-091 - OAIC operations

Senator Xenophon asked the following written question

1. In the period immediately prior to the decision by the Abbott Government to abolish the OAIC:
 - a. How many offices did the OAIC work from
 - b. How many staff were employed by the OAIC
 - c. Of those staff, how many had dedicated FOI functions
 - d. Of those staff, how many had dedicated Privacy functions
2. In the period follow the decision by the Turnbull Government not to abolish the OAIC:
 - a. How many offices does the OAIC work from
 - b. How many staff are employed by the OAIC
 - c. Of those staff, how many had dedicated FOI functions
 - d. Of those staff, how many had dedicated Privacy functions
3. Please describe the impact on the OAIC of Australia signing up to the Open Government Partnership
4. How many staff in the OAIC have delegations to make FOI decisions?
5. Of those, how many of them have university legal qualifications?
6. How many staff in the OAIC have delegations to make Privacy decisions?
7. With respect to FOI reviews that commenced in 2014:
 - a. How many were concluded within 3 months
 - b. How many were concluded in more than three months but less than six
 - c. How many were concluded in more than six months but less than twelve
 - d. How many were concluded in more than 12 months (or have not concluded)
8. With respect to FOI reviews that commenced in 2015:
 - a. How many were concluded within 3 months
 - b. How many were concluded in more than three months but less than six
 - c. How many were concluded in more than six months but less than twelve
 - d. How many were concluded in more than 12 months (or have not concluded)
9. With respect to FOI reviews that commenced in 2016:
 - a. How many were concluded within 3 months
 - b. How many were concluded in more than three months but less than six
 - c. How many were concluded in more than six months but less than twelve

10. What processes are in place to ensure that the 'prompt' requirements of S 3(4) of the FOI Act are met?

The answer to the honourable senator's question is as follows:

1. The following responses are provided as at 13 May 2014 with the staffing numbers as headcount:
 - a. Two
 - b. 97
 - c. 25
 - d. 40

Of the total number of staff (97), 32 performed duties across both privacy and FOI functions proportionate with the relative workloads of each function. This included, for example, members of the Executive, enquiries staff, media and communications, and legal support. It also includes staff who are on long term leave.

2. The following responses are provided as at 14 October 2016 with the staffing numbers as headcount:
 - a. One
 - b. 78
 - c. 13
 - d. 43

Of the total number of staff (78), 21 performed duties across both privacy and FOI functions proportionate with the relative workloads of each function. This includes, for example, members of the Executive, enquiries staff, media and communications, and legal support. It also includes staff who are on long term leave.

3. The Australian Information Commissioner has been a member of the *OGP Consultative Group* and the *Interim Working Group for Australia's National Action Plan*. These groups were established to drive the development of a draft National Action Plan (NAP), and to oversee public consultation with the community and key stakeholders. The OAIC expects that it will continue to participate in OGP-related activities in the future.

The OAIC's participation in the OGP process has required allocation of some staff and resources to enable attendance at meetings, preparatory research and other activities.

The OAIC considers that Australia's participation in the OGP will complement the OAIC's work in promoting the value of government information as a national resource, and in assisting agencies to manage government information effectively while protecting privacy.

4. 41 staff have been delegated various functions under the *Freedom of Information Act 1982 (Cth)* (FOI Act) by the Australian Information Commissioner. However, as per the answer to question 2 (above), 13 of these staff are dedicated specifically to processing FOI matters. Having a larger number of staff delegated provides flexibility within a small agency to move resources as workload changes requires.
5. 20 staff who are delegated under the FOI Act hold a university legal qualification. Of the 13 staff who are dedicated to carryout these functions, 10 hold a university legal qualification.
6. 70 staff have been delegated various functions under the *Privacy Act 1988 (Cth)* by the Australian Information Commissioner. While this number is greater than the number of staff currently processing privacy matters, having a larger number of staff delegated provides flexibility within a small agency to move resources as workload changes requires.
7. The following responses are provided for those IC reviews received in 2014:
 - a. 162
 - b. 146
 - c. 97
 - d. 38
8. The following responses are provided for those IC reviews received in 2015:
 - a. 125
 - b. 113
 - c. 142
 - d. 48

9. The following responses are provided for those IC reviews received in 2016 up to 31 October 2016:

a. 101

b. 76

c. 25

10. The OAIC has implemented a range of process improvements, including through utilising alternative dispute resolution (ADR) methods. This has included concentrating efforts particularly on seeking early resolution of matters where possible.

This has resulted in a significant number of matters being withdrawn by the applicant, following action taken by the government agency to resolve the applicant's access request, such as releasing information informally, making a revised decision, or following an appraisal by the OAIC of the merits of their case.

The OAIC continually monitors the throughput of IC review applications and closely manages matters that are still open after six months.

AE16-015 FOI resourcing trends

Senator Rhiannon asked the following question at the hearing on 9 February 2016:

Senator RHIANNON: Thank you and the other one to maybe also take on notice is that I noticed in some of the findings that it was suggested or reported that some of the departments were overestimating the amount of time it would take for the information to be found and to be released. Is that also a trend?

Mr Pilgrim: Again, I want to be careful of my words and not say it is a particular trend. It is an issue we are seeing, and one of the things we hope to do through the decisions we make is to use them also as an educative process so that they can understand the views of our office in terms of some of the time frames we think should be taken in terms of being able to identify and locate documents.

Senator RHIANNON: Are you just accepting that the departments will make a fair judgement on the time that will be required? Is it just a matter of trust or are there guidelines with regard to this matter? Because it seems as though that becomes quite influential in deciding where some of these cases go.

Mr Pilgrim: We certainly do monitor the IC reviews that are coming through to us to understand what some of the challenges may be for agencies. We try to use some of the decisions we make as the educative tool. Ms Toohey might want to make some observations in terms of sampling.

Ms Toohey: One of the things that we certainly encourage agencies to do is this idea of sampling so they can justify a decision if they have made a decision—

Senator RHIANNON: You used the word 'sampling'; could you define that.

Ms Toohey: If a matter comes to us and it has been a practical refusal, we generally ask the agency to produce a small sample of the documents so that we can then test their calculation versus our own. The commissioner has made a number of decisions looking at those sorts of processes and has certainly provided guidance in those decisions to the agencies about that approach.

Senator RHIANNON: Is there a trend that there is often considerable disparity between your estimations and other departments' estimations?

Mr Pilgrim: I think what I was saying is that I do not want to try to use the word 'trend' because it can be taken in a way to say that there is a major issue. It is certainly something we are looking at and it is something that I think we can provide more guidance to agencies on, and, as I said, our primary way of doing that is using the IC review process as part of that educative process to let agencies have an understanding about what we think in certain circumstances. Looking at each case individually would be a reasonable period of time.

Senator RHIANNON: So you said you are looking at it. In time will you be able to share with us what these trends are?

Mr Pilgrim: I can certainly take that back and see whether it is something we can produce any useful information on. I cannot guarantee what we may be able to produce, but I certainly will take it on board.

The answer to the honourable senator's question is as follows:

The question appears to be 'Is there a trend that there is often considerable disparity between your estimations and other departments' estimations?'

The OAIC has not identified a 'trend' in departments over estimating FOI processing time. There are some IC reviews where the Information Commissioner's estimates on processing time for an FOI request may vary from a Department's estimate. These are attributable to a range of factors, including:

- where the applicant may have revised the scope of their request and excluded from scope information that would have required third party consultation under section 27A of the FOI Act prior to release and
- where the Department has not assessed a sample of the documents at issue, prior to issuing a decision that a practical refusal reason exists
- where a department has relied on standardised assessment calculators rather than the actual documents to assess processing time.

BE15-102 FOI budget

Senator Collins asked the following written question from 27 and 28 May 2015 hearings:

1. What will the \$1.7m of transitional funding announced in the Budget fund? Please provide a detailed breakdown.
 - a. How long is this funding expected to be required?
 - b. How does this figure compare to the usual annual funding of the OAIC prior to the 2014 Budget?
 - c. Will the funding cover premises for the OAIC?
 - d. Will new staff be hired? How many? Are these permanent staff or on short-term contracts?

The Attorney-General's Department's answer to the honourable senator's question is as follows:

1. (a) The transitional funding of \$1.7million for the Office of the Australian Information Commissioner (OAIC) is for the exercise of FOI functions in 2015-16, pending implementation of the 2014-15 Budget measure.

(b) The total net resourcing for the OAIC for 2015-16 is \$11.79 million. The total net resourcing for the OAIC for 2014-15, before the 2014-15 Budget measure, was \$13.67 million.

(c) and (d)

BE15-103 FOI appeals

Senator Collins asked the following written question from the 27 and 28 May 2015 hearings:

1. How will the OAIC be able to discharge its statutory responsibilities with this stopgap funding? Will there be delays in the processing of FOI appeals?
2. What is the present case-load of the OAIC? How many appeals are presently before the Information Commissioner? Is it true that the IC is unable to deal with all the appeals which come before him and is referring many on to the AAT? How many have been referred directly to the AAT?
3. In the 2015 Budget, the Government states that the OAIC will continue to process FOI appeals in the interim but that complaints-handling will now be handled by the Ombudsman and FOI policy developed by the AGD, even though the legislation under which these functions are given to the OAIC has not been repealed.
 - a. How is this in compliance with the law? Has the Government sought legal advice on the legality of this arrangement?
 - b. Has the Government directed the OAIC to cease fulfilling its responsibilities regarding complaint-handling and FOI policy? What power does the Government have to make such a direction?
 - c. Has the OAIC been referring complaints to the Ombudsman? What is the legal basis for making such a referral? How many complaints have been referred to the Ombudsman?

The Attorney-General's Department's answer to the honourable senator's question is as follows:

1. The OAIC is continuing to perform those functions necessary to ensure the ongoing operation of the FOI system. The OAIC advised at the Estimates hearing on 28 May 2015 that in the first 10 months of the 2014-15 financial year, it has finalised 433 Information Commissioner review matters, many of those on an early resolution basis after analysing applications and talking to the parties and, in some instances, discontinuing a matter so that it can be recommenced by the review applicant before the Administrative Appeals Tribunal.
2. The OAIC has advised that it receives approximately 30 Information Commissioner review applications per month; from 1 July 2014 to 31 December 2014 the OAIC received 193 requests for Information Commissioner review. From 1 July 2014 to 30 April 2015 the Administrative Appeals Tribunal has received 57 applications for review of decisions made under the FOI Act.
3. (a) It would not be appropriate for the Attorney-General's Department to answer this question as it is a request for legal advice.

(b), (c) Like all government agencies, it is a matter for the OAIC to determine how it allocates its resources and manages its priorities within the funding provided to it by the Government. Consistent with its status as an independent statutory agency, the Government has not directed the OAIC on how it allocates its resources or exercises its functions. On 15 May 2015 the OAIC advised, on its website, how it proposes to undertake its FOI functions.

AE14-70 Freedom of information applications

Senator Rhiannon asked the following question at the hearing on 24 February 2014:

- 1) Considering the backlog of FOI applications:
 What measures are you considering could be effective to reduce this backlog?
 Has the OAIC had any discussions or representations made to it regarding introducing application fees?
- 2) Has the OAIC considered discontinuing some cases so the parties could continue in the Administrative Appeals Tribunal?
- 3) Does the OAIC inform parties in cases before it that are proceeding slowly, that if they desire the OAIC could discontinue the case and they could then take their case to the AAT?
 Does the OAIC have vexatious applicants?
 How does the OAIC handle such applicants?
 Is the OAIC considering any rule changes to manage such applicants?
 If such rule changes are being considered, what consideration has been given to ensuring that in managing vexatious applicants legitimate applicants are not disadvantaged?
- 4) Does the FOI Act cover intelligence agencies? If not, why not? Is there any discussion or consideration that the FOI Act should cover intelligence agencies? May I have details?

The answer to the honourable senator's question is as follows:

1. The OAIC is taking steps to reduce the IC review timeframes and backlog within its current resources by directing more resources toward an early intervention/resolution model.

The OAIC has a backlog of FOI matters due to the large number of complaints and applications for Information Commissioner review (IC review) received over the last 2–3 years. However, the OAIC has had some considerable success, especially in the last few months, in reducing the size of the backlog, and its age profile. This has been achieved through a range of strategies, including a recent restructure of the team handling IC reviews and FOI complaints.

While there are still delays in some areas, the OAIC has increased the number of matters being finalised each month, the number of decisions on IC reviews being published each month, and is now triaging all matters as they are received to assess whether they can be resolved quickly and informally. Even though the FOI workload has continued to increase, the measures we have implemented have resulted in an overall reduction in the number of FOI matters on hand and reduced timeframes in which FOI matters are being finalised.

The issue of the possible re-introduction of applications fees was ventilated during the *Review of the Freedom of Information Act 1982 and Australian Information Commissioner*

Act 2010 (the ‘Hawke review’) conducted in 2013. In the OAIC’s submission to the Hawke review (in December 2012) and in the OAIC’s comments on the recommendations of the Hawke review (in October 2013—both of which are available on the OAIC website) we did not support the introduction of an application fee for IC reviews.

2. Section 54W(b) of the FOI Act allows the Information Commissioner to decide not to undertake, or not to continue to undertake, an IC review if he is satisfied that the interests of the administration of the FOI Act make it desirable that the IC reviewable decision be considered by the Tribunal. When a matter is finalised on this basis, an applicant can lodge a review application with the Administrative Appeals Tribunal.

The Information Commissioner has finalised matters under s 54W(b), being satisfied that it was in the interests of the administration of the FOI Act to do so: for example, because the parties were already engaged in a similar matter in the AAT.

It would not be an appropriate exercise of this discretion to finalise matters as a caseload management strategy as it would simply divert matters to another tribunal process that would be more expensive and no more informal, and which would not expedite the final resolution of those matters.

3. An FOI matter can only go on appeal to the Administrative Appeals Tribunal if it has been finalised as an IC review, or if the Information Commissioner decides under s 54W(b) not to undertake, or not to continue to undertake, an IC review (as explained in the answer to question 2). It is only rarely the case that s 54W(b) applies, so the OAIC does not, as a matter of course, inform parties to an IC review of this option.

The Information Commissioner can declare an applicant vexatious under s 89K of the FOI Act in certain circumstances. A number of vexatious applicant declarations have been made.

The Hawke review recommended (recommendation 32) that ‘the FOI Act be amended to permit agencies to decline to handle a repeat or vexatious request or requests that are an abuse of process, without impacting on the applicant’s ability to make other requests or remake the request that was not accepted.’ The OAIC supports this recommendation.

4. Intelligence agencies are exempt from the operation of the FOI Act. Under s 7(1) of the FOI Act, bodies specified in Division 1 of Part 1 of Schedule 2 to the Act are deemed not to be prescribed authorities for the purposes of the FOI Act. A number of intelligence agencies are listed and, therefore, exempt.

The issue of the possible application of the FOI Act to intelligence agencies was ventilated during the Hawke review. The review recommended (recommendation 17) that those agencies remain exempt. The OAIC’s view is that, if intelligence agencies were subject to FOI Act, existing exemptions would provide appropriate protection for sensitive information that they hold.

SE13-70 FOI (case and AAT) & Privacy (NSA)

Senator Rhiannon asked the following question at the hearing on 25 November 2013:

1. Currently, what government departments and agencies are exempt from FOI provisions?
2. What is the status of the OAIC's (**Office of the Australian Information Commissioner**) current resources? Are they likely to be subject to budgetary cuts?
3. The OAIC's caseload for FOI's is growing larger, and many cases are taking over a year to finalise. Why is the OAIC not referring cases directly to the Administrative Appeals Tribunal? Wouldn't that help speed up and resolve matters in a more timely way?
4. The Privacy Commissioner said in a July statement in relation to the NSA surveillance revelations that "The Privacy Act can extend to an act or practice that occurs outside Australia in certain circumstances". However, the Act also provides that an act or practice of an organisation done outside Australia does not breach the Privacy Act if it is required by an overseas law. Further, the Privacy Act will generally not cover the acts and practices of overseas government agencies."
 - a. What steps has the Commissioner taken to investigate whether the activities of the federal government and government agencies comply with privacy law and practice?
 - b. Has the Commissioner made enquiries to establish the extent of domestic surveillance?

The answer to the honourable senator's question is as follows:

1. Section 7 of the *Freedom of Information Act 1982* (FOI Act) exempts the following persons, bodies and parts of the Department of Defence from the operation of the FOI Act:
 - Aboriginal Land Councils and Land Trusts;
 - Auditor-General;
 - Australian Government Solicitor;
 - Australian Secret Intelligence Service;
 - Australian Security Intelligence Organisation;
 - Inspector-General of Intelligence and Security;
 - National Workplace Relations Consultative Council;
 - Office of National Assessments;
 - Parliamentary Budget Office;
 - Parliamentary Budget Officer;
 - Defence Imagery and Geospatial Organisation;
 - Defence Intelligence Organisation; and
 - Defence Signals Directorate.

Section 68A of the *Parliamentary Service Act 1999* excludes departments and office-holders established under that Act from the application of the FOI Act.

2. As set out in the Attorney-General's portfolio budget statements (PBS), the OAIC's revenue from government for 2013-14 is \$13.374 million (Table 1.1: Agency resource statement, 2013-14 PBS p 376). This comprises \$10.624 million departmental appropriation plus \$2.75 million from other agencies. The OAIC receives funds from a number of agencies for the provision of privacy advice and related services.

The OAIC is subject to savings and efficiency measures that apply generally across government agencies.

3. The OAIC is not able to refer matters directly to the Administrative Appeals Tribunal (AAT). Section 54W(b) of the FOI Act allows the Information Commissioner to not undertake an Information Commissioner review (IC review) if it is desirable, in the interests of the administration of the FOI Act, for the matter to be considered by the Tribunal. When a matter is finalised on this basis an applicant can then lodge a review application with the AAT if they wish to pursue the matter.

The Information Commissioner finalised 17 cases under s 54W(b) in 2012-13. This is actively considered by the Commissioner as an option for appropriately resolving IC reviews, for example, if the parties are already or may be engaged in a similar matter in the AAT, or the matter is particularly large and complex and might be resolved more suitably or expeditiously through AAT processes.

4.
 - a. The OAIC continues to monitor the activities of government primarily through its compliance activities such as responding to individual complaints, undertaking own motion investigations, audit activities and reviewing privacy impact assessments on request.
 - b. The OAIC has not made enquiries to establish the extent of domestic surveillance.

Question 39 FOI Applications

Senator Brandis asked the following question at the hearing on 16 October 2012:

Senator BRANDIS: Professor McMillan, what is the average length of time from filing to final decision of FOI

applications? Do you deal with this by calendar years or financial years?

Prof. McMillan: There is a table that is set out in the annual report that was tabled last week. It shows that 88 per

cent of FOI requests to government agencies, or 24½ thousand requests, are decided within the applicable

statutory time frame, which can be—

Senator BRANDIS: That is not what I am asking you, though. I am asking what the average length of time was

from the filing of the request to the final determination of the request for FOI applications in each of the financial

years, assuming you do it on a financial year basis, 2011-12, 2010-11 and 2009-10. Can you tell me that?

Prof. McMillan: I will take that on notice. I think the answer might be that those figures are not available. That

sort of figure has not been prepared. At the moment, the reporting framework for agencies to report is whether

they have dealt with a request within the applicable statutory time period, which is presumptively 30 days but can

be more with authorised extensions, or whether the request is taken as being decided more than 30 days outside

the applicable time frame, more than 60 days outside or more than 90 days outside.

Senator BRANDIS: That is fine, though the request I made of you is an elementary statistic: the average length

of time it takes to deal with a request.

Prof. McMillan: It requires computation across 250 government agencies, Senator.

Senator BRANDIS: You are in the freedom of information business, Professor McMillan. So, if we cannot trust

you to provide us with information about how free information is, who can we trust?

Prof. McMillan: The annual report contains a substantial amount of information, Senator, but, as you would be

aware, to existing documents the act does not require the preparation of information that is not currently

available—

Senator BRANDIS: Well, that is the information that I am requesting and you have taken that on notice.

Prof. McMillan: I have taken it on notice.

The answer to the honourable senator's question is as follows:

The OAIC is not able to answer this question. Since 1982–83, Australian Government agencies and Ministers subject to the *Freedom of Information Act 1982* (Cth) (the Act) have provided data on their activities under the Act.

The data includes:

- ☒ the number and type of FOI requests made to Australian Government agencies and Ministers
- ☒ the number of decisions made granting, partially granting or refusing access, and the number and outcome of applications for internal review
- ☒ the number and outcome of requests to amend personal records
- ☒ charges collected.

The data includes some information on the time taken by agencies and Ministers to respond to FOI requests. For example, there is information on the number of FOI requests processed within applicable statutory time periods, and information on those agencies and ministers that took more than 90 days to finalise an FOI request beyond the applicable statutory time period. The most recent available data is contained in Chapter 9 of the OAIC's 2011–12 Annual Report www.oaic.gov.au/publications/reports/annual-report_11-12/chapter9.html. However, the data does not allow the calculation of the average length of time from filing to final decision of FOI applications.

Table A – Legislative provisions and summary of proactive release information

This table outlines the proactive release requirements under the right to Information legislation (RTI) for each jurisdiction.

It should be noted that other legislation, regulations or instruments may operate within each jurisdiction to require or permit publication of government held information and these requirements are not reflected in the table below.

	CTH	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
Legislation	<i>Freedom of Information Act 1982</i>	<i>Freedom of Information Act 2016</i>	<i>Government Information (Public Access) Act 2009</i>	<i>Information Act 2002</i>	<i>Right to Information Act 2009</i>	<i>Freedom of Information Act 1991</i>	<i>Right to Information Act 2009</i>	<i>Freedom of Information Act 1982</i>	<i>Freedom of Information Act 1992</i>
Provisions mandating or authorising proactive release	Sections 3A, 7A, 8, 11C	Section 24	Sections 6,7,18	Section 11	Sections 19-22	Sections 9, 10	Section 49	Sections 7, 8, 10, 11, ¹ 16	Sections 3, 94, 95, 96, 97
Information that must be published or made available under RTK legislation									
Information statement/agency information guide/etc	X	X	X	X	X	X	X	X	X
Structure of the agency	X	X	X	X	X	X	X	X	X
Functions of the agency, including decision-making powers and other powers affecting the public	X	X	X	X	X	X	X	X	X
A description of the kinds of information usually held by the agency and whether it is available free of charges, for purchase or inspection	X	X	X	X	X	X	X	X	X
Details of certain appointments	X								
Consultation mechanisms	X		X					X	X

¹ Section 11(2) of the *Freedom of Information Act 1982* (Vic) requires an agency to publish a statement outlining certain documents in the agency's possession. Further, sections 7, 8 and 11 do not require an agency to publish exempt information (see, sections 7(3), 8(3) and 11(3) of the *Freedom of Information Act 1982* (Vic)).

Table B - Categories of information for proactive release

Category	Examples ⁱ
Valuable to citizens/individuals	<ul style="list-style-type: none"> • Information about their community – development applications, infrastructure projects, environmental information, etc • Information to assist individuals to access government services • Information about laws, regulations, etc • Information about the existence and management of public assets – roads, public transport infrastructure, schools, hospitals, etc • Personal information of the individual • Information to assist in emergency situations – hazard information, disaster, or crisis response information, etc • Registers held by government • Consumer information – food safety, product safety, trade licencing information, consumer complaints, etc
Likely to affect the rights of, and services provided to, the public and to which the public may be subject to by government	<ul style="list-style-type: none"> • Information about policies and procedures for government decision-making • Information about complaints procedures, review rights and challenging government decision-making • Information about judicial processes and decisions • Eligibility information for government services, grants, rebates, subsidies, etc • Information about use of artificial intelligence, machine learning and other enhanced decision-making technology in government decision-making • Details about the information held by agencies including information not publicly available • Information on consultation mechanisms to enable public participation in government decision-making • Results of consultation for the purposes of enabling public participation and government decision-making
Important to the digital economy	<ul style="list-style-type: none"> • Datasets for research – including aggregated and de-identified datasets • Datasets for innovation and commercial development • Geospatial and geographic information • Population information • Statistical and social data • Meteorological information • Patent and trademark information • Transport information

**Important to government
accountability and
transparency**

- Information about agency performance – annual reports, audit reports, strategic plans, performance indicators, audits, inspections and reviews, etc
- Information to ensure effective oversight of public funds - government income and expenditure statements, major plans for capital expenditure including any private finance initiative and public-private partnership contracts, etc
- Information on delivery of government commitments
- Conflict of interest information for decision makers e.g. members of Parliament and Councillors
- Gifts and benefits policies, travel policies, gift registers, etc
- Ministerial diaries, lobbyist registers
- Contract registers and tendering/procurement information
- Reports of integrity agencies
- Agendas and minutes of meetings, including meetings of committees and sub-committees
- Information about appointments and staff remuneration
- Information about consultation processes - access to consultation papers or information about where the papers can be obtained and the results and outcomes of consultation processes
- Information about policies and procedures for conducting agency functions, delivering of services, recruitment of staff, etc

ⁱ Note that examples listed may belong to more than one of the categories listed, however for brevity are only listed once.



Direction as to certain procedures to be followed by applicants in IC reviews

Part 1: About this direction

1.1 This direction is given by the Australian Information Commissioner under s 55(2)(e)(i) of the *Freedom of Information Act 1982* (FOI Act) in relation to Information Commissioner reviews (IC reviews).

1.2 This written direction sets out the procedure to be followed by applicants for IC reviews undertaken by the Information Commissioner under the FOI Act.

1.3 The Information Commissioner may decide not to undertake an IC review, or not to continue to undertake an IC review, if the IC review applicant fails to comply with a direction of the Information Commissioner (s 54W(c)).

1.4 The Information Commissioner may also give written directions as to the procedure to be followed in relation to a particular IC review (s 55(2)(e)(ii)).

1.5 This direction does not apply to the extent it is inconsistent with a provision of the FOI Act, another enactment or a specific direction made in a particular IC review under s 55(2)(e)(ii) of the FOI Act.

1.6 Further information relating to the IC review process is published on the Office of the Australian Information Commissioner's (OAIC) [website](#). In particular, [Part 10](#) (Reviews by the Australian Information Commissioner) of the Guidelines issued by the Information Commissioner under s 93A of the FOI Act (FOI Guidelines) describes the principles that inform the OAIC's approach to IC reviews.

1.7 In addition to this direction, the OAIC service charter, available on our [website](#), sets out the standard of service applicants can expect from the OAIC, explains how applicants can assist the OAIC and provides an opportunity for applicants to provide feedback.

1.8 This direction has effect from 1 September 2021.

Part 2: The IC review process

1.9 The IC review procedures are found in Part VII of the FOI Act. The process is intended to be an informal, non-adversarial and timely means of seeking external merits review of decisions by agencies and ministers on FOI requests. Part 10 of the Guidelines issued by the Information Commissioner under s 93A of the FOI Act, to which agencies must have regard in performing a function or exercising a power under the FOI Act, sets out in detail the process and underlying principles of IC review.

Making an application for IC review

1.10 An application for IC review must be made in writing and should be made online using the Information Commissioner Review Application form available on the [OAIC website](#).

1.11 Where it is not possible for an application to be made online, applications may be sent to the OAIC by:

- email to foidr@oaic.gov.au
- mail to FOI Regulatory Group, GPO Box 5288, Sydney NSW 2001.

1.12 An application must, at a minimum, include the following contact details:

1. The applicant's name or, where the IC review applicant is an organisation or company, the name of contact person for the IC review and the name of the organisation or company
2. A contact telephone number
3. An email address that will be used to receive correspondence in connection with the IC review (a postal address may be provided if no email address is available).

1.13 The OAIC will contact applicants using their preferred contact method nominated in the application for IC review. Where an applicant has listed a preferred contact method as well as other contact information, the OAIC will consider any notices as received when sent to an applicant's preferred contact method.

1.14 An application for IC review must also include the following information (if relevant):

1. The name and contact details of any person the applicant would like to represent them as well as evidence that the person has authority to act on the applicant's behalf, where appropriate
2. If the applicant requires an interpreter, the language or dialect
3. If the applicant requires any other assistance, the type of assistance required
4. If the applicant has contacted the OAIC previously about the current application or another matter, the previous reference number provided.

1.15 An application for IC review may be made by, or on behalf of, the person who made the request to which decision relates (s 54L(3)). The OAIC may require information about the applicant's identity to establish that they are the person who made the original FOI request or evidence that a third party is authorised to seek review of the decision by that person.

1.16 An application must be accompanied by a copy of the agency or Minister's decision (s 26 notice) for which review is sought or, if no decision has been made (for example when the agency is taken to have refused the FOI request because they have not made a decision within the statutory time period), a copy of the FOI request.

1.17 The applicant must provide the OAIC with information about the information access decision, in particular:

a. Whether the decision about which review is sought is an original decision or an internal review decision.

- If an applicant has the choice between applying for internal review or IC review, the Information Commissioner is of the view that it is usually better to seek internal review first as

this is generally quicker and allows that agency to take a fresh look at its original decision. In circumstances where the original decision was made by the Minister or personally by the principal officer of an agency, or in the case of a deemed access refusal, applicants may apply directly for IC review.

- If an applicant has sought internal review, they should wait for the agency to make a decision in relation to the internal review request before applying for IC review.

b. The date of the information access decision.

- In most cases, an application for IC review must be made within 60 days of being notified of the agency or Minister's decision to refuse access to some or all documents or within 30 days of a decision to grant access to documents to another person.
- If an application for IC review is not made within the timeframes provided by the FOI Act, applicants may apply to the Information Commissioner for an extension of time to make an application for IC review under s 54T of the FOI Act. Where an extension of time is sought, the applicant must provide reasons which explain why it is reasonable in all the circumstances to extend the timeframe for making an IC review. In considering what is reasonable in all the circumstances, the Information Commissioner may take the following factors into account:
 - i. the length of the delay in applying for IC review
 - ii. the reason for the delay
 - iii. any action taken by the applicant regarding the decision after the (agency) made its decision
 - iv. any prejudice to the (agency) and the general public due to the delay, and
 - v. the merits of the substantive IC review application.

1.18 An application should also:

- a. identify the aspect(s) of the agency or Minister's decision about which the review is sought
- b. state why the applicant disagrees with the agency or Minister's decision
- c. identify which documents the applicant considers have been wrongly refused or which exemptions have been incorrectly applied
- d. if the request has been refused on the grounds that it would substantially or unreasonably divert an agency's resources or interfere with the performance of a minister's functions (ss 24 and 24AA) – specify the reasons why the applicant believes the FOI request would not have this impact.

1.19 The OIAC must provide 'appropriate assistance' to a person who wishes to make an IC review application and requires assistance to prepare the IC review application (s 54N(3)).

1.20 Section 54N of the FOI Act sets out the requirements for the contents and delivery of an application for IC review. An application that does not comply with the requirements may be considered to be invalid.

During the IC review

Changes to contact details

1.21 An applicant or nominated representative must advise the OAIC if there are any changes to their contact details as soon as it is possible to do so. The Information Commissioner may decide not to undertake an IC review, or not continue to undertake an IC review, if the applicant or their nominated representative cannot be contacted after making reasonable attempts (s 54W(a)(iii)).

Participation in IC review process

1.22 Applicants must respond to enquiries from the OAIC within the period provided unless there are circumstances warranting a longer period to respond. If an extension is required, a request must be made to the OAIC at the earliest opportunity within the period provided for response, and no later than two days before the period is due to expire. Requests must explain why additional time is required and propose a new date for response. Approval of an extension request is at the discretion of the OAIC.

1.23 The Information Commissioner may use techniques that they consider appropriate to facilitate an agreed resolution of matters at issue in the IC review (such as alternative dispute resolution processes - s 55(2)(b)). Where appropriate, the OAIC may invite applicants to attend a teleconference to engage in discussions with the agency or Minister's office about the issues in dispute and to explore options for resolution, with a view to reaching agreement as to some or all of the matters at issue in the IC review.

1.24 The Information Commissioner may decide not to undertake an IC review, or not continue to undertake an IC review, where an IC review applicant has failed to cooperate in progressing the IC review application or the IC review without reasonable excuse (s 54W(a)(ii)).

Submissions

1.25 During an IC review, applicants will be provided with a reasonable opportunity to present their case. This generally includes having the opportunity to comment on relevant, adverse information provided to the OAIC by other parties.

1.26 Information and submissions provided to the OAIC (excluding exempt material or searches evidence) will be made available to the other parties to the review. An IC application and any submissions will be shared with the agency or Minister, as well as any other parties to the review, unless there is a reason not to do so.

1.27 Applicants can apply to the OAIC to make a submission in confidence. The applicant must provide reasons why they want to make a confidential submission and the OAIC will consider those reasons and decide whether to accept the submission on a confidential basis. If the OAIC agrees to treat a submission confidentially, the applicant may be required to provide a second version of the submission which can be shared.

1.28 Generally, submissions should be made in writing and sent by email or pre-paid post. In limited circumstances, if an applicant is unable to provide written submissions, the OAIC may agree to accept verbal submissions by telephone.

Information Commissioner decisions

1.29 The Information Commissioner must give written reasons for the decision to all the parties to the IC review (ss 55K(1) and (6)) and must publish the decision in a manner that makes it publicly

available (s 55K(8)). This means that where the Information Commissioner makes a decision under s 55K of the FOI Act, the outcome of the IC review will be published online.

1.30 When the Information Commissioner makes a decision on IC review under s 55K of the FOI Act, the Information Commissioner will quote or summarise the submissions in the published decision. If a confidential submission is relied on by the Information Commissioner in making a decision on the IC review, this will be noted in the decision without revealing the confidential material.

1.31 To protect against the unreasonable disclosure of personal information, the Information Commissioner will consider whether identifying information should be included in published decisions. Natural persons may opt not to be named by providing notice in writing during the IC review. Other applicants, such as organisations or companies, must provide reasons for wishing not to be named, which will be considered on a case-by-case basis.

Part 3: Procedure for IC review of specific types of decisions

Deemed access refusal decisions

1.32A ‘deemed access refusal’ occurs where the statutory time for making a decision on an FOI request for access to a document has expired and notice of the decision has not been given. Where there has been a deemed decision, the OAIC will make inquiries with the agency or Minister.

1.33 Where a substantive decision is made, and a notice under s 26 has been given, the OAIC will check whether the applicant is satisfied with the agency or Minister’s decision. Applicants who are satisfied with the decision and do not wish to proceed with the IC review must advise the OAIC in writing. Applicants who are not satisfied with the agency or Minister’s decision must explain why they disagree with the decision and the basis on which they wish to proceed with the IC review.

Access refusal decisions

1.34 An ‘access refusal decision’ means (s 53A):

- a. a decision refusing to give access to a document in accordance with a request
- b. a decision giving access to a document, but not all the documents, to which the request relates
- c. a decision purporting to give access to all documents to which a request relates, but not actually giving that access
- d. a decision to defer access to a document for a specified period (s 21) (see Part 3 of the Guidelines)
- e. a decision relating to the imposition or amount of a charge (s 29)
- f. a decision to give access to a document to a ‘qualified person’ (where disclosing the information to the applicant might be detrimental to the applicant’s physical or mental health or well-being) (s 47F(5))
- g. a decision refusing to amend a record of personal information in accordance with an application (s 48)

- h. a decision refusing to annotate a record of personal information in accordance with an application (s 48).

1.35 In an IC review of an access grant decision, it is the IC review applicant that bears the onus of establishing that a decision refusing the FOI request is justified, or that the Information Commissioner should give a decision adverse to the FOI applicant (s 55D(2)).

1.36 Given that the agency or Minister bears this onus, it will generally be necessary to undertake inquiries or seek information from the agency or Minister before inviting comment from applicants.

Access grant decisions

1.37 An 'access grant decision' means a decision to grant access to a document where there is a requirement to consult a third party (s 53B). Such decisions involve granting a third party (the FOI applicant) access to information or documents.

1.38 In an IC review of an access grant decision, it is the IC review applicant that bears the onus of establishing that a decision refusing the FOI request is justified, or that the Information Commissioner should give a decision adverse to the FOI applicant (s 55D(2)).

1.39 Applicants will generally be invited to provide information or submissions which explain why the agency or Minister's decision is wrong before inviting comment from the agency or Minister.

Part 4: Non-compliance with this direction

1.40 If an applicant fails to comply with this direction, the Information Commissioner may decide not to undertake an IC review or continue to undertake an IC review (s 54W(c)). This means that the review will be finalised.

1.41 Applicants will be provided with the opportunity to explain why the Information Commissioner should not finalise the IC review under s 54W(c) of the FOI Act before a decision is made.



Global Right to Information Rating

<https://www.rti-rating.org/>

The Rating Results

The global RTI Rating measures the strength of the legal framework for the right to access information held by public authorities (the right to information or RTI) based on 61 discrete indicators – each of which looks at a particular feature of a strong legal regime for RTI – divided into seven main categories – namely Right of Access, Scope, Requesting Procedure, Exceptions & Refusals, Appeals, Sanctions & Protections, and Promotional Measures.

The performance of countries shows a significant spread with several countries scoring 126 or more points out of a possible total of 150, or around 85%, and several also scoring below 50 points, or 33%. However, most countries fall in between these extremes, with a roughly equal number of countries in each of the score ranges of 51-75, 76-100 and 101-125.

All regions of the world now have a significant number of countries with RTI laws, a major change since the Rating was first launched in 2011. Significantly, not one Western country ranks in the top 25 countries, although eight rank in the bottom 25. Furthermore, all but one of the top 25 countries first adopted an RTI law since 2000. Indeed, a statistical analysis shows that the quality of laws has been improving steadily, with the average score of laws adopted in each 5-year period being stronger than the previous 5-year period.

Despite these improvements, the results show significant room for improvement. About one-third of all countries score less than 75 points, or 50%, so could be said to earn only a failing grade. Average performance across most of the seven categories was roughly equal, although the average for Scope was significantly higher, and it was quite a lot lower for Sanctions & Protections.

Country Rating Results

Top 10

Afghanistan	139
Mexico	136
Serbia	135
Sri Lanka	131

Slovenia	128
Albania	127
India	127
Gambia	127
Croatia	126
Liberia	123

Bottom 10

Palau	33
Austria	33
Liechtenstein	37
Republic of Belarus	38
Monaco	43
Philippines	46
East Timor	50
Tajikistan	50
Cape Verde	50
Benin	51



Overview of Coaldrake report

- The Final Report of the [*Let the sunshine in: review of culture and accountability in the Queensland public sector*](#) (Review) was finalised by Professor Peter Coaldrake on 28 June 2022.
- The Final Report notes that the [Terms of Reference](#) required the Review to consider both the Queensland Government's accountability and integrity framework overall, as well as its component parts and how those parts interact.
- The Review defines the Office of the Information Commissioner (OIC) as a core integrity agency, alongside the Integrity Commissioner, Queensland Audit Office, Ombudsman and the Crime and Conduct Commission (CCC).
- The Review briefly discusses the role of the Information Commissioner as well as the broader issues of government culture that influence the work of the Commissioner and OIC in respect of Right to Information (RTI). It makes recommendations and suggestions in regards to reforming aspects of RTI and funding for integrity agencies including the OIC. The Review does not identify specific issues regarding the OIC's work or performance of its functions.

Role of the Information Commissioner

- The Review specifically discusses the role of the Queensland Information Commissioner at pp. 27-29.
- It highlights the value of the RTI mechanism in creating a more open government, and notes that the Information Commissioner's decisions influence the information available to citizens, who themselves provide a valuable check on government accountability. The external review function provides one means by which the Information Commissioner can oversight the culture within agencies by investigating and reviewing decisions of agencies and ministers under the *Right to Information Act 2009* (RTI Act).
- At the same time, the Review states that of all integrity functions, it is the Information Commissioner's role which can be especially influenced by the culture of government. It states that this same culture is influenced by the 'spectre of exposure' through RTI, with the apprehension within government departments of being 'caught' by an RTI request fostering a culture predisposed to non-disclosure.
- The Review notes that it received submissions from current and former public servants which were critical of agency culture and the handling of RTI requests, and which described 'worrying patterns' of departments seeking to evade data release. Submissions referred to a fear that if 'frank and fearless' advice was given and not followed, a subsequent RTI request would result in a 'gotcha' headline for the Minister, with this concern then influencing the decisions of officials as to which options were presented to decision-makers.
- The Review cites the 2021 Legal Affairs and Safety Committee [Oversight of the Office of the Information Commissioner](#) report and a 2017 PwC [Strategic Review of the OIC](#) as highlighting

some of the current issues facing the Information Commissioner role and the OIC, though does not discuss these. It also suggests that the [2008 Solomon Report](#) on Queensland's (then) Freedom of Information Act remains relevant, particularly in respect of the issues it raises relating to culture.

- In particular, the Review refers to the Solomon Report's finding that there had been a loss of 'favourable policy momentum' to sustain FOI law and practice in the spirit of the original draft of the FOI Act and that absent this momentum and congruent political will, 'serial legislative amendments and contrary public sector cultural norming fill the space left behind.'

Independence of appointments and funding

The Review makes recommendations and comments aimed at strengthening the independence of integrity agencies generally, including the OIC (pp. 69-71). It states that independence from the executive government over appointments of key officials and financial management is key to enabling integrity bodies to scrutinise and report on the actions of the executive government.

Funding

- The Review recommends aligning responsibility for financial arrangements and management practices with the Speaker of Parliament and the appropriate parliamentary committee, rather than the executive government.
- The Review notes that the Information Commissioner (like other integrity agencies) does not control the budget allocated by Government. Instead, the office budget is approved by the Attorney-General.
- The Review states that the Auditor-General, Clerk of Parliament and Office of the Independent Assessor are supportive of changes to increase autonomy over the availability of appropriate human and monetary resources to core integrity agencies.
- It notes that a [2020 report by the NSW Auditor-General](#) highlights the importance of independent financial arrangements and management practices for key integrity bodies to avoid threats to the independent status of these bodies. It cites recent steps taken in Victoria and NSW to provide integrity agencies with greater independence from the financial management processes of the executive government.

Appointments

- The Review notes that practices for appointments vary across jurisdictions, but emphasises that public faith is lost when there is not a serious attempt by governments to work with Opposition to make appointments which have bipartisan concurrence or support. It notes that the CCC is the only integrity body which currently requires nomination of multiple executive figures to be made with bipartisan support.

Specific FOI/RTI issues

The Review discusses the following specific issues in respect of RTI (pp. 60-65):

Proactive release of Cabinet documents

The Review recommends the Department of Premier and Cabinet develop a policy requiring all cabinet submissions, agendas and decision papers (and appendices) to be proactively released and published online within 30 business days of a final decision being taken by Cabinet, subject only to a number of reasonable exceptions outlined in the policy.

- In support of the recommendation, the Review notes that although the RTI Act and *Information Privacy Act 2009* are premised on a model of pro-disclosure ('push model'), with RTI applications necessary only as a last resort, the utility of these regimes is constrained by culture and practice. It states that proactive disclosure of Cabinet documents would be an important signal, from the 'very top', of an open and pro-disclosure culture.
- The Review notes that the need for Cabinet confidentiality around its deliberations is well understood and respected, but can also mitigate against the openness that the Government espouses, and which is necessary for maintaining public trust in the quality and impartiality of decision-making. It discusses in detail the proactive release scheme recently introduced in New Zealand, which includes a comprehensive policy requiring the publication of Cabinet documents.
- In particular, the Review notes that the imperative for maintaining secrecy of Cabinet documents applies principally to those which record deliberations, rather than those documents developed to assist Cabinet in its considerations.

Commercially sensitive information

- The Review also refers to concerns from submissions about excessive reliance on legislative 'carve-outs' to prevent disclosure of commercially sensitive information. It notes that the Queensland Civil and Administrative Tribunal has recently adopted a broader interpretation of the 'breach in confidence' exemption to include breach of contract arising from contractual obligations of confidentiality.
 - In a number of cases, the Information Commissioner's decision that information should be disclosed was overturned by reference to the broad interpretation of this exemption.
- The Review does not make a formal recommendation on this issue but cautions that confidentiality and commercial-in-confidence clauses should not be used as a matter of course and should only be included with strong justification. It states that the RTI process cannot overcome a lack of transparency if expectations are not clear in the procurement process about the openness and accountability required when dealing with government.

Mandatory data breach notifications

The report also recommends a mandatory data breach notification scheme be established in Queensland (pp. 66-67). It notes that the Information Commissioner and Privacy Commissioner advised the Review that they have advocated for such a scheme in Queensland for a number of years.

While the Review states that it is beyond its scope or expertise to provide detailed commentary on a proposed model for the scheme, it notes that it has received submissions raising concerns with the current approach to data handling.



Overview

This document lists legislation (other than the Commonwealth Privacy Act) that confer privacy-related functions, powers, responsibilities, or other obligations that require certain bodies to consult with the Information Commissioner on privacy matters. In the time available, we have not conducted an exhaustive review of all legislation that may meet the above description so the list may not reflect all relevant legislation.

Legislation

1. Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth)
2. Anti-Money Laundering and Counter-Terrorism Financing Rules (Cth)
3. Archives Act 1983 (Cth)
4. Child Care Act 1972 (Cth)
5. Competition and Consumer (Consumer Data Right) Rules 2020 (Cth)
6. Competition and Consumer Act 2010 (Cth)
7. Consumer Data Right (Authorised Deposit-Taking Institutions) Designation 2019 (Cth)
8. Consumer Data Right (Energy Sector) Designation 2020 (Cth)
9. Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014 (Cth)
10. Crimes Act 1914 (Cth), pt VIIC (spent convictions)
11. Data Availability and Transparency Act 2021 (Cth)
12. Data-matching Program (Assistance and Tax) Act 1990 (Cth)
13. Financial Sector Reform Act 2022 (Cth)
14. Foreign Influence Transparency Scheme Act 2018 (Cth)
15. Healthcare Identifiers Act 2010 (Cth)
16. Healthcare Identifiers Regulations 2010 (Cth)
17. Imported Food Control Act 1992 (Cth)
18. Information Privacy Act 2014 (ACT)
19. My Health Records (Information Commissioner Enforcement Powers) Guidelines 2016 (Cth)
20. My Health Records Act 2012 (Cth)
21. My Health Records Rule 2016 (Cth)

- 22. My Health Records Regulation 2012 (Cth)
- 23. National Cancer Screening Register Act 2016 (Cth)
- 24. National Consumer Credit Protection Act 2009 (Cth)
- 25. National Health (Privacy) Rules 2021 (Cth)
- 26. National Health Act 1953 (Cth)
- 27. Personal Property Securities Act 2009 (Cth)
- 28. Privacy (Tax File Number) Rule 2015 (Cth)
- 29. Product Emissions Standards Act 2017 (Cth)
- 30. Road Vehicle Standards Act 2018 (Cth)
- 31. Social Security (Administration) Act 1999 (Cth)
- 32. Student Identifiers Act 2014 (Cth)
- 33. Taxation Administration Act 1953 (Cth) (handling of tax file numbers)
- 34. Telecommunications (Interception and Access) Act 1979 (Cth)
- 35. Telecommunications Act 1997 (Cth)



#N/A


Last refreshed:	#N/A
Start Date	#N/A
End Date	#N/A
FinYear	#N/A
LastYear	#N/A

Dates

Q3 2021 - Q2 2023 MONTHS ▾

2023

FEB MAR APR MAY JUN JUL AUG SEP



FY

2017-18	▲
2018-19	
2019-20	
2020-21	
2021-22	
2022-23	
2023-24	
2024-25	
...	▼

Year at a glance

Privacy complaints

	2021-22	2022-23
Privacy complaints received	2,546	3,402
Change since PY (received)	3%	34%
Privacy complaints finalised	2,206	2,576
Change since PY (finalised)	2%	17%
Percentage of complaints closed within 12 months	90%	84%
Average time to finalise (months)	6.0	6.4

Top 10 sectors by privacy complaints received

	Privacy complaints received
Finance (incl. superannuation)	656
Health service providers	330
Telecommunications	286
Australian Government	284
Retail	217
Insurance	196
Online services	153
Personal services (incl employment, child care, vets)	134
Real estate agents	106
CRBs	80
Total	2,442

Privacy enquiries

PrimaryIssueCategoryLevel1	Privacy & Other
----------------------------	-----------------

	2021-22	2022-23
Privacy enquiries received	10,927	11,672
Change since last year	-6%	7%

How received

PrimaryIssueCategoryLevel1	Privacy & Other
----------------------------	-----------------

	2021-22	2022-23
Privacy enquiries received		
Phone	7,375	8,407
Written	3,550	3,265
In Person	2	
Total	10,927	11,672

Notifiable Data Breaches Scheme

	2021-22	2022-23
NDB notifications received	853	895
Percentage change from last year	-12%	5%
Percentage of notifications finalised within 60 days	81%	77%
Average time to finalise (days)	68	55

Top 10 sectors by data breach notifications received

	NDBs_Received
Health service providers	135
Finance (incl. superannuation)	120
Recruitment Agencies	68
Insurance	66
Legal, accounting & management services	63
Education	52
Personal services (incl employment, child care, vets)	49
Retail	40
Australian Government	35
Information Technology	29
Total	657

FOI enquiries

PrimaryIssueCategoryLevel1	FOI
----------------------------	-----

	2021-22	2022-23
FOI enquiries received	1,944	1,647
Change since last year	6%	-15%

How received

PrimaryIssueCategoryLevel1	FOI
----------------------------	-----

Privacy enquiries received		
	2021-22	2022-23
Phone	1,181	1,029
Written	763	618
Total	1,944	1,647

FOI complaints

	2021-22	2022-23
FOI complaints received	216	212
Percentage change from last year (received)	42%	-2%
FOI complaints finalised	223	124
Percentage change from last year (finalised)	28%	-44%
Percentage of complaints closed within 12 months	74%	94%
Average time to finalise complaints (months)	10.5	4.1

IC Reviews

	2021-22	2022-23
IC review applications received	1,955	1,647
Percentage change from last year (received)	60%	-16%
IC review applications finalised	1,376	1,519
Percentage change from last year (finalised)	35%	10%
Percentage of IC reviews finalised within 12 months	83%	78%
Average time to finalise IC reviews (months)	6.4	9.8

Top 10 agencies by IC review applications received 2022-23

	IC review applications received
DHA - Department of Home Affairs	699
NDIA - National Disability Insurance Agency	89
AFP - Australian Federal Police	87
DHS - Services Australia	83
DVA - Department of Veterans' Affairs	67
OAIC - Office of the Australian Information Commission	59
DOD - Department of Defence	45
ATO - Australian Taxation Office	32
COMBO - Commonwealth Ombudsman	29
DFAT - Department of Foreign Affairs and Trade	27
Total	1,217

#

No.	Performance Measure	Metric	Methodology	Type	Result	Number of cases within target (or baseline result)	Variance to target	Status
1.1	Effectiveness of the OAIC's contribution to the regulation of the Consumer Data Right as measured by stakeholder feedback.	Baseline to be established	Annual stakeholder survey conducted by an independent professional provider	Effectiveness	100%	67 i.p.	0%	Achieved
1.2.1	Time taken to finalise privacy complaints	80% of privacy complaints finalised within 12 months	OAIC information management system	PBS Measure	84%	2,160 / 2,576	4%	Achieved
1.2.2	Time taken to finalise privacy and FOI Commissioner-initiated investigations (CIIs)	80% of CIIs finalised within 8 months	OAIC information management system	PBS Measure	64%	14 / 22	-16%	Not achieved
1.2.3	Time taken to finalise Notifiable Data Breaches (NDBs)	80% of NDBs finalised within 60 days	OAIC information management system	PBS Measure	77%	689 / 894	-3%	Not achieved
1.2.4	Time taken to finalise My Health Record notifications	80% of My Health Record notifications finalised within 60 days	OAIC information management system	PBS Measure	100%	8 / 8	20%	Achieved
1.2.5	Time taken to finalise Information Commissioner (IC) reviews of FOI decisions made by agencies and Ministers	80% of IC reviews finalised within 12 months	OAIC information management system	PBS Measure	78%	1,180 / 1,519	-2%	Not achieved
1.2.6	Time taken to finalise FOI complaints	80% of FOI complaints finalised within 12 months	OAIC information management system	PBS Measure	94%	116 / 124	14%	Achieved
1.2.7	Time taken to finalise written privacy and information access enquiries from the public	90% of written enquiries finalised within 10 working days	OAIC information management system	PBS Measure	71%	2,886 / 4,057	-19%	Not achieved
2.1	Effectiveness of the OAIC's contribution to the advancement of online privacy protections and policy advice as measured by stakeholder feedback	Baseline to be established	Annual stakeholder survey conducted by an independent professional provider	Effectiveness	100%	61 i.p.	0%	Achieved
3.1	Percentage of OAIC recommendations accepted by agencies following FOI complaint investigations	90% of recommendations accepted	OAIC information management system	Effectiveness	92%	11 / 12	2%	Achieved
3.2	Effectiveness of OAIC's advice and guidance on FOI obligations and the Information Publication Scheme in supporting government agencies to provide public access to government-held information, as measured by stakeholder feedback	Baseline to be established	Annual stakeholder survey conducted by an independent professional provider	Effectiveness	100%	60 i.p.	0%	Achieved
4.1	Stakeholder assessment of the extent to which the OAIC's regulatory activities demonstrate a commitment to continuous improvement and building trust	Baseline to be established	Annual stakeholder survey conducted by an independent professional provider	Effectiveness	100%	60 i.p.	0%	Achieved
4.2	Stakeholder assessment of the extent to which to OAIC's regulatory activities demonstrate collaboration and engagement	Baseline to be established	Annual stakeholder survey conducted by an independent professional provider	Effectiveness	100%	58 i.p.	0%	Achieved
4.3	Stakeholder assessment of the extent to which the OAIC's regulatory activities are risk based and data driven	Baseline to be established	Annual stakeholder survey conducted by an independent professional provider	Effectiveness	100%	51 i.p.	0%	Achieved
4.4	Number of stakeholder engagement activities Metric: Number of activities delivered via different engagement mechanisms	Targets not appropriate due to fluctuations in nature and complexity of policy environment in any given year	Data snapshot demonstrating key formal engagements supplemented by case studies to demonstrate breadth, variety and effectiveness of engagement activities and modes of delivery	Effectiveness	N/A	N/A	N/A	Not applicable
4.5	Average call duration of telephone enquiries to the OAIC public enquiry line	Baseline to be established	OAIC information management system	Efficiency	100%	05:04 mins	0%	Achieved

Privacy complaints

Total privacy complaints

	2021-22	2022-23
Privacy complaints received	2,546	3,402
Change since PY (received)	3%	34%
Privacy complaints finalised	2,206	2,576
Change since PY (finalised)	2%	17%
Percentage of complaints closed within 12 months	90%	84%
Average time to finalise (months)	6.0	6.4
Percentage of complaints closed by ER & Conciliation	93%	94%
Privacy complaints on hand at period close	1,442	2,268

Notes

There has been a change in methodology in how the percentage of complaints closed by ER & conciliation processes is calculated. The new methodology assumes that any case closed that had not been transferred to an investigation or determinations queue was resolved via ER or conciliation processes.

Performance against Corporate Plan

	#N/A	#N/A	Cases within target
(1.2.1) 80% of privacy complaints finalised within 12 months	90%	84%	2,160 / 2,576

Privacy complaints received by primary subject of complaint

Primary issue of complaints	#N/A	Percentage	Percentage change from last year
APPs	2,204	65%	43%
Jurisdictional issue	980	29%	41%
Credit reporting	169	5%	-17%
Other (Spent convictions, TFN, Healthcare Identifiers, NDB Scheme)	26	1%	-7%
TPPs	11	0.3%	22%
My Health Record	7	0.2%	-22%
Not yet assessed	4	0.1%	N/A
NPPs	1	0.0%	N/A
COVID-19		0.0%	-100%
Total	3,402	100%	34%

APP complaints include complaints related to the COVID-19 pandemic where the APPs apply.

Privacy complaints received by primary subject

Issue	#N/A	Percentage	Percentage change from last year
APP 11 - Security of Personal Information	1,481	44%	96%
APP 6 - Use or Disclosure	703	21%	2%
APP 12 - Access to Personal Information	482	14%	25%
APP 3 - Collection	402	12%	-5%
APP 10 - Quality of Personal Information	246	7%	7%
APP 5 - Notification of Collection	150	4%	63%
APP 13 - Correction	119	3%	75%
APP 7 - Direct Marketing	117	3%	48%
APP 1 - Open and Transparent Management	18	1%	13%
APP 4 - Unsolicited Personal Information	7	0%	75%
APP 8 - Cross-border Disclosure	5	0%	0%
APP 2 - Anonymity and Pseudonymity	5	0%	0%
APP 9 - Adoption of Government Related Identifiers	3	0%	50%

More than one issue may be handled in an enquiry.

This table includes enquiries related to the COVID-19 pandemic where the APPs apply.

Top 10 sectors by privacy complaints received

Issue	#N/A	Percentage	Percentage change from last year
Finance (incl. superannuation)	656	19%	154%
Health service providers	330	10%	-6%
Telecommunications	286	8%	240%
Australian Government	284	8%	6%
Retail	217	6%	21%
Insurance	196	6%	172%
Online services	153	4%	0%
Personal services (incl employment, child care, vets)	134	4%	60%
Real estate agents	106	3%	38%
CRBs	80	2%	-40%

Privacy complaints received relating to significant privacy incidents

Issue	#N/A
Latitude Data Breach 2023	340
Optus data breach	167
Medibank 2022 data breach	100
MyDeal 2022 data breach	6
Telstra Data Breach 2022	2
Energy Australia 2022 data breach	1
Total	616

Case outcome of privacy complaints finalised

Outcome	#N/A	Percentage	Percentage change from last year
s41 - Decision not to investigate or to not investigate further	1,739	68%	1%
s41(1)(a) - no breach	551	21%	-16%
s41(1A) - withdrawn (resolved)	384	15%	41%
s41(1)(db) - no response in specified period	278	11%	13%
s41(2)(a) - adequately dealt with	170	7%	-29%
s41(1A) - withdrawn (not resolved)	157	6%	50%
s41(1)(da) - investigation not warranted	51	2%	21%
s41(1)(d) - lacking in substance	49	2%	-35%
s41(1)(dc) - being dealt with by recognised EDR	35	1%	21%
s41(1)(f) - Another more appropriate remedy	21	1%	163%
s41(1)(dd) - EDR more effective or appropriate	19	1%	19%
s41(1)(c) - more than 12 months	12	0.5%	-14%
s41(2)(b) - not had adequate opportunity	9	0.3%	-50%
s41(1)(e) - Dealt with under another law	3	0.1%	50%
s36 - not a complaint	394	15%	20%
s40(1A) - complain to Respondent	256	10%	131%
s50 - transfer to alternative complaint body	175	7%	430%
s52 - Determination	10	0.4%	-29%
Within jurisdiction	1	0.0%	N/A
s40A(4) - no reasonable likelihood of conciliation	1	0.0%	0%
Total	2,576	100%	17%

Notes

If there is no 'case outcome' this table returns the outcome of the primary issue. Should other outcomes be grouped according to common outcome category?

Determinations

Year	#N/A	#N/A
Privacy complaints referred to Determinations team	14	1
Number of privacy complaints finalised by Determinations team	17	15
Privacy complaints finalised - by determination	14	9
Privacy complaints finalised - other	3	6

Notes

Provided by the Determinations team. Figure does not match the complaints closed with the outcome of 's52 - Determination'

Commissioner Initiated Investigations

CIIs

	2021-22	2022-23
CIIs commenced	7	26
Change since PY (received)	75%	271%
CIIs finalised	4	22
Change since PY (finalised)	-60%	450%
Ave time to finalise (months)	18.6	7.8
CIIs on hand at period close	8	12

Performance against Corporate Plan

	#N/A	#N/A	Cases within target
(1.2.2) 80% of CIIs finalised within 8 months	25%	64%	14 / 22

Notifiable Data Breaches

Total notifications

	2021-22	2022-23
NDB notifications received	853	895
Change since PY (received)	-12%	5%
NDB notifications finalised	898	894
Changed since PY (finalised)	-9%	-0%
Average time to finalise (days)	68	55
NDBs on hand at period close	117	118

Performance against Corporate Plan

	#N/A	#N/A	Cases within target
(1.2.3) 80% of NDBs finalised within 60 days	81%	77%	689 / 894

Source of data breaches

	2021-22		2022-23	
	NDB notifiicator %		NDB notifiicator %	
Malicious or criminal attack	502	59%	628	70%
Human error	318	37%	229	26%
System fault	33	4%	38	4%
Total	853	100%	895	100%

Notifications received by global number of individuals affected

NDB notifications received	2021-22	2022-23
1	250	207
2-10	158	181
11-100	167	169
101-1,000	159	170
1,001-5,000	64	78
5,001-10,000	19	24
10,001-25,000	12	20
25,001-50,000	7	10
50,001-100,000	4	3
100,001-250,000	4	4
250,001-500,000		2
500,001-1,000,000	3	2
1,000,001-10,000,000	5	10
10,000,001 or more		4
Unknown	1	11
Total	853	895

Notes:

Blank' values are included under 'Unknown'

Notifications received by respondent sector

NDB notifications received		
	2021-22	2022-23
Health service providers	161	135
Finance (incl. superannuation)	107	120
Legal, accounting & management services	76	63
Education	67	52
Insurance	52	66
Recruitment Agencies	27	68
Personal services (incl employment, child care, vets)	44	49
Australian Government	50	35
Retail	37	40
Property/construction/Architects/surveyors	23	28
Information Technology	22	29
Charities	21	21
Travel & Hospitality industry	13	24
Business/Professional Associations	20	15
Mining & Manufacturing	12	23
Telecommunications	17	12
Real estate agents	9	18
Transport	10	14
Online services	11	13
Utilities	13	10
Interest groups/theatre/sports	10	10
CRBs	11	6
Agriculture, Forestry, Fisheries	10	6
Religious organisations	7	7
Professional Organisation	4	4
Local Government	3	3
NSW Government	1	5
Marketing and market research	1	4
Clubs/Pubs	2	3
Media	2	2
Social Media		2
VIC Government	1	1
Postal & courier	1	1
QLD Government		2
Clubs/interest groups/theatre/sports		2
Unions	1	
Business/Profess Assoc & unions	1	
Marketing - direct marketing	1	
ACT Government	1	
Individual	1	
TAS Government	1	
RTDs	1	
NT Government		1
To be determined	1	
SA Government		1
Total	853	895

My Health Record

My Health Record Data Breaches

	2021-22	2022-23
MHR data breach notifications received	3	8
Change since PY (received)	50%	167%
MHR data breach notifications finalised	3	8
Change since PY (finalised)	50%	167%
Average time to finalise (days)	39	30

Performance against Corporate Plan

	#N/A	#N/A	Cases within target
(1.2.4) 80% of My Health Record notifications finalised within 60 days	67%	100%	8 / 8

Consumer Data Right

CDR enquiries

	2021-22	2022-23
CDR enquiries received	40	29
CDR enquiries finalised	39	30
Percentage of enquiries closed within 10 working days	79%	93%
Average time to finalise (business days)	6	4
CDR enquiries on hand at period close	1	0

CDR complaints

	2021-22	2022-23
CDR complaints received	13	9
CDR complaints finalised	13	9
Average time to finalise (business days)	13	21
CDR complaints on hand at period close	0	0